File No. CT-2014-002

COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act;*

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act,* by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

KOBO INC.

Applicant
(Moving Party)

- and -

**THE COMMISSIONER OF COMPETITION,
HACHETTE BOOK GROUP CANADA LTD.,
HACHETTE BOOK GROUP, INC.,
HACHETTE DIGITAL INC.,
HARPERCOLLINS CANADA LIMITED,
HOLTZBRINCK PUBLISHERS, LLC, and
SIMON & SCHUSTER CANADA, A DIVISION OF
CBS CANADA HOLDINGS CO.**

Respondents
(Responding Parties)

MEMORANDUM OF ARGUMENT OF KOBO INC.

(Motion to Strike Notice of Reference)

Date: May 16, 2014

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PART 1 - KOBO'S POSITION IN A NUTSHELL

1. The reference power should accelerate the normal Tribunal process, not delay it. The Reference[1] here will do little to narrow the issues and nothing to expedite matters. The questions it raises are best determined in the normal course of the case in the context of the facts. Had Kobo's Application proceeded along the timelines contemplated by the Rules,[2] the pleadings would be closed and we would be in the midst of documentary discovery. Instead, due to the Reference, we are taking tentative steps into an unnecessary and inefficient procedural quagmire.

2. All the recent cases brought by the Commissioner have involved a dispute over the interpretation of the Act.[3] These disagreements were, correctly, resolved *after* the evidence was heard, in closing argument. The fact of an interpretive dispute did not absolve any of the respondents in those cases from responding to the Commissioner's applications in accordance with the Rules; nor did it lead to inefficient, interlocutory proceedings to try to resolve the interpretive disputes in advance of pleadings. Kobo's case should be no different. The Tribunal should decline to hear the Reference, allow the s. 106(2) Application to proceed, and avoid opening the door to interlocutory appeals.

PART 2 - FACTS

3. Kobo requested, and the Tribunal ordered, that Kobo's Application be determined swiftly.[4]

4. No matter how the Tribunal decides the Commissioner's Reference, Kobo's Application will proceed.

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[1] Notice of Reference in *Kobo Inc v Commissioner of Competition et al*, CT-2014-002.
[2] *Competition Tribunal Rules*, SOR/2008-141, ss 35-41.
[3] *Competition Act*, RSC 1985, c. C-34, as am.
[4] Notice of Application, *supra* note 1 at para (d) ("an Order expediting the hearing of the within Application"); *Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 1 at para 4.

5. No matter how the Tribunal decides the Commissioner's Reference, the schedule and steps applicable to Kobo's Application will be materially the same.

6. If the Tribunal declines to hear the Commissioner's Reference, the issues raised in the Reference will be determined with the benefit of a factual record that will help the Tribunal to better determine how to interpret and apply s. 106(2).

PART 3 - LAW AND ARGUMENT

7. While framed as one question, the Commissioner effectively poses two questions in his Reference:

   (a) what is the nature and scope of the Tribunal's jurisdiction under subsection 106(2) of the Act?

   and

   (b) what is the meaning of the words "the terms could not be the subject of an order of the Tribunal" ("**impugned language**") in subsection 106(2) of the Act?

8. In paragraph 5 of its Notice of Motion to Strike the Reference, Kobo stated that the first question was vague and academic, and the Commissioner did not propose to answer it. As such, it should be struck.[5] At paragraph 5 of the Commissioner's Response, the Commissioner appears to agree. His response there, and in all of the paragraphs that follow, focuses on the second question, not the first. In light of that, Kobo requests that the first question be struck as being vague, academic and so broad as to delay matters unnecessarily.

9. The Tribunal should also strike or decline to hear the second question.

10. First, the content of the question is not appropriate for determination using the reference procedure, as its answer hinges on facts. On a reference, the Tribunal's ability to consider facts is circumscribed. Indeed, the Commissioner

[5] The Tribunal has the jurisdiction to hear and determine a motion to strike, pursuant to rule 34(1) (formerly rule 72) of the *Competition Tribunal Rules*, and rule 221 of the *Federal Court Rules*, SOR/98-106. Rule 221(1)(d) specifically contemplates striking a pleading that may delay the fair trial of action. See *Commissaire de la concurrence c. RONA INC.* 2005, Trib. Concurr. 7 at paras 27-29. **(TAB 1)**

asserts that the meaning of the impugned language in this case should be determined in a factual vacuum.[6] The usual course is to determine legal questions in the context of the facts in which the questions arise. This question, and this case, should be no different.

11. Second, even if it were a proper question to pose on a reference, invoking the reference procedure is inappropriate in the context of this case. It unnecessarily delays Kobo's Application and ignores both the Tribunal's order that Kobo's Application be determined "swiftly" and Parliament's intention that the reference procedure will accelerate matters. That will not occur here. Kobo's Application will proceed regardless of the answer to the Reference question. Even once an interpretation of the impugned language is reached, the parties will still have to grapple with how that interpretation is to be applied to the facts of this case.

(A)

The Purpose of the Reference Power is to Accelerate Matters and Save Time

12. The reference power under s. 124.2(2) was enacted by the same bill that added s. 106(2) to the Act. The text of these provisions reads:

> 106(2). A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.
>
> …
>
> 124.2(2). The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.

[6] See Commissioner's Reference Record (Memorandum of Argument) in *Kobo Inc v Commissioner of Competition et al*, CT-2014-002 at para 11: "no facts are required for [the Reference's] determination".

13. In the Parliamentary committee hearings, then-Commissioner von Finckenstein spoke to the purpose of s. 124.2. The Commissioner was clear that the reference power was being proposed to be invoked where the answer to the question would be determinative of some disagreement that would allow full-scale litigation to be avoided:

> The act uses some very vague language. How do you apply it to specific provisions? Very often everything falls on how you determine one or two words. What [this amendment] does is allow us, rather than start a whole full-scale institution costing maybe a million dollars, to have just this very limited litigation on the interpretation of that section, because everything falls from it. [7]

14. Later, when describing the impetus behind the addition of the reference power, then-Commissioner von Finckenstein explained it as follows:

> In terms of the references, when you have a merger, usually there's one bone of contention that turns the case around and it means approval or disapproval. We may disagree on it. We may disagree on interpretation of a section, or how to apply it. What this would allow us to do, with the consent of the other party, is go to the court and say, we are not going to argue the whole case; we know what the outcome will be. What we need is clarification. How do you read…whatever section it is, 96.2? Let's argue that[,] we get a decision and then it will accelerate the process. It will help both sides. … That's what the reference is meant to deal with. [8]

15. In this case, as is further discussed below, the Reference will not result in the sorts of efficiencies that the then-Commissioner envisioned. It will not "accelerate the process". Rather, Kobo's Application will continue regardless of the answer to the Reference and regardless of whether the Commissioner is correct in his interpretation. Instead of reducing costs, the Reference will add to them. Instead of accelerating the process, it will bog the process down.

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[7] *House of Commons Debates (Standing Committee on Industry, Science and Technology)*, 37th Parl, 1st Sess, No 60 (4 December 2001) at 1700 (Konrad von Finckenstein) [***Debates***], (emphasis added). **(TAB 2)**

[8] *Ibid*, No 37 (4 October 2001) at 1005 (Konrad von Finckenstein) (emphasis added). **(TAB 2)**

16. In the twelve years since it was enacted, the Commissioner has invoked his power to bring a reference under s. 124.2(2) only once. That reference was also brought during the course of a s. 106(2) application – the *Burns Lake* application – and a motion to strike the reference was also brought in that proceeding.[9] The following points emerge from *Burns Lake*:

    (a) The Tribunal retains a residual discretion to decline to hear a reference, even if it poses appropriate questions.[10]

    (b) While the Tribunal did not provide a list of all the circumstances in which its residual discretion might be exercised, it affirmed that it could decline to hear a reference if the reference would delay a hearing on the merits for a question which could be dealt with at the hearing.[11]

    (c) While the question posed does not need to be dispositive of all the issues before the Tribunal in any given case, it *does* need to be determinative of *an* issue.[12]

17. The circumstances of this case call out for the Tribunal to exercise its discretion. Not only are the questions inappropriately framed, their disposition will unnecessarily delay Kobo's Application. The answers will not be dispositive of the case, nor will they be determinative of an issue, as the application of the interpretation will still be a live issue.

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[9] *Burns Lake Native Development Corp. v Canada (Commissioner of Competition)*, 2005 Comp Trib 19 [***Burns Lake***], aff'd 2006 FCA 97, 2006 CarswellNat 533 (WL Can) (FCA) in respect of on appeal of a procedural point. **(TAB 3)**
[10] *Burns Lake*, *ibid* at para 41
[11] *Ibid* at paras 43, 44
[12] *Ibid* at para 29

(B)
The Question is Inappropriate

18. The Commissioner's question assumes that the impugned language lends itself to an abstract interpretation that can be arrived at in isolation, regardless of the facts underpinning the s. 106(2) application or the section in reference to which the consent agreement was filed.

19. There are two possible approaches that the interpretation of s. 106(2) could take: either the impugned language is given a universal meaning that can be applied to all of Part VIII, or it is given a variable meaning that will be applied flexibly, depending on the facts and the section in relation to which the consent agreement is filed.

20. Because s. 106(2) applies to the entirety of Part VIII of the Act, interpreting the meaning of the impugned language will require what Ruth Sullivan calls "consequential analysis". [13] Consequential analysis requires the statutory interpreter to consider the consequences of the proposed interpretations of the impugned language. Consideration of how the interpretation would play out in the context of real facts is part of that analysis. It is inappropriate for the Commissioner to pose a question that requires consequential analysis, and at the same time to deny the relevance of facts and insist upon determining the question in a manner divorced from the facts.

(i)

Consequential Analysis requires the Court or Tribunal to Consider Facts

21. Interpretation of legislation is not a purely academic exercise. In recognition of the real effects of the meaning given to the words used in legislation, the judicial body considering the interpretation must avoid giving meaning to the words that would result in any absurdity, including an interpretation that would defeat

[13] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 299. **(TAB 4)**

Parliament's intentions. The only way in which to determine whether there would be an absurdity is to consider what the practical result of the interpretation would be. To do that, facts are required.

22. In describing the exercise of such statutory interpretation, Sullivan explains:

> When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse.[14]

23. The Supreme Court of Canada has recognized that imbuing a particular word or phrase in the legislation with meaning can be a context- and fact-specific analysis.[15] The manner in which particular language, such as the impugned language, is to be interpreted may vary, depending upon the context in which it is sought to be interpreted. Even where consideration of the facts is not strictly necessary, courts nonetheless consider the facts of cases in the course of engaging in the interpretive exercise.[16]

24. The importance of consequential analysis in this case is evident when the possible interpretations of the impugned language, particularly the universal interpretation advanced by the Commissioner, are considered.

(ii)

Universal Interpretation

25. An interpretation of s. 106(2) that would have uniform, universal application would, in this case, be contrary to the first rule of modern statutory interpretation: that the words of a statute must be read in their grammatical and ordinary sense harmoniously with the rest of the Act and Parliament's intentions. In placing s. 106 at the end of Part VIII, and in view of its wording and the wording of

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[14] *Ibid* at 299

[15] See e.g. *Ontario v Canadian Pacific Ltd*., [1995] 2 SCR. 1031 at paras 65-68. **(TAB 5)**

[16] See e.g. *Wood v Schaeffer*, 2013 SCC 71, [2013] 3 SCR 1053, in particular paras 51, 78-81. In addition to considering legislative facts when construing the statute in that case, the Court also considered the facts of that particular case as part of the interpretive process. **(TAB 6)**

106(1), Parliament's intention was to create a review process that would be applicable to all sections in Part VIII of the Act.

26. Part VIII of the Act includes a dozen provisions in respect of which a consent agreement might be filed,[17] and thus in respect of which s. 106(2) may be invoked. These sections address a wide spectrum of activities, including mergers, abuse of dominance, market restriction, price maintenance, and refusal to deal. Each of these sections contains its own test, and many contain restrictions on what terms the Tribunal may order and under what circumstances.

27. A universal interpretation that would have s. 106(2) applied in the exact same manner to every consent agreement that is filed, regardless of the section under which it is filed and irrespective of the circumstances, is untenable.

28. The universal approach advanced by the Commissioner illustrates this point. The Commissioner would have the section interpreted such that:[18]

> "a. the Tribunal's jurisdiction under subsection 106(2) of the Act is limited to reviewing the terms of a consent agreement to determine whether those terms:
>
> (i) are terms that could be contained in an order issued by the Tribunal; and
>
> (ii) are so vague or ambiguous as to be unenforceable or would lead to no enforceable obligation; and
>
> b. for greater certainty, the Tribunal does not have jurisdiction in a subsection 106(2) proceeding to consider the facts underpinning a consent agreement or any of the questions of law or mixed fact and law that would have been at issue had the matter proceeded as a contested case."

29. In effect, the Commissioner is saying that the Tribunal should approach every s. 106(2) exercise with blinders on, ignoring the facts of the case and the facts

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[17] See e.g. *Competition Act*, *supra* note 1, ss 75, 76, 77, 79, 81, 82, 83, 84, 86, 90.1, 92 and 100, which all permit application by the Commissioner and an order by the Tribunal.

[18] Memorandum of Argument of the Commissioner of Competition in *Kobo Inc v Commissioner of Competition et al*, CT-2014-002, Reference Record of the Commissioner of Competition at 37.

underpinning the consent agreement. So long as the terms are of a nature that the Tribunal could order, then the Tribunal should probe no further.

30. The Commissioner's interpretation cannot be right, as it would render s. 106(2) effectively inapplicable to many sections of Part VIII. We provide three examples: sections 77, 79, and 90.1.

31. Under s. 77,[19] the Tribunal can make any order it sees fit to overcome the effects of exclusive dealing or tied selling, and to restore or stimulate competition in the market. To illustrate the absurdity of the Commissioner's interpretation, consider a factual scenario where a consent agreement contains no description of the wrongdoing alleged to have occurred, but which does state that s. 77 was contravened. On the Commissioner's interpretation, the terms of such a s. 77 consent agreement would be immune from Tribunal review under s. 106(2). If the Tribunal's only task under s. 106(2) is to verify that a type of order is permitted and if s. 77 says that any order can be made, then s. 106(2) becomes useless in the context of s. 77 consent agreement. Every s. 106(2) application would fail on the Commissioner's interpretation.

32. For s. 106(2) to have any meaning in application to s. 77 consent agreements, the Tribunal must be allowed to consider the effects that gave rise to the need for a consent agreement. Without that, it cannot test whether the remedies are necessary to overcome the effects. If the Commissioner's interpretation stands, all the Commissioner would need to do is make some reference to s. 77 in the

[19] *Competition Act*, *supra* note 1, s 77(2) (emphasis added):

> 77. (2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
>
> (a) impede entry into or expansion of a firm in a market,
> (b) impede introduction of a product into or expansion of sales of a product in a market, or
> (c) have any other exclusionary effect in a market,
>
> with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing **any other requirement that, in its opinion, is necessary** to overcome the effects thereof in the market or to restore or stimulate competition in the market.

recitals of a consent agreement, and the consent agreement would immediately be rendered immune from s. 106(2) review. This cannot be right. As is evident, determining the interpretation of s. 106(2) in relation to s. 77 consent agreements necessitates some consideration of how the interpretation would play out in a factual context.

33. Nor does the Commissioner's interpretation work for s. 79(3). That section limits the Tribunal to ordering "such terms as will in [the Tribunal's] opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order".

34. Consider then a scenario where a person directly affected by a s. 79(3) order brings an application for relief under s. 106(2) – presumably because that person believes that the order goes beyond what would be necessary to achieve the purpose of the order – the Tribunal would have to consider facts in order to determine the purpose of the order and the extent of terms necessary to achieve the order's purpose. If the Tribunal were denied the ability to consider facts, it would be impossible to challenge a s. 79(3) consent agreement. Again, these consequential considerations cannot be approached in a factual vacuum.

35. The same interpretive issue applies in the s. 90.1(1) context, where the terms of a prohibition order must be tied directly to the terms of the alleged agreement or arrangement between competitors.[20] Consider the facts of a case like Kobo's, where the Commissioner has not identified the terms of an alleged agreement or arrangement between competitors. Without the ability to examine what activity

[20] *Ibid*, s 90.1(1)(a) (emphasis added):

> 90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order
>
> (a) prohibiting any person — whether or not a party to the agreement or arrangement — **from doing anything under the agreement or arrangement**; or
>
> (b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

was contemplated by the alleged agreement or arrangement between competitors, the Tribunal is foreclosed from undertaking any meaningful review of whether the prohibitionary terms of the order are directed toward activity that was contemplated by the arrangement or agreement. Again, facts are central to the interpretive exercise.

(iii)

Variable Interpretation

36. From the foregoing, it is clear that the universal interpretation advanced by the Commissioner cannot be given credence. More likely, s. 106(2) requires an interpretation that allows it to be applied in a variable manner, dependent upon the section of the Act underlying the consent agreement. In such circumstances, the Commissioner's Reference question is inappropriate, as it should not be answered in the abstract. Rather, the interpretive questions need to be answered in light of the allegations that underpin the particular s. 106(2) application and the allegations that form the basis of the particular consent agreement.

37. The text of s. 124.2 confirms that the Commissioner's reference power was not enacted to allow it to be used in circumstances where, as here, the facts will matter. Subsections 124.2(1) and (3) permit a reference to be brought, on the agreement of the parties,[21] to ask for determination of any question of mixed law and fact, in addition to questions of law, jurisdiction, practice or procedure.

38. In contrast, the Commissioner's reference power may only be used to determine a question of law, jurisdiction, practice or procedure. Reference questions that require the Tribunal to grapple with facts are not permitted. Rather, such questions must be determined in the context of the case, in the usual course.

[21] *Ibid*, s 124.2(1) & (2). In the case of s 124.2(1), the parties are the Commissioner and "a person who is the subject of an inquiry under section 10"; in the case of s 124.2(3), the parties are "[a] person granted leave under section 103.1 and the person against whom an order is sought under section 75 or 77".

(a)

In *Burns Lake*, the Question was appropriate because the facts were not in dispute

39. To this end, it is important to realize that, unlike in the *Burns Lake* reference, the facts here are important and are in dispute. For the purpose of the *Burns Lake* reference, the Commissioner agreed to accept as true the facts as alleged in the s. 106(2) application and Statement of Grounds and Material Facts.[22] So, while the Tribunal found that it could consider the facts of that particular case in that reference,[23] it was limited to considering facts that were not in dispute.[24]

40. The same cannot be said of the current Reference. Rather than accept Kobo's allegations – namely that there is no agreement or arrangement among competitors, that the agency agreement between a retailer and a publisher cannot be a s. 90.1 agreement, and that any international conspiracies that contemplated activity in Canada came to an end with the US Department of Justice's remedies – the Commissioner is proposing to not even address those allegations until *after* the Reference.

41. In this case, since there are no agreed facts, the Tribunal would be required to approach the interpretive exercise on the basis of hypotheticals, testing whether the proposed interpretations could be applied in the context of a variety of reasonable cases that could be brought under each of the sections of Part VIII. Approaching the interpretive exercise in this manner is patently inefficient.

42. Nor is it necessary to do so, since there is a factual context readily available – namely, the facts that will arise in Kobo's Application. Considerations of the implication of the law, and the practical nuances of any interpretation of the impugned language, are best addressed in the context of the full hearing of Kobo's Application. If the interpretation of s. 106(2) is determined by reference, a question of complex statutory interpretation will be answered in the abstract. The

[22] *Burns Lake*, *supra* note 9 at paras 16, 17, 42, 47. **(TAB 3)**
[23] *Ibid* at para 21.
[24] *Ibid* at paras 25-26.

parties will still have to argue over how to apply the interpretation during the course of the hearing.

43. A reference question that resolves little, delays a lot, and must be approached in a hypothetical manner is inappropriate and should not proceed.

(C)
The Process is Inappropriate

44. Even if the Reference question is appropriate and could be answered in a factual vacuum, the reference process is inappropriate in this case as it: (i) will not obviate the need for Kobo's Application, even on the Commissioner's interpretation of the section; (ii) runs counter to Parliament's intentions in respect of both sections 124.2 and 106; (iii) ignores this Tribunal's order that Kobo's application be determined swiftly; and (iv) leads the way to unnecessary interlocutory appeals.

(i)

Kobo's Application will continue, irrespective of the answer to the Reference

45. The Commissioner is wrong to say that, if his interpretation of s. 106(2) is accepted, there will be no need for Kobo's Application to continue. Kobo has alleged, and stands by its allegation, that the terms of the consent agreement are not terms that could be contained in a Tribunal order. An entire section of Kobo's Statement of Grounds and Material Facts addresses this very point (see, *inter alia*, the section of Kobo's SGMF titled "The Terms of the Consent Agreement could not be the subject of an Order of the Tribunal"). The Commissioner appears to have overlooked this part of Kobo's argument, wrongly stating at para. 17 of his Response to the Motion to Strike that Kobo has failed to allege that the terms are not terms that could form part of a Tribunal order.

46. So that there can be no misunderstanding, Kobo repeats here what it says in its s. 106(2) Application: The terms of the Consent Agreement could not form the

part of a Tribunal order. This is the case, even on the Commissioner's fact-less interpretation of s. 106(2).

47. Even if the Tribunal does not consider the facts underpinning the allegations contained in the Consent Agreement, the Tribunal will still have to consider the allegations themselves to determine whether the prohibition order is directly tied to the alleged agreement or arrangement. Put another way, even if the Tribunal accepts as true all of the allegations contained in the recitals of the Consent Agreement, Kobo maintains that the terms of the Consent Agreement are still improper and unenforceable, as the prohibitionary terms in the Consent Agreement are not demonstrably linked to the terms of any s. 90.1 agreement or arrangement.

48. Kobo concedes that it may be possible that some steps in the litigation will be marginally shortened depending on the outcome of the Reference. However, in the main, all the typical litigation steps will still take place, including affidavits of documents, discoveries, witness statements and a hearing. The Reference does not obviate the need for Kobo's Application to be heard.

(ii)

The Reference undermines Parliament's intention that References be brought where they will accelerate matters

49. Kobo is not saying that references are always inappropriate. First, because the process can be invoked by the Commissioner at any time, this allows the Commissioner to gain clarity at any time, even if there is no extant application. To the extent that the Commissioner is justifying this Reference by stating that "the Tribunal, future litigants and the public at large" will benefit from the resolution of "an overarching legal question", [25] it is respectfully submitted that the Commissioner should not have waited until now to bring the Reference. The Reference is all the more unnecessary since the questions the Commissioner posits will necessarily be addressed in the course of Kobo's Application.

[25] Response of the Commissioner of Competition (Motion to Strike Notice of Reference) in *Kobo Inc v Commissioner of Competition et al*, CT-2014-002 at para 1 ***[Commissioner's Response to Motion]***.

50. One of the objectives of administrative tribunals such as the Competition Tribunal is to achieve judicial economy. This is reflected in the *Competition Tribunal Act*, which specifies that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."[26] As Commissioner von Finkenstein stated, the objective of the reference power was to "accelerate the process". No meaningful acceleration will be achieved in this case.

51. Second, references are also appropriate – even in the case of an extant s. 106(2) application – where the reference will result in judicial economy, and particularly where it will obviate the need for a hearing on the merits. *Burns Lake* was one such example. Although, on its face, the reference did not dispose of all of the issues in the application, it did resolve the one critical issue of standing, which meant that the case would not proceed. Bringing the reference thus fulfilled, rather than frustrated, Parliament's intention. Had it not been dispositive of the issue of standing, however, that reference would have delayed the hearing of the application by a year, as the Tribunal's decision was appealed to the Federal Court of Appeal.[27]

52. Here, little to no judicial economy will be achieved, even if the Commissioner is right about the interpretation of the section. And if the Commissioner is wrong, and s. 106(2) does allow for at least *some* probing of the underlying facts, the process becomes even more complicated. In such circumstances, the parties will have to argue about the interpretation twice: once on the Reference and once when seeking to apply that interpretation in the course of the Application.

53. The Reference here is not serving the purposes of efficiency or judicial economy. Rather, it only achieves one thing: delaying the timing of the Commissioner's obligation to tell Canadians why he needed a Consent Agreement in this case and why he chose a remedy that keeps whole the subjects of his investigation,

[26] RSC 1985, c 19 (2nd Supp), s 9(2).
[27] Affidavit of Chinda Kham, sworn April 29, 2014, Kobo's Motion Record, Tab 2.

while punishing a party that has never been accused of any anticompetitive wrongdoing.

(iii)

The Reference ignores the Tribunal's Order that the Matter Proceed Swiftly

54. Kobo requested that its Application be expedited. The Tribunal agreed, and ordered the matter proceed "swiftly". The timetable that has been set is as quick of a timetable as could be expected, given all the necessary steps to ensure a fair hearing.

55. By bringing a reference in the middle of Kobo's Application, the Commissioner is delaying his obligation to respond to Kobo's allegations and delaying the hearing of Kobo's Application. To put matters into context, had the Reference not been brought, the Rules would have contemplated the Commissioner's response in early April. By the end of April, pleadings would have closed. We would now be in the documentary discovery phase, and would be dealing with the question of intervenors.

56. Instead, it has been over three months since the consent agreement was registered, and the Commissioner has yet to articulate what agreement or arrangement led to the Consent Agreement and why it needed to radically alter Kobo's contractual relationships.

57. The Tribunal is obligated to deal with proceedings as expeditiously as the circumstances and considerations of fairness permit.[28] In this case, the expeditious route is the direct one: allowing Kobo's Application to proceed and obligating the Commissioner to respond to it. If neither time nor expense will be saved by the Reference, then it should not be pursued. In those circumstances,

[28] *Competition Tribunal Act*, *supra* note 26, s 9(2).

the Tribunal should not by-pass the normal procedure by hiving off legal issues for preliminary determination.[29]

(iv)

The Reference sets the stage for interlocutory appeals

58. Kobo's arguments above should not be read to discount the materiality of the issues raised by the Reference. It is not that the questions are not legitimate; rather, it is that those important questions will be dealt with in an inappropriate manner. Otherwise put, the answer to the interpretive question will affect how the Tribunal decides Kobo's Application, but the answer will not itself do away with Kobo's Application.

59. Given how important the interpretive question is, it is to be expected that the Reference, if it proceeds, will be appealed.

60. The Commissioner cannot seriously contend that the prospect of an appeal of his Reference is "speculative". The Commissioner is advocating an interpretation that Kobo asserts will effectively gut s. 106(2)'s applicability to vast portions of Part VIII of the Act. Conversely, Kobo is advancing an approach that will require the Bureau to explain to Canadians what agreement or arrangement led to the need for a consent agreement. These approaches are so fundamentally different that it is unlikely that – at the preliminary stages of the case – the Tribunal will come to an interpretation that will satisfy both sides.

61. By declining to hear the Reference and proceeding directly to the Application, the Tribunal takes away the possibility for an interlocutory appeal of the Reference. In *Burns Lake*, where there was a procedural appeal, it took eight months from the date of Tribunal decision to the date of the decision of the Court of Appeal. The schedule set in the Direction of the Tribunal would be delayed by as many months as required for a decision to be delivered in this case as well. While Kobo is committed to proceeding with those parts of the schedule that could proceed,

[29] *Perera v Canada*, 158 DLR (4th) 341, 1998 CarswellNat 584 (WL Can) at paras 13-15 (FCA). **(TAB 7)**

such as the intervenors' motions, the Commissioner appears to want an answer to the interpretive question before he even responds to Kobo's Application.[30] The fact that there may be an interpretive disagreement should not forestall the Commissioner's obligation to respond to the Application.

62. It is worth contemplating how the Commissioner would react if the shoe were on the other foot. It is common for the Commissioner and respondents in other cases to disagree about the interpretation of the Act.[31] Despite these differences, the respondents in those cases had to respond to the Commissioner's allegations; had to serve affidavits of documents; had to submit to discoveries; had to produce reports that addressed conflicting interpretations; and had to address the interpretive disagreements in the course of closing arguments. Given the Commissioner's steadfast, and correct, insistence that his applications must be determined quickly, it seems implausible that the Commissioner would have tolerated, in any of those cases, an argument by the parties that there had to be an interpretive battle before the respondents even had to respond to an application.

63. If interpretive disagreements stand as a reasonable justification for delaying pleadings and proceedings, the Tribunal's ability to expeditiously resolve cases will, in the future, be put into serious doubt.

[30] Commissioner's Response to Motion, *supra* note 25 at para 18.
[31] See e.g. *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated et al*, 2013 Comp Trib 10 in which there was a dispute over the interpretation of s 76, and *Commissioner of Competition v CCS Corporation et al*, CT-2011-002, in which there was a dispute over the interpretation of ss 92 and 96.

PART 4 - CONCLUSION

64. The Act was designed to permit directly affected persons to have access to the Tribunal for an expeditious hearing of a s. 106(2) application. The Commissioner's Reference interferes with this aim. The reference power was not enacted for the Commissioner to invoke every time an affected party seeks to challenge the Commissioner's actions. To permit Parliament's legislative goal to be achieved, the Tribunal should decline to hear the Reference, and instead order that the parties proceed with the schedule contemplated for the s. 106(2) Application.

PART 5 - ORDER SOUGHT

65. Kobo requests an order:

(a) striking the Notice of Reference filed by the Commissioner; or

(b) in the alternative, declaring that the Tribunal declines to hear the Reference.

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Lawyers for the Applicant/Moving Party

TAB 1

PARAS. 27-29

Tribunal de la concurrence | Competition Tribunal

VERSION PUBLIQUE

Référence : *Commissaire de la concurrence c. RONA INC.* 2005, Trib. Concurr. 7
N° de dossier : CT-2003/007
N° de document du Greffe : 0042b

EN MATIÈRE DE la *Loi sur la concurrence,* L.R.C. (1985), ch. C-34, et ses modifications ;

ET EN MATIÈRE DE l'acquisition de Réno-Dépôt Inc. par RONA inc. ;

ET EN MATIÈRE D'UNE requête pour modification d'un consentement selon le paragraphe 106(1) de la *Loi sur la concurrence.*

E N T R E :

LA COMMISSAIRE DE LA CONCURRENCE
(requérante)

et

RONA INC.
(intimée)

et

ERNST & YOUNG ORENDA CORPORATE FINANCE INC.
(mise en cause)

Date de l'audience : Les 21 et 22 février 2005
Membre : Le juge Blais
Date de l'ordonnance : Le 24 février 2005
Ordonannce signé par : Le juge Blais

MOTIFS DE L'ORDONNANCE ET ORDONNANCE

[1] La Commissaire de la concurrence (la « Commissaire ») a déposé une requête en radiation le 21 janvier 2005, modifiée le 28 janvier 2005, aux termes des articles 38 et 49 et du paragraphe 72(1) des *Règles du Tribunal de la concurrence,* DORS/94-290, et de l'alinéa 227 (1)(f) des *Règles de la Cour fédérale (1998),* DORS/98-106, pour obtenir la radiation de la demande présentée par RONA inc. (« RONA ») en vertu de l'article 106 de la *Loi sur la concurrence,* L.R.C. 1985, c. C-34 (la « Loi »). RONA demande l'annulation du consentement au dessaisissement du Réno-Dépôt de Sherbrooke, consentement enregistré auprès du Tribunal de la concurrence (le « Tribunal ») le 4 septembre 2003.

FAITS

[2] La chaîne de magasins RONA, une entreprise canadienne de taille dans le domaine de la quincaillerie-rénovation, compte environ 540 magasins. En avril 2003, RONA a conclu une convention d'achat en vue d'acquérir toutes les actions d'une société concurrente, Réno-Dépôt, au prix de 350 millions de dollars. Cet achat a permis à RONA de devenir propriétaire de 14 magasins Réno-Dépôt au Québec, ainsi que de 6 magasins « The Building Box » situés en Ontario.

[3] Au terme d'une enquête, le Commissaire avait quelques réserves quant à l'effet de l'achat des magasins Réno-Dépôt sur la concurrence dans le marché de la vente au détail des produits de quincaillerie-rénovation, et a conclu que l'achat risquait vraisemblablement de diminuer sensiblement la concurrence dans la région de Sherbrooke.

[4] Des pourparlers ont donc été engagés entre le Commissaire et RONA, qui ont abouti à une entente selon laquelle RONA consentait à se dessaisir du magasin Réno-Dépôt de Sherbrooke; en contrepartie, le Commissaire ne s'opposerait pas à l'achat des actions de Réno-Dépôt par RONA. Le consentement a été enregistré auprès du Tribunal le 4 septembre 2003, et RONA a pu acquérir les actions de Réno-Dépôt.

[5] Aux termes du consentement, RONA avait **[CONFIDENTIEL]** pour réaliser la vente du Réno-Dépôt de Sherbrooke. La vente n'ayant pas eu lieu, l'entreprise Ernst & Young Orenda Corporate Finance Inc. (le « fiduciaire » ou « Ernst & Young ») a été nommé fiduciaire de vente aux fins du dessaisissement, conformément à ce qui était prévu dans le consentement.

[6] Le 24 novembre 2004, le fiduciaire a conclu une convention d'achat et de vente avec un acquéreur, **[CONFIDENTIEL]**.

[7] Le 8 décembre 2004, date limite prévue au consentement, RONA a transmis une liste de questions au fiduciaire pour obtenir des renseignements supplémentaires sur la vente et sur l'acquéreur. RONA a également cessé de transmettre, vers le 15 décembre 2004, les rapports hebdomadaires d'inventaire prévus à la convention.

[8] La Commissaire a présenté une requête au Tribunal pour enjoindre RONA de continuer à transmettre les inventaires, et pour prolonger le délai pour clôturer la vente, qui avait déjà été prolongé **[CONFIDENTIEL]**. RONA a consenti à cette requête et le 6 janvier 2005, le Tribunal a rendu une ordonnance qui prolongeait le délai pour le dessaisissement jusqu'à 14 jours après le

délai accordé à RONA pour s'opposer à la vente, ou dans l'éventualité d'une opposition de la part de RONA, jusqu'à 14 jours après que le Tribunal ordonne la vente.

[9] Le 10 janvier 2005, RONA a déposé un avis d'opposition à la vente, aux termes du consentement. Elle a également déposé un avis de demande d'annulation du consentement, en vertu de l'article 106 de la Loi. Selon RONA, les circonstances qui ont donné lieu au consentement ont changé, puisqu'il y aura désormais une forte concurrence dans le marché de la quincaillerie-rénovation à Sherbrooke, vu l'arrivée d'un magasin Home Depot à la fin de l'année 2005, **[CONFIDENTIEL]**. RONA demande aussi une suspension de l'ordonnance du 6 janvier 2005.

HISTORIQUE DES PROCÉDURES

[10] Il peut être utile ici de rapporter de façon succincte les étapes procédurales de l'affaire :

4 septembre 2003	Enregistrement du consentement. RONA consent à se dessaisir du magasin Réno-Dépôt à Sherbrooke, et le Commissaire consent à l'achat de Réno-Dépôt par RONA.
1er mars 2004	Nomination du fiduciaire à la vente (Ernst & Young).
18 août 2004	Lettre d'intention de l'acquéreur.
24 septembre 2004	Ordonnance du tribunal prolongeant le délai pour la vente jusqu'au **[CONFIDENTIEL]** (le consentement ayant fixé le délai à **[CONFIDENTIEL]** après la nomination du fiduciaire).
8 octobre 2004	Acceptation de la lettre d'intention par le fiduciaire.
24 novembre 2004	Signature de la convention d'achat et de vente entre le fiduciaire et l'acquéreur.
8 décembre 2004	Demande par RONA de renseignements supplémentaires sur l'acquéreur.
[CONFIDENTIEL]	Dépôt de la requête par la Commissaire pour prolonger le délai pour la vente par le fiduciaire et forcer la production par RONA de rapports d'inventaire.
31 décembre 2004	Dépôt de la requête modifiée de la Commissaire.
6 janvier 2005	Ordonnance du tribunal suite au consentement de RONA pour prolonger le délai de clôture et transmettre les rapports d'inventaire.
10 janvier 2005	RONA transmet au fiduciaire son avis d'opposition à la vente, aux termes du paragraphe 10 du consentement. RONA dépose une demande en vertu de l'article 106 de la Loi pour faire annuler le consentement.

21 janvier 2005	La Commissaire dépose une requête en radiation de la demande de RONA pour faire annuler le consentement.
28 janvier 2005	La Commissaire dépose une requête modifiée.
28 janvier 2005	Le fiduciaire dépose une requête aux termes de l'article 12 du consentement, qui demande au Tribunal d'approuver la vente du Réno-Dépôt de Sherbrooke.
3 février 2005	Ordonnance du Tribunal fixant l'audience de la requête en radiation au 21 février 2005.

LITIGE

[11] La seule question en litige dans la présente procédure est de savoir si le Tribunal doit accorder la requête en radiation.

ARGUMENTS DES PARTIES

La Commissaire

[12] La Commissaire soutient que compte tenu du peu de diligence dont RONA a fait preuve dans l'exécution des termes du consentement, et vu la présence d'un acheteur avec lequel le fiduciaire a déjà conclu une convention d'achat et de vente, la demande présentée par RONA en vertu de l'article 106 de la Loi constitue un abus de procédure, selon le sens de l'alinéa 221(1)(f) des *Règles de la Cour fédérale, 1998*, et devrait en conséquence être radiée. De plus, elle allègue qu'il est dans le meilleur intérêt du public de régler ceci le plus vite possible afin d'assurer un niveau de concurrence adéquat dans la région de Sherbrooke.

[13] La Commissaire motive sa requête en se fondant sur les faits suivants :

1. Toutes les étapes de la vente du Réno-Dépôt de Sherbrooke sont franchies. Dans le cadre des négociations pour la vente, la Commissaire et le fiduciaire se sont assurés que l'acquéreur entend exploiter l'entreprise pour la vente au détail de produits de quincaillerie-rénovation, et qu'il a les capacités financières et opérationnelles pour ce faire.

2. La convention conclue entre le fiduciaire et l'acquéreur crée des droits et obligations qui ne peuvent être annulés par le Tribunal. La convention a force obligatoire, sous réserve seulement du droit d'opposition de RONA en vertu du consentement. En demandant l'annulation du consentement, RONA demande indirectement au Tribunal d'annuler une convention entre deux parties qui ne sont pas par ailleurs parties au consentement.

3. RONA n'a pas agi avec diligence pour entreprendre son recours. La Commissaire souligne notamment que RONA a attendu la date limite pour présenter une demande de renseignements supplémentaires, qui visait moins l'obtention de renseignements que la contestation des négociations menées par le fiduciaire, contrairement à l'esprit du consentement. RONA a de nouveau, selon la Commissaire, attendu la date limite pour déposer son avis d'opposition à la vente.

4. Les conditions n'ont pas véritablement changé, puisque RONA prétendait déjà, même avant la signature du consentement, que Home Depot allait ouvrir sous peu un magasin dans la région de Sherbrooke.

RONA

[14] RONA oppose à la requête en radiation les arguments suivants :

[15] La demande d'annulation ou de modification d'un consentement est prévue à la fois par la Loi (article 106) et par le consentement lui-même au paragraphe 21, qui se lit comme suit :

> 21. Le Tribunal conserve compétence à l'égard de toute demande du commissaire ou de RONA visant à annuler ou à modifier toute disposition du présente consentement en cas de changement de circonstance ou pour un autre motif.

[16] Rien dans la Loi n'empêche une partie de présenter une demande d'annulation ou de modification d'un consentement, tant que celui-ci demeure en vigueur.

[17] En outre, RONA soutient que la Commissaire n'a présenté aucun argument justifiant la radiation de l'acte de procédure. La jurisprudence sur ce point, toujours de l'avis de RONA, est particulièrement stricte. La Commissaire aurait à démontrer la futilité et la frivolité de la demande pour en justifier la radiation.

[18] RONA affirme par ailleurs que le bureau de la Commissaire a lui-même suggéré la demande en vertu de l'article 106, lorsque RONA a fait part du changement de circonstances occasionné par l'arrivée de Home Depot dans le marché de Sherbrooke.

[19] Le consentement ne prend pas fin avec la signature de la convention d'achat et de vente, mais bien lorsque le transfert de l'actif est conclu, d'après le paragraphe 22 du consentement, qui se lit comme suit :

> 22. Le présent consentement demeure en vigueur jusqu'à ce que le commissaire avise par écrit le Tribunal que le dessaisissement a eu lieu, ou jusqu'à une ordonnance du Tribunal.

[20] L'exigence de dessaisissement prévue au paragraphe 2 du consentement est énoncée sous réserve des dispositions du consentement, qui prévoit notamment, au paragraphe 21, la possibilité d'un recours au Tribunal en cas de changement de circonstances.

[21] RONA a respecté tous les délais prévus au consentement. La Commissaire ne peut, selon

RONA, demander la radiation d'une demande alors que celle-ci est prévue à la fois dans la Loi et le consentement, simplement parce que le dessaisissement a procédé plus lentement que ne l'aurait souhaité la Commissaire. Par ailleurs, RONA affirme avoir déposé la demande en vertu de l'article 106 dès qu'elle a reçu confirmation officielle que Home Depot ouvrirait un magasin à Sherbrooke.

[22] RONA soutient enfin que les allégations contenues dans l'affidavit de Mme Laflamme, déposé à l'appui de la requête, sont non seulement erronées mais également d'aucune pertinence pour les fins de la demande en vertu de l'article 106. RONA oppose à cet affidavit celui de Claude Guévin, premier vice-président et chef de la direction financière de RONA, qui affirme que RONA a pris toutes les mesures raisonnables pour collaborer avec la Commissaire et le fiduciaire et a fait preuve de diligence raisonnable.

[23] Par ailleurs, d'après RONA, le comportement de RONA dans le cadre du dessaisissement n'a rien à voir avec la demande en vertu de l'article 106, où le Tribunal doit simplement déterminer si les circonstances entourant le consentement ont changé de sorte que sur la base des circonstances au moment de la demande, le consentement n'aurait pas été signé.

[24] S'appuyant sur le critère énoncé dans l'arrêt *David Bull Laboratories v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), RONA soutient qu'il n'y a pas lieu de radier la demande. Lorsque la question est sérieuse et n'est pas évidente, la jurisprudence de la Cour fédérale indique clairement qu'il est préférable de ne pas régler un dossier de façon sommaire.

[25] La Commissaire invoque pour seul motif de radiation l'abus de procédure de la part de RONA. Or, répond celle-ci, le fait d'intenter une procédure ou d'affirmer ses droits n'est pas un abus de procédure. Le fait pour RONA de s'adresser au Tribunal pour être relevée de son obligation de dessaisissement, en raison d'un changement de circonstances, est un exercice des droits que lui accordent à la fois la Loi et le consentement. Selon RONA, la Commissaire n'a nullement démontré qu'il s'agissait-là d'un abus de procédure.

[26] Enfin, RONA demande que les dépens de la requête lui soient payés sans délai, sur une base avocat-client, pour les motifs suivants :

1. La requête de la Commissaire n'est pas fondée;
2. elle repose sur des allégations inexactes ou non pertinentes;
3. la position de la Commissaire contredit les conseils donnés à RONA de déposer une demande aux termes de l'article 106;
4. la requête a non seulement causé un retard dans l'instance, mais a entraîné des coûts de recherche rendue inutile par les modifications apportées à la requête par la Commissaire;
5. la requête et contraire à l'ordre public, puisqu'elle cherche à priver une partie d'un recours prévu par la Loi et expressément inclus dans le consentement signé par les parties.

ANALYSE

[27] Trois textes législatifs paraissent pertinents à la présente requête et sont ici reproduits pour faciliter la lecture de l'analyse qui suit :

Loi sur la concurrence, L.R.C. 1985, c. C-34 et modifications subséquentes

106. (1) Le Tribunal peut annuler ou modifier un consentement ou une ordonnance rendue en application de la présente partie, à l'exception d'une ordonnance rendue en vertu des articles 103.3 ou 104.1 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :	**106.** (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that
a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;	(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or
b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.	(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Règles de la Cour fédérale (1998), DORS/98-106

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :	**221.** (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
a) qu'il ne révèle aucune cause d'action ou de défense valable;	(a) discloses no reasonable cause of action or defence, as the case may be,
b) qu'il n'est pas pertinent ou qu'il est redondant;	(b) is immaterial or redundant,
c) qu'il est scandaleux, frivole ou vexatoire;	(c) is scandalous, frivolous or vexatious,
d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;	(d) may prejudice or delay the fair trial of the action,
e) qu'il diverge d'un acte de procédure antérieur;	(e) constitutes a departure from a previous pleading, or
f) qu'il constitue autrement un abus de procédure.	(f) is otherwise an abuse of the process of the Court,
Elle peut aussi ordonner que l'action soit rejetée	

ou qu'un jugement soit enregistré en conséquence.	and may order the action be dismissed or judgment entered accordingly.
Règles du Tribunal de la concurrence, DORS/94-290	*Competition Tribunal Rules*, SOR/94-290
72. (1) Les Règles de la Cour fédérale, C.R.C. (1978), ch. 663, s'appliquent, avec les adaptations nécessaires, aux questions qui se posent au cours des procédures quant à la pratique ou la procédure à suivre dans les cas non prévus par les présentes règles.	**72.** (1) Where, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the Federal Court Rules, C.R.C., 1978, c. 663, shall be followed, with such modifications as the circumstances require.

[28] Le paragraphe 72(1) des *Règles du Tribunal de la concurrence* prévoit expressément qu'en cas de vide juridique, les *Règles de la Cour fédérale* s'appliqueront. Dans sa demande, la Commissaire n'invoque que l'alinéa (f) de la Règle 221 (*Règles de la Cour fédérale, 1998*). Il lui faut donc démontrer que la demande de RONA déposée en vertu de l'article 106 constitue un abus de procédure.

[29] La Commissaire tente de démontrer que RONA n'a pas coopéré à l'exécution du consentement, que RONA a plutôt utilisé les délais prévus jusqu'à la limite, a soulevé des questions de dernières minutes qui n'avaient que peu ou pas de pertinence, et a plutôt démontré un certain mépris pour le consentement signé et déposé le 4 septembre 2003.

[30] Le point le plus sérieux soulevé par la Commissaire est à l'effet que RONA a toujours prétendu que Home Depot allait s'installer à Sherbrooke dans un avenir rapproché, et que, finalement, le consentement a été signé pour permettre à la transaction globale de se réaliser sans objection de la part de la Commissaire, et que l'intention de RONA a toujours été de demander l'annulation de ce consentement par une demande en vertu de l'article 106.

[31] La Commissaire suggère que la preuve démontre que RONA n'a jamais eu l'intention de vendre le Réno Dépôt de Sherbrooke et que tous les efforts ont été mis pour faire avorter les efforts de la Commissaire et du fiduciaire pour procéder à la vente.

[32] La Commissaire est d'avis que RONA était convaincu de l'arrivée prochaine de Home Depot sur le marché de Sherbrooke et que malgré cette conviction profonde, voyant qu'il ne semblait pas possible d'amener la Commissaire à accepter ce fait, le consentement a été signée sans volonté d'y donner effet. En corollaire, la Commissaire conclut qu'il n'y a pas de changements de circonstances au sens de la loi, et que la demande sous l'article 106, est un abus de procédure.

[33] Enfin, la Commissaire suggère que tous les éléments factuels démontrés par la preuve ajoutés à l'intention manifeste de RONA d'empêcher que la vente soit conclue constitue un abus de procédure au sens de l'article 221*f)* des *Règles de la Cour fédérale, 1998*.

[34] Évidemment, RONA nie l'interprétation faite de la preuve déposée devant la Cour et affirme avoir agi en vertu des dispositions de la loi et des règles et des ententes intervenues entre les parties

[35] La Cour d'appel fédérale, dans l'arrêt *David Bull*, a maintenu le rejet d'une demande de radiation d'un avis de requête introductive d'instance. Les Règles de la Cour ne permettaient pas une telle procédure, d'après l'interprétation de la Cour d'appel, et ce, pour une bonne raison : il était de beaucoup préférable, selon la Cour, de plaider la requête que d'y mettre fin de façon prématurée.

> Pour ces motifs, nous sommes convaincus que le juge de première instance a eu raison de refuser de prononcer une ordonnance de radiation sous le régime de la Règle 419 ou de la règle des lacunes, comme il l'aurait fait dans le cadre d'une action. Nous n'affirmons pas que la Cour n'a aucune compétence, soit de façon inhérente, soit par analogie avec d'autres règles en vertu de la Règle 5, pour rejeter sommairement un avis de requête qui est manifestement irrégulier au point de n'avoir aucune chance d'être accueilli (Voir, par exemple, *Cyanamid Agricultural de Puerto Rico, Inc. c. Commissaire des brevets et autre* (1983), 74 C.P.R. (2d) 133 (C.F. 1ère inst.); et l'analyse figurant dans la décision *Vancouver Island Peace Society c. Canada*, [1994] 1 C.F. 102 (1ère inst.), aux p. 120 et 121). Ces cas doivent demeurer très exceptionnels et ne peuvent inclure des situations comme celle dont nous sommes saisis, où la seule question en litige porte simplement sur la pertinence des allégations de l'avis de requête. (*David Bull Laboratories (Canada) Inc. c. Pharmacia Inc.*, [1995] 1 C.F. 588 (C.A.) au paragraphe 16)

[36] Il convient de souligner que la radiation d'un acte introductif d'instance est une mesure draconienne qui met fin à l'instance, contrairement, par exemple, à la radiation de certains éléments de preuve. Somme toute, la radiation de l'acte introductif d'instance est un jugement sommaire, puisque le tribunal enlève au justiciable le recours dont celui-ci cherche à se prévaloir.

[37] La jurisprudence de la Cour fédérale et de la Cour d'appel fédérale insiste sur le caractère exceptionnel de la radiation d'un acte introductif d'instance. Le principe est établi dans l'arrêt *Creaghan Estate c. La Reine*, [1972] C.F. 732 (1ère inst.) où le juge Pratte écrit :

> Enfin, une déclaration ne doit pas, à mon avis, être radiée pour le motif qu'elle est vexatoire ou futile, ou qu'elle constitue un emploi abusif des procédures de la Cour, pour la seule raison que, de l'avis du juge qui préside l'audience, l'action du demandeur devrait être rejetée. Je suis d'avis que le juge qui préside ne doit pas rendre une pareille ordonnance à moins qu'il ne soit évident que l'action du demandeur est tellement futile qu'elle n'a pas la moindre chance de réussir, quel que soit le juge devant lequel l'affaire sera plaidée au fond. C'est uniquement dans ce cas qu'il y a lieu d'enlever au demandeur l'occasion de plaider. (*Creaghan Estate*, p. 736)

[38] Le juge Muldoon, dans la décision *Apotex Inc. c. Merck & Co.*(T-2869-96), (1999) 167 F.T.R. 59 (1ère inst.) résume ainsi l'état du droit en la matière :

> Il est de jurisprudence constante que le pouvoir de déclarer irrecevable une action au moyen de la radiation d'un acte de procédure doit être exercé avec parcimonie et prudence et uniquement dans les cas où l'action constitue un abus de procédure évident. Ainsi, dans l'arrêt Procureur général du Canada c. Inuit Tapirisat du Canada, [1980] 2 R.C.S. 735, la Cour suprême du Canada a déclaré, sous la plume du juge Estey :
>
> > Comme je l'ai dit, il faut tenir tous les faits allégués dans la déclaration pour

> avérés. Sur une requête comme celle-ci, un tribunal doit rejeter l'action ou radier une déclaration du demandeur seulement dans les cas évidents et lorsqu'il est convaincu qu'il s'agit d'un cas " au-delà de tout doute " : *Ross v. Scottish Union and National Insurance Co.* [(1920), 47 O.L.R. 308 (C.A.)].

> Le critère à appliquer est devenu celui du caractère "évident et manifeste" : il faut qu'il soit évident et manifeste que la déclaration du demandeur ne révèle aucune demande ou cause d'action valable pour qu'on puisse la radier.

> Cette formule a été retenue par Mme le juge Wilson dans l'arrêt *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441. Dans l'arrêt *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, Mme le juge Wilson, qui s'exprimait au nom de la majorité des juges de la Cour suprême du Canada, a examiné l'origine et l'évolution du principe qui permet aux tribunaux de radier des actes de procédure. Dans d'anciennes décisions, les tribunaux anglais insistaient sur le fait que le principe découlait du pouvoir des cours de justice de veiller à ce qu'elles demeurent une tribune où de véritables questions de droit sont abordées et qu'on ne s'en serve pas pour présenter des actions vexatoires destinées seulement à harceler une autre partie. (*Apotex Inc. c. Merck & Co.* aux paragraphes 13 et 14)

[39] Par ailleurs, il paraît difficile de caractériser la démarche de RONA comme un abus de procédure. Le fait de présenter la même demande à plusieurs reprises (*Black c. L'actif de la faillite de NsC Diesel Power Inc. (Syndic de)* (2000), 183 F.T.R. 301, maintenue en appel 2003 CAF 300), ou de présenter une demande alors que la question est *res judicata* (*Beattie c. Canada* (T-1373-99, 11 novembre 2000) 197 F.T.R. 209, maintenue en appel 2001 CAF 309), constituent des exemples d'abus de procédure. L'action vexatoire qui ne sert qu'à harceler l'autre partie, selon l'expression de Mme Wilson dans l'arrêt *Hunt,* serait clairement un abus de procédure.

[40] Ici, force est de constater que RONA se prévaut d'une disposition de la Loi, et invoque une clause du consentement, pour appuyer son avis de demande. Le consentement prévoit expressément, au paragraphe 21, que les parties conviennent de la compétence du Tribunal pour toute demande de la part de l'une ou l'autre pour annuler ou modifier le consentement :

> 21. Le Tribunal conserve compétence à l'égard de toute demande du commissaire ou de RONA visant à annuler ou à modifier toute disposition du présent consentement en cas de changement de circonstance ou pour un autre motif.

[41] La demande en vertu de l'article 106 n'est ni une démarche vexatoire, scandaleuse, frivole, non pertinente ou redondante, ni une demande dénuée d'intérêt en droit. (Voir *Sweet c. Canada*, [1999], A.C.F. no 1539 (C.A.); *Burnaby Machine & Mill Equipment Ltd. v. Berglund Industrial Supply Co. Ltd. et al.* (1982), 64 C.P.R. (2d) 206 (F.C.T.D.)

[42] Les parties ont débordé le cadre de la requête en radiation pour aborder les questions de fond quand à la requête sous l'article 106 tel que discuté précédemment.

[43] Bien que la Commissaire a démontré le sérieux de ses arguments quant à la requête de RONA sous l'article 106, je ne peux que conclure qu'il est prématuré de tirer des conclusions sur le fond. Cependant la pertinence de ces arguments m'amène à considérer qu'il faille accélérer le processus, afin que les droits de toutes les parties soient sauvegardés et que les recours ne soient pas illusoires.

[44] La requête interlocutoire de la Commissaire sera donc rejetée, mais les parties devront s'attendre à ce que l'audition de la demande sous l'article 106 et les autres requêtes relatives à la convention d'achat intervenue soient entendues dans les délais les plus courts possibles. Les parties ont d'ailleurs toutes consenti à l'avance à ce processus accéléré, dans le respect, évidemment, des droits de toutes les parties. Les parties seront par ailleurs appelées à coopérer davantage à cet effet.

DÉPENS

[45] La *Loi sur le Tribunal de la concurrence* confère désormais au Tribunal le pouvoir d'accorder des dépens (article 8.1), en conformité avec les dispositions des *Règles de la Cour fédérale, 1998*. La règle 401 (2) prévoit ce qui suit :

401. (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.	**401. (1)** The Court may award costs of a motion in an amount fixed by the Court.
(2) Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.	**(2)** Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.

[46] Dans l'exercice de son pouvoir discrétionnaire, selon la règle 400, le Tribunal peut tenir compte de divers facteurs pour déterminer les dépens, le cas échéant, et notamment, à l'alinéa 400(3)k) :

400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.	**400. (1)** The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.
(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants : (...)	**(3)** In exercising its discretion under subsection (1), the Court may consider (...)
k) la question de savoir si une mesure prise au cours de l'instance, selon le cas : (i) était inappropriée, vexatoire ou inutile,	**(k)** whether any step in the proceeding was (i) improper, vexatious or unnecessary, or
(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;	(ii) taken through negligence, mistake or excessive caution;

[47] RONA demande les dépens pour la requête, sur une base avocat-client. Il faut donc considérer chacune de ces questions.

[48] La règle 401 permet au juge d'accorder les dépens peu importe l'issue du litige. Il s'agit en fait d'une règle d'exception, qui remplace le principe confirmé dans l'arrêt *Toronto Dominion Bank c. Canada Trustco Mortgage Co.* (1992), 50 F.T.R. 317. Dans l'arrêt *A. Lassonde Inc. c. Island Oasis Canada Inc.*, [2001] 2 F.C. 568, le juge Létourneau précise qu'une fois convaincu du fait qu'une requête n'aurait pas dû être présentée, le juge des requêtes doit ordonner le paiement des dépens sans délai, sans égard à l'issue de la cause (*Oasis*, para. 25).

[49] Par ailleurs, les dépens sur une base avocat-client ne sont accordés que dans des cas exceptionnels, pour sanctionner la mauvaise foi d'une des parties.

[50] Dans l'affaire *Sedpex, Inc. c. Canada*, [1989] 2 C.F. 289 (C.F. 1ère inst.), le juge Strayer écrit :

> L'intimé a demandé que, dans l'hypothèse où je rejetterais cette demande, j'adjuge les dépens contre la requérante sur la base procureur-client. À l'appui de cette demande, son avocat a allégué la faiblesse de la cause de la requérante. Les dépens ne devraient normalement pas être accordés sur la base procureur-client pour la seule raison que les prétentions de la partie perdante ne sont pas fondées: la manière dont l'instance a été menée devrait être le facteur déterminant à cet égard. La conduite de la présente affaire par la requérante ne m'apparaît aucunement répréhensible. Il est regrettable pour la bonne application de l'article 61.5 que les présentes procédures aient retardé d'environ un an la décision de l'arbitre sur le fond de la présente affaire. Le recours de la requérante pouvait cependant être exercé légalement en vertu du rôle de supervision que se sont garanti les cours en matière de compétence. J'adjuge donc les dépens contre la requérante, mais seulement entre parties. (*Sedpex*, para. 16)

[51] Dans l'arrêt *Robert c. R.* (1999), 247 N.R. 350, la Cour d'appel fédérale a statué que le fait pour une cause d'être peu fondée et très faible ne constituait pas en soi un motif pour accorder les dépens sur une base avocat-client. Là aussi, la Cour a souligné que ces dépens sont exceptionnels, et servent à sanctionner une conduite particulièrement répréhensible (para. 88). Le principe est affirmé dans un arrêt de la Cour suprême du Canada, *Young c. Young* [1993] 4 R.C.S. 3 à la p. 134 :

> Les dépens comme entre procureur et client ne sont généralement accordés que s'il y a eu conduite répréhensible, scandaleuse ou outrageante d'une des parties. Le peu de fondement d'une demande ne constitue donc pas une raison d'accorder les dépens sur cette base;

[52] La Commissaire n'a pas, à mon sens, fait preuve d'une conduite particulièrement répréhensible en présentant cette requête en radiation. Je suis toutefois d'avis que la requête n'avait qu'un fondement plutôt faible, et qu'elle ajoute un retard à une procédure que la Commissaire souhaitait voir accélérée. Pour ces motifs, il ne me paraît pas justifié d'accorder les dépens sur une base avocat-client, mais il convient d'accorder les dépens à l'intimée RONA.

CONCLUSION

[53] Pour les motifs énoncés, je rejetterais la requête en radiation, et j'accorderais les dépens de la requête à l'intimée RONA, mais sur la base partie-partie selon la colonne IV du tarif B.

[54] La présente ordonnance demeurera confidentielle jusqu'à mardi le 1er mars 2005 à 17h00.

[55] Les parties aviseront le registraire des éléments qu'elles souhaitent voir demeurer confidentiels, en précisant les motifs, au plus tard lundi le 28 février 2005 à 17h00.

ORDONNANCE

LE TRIBUNAL ORDONNE CE QUI SUIT :

[56] La requête en radiation est rejetée;

[57] Les dépens de la requête sont accordés à l'intimée RONA, sur la base partie-partie selon la colonne IV du tarif B;

[58] La présente ordonnance demeure confidentielle jusqu'à mardi le 1er mars 2005 à 17h00; les parties aviseront le registraire des éléments qu'elles souhaitent voir demeurer confidentiels, en précisant les motifs, au plus tard lundi le 28 février 2005 à 17h00.

FAIT à Ottawa, ce 24ième jour de février 2005.

SIGNÉ au nom du Tribunal par le juge.

(s) Pierre Blais

REPRÉSENTANTS

Pour la requérante :

La Commissaire de la concurrence :

Diane Pelletier
André Brantz

Pour l'intimée :

RONA INC.

Eric Lefebvre
Martha A. Healey
Denis Gascon

Pour la mise en cause :

Ernst & Young Orenda Corporate Finance Inc.

Louis-Martin O'Neill

TAB 2

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Thursday, October 4, 2001

• 0908

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I'm going to call the meeting to order.

Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act, is our order of the day.

We're very pleased to welcome here this morning, from the Department of Industry, the Commissioner of Competition, Konrad von Finckenstein. With him today is Marcel Morin, the acting assistant deputy commissioner, and François-Bernard Côté, the director of the competition law division.

Without further ado, I'll turn it over to you, Mr. Commissioner.

Mr. Konrad von Finckenstein (Commissioner of Competition, Competition Act, Competition Bureau, Department of Industry): Thank you, Madam Chairman, and thank you for having invited me to talk to you about Bill C-23.

[*Translation*]

This bill reflects the valuable work of this committee's June 2000 report and initiatives taken by individual members of Parliament, some of whom are on this committee. As you know, there was an extensive national consultation process on this issue conducted by the Public Policy Forum. Twelve round tables were conducted across Canada.

As you know, the Competition Act is designed to promote competition and efficiency in the Canadian marketplace to ensure that all Canadians enjoy the benefit of low prices, product choice and quality service.

• 0910

[*English*]

The legislation before you is very important to keep up to date with changes in our economy and to give the Competition Bureau the tools it needs to do its job.

The bill basically has four items of great importance to us. It prohibits the sending of deceptive notices; it enables us to gather evidence located abroad; it will streamline the Competition Tribunal process; and it will give the Competition Tribunal the power to issue temporary orders.

Let me deal with these issues one by one.

In regard to deceptive notices, our bureau receives thousands of complaints each year regarding cleverly worded mail notices designed to deceive victims into believing they have won a prize, requiring the so-called winner to pay in order to receive the prize. Most often there's no prize, or the value of that prize does not exceed the amount that has to be paid.

Canadians who are targeted for these mailings are often the most vulnerable members of our society. They target specifically our seniors, and losses can amount to thousands of dollars per person. Increasingly, these scams also become international in scope. These scam artists locate in one location and target another one, and Canada, unfortunately, is in the process of gaining a reputation as a haven for these scam artists, who concentrate on the United States.

It's therefore very timely that we enact these provisions. They will also have, as a goal, to draw a difference between legitimate business contests and scams. The amendments create an offence that prohibits the sending of a notice by any means that a) leads recipients to believe they have won a prize; and b) requires them to pay anything to receive the prize. No offence would occur if the person actually wins a prize and the notice disclosures are satisfied.

You are going to hear from the bar and others who will appear before you. How are we going to do this? How do these things work out? There's a lot of discretion vested in the bureau. For that purpose, I have distributed to you today tentative draft enforcement guidelines that show how we would apply those provisions--what we consider a prize, what's considered payment, etc.—and hopefully, this will put some flesh on the bare bones of the legislation and give you a view of what we intend to do. It will also lead to greater certainty for business.

The next point was international cooperation.

[*Translation*]

The ability to obtain evidence located in other countries is crucial in administering and enforcing competition laws in today's global economy. In order to inquire fully into abusive dominance allegations concerning a large, multinational corporation, we need access to relevant evidence which is often located beyond our borders. Currently, there's no way to obtain that evidence.

The proposed amendments regarding mutual legal assistance will facilitate evidence-gathering on behalf of Canada regarding civil competition matters, such as abusive dominance and mergers. This will ensure that enforcement decisions affecting domestic competition are made in Canada.

The proposal sets minimum standards for treaties and essentially mirrors the existing tools with respect to criminal matters under the Mutual Legal Assistance in Criminal Matters Act.

That said, you make a statement here that Canada is gaining a reputation as a haven for scam artists. I'm sure that's quite true, but is there any quantitative data to that effect, or is it anecdotal? And what does it mean to be a haven? Does it mean that these operators operate in Canada and do their illicit business somewhere else, or they operate somewhere else and do their scamming here, or they operate here and scam here? I wonder if you could clarify that a little.

Mr. Konrad von Finckenstein: You have scam artists who operate here and scam here, but the more difficult ones are the ones who operate here but scam in the U.S., and that's a bit of a growth industry. The number of complaints the U.S. authorities get about scams that are originating in Canada, but where the victims are in the U.S., is growing. Their statistics show a steady increase of Canada being one of the major originators of these scams. We want to go after them, and that's part of what this legislation is designed for.

We also have some of them who operate in Australia and New Zealand. The scams are there, but they originate from here. The really smart ones do not have any victims in Canada. There will be no complaints in Canada to provincial authorities, to the provincial attorneys general, and there won't be any to us, because there are no Canadian victims. The victims are located in Utah, or Florida, or something. They complain to the FTC. The FTC tells us and then on that basis we try to go after them, but we really don't have tools designed for it.

The second part of this, which I think is just as important, is you don't want to tar the innocent. There are a lot of people who run legitimate contests, with prizes, etc., and this legislation basically puts down a code of behaviour and says if you want to do a contest this is what you have to do. The guidelines I tabled with you explain that in more detail. They should be able to do that; there's nothing wrong with doing contests. What's wrong is running a contest where you're scamming people, where you're asking them to pay and they don't get a prize.

Mr. Brent St. Denis: I want to go on to the second part on the international cooperation and evidence gathering. You gave us a working model to consider. I take it from this that Canada would have to make an agreement with each other state; let's say, Canada and the U.S., and Canada and Australia, and Canada and France. Would there have to be a separate agreement with each country? There are no means to have an international protocol, like you had say with land mines? You have to do these one at a time?

Mr. Konrad von Finckenstein: That's because competition law in some countries is relatively new. There's no tradition. There's an agency that doesn't have a reputation yet, or hasn't established a track record, etc., so we would be doing those treaties only with the countries where we feel the other side in effect has a system of equal value, of equal guarantees, to what we have. Primarily, I see us doing one with the U.S. first and foremost, then the EU, probably with France, with the U.K., with Germany, etc.

Down the line we may have it with lots of countries as they develop. Competition is a growth industry where 40 years ago 10 countries had a competition regime; now about 100 have them. But they are at various stages of various sophistication, etc., and you would only do this with a country where you can be sure they will play by the rules, and things that are given to them, subject to certain conditions or confidentiality, will be treated that way.

Mr. Brent St. Denis: Are there any—

Mr. Konrad von Finckenstein: I'm sorry, my colleague would like to elaborate.

Mr. François-Bernard Côté: It's possible. It's been done in other areas, criminal areas, for example, where it could be that there is a multilateral agreement between a number of countries. If the conditions that are in the multilateral agreement, or treaty, are also conditions that are found in the proposed legislation, I would venture to say that this would be a valid cooperation agreement between those countries as long as Canada finds in those treaties what the legislation would require.

• 1005

Mr. Konrad von Finckenstein: This is very optimistic. We're not there yet by a long shot. But it is substantially correct.

Mr. Brent St. Denis: So I take it that, as good an idea as this is, no doubt, once the bill is in place, it could conceivably be years before we have.... Are there other agreements somewhere else now? Or are there discussions going on as we speak on these matters?

Mr. Konrad von Finckenstein: Yes, the origin of this bill is the U.S. legislation. The U.S. legislation specifically says that the U.S. may not make this type of treaty with another country unless that country has reciprocal legislation. So as soon as this is signed, we will sit down with the Americans and do one with the U.S.

Mr. Brent St. Denis: Thank you, Madam Chair.

The Chair: Thank you, Mr. Finckenstein.

Mr. Rajotte.

Mr. James Rajotte: Thank you, Madam Chair.

I'm going to touch on two of the broad aspects that the amendments cover. The first is streamlining the competition and tribunal processes by providing the tribunal with the power to award costs, make summary dispositions, and hear and determine references. And there is the fourth broad section, which is broadening the scope under which the Competition Tribunal may issue temporary orders.

These amendments are designed to streamline the process, which I think we can all favour here. But I think one of the possible negative side effects of increasing the power and influence of the Competition Tribunal was raised by a comment you made, Commissioner, about determining what is anti-competitive behaviour and what is true competition. So I would like you to address the concern about the negative side effects of possibly increasing the power and influence of the Competition Tribunal, and how do we determine what is anti-competitive behaviour versus true competition?

Mr. Konrad von Finckenstein: Actually it fits the other way around. Right now we're reluctant to go to the tribunal because it is a very crude instrument. It's a tribunal that does not have the power to award costs and as such cannot really control its process.

To give you an example, we had one merger case in the port of Montreal. We started litigation. We had 54 motions, and we never got to discovery because there is no penalty for bringing motions. In my view, that's the sort of abuse of process that would be cured. By putting these streamlining provisions in the tribunal, it will be a more useful tool to use. It's still our decision as to whether to bring cases there or not, but we will bring cases there if we find out we're not going to be tied up in endless litigation but we're going to get a decision.

In terms of the references, when you have a merger, usually there's one bone of contention that turns the case around and it means approval or disapproval. We may disagree on it. We may disagree on interpretation of a section, or how to apply it. What this would allow us to do, with the consent of the other party, is go to the court and say, we are not going to argue the whole case; we know what the outcome will be. What we need is clarification. How do you read...whatever section it is, 96.2?

Let's argue that we get a decision and then it will accelerate the process. It will help both sides. For me it will mean fewer costs for the bureau in bringing the case before the tribunal. For the other side, they realize this is something that's key to them for their business plan. They are not willing to give it up unless they have to. Fine, let's find out whether the law says I have to or not. That's what the reference is meant to deal with.

I think on the whole these provisions will help us use the tribunal...will make, rather than what happens now.... We've been heavily criticized and observers feel the process doesn't work, that the bureau is omnipotent and makes a lot of decisions, and that people are not taking them to court because the court is such an unwieldy, crude instrument the way it's set up right now. It costs too much and takes too much time, and therefore cases are not being brought there. This will allow us to bring genuine differences of opinion for courts to resolve, which is what courts are for.

In terms of making a distinction with anti-competitive and rigorous competition, I can't give you a short answer. You have to look at the various provisions of the act, at what they stipulate, and then look at the effects of the individual case and see whether this conduct is such that it is designed to have that effect or it is only designed to maximize further profits.

It is not an easy decision. As I say, it is one of the most difficult ones and the cases are not usually clear-cut. We try to resolve them mostly through negotiation, but where they can't be, with a streamlined procedure we will again be able to find whether the activity can be considered anti-competitive or not.

• 1010

Mr. James Rajotte: Thank you.

The Chair: Thank you very much, Mr. Rajotte.

Ms. Torsney, please.

Ms. Paddy Torsney (Burlington, Lib.): Thank you.

It's great to see the game contest section of this act. It's something I had been working on prior to the bill becoming Ms. Redman's.

I've seen a lot of these game cards over the last number of years, and when I was reading the guidelines I had some concerns about some of the non-application sections.

Proposed paragraph 53(2)(a)—this is on page 2 of your notes—reads:

makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the areas or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;

Would that still allow someone to charge you a fee for claiming the prize if you provide that information?

Mr. Konrad von Finckenstein: I'm sorry, you lost me. Where are you reading from?

Ms. Paddy Torsney: These are the proposed guidelines on the Competition Act, page 2—sorry, page 1—regarding non-application.

Regarding subparagraph 53(1), they say there's a scratch-and-win here, call this 1-900 number or send us $50 and you'll claim your prize. I get that part. But it does not apply if they say what?

Mr. Konrad von Finckenstein: That's if they say you can win a prize provided you pay $20. Then it is up to you to decide whether you want to. There's no deception. You know you are going to lose $20; that's the entry fee. You take your pick: You do it, or you don't. That's a fair contest.

If people want to run a contest that way, I'm not going to stop them. What we're trying to do is stop them saying, here, you can win, and you don't realize that by entering it will cost you $20.

Ms. Paddy Torsney: But what they do is write in really tiny, little print "Some charges may apply." Most people are so flipped about winning the prize after they've scratched that they don't even notice that.

Mr. Konrad von Finckenstein: That's why the words "adequate and fair disclosure" are there.

Ms. Paddy Torsney: So how do you decide that?

Mr. Konrad von Finckenstein: I can't do it in the abstract, but I can tell you that if there is fine print at the bottom, if it says I win $2,000, and down here in one millimetre size there is a disclosure, then obviously that's not adequate.

We actually have a definition of "adequate and fair disclosure" at the bottom of page 4.

Mr. François-Bertrand Côte: No, it's the bottom of page 3; it announces page 4.

Ms. Paddy Torsney: I'm glad you guys all got mixed up on that, because I did as well.

Mr. Konrad von Finckenstein: You see, it says:

disclosure has been made in a reasonably conspicuous manner, at a time before the potential entrant is inconvenienced in some way.

That's why we issue the guidelines, precisely for this type of question. If you are a scam artist, you are going to try to get around it. If you are an honest participant, you look at them and say, what do I have to do to get the Competition Bureau off my back? Live up to these, and you'll know what to do.

Ms. Paddy Torsney: Except that, with respect, your "adequate" and my "adequate", based on our vision, are slightly different.

I've talked to some of these scam artists, and they think they've been perfectly clear in their information. Perhaps I can go through my files and pull out some, and we could have a little chat about what might and might not work, because that would give me a little more comfort.

Mr. Konrad von Finckenstein: Sure, I'd love to hear from you, but rest assured, we have gone after many scam artists under our present provisions, which are not as targeted in terms of it being misleading, and so on, and we've gotten quite a few of them to change or stop their behaviour—but not enough, I agree with you.

Ms. Paddy Torsney: It's not just seniors; I've had lots of people of all ages get scammed by these guys.

The other question I have is in the general principle section on page 3, the determination of cost incurred. In the second paragraph, it says:

PAGE 1700

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

COMITÉ PERMANENT DE L'INDUSTRIE, DES SCIENCES ET DE LA TECHNOLOGIE

EVIDENCE

[*Recorded by Electronic Apparatus*]

Tuesday, December 4, 2001

• 1543

[*English*]

The Chair (Ms. Susan Whelan (Essex, Lib.)): I'm going to call the meeting to order.

We will discuss Bill C-23, an act to amend the Competition Act and the Competition Tribunal Act.

Today we have, from the Department of Industry, Konrad von Finckenstein, the Commissioner of Competition, from the Competition Bureau. And we have Mr. Chris Martin. I'm sorry, I don't know your position, Chris.

Mr. Chris Martin (Acting Assistant Deputy Commissioner of International Affairs, Department of Industry): I'm the acting assistant deputy commissioner of international affairs.

The Chair: Thank you.

We also have with us, from Justice Canada, Louise Faille, legal counsel for the competition law division, Industry Canada.

Everyone has a set of amendments in front of them now. I would propose we move to our clause-by-clause. As we reach each clause, if anyone has any questions on the clause or any questions on the amendment, we would then have the witnesses discuss them and answer any questions. Is everyone okay with that?

That being said, we'll move to clause-by-clause consideration.

(Clauses 1 and 2 agreed to)

The Chair: There is a proposed amendment for a new clause 2.1.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin (Beauce, Lib.): Thank you, Madam Chair.

• 1545

We are proposing to amend Bill C-23 in clause 2.1(1) by adding a paragraph e) to subsection 29(1) of the Competition Act.

Committee members have the text of the proposed amendment. Do we need to read it?

[*English*]

The Chair: Actually, why don't you read the amendment?

Mr. Claude Drouin: Me?

The Chair: Read the amendment, please.

[*Translation*]

Mr. Claude Drouin: Fine then. We propose the following paragraph (e):

(e) any information provided voluntarily pursuant to this Act.

[*English*]

The Chair: Monsieur Drouin, could you read the entire wording of the amendment?

[*Translation*]

Mr. Claude Drouin: Okay:

2.1(1) Subsection 29(1) of the Act is amended [...] by adding the following after paragraph (d):

(e) any information provided voluntarily pursuant to this Act.

How's that, Madam Chair?

[*English*]

The Chair: I have something different. The English is different from the French.

The Chair: We're on amendment G-17. Mr. Drouin.

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23, in clause 14, be amended by

(a) replacing line 8 on page 30 with the following:

Rescission or variation of consent agreement or order

106.(1) The Tribunal may rescind or vary a

(b) adding after line 27 on page 30 the following:

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

• 1655

[*English*]

The Chair: G-17 is moved by Mr. Drouin as you have it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: It can be here in the consent agreement. The previous amendment made sure that it had to be an amendment that was consistent with the act. Now a person who is directly affected by a consent agreement and who feels that this judgment is not consistent with the act is given the right to go to the tribunal within 60 days after the consent agreement has been registered and ask the tribunal to vary or rescind that consent agreement.

Basically, the commissioner can make a consent agreement with any party as long as it's consistent with the act. Anybody directly affected by that agreement who feels it's inconsistent with the act has 60 cays to go to the tribunal and challenge that consent agreement.

The Chair: Are there any questions on G-17? Mr. Strahl.

Mr. Chuck Strahl: Just for greater clarity, is it if you make a ruling or if the tribunal makes a ruling?

Mr. Konrad von Finckenstein: We start an action against the company. The company comes to us and says, why don't we settle this? We make a consent agreement, we draft it, we register it, and it becomes a judgment of the court. If somebody else is directly affected by that and says that we shouldn't have done it, that this was something the tribunal couldn't impose, they have 60 days to go to the tribunal to challenge the agreement.

Mr. Chuck Strahl: If you use the current sexy issue, which is airlines, let's suppose there were some sort of interim agreement agreed to between two parties, but somehow we'd forgotten to think of some little guy who's flying to Victoria from Abbotsford. If he feels that it's somehow compromising his future and contravenes the act, then could he apply under this grace period here, the 60-day period?

Mr. Konrad von Finckenstein: If he could prove that he's likely affected by it and that what we did was outside the act, yes indeed, he could do it.

Mr. Chuck Strahl: So he couldn't just ask to be included in the interim order. It would have to be a case where it contravenes the intent of the act.

Mr. Konrad von Finckenstein: Precisely.

Mr. Chuck Strahl: And if he wanted to, he could start his own further action, I suppose. Otherwise, the interim order as it affects him....

Mr. Konrad von Finckenstein: To take your hypothetical situation, let's say we have an action with Air Canada and we settle it. If we settle it to the detriment of some other airline, presumably, and our settlement is outside the terms of the Competition Act, then it could be attacked.

Mr. Chuck Strahl: Good. Thank you.

(Amendment agreed to on division)

(Clause 14 as amended agreed to on division)

(On clause 15)

The Chair: We're on amendment G-18.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: I move that Bill C-23, in clause 15, be amended by replacing line 23 on page 31 with the following:

Reference by agreement of parties to a private action

(3) A person granted leave under section 103.1 and the person against whom an order is sought under section 75 or 77 may by agreement refer to the Tribunal for determination any question of law, or mixed law and fact, in relation to an application or interpretation of Part VIII, if the Tribunal grants them leave. They must send a notice of their application for leave to the Commissioner, who may intervene in the proceedings.

Reference procedure

(4) The Tribunal shall decide the questions

[*English*]

The Chair: Amendment G-18 is moved as read by Mr. Drouin.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: As you know, the act right now has provisions for references if there's an issue of fact or law where both parties to an action want to settle rather than start a whole law suit. Where everything really turns on some interpretation or some definition, they can bring it before the tribunal and the tribunal can make a ruling.

Now that we've opened the act to private parties, the provision here that basically allows two private parties engaged, unless they refuse to deal in a case where there is a question of interpretation of the act or its application.... They can by consent go to the tribunal and say, "Just decide this one issue for us, because everything turns on it. There's no need to bring it to a full case."

The reference provisions that are in Bill C-23 in proposed section 124.2 now have been extended to also allow private parties to avail themselves of these reference proceedings.

The Chair: Are there any questions on G-18? Mr. Strahl.

• 1700

Mr. Chuck Strahl: We talked again this morning about the usefulness of the guidelines, the advisory bulletins that the commissioner and the tribunal put out. Does this affect that in any way, other than that it expands to include those that are initiated by right to private access? Is that what it does? Or does this change it?

Mr. Konrad von Finckenstein: The act uses some very vague language. How do you apply it to specific provisions? Very often everything falls on how you determine one or two words. What Bill C-23 does is allow us, rather than start a whole full-scale institution costing maybe a million dollars, to have just this very limited litigation on the interpretation of that section, because everything falls from it.

What we're saying here is why should this be restricted to the commissioner? If two private parties are now disputing an issue and have the same uncertainty about an interpretation, they can do it. It has nothing to do with our guidelines. Our guidelines are generally to help people interpret; they just tell them what our position is. They may not agree with our position, of course.

(Amendment agreed to on division)

The Chair: Mr. McTeague.

Mr. Dan McTeague: I have a question and perhaps even a motion—but I don't want to spring this on my colleague here—on clause 15. It refers to an amendment I had made earlier regarding the International Trade Tribunal and a reference there by the commissioner. It is contained in the package originally given to us. I just want to read the motion; I'm leaving it open to the committee whether or not to deliberate it at this time—we didn't have much discussion on it. The motion is that Bill C-23 be amended in clause 15 by adding after line 27 on page 31 the following:

124.3(1) The Commissioner may ask the Canadian International Trade Tribunal to inquire, in accordance with terms of reference approved by the Minister, into the state of competition and the functioning of markets in any sector or subsector of the Canadian economy.

(2) The Canadian International Trade Tribunal shall conduct the inquiry, submit a report to the Commissioner and the Minister and cause notice of its submission to be published in the *Canada Gazette*.

(3) The Minister shall cause a copy of the report to be tabled before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is submitted.

Madam Chair, the reason I'm moving the motion is for obvious reasons. We've heard a number of witnesses come before us to suggest Canada's international competitiveness is in question. There have been a number of incidents, particularly with the airline industry, but also with gasoline and other industries, where there may be sectoral concerns. Currently the commission does not have this discretion, but it may very well be put to some use.

I'm advancing it on the presumption that this is not something that has created a lot of fire and incendiary remarks, and I think it's something we may well want to entertain, with the consent of the members of Parliament here. I'll gladly withdraw it, though, if there's a lot of objection.

Perhaps the commissioner would like to also comment on it while I'm putting it on the floor.

The Chair: Before the commissioner comments, Monsieur Drouin wishes to comment on it.

[*Translation*]

Mr. Claude Drouin: Thank you, Madam Chair.

Since the committee hasn't really worked on this, I think it would be better to defer our study and come back to this matter later. Therefore, I move that we defer consideration of Mr. McTeague's motion.

[*English*]

The Chair: Mr. von Finckenstein, did you have any comments on it?

Mr. Konrad von Finckenstein: I have followed the proceedings of your committee very closely. I don't believe there was any discussion or debate on this particular amendment. Mr. Drouin will know better, but I don't believe the government supports it; it's not being put forward as a government amendment. Maybe this is an amendment that should have the benefit of full discussion before being moved.

The Chair: Mr. McTeague.

Mr. Dan McTeague: Madam Chair, under the circumstances, I withdraw the motion in accordance with what we've heard here.

The Chair: The motion is not moved.

(Clause 15 as amended agreed to on division)

(Clause 16 agreed to on division)

(On clause 17)

The Chair: The next amendment is G-19.

[*Translation*]

Mr. Drouin.

Mr. Claude Drouin: I move that Bill C-23 be amended by adding after line 34 on page 31 the following:

1999, c. 2, s. 41

16.1 Subsection 8(1) of the Act is replaced by the following:

Jurisdiction

8. (1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or VIII of the Competition Act and any related matters, as well as any matter under Part IX of that Act that is the subject of a reference under 124.2(2) of that Act.

• 1705

[*English*]

The Chair: Mr. Drouin has moved amendment G-19, as you have it in front of you.

Mr. von Finckenstein.

Mr. Konrad von Finckenstein: The purpose of this clause is to give the Competition Tribunal authority to hear references under part VII.1, part VIII, and part IX of the Competition Act. There was some doubt after our consultation with the tribunal whether the Competition Tribunal Act, as it stands right now, does give them the power to hear references under part IX. Putting this section in makes clear that they have that capacity.

(Amendment agreed to on division)

The Chair: On clause 17, Mr. Strahl, we have your amendment and then we have amendment G-20. I'm not sure.... We can't pass both of them. Do you want to move your amendment first, or did you want to withdraw your amendment?

Mr. Chuck Strahl: Well, I—

The Chair: Did you want to move your amendment? Go ahead.

Mr. Chuck Strahl: I move that in Bill C-23, clause 17 be amended by replacing lines 4 to 7 on page 32 with the following:

Competition Act on a final or interim basis.

Basically, what I did with that amendment was take the clause—this deals with awarding costs of proceedings—and remove the phrase "if it finds that the proceedings are frivolous or vexatious or that any step in the proceedings is taken to hinder or delay their progress." It just basically eliminates that.

As for its purpose, we heard testimony from several witnesses—certainly it was quite clear, for example, from Jack Quinn, who is one of the lawyers who testified—who mentioned that the standard of the bill now, which includes "frivolous and vexatious", is not going to work very well to ensure that the private litigants' incentives are aligned with the public interest, because a frivolous and vexatious test is a very high standard to meet on a cost award.

The intent of this amendment is to take out "frivolous and vexatious" and leave the common law rules to apply to it. But in the amendment that follows—the government amendment—they are more specific. They add the words "in accordance with the provisions governing costs in the Federal Court Rules, 1998."

I'm not familiar exactly with what that does, but I don't think it obviates what I'm trying to do here, which is just to take "frivolous and vexatious" out and allow this to be covered by the common rules. If that's the intent, I'll withdraw my motion, and we can go with the government one.

The Chair: That's okay with you?

Mr. Chuck Strahl: I believe so. I'm not a lawyer, but my understanding is it covers it by general Federal Court rules.

The Chair: Mr. von Finckenstein, is that correct?

Mr. Konrad von Finckenstein: You should be a lawyer; your understanding is absolutely correct.

The Chair: All right, then. Mr. Strahl has withdrawn his amendment—not moved it. We will go to Mr. Drouin for amendment G-20.

[*Translation*]

Mr. Claude Drouin: I move that Bill C-23, in clause 17, be amended by replacing lines 4 to 7 on page 32 with the following:

Competition Act on a final or interim basis, in accordance with the provisions governing costs in the Federal Court Rules, 1998.

[*English*]

(Amendment agreed to on division)

(Clause 17 as amended agreed to on division)

(Clause 18 agreed to on division)

(On clause 19)

The Chair: On clause 19, we have an amendment, I see—amendment G-21. This should do it.

[*Translation*]

TAB 3

PARAS. 16-17, 21, 25-26, 29, 41-44, 47

Competition Tribunal | Tribunal de la Concurrence

Reference: *Burns Lake Native Development Corporation et al. v. Commissioner of Competition and West Fraser Timber Co. Ltd. et al.* 2005 Comp. Trib. 19
File No. CT2004-013
Registry Document No.: 0030

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

AND IN THE MATTER OF the acquisition by West Fraser Timber Co. Ltd. of Weldwood of Canada Limited;

AND IN THE MATTER OF an application under Section 106(2) of the *Competition Act* by Burns Lake Native Development Corporation, Lake Babine Nation, Burns Lake Band, Nee Tahi Buhn Indian Band to rescind or vary the Consent Agreement between the Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. filed and registered with the Competition Tribunal on December 7, 2004, under s. 105 of the *Competition Act*;

AND IN THE MATTER OF a motion by the Applicants to strike the Reference of the Commissioner of Competition filed April 4, 2005.

B E T W E E N:

Burns Lake Native Development Corporation, Council of Lake Babine Nation and Emma Palmantier, on her own behalf and on behalf of all members of Lake Babine Nation, Council of Burns Lake Band and Robert Charlie, on his own behalf and on behalf of all Members of Burns Lake Band and Council of Nee Tahi Buhn Indian Band and Ray Morris, on his own behalf and on behalf of all Members of Nee Tahi Buhn Indian Band
(applicants)

and

The Commissioner of Competition, West Fraser Timber Co. Ltd. and West Fraser Mills Ltd.
(respondents)

Date of hearing: May 18, 2005
Member: Simpson J. (Chairperson)
Date of Order: June 1, 2005
Order signed by: Simpson J.

APPLICANTS' MOTION TO STRIKE COMMISSIONER'S REFERENCE
ORDER AND REASONS FOR ORDER

[1] This motion is brought by Burns Lake Native Development Corporation et al. (the "Applicants") for an order to strike the notice of reference filed by the Commissioner of Competition (the "Commissioner") in the context of the Applicants' application to rescind or vary a consent agreement (the "Consent Agreement") made between the Commissioner and West Fraser Mills Ltd. and West Fraser Timber Co. Ltd ("West Fraser").

I. THE PROCEEDINGS TO DATE

The Consent Agreement

[2] On December 7, 2004, the Commissioner and West Fraser entered into the Consent Agreement in connection with West Fraser's acquisition (the "Merger") of Weldwood of Canada Limited ("Weldwood"). Under the terms of the Consent Agreement, West Fraser was obliged to divest, among other things, its post-merger 89.8% interest in the Burns Lake Mill, the Decker Lake Mill, certain timber harvesting rights, and associated assets ("Mill Assets and Timber Rights").

[3] The Consent Agreement was registered by the Tribunal on December 7, 2004, at which time it acquired the same force and effect as if it were an order of the Tribunal.

The Applicants' Application to rescind or vary

[4] On February 3, 2005, the Applicants filed a Notice of Application for an order to rescind or vary the Consent Agreement, under subsection 106(2) of the *Competition Act*, R.S.C. 1985, c.C-34 as amended in 2002 (the "Act"). The Notice of Application and the Statement of Grounds and Material Facts were both amended on February 11, 2005, to add West Fraser as a Respondent. The terms "Section 106 Application" and "Statement of Grounds" will be used to refer to the amended versions of the documents.

[5] Without dealing in detail with the underlying corporate structure, it is fair to say that in broad terms the Applicants are aggrieved because they participated as minority shareholders in a satisfactory long term joint venture with a partner who operated the Mill Assets and Timber Rights to their satisfaction. As a result of the divestiture requirement in the Consent Agreement, they are faced with the prospect of a new unknown joint venture partner.

[6] The Applicants submit that the Consent Agreement must be rescinded or varied to take into account the Applicants' various interests in the divestiture of the Mills Assets and Timber Rights. These interests include their Aboriginal land claims. The grounds for their position are described in the Statement of Grounds in the following terms:

> (i) subsections 105(3) and (4) of the *Competition Act,* which permit directly affected persons to be subject to and/or impacted by an order of

the Tribunal without a fair hearing, are contrary to the *Canadian Bill* of *Rights* and inoperative;

(ii) by entering into the Consent Agreement, the Commissioner has breached her duties to the First Nations and the First Nations peoples of Burns Lake, including her fiduciary duties, duty to consult, and duty to accommodate; and

(iii) the Consent Agreement could *not* be the subject of an order of the Tribunal. There is no evidentiary record on which to find that there has been a substantial lessening of competition and, in the absence of such evidence, there is no basis in law for a Tribunal to order the divestiture of the Mill Assets and Timber Rights.

The Reference

[7] On April 4, 2005, the Commissioner filed a Notice of Reference pursuant to subsection 124.2(2) of the Act (the "Reference"). The Reference consists of three questions ("Questions"), which will be presented in their entirety later in these Reasons. Basically, the Commissioner is asking the Tribunal (i) to determine the scope and meaning of "directly affected person" and whether the term applies to the Applicants, (ii) whether it is necessary at the time a consent agreement is registered with the Tribunal to file evidence of substantial lessening or prevention of competition, and (iii) whether the Tribunal is authorized under subsection 106(2) to engage in a *de novo* review of the impact of a merger.

The Case Conference

[8] A case conference was held on April 13, 2005. At that time, the presiding judicial member indicated that although she considered a reference to be the appropriate procedure for addressing whether the Applicants are directly affected, she would be willing to entertain a motion by the Applicants alleging that the contents of the Questions were inappropriate. Accordingly, the Applicants filed this motion on April 22, 2005 to strike the Reference.

The Appeal

[9] During the case conference described above, the judicial member also dealt with the Applicants' submission that the reference procedure (as distinct from the contents of the Questions) was inappropriate and that the Tribunal's gap rule should be used to require the Commissioner to move to strike the Section 106 Application. The judicial member decided that the reference procedure was appropriate. That ruling was appealed when the Applicants filed a Notice of Appeal in the Federal Court of Appeal on
April 25, 2005.

This Motion

[10] In this motion, the Applicants state that none of the three Questions posed in the Reference should be considered. However, as will be later described, Question 3 is no longer at issue. With regard to Question 2, while the Applicants acknowledge that it is an appropriate question for a reference, they ask that it be heard as part of the main hearing in the Section 106 Application rather than on a separate reference to avoid delay.

[11] The hearing was held in Ottawa on May 18, 2005, and oral submissions were made by all parties. The Applicants and the Commissioner both filed written material but West Fraser did not. At the end of the hearing, only one issue was left for post-hearing written submissions. It was whether the material facts pleaded in the Applicants' Reply would be accepted as true on the Reference. The Tribunal received written submissions from the Commissioner on May 20, 2005, from the Applicants on May 30, 2005 and again from the Commissioner on May 30, 2005. These submissions were considered only on the issue of the Reply. To the extent that the submissions dealt with other issues, they were not appropriate and have been disregarded.

II. THE ISSUES

[12] The first issue is whether the Questions fit within subsection 124.2(2) of the Act. To decide this issue, the following questions must be addressed:

(a) What is the evidence to be considered on the Reference in this case?
(b) What are the parameters of the Reference power in subsection 124.2(2) of the Act?
(c) Are the Questions appropriate?

[13] The second issue is whether, if Questions 1 and 2 are appropriate on the Reference, there are any other reasons why they should not be heard.

A. ISSUE 1

(1) *The Evidence*

[14] The Commissioner's Memorandum of Argument of April 1, 2005 made it clear at paragraph 60 that the Questions were to be considered on the Reference on the basis that the facts pleaded by the Applicants in their Statement of Grounds were true. After the Reference was filed, the Commissioner filed her Response in the Section 106 Application and, in due course, the Applicants filed their Reply.

[15] In the Reply the Applicants pleaded facts which they say show how, in a competition law sense, they are directly affected by the Consent Agreement.

[16] The Commissioner argued at the hearing of the motion that the Reply should not form part of the pleadings to be accepted as true on the Reference. She said that the Applicants' case crystallized when she filed the Reference and that the Tribunal is not entitled to consider the facts raised in the Reply. However, in her subsequent written submissions dated May 20, 2005, the Commissioner conceded, for the purpose of the Reference, that the material facts (if any) contained in the Reply may be considered on the Reference. Accordingly those facts, like those in the Section 106 Application, will be treated as true on the Reference.

[17] Accordingly, the Reference will be based on the facts alleged in the Applicants' Statement of Grounds and their Reply and those facts will be treated as true for the purpose of the Reference.

(2) The Parameters of the Reference Power

[18] The Applicants say that subsection 124.2(2) of the Act is identical for all practical purposes with section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and that it should therefore be interpreted according to the case law related to that section.

[19] However, I have not been persuaded that the two sections are virtually identical. In my view, there are significant differences between the relevant sections of the Act and the *Federal Courts Act*. For ease of comparison, they are set out below:

THE COMPETITION ACT

Reference by Commissioner	Renvois par le commissaire
124.2(2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.	124.2(2) Le commissaire peut, en tout temps, soumettre au Tribunal toute question de droit, de compétence, de pratique ou de procédure liée à l'application ou l'interprétation des parties VII.1 à IX.

THE FEDERAL COURTS ACT

Reference by federal tribunal	Renvoi d'un office fédéral
18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

[20] The first difference concerns the time when a reference may be brought. In the case of 18.3(1), a reference can only be brought in the context of a proceeding before a federal tribunal. However, under the Act, a reference is possible "at any time". For this reason, I have concluded that subsection 124.2(2) allows the Commissioner to refer a question to the Tribunal which is not raised in the context of a case. This means that the determinations made on a reference under 124.2(2) of the Act need not be dispositive of a "live" or case-related issue. In other words, the Commissioner may bring a free-standing reference which is not related to an inquiry under the Act or litigation before the Tribunal.

[21] Secondly, although both provisions refer to questions of law, jurisdiction, practice and procedure, the language which qualifies those words is found only in the Act. It says that the questions must be in relation to the "application" or "interpretation" of specific parts of the Act. The word "application" suggests to me that questions on a reference to the Tribunal under 124.2(2) may properly deal with the issue of how the Act applies to the facts of a particular case.

[22] Both provisions indicate that the questions are for determination and I accept the Applicants' submission that the Tribunal has not been given the power to "consider" questions, which is available to the Supreme Court under subsection 53(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[23] The Applicants also state that the case law under section 18.3 of the *Federal Courts Act* applies to section 124.2(2) of the Act and establishes principles relevant to this reference. Specifically, the Applicants rely on the Federal Court of Appeal's decisions in *Public Service Staff Relations Act (Canada) (Re)*, [1973] F.C. 604 (C.A.), *Martin Service Station Ltd.* v. *Canada (Minister of National Revenue)*, [1974] 1 F.C. 398 (C.A.) and *Rosen (Re)*, [1987] 3 F.C. 238 (C.A.) to argue that questions in the Reference must be posed so that the Tribunal (i) determines one or more issues and does not merely provide an advisory opinion, (ii) disposes of an actual fact situation in a case rather than a hypothetical question, and (iii) deals only with material facts which are agreed or are not in dispute.

[24] Counsel for the Applicants also argued that a reference cannot answer a mixed question of fact and law. When law is applied to facts, according to the Applicants, the Tribunal is deciding a mixed question of fact and law (see *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 758 at paragraph 35). They submit that such questions are outside the jurisdiction of the Tribunal on a Commissioner's reference under subsection 124.2(2) because the subsection refers only to questions of law.

[25] However, I have not been persuaded that *Southam* applies. It is clear to me that, in *Southam*, the Supreme Court was describing a mixed question in the context of an adversarial hearing. In my view, in situations such as this Reference, in which no material facts are in dispute for the purpose of the Reference, it cannot be said that questions of fact are involved. There will be no questions of fact on the Reference and no findings of fact will be made.

[26] The exercise of determining the law and then determining how it applies to undisputed facts is, in my view, a question of law which is appropriate for a reference under subsection 124.2(2) of the Act.

(3) Are the Questions appropriate?

[27] **Question 1 (a)**
What is the nature and scope of the interest sufficient to satisfy the "directly affected" requirement for standing in subsection 106(2) of the Act?

[28] The Applicants say that this question is inappropriate because it seeks an advisory opinion, not a determination of a legal issue. However, I find that the Tribunal is asked to interpret the words "directly affected" and decide their meaning. The answer to the question will impact the application of section 106 of the Act and, therefore, falls squarely within the provisions of 124.2(2).

[29] I recognize that this question will not, by itself, be dispositive of an issue before the Tribunal in this case. However, as discussed above, there is no requirement that a reference under subsection 124.2(2) relate to a specific case. Given that a question of law can be a matter of interpretation only, the fact that the question is determinative of an issue is sufficient.

[30] **Questions 1(b) and (c)**
(2) In particular; must an applicant under subsection 106(2) be "affected":
(i) in relation to competition; and
(ii) in relation to its substantive rights and/or pecuniary interests?
(3) In particular, must an applicant under subsection 106(2) be affected "directly" in that the alleged effect must be:
(i) suffered (or threatened to be suffered) by the applicant exclusively as a consequence of the Consent Agreement, and not as a result of other factors, influences, or circumstances; and
(ii) imminent and real; and not hypothetical or speculative?

[31] The Applicants' say that these questions are also inappropriate because, although more precise than question 1(a), they call for opinions which will not be dispositive of issues in a case before the Tribunal.

[32] For the reasons given above, this submission is not accepted and I find that the questions are appropriate.

[33] **Question 1(d)**

As to the application of subsection 106(2), have the Applicants, as grouped below, disclosed in their Notice of Application herein facts which, if proved, establish that they are "directly affected" for the purposes of subsection 106(2):

- **(i) Burns Lake Native Development Corporation, a body corporate established in 1974 (the "Corporation");**
- **(ii) Council of Burns Lake Band, Council of Lake Babine Nation, Council of Nee Tahi Buhn Indian Band (the "Bands"); and**
- **(iii) Robert Charlie, Emma Palmantier and Ray Morris (the "Chiefs")?**

[34] The objection to this question is that it requires an application of the law to the facts and is, therefore, a mixed question of fact and law which cannot be considered in a Commissioner's reference under subsection 124.2(2) of the Act.

[35] As discussed above, there are no facts in dispute which are material to the issue of standing. Accordingly, no questions of fact will be considered and no findings of fact will be made during the Reference. For this reason, I find that this question is not properly characterized by the Applicants as a mixed question of fact and law. In my view, it is best characterized as a question of jurisdiction relating to the application of the Act. At its core is the question of whether the Tribunal has jurisdiction to entertain the Applicants' Section 106 Application. If the Applicants are not directly affected by the Consent Agreement, they have no standing and the Tribunal has no jurisdiction to hear their Section 106 Application. In my view, this question is appropriate for the Reference.

[36] The Commissioner accepts and the Applicants agree that on the Reference, when dealing with Question 1 (d), the Commissioner will have to show that it is plain and obvious that the Applicants are not directly affected within the meaning of subsection 106(2) of the Act.

[37] **Question 2**

At the time a consent agreement is registered under section 105 of the Act, are parties required to file evidence to substantiate that the merger or proposed merger is likely to substantially lessen or prevent competition without the remedial terms in the consent agreement? If so, is the absence of such filed evidence sufficient to support a finding that "the terms could not be the subject of an order of the Tribunal" as required to be established by an applicant under subsection 106(2) of the Act?

[38] The Applicants have conceded that this is a proper question.

[39] **Question 3**
In an application under subsection 106(2) of the Act to vary or rescind the terms of a consent agreement, is the Tribunal authorized, by the language "that the terms could not be the subject of an order of the Tribunal," to engage in a *de novo* review of whether the merger or proposed merger is likely to substantially lessen or prevent competition?

[40] The Commissioner agreed during the hearing not to proceed with this question on the Reference because the Applicants made it clear that they had no intention of asking the Tribunal to engage in a *de novo* analysis of whether there was a substantial lessening or prevention of competition. The Commissioner, in her written submissions dated May 20, 2005, attempted to put post-hearing conditions on this concession. This portion of the written submissions has been disregarded because, as noted above, counsel's right to file further submissions was restricted to the relevance of the Reply.

B. Issue 2 - Other Reasons Not to Hear the Reference

[41] The Commissioner's submission is that the Tribunal must hear the Reference if it finds that the questions fall within the ambit of subsection 124.2(2). I am not persuaded by this submission. Subsection 124.2(4) does not oblige the Tribunal to hear a reference – it simply indicates the procedure to be followed if the Reference is entertained. There could be circumstances in which the Tribunal might decide not to hear a reference even though it posed appropriate questions. That being so, I will consider the Applicants' submissions on this subject.

[42] The Applicants ask that the Reference not be heard because there are "huge" disputes between the parties and a hearing is required for their resolution. I agree that there are significant disagreements which will be considered if this matter proceeds to a hearing. However, for the purpose of the Reference, all the Applicants' allegations of material fact will be accepted. In these circumstances, the fact that the Commissioner may dispute those allegations in the future is not a reason to decline to hear a proper reference.

[43] The Applicants also say that, in spite of their agreement that Question 2 is appropriate, the Reference should not proceed because it is unreasonable to delay a hearing on the merits for a question which could easily be dealt with at the hearing.

[44] This submission illustrates a situation in which the Tribunal might exercise its discretion not to hear a reference. However, the facts do not support the submission in this case. Since Question 1, in its entirety, is proper for the Reference, and since the reference power in subsection 124.2(2) of the Act provides for the threshold determination of issues in a summary way and since the answers to Question 1 will decide the issue of standing, I have concluded that it would not be appropriate to exercise my discretion against the Reference for reasons of expedition.

[45] The Applicants also argue that the Reference should not proceed because they have raised constitutional issues relating to their allegations that the Commissioner had a duty to consult them about the Consent Agreement. The Commissioner counters that the issue of standing is a proper preliminary issue in a constitutional matter, and cites and refers to four Supreme Court of Canada decisions to support this argument : *Canada (Min. of Justice) v. Borowski* [1981] 2 S.C.R. 575; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236; *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607; and *Nova Scotia (Board of Censors) v. McNeil* [1976] 2 S.C.R. 265. In these cases, the issue was whether the Applicants had public interest standing and the Court applied the facts of the Applicants' situations to its definition of the required interest to decide the issue as a preliminary matter. In my view, it is therefore clear that standing is a question which may be decided as a preliminary issue even though constitutional issues will be considered if a case proceeds.

[46] This case, however, is different in that the duty to consult (i.e. the constitutional issue) may be argued on the Reference as well as at a future hearing on the merits if the matter proceeds. The questions on the Reference will be whether the facts are sufficient to give rise to the duty to consult and, if so, whether the existence of the duty is relevant to the definition of directly affected. In my view, the fact that a constitutional issue may be argued during the Reference on standing does not preclude the determination of standing as a preliminary matter when all relevant facts are admitted.

[47] The Applicants further submit that the presence of constitutional issues bars the Reference because the law is clear that such issues should not be addressed in a factual vacuum. However, as discussed earlier, there will be no such vacuum on the Reference. All the Applicants' material facts will be accepted as true by the Tribunal.

[48] The Applicants have alleged that section 2 of the *Canadian Bill of Rights* (1960, c. 44) is infringed in two respects. Firstly, they state that the Reference should not proceed because the decision on the Reference might deprive them of a hearing on the merits. It is accurate to say that if the Applicants have no standing, their Section 106 Application will not proceed, but that outcome is not contrary to section 2. The section does not require a hearing when the party has no standing. Secondly, the Applicants say that subsections 105(3) and (4) of the Act are incompatible with subsection 2*(e)* of the *Bill of Rights* because the consent agreement registration process did not provide the Applicants with a fair hearing. This allegation is not relevant to standing and, in my view, it does not operate to bar the Reference.

[49] Finally, the Applicants say that the Reference should not proceed because the Commissioner failed to comply with the Tribunal's Practice Direction dated August 30, 2002, when she filed the Notice of Reference and failed to file a supporting affidavit. The relevant text of the Practice Direction reads as follows:

98. (2) A notice of reference shall be accompanied by:	**98.** (2) Sont joints à l'avis de renvoi :
(a) an affidavit or affidavits setting out the facts on which the reference is based or an agreed statement of facts; and	a)un ou des affidavits indiquant les faits sur lesquels s'appuie le renvoi ou un exposé conjoint des faits;
...	(...)

[50] The Commissioner's response is that she made it clear in paragraph 60 of her Memorandum of Argument for the reference dated April 1, 2005 that the relevant facts were those pleaded by the Applicants and that, in these circumstances, an affidavit is not required. I agree. It would serve no useful purpose to file an affidavit which simply exhibits the Applicants' pleadings. Accordingly, this submission does not provide a basis for refusing to entertain a proper reference.

[51] **FOR ALL THESE REASONS, THE TRIBUNAL ORDERS THAT:**

(i) Questions 1 and 2 remain in the Reference,

(ii) Question 3 is hereby struck from the Reference, and

(iii) The Applicants are to pay to the Respondent, the Commissioner of Competition, her costs of this motion which are hereby fixed in the amount of $1,000.00.

(iv) The Commissioner of Competition is granted leave to file a fresh Memorandum of Argument to address any allegations in the Reply which she identifies as new.

DATED at Ottawa, this 1st day of June, 2005.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

Burns Lake Native Development Corp. et al.

Orestes Pasparakis

For the respondent:

Commissioner of Competition

Melanie Aitkin
Duane Schippers
Derek Bell

West Fraser Timber Co. Ltd.

James Musgrove

Case Name:

Burns Lake Native Development Corp. v. Canada (Commissioner of Competition)

IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; and ss. 3 and 49 of the Competition Tribunal Rules, Can. Reg. SOR/94-290
AND IN THE MATTER OF the acquisition by West Fraser Timber Co. Ltd. of Weldwood of Canada Limited
AND IN THE MATTER OF an application under Section 106(2) of the Competition Act by Burns Lake Native Development Corporation, Lake Babine Nation, Burns Lake Band, Nee Tahi Buhn Indian Band to rescind or vary the Consent Agreement between the Commissioner of Competition and West Fraser Timber Co. Ltd. and West Fraser Mills Ltd. filed and registered with the Competition Tribunal on December 7, 2004, under s. 105 of the Competition Act
Between
Burns Lake Native Development Corporation, Council of Lake Babine Nation and Emma Palmantier, on her own behalf and on behalf of all members of Lake Babine Nation, Council pf Burns Lake Band and Robert Charlie, on his own behalf and on behalf of all members of Burns Lake Band and Council of Nee Tahi Buhn Indian Band and Ray Morris, on his own behalf and on behalf of all members of Nee Tahi Buhn Indian Band, appellants, and Commissioner of Competition, West Fraser Timber Co. Ltd. and West Fraser Mills Ltd., respondents

[2006] F.C.J. No. 372

[2006] A.C.F. no 372

2006 FCA 97

2006 CAF 97

346 N.R. 140

47 C.P.R. (4th) 343

146 A.C.W.S. (3d) 631

Dockets A-189-05, A-276-05

Federal Court of Appeal
Toronto, Ontario

Evans, Sharlow and Malone JJ.A.

Heard: March 6, 2006.
Judgment: March 7, 2006.

(25 paras.)

Administrative law -- Judicial review and statutory appeal -- Deference to expertise of decision-maker -- Appeals from decisions of Competition Tribunal dismissed -- The Commissioner had power to make a reference at any time -- The facts were not in dispute for the purpose of the reference.

Appeals by Burns Lake Native Development from the Competition Tribunal's orders that a reference question was not procedurally improper as having been brought by the Commissioner after Burns Lake had filed their proceeding, and that a reference question was not substantively improper on the ground that the Tribunal was being asked to decide abstract or hypothetical questions, or questions that were of mixed fact and law.

HELD: Appeals dismissed. The Tribunal did not err in holding that the Commissioner's power to make a reference at any time enabled the Commissioner to refer a question arising in the course of a proceeding before the Tribunal instituted under the Act to which the Commissioner was party. The Tribunal held that the reference question would be answered on the assumption that the facts set out by Burns Lake in their application and reply were true. In these circumstances, the facts were not in dispute for the purpose of the reference.

Statutes, Regulations and Rules Cited:

Competition Act, R.S.C. 1985, c. C-34, ss. 7, 105, 106(2), 124.2(1), 124.2(2)

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.)

Federal Courts Act, R.S.C. 1985, c. F-7., ss. 18.3, 18.3(1)

Counsel:

Orestes Pasparakis and D. Michael Brown, for the appellants.

Melanie Aitken and Derek Bell, for the respondent, Commissioner of Competition.

James Musgrove, for the respondent, West Fraser Timber Co. Ltd. et al.

[Editor's note: An amendment was released by the Court on June 28, 2006. The changes were not indicated. This document contains the amended text.]

The judgement of the Court was delivered by

1 EVANS J.A.;-- In these consolidated appeals the Burns Lake Native Development Corporation and others ("the appellants") appeal from orders of the Competition Tribunal, dated April 13, 2005, and June 1, 2005. The appellants say that the Competition Tribunal erred in making orders upholding the procedural propriety of a reference to the Tribunal by the Commissioner of Competition, and ordering that Question 1 of the reference proceed to hearing.

2 The reference by the Commissioner asks the judicial member of the Tribunal to determine questions pertaining to the interpretation of the words "directly affected" in subsection 106(2) of the *Competition Act*, R.S.C. 1985, c. C-34 ("the Act"), and their application to particular facts.

3 Subsection 106(2) provides:

> (2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.
>
> * * *
>
> (2) Toute personne directement touchée par le consentement -- à l'exclusion d'une partie à celui-ci -- peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

4 The Commissioner made this reference in response to an application by the appellants under subsection 106(2) requesting the Tribunal to rescind or vary certain terms in a consent agreement

entered into by the Commissioner and two companies ("West Fraser"), following West Fraser's acquisition of Weldwood of Canada Co. Ltd.. The consent agreement was registered by the Tribunal in accordance with section 105 of the Act. The appellants named the Commissioner and West Fraser as respondents to their application.

5 The appellants allege, among other things, that they will be injured by a provision in the consent agreement requiring West Fraser to divest itself of certain timber mill interests and harvesting rights. They say also that the consent agreement is invalid because there was no evidence that the acquisition would lessen competition substantially, and it was entered into in breach of the Commissioner's duties to First Nations peoples of Burns Lake.

6 The Commissioner made her reference to the Tribunal pursuant to subsection 124.2(2) of the Act, which provides:

> (2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.
>
> * * *
>
> (2) Le commissaire peut, en tout temps, soumettre au Tribunal toute question de droit, de compétence, de pratique ou de procédure liée à l'application ou l'interprétation des parties VII.1 à IX.

7 The propriety of Question 1 of the reference is still in dispute. It is as follows:

1.

(a) What is the nature and scope of the interest sufficient to satisfy the "directly affected" requirement for standing in subsection 106(2) of the Act?

(b) In particular, must an applicant under subsection 106(2) be "affected":

(i) in relation to competition; and
(ii) in relation to its substantive rights and/or pecuniary interests?

(c) In particular, must an applicant under subsection 106(2) be affected "directly" in that the alleged effect must be:

(i) suffered (or threatened to be suffered) by the applicant exclusively as a consequences of the Consent Agreement, and not as a result of other factors, influences, or circumstances; and
(ii) imminent and real, and not hypothetical or speculative?

(d) As to the application of subsection 106(2), have the Applicants, as grouped below, disclosed in their Notice of Application herein facts which, if proved, establish that they are "directly affected" for the purposes of subsection 106(2):

(i) Burns Lake Native Development Corporation, a body corporate established in 1974 (the "Corporation");
(ii) Council of Burns Lake Band, Council of Lake Babine Nation, Council of Nee Tahi Buhn Indian Band (the "Bands"); and
(iii) Robert Charlie, Emma Palmantier and Ray Morris (the "Chiefs")?

8 The Commissioner referred this question in the interests of settling legal questions likely to recur relating to the standing of parties to make a subsection 106(2) application, and to determine, on the basis of the relevant legal tests, if the appellants had standing to make their application as persons "directly affected". If the Tribunal were to answer the questions (and especially Question 1(d)) in the manner advocated by the Commissioner, it would probably not be necessary for the Tribunal to enter into the merits of the appellants' application. Delay in determining the subsection 106(2) application may also prejudice the interests of West Fraser.

9 The judicial member of the Tribunal, acting as the case management judge of the subsection 106(2) application, made two orders respecting the reference which are the subject of these appeals. First, she held that the reference was not procedurally improper as having been brought by the Commissioner *after* the appellants had filed their subsection 106(2) proceeding. This is the subject of the appeal in Court File No. A-189-05.

10 Second, she held that Question 1 was not substantively improper on the ground that the Tribunal was being asked to decide abstract or hypothetical questions, or questions that were of mixed fact and law. The Commissioner is only authorized by subsection 124.2(2) to refer to the Tribunal questions of law, jurisdiction or procedure.

11 I should add that the Tribunal has now held a two-and-a-half-day hearing on the question of whether the appellants are "directly affected" by the consent agreement. Its decision is under reserve. In an attempt to obtain a ruling from the Tribunal that would obviate the need for a possibly lengthy hearing on the merits of the subsection 106(2) application, the Commissioner accepted that

the "plain and obvious" standard applicable to motions to strike should also apply to the determination of the reference.

12 Having described the background to the appeals, I shall discuss each separately.

The A-189-05 appeal

13 I am not persuaded that the Tribunal erred in holding that the Commissioner's power to make a reference under subsection 124.2(2) "at any time" enables the Commissioner to refer a question arising in the course of a proceeding before the Tribunal instituted under the Act to which the Commissioner is party.

14 In view of the plain meaning of the words "at any time", it is not justifiable to limit their scope by reading in words to the effect that no question may be referred in connection with a proceeding which had already been initiated before the Tribunal and to which the Commissioner was party. That the Commissioner, like the appellants, may raise an issue by way of a motion to strike is irrelevant. The fact that there may be an overlap between subsection 124.2(2), as interpreted by the Tribunal, and subsection 124.2(1) is not a reason for imposing implied limits on the words "at any time".

15 Counsel for the appellants submitted that the words "at any time" must be construed in their context. He argued that, since subsection 124.2(2) was located in the *Competition Act*, not the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), it should not be regarded merely as a rule of procedure applicable to proceedings before the Tribunal.

16 I do not agree. Section 7 of the *Competition Act* creates the office of Commissioner. Since subsection 124.2(2) confers a power on the Commissioner it is not surprising to find it included in the *Competition Act*, rather than the *Competition Tribunal Act*. It is not a provision governing the procedure of the Tribunal, but a power exercisable by the Commissioner in the administration of the Act.

17 Nor am I persuaded that the appellants were denied a fair hearing when the Tribunal rendered its decision on the basis of a case management telephone conference. The propriety of the use of the reference procedure once a proceeding had commenced was fully argued before the Tribunal, both in writing and orally. In these circumstances, fairness did not require the Tribunal to permit the appellants to bring a formal motion to strike the reference.

The A-276-05 appeal

18 In the alternative, the appellants advance two grounds for saying that the Tribunal erred in denying their motion to strike Question 1 from the reference.

19 First, they argue that the Commissioner may refer a question under subsection 124.2(2) only if

it has a factual foundation. They allege that parts (a), (b), and (c) of Question 1 are academic, hypothetical or advisory in nature. They rely on jurisprudence of this Court dealing with questions referred by administrative tribunals under the similarly worded section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

20 I do not accept this argument. An application may be made under subsection 124.2(2) outside the context of a specific proceeding, while a federal tribunal may refer a question to the Federal Court under section 18.3(1) "at any stage of its proceedings". Consequently, the case law under section 18.3 does not, in my view, help the appellants.

21 As for part (d) of Question 1, the appellants rely on *Canada (Director of Research & Investigation) v. Southam Inc.*, [1997] 1 S.C.R, 748, to argue that the application to the stated facts of the statutory words "directly affected" is a question of mixed fact and law, not a question of law alone, and is thus not authorized by subsection 124.2(2). The appellants submit that a reference question must be based on undisputed facts and that Question 1(d) was not, since many of the facts that they asserted in the statement of grounds in their subsection 106(2) notice of application are disputed by the Commissioner.

22 The Tribunal held that Question 1(d) would be answered on the assumption that the facts set out by the appellants in their subsection 106(2) application, and reply, were true. In these circumstances, I do not agree that the facts were in dispute for the purpose of the reference.

23 The appellants concede that whether they have standing as persons "directly affected" to make a section 106(2) application would have been a question of law if the facts on which the reference was based were not in dispute. However, for reasons already given, I agree with the Tribunal that the facts were not in dispute.

24 The Commissioner also points out that subsection 124.2(2) states that a question about the interpretation or *application* of the Act may be referred to the Tribunal, and that Parliament therefore must have contemplated that some questions of statutory application were questions of law.

Conclusion

25 For these reasons, I would dismiss both appeals with costs payable to the Commissioner by the appellants. Costs were not requested by counsel for West Fraser.

EVANS J.A.
SHARLOW J.A.:-- I agree.
MALONE J.A.:-- I agree.

TAB 4

CHAPTER 9

Consequential Analysis

INTRODUCTION

What counts as absurdity and what, if anything, courts should do in response to absurdity are questions that have a lengthy and vexed history in statutory interpretation. This chapter begins by briefly reviewing that history, focusing on the different answers that have been given to these questions and the justification for taking absurdity into account. It sets out a principle that purports to summarize current judicial practice.

The chapter next describes certain well-established categories of absurdity — defeating the purpose, irrational distinctions, contradictions and anomalies, inconvenience, interference with the administration of justice, and egregious violations of fairness or right reason.

The chapter ends by examining the ways avoiding absurdity is used to help resolve interpretation issues.

Relevance of consequences in interpretation. When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of individuals and communities for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good are presumed to be intended and generally are regarded as part of the legislative purpose. Consequences judged to be contrary to accepted norms of justice or reasonableness are labelled absurd and are presumed to have been unintended. If adopting an interpretation would lead to absurdity, the courts may reject that interpretation in favour of a plausible alternative that avoids the absurdity. As O'Halloran J.A. explained in *Waugh v. Pedneault*:

> The Legislature cannot be presumed to act unreasonably or unjustly, for that would be acting against the public interest. The members of the Legislature are elected by the people to protect the public interest, and that means acting fairly and justly in all circumstances. Words used in enactments of the Legislature must be construed upon that premise. That is the real "intent" of the Legislature. That is why words in an Act of the Legislature are not restricted to what are sometimes called their "ordinary" or "literal" meaning, but are extended flexibly to in-

> clude the most reasonable meaning which can be extracted from the purpose and object of what is sought to be accomplished by the statute.[1]

This understanding has been affirmed on numerous occasions by the Supreme Court of Canada. In *Morgentaler v. The Queen*, Dickson J. wrote:

> We must give the sections a reasonable construction and try to make sense and not nonsense of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.[2]

In *R. v. McIntosh*, McLachlin J. wrote:

> While I agree ... that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear intention to the contrary, the courts must impute a rational intent to Parliament.[3]

In *Ontario v. Canadian Pacific Ltd.*, Gonthier J. wrote:

> Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results.[4]

In *Re Rizzo and Rizzo Shoes Ltd.*, Iacobucci J. wrote:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.[5]

Propositions comprising consequential analysis. The modern understanding of the "golden rule" or the presumption against absurdity includes the following propositions.

(1) It is presumed that the legislature does not intend its legislation to have absurd consequences.

(2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.

(3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.

---

1 [1948] B.C.J. No. 1, [1949] 1 W.W.R. 14, at 15 (B.C.C.A.).

2 [1975] S.C.J. No. 48, [1976] 1 S.C.R. 616, at 676 (S.C.C.).

3 [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686, at 722 (S.C.C.), from the dissenting judgment of McLachlin, La Forest, L'Heureux-Dubé and Gonthier JJ.

4 [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031, at para. 65 (S.C.C.). See also *Marche v. Halifax Insurance Co.*, [2005] S.C.J. No. 7, [2005] 1 S.C.R. 47, at para. 84 (S.C.C.), where Bastarache J. dissenting says: "We must presume that the legislature ... provided for [statutory] conditions [in insurance contracts] which are just and reasonable for both the insured and the insurer."

5 [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, at 43 (S.C.C.).

TAB 5

PARAS. 65-68

Case Name:

Ontario v. Canadian Pacific Ltd.

Canadian Pacific Limited, appellant;

v.

Her Majesty The Queen in Right of Ontario, respondent, and The Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General for Saskatchewan and Canadian Environmental Law Association, interveners.

[1995] S.C.J. No. 62

[1995] A.C.S. no 62

[1995] 2 S.C.R. 1031

[1995] 2 R.C.S. 1031

125 D.L.R. (4th) 385

183 N.R. 325

J.E. 95-1497

82 O.A.C. 243

99 C.C.C. (3d) 97

17 C.E.L.R. (N.S.) 129

41 C.R. (4th) 147

30 C.R.R. (2d) 252

27 W.C.B. (2d) 485

1995 CarswellOnt 968

File No.: 23721.

Supreme Court of Canada

1995: January 24 / 1995: July 20.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

[Ed. note: This appeal was rendered orally January 24, 1995 and published in this database at [1995] S.C.J. No. 6. Full reasons for judgment were released July 20, 1995 and superseded the earlier oral ruling. [1995] S.C.J. No. 6 therefore was removed from the database. Text of oral ruling in this case, dated January 24, 1995, is appended.]

Constitutional law -- Fundamental justice -- Vagueness -- Use of reasonable hypotheticals -- Overbreadth -- Environmental protection law drafted in very broad terms -- Whether or not law capable of interpretation so as to allow for legal debate -- Environmental Protection Act, R.S.O. 1980, c. 141, ss. 1(1)(c), (k), 13(1)(a) -- Canadian Charter of Rights and Freedoms, s. 7.

During controlled burns along the appellant's railway right-of-way, dense smoke escaped onto adjacent properties. This led to complaints about injuries to health and property, and the appellant was charged under s. 13(1)(a) of Ontario's Environmental Protection Act (EPA). This provision constitutes a broad and general prohibition of the pollution "of the natural environment for any use that can be made of it". CP's acquittal in the Provincial Offences Court of Ontario was overturned on appeal to the Ontario Court of Justice, Provincial Division and a further appeal to the Court of Appeal was dismissed. The constitutional issues that were raised in that court were appealed here. The first, that the Ontario EPA was not constitutionally applicable to CP, a federal undertaking, was dismissed here as Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367, was determinative of the issue. The second, that s. 13(1)(a), and in particular the words "for any use that can be made of [the natural environment]", was unconstitutionally vague, overbroad, and therefore in violation of s. 7 of the Canadian Charter of Rights and Freedoms, remained.

Held: The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Major JJ.: Section 13 (1)(a) EPA was neither unconstitutionally vague nor overbroad, and clearly covered the pollution activity at issue.

A law will be found unconstitutionally vague if it is so lacking in precision as not to give sufficient guidance for legal debate. Legislative precision is required because of (1) the need to provide fair notice to citizens of prohibited conduct and, (2) the need to proscribe enforcement discretion.

Vagueness must be considered within the larger context and not in abstracto. A court can only determine whether an impugned provision affords sufficient guidance for legal debate after its interpretative role has been exhausted.

Using broad and general terms in legislation may well be justified. Section 7 of the Charter does not preclude the legislature from relying on the judiciary to determine whether those terms apply in particular fact situations. The standard of legal precision required by s. 7 will vary depending on the nature and subject matter of a particular legislative provision. A deferential approach should be taken in relation to legislation with legitimate social policy objectives.

The purpose of the EPA is to provide for the protection and conservation of the natural environment. Environmental protection has an obvious social importance and yet the nature of the environment does not lend itself to precise codification. In the context of environmental protection legislation, a generally framed pollution prohibition may be desirable from a public policy perspective. The generality of s. 13(1)(a) ensures flexibility in the law, so that the EPA may respond to a wide range of environmentally harmful scenarios which could not have been foreseen at the time of its enactment.

The fair notice element of vagueness analysis has procedural and substantive aspects. Procedural notice, which involves the mere fact of bringing the text of a law to the attention of citizens who are presumed to know the law is not a central concern of vagueness analysis. Instead, the focus of the analysis is the substantive aspect -- an understanding that some conduct comes under the law. Whether citizens appreciate that the particular conduct is subject to legislative sanction is inextricably linked to societal values.

The purpose and subject matter of s. 13(1)(a) EPA, the societal values underlying it, and its nature as a regulatory offence, all have some bearing on the analysis of the s. 7 vagueness claim. Because environmental protection is an important societal value, legislators must have considerable room to manoeuvre in regulating pollution. Section 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection.

To secure a conviction under s. 13(1)(a) EPA, the Crown must prove: (1) that the accused has emitted a contaminant; (2) that the contaminant was emitted into the natural environment; and (3) that the contaminant caused or was likely to cause the impairment of the quality of the natural environment for any use that can be made of it. The statutory definitions of "contaminant" and "natural environment" provide the basis for legal debate as to what constitutes a "contaminant" and the "natural environment". The term "impairment" has been the subject of legal debate in other contexts and provides the basis for legal debate. Judicial interpretation of what constitutes a "use" of the natural environment is easily accomplished through various interpretive techniques. The word must be considered in its context, should be interpreted in a manner which avoids de minimis applications and absurd results, and may be considered in contexts other than environmental law. These principles demonstrate that s. 13(1)(a) does not attach penal consequences to trivial or

minimal impairments of the natural environment, nor to the impairment of a use of the natural environment which is merely conceivable or imaginable. A degree of significance, consistent with the objective of environmental protection, must be found in relation to both the impairment, and the use which is impaired.

After taking these interpretive principles and aids into account, the scope of s. 13(1)(a) is reasonably delineated, and legal debate can occur as to its application to a specific fact situation. This is all that s. 7 of the Charter requires.

Although its conduct fell within the "core" of polluting activity prohibited by s. 13(1)(a), CP is challenging the provision by relying on hypothetical fact situations which fall at the "periphery". Peripheral vagueness arises where a statute applies without question to a core of conduct but applies with uncertainty to other activities. Peripheral vagueness is the basis for the argument that the expression "for any use that can be made of [the natural environment]" is vague because it is not qualified as to time, degree, space or user, and thus fails to delineate clearly an "area of risk" for citizens.

Reasonable hypotheticals, however, have no place in the vagueness analysis under s. 7. There is no need to consider hypothetical fact situations, since it is clear after an analysis of the provision and its context that the law either provides or does not provide the basis for legal debate, thereby either satisfying or infringing the requirements of s. 7 of the Charter.

Unlike the analysis for overbreadth, where reasonable hypotheticals may be advanced, proportionality plays no role in vagueness analysis. When considering a vagueness claim, a court is required to perform its interpretive function in order to determine if an impugned provision provides the basis for legal debate. The comparative nature of proportionality is, therefore, not an element of vagueness analysis.

Section 13(1)(a) is not overbroad. Environmental protection is a legitimate concern of government and a very broad subject matter which does not lend itself to precise codification. The legislature, when pursuing the objective of environmental protection, is justified in choosing equally broad legislative language in order to provide for a necessary degree of flexibility. Section 13(1)(a), while it captures a broad range of polluting conduct, does not apply to pollution with only a trivial or minimal impact on a use of the natural environment. Moreover, the "use" condition limits the application of s. 13(1)(a) by requiring the Crown to establish not only that a polluting substance has been released, but also that an actual or likely use of the environment, which itself has some significance, has been impaired by the release. Speculative or purely imaginary uses of the environment are not captured by the provision. These limits on the application of s. 13(1)(a) prevent it from being deployed in situations where the objective of environmental protection is not implicated.

It was not necessary to decide whether the independent principle of overbreadth, as outlined in R. v. Heywood, is available to the appellant in the circumstances of this case. Section 13(1)(a) is simply

not overbroad.

Per Lamer C.J. and Sopinka and Cory JJ.: Section 13(1)(a) of the Ontario EPA meets the test for vagueness under s. 7 in that it provides sufficient guidance for legal debate.

The claim that the section is unconstitutionally overbroad also fails.

The availability of a defence can be relevant to s. 7 vagueness analysis if the fact that the defence exists sheds light on the meaning to be ascribed to an otherwise vague provision. The availability of the defence of due diligence, however, has no bearing on the question of whether s. 13(1)(a) EPA is unconstitutionally vague. This defence does not protect an accused from the consequences of his or her erroneous interpretation of a vague statutory provision and does nothing to impose standards on how such a provision is applied. Its availability is thus of no relevance to the s. 7 vagueness analysis.

Arguments based on hypothetical examples generally have little or no bearing on the s. 7 vagueness analysis since the task of a court conducting the analysis is to determine whether the law at issue provides "sufficient guidance for legal debate", as distinct from actually interpreting it. This conclusion, however, is not based on any doctrine of standing similar to that found in U.S. case law (such as Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)). As this Court has held on many occasions, a person charged with an offence in Canada need not show that the law at issue directly infringes his or her constitutional rights in order to have standing to raise a constitutional challenge. However, the fact that an accused's conduct clearly falls within the ambit of the impugned provision may still be relevant to the s. 7 vagueness analysis since the fact that an identifiable "core" of prohibited activity can be identified will often be a strong indicator that the terms of the law provide sufficient guidance for legal debate. It should also be noted that s. 7 vagueness claims will often be raised in conjunction with other arguments that do call for a consideration of hypothetical examples.

As this Court held in R. v. Heywood, s. 7 overbreadth analysis requires a comparison of the state's objectives underlying a statutory provision with the means it has chosen to achieve these objectives. In order to make such a comparison, it is necessary to interpret the statutory provision in question so as to determine what the means at issue are. The key to the interpretation of s. 13(1)(a) EPA is the expression "impairment of the quality of the natural environment for any use that can be made of it". Interpreting this expression requires that meaning be ascribed to two distinct phrases: the phrases "impairment of the quality" and "for any use that can be made [of the natural environment]".

Ordinarily, it can be presumed that a statute's literal meaning, as construed in the context of the statute as a whole, best reflects the intention of the legislature. In some cases, however, this presumption can be countered by the competing presumption that the legislature does not intend to violate the constitution. If the words in a statutory provision reasonably bear an interpretation other than a literal reading, the presumption of constitutionality can sometimes justify rejecting the literal

interpretation in favour of the non-literal reading, when the former interpretation would render the legislation unconstitutional and the latter would not. If, however, the terms of the legislation are so unequivocal that no real alternative interpretation exists, respect for legislative intent requires that the court adopt the plain meaning, even if the legislation must then be struck down as unconstitutional.

The expression "for any use that can be made of [the natural environment]" has an identifiable literal or "plain" meaning when viewed in the context of the EPA as a whole, particularly the other paragraphs of s. 13(1). When the terms of the other paragraphs are taken into account, it can be concluded that the literal meaning of the expression "for any use that can be made of [the natural environment]" is "any use that can conceivably be made of the natural environment by any person or other living creature". In ordinary circumstances, once the "plain meaning" of the words in a statute have been identified there is no need for further interpretation. Different considerations can apply, however, in cases where a statute would be unconstitutional if interpreted literally. This is one of those exceptional cases, in that a literal interpretation of s. 13(1)(a) would fail to meet the test for overbreadth established in Heywood.

The state objective underlying s. 13(1)(a) EPA is, as s. 2 of the Act declares, "the protection and conservation of the natural environment". This legislative purpose, while broad, is not without limits. In particular, the legislative interest in safeguarding the environment for "uses" requires only that it be preserved for those "uses" that are normal and typical, or that are likely to become normal or typical in the future. Interpreted literally, s. 13(1)(a) would capture a wide range of activities that fall outside the scope of the legislative purpose underlying it, and would fail to meet s. 7 overbreadth scrutiny. There is, however, an alternative interpretation of s. 13(1)(a) that renders it constitutional. Section 13(1)(a) can be read as expressing the general intention of s. 13(1) as a whole, and paras. 13(1)(b) through (h) can be treated as setting out specific examples of "impairment[s] of the quality of the natural environment for any use that can be made of it". When viewed in this way, the restrictions place on the word "use" in paras. (b) through (h) can be seen as imported into (a) through a variant of the ejusdem generis principle. Interpreted in this manner, s. 13(1)(a) is no longer unconstitutionally overbroad, since the types of harms captured by paras. (b) through (h) fall squarely within the legislative intent underlying the section.

In light of the presumption that the legislature intended to act in accordance with the constitution, it is appropriate to adopt this interpretation of s. 13(1)(a). Thus, the subsection should be understood as covering the situations captured by paras. 13(1)(b) through (h), and any analogous situations that might arise.

The term "impairment" supports two alternative interpretations: it can be seen as covering even slight departures from the norm or, alternatively, as requiring a more marked departure. When interpreting a term that on its face bears two equally plausible meanings, it is appropriate to consider the consequences that would result from applying either interpretation to the statutory provision at issue, and to ask whether these consequences can plausibly be seen as having been

intended by the legislature. If the term "impairment" in s. 13(1)(a) were interpreted as capturing all slight departures from the norm, virtually everyone in Ontario would regularly be in contravention of the section, and thus subject to fines or imprisonment. While the legislature has a legitimate interest in controlling pollution that results from multiple sources, each one insignificant in itself (such as air pollution resulting from automobile emissions) the legislature clearly did not consider the threat of imprisonment to be an appropriate means of addressing problems of this nature (for example, the legislature clearly did not contemplate the imprisonment of all Ontario drivers). Rather, the legislature intended to reserve the threat of imprisonment as a deterrent aimed at persons whose activities contribute significantly to an environmental problem. When the term "impairment" in s. 13(1)(a) is interpreted in this manner, the impugned provision is not overbroad in relation to the underlying legislative purpose.

Cases Cited

By Gonthier J.

Followed: Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367; applied: R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; considered: R. v. Commander Business Furniture Inc. (1992), 9 C.E.L.R. (N.S.) 185; not followed: Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Parker v. Levy, 417 U.S. 733 (1974); referred to: R. v. Morgentaler (1985), 52 O.R. (2d) 353; R. v. Lopes (1988), 3 C.E.L.R. (N.S.) 78; R. v. Royal Pacific Seafarms Ltd. (1989), 7 W.C.B. (2d) 355; Québec (P.G.) v. Noranda Inc. (Mines Noranda Ltée) (1989), 4 C.E.L.R. (N.S.) 158; R. v. Algoma Steel Corp. (1991), 14 W.C.B. (2d) 264; R. v. Satellite Construction Ltd. (1992), 8 C.E.L.R. (N.S.) 215; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154; R. v. Stellato (1993), 78 C.C.C. (3d) 380, aff'd [1994] 2 S.C.R. 478; R. v. McKenzie (1955), 111 C.C.C. 317; R. v. Smith (1992), 73 C.C.C. (3d) 285; R. v. Winlaw (1988), 13 M.V.R. (2d) 112; R. v. Bruhjell, [1986] B.C.J. No. 746 (QL); R. v. Campbell (1991), 87 Nfld. & P.E.I.R. 269; The "Reward" (1818), 2 Dods. 265, 165 E.R. 1482; Qualico Developments Ltd. v. M.N.R. (1984), 51 N.R. 387; Galt Art Metal Co. v. Pedlar People Ltd., [1935] O.R. 126; Elias v. Insurance Corp. of British Columbia (1992), 95 D.L.R. (4th) 303; Watts v. Centennial Insurance Co. (1967), 62 W.W.R. 175; Rockert v. The Queen, [1978] 2 S.C.R. 704; Stevenson v. R. (1980), 19 C.R. (3d) 74; Conlin v. Prowse (1993), 109 D.L.R. (4th) 243; Pickering Twp. v. Godfrey, [1958] O.R. 429; R. v. Zundel (1987), 58 O.R. (2d) 129; R. v. LeBeau (1988), 41 C.C.C. (3d) 163; Thornhill v. Alabama, 310 U.S. 88 (1940); R. v. Smith, [1987] 1 S.C.R. 1045; R. v. Goltz, [1991] 3 S.C.R. 485; R. v. Heywood, [1994] 3 S.C.R. 761.

By Lamer C.J.

Applied: R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; considered: Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139; R. v. Creighton, [1993] 3 S.C.R. 3; not followed: Parker v. Levy, 417 U.S. 733 (1974); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); referred to: R. v. Keegstra, [1990] 3 S.C.R. 697; R. v. City of

Sault Ste. Marie, [1978] 2 S.C.R. 1299; Broadrick v. Oklahoma, 413 U.S. 601 (1973); R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Morgentaler, [1988] 1 S.C.R. 30; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Schachter v. Canada, [1992] 2 S.C.R. 679; R. v. Heywood, [1994] 3 S.C.R. 761; R. v. McIntosh, [1995] 1 S.C.R. 686; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; R. v. DeSousa, [1992] 2 S.C.R. 944; Smithers v. The Queen, [1978] 1 S.C.R. 506; R. v. Smith, [1987] 1 S.C.R. 1045; R. v. Hibbert, [1995] 2 S.C.R. 973.

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APPEAL from a judgment of the Ontario Court of Appeal (1993), 13 O.R. (3d) 389, 63 O.A.C. 222, 103 D.L.R. (4th) 255, 10 C.E.L.R. (N.S.) 169, 81 C.C.C. (3d) 498, 22 C.R. (4th) 238, 15 C.R.R. (2d) 278, allowing an appeal from a judgment of Fraser Prov. Div. J. (1992), 9 C.E.L.R. (N.S.) 26 allowing an appeal from acquittal by the Provincial Offences Court of Ontario. Appeal dismissed.

H. C. Wendlandt and G. Despars, for the appellant.
David Lepofsky and Pat Moran, for the respondent.
Jean Bouchard, for the intervener the Attorney General of Quebec.
Kenneth J. Tyler and Stewart J. Pierce, for the intervener the Attorney General of Manitoba.
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The reasons of Lamer C.J. and Sopinka and Cory JJ. were delivered by

1 **LAMER C.J.**:-- I have read the reasons of my colleague Justice Gonthier, and find myself in substantial agreement with his analysis of the appellant's claim that s. 13(1)(a) of the Ontario Environmental Protection Act, R.S.O. 1980, c. 141 ("EPA"), is unconstitutionally vague, subject to certain additional comments that I will set out below. In particular, I agree with my colleague's conclusion that the section provides sufficient guidance for legal debate, and therefore meets the test for vagueness set out by this Court in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R.

606. On the question of the actual interpretation that should be given to s. 13(1)(a), however, I find that although my colleague and I adopt substantially similar interpretations of the section, we reach our conclusions on the basis of different principles of construction. Therefore, while I agree with Gonthier J. that the appellant's alternative claim that the section is unconstitutionally overbroad also fails, and that the appeal should accordingly be dismissed, I arrive at this conclusion by a somewhat different route from that taken by my colleague.

I. The Section 7 Vagueness Claim

2 In Nova Scotia Pharmaceutical Society, the Court (per Gonthier J.) established the test for assessing "void for vagueness" claims under s. 7 of the Canadian Charter of Rights and Freedoms, declaring (at p. 643) that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate". As my colleague observes in his reasons, vague laws have the potential to violate the requirements of the principles of fundamental justice that citizens be provided with fair notice of prohibited conduct, and that there be adequate safeguards against selective and arbitrary law enforcement. As I noted above, on the issue of vagueness I am in substantial agreement with Gonthier J.'s s. 7 analysis, and with his conclusion that s. 13(1)(a) EPA is not unconstitutionally vague. I wish, however, to make a few brief comments in connection with two points: the relevance of the existence of a defence of due diligence to the issue of vagueness under s. 7, and the role of "reasonable hypotheticals" in the s. 7 vagueness analysis.

A. The Relevance of the Defence of Due Diligence to Section 7 Vagueness Analysis

3 In its submissions, the respondent argued that the fact that persons charged with violations of s. 13(1)(a) can raise a defence of "due diligence" was relevant to the issue of whether the subsection fails s. 7 vagueness analysis. With respect, I do not agree that the availability of the defence of due diligence has any bearing on the question of whether the impugned provision in the present case is unconstitutionally vague. In my view, while the fact that a defence exists will often shed light on the meaning that is to be ascribed to an otherwise vague provision, and thus be relevant to s. 7 vagueness analysis, this is not the case with every defence. What is important is the relation between the defence and the terms of the statute that are said to be unconstitutionally imprecise. In R. v. Keegstra, [1990] 3 S.C.R. 697, for instance, the defences established in s. 319(3) of the Criminal Code, R.S.C., 1985, c. C-46, to prosecutions for "wilfully promoting hatred" under s. 319(2) provided considerable assistance in interpreting the ambit of the offence in s. 319(2). As Dickson C.J. observed (at p. 779, in the context of considering vagueness under s. 1 of the Charter):

> [The s. 319(3)] defences are ... intended to aid in making the scope of the wilful promotion of hatred more explicit; individuals engaging in the type of expression described [in s. 319(3)] are thus given a strong signal that their activity will not be swept into the ambit of the offence. The result is that what danger exists that s. 319(2) is overbroad or unduly vague, or will be perceived as such, is significantly reduced.

4 In contrast, the fact that the defence of due diligence is available does not help provide a basis for interpreting the term "use" in s. 13(1)(a) of the Ontario EPA.

As Dickson J. (as he then was) noted in R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, at p. 1326:

> [The defence of due diligence] involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

The defence does not, however, protect an accused from his or her erroneous interpretation of the terms of a statute, since this is an error of law rather than of fact. This sort of error is, of course, the type most likely to arise as a consequence of vague language having been used in a statute. Although the defence of due diligence prevents some actors from being found liable under s. 13(1)(a), it does nothing to impose standards on the application of the section in other cases. In my view, since the availability of the defence does nothing to address the problems that might potentially arise as a result of the imprecise language employed by the drafters of s. 13(1)(a), it is of no relevance to the s. 7 vagueness analysis.

B. The Role of Reasonable Hypotheticals in Section 7 Vagueness Analysis

5 I agree with Gonthier J.'s conclusion that arguments based on hypothetical fact situations will generally have little or no bearing on the analysis that is required when assessing s. 7 vagueness claims. I wish to emphasize, however, that this results from the nature of the s. 7 vagueness analysis itself, as set out in Nova Scotia Pharmaceutical Society, supra, rather than as a consequence of any limitations on standing akin to those found in American case law. As Nova Scotia Pharmaceutical Society indicates, the task of a court conducting s. 7 vagueness analysis is to determine whether the law at issue provides "sufficient guidance for legal debate". Put another way, the court must determine whether the words chosen by the legislature provide an adequate foundation upon which to anchor an interpretation of the law that provides adequate notice of prohibited conduct and guards against "standardless sweeps". Determining whether a law can be interpreted in this manner is, however, a distinct process from actually interpreting the law. While a court that actually interprets a law also demonstrates in the process that the law is capable of interpretation, the converse is not true -- it is possible to establish that a law is capable of being interpreted while leaving for another day the actual problem of interpreting it. When called on actually to interpret a law, a court will usually be required to draw lines separating prohibited from non-prohibited conduct. In so doing, considering how the law would apply to hypothetical fact situations will often be a useful analytical tool. In contrast, when analysing whether a law is capable of being interpreted, recourse to such hypotheticals will often be unnecessary, since all that is required is that it be established that the law provides sufficient guidance to direct the interpretive exercise.

6 Although hypothetical examples are thus of limited utility when conducting s. 7 vagueness analysis of legislation, I wish to emphasize that this conclusion has nothing whatsoever to do with the question of who has standing to challenge the legislation's constitutionality. More specifically, this conclusion is not based on any doctrine of standing similar to that found in American cases such as Parker v. Levy, 417 U.S. 733 (1974), and Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), cases that were relied on by the trial judge and the Court of Appeal in the present case. In Parker, the U.S. Supreme Court held, at p. 756, that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness". This position was subsequently reaffirmed in Hoffman Estates, supra, where the court stated, at p. 495:

> A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

This approach accords with the general American doctrine on standing to challenge legislation's constitutionality, which was described by the U.S. Supreme Court in the following terms in Broadrick v. Oklahoma, 413 U.S. 601 (1973), per White J., at pp. 610-11 :

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.... [This principle reflects] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.

7 This Court, however, has adopted a different approach to the question of standing in Canada, in recognition of the Canadian constitution's distinct structure -- in particular, the existence of s. 52 of the Constitution Act, 1982, which declares that laws that are inconsistent with the provisions of the Constitution are "to the extent of the inconsistency, of no force or effect". As Dickson J. observed in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 313-14:

> Section 52 [of the Constitution Act, 1982] sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent [Big M] did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases ... but that was not the reason for its appearance in Court.

> Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been charged is inconsistent with s. 2(a) of the Charter and by reason of s. 52 of the Constitution Act, 1982, it is of no force or effect.

This principle has been reconfirmed by this Court on many subsequent occasions. For instance, in R. v. Morgentaler, [1988] 1 S.C.R. 30, Dr. Morgentaler was allowed to argue that the law under which he was charged violated s. 7 as a consequence of its impact on some women, and his acquittal was restored. Similarly, in R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, the Court confirmed that a corporation was entitled to challenge the constitutionality of the law under which it was charged, notwithstanding the fact that the constitutional challenge was based on s. 7, which does not grant rights to corporations (see Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927). In my view, this principle applies equally to s. 7 vagueness challenges. That is, a person charged with an offence need not demonstrate that the law at issue directly infringes his or her constitutional rights in order to obtain standing to raise a constitutional challenge. That is not to say, however, that the fact that an accused's conduct clearly falls within the ambit of the law is irrelevant to the question of whether the law is unconstitutionally vague -- rather, the fact that there is some identifiable "core" of activity prohibited by the law will often be a strong indicator that the terms of the law provide sufficient guidance for legal debate. Furthermore, the fact that an accused has standing to challenge a law does not inevitably mean that he or she will benefit from a finding that the law is unconstitutional, since there is always the possibility that a court might be able to sever or read down the offending provision so as to maintain its applicability to the accused's particular case (whether this is possible will, of course, depend on how the principles I set out in Schachter v. Canada, [1992] 2 S.C.R. 679, at pp. 705ff, apply to the particular piece of legislation at issue). Depending on the circumstances, the fact that the impugned law is directed at an identifiable "core" of conduct may be a factor to consider in deciding whether either of these remedial alternatives are appropriate. Of course, if it proves necessary to strike the offending law down in its entirety, this invalidation will apply to the prosecution of the accused's case: see Wholesale Travel, supra, at pp. 179ff.

8 It should be noted that although s. 7 vagueness analysis itself requires courts only to establish whether or not a given law is capable of being interpreted, and does not demand that courts take the next step and actually provide an interpretation, vagueness claims will often be raised in conjunction with other arguments that do require courts actually to engage in the interpretive process. Once it has been established that a given law provides sufficient guidance for legal debate, many accused persons will attempt to argue that the law, when properly understood, does not prohibit their conduct. Alternatively, they may argue that while the law does apply to them on its face, the law itself is unconstitutionally overbroad (see R. v. Heywood, [1994] 3 S.C.R. 761) and thus violates s. 7. In order to resolve these claims, it will generally be necessary for a court actually

to interpret the law and identify the boundary between prohibited and non-prohibited conduct. When conducting this analysis, it will often prove necessary to consider hypotheticals, even when this is not required at the s. 7 vagueness analysis stage.

II. The Section 7 Overbreadth Claim

9 The alternative constitutional argument open to the appellant in this case is based on the protection s. 7 of the Charter provides against overbroad laws. The principles governing s. 7 overbreadth analysis were set out by Cory J. (writing for the majority) 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.

He continued by observing that "[r]eviewing legislation for overbreadth as a principle of fundamental justice is simply an example of balancing of the State interest against that of the individual". Furthermore, he stated at p. 793:

> 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.

10 Before the state's means can be compared to its objectives, it is necessary to determine what exactly those means are -- that is, the statutory provision that is at issue must be interpreted, in order that its true scope be identified. The key to the interpretation of s. 13(1)(a) of the Ontario EPA is the expression "impairment of the quality of the natural environment for any use that can be made of it", a phrase which both defines the scope of s. 13(1)(a) and specifies what is and what is not a "contaminant", as defined in s. 1(1)(c) of the Act. As Gonthier J.'s reasons indicate, interpreting this expression requires that meaning be ascribed to two distinct phrases: the phrases "impairment of the quality" and "for any use that can be made [of the natural environment]".

11 The starting point of the interpretive process is the plain meaning of the statute's terms. As I noted in R. v. McIntosh, [1995] 1 S.C.R. 686, at p. 697, "[w]here the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise". Of course, isolated words in a statute will, bereft of their context, tend to support more than one meaning. As Driedger notes (Construction of Statutes (2nd ed. 1983)) at p. 39:

> Words, and particularly general words, when taken by themselves, can almost always be said to have two meanings (and in a law suit it is so urged), a broad one and a restricted one, and the task is to determine what the meaning is in the particular context. If the context determines the meaning, then the words are clear and unambiguous and effect must be given to them whatever the consequences.

Similarly, as Côté observes (The Interpretation of Legislation in Canada (2nd ed. 1991)) at p. 242:

> It should not be forgotten that research in semantics has shown that words only take on their real meaning when placed in context. The meaning of words and sentences is crystallized by the context, and in particular by the purpose of the message.

Thus, the first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention. As Driedger observes at p. 106, "[t]he 'intention of Parliament' can only be an agreement by the majority that the words in the bill express what is to be known as the intention of Parliament." Côté makes a similar point, noting at p. 248 that "[i]t is only reasonable to assume that apparent intention leads to the true intention: lacking extra-sensory perception, we have no other choice". Thus, the best way for the courts to complete the task of giving effect to legislative intention is usually to assume that the legislature means what is says, when this can be clearly ascertained.

12 The presumption that a statute's literal meaning, as construed in the context of the statute as a whole, best reflects legislative intention is valid in ordinary circumstances. However, the presumption is not irrebuttable. In cases where special circumstances exist, these circumstances can lead a court to conclude that a statutory provision's apparent literal meaning does not, in fact, provide an accurate reflection of the legislature's intentions, and that an alternative understanding of the words in the statute would be more appropriate, provided that the words of the statute reasonably bear such an alternative interpretation. One situation where such special circumstances can occur is in cases where a statutory provision would be unconstitutional if it were to be interpreted literally. In such cases, the presumption that the legislature intended that effect to be given to the plain meaning of its enactments can be countered by the competing presumption that

the legislature ordinarily does not intend to violate the constitution. If the words in the statutory provision at issue reasonably bear an interpretation other than a literal reading, this second presumption will justify rejecting the literal interpretation in favour of the non-literal reading, when the former (but not the latter) interpretation would render the legislation unconstitutional. As I stated in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1078, (writing for the Court on this point):

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect.

13 In Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139, I applied this approach to statutory construction in the course of interpreting s. 7 of the Government Airport Concession Operations Regulations, SOR/79-373, which stated that "no person shall ... advertise or solicit at an airport on his own behalf or on behalf of any person" without prior ministerial approval. I held (Sopinka and La Forest JJ. concurring on this point) that, as a matter of construction, this section did not apply to political speech. I based this conclusion in part "on the interpretative presumption that legislation is constitutional" (p. 163). Although a majority of the Court adopted a different interpretation of s. 7 of the Regulations, I do not understand the majority as rejecting the existence of the presumption of constitutionality, but rather as differing as to its application on the particular facts of the case. Indeed, McLachlin J. expressly referred to the presumption (at p. 244), but took the position that it did not apply in that case, since even if s. 7 of the Regulations were held to apply (which would violate s. 2(b) of the Charter) the section might still be upheld under s. 1 and thus be constitutional.

14 Similarly, in R. v. Creighton, [1993] 3 S.C.R. 3, I took the position that the term "unlawful act" in s. 222(5)(a) of the Criminal Code, R.S.C., 1985, c. C-46, should be interpreted to include a requirement that there be objective foreseeability of death. After concluding that s. 7 of the Charter required no less, I stated at p. 23 that "it remains to consider whether s. 222(5)(a) is open to an interpretation that would render it constitutional in this regard". I held that it was, stating at pp. 24-25 that:

> ... in light of the constitutional imperative, the wording of the section, and the reasoning employed by this Court in [R. v. DeSousa, [1992] 2 S.C.R. 944] and the Ontario Court of Appeal in R. v. L. (S.R.) [(1992), 11 O.R. (3d) 271], I have no hesitation in concluding that the section is open to an interpretation that would render it constitutional.

Although I was writing in dissent on this issue, the source of my disagreement with the majority was over the issue of whether or not s. 7 required objective foreseeability of death rather than on the

application of the presumption of constitutionality if it did. While the majority (per McLachlin J.) interpreted the section differently, no suggestion was made that my interpretive approach was incorrect in light of my premise that the alternative interpretation was unconstitutional -- rather, the majority did not accept this premise. Indeed, the majority interpreted "unlawful act" as requiring objective foreseeability of bodily harm, as had the Court in R. v. DeSousa, [1992] 2 S.C.R. 944, when interpreting these as used in s. 269 of the Code -- an interpretation that itself clearly departs from the "plain meaning" of the word "unlawful act", standing alone. In DeSousa, it should be noted, the Court rejected the literal meaning of this phrase (which had been suggested in Smithers v. The Queen, [1978] 1 S.C.R. 506), in part on the grounds that "Smithers was not argued under the Charter" (p. 960, per Sopinka J.).

15 In my view, therefore, the presumption of constitutionality can sometimes serve to rebut the presumption that the legislature intended that effect be given to the "plain meaning" of its enactments. It is important to note, however, that the process of invoking the presumption of constitutionality so as to arrive at an interpretation different from that that would ordinarily result from applying the rules of statutory construction leads to essentially the same result as would be reached by adopting the ordinary interpretation, holding that the legislation is unconstitutional, and "reading it down" as a remedy under s. 52 of the Constitution Act, 1982. In light of this essential similarity between the two processes, it is clear that courts relying on the presumption of constitutionality to interpret legislation must take into account the principles I identified in Schachter, supra, in the context of "reading down" as a constitutional remedy. As I stated in that case (at p. 715), "respect for the role of the legislature and the purposes of the Charter are the twin guiding principles" when crafting a remedy under s. 52; in my view, they also provide guidance when interpreting legislation in light of the presumption of constitutionality. In this latter context, the former principle imposes a requirement that any alternative interpretation adopted in preference to the "plain meaning" must itself be one that is reasonably supported by the terms of the legislation. As I observed in Schachter at pp. 708-9:

> Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

Thus, merely invoking the presumption of constitutionality does not give a court complete freedom to depart from the terms of a statute employed by the legislature. Rather, the presumption is simply a factor that on some occasions tips the scales in favour of one interpretation over another construction that, in the absence of this consideration, would appear to be the most strongly supported by the rules of statutory construction. If the terms of the legislation are so unequivocal that no real alternative interpretation exists, respect for legislative intent requires that the court adopt this meaning, even if this means that the legislation will be struck down as unconstitutional.

A. "For Any Use That Can Be Made of It"

16 In order to apply this approach in the present case, it is first necessary to determine whether the terms of s. 13(1)(a) have a "plain meaning" when viewed in the context of the statute as a whole. I begin by considering the expression "for any use that can be made of [the natural environment]". Although the word "use" is somewhat ambiguous when considered on its own, the expression "for any use that can be made of [the natural environment]" has, in my view, an identifiable literal or "plain" meaning when viewed in the context of the EPA as a whole, particularly the other subsections of s. 13(1). Section 13(1) contains eight subsections ((a) through (h)). If each of these subsections is seen as having been intended by the legislature to address a distinct problem (which, in my view, is the most natural construction when the presumption of constitutionality is left out of the picture), differences in the manner in which the term "use" is employed in the different subsections become significant. In s. 13(1)(a), for instance, the word "use" is qualified by the addition of the word any, which suggests that "use" is to be interpreted broadly. This stands in marked contrast to s. 13(1)(g), where the meaning of the word "use" is restricted by the further qualifier that it be "normal". The fact that s. 13(1)(f) employs the term "for use by man" (emphasis added) is also significant, since the absence of such qualification in s. 13(1)(a) suggests an intention on the part of the drafters that the section apply to "uses" of the environment by non-humans as well as by humans. Finally, the use of the phrase "can be made of it" (emphasis added) suggests that the subsection is not restricted to actual existing uses, but applies instead to any conceivable use. When these factors are taken into account, it can, I believe, be concluded that the literal meaning of the expression "for any use that can be made of [the natural environment]" is "any use that can conceivably be made of the natural environment by any person or other living creature".

17 In ordinary circumstances, once the "plain meaning" of the words in a statute have been identified, there is no need for further interpretation. In particular, as I indicated in McIntosh, supra, at p. 704, even when the literal interpretation of a statute results in absurd or undesirable consequences, this "is not ... sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis". As I have explained, however, different considerations can apply in cases where interpreting a statute in a literal manner would not merely lead to undesirable results, but would also render the statute unconstitutional. This, I believe, is one of those exceptional cases -- in my view, if interpreted literally, s. 13(1)(a) would fail to meet the test for overbreadth established by this Court in Heywood, supra.

18 As Cory J.'s reasons in Heywood, supra, establish, in order to conduct overbreadth analysis under s. 7 it is first necessary to identify the state objective underlying the law, which is then to be compared with the means the legislature has chosen to achieve it. In the case of s. 13(1)(a) EPA, the state objective is, as s. 2 of the Act declares, "the protection and conservation of the natural environment." Among other things, the objectives of the Act thus seem to encompass the preservation of the natural environment for some range of use by humans and animals. I agree with my colleague Gonthier J.'s observations that environmental protection is a very broad subject matter. I do not believe, however, that the scope of the Ontario legislature's intentions underlying the enactment of s. 13(1)(a) is unlimited. In particular, I do not believe that the legislature intended to prohibit absolutely all human activity that has the effect of reducing to any degree the suitability

of a particular portion of the environment for any conceivable use. In my view, the legislative interest in safeguarding the environment for "uses" extends only so far as to require that it be preserved for those "uses" that are normal and typical of the place in question, or that are likely to become normal or typical in the future.

19 As I have explained, however, when interpreted literally, s. 13(1)(a) captures considerable activity outside this range, since on a literal reading, the expression "any use that can be made of [the natural environment]" includes all activities that could go on at a given locale, not merely those that normally or even sometimes take place there, or are likely to take place there in the future. Thus, for example, under a "plain meaning" interpretation of s. 13(1)(a) all Ontario residents who in winter-time place sand on the icy sidewalks in front of their houses to lessen the risk of passers-by injuring themselves by slipping and falling would seemingly be subject to prosecution and imprisonment: city sidewalks are clearly part of the "natural environment" as defined in s. 1(1)(k) EPA, and the spreading of sand can render them less suitable for use as cross-country ski trails (making sand a "contaminant", and triggering the operation of s. 13(1)(a)). It would be no defence for the accused to establish that no-one wanted to ski on the sidewalk, since as long as it was clear that it was physically possible to "use" sidewalks in this manner (so that this "use" was thus conceivable), it would fall within the scope of the section. While my colleague Gonthier J. is no doubt correct in his assertion, in para. 56, that "the average citizen in Ontario would have known that pollution was statutorily prohibited", I believe it is also fair to say that the average person in Ontario would have been very surprised to learn that placing sand on sidewalks, and countless other similar activities, were prohibited and subject to criminal sanction even when they did not interfere with any actual current or probable future "use" of the environment. Although the fact that police and provincial prosecutors rarely, if ever, lay charges against persons whose activities interfere with purely hypothetical "uses" of the environment cannot, in my view, be invoked to sustain the legislation if it were found to be unconstitutionally overbroad (in my opinion, my reasoning in R. v. Smith, [1987] 1 S.C.R. 1045, applies equally to the present context), this fact does suggest that the legislature did not seriously intend that all such activity was to be prohibited and punished. In my view, the fact that s. 13(1)(a), when interpreted literally, captures a wide range of activities that fall outside the scope of the legislative purpose underlying the section indicates that the provision would, if given this interpretation, fail to meet s. 7 scrutiny. Imprisoning a person whose activities do not affect any actual or apprehended "use" of the environment and which do not have any other negative effect would, in my view, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice -- imposing penal sanctions in such cases would indeed "[go] beyond what is needed to accomplish the governmental objective": Heywood, supra, at p. 794.

20 The question that must be addressed in the present case is thus the following: given the presumption that the legislature intended to legislate in accordance with the constitution, is s. 13(1)(a) open to an alternative construction that would render it constitutional? In my view, such an alternative interpretation does indeed exist. As I noted earlier, the most natural manner of viewing s. 13 is to view all of the various subsections as directed at different (albeit overlapping) evils. However, it is also possible to interpret s. 13(1)(a) as expressing the general intention of the section

as a whole, and to treat paras. 13(1)(b) through (h) as setting out specific examples of "impairment[s] . . . of the natural environment for any use that can be made of it". That is, s. 13(1)(a) can be read as if it were part of the main body of the section, with words to the effect of "and, without limiting the generality of the foregoing, that" interposed between it and the other subsections. When viewed in this way, the fact that the word "use" in paras. (b) through (h) is qualified and narrowed in several respects has a very different effect than it does if para.(a) is seen as standing independently (as was discussed above) -- now, the restrictions on the term in the other subsections can be seen as being imported into para. (a) (through a variant of the ejusdem generis principle), rather than as suggesting that the term as used in para. (a) is to be interpreted more broadly than in the other subsections.

21 In my view, s. 13(1) is open to construction in this manner. Furthermore, when provisions in paras. 13(1)(b) through (h) are taken as specifying the sense to be ascribed to the term "use" in para. (a), I am of the view that the section is no longer unconstitutionally overbroad, since the types of harms captured by paras. (b) through (h) fall squarely within the legislative intent underlying the section and the Act as a whole. In light of the presumption that the legislature intended to act in accordance with the constitution, I believe it is appropriate to interpret s. 13(1)(a) in this manner, as providing the best reflection of the intentions of Ontario's legislature. That is, the term "for any use that can be made of [the natural environment]" in s. 13(1)(a) should be understood as covering situations captured by paras 13(1)(b) through (h) and analogous situations, if any indeed exist. For the purposes of the present case, I believe it suffices to resolve the interpretive problem only to this level of detail, since it is clear that any interpretation based on the framework of construction I have outlined above will not be unconstitutionally overbroad. That is, it is unnecessary in the present case to determine whether there exist any situations analogous to those in paras. 13(1)(b) through (h) that would not be captured by those subsections but would be covered by (a), since it is clear that in the case at bar the appellant's conduct contravened, at minimum, s. 13(1)(b), (c), (d) and (g). This is sufficient to bring the appellant squarely within the ambit of para. (a), under any interpretation where the content of para. (a) is informed by the terms of s. 13(1)'s other paragraphs.

B. "Impairment"

22 What remains to be considered is the interpretation to be given to the word "impairment" as it appears in s. 13(1)(a). As Gonthier J. points out, the meaning of the related term "impaired" has been the subject of considerable debate in the context of the "impaired driving" provision of the Criminal Code (s. 253(a)), where courts have reached differing conclusions over whether or not the term covers even a slight departure from the norm, or whether instead some more marked departure from the norm is required. It is clear from this debate that the term "impair" equally supports either of these two senses standing alone, and that the task of interpretation thus arises. I find it unnecessary, however, to invoke the presumption of constitutionality here, since I am of the view that an interpretation can be generated by the ordinary rules of construction that is not overbroad.

23 When interpreting a term that on its face bears two equally plausible meanings, it is

appropriate to consider the consequences that would result from applying either interpretation to the statutory provision at issue, and to ask whether these consequences can plausibly be seen as intended by the legislature (see my reasons in R. v. Hibbert, [1995] 2 S.C.R. 973.) In the context of s. 13(1)(a), interpreting the term "impairment" as including all slight departures from the norm would mean that virtually everyone in Ontario would regularly be in contravention of the section, and thus liable to fines and imprisonment. Although the Ontario legislature is undoubtedly concerned about the significant impairments of environmental quality that can result from the aggregate of a large number of sources of pollution, each having an insignificant effect standing alone, I do not believe that the legislature considered the threat of imprisonment an appropriate means of addressing problems of this nature. For example, it is well established that emissions from automobiles are a major contributor to smog in urban areas, which is clearly an environmental problem of the sort the legislature was concerned with. While no one automobile can be said to "impair" environmental quality significantly, the combination of many thousands of automobiles results in a significant source of discomfort and hazard to health. Yet, while the legislature no doubt has a legitimate interest in controlling such pollution, it clearly did not contemplate the imprisonment of all drivers in Ontario. Rather, I believe the legislature intended to reserve the threat of imprisonment as a deterrent aimed at persons whose activities contribute significantly to an identifiable environmental problem. It is self-evident, I believe, that when the term "impairment" is interpreted in this manner it does not render the impugned provision overbroad in relation to the legislative purpose.

III. Conclusion

24 Subject to the above remarks, I would dismiss the appeal in accordance with the reasons of Gonthier J.

The judgment of La Forest, L'Heureux-Dubé , Gonthier, McLachlin, Iacobucci and Major JJ. was delivered by

GONTHIER J.:--

I. Issues

25 The issues in this appeal are encompassed in the three following constitutional questions:

1. Does s. 13(1)(a) of the Environmental Protection Act, R.S.O. 1980, c. 141 (now s. 14(1) of the Environmental Protection Act, R.S.O. 1990, c. E.19), constitutionally apply to the appellant when maintaining its right-of-way?
2. Is s. 13(1)(a) of the Environmental Protection Act so vague as to infringe s. 7 of the Canadian Charter of Rights and Freedoms?
3. If the answer to question 2 is in the affirmative, is s. 13(1)(a) nevertheless justified by s. 1 of the Charter?

26 The first question was answered in the affirmative in reasons delivered orally at the conclusion of the hearing of the appeal and the decision as to questions 2 and 3 was reserved. These reasons respond to the second and third questions. The issue as argued is more fully stated as whether s. 13(1)(a) of Ontario's Environmental Protection Act, R.S.O. 1980, c. 141 (as amended) ("EPA") contravenes s. 7 of the Canadian Charter of Rights and Freedoms because it is unconstitutionally vague and/or overbroad.

II. Factual Background

27 On April 6 and 11, 1988, Canadian Pacific Limited ("CP") conducted controlled burns of the dry grass and weeds on its railway right-of-way in the town of Kenora, Ontario. The purpose of the controlled burns was to clear the right-of-way of combustible material which posed a potential fire hazard. Both burns discharged a significant amount of thick, dark smoke, which adversely affected the health and property of nearby residents. One resident suffered an asthma attack in his driveway after being exposed to the smoke. The smoke filled the home of another man, with the result that he had to clean the interior walls and furniture thoroughly. Another resident discovered that the shrubs, grass and trees in her backyard had been damaged by the fire and smoke.

28 The smoke from the April 11, 1988 controlled burn was not only injurious to the health and property of several Kenora residents, but also hampered visibility on a 200-foot stretch of an adjacent road. One driver was forced to engage his vehicle lights and brakes because the smoke was so heavy that he was unable to see the other side of the road.

29 Following complaints from residents of the town, CP was charged with unlawfully discharging or permitting the discharge of a contaminant, namely smoke, into the natural environment that was likely to cause an adverse effect, contrary to s. 13(1)(a) of the Ontario EPA.

30 On October 22, 1991, CP was acquitted by Daub J.P. of the Provincial Offences Court of Ontario, who concluded that, although the respondent had established the essential elements of the offence under s. 13(1)(a) EPA, the appellant's defence of due diligence raised a reasonable doubt. On June 22, 1992, the respondent's appeal to the Ontario Court of Justice, Provincial Division, was allowed, and CP's acquittal was overturned.

31 CP appealed to the Ontario Court of Appeal, raising two constitutional issues. First, CP advanced an interjurisdictional immunity claim, arguing that, because it is a federal undertaking, s. 13(1)(a) of the Ontario EPA is not constitutionally applicable to emissions from controlled burns on its railroad right-of-way. Second, CP alleged that s. 13(1)(a) was unconstitutionally vague, and therefore in violation of s. 7 of the Charter. On May 19, 1993, the Court of Appeal dismissed CP's appeal.

32 CP then appealed both constitutional issues to this Court. In reasons delivered from the bench on January 24, 1995, this Court dismissed the interjurisdictional immunity claim, finding that the Privy Council decision in Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame

de Bonsecours, [1899] A.C. 367, was determinative that s. 13(1)(a) was constitutionally applicable to CP in the circumstances of this case. Judgment on the s. 7 claim was reserved.

III. Relevant Statutory Provisions

Environmental Protection Act, R.S.O. 1980, c. 141, as amended S.O. 1983, c. 52:

1. -- (1) In this Act,

...

(c) "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man that may,

(i) impair the quality of the natural environment for any use that can be made of it,
(ii) cause injury or damage to property or to plant or animal life,
(iii) cause harm or material discomfort to any person,
(iv) adversely affect the health or impair the safety of any person,
(v) render any property or plant or animal life unfit for use by man;
(vi) cause loss of enjoyment of normal use of property, or
(vii) interfere with the normal conduct of business.

(k) "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario....

13. -- (1) Notwithstanding any other provision of this Act or the regulations, no person shall deposit, add, emit or discharge a contaminant or cause or permit the deposit, addition, emission or discharge of a contaminant into the natural environment that,

(a) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it;
(b) causes or is likely to cause injury or damage to property or to plant or animal life;
(c) causes or is likely to cause harm or material discomfort to any person;

(d) adversely affects or is likely to adversely affect the health of any person;
(e) impairs or is likely to impair the safety of any person;
(f) renders or is likely to render any property or plant or animal life unfit for use by man;
(g) causes or is likely to cause loss of enjoyment of normal use of property; or
(h) interferes or is likely to interfere with the normal conduct of business.

(2) Clause (1)(a) does not apply to animal wastes disposed of in accordance with normal farming practices.

IV. Decisions Below

(1) Daub J.P.

33 Daub J.P. agreed that s. 13(1)(a) EPA could apply to an almost limitless number of possible circumstances, but did not think that the provision was indefinite or uncertain. He observed that it would be impossible for the legislature to codify each circumstance in which the provision might apply, and that it would be the task of the courts to interpret and apply the provision in each case.

34 Moreover, Daub J.P. relied on the decision of the United States Supreme Court in Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), as adopted by the Ontario Court of Appeal in R. v. Morgentaler (1985), 52 O.R. (2d) 353, for the proposition that a party may not allege vagueness where that party's conduct is clearly proscribed by the challenged legislative enactment. In Daub J.P.'s view, CP's conduct in Kenora on April 6 and 11, 1988 was prohibited by s. 13(1)(a) EPA, and CP could not therefore raise a vagueness claim against the provision.

(2) Fraser Prov. Div. J., Ontario Court (Provincial Division) (1992), 9 C.E.L.R. (N.S.) 26

35 Fraser Prov. Div. J. agreed with the conclusion reached by Daub J.P. He stated at p. 31 that "Section 13 does make it clear to any person of average intelligence what conduct is being prohibited".

(3) The Ontario Court of Appeal (1993), 13 O.R. (3d) 389

36 The Ontario Court of Appeal unanimously rejected CP's vagueness claim. Relying on the decision of this Court in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, the court sought to determine whether s. 13(1)(a) EPA provided sufficient guidance for legal debate. The court also determined that a deferential approach should be employed in light of the important

social objectives of the EPA.

37 Like Daub J.P., the court relied upon the decision of the United States Supreme Court in Hoffman Estates, supra, and concluded that CP could not rely on hypothetical examples in support of its vagueness claim. It framed the issue as whether, "in the light of the circumstances of this case" (p. 400), s. 13(1)(a) is unconstitutionally vague.

38 The court then observed that there are three essential elements which must be proved by the Crown under s. 13(1)(a): (1) the Crown must prove that the defendant discharged or permitted the discharge of a contaminant; (2) the Crown must prove that the contaminant was discharged into the natural environment; and (3) the Crown must prove that the discharge of the contaminant was likely to cause impairment of the quality of the natural environment. The Court concluded that the terms "discharge", "contaminant", "natural environment" and "impairment" provided sufficient guidance for legal debate, and that the test developed by this Court in Nova Scotia Pharmaceutical Society, supra, was satisfied.

V. Analysis

(1) Introduction

39 CP alleges that s. 13(1)(a) EPA is unconstitutionally vague and overbroad, and thereby infringes s. 7 of the Charter. Section 13(1)(a) states:

> 13. -- (1) Notwithstanding any other provision of this Act or the regulations, no person shall deposit, add, emit or discharge a contaminant or cause or permit the deposit, addition, emission or discharge of a contaminant into the natural environment that,
>
> (a) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it....

In the courts below, CP's vagueness claim involved a general challenge to s. 13(1)(a) in its entirety. In this Court, however, CP's claim specifically challenges the expression "for any use that can be made of [the natural environment]". CP submits that this element of s. 13(1)(a) is so vague and broad that it fails to provide an intelligible standard that would enable citizens to regulate their conduct.

40 I would note that s. 13(1)(a) EPA was amended in 1988 (S.O. 1988, c. 54, s. 10) and later renumbered as s. 14(1) (R.S.O. 1990, c. E.19). That provision states:

> 14. -- (1) Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a

> contaminant into the natural environment that causes or is likely to cause an adverse effect.

"Adverse effect" is defined in s. 1(1) of the 1988 Act, and includes "impairment of the quality of the natural environment for any use that can be made of it" (s. 1(1)(a)). Therefore, the issue raised by CP in relation to the old s. 13(1)(a) EPA is directly relevant to ss. 14(1) and 1(1)(a) of the revised Act.

41 Section 13(1)(a) constitutes a broad and general pollution prohibition. In this respect, it is not unusual, as the EPA contains several broadly worded prohibitions. For example, Part VIII of the EPA prohibits "littering", and "litter" is broadly defined in s. 73 to include,

> ... any material left or abandoned in a place other than a receptacle or place intended or approved for receiving such material and "littering" has a corresponding meaning. [Emphasis added.]

Another example is found in s. 23(2) EPA, which prohibits the discharge or deposit of "any waste" upon or over the ice over any water. "Waste" is defined in s. 23(1)(c) as "human excrement or any refuse" (emphasis added).

42 Environmental protection laws in other provinces contain similarly broad pollution prohibitions. Nova Scotia's Environmental Protection Act, R.S.N.S. 1989, c. 150, prohibits "pollution" generally (s. 23(1)), and "pollution" is defined in part as a "detrimental variation or alteration" (s. 3(n)) "that causes or is likely to cause impairment of the quality of the environment for any use that can be made of it..." (s. 3(f)(i)(A)). Quebec's Environment Quality Act, R.S.Q. 1977, c. Q-2, contains the following prohibition:

> 20. No one may emit, deposit, issue or discharge or allow the emission, deposit issuance or discharge into the environment of a contaminant in a greater quantity or concentration than that provided for by regulation of the Gouvernement.
>
> The same prohibition applies to the emission, deposit, issuance or discharge of any contaminant the presence of which in the environment is prohibited by regulation of the Gouvernement or is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair the quality of the soil, vegetation, wild life or property. [Emphasis added.]

Saskatchewan's The Environmental Management and Protection Act, S.S. 1983-84, c. E-10.2, as am. by S.S. 1992, c. 49, s. 5, is more succinct: "no person shall pollute or cause any pollution" (s. 34.1), with "pollution" defined very broadly in s. 2(v). Examples of similarly broad pollution prohibitions can be found in s. 8 of the Waters Protection Act, R.S.N. 1990, c. W-5; s. 20 of the

Environmental Protection Act, R.S.P.E.I. 1988, c. E-9; s. 5.3 of the Clean Environment Act, R.S.N.B. 1973, c. C-6, ad. by S.N.B. 1989, c. 52, s. 6 and am. by S.N.B. 1993, c. 13, s. 5; and s. 98 of the Environmental Protection and Enhancement Act, S.A. 1992, c. E-13.3. Moreover, the Canadian Environmental Protection Act, R.S.C., 1985, c. 16 (4th Supp.), contains a very broad prohibition against ocean dumping, which makes it a crime to dump "any substance" from "any ship, aircraft, platform or other anthropogenic structure" in "any area of the sea" over which Canada exercises jurisdiction (s. 67).

43 What is clear from this brief review of Canadian pollution prohibitions is that our legislators have preferred to take a broad and general approach, and have avoided an exhaustive codification of every circumstance in which pollution is prohibited. Such an approach is hardly surprising in the field of environmental protection, given that the nature of the environment (its complexity, and the wide range of activities which might cause harm to it) is not conducive to precise codification. Environmental protection legislation has, as a result, been framed in a manner capable of responding to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation. This has left such legislation open to allegations of unconstitutional vagueness:

R. v. Lopes (1988), 3 C.E.L.R. (N.S.) 78 (Ont. Dist. Ct.); R. v. Royal Pacific Seafarms Ltd. (1989), 7 W.C.B. (2d) 355 (B.C. Co. Ct.); Québec (P.G.) v. Noranda Inc. (Mines Noranda Ltée) (1989), 4 C.E.L.R. (N.S.) 158 (Que. Ct. (crim. div.)); R. v. Algoma Steel Corp. (1991), 14 W.C.B. (2d) 264 (Ont. Ct. (Prov. Div.)); R. v. Satellite Construction Ltd. (1992), 8 C.E.L.R. (N.S.) 215 (N.S. Prov. Ct.), and R. v. Commander Business Furniture Inc. (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. (Prov. Div.)). In none of these cases, however, has the s. 7 vagueness claim succeeded.

44 CP's vagueness and overbreadth claims in relation to s. 13(1)(a) of the Ontario EPA could, in my view, be raised against any of the provincial and federal pollution prohibitions which I have mentioned above. Thus, a finding in CP's favour in the instant case would place these prohibitions, and potentially many others, in constitutional jeopardy. Such a finding would obviously impede the ability of the legislature to provide for environmental protection, and would constitute a significant social policy setback. However, for the reasons developed below, I find that CP's constitutional challenge must fail. The terms of s. 13(1)(a) EPA are not vague, but in fact apply quite clearly to pollution activity which is appropriately the subject of legislative prohibition. Moreover, while s. 13(1)(a) applies broadly, the objective of environmental protection is ambitious in scope. The legislature is justified in choosing equally ambitious means for achieving this objective.

45 In the discussion below, I will consider in detail the vagueness aspect of CP's constitutional challenge. I will then turn briefly to the overbreadth claim.

(2) The Applicable Legal Principles for a Section 7 Vagueness Claim

46 In Nova Scotia Pharmaceutical Society, supra, I enunciated the appropriate interpretive approach to a s. 7 vagueness claim. As I observed there, the principles of fundamental justice in s. 7

require that laws provide the basis for coherent judicial interpretation, and sufficiently delineate an "area of risk". Thus, "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643). This requirement of legal precision is founded on two rationales: the need to provide fair notice to citizens of prohibited conduct, and the need to proscribe enforcement discretion.

47 In undertaking vagueness analysis, a court must first develop the full interpretive context surrounding an impugned provision. This is because the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an "area of risk". This does not necessitate an exercise in strict judicial line-drawing because, as noted above, the question to be resolved is whether the law provides sufficient guidance for legal debate as to the scope of prohibited conduct. In determining whether legal debate is possible, a court must first engage in the interpretive process which is inherent to the "mediating role" of the judiciary (Nova Scotia Pharmaceutical Society, supra, at p. 641). Vagueness must not be considered in abstracto, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.

48 The mediating role of the judiciary is of particular importance in those situations where practical difficulties prevent legislators from framing legislation in precise terms. On this point, I find helpful the comments of Andrew S. Butler, "A Presumption of Statutory Conformity with the Charter" (1993), 19 Queen's L.J. 209, at pp. 225-27:

> Let us consider the practical difficulties facing legislators in giving statutory expression to their intentions. One difficulty faced in the drafting of statutes is meeting the demand that laws operate prospectively. Legislatures cannot as a rule set down ex post facto provisions, which identify types of fact situations intended to be caught by a particular enactment, distinguished from others. Accordingly, legislators face a dilemma: they must pay particular attention to and identify the core commonalities of the fact situations they do wish to legislate against (which become embodied within statutes), while at the same time not neglecting to anticipate and provide for variations on those fact situations, which may occur in the future.... The usual solution to this dilemma is to fall back on general language, which is adequate to cover the particular situations envisaged, and which holds out the possibility of catching unforeseen variations. This strategy can often lead to broadly expressed statutory language, with the danger that it may apply to too much activity -- the problem of overbreadth -- or that it will not be expressed in concrete enough terms -- the problem of vagueness. In such instances, however, the expectation of legislators will invariably be that the courts will flesh-out the generality of the provisions

> through interpretation based upon experience. [Emphasis added; italics in original text.]

49 The use of broad and general terms in legislation may well be justified, and s. 7 does not prevent the legislature from placing primary reliance on the mediating role of the judiciary to determine whether those terms apply in particular fact situations. I would stress, however, that the standard of legal precision required by s. 7 will vary depending on the nature and subject matter of a particular legislative provision. As I stated in Nova Scotia Pharmaceutical Society, supra, at p. 627:

> Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist....

In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives (at p. 642). The s. 7 doctrine of vagueness must not be used to straight-jacket the state in social policy fields.

(3) Application of the Vagueness Principles in the Instant Case

50 CP alleges that s. 13(1)(a) is so open-ended that it constitutes a "standardless sweep". The issue to be resolved is whether s. 13(1)(a) provides the basis for coherent legal debate as to what constitutes a "contaminant", an "impairment" and a "use" of the "natural environment". In other words, can the scope of s. 13(1)(a) be reasonably interpreted, in order for an "area of risk" to be discerned?

51 In developing the interpretive context for a s. 7 vagueness analysis, it is first necessary to have regard to the purpose and subject matter of the impugned legislative provision. The purpose of the EPA, as stated in s. 2, "is to provide for the protection and conservation of the natural environment". The social importance of environmental protection is obvious, yet the nature of the environment does not lend itself to precise codification. On this point, the comments of the Law Reform Commission of Canada, Crimes Against the Environment (1985), Working Paper 44, are apposite. There, the Commission proposed the formulation of a Criminal Code prohibition against environmental pollution, and at p. 46 recommended that the prohibition should be framed in "general terms":

> To be as effective as possible, a Criminal Code prohibition against environmental pollution should be formulated in general terms as regards the substances, contaminants, and range of activities which could fall within its scope. The advantage thereby gained is that the offence could be as all-inclusive as possible, not excluding as a potential focus of criminal liability a specific form

> of conduct, a particular element of the environment, or a specific substance or contaminant only because they were not expressly referred to in the Code offence. If each substance, emission standard or type of activity had to be expressly listed in a Criminal Code offence, it would have to be revised each time a new pollutant, hazard or activity not originally foreseen came into existence, and each time a new emission standard was formulated, or an existing one revised....
>
> To be as effective as possible, a Code prohibition of pollution should accommodate a wide range of activities. The environment and consequently human life and health, can after all, be harmed or endangered either by direct acts or in the course of many kinds of activity. The primary harm and danger points as regards a wide variety of potentially hazardous goods, wastes and contaminants are their manufacture, their transportation, their use, their storage and their disposal. In the interests of both comprehension and specificity, all these activities and stages which could in some circumstances, attract criminal liability, should be expressly included in the formulation of the Code offence.

52 In the context of environmental protection legislation, a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime. As the Law Reform Commission suggests, then, generally framed pollution prohibitions are desirable from a public policy perspective. This explains why s. 13(1)(a) prohibits any emission of a contaminant which causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it. In my view, the generality of s. 13(1)(a) ensures flexibility in the law, so that the EPA may respond to a wide range of environmentally harmful scenarios which could not have been foreseen at the time of its enactment.

53 Moreover, the precise codification of environmental hazards in environmental protection legislation may hinder, rather than promote, public understanding of what conduct is prohibited, and may fuel uncertainty about the "area of risk" created by the legislation. This is a point raised in Nova Scotia Pharmaceutical Society, supra, at p. 642. In the area of environmental protection, legislators have two choices. They may enact detailed provisions which prohibit the release of particular quantities of enumerated substances into the natural environment. Alternatively, they may choose a more general prohibition of "pollution", and rely on the courts to determine whether, in a particular case, the release of a substance into the natural environment is of sufficient magnitude to attract legislative sanction. The latter option is, of course, more flexible and better able to accommodate developments in our knowledge about environmental protection. However, a general enactment may be challenged (as in the instant case) for failing to provide adequate notice to citizens of prohibited conduct. Is a very detailed enactment preferable? In my view, in the field of environmental protection, detail is not necessarily the best means of notifying citizens of prohibited conduct. If a citizen requires a chemistry degree to figure out whether an activity releases a

particular contaminant in sufficient quantities to trigger a statutory prohibition, then that prohibition provides no better fair notice than a more general enactment. The notice aspect of the vagueness analysis must be approached from an objective point of view: would the average citizen, with an average understanding of the subject matter of the prohibition, receive adequate notice of prohibited conduct? If specialized knowledge is required to understand a legislative provision, then citizens may be baffled.

54 Of course, the question remains as to whether sufficient notice is provided to meet the standard demanded by s. 7. On this point, in Nova Scotia Pharmaceutical Society, supra, I observed that there are two aspects to the fair notice requirement: procedural and substantive. Procedural notice involves the mere fact of bringing the text of a law to the attention of citizens. As I noted at p. 633, the idea of giving fair notice to citizens would be rather empty if procedural notice were sufficient, particularly since citizens are presumed to know the law. Therefore, whether or not citizens are familiar with the text of a law is not a central concern of vagueness analysis. Instead, the focus of the analysis is the substantive aspect of fair notice, which I described at pp. 633-34 as "an understanding that some conduct comes under the law".

55 Whether citizens appreciate that particular conduct is subject to legislative sanction is inextricably linked to societal values. As I stated in Nova Scotia Pharmaceutical Society, supra, at p. 634:

> The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.

Societal values are highly relevant in assessing whether a general pollution prohibition, such as s. 13(1)(a) EPA, provides fair notice to citizens of prohibited conduct. It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the Exxon Valdez oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, Crimes Against the Environment, supra, which concluded at p. 8 that:

> ... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the right to a safe environment.

> To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as quality of life, and stewardship of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the sanctity of life, the inviolability and integrity of persons, and the protection of human life and health. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health. [Emphasis in original text.]

Not only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in legislative provisions such as s. 13(1)(a) EPA.

56 In 1988, when the pollution in the instant case took place, few citizens would have been aware of the actual terms of s. 13(1)(a) EPA. However, the average citizen in Ontario would have known that pollution was statutorily prohibited. It therefore would not have come as a surprise to citizens that the EPA prohibited the emission of contaminants into the environment that were likely to impair a use of the natural environment. In my view, the purpose and terms of s. 13(1)(a) are so closely related to the societal value of environmental protection that substantive notice of the prohibition in s. 13(1)(a) is easy to demonstrate.

57 In addition to the purpose and subject matter of s. 13(1)(a) EPA, and the societal values underlying the provision, the interpretive context in the instant case is further coloured by the regulatory nature of the offence contained in s. 13(1)(a). In R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154, Cory J. held at p. 227 that, "the contextual approach requires that regulatory and criminal offences be treated differently for the purposes of Charter review", with the result that regulatory offences are subject to a lower standard of Charter scrutiny. He offered two justifications for differential treatment. The first, the licensing justification, is not implicated in the instant case. However, the second, the vulnerability justification, is highly relevant. As Cory J. explained, at p. 233:

> The realities and complexities of a modern industrial society coupled with the very real need to protect all of society and particularly its vulnerable members, emphasize the critical importance of regulatory offences in Canada today. Our country simply could not function without extensive regulatory legislation. The protection provided by such measures constitutes a second

> justification for the differential treatment, for Charter purposes, of regulatory and criminal offences.

Cory J. emphasized the principle that the Charter should not be used as an instrument to roll back legislative protections enacted on behalf of the disadvantaged, vulnerable and comparatively powerless members of society. He then reached the following conclusion, at p. 234:

> Regulatory legislation is essential to the operation of our complex industrial society; it plays a legitimate and vital role in protecting those who are most vulnerable and least able to protect themselves. The extent and importance of that role has increased continuously since the onset of the Industrial Revolution. Before effective workplace legislation was enacted, labourers -- including children -- worked unconscionably long hours in dangerous and unhealthy surroundings that evoke visions of Dante's Inferno. It was regulatory legislation with its enforcement provisions which brought to an end the shameful situation that existed in mines, factories and workshops in the nineteenth century. The differential treatment of regulatory offences is justified by their common goal of protecting the vulnerable.

58 In the environmental context, each one of us is vulnerable to the health and property damage caused by pollution. Where the legislature provides protection through regulatory statutes such as the EPA, it is appropriate for courts to take a more deferential approach to the Charter review of the offences contained in such statutes.

59 I therefore conclude that the purpose and subject matter of s. 13(1)(a) EPA, the societal values underlying it, and its nature as a regulatory offence, all inform the analysis of CP's s. 7 vagueness claim. Legislators must have considerable room to manoeuvre in the field of environmental regulation, and s. 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection.

60 Keeping this in mind, it is now necessary to consider the actual terms of s. 13(1)(a). In order to secure a conviction under s. 13(1)(a), the Crown must prove three elements: (1) that the accused has emitted, or caused or permitted the emission of a contaminant; (2) that the contaminant was emitted into the natural environment; and (3) that the contaminant caused or was likely to cause the impairment of the quality of the natural environment for any use that can be made of it.

61 The term "contaminant" is defined in s. 1(1)(c) EPA as:

> (c) . . . any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man that may,

(i) impair the quality of the natural environment for any use that can be made of it,
(ii) cause injury or damage to property or to plant or animal life,
(iii) cause harm or material discomfort to any person,
(iv) adversely affect the health or impair the safety of any person,
(v) render any property or plant or animal life unfit for use by man;
(vi) cause loss of enjoyment of normal use of property, or
(vii) interfere with the normal conduct of business.

The term "natural environment" is defined in s. 1(1)(k) as "the air, land and water, or any combination or part thereof, of the Province of Ontario". Subject to my comments below, which are relevant to the interpretation of s. 1(1)(c)(i), I have no trouble concluding that these statutory definitions provide the basis for legal debate as to what constitutes a "contaminant" and the "natural environment".

62 The term "impairment" is not defined in the EPA. However, I agree with Galligan J.A. in the court below, who found it significant that the concept of "impairment" has been the subject of legal debate in the context of drinking and driving for decades. In the recent decision of the Ontario Court of Appeal in R. v. Stellato (1993), 78 C.C.C. (3d) 380, aff'd, [1994] 2 S.C.R. 478, that court had the opportunity to review the legal debate surrounding the interpretation of "impaired", as the term is used in s. 253(a) of the Criminal Code (operation of a motor vehicle while impaired). Labrosse J.A., writing for the court at p. 382, observed that some courts have adopted an interpretation of "impaired" which requires a "marked departure from what is usually considered as the normal" (R. v. McKenzie (1955), 111 C.C.C. 317 (Alta. Dist. Ct.); R. v. Smith (1992), 73 C.C.C. (3d) 285 (Alta. C.A.)), whereas other courts have concluded that the term "impaired" covers even a slight departure from the norm (R. v. Winlaw (1988), 13 M.V.R. (2d) 112 (Ont. Dist. Ct.); R. v. Bruhjell, [1986] B.C.J. No. 746 (C.A.); R. v. Campbell (1991), 87 Nfld. & P.E.I.R. 269 (P.E.I.C.A.)). Labrosse J.A. himself favoured the latter interpretation, at p. 384:

> If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

In my view, the decision in Stellato demonstrates conclusively that the term "impairment" provides the basis for legal debate.

63 I next turn to the "use" requirement in s. 13(1)(a), which is the focus of CP's s. 7 challenge. It is notable that the existence of the "use" condition actually narrows the scope of s. 13(1)(a), and that CP is therefore alleging vagueness in relation to an element of s. 13(1)(a) which operates to limit CP's liability. If the "use" element were not present, then s. 13(1)(a) would cover a much broader

range of pollution activity. However, the "use" condition requires the Crown to establish not only that a polluting substance has been released, but also that the release of the substance has actually impeded, or is likely to impair, someone's or something's "use" of the environment. The instant case illustrates this point. If CP had employed controlled fires on its right-of-way in a remote and unpopulated region of Northern Ontario, and wind conditions had caused the smoke to spread beyond the confines of CP's property, then CP could argue that it did not infringe s. 13(1)(a) because no discernible "use" of the environment had been, or was likely to have been, impaired. However, the smoke in Kenora filled residential homes, and diminished visibility on nearby roads. Thus, identifiable human "uses" were affected by the smoke, resulting in CP's liability under s. 13(1)(a).

64 The term "use" is not defined in the EPA. Nevertheless, I am of the view that judicial interpretation of what constitutes a "use" of the natural environment is easily accomplished. Various interpretive techniques are of assistance. First, as I observed in Nova Scotia Pharmaceutical Society, supra, at pp. 647-48, legislative provisions must not be considered in a vacuum. The content of a provision "is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it". Thus, it is significant that the expression challenged by CP as being vague (i.e., "for any use that can be made of [the natural environment]") appears in s. 13(1)(a) alongside various other environmental impacts which attract liability. It is apparent from these other enumerated impacts that the release of a contaminant which poses only a trivial or minimal threat to the environment is not prohibited by s. 13(1). Instead, the potential impact of a contaminant must have some significance in order for s. 13(1) to be breached. The contaminant must have the potential to cause injury or damage to property or to plant or animal life (s. 13(1)(b)), cause harm or material discomfort (s. 13(1)(c)), adversely affect health (s. 13(1)(d)), impair safety (s. 13(1)(e)), render property or plant or animal life unfit for use by man (s. 13(1)(f)), cause loss of enjoyment of normal use of property (s. 13(1)(g)), or interfere with the normal conduct of business (s. 13(1)(h)). The choice of terms in s. 13(1) leads me to conclude that polluting conduct is only prohibited if it has the potential to impair a use of the natural environment in a manner which is more than trivial. Therefore, a citizen may not be convicted under s. 13(1)(a) EPA for releasing a contaminant which could have only a minimal impact on a "use" of the natural environment.

65 Second, interpreting the concept of "use" in s. 13(1)(a) in a restrictive manner is supported not only by its place in the legislative scheme, but also by the principle that a statute should be interpreted to avoid absurd results. Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991), observes at pp. 383-84 that consideration of the consequences of competing interpretations will assist the courts in determining the actual meaning intended by the legislature. Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results. One method of avoiding absurdity is through the strict interpretation of general words (at p. 330). Driedger on the Construction of Statutes (3rd ed. 1994) states the relationship between the absurdity principle and strict interpretation as follows, at p. 94: "Absurdity is often relied on to justify giving a restricted application to a provision". Where a provision is open to two or more interpretations, the

absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature. In particular, because the legislature is presumed not to have intended to attach penal consequences to trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision. In this respect, the absurdity principle is closely related to the maxim, de minimis non curat lex (the law does not concern itself with trifles). The rationale of this doctrine was explained by Sir William Scott in the case of The "Reward" (1818), 2 Dods. 265, 165 E.R. 1482, at pp. 269-70 and p. 1484:

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim De minimis non curat lex. -- Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

The absurdity, strict interpretation and de minimis principles assist in narrowing the scope of the expression "for any use that can be made of [the natural environment]", and determining the area of risk created by s. 13(1)(a) EPA. Where an accused has released a substance into the natural environment, the legal debate must focus on whether an actual or likely "use" of the "natural environment" has been "impaired" by the release of a "contaminant". This legal debate is clearly facilitated by the application of generally accepted interpretive principles. In particular, these principles demonstrate that s. 13(1)(a) does not attach penal consequences to trivial or minimal impairments of the natural environment, nor to the impairment of a use of the natural environment which is merely conceivable or imaginable. A degree of significance, consistent with the objective of environmental protection, must be found in relation to both the impairment, and the use which is impaired.

66 Third, reference may be made to judicial consideration of the term "use" in contexts other than environmental law. On this point, it is worth observing that the "use" concept has been judicially considered and interpreted in a variety of different contexts, examples of which include: "use" of property under the Income Tax Act (Qualico Developments Ltd. v. M.N.R. (1984), 51 N.R. 387 (F.C.A.)); "use" of a patent (Galt Art Metal Co. v. Pedlar People Ltd., [1935] O.R. 126 (H.C.)); "use" of a motor vehicle (Elias v. Insurance Corp. of British Columbia (1992), 95 D.L.R. (4th) 303 (B.C.S.C.), Watts v. Centennial Insurance Co. (1967), 62 W.W.R. 175 (B.C.S.C.)); "use" of a place as a common gaming house (Rockert v. The Queen, [1978] 2 S.C.R. 704); "use" of writing purporting to be an affidavit (Stevenson v. R. (1980), 19 C.R. (3d) 74 (Ont. C.A.)); "use" for human habitation (Conlin v. Prowse (1993), 109 D.L.R. (4th) 243 (Ont. Ct. (Gen. Div.))).

67 A review of these cases indicates that courts have generally looked to dictionary definitions of the word "use" as a starting point in the interpretive process. However, the proper legal

interpretation of "use" is context-and fact-specific, and this may require a refinement of the definition in a particular circumstance. For example, in Pickering Twp. v. Godfrey, [1958] O.R. 429, the Ontario Court of Appeal was faced with the issue of whether the digging of a gravel pit, for the purpose of selling gravel, was a "use of land" that could be regulated or prohibited by municipal by-law. The answer depended on the interpretation of the word "use" in s. 390 of The Municipal Act, R.S.O. 1950, c. 243. Morden J.A., writing for the court, held as follows at p. 437:

> Counsel did not refer to any decisions interpreting the words "use of land" as they appear in s. 390 and I could find none. The dictionary definitions of "use" are numerous and diverse. An examination of them and some authorities, to which I will refer, has led me to the opinion that the word when used in conjunction with such commodities as food and water connotes the idea of consumption, but when applied to more durable forms of property means the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself.

Morden J.A. went on to find that the grant of power under s. 390 to regulate the "use of land" could not be interpreted to allow municipalities to prohibit an owner from selling his land or any part of it. Therefore, a by-law passed under s. 390 could not prevent a land owner from digging and removing gravel or other substances from his land.

68 A similar contextual and fact-sensitive analysis is required in interpreting the expression "for any use that can be made of [the natural environment]". The kinds of environmental "uses" that can be made of a particular area, and the question of whether the release of a contaminant has impaired these "uses" in a manner which is more than trivial or minimal, will involve certain factual inquiries. The character of the neighbourhood in which the contaminant has been released, the nature of the released contaminant, and the amount released, will all be important factors. The decision of Hackett Prov. Div. J. in Commander Business Furniture Inc., supra, illustrates this kind of factual inquiry. In that case, the defendant company was charged under s. 13(1) EPA (as amended, S.O. 1988, c. 54, s. 10; now s. 14(1), R.S.O. 1990, c. E.19) with emitting "volatile organic compound" emissions which caused a recurrent odour problem in a nearby residential neighbourhood. Hackett Prov. Div. J. heard testimony from six residents concerning the odours. As well, a scientific survey was admitted into evidence, which confirmed the nature and extent of the problem. Hackett Prov. Div. J. considered this evidence, along with the character of the neighbourhood, and reached the following conclusion, at p. 207:

> The residential area in question is adjacent to a commercial/industrial strip in which Commander is located. I find that "normal use of property" in this residential area must include the full use of yards and community parks. As set forth earlier, it is clear that these six residents lost the full use of their own yards and community parks. When the odour occurred, many of them described having to go inside or stay indoors. In my view, these are not trivial or inconsequential

> effects, as argued by the defence. On all of the evidence, including the frequency, nature and duration of these experiences, I conclude that the Crown has proved beyond a reasonable doubt that these residents significantly lost the normal use of property which would be reasonable in such a mixed-use neighbourhood at the relevant time.

Hackett Prov. Div. J. thus determined that a human "use" of property had been impaired, and that this impairment was neither trivial nor inconsequential. Such a factual and legal inquiry is precisely the kind in which courts engage on a daily basis.

69 Extrinsic materials provide additional assistance in interpreting the term "use" in the environmental context. In particular, I have in mind the 1986 Report of the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED), entitled Legal Principles for Environmental Protection and Sustainable Development (U.N. Doc. WCED/86/23/Add. 1 (1986), A/42/427, Annex I). This Report was prepared by 13 legal experts, who were appointed by the United Nations-mandated WCED. In it, the Experts Group formulated 22 legal principles, which were intended to serve as a guide for the development of domestic environmental protection legislation. For the purposes of the instant case, the most significant principle is Art. 4, which requires states to take measures "aimed at preventing or abating interferences with natural resources or the environment". In the "Use of Terms" section of their Report, the Experts Group provided the following definition of "environmental interference":

> (f) "environmental interference" means any impairment of human health, living resources, ecosystems, material property, amenities or other legitimate uses of a natural resource or the environment caused, directly or indirectly, by man through polluting substances, ionizing radiation, noise, explosions, vibration or other forms of energy, plants, animals, diseases, flooding, sand-drift or other similar means; [Emphasis added.]

The Experts Group also adopted the following definition of the expression, "use of a natural resource":

> (a) "use of a natural resource" means any human conduct, which, directly or indirectly, takes advantage of the benefits of a natural resource in the form of preservation, exploitation, consumption or otherwise of the natural resource, in so far as it does not result in an environmental interference as defined in Paragraph (f);

In my view, it is significant that 13 experts in environmental law, working under a United Nations mandate, adopted the "use" concept as a legal principle for domestic environmental law, and proceeded to define it in their Report. This is evidence that the term "for any use that can be made of the [natural environment]" is capable of forming the basis for legal debate. Moreover, where a court is considering the application of s. 13(1)(a) EPA in a particular fact situation, it would be

entitled to have recourse to the definition of "use" adopted by the Experts Group, since this definition has important persuasive value.

70 Thus, after taking into account interpretive principles and aids which narrow and define the scope of the term "use" in the environmental context, I see no reason to believe that the "use" concept in s. 13(1)(a) poses any greater interpretive challenge to the judiciary than it does in other contexts. Therefore, I conclude that the scope of s. 13(1)(a) EPA is reasonably delineated, and that legal debate can occur as to the application of the provision in a specific fact situation. This is all that s. 7 of the Charter requires.

(4) The Role of "Reasonable Hypotheticals" in Section 7 Vagueness Analysis

71 In the instant case, Daub J.P., Fraser J. and the Ontario Court of Appeal all concluded that CP could not rely on hypotheticals involving third parties to demonstrate the vagueness of s. 13(1)(a) EPA. In reaching this conclusion, the lower courts relied on the ruling of the United States Supreme Court in Hoffman Estates, supra, in which the court held, at p. 495, that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Prior to the instant case, this position had been adopted by the Ontario Court of Appeal in Morgentaler, supra, R. v. Zundel (1987), 58 O.R. (2d) 129, and R. v. LeBeau (1988), 41 C.C.C. (3d) 163.

72 Like the lower courts, I have no difficulty in concluding that CP's conduct in Kenora on April 6 and 11, 1988 fell squarely within the pollution prohibition contained in s. 13(1)(a) EPA. CP emitted noxious smoke which contaminated the natural environment, and which interfered with its use by several home owners and drivers in a manner which was more than trivial or minimal. In fact, I do not understand CP's argument to be that s. 13(1)(a) is vague in relation to the conduct which gave rise to the charges in the instant case. CP argues instead that the expression "for any use that can be made of [the natural environment]" is vague because it is not qualified as to time, degree, space or user, and thus fails to delineate clearly an "area of risk" for citizens generally.

73 CP is advancing an argument based on peripheral vagueness, which arises where a statute applies without question to a core of conduct, but applies with uncertainty to other activities. CP's conduct fell within the core of polluting activity prohibited by s. 13(1)(a), yet CP is relying on hypothetical fact situations which fall at the "periphery" of s. 13(1)(a), and to which it is uncertain whether liability attaches. I would note that the core-periphery problem is encountered in relation to virtually every legislative provision, and is an inevitable result of the imprecision of human language. This point was raised in Nova Scotia Pharmaceutical Society, supra, at p. 639:

> Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk;

> no definite prediction can then be made.

The role of the courts, then, is to interpret and clarify the language of an enactment, and thereby determine the area of risk.

74 The question then becomes whether CP's s. 7 challenge must necessarily fail because its polluting activity in Kenora on April 6 and 11, 1988 fell within the "core" of conduct prohibited by s. 13(1)(a) EPA. If I were to agree with the position of the United States Supreme Court in Hoffman Estates, supra, as adopted by the Ontario Court of Appeal, then I would reject CP's attempt to stray beyond its own fact situation in the instant case.

75 It may be trite, but nevertheless worth repeating, that while American rights jurisprudence can be of assistance in interpreting provisions of the Charter, Canadian courts should not simply import American constitutional principles into our law. What may be appropriate in the American constitutional setting may be unacceptable, or even unworkable, in the unique Canadian milieu. For this reason, the Hoffman Estates principle must be approached with considerable caution.

76 A review of American constitutional jurisprudence on the subject of the use of reasonable hypotheticals indicates that the issue has been approached as one of standing. Christina L. Jadach, "Pre-enforcement Constitutional Challenges to Legislation after Hoffman Estates: Limiting the Vagueness and Overbreadth Doctrines" (1983), 20 Harv. J. on Legis. 617, explained the standing rationale, at p. 620:

> Generally courts evaluate a statute by considering whether the provision impairs the rights of the complaining party in light of the attending circumstances. This traditional standing rule prohibits petitioners from invoking rights of third parties in individual claims.

In the predecessor case to Hoffman Estates, Parker v. Levy, 417 U.S. 733 (1974), the United States Supreme Court confirmed that an appellant who is alleging unconstitutional vagueness cannot rely on hypothetical fact situations, and at pp. 755-56, supported this conclusion by reference to the traditional American approach to standing in constitutional claims. In fact, resort to hypothetical fact situations is only possible in the area of overbreadth claims under the First Amendment. This narrow exception is justified because of the historical pre-eminence of free speech in American constitutional law, and particularly because of the concern that an overly broad limitation on speech will result in the "chilling" of legitimate and valuable expression: Thornhill v. Alabama, 310 U.S. 88 (1940).

77 The traditional hostility of the American courts to the use of hypothetical fact scenarios in constitutional adjudication has not been shared by this Court. In R. v. Smith, [1987] 1 S.C.R. 1045, and R. v. Goltz, [1991] 3 S.C.R. 485, this Court approved the use of reasonable hypotheses in assessing legislation under s. 12 of the Charter. Moreover, in R. v. Heywood, [1994] 3 S.C.R. 761, Cory J. held that a court could have resort to reasonable fact scenarios other than that of the

particular appellant where overbreadth is alleged under s. 7.

78 In light of the different approach taken by this Court in relation to constitutional standing (a matter elaborated upon by Chief Justice Lamer in his concurring reasons), I cannot adopt the rationale underlying the Hoffman Estates principle. Nevertheless, I take the view that reasonable hypotheticals have no place in the vagueness analysis under s. 7.

79 Where a court is faced with a vagueness challenge under s. 7, the focus of the analysis is on the terms of the impugned law. The court must determine whether the law provides the basis for legal debate and coherent judicial interpretation. As I stated above, the first task of the court is to develop the full interpretive context surrounding the law, since vagueness should only be assessed after the court has exhausted its interpretive function. If judicial interpretation is possible, then an impugned law is not vague.

A law should only be declared unconstitutionally vague where a court has embarked upon the interpretive process, but has concluded that interpretation is not possible. In a situation, such as the instant case, where a court has interpreted a legislative provision, and then has determined that the challenging party's own fact situation falls squarely within the scope of the provision, then that provision is obviously not vague. There is no need to consider hypothetical fact situations, since it is clear that the law provides the basis for legal debate and thereby satisfies the requirements of s. 7 of the Charter.

80 The analysis of overbreadth under s. 7, and of cruel and unusual treatment or punishment under s. 12, are quite different from vagueness analysis. Where a party alleges that a law is overbroad, or that punishment is cruel and unusual, a court must engage in proportionality analysis. In Goltz, supra, for example, I discussed the test for determining violations of s. 12 of the Charter, and stated, at p. 498, "that a sentence which is grossly or excessively disproportionate to the wrongdoing would infringe s. 12". Cory J. asserted a similar proportionality test in Heywood, supra, at p. 793: "The effect of overbreadth is that in some applications the law is arbitrary or disproportionate".

81 Proportionality analysis involves an assessment of whether a law, the terms of which are not vague, applies in a proportionate manner to a particular fact situation. Inevitably, courts will be required to compare the law with the facts. In that situation, the use of reasonable hypotheticals will be of assistance, and may be unavoidable (Goltz, supra, at p. 515).

82 In the context of vagueness, proportionality plays no role in the analysis. There is no need to compare the purpose of the law with its effects (as in overbreadth), or to compare the punishment with the wrongdoing (as with cruel and unusual punishment). A court is required to perform its interpretive function, in order to determine whether an impugned provision provides the basis for legal debate. Given this, I see no role for the consideration of reasonable hypotheticals in vagueness analysis.

(5) The Overbreadth Claim

83 Having dispensed with CP's vagueness claim, it is now necessary to turn to the issue of overbreadth. In its submissions, CP argued in part that s. 13(1)(a) EPA is vague because it is overbroad. In light of my reasons above, however, I think that this submission must fail.

84 Environmental protection is a legitimate concern of government, and as I have already observed, it is a very broad subject matter which does not lend itself to precise codification. Where the legislature is pursuing the objective of environmental protection, it is justified in choosing equally broad legislative language in order to provide for a necessary degree of flexibility. Certainly, s. 13(1)(a) captures a broad range of polluting conduct. However, my reasons in relation to the vagueness claim illustrate that the provision does not capture pollution with only a trivial or minimal impact on a use of the natural environment. Moreover, the "use" condition limits the application of s. 13(1)(a) by requiring the Crown to establish not only that a polluting substance has been released, but also that an actual or likely use of the environment, which itself has some significance, has been impaired by the release. Speculative or purely imaginary uses of the environment are not captured by the provision. These limits on the application of s. 13(1)(a) prevent it from being deployed in situations where the objective of environmental protection is not implicated. In my view, then, the breadth of s. 13(1)(a) matches the breadth of the objective of environmental protection. There is no overbreadth.

85 In his concurring reasons, Lamer C.J. has concluded that the literal interpretation of s. 13(1)(a) results in overbreadth, since the provision applies on its face to "any conceivable use" of the environment. He then applies the presumption of constitutionality for the purpose of limiting the scope of s. 13(1)(a). With respect, I cannot agree that the term "use" has a plain and literal meaning in the context of environmental protection. The term is open to interpretation, and I prefer a construction which avoids the kinds of absurd applications of s. 13(1)(a) which are identified by Lamer C.J. In my view, the first step in the overbreadth analysis requires a court to exhaust its interpretive function. Only then can overbreadth be assessed.

In the instant case, having interpreted s. 13(1)(a) (and in particular, the terms "use" and "impairment"), I have concluded that the appellant's overbreadth claim must fail.

86 Before concluding, I wish to add a caveat to my overbreadth analysis. My reasons should not be taken to endorse the view that the independent principle of overbreadth, as outlined in Heywood, supra, is available to the appellant in the circumstances of this case. My point is simply that s. 13(1)(a) is clearly not overbroad. Since neither CP nor the respondent were aware of this Court's decision in Heywood, the matter was not argued. I therefore prefer to defer consideration of the Heywood principle to a future case, where it is actually necessary to the result.

VI - Conclusion

87 I agree with the courts below that s. 13(1)(a) EPA, and specifically the expression "for any use

that can be made of [the natural environment]", are not unconstitutionally vague or overbroad. Section 13(1)(a) is sufficiently precise to provide for a meaningful legal debate, when the provision is considered in light of the purpose and subject matter of the EPA, the nature of the provision as a regulatory offence, the societal value of environmental protection, related provisions of the EPA, and general interpretive principles. Section 13(1)(a) is also proportionate and not overbroad. The objective of environmental protection is itself broad, and the legislature is justified in choosing broad, flexible language to give effect to this objective. I would therefore dismiss the appeal and answer the second and third constitutional questions as follows:

2. Is s. 13(1)(a) of the Environmental Protection Act so vague as to infringe s. 7 of the Canadian Charter of Rights and Freedoms?

A. No.

3. If the answer to Question 2 is in the affirmative, is s. 13(1)(a) nevertheless justified by s. 1 of the Charter?

A. This question does not arise.

* * * * *

Oral ruling, dated January 24, 1995

LAMER C.J.:-- We are all of the view that the judgment Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367, governs the first issue in this appeal and, accordingly, the appeal with respect to that ground fails, and the first constitutional question is answered in the affirmative:

1. Does s. 13(1)(a) of the Environmental Protection Act, R.S.O. 1980, c. 141 (now s. 14(1) of the Environmental Protection Act, R.S.O. 1990, c. E-19), constitutionally apply to the appellant when maintaining its right-of-way?

Answer: Yes.

Question numbers 2 and 3 are held in reserve.

TAB 6

PARAS. 51, 78-81

SUPREME COURT OF CANADA

CITATION: Wood *v.* Schaeffer, 2013 SCC 71, [2013] 3 S.C.R. 1053 **DATE:** 20131219
DOCKET: 34621

BETWEEN:

Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Police Constable Graham Seguin

Appellants/Respondents on cross-appeal

and

Ruth Schaeffer, Evelyn Minty, Diane Pinder and Ian Scott, Director of the Special Investigations Unit

Respondents/Appellants on cross-appeal

and

Julian Fantino, Commissioner of the Ontario Provincial Police

Respondent/Respondent on cross-appeal

- and -

Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Aboriginal Legal Services of Toronto Inc., Criminal Lawyers' Association (Ontario), Richard Rosenthal, Chief Civilian Director of the Independent Investigations Office of British Columbia, Urban Alliance on Race Relations, Canadian Police Association and Police Association of Ontario

Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 90)	Moldaver J. (McLachlin C.J. and Abella, Rothstein, Karakatsanis and Wagner JJ. concurring)
JOINT DISSENTING REASONS ON CROSS-APPEAL: (paras. 91 to 111)	LeBel and Cromwell JJ. (Fish J. concurring)

Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Police Constable Graham Seguin *Appellants/Respondents on cross-appeal*

v.

Ruth Schaeffer, Evelyn Minty, Diane Pinder and Ian Scott, Director of the Special Investigations Unit *Respondents/Appellants on cross-appeal*

- and -

Julian Fantino, Commissioner of the Ontario Provincial Police *Respondent/Respondent on cross-appeal*

and

Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Aboriginal Legal Services of Toronto Inc., Criminal Lawyers' Association (Ontario), Richard Rosenthal, Chief Civilian Director of the Independent Investigations Office of British Columbia, Urban Alliance on Race Relations, Canadian Police Association and Police Association of Ontario *Interveners*

Indexed as: Wood *v.* Schaeffer

2013 SCC 71

File No.: 34621.

2013: April 19; 2013: December 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Police — Investigations — Special Investigations Unit — Right to counsel — Duty to make notes — Whether police officers have right to consult with counsel before making notes on incident — Whether police officers are entitled to basic legal advice as to nature of rights and obligations in connection with incident — Police Services Act, R.S.O. 1990, c. P-15, s. 113 — Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 267/10, ss. 7, 9.

This case arises from two independent fatal incidents in which civilians were shot by the police. In both cases, the involved officers were instructed by superior officers to refrain from making their police notes on the incident until they had spoken with counsel. The families of the two civilians who were killed brought an application seeking an interpretation of various provisions of the *Police Services Act*, R.S.O. 1990, c. P-15, and *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10. For purposes of

this appeal, the pertinent issue raised by the families was whether the legislative scheme permitted officers to consult with counsel before completing their notes.

The families' application was dismissed by the Superior Court on procedural grounds. The Court of Appeal dealt with the matter on its merits, and held that the regulation did not permit police officers to seek the assistance of counsel in completing their notes. However, it found that, under the regulation, officers were entitled to receive basic legal advice as to the nature of their rights and obligations regarding the incident and the Special Investigations Unit ("SIU") investigation before completing their notes. The officers argue that those limits are too restrictive. The Director of the Special Investigations Unit cross-appeals, arguing that police officers are not entitled to legal advice, basic or otherwise, prior to completing their notes.

Held (LeBel, Fish and Cromwell JJ. dissenting in the cross-appeal): The appeal should be dismissed and the cross-appeal should be allowed.

Per McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.: Police officers are entrusted by the communities they serve with significant legal authority, including, in some circumstances, the power to use deadly force against their fellow citizens. The indispensible foundation for such authority is the community's steadfast trust in the police. But that trust can be tested when a member of the community is killed or seriously injured at the hands of a police officer. The SIU is charged with the delicate task of determining independently and

transparently what happened and why, in the hope of providing the community with answers. Permitting police officers to consult with counsel before their notes are prepared is an anathema to the very transparency that the legislative scheme aims to promote. When the community's trust in the police is at stake, it is imperative that the investigatory process be — and appear to be — transparent.

Under the Act and regulation, a police officer who witnessed or participated in an incident under investigation by the SIU is not permitted to speak with a lawyer before preparing his or her notes concerning the incident. While officers, in their capacity as ordinary citizens, may be free at common law to consult with counsel as and when they see fit, we are considering them here in their professional capacity as police officers who are involved in an SIU investigation. In these circumstances, the point of departure is not the common law, but the regulation which governs these situations and which comprehensively sets out their rights and duties, including their entitlement to counsel. So long as police officers choose to wear the badge, they must comply with their duties and responsibilities under the regulation, even if this means at times having to forego liberties they would otherwise enjoy as ordinary citizens.

Read in the full light of its history and context, it is apparent, for three reasons, that the regulation was not meant to permit officers to consult with counsel before they complete their notes.

First, consultation with counsel at the note-making stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence that the SIU process was meant to foster. The legislative scheme specifically combats the problem of appearances that flowed from "police investigating police" by placing investigations of the police in the hands of civilians. Allowing officers to fully consult with counsel at the note-making stage creates an "appearances problem" similar to the one that the SIU was created to overcome: a reasonable member of the public would naturally question whether counsel's assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation.

Second, the legislative history demonstrates that s. 7(1) was never intended to create a freestanding entitlement to consult with counsel that extended to the note-making stage. There was no discussion of a role for counsel at the note-making stage in any of the reports related to the regulation, let alone a recommendation to that effect. While the government has long been aware of the practice of officers consulting with counsel prior to preparing their notes, the government is not required to amend regulations to forbid practices that are already inconsistent with the legislative scheme.

Third, consulting with counsel at the note-making stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with their duty under s. 9 of the regulation. Sections 9(1) and 9(3) of the regulation require witness and subject officers to "complete in full the notes on the incident in accordance with [their] duty". While neither the regulation nor the Act define the duty to make notes, police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation. Permitting officers to consult with counsel before preparing their notes runs the risk that the focus of the notes will shift away from the officer's public duty toward his or her private interest in justifying what has taken place. This shift would not be in accord with the officer's duty.

Without in any way impugning the integrity of counsel or police officers, even the perfunctory consultation contemplated by the Court of Appeal is liable to cause the same threat to public confidence, if on a somewhat diminished scale, because the initial consultation is privileged. A loss of public trust would seem a high price to pay for an initial consultation that is limited to providing officers with basic information that can easily be conveyed in ways that do not generate any appearance problem. Nothing in the regulation prevents officers who have been involved in traumatic incidents from speaking to doctors, mental health professionals, or uninvolved senior police officers before they write their notes, and the regulation empowers the chief of police to allow officers more time to complete their notes

when required. Once officers have completed their notes and filed them with the chief of police, they are free to consult with counsel.

Per LeBel, Fish and Cromwell JJ. (dissenting in the cross-appeal): Everyone is at liberty to consult counsel whenever they wish unless doing so is precluded by lawful authority or inconsistent with their duty. This freedom reflects the importance of the societal role of lawyers in a country governed by the rule of law and it should not be eliminated in the absence of clear legislative intent.

Interpreting s. 7(1) of the regulation purposively requires that we give effect to police officers' freedom to consult counsel and consider the importance of the SIU's mandate to enhance public confidence in the police. The plain wording of s. 7(1) grants the right to consult with legal counsel and the right to have legal counsel present during an SIU interview. Since this wording does not oust the rights that police officers would otherwise enjoy as ordinary citizens, and since the potential tension between the right to consult and the duty of the officer to write complete and independent notes can be resolved, there is no need to completely eliminate a police officer's liberty to consult counsel.

We must trust that lawyers will know that they cannot give advice about the contents and drafting of the notes, which must remain the result of a police officer's independent account of the events. However, the officer could be advised that he or she is required to complete notes of the incident prior to the end of his or her tour of duty and submit them to the chief of police unless excused by the chief of

police; that the chief of police will not pass the notes of a subject officer on to the SIU, but will pass the notes of a witness officer on to the SIU; that the officer will be required to answer questions from the SIU investigators; that the officer will be entitled to consult counsel prior to the SIU interview and to have counsel present during the interview; and that the notes should provide a full and honest record of the officer's recollection of the incident in the officer's own words. This brief, informative conversation might not be as meaningful as comprehensive legal advice on the relationship between an officer's notes and potential liability, but it might help to remind an officer of his or her duties in the circumstances and put the officer at ease after having experienced a potentially traumatic incident.

Cases Cited

By Moldaver J.

Referred to: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. v. Bailey*, 2005 ABPC 61, 49 Alta. L.R. (4th) 128; *R. v. Zack*, [1999] O.J. No. 5747 (QL); *R. v. Stewart*, 2012 ONCJ 298 (CanLII); *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657.

By LeBel and Cromwell JJ. (dissenting on cross-appeal)

Referred to: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309; *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269; *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181.

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Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 267/10, ss. 1(1) "subject officer", "witness officer", 6(1), (2), 7, 8(1), (2), 9, 10(3)(b), (c), 12.

Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit, O. Reg. 673/98, ss. 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13.

Police Services Act, R.S.O. 1990, c. P.15, ss. 42, 113(3), (5), (7), (9).

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 716, 107 O.R. (3d) 721, 284 O.A.C. 362, 341 D.L.R. (4th) 481, 278 C.C.C. (3d) 57, 246 C.R.R. (2d) 181, [2011] O.J. No. 5033 (QL), 2011 CarswellOnt 12463, setting aside a decision of Low J., 2010 ONSC 3647 (CanLII), [2010] O.J. No. 2770 (QL), 2010 CarswellOnt 4564. Appeal dismissed and cross-appeal allowed, LeBel, Fish and Cromwell JJ. dissenting on cross-appeal.

Brian H. Greenspan, *David M. Humphrey* and *Jill D. Makepeace*, for the appellants/respondents on cross-appeal.

Julian N. Falconer and *Sunil S. Mathai*, for the respondents/appellants on cross-appeal Ruth Schaeffer, Evelyn Minty and Diane Pinder.

Marlys A. Edwardh, *Daniel Sheppard* and *Kelly Doctor*, for the respondent/appellant on cross-appeal Ian Scott, Director of the Special Investigations Unit.

Christopher Diana and *Kenneth W. Hogg*, for the respondent/respondent on cross-appeal Julian Fantino, Commissioner of the Ontario Provincial Police.

Wendy J. Wagner and *Ryan W. Kennedy*, for the intervener the Canadian Civil Liberties Association.

Andrew I. Nathanson and *Gavin R. Cameron*, for the intervener the British Columbia Civil Liberties Association.

Christa D. Big Canoe and *Emily R. Hill*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Howard L. Krongold and *Michael Spratt*, for the intervener the Criminal Lawyers' Association (Ontario).

Marian K. Brown, for the intervener Richard Rosenthal, Chief Civilian Director of the Independent Investigations Office of British Columbia.

Maureen L. Whelton and *Neil Wilson*, for the intervener the Urban Alliance on Race Relations.

David B. Butt, for the interveners the Canadian Police Association and the Police Association of Ontario.

The judgment of McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

MOLDAVER J. —

I. Introduction

[1] Police officers are entrusted by the communities they serve with significant legal authority, including, in some circumstances, the power to use deadly force against their fellow citizens. The indispensible foundation for such authority is the community's steadfast trust in the police. Each and every day, thousands of officers across this country work diligently to earn that trust, often putting their own lives on the line.

[2] But that trust can be tested — sometimes severely — when a member of the community is killed or seriously injured at the hands of a police officer. For that reason, the citizens of Ontario have charged an all-civilian Special Investigations Unit ("SIU") with the delicate task of investigating such tragic incidents. The SIU's mission is clear: it is to determine independently and transparently what happened and why, in the hope of providing the community with answers.

[3] No one is above the law. When a member of the community is killed or seriously injured by a police officer, it is not only appropriate to ask whether the police were acting lawfully, it is essential. To that end, the SIU plays a vital role in ensuring that our society remains fair and just and that everyone is treated equally before and under the law.

[4] This appeal concerns one aspect of the way in which the SIU conducts its investigations. The question presented is whether, under the scheme that Ontario has crafted, a police officer who witnessed or participated in an incident under investigation by the SIU is entitled to speak with a lawyer *before* preparing his or her notes concerning the incident. In my view, the answer is "no".

[5] The legislative scheme at issue here reflects the promise of a series of public inquiries and task forces urging reform of the old approach of "police investigating police". Time and time again, reports of these groups have underscored the importance of creating an independent body charged with transparently investigating whether what happened reflected a breach of the public's trust or not.

[6] Permitting police officers to consult with counsel before their notes are prepared is an anathema to the very transparency that the legislative scheme aims to promote. Put simply, appearances matter. And, when the community's trust in the police is at stake, it is imperative that the investigatory process be — and appear to be — transparent.

[7] Manifestly, the legislature did not intend to provide officers with an entitlement to counsel that would undermine this transparency. The SIU's governing regulation hews closely to the specific recommendations of those tasked with proposing reforms — down to many of its specific provisions. Read in the full light of its history and context, it is apparent that the regulation was not meant to afford officers an entitlement to consult with counsel before they complete their notes.

[8] Nor is such an entitlement consistent with an officer's duties under the legislative scheme. Such an expansive understanding of the entitlement to counsel impinges on the ability of police officers to prepare accurate, detailed, and comprehensive notes in accordance with their duty. Permitting consultation with counsel before notes are prepared runs the risk that the focus of the notes will shift away from the officer's public duty toward his or her private interest in justifying what has taken place. This shift would not be in accord with the officer's duty.

[9] In the result, I would dismiss the appeal and allow the cross-appeal.

II. Facts

[10] This case arises from two independent fatal incidents in which Douglas Minty and Levi Schaeffer were shot by the police. The facts surrounding the incidents are not in dispute.

A. *The Minty Investigation*

[11] On June 22, 2009, Mr. Minty was shot to death by Cst. Seguin of the Ontario Provincial Police ("OPP"). That evening, Cst. Seguin had been dispatched to investigate an alleged assault committed by Mr. Minty on a door-to-door salesman. When Cst. Seguin arrived at the scene, he approached Mr. Minty. Mr. Minty walked quickly toward Cst. Seguin. He had a knife in his hand. Cst. Seguin instructed Mr. Minty to put down or drop his weapon. Mr. Minty ignored these commands and "charged at Cst Seguin with his arm extended and the knife pointing at the officer" (SIU Report, A.R., vol. III, at p. 661). Cst. Seguin shot Mr. Minty five times.

[12] Cst. Seguin reported that shots had been fired and additional officers arrived at the scene. Sgt. Burton, Cst. Seguin's senior officer, told all of the officers in the area that the SIU might consider them to be witnesses to the incident and instructed them not to make any further notes until they had spoken with counsel.

[13] On October 14, 2009, Mr. Scott, the Director of the SIU (the "SIU Director"), provided his report on the incident to the Attorney General. In his report, the SIU Director found that Cst. Seguin "had a reasonable apprehension of imminent death or grievous bodily harm" from which he could not escape and concluded that

"the lethal force used was not excessive" in the circumstances (SIU Report, A.R., vol. III, at p. 661).

[14] Significant for present purposes, the SIU Director noted in his report that he would be raising several issues of concern with the OPP Commissioner. Among them, the SIU Director included his concern that all witness officers had been instructed not to write up their notes until they had spoken to counsel.

B. *The Schaeffer Investigation*

[15] On June 24, 2009, Mr. Schaeffer was shot and killed by Cst. Wood of the OPP. Cst. Wood and Acting Sgt. Pullbrook had traveled by boat to a rocky peninsula on Osnaburgh Lake to investigate a reported theft. When they arrived at the peninsula, the officers approached Mr. Schaeffer, questioned him, and attempted to detain him. According to the officers, Mr. Schaeffer physically resisted and pulled a knife out of his pocket. Both officers retreated as Mr. Schaeffer advanced towards them. Mr. Schaeffer did not comply with commands to drop the knife. At that point, Cst. Wood shot Mr. Schaeffer twice in the chest, killing him.

[16] After the shooting, Det. Sgt. Wellock was assigned to attend the scene. Before leaving the detachment, she instructed another officer to tell Cst. Wood and Acting Sgt. Pullbrook not to communicate with each other and not to write any notes until they had spoken to counsel. Cst. Wood and Acting Sgt. Pullbrook retained the same lawyer as their counsel and spoke to him, separately, several hours after the

shooting. Their lawyer advised both officers to refrain from completing their notes and to provide him with a draft set of notes for his review. Both officers completed their notebook entries two days after the shooting, on June 26, 2009, after counsel had reviewed their draft notes.

[17] On September 25, 2009, the SIU Director provided his report on this incident to the Attorney General. He concluded that he could not form reasonable and probable grounds to believe that Cst. Wood had committed a criminal offence because he could not "place sufficient reliance on the information provided by Cst Wood or A/Sgt Pullbrook to decide what probably happened" (A.R., vol. III, at p. 516). The SIU Director expressed specific concern over the manner in which Cst. Wood and Acting Sgt. Pullbrook completed their notes. The SIU Director wrote:

> This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been "approved" by an OPPA lawyer who represented all of the involved officers in this matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones — they were not written as soon as practicable and the first drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely upon these notes nor A/Sgt Pullbrook's interview based upon them for the truth of their contents.
>
> I have a statutory responsibility to conduct independent investigations and decide whether a police officer probably committed a criminal offence. In this most serious case, I have no informational base I can rely upon. Because I cannot conclude what probably happened, I cannot form

> reasonable grounds that the subject officer in this matter committed a criminal offence. [Emphasis added; A.R., vol. III, at p. 517.]

III. Relevant Legislative Provisions

A. *The Police Services Act*

[18] The SIU was established by s. 113 of the *Police Services Act*, R.S.O. 1990, c. P.15. Section 113(5) of the Act empowers the SIU to "cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers". The SIU Director cannot be a police officer or a former police officer, and SIU investigators cannot be current police officers (s. 113(3)). The SIU Director determines whether charges will be laid against police officers (s. 113(7)). Police officers are required by the Act to "co-operate fully" with the SIU in the conduct of investigations (s. 113(9)).

B. *The Regulation*

[19] The regulation governs the conduct of SIU investigations (*Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10). Officers involved in an incident triggering an SIU investigation fall into two categories: officers whose conduct appears to have caused the death or serious injury are designated "subject officers", and involved officers who are not subject officers are deemed to be "witness officers" (s. 1(1)).

[20] The regulation provides that all involved officers must be segregated from each other, to the extent practicable, until after the SIU has completed its interviews (s. 6(1)). The regulation also provides all officers with an entitlement to "consult" with legal counsel and to have counsel "present" during their SIU interviews (s. 7(1)), unless the SIU Director is of the opinion that waiting for counsel would cause an unreasonable delay in the investigation (s. 7(2)). Witness officers are required to meet with the SIU and answer all of its questions (s. 8(1)). Both subject and witness officers are required to complete their notes on the incident "in accordance with [their] duty" (s. 9(1) and (3)). However, only witness officers are required to provide their notes to the SIU (s. 9(1) and (3)). If a witness officer is later designated a subject officer by the SIU, the SIU is required to provide the officer with the original and all copies of his interview with the SIU and his officer notes (s. 10(3)(b) and (c)).

[21] The proper interpretation of the regulation lies at the heart of this appeal. The entitlement to counsel under s. 7(1) and the duty to make notes under s. 9(1) and (3) are of particular importance. These provisions read as follows:

> **7.** [Right to counsel] (1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU.
>
> . . .
>
> **9.** [Notes on incident] (1) A witness officer shall complete in full the notes on the incident in accordance with his or her duty and . . . shall

> provide the notes to the chief of police within 24 hours after a request for the notes is made by the SIU.
>
> . . .
>
> (3) A subject officer shall complete in full the notes on the incident in accordance with his or her duty, but no member of the police force shall provide copies of the notes at the request of the SIU.

IV. Proceedings Below

A. *Superior Court of Justice for Ontario, 2010 ONSC 3647 (CanLII)*

[22] Mr. Schaeffer's mother, Ruth Schaeffer, and Mr. Minty's mother and sister, Evelyn Minty and Diane Pinder (the "Families") brought an application under Rule 14.05(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking "[d]eclaratory relief in the form of judicial interpretations and guidance in respect of those provisions of the *Police Services Act* and Regulations that govern the police duty to cooperate with investigations by the Special Investigations Unit" (A.R., vol. I, at p. 91). One of the issues raised by the Families was whether the legislative scheme permitted officers to consult with counsel before completing their notes. The Families named Cst. Seguin, Cst. Wood, Acting Sgt. Pullbrook (the "Officers"), OPP Commissioner Julian Fantino, the SIU Director, and the Ministry of Community Safety and Correctional Services as respondents.

[23] Prior to the hearing of the application on its merits, the Officers brought a motion to strike the application on the grounds that the application was not justiciable

and that the Families lacked standing to bring it. Low J. allowed the Officers' motion and struck the application. Before this Court, the Officers have abandoned these procedural arguments. It is therefore unnecessary to consider them further.

B. *Court of Appeal for Ontario, 2011 ONCA 716, 107 O.R. (3d) 721*

[24] The Families appealed to the Ontario Court of Appeal seeking to have the application decided on its merits. Sharpe J.A., writing for a unanimous court, held that the application was justiciable, that the Families had public interest standing, and that the Court of Appeal had jurisdiction to decide the substantive issues raised in the application without the need to remit the matter to the Superior Court.

[25] The Court of Appeal found that the assistance of counsel in the preparation of an officer's notes "would be inconsistent with the purpose of police notes and with the duty imposed on police officers to prepare them" primarily because any legal advice received by the officer would be "geared to the officer's own self interest, or the interests of fellow officers, rather than the officer's overriding public duty" (paras. 71-72). As a result, the court concluded that s. 7(1) did not permit police officers to seek the assistance of counsel in completing their notes.

[26] However, in the Court of Appeal's view, s. 7(1) of the regulation did entitle officers to "basic legal advice as to the nature of [their] rights and obligations in connection with the incident and the SIU investigation" (paras. 79 and 81).

V. Issue

[27] The Officers have appealed to this Court, asserting that the Court of Appeal erred in restricting the entitlement to counsel in s. 7(1) to nothing more than "basic legal advice". The SIU Director has cross-appealed and takes the opposite view, arguing that, although the Court of Appeal was correct in holding that officers are not entitled to the assistance of counsel in the preparation of their notes, it erred in concluding that police officers are entitled to "basic legal advice" prior to completing their notes. The Families and the OPP Commissioner are content with the decision of the Court of Appeal and defend its correctness.

[28] The primary issue on appeal is whether s. 7(1) of the regulation entitles officers involved in incidents triggering SIU investigations to speak with counsel before completing their notes. Given my conclusion that the answer to this issue is no, I need not go on to consider the nature or extent of any such entitlement.

VI. Analysis

A. *The Source of the Disputed Right to Counsel*

[29] At the outset, it is important to be clear about the focus of our inquiry. This case concerns the scope of an entitlement to counsel that flows from a regulatory provision. We are not here concerned with the right to counsel that exists under s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*. No party has sought to

determine whether witness or subject officers are "detained" within the meaning of s. 10(*b*) during SIU investigations. Two of the interveners before this Court argued that the regulation triggers an officer's right to counsel under s. 10(*b*) of the *Charter*: see factums of the Canadian Civil Liberties Association and the Canadian Police Association. The SIU Director brought a motion to strike out the paragraphs of the interveners' factums that raised this issue on the grounds that it had not been raised by any of the parties to this appeal, and the interveners were precluded from raising new issues on their own accord. I agree with the SIU Director that the s. 10(*b*) issues are not properly before this Court, and would therefore allow the motion.

[30] Nor has any party questioned whether the right to silence or the common law confessions rule prevents an officer's notes from being used against that officer in a subsequent criminal prosecution. Accordingly, I refrain from expressing any opinion on those issues. Finally, this case does not concern the liberty citizens generally enjoy at common law to consult with counsel as and when they see fit. The Officers argue that, no matter how s. 7(1) is interpreted, they are free at common law to consult with counsel in the preparation of their notes.

[31] With respect, I cannot agree. We are not here dealing with police officers in their capacity as ordinary citizens. We are dealing with them in their professional capacity as police officers who are the subject of an SIU investigation because they have been involved in an incident that has resulted in serious injury or death. In these circumstances, the point of departure is not the common law liberty to consult with

counsel. Rather, we must begin with the regulation which governs these situations and which comprehensively sets out their rights and duties, including their entitlement to counsel.

[32] This starting point requires that an officer's entitlement to counsel at the note-making stage be determined purposively, through the lens of the legislative scheme, thus ensuring the entitlement will be in harmony with the scheme and its overarching purpose. The first question, therefore, is whether s. 7(1) of the regulation, interpreted purposively, entitles officers to consult with counsel at the note-making stage. If such an entitlement is inconsistent with the regulation, then officers involved in SIU investigations are precluded from such consultations and we need not reach the question of what residual liberty officers may retain at common law. In short, so long as police officers choose to wear the badge, they must comply with their duties and responsibilities under the regulation, even if this means at times having to forego liberties they would otherwise enjoy as ordinary citizens.

B. *The Proper Approach to Statutory Interpretation*

[33] Answering the question posed by this appeal requires interpreting s. 7(1) of the regulation. The words of the provision must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the regulation, its objective, and the intention of the legislature. Critically, the provisions of the regulation must be read in light of the purpose of the enabling legislation — the Act. That purpose "transcends and governs" the regulation (*Bristol-Myers Squibb Co. v.*

Canada (Attorney General), 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 38). An interpretation of s. 7(1) that leads to conflict with another provision of the regulation, or that runs contrary to the purpose of the legislative scheme, must be avoided.

C. *The Origin and Purpose of the Special Investigations Unit*

[34] Before turning to the interpretation of s. 7(1) of the regulation, it is necessary to describe the origin and purpose of the legislative scheme. Doing so provides the context for the analysis that follows.

(1) The Creation of the Special Investigations Unit

[35] Before the SIU was formed, incidents of serious injuries or deaths involving police officers were investigated internally by the police (A. Marin, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility* (2008), at para. 23). This changed in 1990 with the enactment of the Act, which created the SIU.

[36] The creation of the SIU followed on the heels of a report released in 1989 by the Task Force on Race Relations and Policing (*Report of the Race Relations and Policing Task Force* (1989)). The Task Force was commissioned by the provincial government after two black Ontarians were fatally shot by the police in 1988. Its report contained a host of recommendations, one of which called for the creation of an "investigative team" comprised partially of civilians "to investigate police

shootings" in the province (p. 150). The Task Force recommended civilian participation in investigations of the police because, in its view, the practice of "police investigating the police" could not "satisfy the public demand for impartiality" and fostered "a serious deterioration in the public confidence" (p. 147).

[37] The Solicitor General, during legislative debate on the Act, confirmed that the creation of the SIU was a direct response to the recommendation of the Task Force. He stated that the government had listened to the concerns raised by the Task Force and that the Act "addresses the concern, heard by the general public, of police investigating police" (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 2nd Sess., 34th Parl., May 17, 1990, at p. 1318).

(2) The Creation of the Regulation

[38] The SIU operated without a regulation governing the conduct of its investigations until 1998 when O. Reg. 673/98, the predecessor to the regulation at issue in this appeal, was adopted following another government report. In 1997, the Honourable G. W. Adams was appointed by the government to consult with community and police organizations and to make consensus-based recommendations for improving the relationship between the SIU and the police.

[39] Mr. Adams released his report in 1998 (*Consultation Report Concerning Police Cooperation with the Special Investigations Unit* (1998) ("Adams 1998")). In his report, Mr. Adams recognized that SIU investigations had to be carried out in a

"transparent manner" and that "any deviation from what is understood to be standard investigation practices undermines public confidence" (p. 4). The report contained 25 recommendations that were intended to provide the standard investigatory practices necessary to ensure public confidence in these investigations. Chief among them was the creation of a comprehensive regulation to govern SIU investigations.

[40] The various provisions of O. Reg. 673/98 — and certainly the key ones — tracked Mr. Adams' recommendations. Indeed, Mr. Adams can fairly be described as the father of the SIU's governing regulation. All of the following provisions of O. Reg. 673/98 can be traced back to his recommendations:

- section 1 of the regulation distinguished between subject and witness officers (recommendation 9);

- section 3 required the police to immediately notify the SIU of an incident triggering its jurisdiction (recommendation 4);

- section 4 required the police to secure the scene of the incident until the SIU's arrival (recommendation 6);

- section 5 provided that the SIU was to be the lead investigator (recommendation 7);

- section 6 required witness and subject officers to be segregated until the completion of their SIU interviews (recommendation 8);

- section 7 provided an entitlement to consult with counsel (recommendation 11);

- section 8 required witness officers to submit to SIU interviews forthwith (recommendation 12);

- section 9 required officers to complete their notes on the incident in accordance with their duty (recommendation 14);

- section 11 required chiefs of police to also conduct an investigation into the incident (recommendation 15); and

- sections 12 and 13 regulated public statements by the police and the SIU (recommendation 17).

[41] O. Reg. 673/98 was never amended and remained in force until 2010. In 2010, it was revoked and O. Reg. 267/10, the regulation at issue in this case, came into force. Little of O. Reg. 673/98, however, was modified as a result of this

change.[1] The s. 7(1) entitlement to counsel and the s. 9 duty to make notes, which are at the centre of this appeal, were worded identically in both regulations.

[42] Since 2010, ss. 7 and 9 of the regulation were amended in O. Reg. 283/11, while this case was pending in the Court of Appeal, following a brief report by the Honourable P. J. LeSage (*Report regarding SIU Issues* (2011)). Mr. LeSage had been asked to "review some issues that [had] arisen over the last few years" in SIU investigations (p. 1).

[43] In his report, Mr. LeSage recommended four amendments to the regulation, three of which were implemented in 2011: that officers involved in the incident be forbidden from communicating *directly or indirectly* with other officers involved in the incident during SIU investigations (p. 2; s. 6(2)); that witness officers not be represented by the same counsel as subject officers (p. 2; s. 7(3)); and that notes be completed by the end of an officer's tour of duty, except where excused by the chief of police (p. 2; s. 9(5)).[2] Mr. LeSage's report was silent on the issue of police officers consulting with counsel before making their notes.

(3) Conclusion on the Purpose of the Special Investigations Unit

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[1] The new regulation added two subsections to s. 1, clarified s. 8(2), expanded on the s. 12 prohibition on police disclosure of information relating to SIU investigations, added translations to the definitions section, and added marginal notes. Aside from these changes, the regulation's wording was identical to O. Reg. 673/98.

[2] Mr. LeSage's report did not provide any explanation for these recommendations. His fourth recommendation is unrelated to the issue at hand.

[44] In establishing the SIU, the legislature intended to create an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system as a whole. This was the rationale for the Task Force's recommendation, and it was explicitly adopted by the government of the day when the Act was enacted. The regulation was created to facilitate this purpose. It provided a regulatory framework designed to ensure that the SIU could conduct its investigations in an independent and transparent fashion.

D. *Interpreting the Section 7(1) Entitlement to Counsel*

[45] As indicated, this appeal turns on the proper interpretation of s. 7(1) of the regulation, which reads in relevant part:

> . . . every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU.

[46] The Officers urge an expansive interpretation of s. 7(1). They argue that s. 7(1) provides two distinct entitlements to counsel. First, officers are entitled to "consult" with counsel. Second, they are entitled to have counsel "present" during their interview with the SIU. The right to "consult" with counsel is said to be a freestanding right that includes the right to consult with counsel in the preparation of notes.

[47] With respect, I cannot accept this submission. Read in its entire context, s. 7(1) does not provide a freestanding entitlement to consult with counsel at the note-making stage. I reach this conclusion for three reasons. First, consultation with counsel at the note-making stage is antithetical to the dominant purpose of the legislative scheme because it risks eroding the public confidence that the SIU process was meant to foster. Second, the legislative history demonstrates that s. 7(1) was never intended to create a freestanding entitlement to consult with counsel that extended to the note-making stage. Third, consulting with counsel at the note-making stage impinges on the ability of police officers to prepare accurate, detailed and comprehensive notes in accordance with their duty under s. 9 of the regulation.

(1) The Purpose of the Legislative Scheme

[48] The SIU was born out of a crisis in public confidence. Whether or not police investigations conducted into fatal police shootings in the 1980s were actually biased, the public did not perceive them to be impartial (see, e.g., Task Force Report). This history teaches us that appearances matter. Indeed, it is an oft-repeated but jealously guarded precept of our legal system that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259, *per* Lord Hewart C.J.). And that is especially so in this context, where the community's confidence in the police hangs in the balance.

[49] The legislative scheme is designed to foster public confidence by specifically combating the problem of appearances that flowed from the old system of "police investigating police". The problem under that system, of course, was that it created the unavoidable *appearance* that officers were "protecting their own" at the expense of impartial investigations. The legislature deemed this appearance unacceptable and created the SIU to guard against it by placing investigations of the police in the hands of civilians.

[50] The difficulty with allowing officers to fully consult with counsel at the note-making stage is that it creates an "appearances problem" similar to the one that the SIU was created to overcome. A reasonable member of the public would naturally question whether counsel's assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation. Given that solicitor-client privilege attaches to these discussions, the public's unease is unanswerable.

[51] In this regard, the facts of the Schaeffer investigation are especially troubling. Both officers completed their notes only after their lawyer had reviewed their draft notes. Neither officer ever provided their original draft notes, which, of course, were shielded behind solicitor-client privilege, to the SIU. The public has no way of knowing what counsel's role was. The SIU Director, however, concluded that he had no information from which he could base his conclusion as to what happened

in the death of Mr. Schaeffer as a result of counsel's involvement. Surely this is not the stuff out of which public confidence is built.

[52] It seems fitting to recall here that Sir Robert Peel, the father of modern policing, is credited with having said that "the police are the public and . . . the public are the police" (C. Reith, *The Blind Eye of History: a study of the origins of the present Police era* (1975), at p. 163). The wisdom of this statement lies in its recognition that public trust in the police is, and always must be, of paramount concern. This concern requires that officers prepare their notes without the assistance of counsel. Consultations with counsel during the note-making stage are antithetical to the very purpose of the legislative scheme — and for that reason, they must be rejected.

(2) The Intended Scope of the Section 7(1) Entitlement to Counsel

[53] My conclusion that s. 7(1) has no application at the note-making stage is supported by the regulation's legislative history. When this history is considered, it is apparent that the provision was never meant to provide an entitlement to counsel at the note-making stage.

[54] Section 7(1) of the regulation flows from Mr. Adam's 1998 report. As such, the report provides cogent evidence of the intended scope of the s. 7(1) entitlement to consult counsel — an observation with which the Officers agree. Indeed, in oral argument, they stressed the fact that Mr. Adams had engaged in

"literally . . . hundreds of consultations" with interested parties, including "virtually every police force", and that the Attorney General, after reviewing the report, had "created the legislation based upon the framework suggested [by Mr. Adams] as a result of that consensus" (transcript, at pp. 6-7). Recommendation 11 of the Adams 1998 report dealt with the entitlement to counsel and read as follows:

> The regulation should stipulate that an officer is entitled to representation by legal counsel and/or a police association, provided the availability of such advisors will not lead to an unwarranted delay. [p. 91]

[55] The discussion surrounding this recommendation centred on an officer's entitlement to have counsel at the SIU interview. As the report notes:

> There was . . . broad agreement that an officer was entitled to legal and police association representation at SIU interviews, provided such representation did not result in unwarranted delay. [p. 90]

In contrast, there is no discussion of a role for counsel at the note-making stage, let alone a recommendation that officers should be entitled to consult with counsel when making their notes.

[56] In 2003, Mr. Adams released a second report, after having been appointed by the Attorney General to evaluate the implementation of his 1998 recommendations (*Review Report on the Special Investigations Unit Reforms* (2003) ("Adams 2003")). Mr. Adams commented specifically on the implementation of the recommendation that officers be entitled to representation by counsel:

> This recommendation has been implemented in s. 7 of the Regulation. Every police officer is entitled to have legal counsel or an association representative present during his or her interview. The SIU Director has the power to waive this right, if waiting for representation would cause an unreasonable delay. [Emphasis added; p. 51.]

[57] Again, no role for counsel at the note-making stage was mentioned. Indeed, later in the report, Mr. Adams observed that some officers had been receiving legal advice "to refrain from completing their notes until they [had] consulted with their lawyers". He described this practice as "very problematic" (p. 55).

[58] The interpretation of s. 7(1) proposed by the Officers fails to take account of this legislative history. As they themselves note, Mr. Adams' 1998 report resulted from a comprehensive process of consultation and analysis. Indeed, it is not an overstatement to say that his 25 recommendations *became* the regulation. Yet, in neither his 1998 report nor his 2003 report does Mr. Adams make mention of an entitlement to counsel at the note-making stage. I would have thought that if s. 7(1) was intended to permit such a contentious practice, it would have generated considerable discussion in Mr. Adams' comprehensive reports. The fact that no mention is made of it supports my opinion that s. 7(1) was never meant to provide an entitlement to counsel at the note-making stage.

[59] In so concluding, I have not ignored the Officers' argument regarding governmental inaction. In particular, they point out that, in the context of SIU investigations, the government has long been aware of the practice of officers consulting with counsel prior to preparing their notes. Mr. Adams observed the

problem in his 2003 report, and Mr. LeSage certainly would have been aware of it when he made his recommendations in 2011, after this case had been decided by the Superior Court. Yet the government did nothing to curtail the practice, despite making other changes to the regulatory framework in 2010 and 2011. The Officers argue that it can be inferred from this that the government intended and still intends to permit this practice under the regulation (A.F., at para. 64).

[60] With respect, I do not agree. In this case, governmental inaction provides no meaningful insight into the intended scope of the s. 7(1) entitlement to counsel. It is only if we start from the position that s. 7(1) allows consultation with counsel at the note-making stage that we can infer from governmental inaction that the government intended — and is content with — the current practice. If, however, we assume that s. 7(1) does not and never did permit consultation with counsel at the note-making stage, one can just as readily infer that the government has taken no action because none was needed. The government is not required to amend regulations to forbid practices that are already inconsistent with the legislative scheme. Viewed in this way, the Officers' argument does not tip the scale one way or another.

(3) Avoiding a Conflict With The Duty to Make Notes

[61] My conclusion that s. 7(1) was never meant to provide an entitlement to consult with counsel at the note-making stage is reinforced when the duty to make notes, as recognized in s. 9, is considered. Consultation with counsel during the note-making process impinges on the ability of police officers to comply with that duty.

(a) *The Duty to Make Notes Generally*

[62] Sections 9(1) and 9(3) of the regulation require witness and subject officers to "complete in full the notes on the incident in accordance with [their] duty". The regulation does not define the duty to make notes. Nor does the Act, which provides a non-exhaustive list of the "duties of a police officer" in s. 42, including, for example, preserving the peace, laying charges and participating in prosecutions, and performing the lawful duties that the chief of police assigns.

[63] Although it is common ground among the parties that the duties of a police officer include a duty to make notes on the events that transpire during the officer's tour of duty, I recognize that neither side points to a definitive statement of this Court holding as much.[3]

[64] However, reports by experienced jurists have concluded that such a duty exists. For example, in their 1993 report to the Attorney General of Ontario on charge screening, disclosure, and resolution discussions, a committee made up of experienced counsel and police officers and led by the Honourable G. A. Martin, observed that:

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[3] At least one lower court, however, has given the matter thoughtful consideration and arrived at that conclusion; see *R. v. Bailey*, 2005 ABPC 61, 49 Alta. L.R. (4th) 128, at para. 42. Other courts have simply stated that such a duty exists, without significant analysis; see, e.g., *R. v. Zack*, [1999] O.J. No. 5747 (QL) (Ct. J.), at para. 6; *R. v. Stewart*, 2012 ONCJ 298 (CanLII), at para. 28. I note that this Court also observed recently that "notes of how a search is conducted should . . . be kept, absent unusual or exigent circumstances" (*R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at para. 70).

> . . . the duty to make careful notes pertaining to an investigation is an important part of the investigator's broader duty to ensure that those who commit crimes are held accountable for them.
>
> . . .
>
> . . . inadequate note-taking, while it can hamper the conduct of the defence, also risks hampering an investigation and/or a prosecution. In short, inadequate note-taking does a disservice to both an accused and the community, [which] is entitled to expect that innocent people will be acquitted and guilty people properly convicted. [Emphasis added.]

(*Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) ("Martin Committee"), at pp. 151 and 153)

[65] In another instance, the Honourable R. E. Salhany considered the significance of police notes in the course of a public inquiry into a death caused by an off-duty officer. He explained the importance of notes in this way:

> [Note-making] is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. It is as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses. The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator. [Emphasis added.]

(*Report of the Taman Inquiry* (2008), at p. 133)

[66] These conclusions, in my view, stand on firm ground. The importance of police notes to the criminal justice system is obvious. As Mr. 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. [p. 152]

[67] Against that background, I have little difficulty concluding 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 — a duty that is explicitly recognized in s. 42(1)(e) of the Act.

[68] None of this, of course, comes as news to police officers. In this case, for example, OPP policy confirms the duty to make notes by requiring constables to record "concise, comprehensive particulars of each occurrence" during their tour of duty and to "make all original investigative notes . . . during an investigation or as soon thereafter practicable" (OPP Order 2.50, Member Note Taking, SIU Record, at pp. 48-52). More generally, police manuals have long emphasized the importance of accurate, detailed, and comprehensive notes; see, e.g., R. E. Salhany, *The Police Manual of Arrest, Seizure & Interrogation* (7th ed. 1997), at pp. 270-78.

(b) *Consultation With Counsel and the Duty to Make Notes*

[69] The parties agree on the existence of the duty to make notes. Their dispute centers on whether consultation with counsel is consistent with that duty.

Specifically, the issue is whether talking to a lawyer before preparing one's notes impinges on the ability of police officers to prepare accurate, detailed, and comprehensive notes in accordance with their duty under s. 9 of the regulation.

[70] The SIU Director argues that consulting with counsel risks undermining the independence and timeliness of officer notes. The Officers' response is that the regulation provides a complete answer to concerns about timeliness, and that consulting with counsel at the note-making stage does not interfere with the independence of notes because counsel can be trusted to act with integrity and not impinge on the note-making process.

[71] With respect, I do not find the SIU Director's concerns decisive. The regulation has been amended to ensure that notes are completed in a timely fashion (see s. 9(5)). And as far as independence is concerned, although I acknowledge the possibility of some risk, I am not prepared to find that consultation with counsel would, in fact, undermine the *independence* of a witness or subject officer's account. Such a conclusion is inconsistent with the position of trust counsel rightly enjoy in our justice system.

[72] But that does not end the matter. In my view, the expansive right of consultation urged by the Officers remains problematic. To be precise, it creates a real risk that *the focus* of an officer's notes will shift away from his or her *public duty* under s. 9, i.e. making accurate, detailed, and comprehensive notes, and move toward

his or her *private interest*, i.e. justifying what has taken place — the net effect being a failure to comply with the requirements of the s. 9 duty.

[73] The Officers, it must be recalled, contend that s. 7(1) creates a broad right to counsel. They argue that it provides "full consultation with counsel before notes are completed and the interview process is even engaged" (A.F., at para. 56 (emphasis added)). They further contend that the advice provided during the "full consultation" would cause the officer to "fully appreciate the importance of providing a comprehensive account which addresse[s] all factual and legal issues that would be of interest to the SIU, to the officer's police service and to the public" (A.F., at para. 65 (emphasis added)) and lead to "enhanced" notes (transcript, at pp. 26-27 and 54).

[74] Manifestly, the "full consultation" envisioned by the Officers — geared towards creating a "comprehensive account" that addresses *all* of the "legal issues" of interest to the SIU — means that the private interests of the officer will be discussed. That is, the conversation will address the potential liability facing the officer and his colleagues and the possible justifications for what has occurred. The sort of advice one might expect to hear during this wide-ranging conversation is illustrated by an article in a police association newsletter written to police officers by a lawyer with significant experience in such cases:

> Responding to SIU calls is not so much about what happened, but why it happened. It matters less that the suspect was punched, kicked or even shot than it does why. Note-making and report-drafting in the face of an SIU investigation are mostly about setting forth the reasons why you responded as you did.

> The obvious needs to be said and said again: "He pointed the firearm at me and, fearing for my life and the life and safety of my fellow officers and members of the public, I fired at him several times."
>
> You will note that I said several times. Most people who discharge their firearm at an armed suspect are unsure how many times they fired, and equally unsure whether or not to admit it. In a world of admit and explain, it is crucial that you allow yourself some margin of error in your account so that later the SIU does not begin to doubt your credibility/reliability. [Emphasis added.]

(G. Clewley, "Officers and the SIU" (2009), 4 *The Back-Up* 25)

[75] To be clear, there is nothing sinister about such discussions. Advising clients of their public duties *and their private interests* is the responsibility of competent counsel. As Sharpe J.A. observed, correctly in my view, "[a] lawyer would only be doing his or her job in providing the police officer with information as to the ingredients of an offence or possible legal defence" (para. 73).

[76] But therein lies the risk to the fulfilment of the officer's duty. The purpose of notes is not to explain or justify the facts, but simply to set them out. Indeed, until human ingenuity develops a technology that can record sights, sounds, smells, and touch, an officer's notes are effectively the next best thing. In this regard, I note that the OPP Basic Constable Workbook instructs officers that:

> Your notes are made from independent recollection and are your link to the past. They are there to assist you to gather the facts and details and to properly record events, observations and performances experienced during general duty functions and investigations. . . . [I]t is your

> responsibility to maintain an up-to-date record of what you have done, seen, heard, smelled, or touched during your tour of duty.

(Ontario Police College, *Basic Constable Training Program — Student Workbook* (2008), at p. 2 (SIU Record, at p. 7))

[77] Without imputing any ill will on the part of officers who seek legal advice or the lawyers who provide it, it would only be natural for officers to listen to the good advice of counsel, and it would not be surprising for the notes they prepare *after* this consultation to reflect that advice. But this creates a real risk that the focus of an officer's notes will shift — perhaps overtly, perhaps more subtly — away from the rather mechanical recitation of *what* occurred (which is required by their duty) toward a more sophisticated explanation for *why* the incident occurred (which detracts from that duty).

[78] This risk is not merely theoretical. The notes of Acting Sgt. Pullbrook serve as an example of this subtle shift toward *justifying* conduct. The record contains his notes from the day of the shooting (prepared with the assistance of counsel; A.R., vol. III, at pp. 537-64) and his notes from the two previous days (prepared without assistance; A.R. vol. III, at pp. 532-37). The notes made before the day of the shooting recite what the officer saw and did, and make repeated references to the time at which the events occurred. In other words, they reflect in form and

substance the type of notes that police officers are taught to make from their very first days of basic-training.[4]

[79] By contrast, the notes from the day of the shooting contain no time references between 8 a.m. and 2 p.m. — spanning the time between when Acting Sgt. Pullbrook began his shift and when paramedics arrived on the peninsula after the shooting. The notes also display a particular concern with justifying why the officers first took physical control of Mr. Schaeffer — before he became resistant and brandished a knife — and invoke legal terminology to that end.

[80] In short, Acting Sgt. Pullbrook's notes read like a prepared statement designed, at least in part, to justify his and his partner's conduct, unlike a set of police notes that simply record the events in a straightforward fashion. And while I would not suggest there is anything inaccurate or dishonest in the notes as a result of counsel's participation, an officer's notes are not meant to provide a "lawyer-enhanced" justification for what has occurred. They are simply meant to record an event, so that others — like the SIU Director — can rely on them to determine *what* happened. In this case, that is what the SIU Director was unable to do.

(4) Conclusion on the Interpretation of Section 7(1)

[4] Apart from SIU investigations, there is no evidence in the record to suggest that police officers seek the advice of counsel before preparing their notes in other contexts. This is unsurprising. Officers know how to prepare their notes in accordance with their duty.

[81] As I noted at the outset, the ambit of s. 7(1) must be interpreted harmoniously with the regulatory scheme. Here, we are asked to pick between two possible interpretations of s. 7(1) of the regulation — one that reads the provision as allowing consultation with counsel at the note-making stage, and one that does not. As I have just explained, interpreting s. 7(1) as allowing this consultation is inconsistent with the purpose of the legislative scheme, runs contrary to the legislative intent behind the provision, and creates a real risk that officers will fail to meet their obligation under s. 9 of the regulation to make notes in accordance with their duty. Reading s. 7(1) as providing a more limited entitlement to counsel that does not apply at the note-making stage, however, avoids all three of these difficulties. Under this interpretation, the provision is in harmony with the purpose of the legislative scheme, the intent behind the provision, and the s. 9 duty to make notes. This is precisely what the modern approach to statutory interpretation demands. As a result, this interpretation must be accepted.

E. *The Cross-Appeal*

[82] The Court of Appeal concluded that, while s. 7(1) of the regulation does not entitle officers to the assistance of counsel in the preparation of their notes, it does entitle them to "basic legal advice" about the nature of their rights and obligations under the Act and the regulation before they complete their notes. That basic advice could include informing officers that they are required to complete their notes prior to

the end of their tour of duty unless excused by the chief of police, and that their notes will be submitted to the chief of police (para. 81).

[83] With respect, I disagree with this aspect of the Court of Appeal's reasons. In my view, the legislative history shows that s. 7(1) was not meant to create an entitlement to counsel before an officer has completed his or her notes. Without in any way impugning the integrity of counsel or police officers, even the perfunctory consultation contemplated by the Court of Appeal is liable to cause an "appearances problem" similar to the one I have already identified. Because the initial consultation is privileged, the public will have no way of knowing what was discussed. As a result, the same threat to public confidence exists, even if on a somewhat diminished scale.

[84] A loss of public trust would seem a high price to pay for an initial consultation that, in my view, achieves no tangible benefit. Counsel cannot discuss the facts surrounding the incident in any meaningful sense, if at all; nor can there be any discussion about the legal issues that flow from the facts. Under the Court of Appeal's model, counsel is limited to providing officers with basic information about their rights and obligations under the legislative scheme. This information can easily be conveyed in ways that do not generate any appearance problem. It can and should be included as part of every officer's training. If there is some need to refresh officers as to their responsibilities after an event triggering an SIU investigation, this

refresher can be provided by a ranking officer or a generic card kept in an officer's notebook.

[85] In the end, the basic legal advice contemplated by the Court of Appeal is essentially meaningless — and anything that might be meaningful sends counsel into a minefield. In this regard, I agree with the Officers that the court's proposal is unhelpful:

> The officer is unable to ascertain what questions can properly be addressed to counsel and counsel is required to navigate through an obstacle course and provide little, if any, practical assistance to his client. The permissible advice is, in effect, no advice at all. The Court of Appeal for Ontario has relegated the role of counsel to a recitation of the most basic legislative requirements rather than providing meaningful legal assistance. [Emphasis added; A.F., at para. 72.]

[86] In reaching the conclusion that officers are not permitted to consult with counsel before they have completed their notes, I acknowledge the fact that officers who have been involved in a traumatic incident may well feel the need to speak to someone before they complete their notes. While the regulation prevents such officers from consulting with counsel, it does not prevent them from speaking to doctors, mental health professionals, or uninvolved senior police officers before they write their notes. Moreover, the regulation empowers the chief of police to allow such officers more time to complete their notes (see s. 9(5)).

[87] I should also be clear about the scope of my conclusion. Once officers have completed their notes and filed them with the chief of police, they are free to

consult with counsel. This would include consultation both before and after the interview with the SIU. Consulting with counsel at that stage is consistent with the plain wording of s. 7(1) of the regulation and does not derogate from an officer's duty or from the purpose of the legislative scheme.

VII. Disposition

[88] For these reasons, I agree with the Court of Appeal that police officers, under the Act and the regulation, are not permitted to have the assistance of counsel in the preparation of their notes.[5] However, in my respectful view, the Court of Appeal erred in finding that police officers are entitled to receive basic legal advice as to the nature of their rights and duties prior to completing their notes.

[89] I would therefore dismiss the appeal and allow the cross-appeal and grant a declaration pursuant to Rule 14.05(3) of the *Rules of Civil Procedure* in the following terms:

The *Police Services Act*, R.S.O. 1990, c. P.15, s. 113(9), and the regulation regarding *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit*, O. Reg. 267/10, prohibit subject and witness officers from

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[5] It must be noted that s. 7(1) provides an entitlement to consult with both counsel and "police association" representatives. The arguments before this Court centred on the entitlement to counsel. Virtually no mention was made of the role of police association representatives, and the order of the Court of Appeal does not address this issue. In the absence of any record or arguments with respect to the representatives, I would thus confine my conclusion to the entitlement to counsel. It is clear, however, that, to the extent that the role of police association representatives approximates that of counsel, my conclusion would apply to them with equal force.

consulting with counsel until the officers have completed their police notes and filed them with the chief of police.

[90] The motion to strike brought by the SIU Director is granted. I would award costs to the Families on the appeal and cross-appeal, but would make no other order as to costs.

The reasons of LeBel, Fish and Cromwell JJ. were delivered by

[91] LEBEL AND CROMWELL JJ. (dissenting) —We have had the benefit of reading Justice Moldaver's reasons. We do not agree that the wording of the legislation alone fully resolves the issues in this case. However, we agree with our colleague that it is inconsistent with a police officer's duty to complete his or her notes to seek legal advice which would influence the contents of those notes. On that basis, we agree that the appeal should be dismissed. However, we disagree with Justice Moldaver's proposed disposition of the cross-appeal. As we see it, it is not inconsistent with the officer's duty or with the legislation to have access to legal advice about the limited matters contemplated by the Court of Appeal. We would therefore dismiss the cross-appeal.

[92] We rely on the facts as set out by Justice Moldaver in his reasons.

I. Section 7(1) Does Not Restrict the Liberty to Consult with Counsel

[93] Justice Moldaver is of the view that s. 7(1) of the *Conduct and Duties of Police Officers Respecting Investigations by the Special Investigations Unit* regulation, O. Reg. 267/10, is a comprehensive code regarding a police officer's entitlement to counsel and that "the scope of [the] entitlement to counsel . . . flows from a regulatory provision" (para. 29).

[94] Respectfully, we do not agree. The starting point for the analysis and for interpreting the legislation is that a police officer, in common with everyone else, is free to get legal advice provided that doing so is not prohibited by law or contrary to the police officer's other responsibilities and duties. Viewed in this light and interpreted in its full context, the regulation cannot be viewed as a comprehensive code and therefore does not mandate the result proposed by Justice Moldaver. Everyone is at liberty to consult counsel whenever they wish unless doing so is precluded by lawful authority or inconsistent with their duty. Section 7(1) is simply a confirmation of the entitlement to counsel of police officers at the interview stage of a Special Investigations Unit ("SIU") investigation.

[95] The regulation was designed to clarify the rights of officers, their duties, and the processes of the SIU. It is not a comprehensive code that determines the scope of the right to counsel during an SIU investigation or excludes any other consultation with counsel or police association representative. When freedoms are restricted under the regulation, the restrictions are expressed clearly, either by the regulation's express words or by reason of inconsistency with its purpose.

[96] The enactment of the regulation was necessary in light of uncertainty with respect to the rights and duties of police officers and processes of the SIU following its inception in 1990 (see *Consultation Report Concerning Police Cooperation with the Special Investigations Unit* (1998) ("Adams Report 1998"), at pp. 13 and 22-24). As noted by Justice Moldaver, the SIU operated for years in the absence of the regulation intended to guide the conduct of police officers *vis-à-vis* SIU investigations. Prior to the enactment of the regulation, however, police officers did not operate in a lawless vacuum. Although the regulation created some legal distinctions that did not exist beforehand, the rights and duties of police officers were merely reiterated more precisely and clarified in the regulation. The *Police Services Act*, R.S.O. 1990, c. P.15, (as well as the common law) already provided for the rights and duties of police officers. This is confirmed in the 1998 Adams Report. In this report, the Honourable George Adams stated:

> With respect to the cooperation police officers are expected to provide to an SIU investigation, the Act says only:
>
> 113(9) Members of police forces shall cooperate fully with the members of the unit in the conduct of investigations.
>
> There are no other references in the statute or in the regulations to the conduct of SIU investigations. However, the express duties of police officers in the Act and the regulations are cast in sufficiently general terms so that a failure to cooperate with the SIU is a breach of duty. Nevertheless, the generality of s. 113(9) and its potential relationship with the *Canadian Charter of Rights and Freedoms* have proven fertile ground for dispute and confusion over what precisely is expected of police officers and chiefs of police by this subsection. [Emphasis added; footnote omitted; p. 13.]

[97] Such a clarification of existing rights and duties, however, cannot be an exhaustive code. The provisions of the regulation on their own do not have the requisite comprehensiveness to qualify as complete codes. To characterize the provisions of the regulation as a "complete code" undermines the importance of the rights, duties and liberties of police officers and disregards the complexity of the legal environment that grounds and defines them. For example, s. 9 of the regulation provides for officers' duty to complete notes, but leaves the whole content of this duty left to be spelled out elsewhere. To view s. 9 as an exhaustive framework of the duty to write notes would be to leave officers with insufficient guidance. Surely this provision on its own cannot be interpreted as a comprehensive code or a part of a complete code.

[98] Section 7(1) is similarly bare. It is inconsistent to say on one hand that s. 7(1) of the regulation comprehensively sets out an officer's entitlement to counsel, yet on the other hand leave open the question as to whether a police officer who has completed his or her notes is entitled to consult counsel before (or after) his or her interview and the appropriate extent of such consultation; the reasons of our colleague do not answer this question. Leaving such a basic question unanswered in s. 7(1) conflicts with the very nature of a comprehensive, exhaustive framework. Such basic questions must in fact be answered by examining the rights and duties of police officers in light of the common law and the overarching purpose of the Act; examining s. 7(1) on its own does not suffice.

II. The Appropriate Interpretation of Section 7(1) of the Regulation and a Police Officer's Freedom to Consult Counsel

[99] Given that our approach is to emphasize a starting point of liberty and to acknowledge that s. 7(1) of the regulation on its own is not a comprehensive code, our interpretation of the scope of s. 7(1) differs from that of Justice Moldaver. Under the modern approach to legal interpretation, the words of s. 7(1) are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41).

[100] Section 7(1) reads as follows:

> Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of a police association and to have legal counsel or a representative of a police association present during his or her interview with the SIU.

[101] The plain wording of s. 7(1) is declaratory and affirmative in nature rather than prohibitive. Further, the provision is conjunctive — it grants the right to consult with legal counsel *and* the right to have legal counsel present during an SIU interview. This wording does not oust the rights that police officers would otherwise enjoy as ordinary citizens. This wording also confirms that the regulation's purpose is to clarify, and not to expand or remove, rights and duties.

[102] Another principle of modern legal interpretation is that provisions of a statute or a regulation must be read in context and in harmony with other provisions of the statute or regulation. Thus, we acknowledge the importance of the relationship between a police officer's duty to write notes about an incident and his or her entitlement to consult counsel. It is clear that police officers have a duty to make notes in an independent, timely and comprehensive manner. But the question is whether, under a correct interpretation, the existence and execution of this duty necessarily excludes any form of legal consultation prior to the drafting of the notes.

[103] The potential tension between the right to consult and the duty of the officer to write complete and independent notes can be resolved by simply drawing a line to determine how and when the right to consult with counsel should not be exercised. In our view, the reasons of Sharpe J.A. in the Court of Appeal drew the line at the right place (2011 ONCA 716, 107 O.R. (3d) 721). We agree with him that police officers should not be allowed to consult about the drafting of the notes themselves where such consultation affects the independence of notes. The contents and drafting of the notes should not be discussed with counsel. The drafting should not be directed or reviewed by counsel. The notes must remain the result of a police officer's independent account of the events. However, eliminating any form of consultation before the drafting of the notes is an entirely different matter. Such an overly cautious approach takes no account of the basic freedoms that police officers share with other members of society. Everyone is entitled to seek the advice of a lawyer. This freedom also reflects the importance of the societal role of lawyers in a

country governed by the rule of law. Lawyers represent people, communicate legal information and give advice. The execution of these functions contributes to the maintenance of the rule of law. Indeed, these functions are deemed so important that they are often protected by strong privileges of confidentiality that are linked to our basic values and constitutional rights. With this in mind, the freedom to consult with counsel should not be eliminated merely through a narrow reading of the regulation in the absence of clear legislative intent. This narrow interpretation also reflects an unjustified mistrust of lawyers. It cannot be assumed that lawyers will advise their clients to break the law and fail to discharge their duties to the public and to justice itself.

[104] Interpreting s. 7(1) of the regulation purposively requires that we give effect to police officers' freedom to consult counsel and at the same time consider the importance of the SIU's mandate to enhance public confidence in the police. The content of a police officer's notes cannot vary in accordance with his or her personal legal interests. To that effect, legal counsel must be cognizant of an imperative ethical boundary — they cannot place their clients' interests ahead of their duty to the public and the advice they provide must be confined within this boundary. It cannot be assumed that they will not be faithful to their ethical duties or that they will recommend that police officers disregard their obligations. Lawyers will know that they cannot give advice on the style or content of the notes. They will be mindful of the proper scope of their advice.

III. The Appropriate Scope of Legal Consultation

[105] Sharpe J.A.'s reasons properly define the appropriate scope of legal consultation prior to the drafting of the notes of the police officer. His approach acknowledges that police officers have a duty to write independent and comprehensive notes in a timely manner *and* that brief and basic legal consultation does not necessarily interfere with that duty.

[106] Justice Moldaver suggests:

> A reasonable member of the public would naturally question whether counsel's assistance at the note-making stage is sought by officers to help them fulfill their duties as police officers, or if it is instead sought, in their self-interest, to protect themselves and their colleagues from the potential liability of an adverse SIU investigation. [para. 50]

[107] However, the standard for determining public confidence is a reasonable member of the community who is properly informed about "the philosophy of the legislative provisions, *Charter* values and the actual circumstances of the case" (*R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 41, quoting *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269, at p. 274). If this is the standard, the member of the community would know that an officer's notes cannot be used against him or her in the course of an investigation by the SIU. This is because of s. 9(3) of the regulation and the treatment the Attorney General affords to subject officers' notes as involuntary statements that attract both use-immunity and derivative use-immunity. The risk of *self*-interest prevailing over an officer's public duty is therefore slightly exaggerated.

The concern relating to public confidence in the context of police completing their notes impartially relates to an apprehension that an officer may place his or her *colleague*'s interest over his or her public duty. More importantly, to be skeptical of the propriety of legal counsel's advice in the presence of clear guidelines relating to the content of the advice set out for their benefit is not reasonable. This would undermine the trust we instill in lawyers as officers of the court.

[108] Legal consultation on the specific contents of an officer's notes runs the risk of compromising an officer's independent account of the facts. We agree with Sharpe J.A. that appropriate advice given to a police officer is the following:

> - he or she is required to complete notes of the incident prior to the end of his or her tour of duty unless excused by the chief of police;
>
> - the lawyer cannot advise the officer what to include in the notes other than that they should provide a full and honest record of the officer's recollection of the incident in the officer's own words;
>
> - the notes are to be submitted to the chief of police;
>
> - if the officer is a subject officer, the chief of police will not pass the notes on to the SIU;
>
> - if the officer is a witness officer, the chief of police will pass the notes on to the SIU;
>
> - the officer will be required to answer questions from the SIU investigators; the officer will be entitled to consult counsel prior to the SIU interview and to have counsel present during the interview. [para. 81]

These elements outline the steps and procedures of an SIU investigation, and there is no harm in allowing police officers this kind of legal advice. Our colleague suggests

that this advice achieves "no tangible benefit" (para. 84). While this brief, informative conversation might not be as meaningful as comprehensive legal advice on the relationship between an officer's notes and potential liability, it might help to remind an officer of his or her duties in the circumstances and put the officer at ease after having experienced a potentially traumatic incident. The utility of having some information about one's rights and obligations under the legislative scheme is clear.

[109] Indeed, our colleague recognizes the natural instinct officers would have to listen to the "good advice of counsel" (para. 77). We are in complete agreement. For this reason, with such limits outlined above, there are no reasonable grounds for concern regarding an officer's reliance on legal counsel's advice. Further, there are no reasonable grounds for the public to suspect that counsel will not abide by these limits. Lawyers have duties towards both the public and the court. One of these duties is to encourage their clients to comply with the law. According to M. Orkin in *Legal Ethics* (2nd ed. 2011), at p. 16:

> It follows that the lawyer should uphold the law; should not advise or assist the client in violating the law; . . . and should help to improve the administration of justice.
>
> . . .
>
> . . . Not only is a lawyer required affirmatively to uphold the law, but is also under a duty not to subvert the law.

This is not novel to our legal tradition. We expect and trust lawyers to act as ethical agents as part of our justice system. As Estey J. stated in *Irvine v. Canada*

(Restrictive Trade Practices Commission), [1987] 1 S.C.R. 181, at p. 211, citing *Halsbury's Laws of England* (4th ed. 1973), vol. 3, at para. 1137, with approval:

> A barrister has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he properly may and which he thinks will help his client's case, without regard to any unpleasant consequences to himself or any other person. In the interests of the administration of justice, however, a barrister has an overriding duty to the court, to the standards of his profession and to the public. Thus, he must not knowingly mislead the court; this duty prevails over that he owes to his client. [Emphasis added.]

[110] If the ethical duties of lawyers are fulfilled, which we trust them to be, there is no inconsistency with the provision of basic legal advice and the overarching purpose of public oversight of police. As we said above, legal advice relating to the content of the notes, however, might run the risk of compromising the independence of an officer's recollection of the facts by shifting an officer's focus from what occurred to potential legal consequences under various scenarios. However, the reasons of the Court of Appeal properly addressed the scope of advice to which a police officer is entitled if he or she chooses to seek it in order to safeguard the independence of the drafting of notes. Only liberties that are expressly displaced or inconsistent with the purposes of the Act or a police officer's duties should be restricted. There is no need to completely eliminate a police officer's liberty to consult counsel.

[111] For these reasons, we would dismiss the appeal and the cross-appeal.

Appeal dismissed and cross-appeal allowed, LEBEL, FISH *and* CROMWELL JJ. *dissenting on cross-appeal.*

Solicitors for the appellants/respondents on cross-appeal: Greenspan Humphrey Lavine, Toronto.

Solicitors for the respondents/appellants on cross-appeal Ruth Schaeffer, Evelyn Minty and Diane Pinder: Falconer Charney, Toronto.

Solicitors for the respondent/appellant on cross-appeal Ian Scott, Director of the Special Investigations Unit: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondent/respondent on cross-appeal Julian Fantino, Commissioner of the Ontario Provincial Police: Ministry of Community Safety and Correctional Services, Orillia, Ontario.

Solicitors for the intervener the Canadian Civil Liberties Association: Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Fasken Martineau DuMoulin, Vancouver.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Legal Clinic, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Webber Schroeder Goldstein Abergel, Ottawa.

Solicitor for the intervener Richard Rosenthal, Chief Civilian Director of the Independent Investigations Office of British Columbia: Independent Investigations Office of British Columbia, Surrey.

Solicitors for the intervener the Urban Alliance on Race Relations: Stevensons, Toronto.

Solicitor for the interveners the Canadian Police Association and the Police Association of Ontario: David B. Butt, Toronto.

TAB 7

PARAS. 13-15

Indexed as:
Perera v. Canada (C.A.)

Ranjit Perera, Frank Boahene and Fred Bloch (Appellants)
(Plaintiffs)
v.
The Queen in Right of Canada (Respondent) (Defendant)
and
Public Service Alliance of Canada (Intervenor)

[1998] 3 F.C. 381

[1998] F.C.J. No. 413

Court File No. A-146-97

Federal Court of Canada - Court of Appeal

Pratte, Létourneau and McDonald JJ.A.

Heard: Ottawa, February 24 and 25, 1998.
Judgment: March 31, 1998.

Practice -- Preliminary determination of question of law -- Appeal from order dismissing R. 474 motion for direction certain questions of law be determined before trial -- R. 474 contemplating two-stage procedure: (1) decision whether to order questions be determined before trial; (2) decision answering questions of law -- On appeal from decision rendered at first stage, F.C.A. empowered only to make decision ought to have been made at that stage -- R. 474 conferring discretion to order determination of question of law -- Questions must be pure questions of law i.e. may be answered without requiring any findings of fact -- Legal question may be based on assumption of truth of allegations in pleadings provided facts, as alleged, sufficient to enable Court to answer question -- Questions must be not merely academic but conclusive of matter in dispute i.e. may probably be decided in such way as to dispose of action or substantial part thereof -- R. 474 should be resorted to only when will save time, money -- All circumstances must be considered -- Motions Judge properly exercising discretion as believed questions would be answered in appellants' favour, thus necessitating trial.

Constitutional law -- Charter of Rights -- Enforcement -- Appeal from order striking out paragraphs of prayer for relief seeking letters of apology, directing adoption of special program to rectify adverse effect of discriminatory practices, directing employer to implement Employment Equity Program -- Action alleging individual, systemic

discrimination based on race, national or ethnic origin, colour -- Founded on Charter, s. 24, conferring right to seek remedy from competent court -- In action under s. 24, courts free to fashion remedies deemed appropriate in circumstances -- As remedy requiring letter of apology, may contravene Charter, s. 2(b) (freedom of expression), must be justifiable under s. 1 -- That question not answerable without trial -- As CHRT having jurisdiction to impose programs to rectify effects of discrimination, supervisory courts having power to impose similar remedies when deemed appropriate.

Federal Court jurisdiction -- Appeal from order striking out paragraphs of prayer for relief seeking letters of apology, directing employer to adopt program to rectify adverse effect of discriminatory practices, directing CIDA to implement Employment Equity Program on ground outside Court's jurisdiction -- Statement of claim alleging individual, systemic discrimination -- As superior court of record with supervisory jurisdiction, Federal Court having jurisdiction to enforce constitutional equality rights in federal sphere by providing appropriate, just remedy pursuant to Charter, s. 24 -- As CHRT having jurisdiction to impose programs to remedy effects of discrimination, courts must have power to impose similar remedies if deemed appropriate -- In context of systemic discrimination, such remedies, in order to be just, appropriate may take form of orders sought by appellants.

This was an appeal from a Trial Division order dismissing a Rule 474 motion, and striking out certain paragraphs of the prayer for relief under Rule 419; and a cross-appeal from the Judge's refusal to strike out the statement of claim in its entirety. The statement of claim alleged individual and systemic discrimination against the appellants, former CIDA employees, on the basis of race, national or ethnic origin and colour contrary to Charter, section 15. The prayer for relief sought a variety of remedies, including orders directing that letters of apology be written to the appellants, and that CIDA adopt a special program to rectify the adverse effect of discriminatory practices and implement an Employment Equity Program. The respondent filed a Rule 419 notice of motion to strike out the statement of claim as disclosing no cause of action. The appellants then filed a Rule 474 notice of motion seeking an order directing that certain questions of law be determined before trial. The Motions Judge dismissed the motion under Rule 474, and refused to strike out the statement of claim, but struck out the paragraphs of the prayer for relief claiming the above-mentioned remedies.

Held, the cross-appeal should be dismissed; the appeal should be allowed only in so far as it is directed against that part of the order of the Trial Division that struck out subparagraphs 12(a)(iii), (b)(iii), (c)(iii) and (d)(ii).

Rule 474 contemplates a two-stage procedure: if the Court decides that the proposed questions should be determined before trial, then it must, after a new hearing, render a second decision answering the questions of law. On an appeal from a decision rendered at the first stage of the procedure, the Court of Appeal is empowered only to make the decision that should have been made at that first stage of the procedure.

Rule 474 confers on the Court merely the discretion to order that a determination of a question of law be made. The Court must be satisfied that the proposed questions are

pure questions of law i.e. questions that may be answered without having to make any finding of fact. The purpose of the Rule is to have the question answered before trial; it is neither to split the trial in parts nor to substitute for part of the trial a trial by affidavits. The parties are not required to agree on the facts giving rise to the legal questions; a legal question may be based on an assumption of truth of the allegations of the pleadings provided that the facts, as alleged, are sufficient to enable the Court to answer the question.

Before exercising its discretion under Rule 474, the Court must also be satisfied that the questions to be answered are not academic and will be "conclusive of a matter in dispute". Rule 474 does not require an absolute certainty that the determination of the question will dispose, in whole or in part, of the litigation. The judge hearing the question must only be satisfied that the proposed question may probably be decided in such way as may dispose of the action or some substantial part of it. It is therefore not necessary that the question of law be one which, whatever way it is answered, will be decisive of the litigation. Once these requirements are met, the Court is under no obligation to grant the Rule 474 motion. It must, at that stage, exercise its discretion having in mind that the procedure contemplated by Rule 474 is exceptional and should be resorted to only when the Court is of the view that the adoption of that exceptional course will save time and expense. The Court must consider all the circumstances, including the agreement of the parties, the Judge's opinion as to the probability that the question will be answered in a manner that will not dispose of the litigation, the complexity of the facts that will have to be proved at the trial and the desirability, for that reason, of avoiding such a trial, the difficulty and importance of the proposed questions of law, the desirability that they not be answered in a "vacuum", and the possibility that the determination of the questions before trial might, in the end, save neither time nor expense.

The Motions Judge could not accede to the appellants' motion if he was not satisfied that the preliminary determination of the questions would save either time or costs. As the Motions Judge was of the opinion that the answers would favour the appellants, the trial would still have to take place. The predetermination of those questions would not likely shorten the proceedings. The Motions Judge did not wrongly exercise his discretion in rejecting the appellants' Rule 474 motion.

As to the motion to strike, it had to be remembered that the appellants' action was founded on Charter, section 24. As a rule, in an action under section 24, the courts must be free, if they find in the plaintiff's favour, to fashion the remedies that they deem appropriate in the circumstances. The prayer for relief requiring letters of apology should not have been struck out. As such a remedy may contravene Charter, paragraph 2(b) which protects freedom of expression, it may only be granted if it is justifiable under section 1, a question that cannot be answered in the abstract.

Remedies such as the imposition of programs to rectify and remedy the effects of the discrimination alleged, imposed by a Canadian Human Rights Tribunal to counter and remedy systemic discrimination, have been found to be justifiable. As a superior court of record with supervisory jurisdiction, the Federal Court does have jurisdiction to enforce constitutional equality rights in the federal sphere by providing to an aggrieved citizen an

appropriate and just remedy pursuant to section 24. In the context of systemic discrimination, such remedies, in order to be just and appropriate, may take the form of the orders sought by the appellants.

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(b), 15, 24.
Canadian Human Rights Act, R.S.C., 1985, c. H-6.
Crown Liability and Proceedings Act, R.S.C., 1985, c. C-50 (as am. by S.C. 1990, c. 8, s. 21), ss. 3(a), 10.
Federal Court Act, R.S.C., 1985, c. F-7, s. 39 (as am. by S.C. 1990, c. 8, s. 10).
Federal Court Rules, C.R.C., c. 663, RR. 419, 474 (as am. by SOR/79-57, s. 14).
Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(g).

Cases Judicially Considered

Applied:

Berneche v. Canada, [1991] 3 F.C. 383; (1991), 133 N.R. 232 (C.A.);
Nelles v. Ontario, [1989] 2 S.C.R. 170; (1989), 60 D.L.R. (4th) 609; 41 Admin. L.R. 1; 37 C.P.C. (2d) 1; 71 C.R. (3d) 358; 42 C.R.R. 1; 98 N.R. 321; 35 O.A.C. 161;
Krznaric v. Chevrette (1997), 154 D.L.R. (4th) 527; 98 CLLC 145,010 (Ont. Ct. (Gen. Div.)).

Considered:

Novopharm Ltd. v. Wyeth Ltd. (1986), 26 D.L.R. (4th) 80; 8 C.P.R. (3d) 448; 64 N.R. 144 (F.C.A.);
Windsor Refrigerator Co., Ltd. v. Branch Nominees, Ltd., [1961] 1 All E.R. 277 (C.A.);
David (Asoka Kumar) v. M. A. M. M. Abdul Cader, [1963] 3 All E.R. 579 (P.C.);
Attorney-General for British Columbia v. Attorney-General for Canada, [1914] A.C. 153 (P.C.);
Tilling v. Whiteman, [1980] A.C. 1 (H.L.);
Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; (1987), 40 D.L.R. (4th) 193; 27 Admin. L.R. 172; 87 CLLC 17,022; 76 N.R. 16;
Robichaud v. Canada (Treasury Board), [1987] 2 S.C.R. 84; (1987), 40 D.L.R. (4th) 577; 8 C.H.R.R. D/4326; 87 CLLC 17,025; 75 N.R. 303.

Referred to:

R. v. Achorner, [1977] 1 F.C. 641; (1976), 16 N.R. 346 (C.A.);
Page v. Churchill Falls (Labrador) Corp. Ltd., [1972] F.C. 1141; (1972), 29 D.L.R. (3d) 236 (C.A.);
Asbjorn Horgard A/S v. Northwest Tackle Manufacturing Ltd., [1982] 1 F.C. 680; (1981), 56

C.P.R. (2d) 115 (T.D.);
Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; (1989), 59 D.L.R. (4th) 416; 26 C.C.E.L. 85; 89 CLLC 14,031; 93 N.R. 183.

APPEAL from order dismissing a Rule 474 motion, and striking out certain parts of the prayer for relief; and cross-appeal from the Judge's refusal to strike out the statement of claim in its entirety (Perera v. Canada, [1997] F.C.J. No. 199 (T.D.) (QL)). The cross-appeal should be dismissed; the appeal should be allowed only in so far as it was directed against that part of the order that struck out subparagraphs 12(a)(iii), (b)(iii), (c)(iii) and (d)(ii).

Counsel:

Peter C. Engelmann for appellants.
Geoffrey S. Lester for respondent.
Andrew J. Raven for intervenor.

Solicitors:

Caroline Engelmann Gottheil, Ottawa, for appellants.
Deputy Attorney General of Canada for respondent.
Raven, Allen, Cameron & Ballantyne, Ottawa, for intervenor.

The following are the reasons for judgment rendered in English by

1 **LÉTOURNEAU J.A.**:-- This is an appeal and a cross-appeal from an order of the Trial Division [[1997] F.C.J. No. 199 (T.D.) (QL)] disposing of two motions: a motion made by the appellants under Rule 474 of the Federal Court Rules [C.R.C., c. 663 (as am. by SOR/79-57, s. 14)], which was dismissed, and a motion made by the respondent under Rule 419, which was granted only in part. The appellants' appeal is directed against the rejection of their Rule 474 motion and, as well, against the Judge's decision, under Rule 419, to strike out certain parts of the prayer for relief of their statement of claim. The respondent's cross-appeal attacks the Judge's refusal to strike out the appellants' statement of claim in its entirety as disclosing no reasonable cause of action.

2 The dispute between the parties arose out of the appellants' employment with the Canadian International Development Agency (CIDA). In their statement of claim, filed on March 16, 1992, as it was amended in 1994 and 1996, the appellants alleged that, while employed with CIDA, they had been subject to individual and systemic discrimination by servants of the respondent on the basis of their race, national or ethnic origin and colour contrary to section 15 of the 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]]. They alleged that twenty-two named individuals working for CIDA and the respondent hindered their career ambitions. The discrimination related to selections for promotions and acting appointments, performance appraisal reviews, selections for postings abroad, assignment of work and responsibilities, and delegation of authority. They also alleged that, in answer to their complaints of discrimination, retaliatory actions culminating in the termination of their employment were taken against them. In their prayer for relief, the appellants sought a variety of remedies including an order directing that appropriate letters of apology be written to the appellants, an order directing CIDA to adopt a special program to rectify the adverse effect of discriminatory practices on visible minorities in CIDA and an order directing CIDA to implement an Employment Equity Program.

3 The respondent has not yet filed a defence to the amended amended statement of claim. However, in her amended statement of defence, the respondent denied liability in this matter. More particularly, she denied all allegations of discrimination and retaliation; she asserted that, in view of the Canadian Human Rights Act [R.S.C., 1985, c. H-6], paragraph 3(a) and section 10 of the Crown Liability and Proceedings Act [R.S.C., 1985, c. C-50 (as am. by S.C. 1990, c. 8, s. 21)], section 39 of the Federal Court Act [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 10)] and paragraph 45(1)(g) of the Limitations Act [R.S.O. 1990, c. L.15], the statement of claim did not disclose a reasonable cause of action; finally, the respondent pleaded that the Court did not have jurisdiction to grant some of the remedies sought by the appellants.

4 The respondent filed a Rule 419 notice of motion asking that the appellants' statement of claim be struck out as disclosing no cause of action. The appellants counter-attacked by filing a Rule 474 notice of motion seeking an order directing that certain questions of law be determined before trial.

5 Pursuant to an order of the Associate Chief Justice, these motions were heard together on February 10 and 11, 1997. On February 24, 1997, the Judge of first instance dismissed the appellants' motion under Rule 474 and, ruling on the respondent's motion under Rule 419, refused to strike out the appellants' statement of claim which, in his view, disclosed a reasonable cause of action, but struck out certain paragraphs of the prayer for relief claiming remedies that, in the Judge's opinion, the Court had no jurisdiction to grant. Hence this appeal and this cross-appeal.

I--The Appellants' Motion Under Rule 474[1]

6 By their motion, the appellants sought an order directing that five questions of law be determined before trial. Most of them had been raised by the respondent in her amended statement of defence and her Rule 419 notice of motion. These questions read as follows:

> (a) whether the within action for damages and other appropriate and just remedies pursuant to Section 24 of the Canadian Charter of Rights and Freedoms (the "Charter") for a breach of equality rights under Section 15 of the Charter exist at law, and if so:

(i) whether Section 15 of the Charter imposes a fiduciary responsibility on the Crown and its agents not to discriminate on the basis of the grounds proscribed and those analogous thereto, or alternatively the responsibility is analogous to that of a fiduciary; and
(ii) whether the within action is restricted by Section 32 of the Charter in any way;

(b) whether the within Charter action is statutorily ousted by the Canadian Human Rights Act, R.S.C. 1985, c. H-6;
(c) whether the within action, or any part thereof is statute barred as a result of Section 39 of the Federal Court Act and Section 45 of the Limitations Act, R.S.O. 1990, chap. L.15;
(d) whether the principles of issues estoppel/res judicata have any application in the within case . . . ;
(e) whether punitive damages are available in actions involving breaches of Section 15 Charter rights and/or breaches of the Crown Liability and Proceed-ings Act.

The appellants also asked for an order that those questions of law be determined on a case consisting, inter alia, of

(a) affidavit evidence filed herein, or to be filed by the parties;
(b) transcripts of any cross examination on affidavits;
(c) the pleadings filed herein, or to be filed, by the parties; . . .

In support of their motion the appellants filed six affidavits and more than six volumes of exhibits to establish the accuracy of the very vague allegations of their statement of claim.

7 The Judge of first instance [at paragraphs 7-9 (QL)] dismissed that motion on three grounds, namely,

> . . . the facts that go to the heart of this case are in dispute [and the parties disagree on the formulation of the question] . . . there is . . . no pure question of law that can be determined in the Rule 474 motion . . . because a ruling would require an adjudication on some of the facts in dispute . . . It has not been established that proceeding in the Rule 474 motion will expedite the trial.

That decision is apparently based on the decision of this Court in Berneche v. Canada, [1991] 3 F.C. 383 (C.A.), at page 388, where Mahoney J.A., after referring to decisions of the Trial Division which had refused to apply Rule 474 unless the parties agreed on the need for preliminary determination, stated:

> With respect, the Trial Division has unduly restricted the application of the Rule.

> What Rule 474(1)(a) requires is that there be application for preliminary determination by at least one of the parties: the Court cannot proceed ex proprio motu. It then requires that the Court be satisfied (1) that there is no dispute as to any fact material to the question of law to be determined; (2) that what is to be determined is a pure question of law, and (3) that its determination will be conclusive of a matter in dispute so as to eliminate the necessity of a trial or, at least, shorten or expedite the trial.

8 Counsel for the appellants conceded at the hearing the correctness of the decision under appeal with respect to questions (a)(i), (d) and (e). With respect to question (c), he did not make any express concession but seemed to acknowledge the obvious: in the circumstances of this case where he alleges that the discrimination suffered was of a continuing nature, no real benefit could be derived from an early determination of that question. That leaves us with three questions: (a), (a)(ii) and (b).

9 With respect to these three questions, counsel for the appellants argued that the three conditions formulated by Mahoney J.A. in the Berneche case were satisfied. He added that, in any event, the Judge had been wrong in failing to take into account that the proposed questions involved important Charter issues which, by their very nature, ought to be decided without delay. Finally, counsel invited us, not only to set aside the order of the Judge of first instance, but also to answer the three questions.

10 The main argument put forward by counsel for the respondent in support of the decision under attack was that these questions ought not to be decided before trial because, if they were to be answered in the manner proposed by the appellants, the matter would not be concluded one way or another; there would still need to be a trial in order to establish the allegations of the statement of claim. According to counsel, the only questions that may be determined before trial under Rule 474 are those which will be decisive of the trial, whatever be the answers that are given to them. Counsel also opposed the appellants' request that the Court, if it allowed the appeal, answer the proposed questions of law.

11 Dealing first with this last point, it seems clear that the Court would have no jurisdiction, on this appeal, to answer the proposed questions of law. Rule 474 contemplates a two-stage procedure: first, the Court decides whether to order that the proposed questions be determined before trial; second, if it makes such an order, then the Court must, after a new hearing, render a second decision answering the questions of law. On an appeal from a decision rendered at the first stage of the procedure, the only decision that the Court of Appeal is empowered to make is the decision that the Judge of first instance ought to have made at that first stage of the procedure; the Court, then, has no jurisdiction to make the order that the Judge of first instance has not yet made but ought to make at the second stage of the procedure.[2]

12 The only issue on this branch of the appeal, therefore, is whether the Judge of first

instance erred in concluding that the proposed questions of law ought not to be decided before trial.

13 It may be useful to recall that Rule 474 does not confer on anyone the right to have questions of law determined before trial; it merely confers on the Court the discretion to order, on application, that such a determination be made. In order for the Court to be in a position to exercise that discretion, it must be satisfied, as was stated in the Berneche case, that the proposed questions are pure questions of law, that is to say questions that may be answered without having to make any finding of fact. Indeed, the purpose of the Rule is to have the questions answered before trial; it is neither to split the trial in parts nor to substitute for part of the trial a trial by affidavits.[3] This is not to say, however, that the parties must agree on the facts giving rise to the legal questions; a legal question may be based on an assumption of truth of the allegations of the pleadings provided that the facts, as alleged, be sufficient to enable the Court to answer the question.[4]

14 Before exercising its discretion under Rule 474, the Court must also be satisfied that the questions to be answered are not academic and will be "conclusive of a matter in dispute". In this regard, it is important to note that, contrary to what was argued by counsel for the respondent, Rule 474 does not require an absolute certainty that the determination of the question will dispose, in whole or in part, of the litigation. The judge hearing the question must only be satisfied that the proposed question, as said by Jackett C.J. in R. v. Achorner,[5] "may probably be decided in such a way as may dispose of the action or some substantial part of it". It is therefore not necessary that the question of law be one which, whatever way it is answered, will be decisive of the litigation.[6]

15 Once these requirements are met, the Court is under no obligation to grant the Rule 474 motion. It must, at that stage, exercise its discretion having in mind that the procedure contemplated by Rule 474 is exceptional and should be resorted to only when the Court is of the view that the adoption of that exceptional course will save time and expense. It is in that light that the Court must take into consideration all the circumstances of the case which, in its view, militate in favour or against the granting of the motion. It is not possible to give a list of all these circumstances. The agreement of the parties is obviously one of them. Less obvious, perhaps, is the fact that the Judge may take into account his opinion as to the probability that the question will be answered in a manner that will not dispose of the litigation. He may also consider the complexity of the facts that will have to be proved at the trial and the desirability, for that reason, of avoiding such a trial. He must also take into consideration the difficulty and importance of the proposed questions of law, the desirability that they not be answered in a "vacuum", and the possibility that the determination of the questions before trial might, in the end, save neither time nor expense.[7]

16 This being said, I turn to the various attacks made by the appellants against the dismissal of their Rule 474 motion.

17 I see no merit in the appellants' contention that the Judge of first instance erred in ignoring that the proposed questions of law raise Charter issues which, because of their importance, ought to be determined before trial. No doubt, Charter issues are important

and very often difficult to resolve. But it is precisely for that reason that the courts are reluctant to answer them "in a vacuum" or on the basis of facts that are not proven.[8]

18 The appellants also say that the Judge of first instance was wrong in concluding that the facts material to the proposed questions of law were in dispute and that those questions were not pure questions of law. I am ready to assume, for argument's sake, that the Judge fell into these errors and that the questions were pure questions of law that could have been answered on the sole basis of the very vague allegations of the statement of claim. I cannot help saying, however, that the appellants themselves, who insisted that the questions be answered on the basis of the affidavit evidence that they had filed with their notice of motion, should share the blame for those errors.

19 What is important, however, is the last finding of the Judge, namely, that the preliminary determination of the questions would save neither time nor costs. Even if his other findings were wrong, he could not accede to the appellants' motion if he was not satisfied on this last point.

20 The Judge was obviously of opinion that the three questions with which we are concerned would eventually be answered in the appellants' favour. He said so when he disposed of the respondent's Rule 419 motion. He could hardly, in those circumstances, find that the predetermination of those questions would likely shorten the proceedings. Indeed, if the questions were given answers favourable to the appellants, the trial would still have to take place and there could be appeals not only from the final decision on the merit but also on the answers given to the questions of law.

21 Taking into account all the circumstances of this case, I cannot say that the Judge of first instance, in spite of the errors he may have made, wrongly exercised his discretion in rejecting the appellants' Rule 474 motion.

II--The Respondent's Rule 419 Motion

22 The respondent, by her motion, sought an order striking out the appellants' statement of claim as disclosing no reasonable cause of action. The Judge of first instance rejected that request. He was satisfied that the appellants had an arguable case. There is no reason to interfere with that conclusion.

23 The Judge, however, struck out subparagraphs 12(a)(iii), (b)(iii), (c)(iii), (d)(i) and (d)(ii) of the appellants' amended amended statement of claim which, in the Judge's opinion, claimed remedies which the Court had no jurisdiction to grant.

24 Subparagraphs 12(b)(iii) and (c)(iii) are identical to 12(a)(iii) but refer to different appellants; it is therefore sufficient to reproduce paragraphs 12(a)(iii), (d)(i) and (d)(ii):

> 12. The Plaintiffs claim as follows:
>
> (a) . . .

(iii) an appropriate letter of apology from the Minister responsible for CIDA or the President of CIDA for the harassment and discrimination that the Plaintiff Perera was subjected to and appropriate action to correct the continuing derogatory effects that discriminatory reprimands and appraisals given to him on his professional reputation;

. . .

(d) (i) to cease forthwith the discriminatory practices and, in order to prevent the occurrence of the same or similar practices, to take measures, within a reasonable time, including the adoption of a special program or plan, designed to rectify the adverse effect of the discriminatory practices on visible minorities in CIDA, particularly the discrimination that prevailed in the period between April 1985 to March 1992;

(ii) to implement an Employment Equity Program which would ensure that in the next five years:

(aa) at least 20% of all new appointments to the senior management category in CIDA, in each year, will be from the visible minority group;

(bb) at least 20% of all new hires in CIDA, in each year, will be from the visible minority group; . . .

25 The appellants' action is founded on section 24 of the Charter. That section, as stated by Lamer J. (as he then was) in Nelles v. Ontario,[9] "confers a right to an individual to seek a remedy from a competent court" and allows "courts to fashion remedies when constitutional infringements occur".

26 As a rule, therefore, on an action under section 24 of the Charter, the courts must be free, if they find in the plaintiff's favour, to fashion the remedies that they deem appropriate in the circumstances.

27 The only objection that may be raised against the part of the appellants' prayer for relief requiring letters of apology is that it seeks a remedy which, by its very nature, would contravene paragraph 2(b) of the Charter which protects freedom of expression.[10] That objection is well founded, but it follows that such a remedy may only be granted if it is justifiable under section 1, a question that cannot be answered in the abstract without knowledge of all the circumstances of the case. For that reason, subparagraphs 12(a)(iii), (b)(iii) and (c)(iii) should not have been struck out at this stage of the proceedings.

28 As to subparagraphs 12(d)(i) and (ii), which were also struck out by the Judge of first instance, they seek the imposition of programs to rectify and remedy the effects of the discrimination alleged by the appellants. The Supreme Court, in Canadian National Railway Co. v. Canada (Canadian Human Rights Commission),[11] found that remedies of that type, imposed by a Canadian Human Rights Tribunal to counter and remedy systemic discrimination, were entirely justifiable. In Robichaud v. Canada (Treasury Board)[12], the

Supreme Court found that, in cases where attitudes or behaviour need to be changed, an instrumental approach to remedies is necessary in order to enforce compliance with the purposes and objectives of human rights codes or legislations. It necessarily follows, in my view, that the courts must have, under section 24 of the Charter, the power to impose similar remedies when they deem it appropriate.

29 Indeed, it would be astonishing if the Federal Court, as a superior court of record with a supervisory jurisdiction, did not have jurisdiction to enforce constitutional equality rights in the federal sphere by providing to an aggrieved citizen an appropriate and just remedy pursuant to section 24 of the Charter. It would be all the more so if such jurisdiction found to be lacking in the Court were to exist in other instances subject to the supervisory powers of the Court, especially when these other instances, through statutory limitations, would not be in a position to grant a remedy which is appropriate and just in the circumstances. As Pardu J. of the Ontario Court (General Division) stated in Krznaric v. Chevrette,[13] superior courts of record have played and continue to play a role in redressing wrongs committed in the employment context.

30 I believe the Trial Division of this Court has jurisdiction pursuant to section 24 to provide effective remedies for breaches of a citizen's constitutional rights to equality and it cannot be ruled out that, in the context of systemic discrimination and circumstances warranting, such remedies, in order to be just and appropriate, may take the form of the orders sought by the appellants.

31 For these reasons, I would dismiss the respondent's cross-appeal, allow the appellants' appeal only in so far as it is directed against that part of the order of the Trial Division that struck out subparagraphs 12(a)(iii), (b)(iii), (c)(iii), (d)(i) and (d)(ii), and substitute the following sentence for the second paragraph of the order of the Trial Division:

> It is hereby ordered that the motion pursuant to Rule 419 is dismissed.

32 I would not make any order as to costs.

PRATTE J.A.:-- I agree.

McDONALD J.A.:-- I agree.

cp/d/nnb

1 S. 474 (1) of the Rules reads in part as follows:

> Rule 474. (1) The Court may, upon application, if it

> deems it expedient to do so
>
> > (a) determine any question of law that may be relevant to the decision of a matter, or
>
> . . .
>
> > and any such determination shall be final and conclusive for the purposes of the action subject to being varied upon appeal.

2 R. v. Achorner, [1977] 1 F.C. 641 (C.A.), at p. 647.

3 For that reason, the appellants' request that the question be answered on the basis of the voluminous affidavit evidence that they had filed could obviously not be granted.

4 See Page v. Churchill Falls (Labrador) Corp. Ltd., [1972] F.C. 1141 (C.A.) and Berneche v. Canada, supra, at p. 388.

5 Supra, note 2, at p. 646.

6 The contrary view finds support in the decision of this Court in Novopharm Ltd. v. Wyeth Ltd. (1986), 26 D.L.R. (4th) 80 (F.C.A.). It should be noted, however, that only one of the four authorities cited by the Court in that decision in support of its opinion was to the point: the decision of the Trial Division in Asbjorn Hogard A/S v. Northwest Tackle Manufacturing Ltd., [1982] 1 F.C. 680.

7 See Windsor Refrigerator Co., Ltd. v. Branch Nominees, Ltd., [1961] 1 All E.R. 277 (C.A.), where Lord Evershed said, at p. 283:

> > . . . the course which this matter has taken emphasises as clearly as anyone in my experience the extreme unwisdom--save in very exceptional cases--of adopting this procedure of preliminary issues. My experience has taught me . . . that the short cut so attempted inevitably turns out to be the longest way round.

and also David (Asoka Kumar) v. M. A. M. M. Abdul Cader, [1963] 3 All E.R. 579 (P.C.) where Viscount Radcliffe said, at p. 583:

> > Useful as the argument of preliminary issues can be when their determination can safely be foreseen as conclusive of the whole action in which they arise, experience shows that great care is needed in the selection of the proper occasion for allowing such

> procedure. Otherwise, the hoped-for shortening of proceedings and saving of costs may prove in the end to have only the contrary effect to what which is intended.

8 See Attorney-General for British Columbia v. Attorney-General for Canada, [1914] A.C. 153 (P.C.), at p. 162, per Viscount Haldane L.C. "Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied.

and also, Tilling v. Whiteman, [1980] A.C. 1 (H.L.), at pp. 17-18 per Lord Wilberforce: "So the case has reached this House on hypothetical facts, the correctness of which remains to be tried. I, with others, have often protested against the practise of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional."

9 [1989] 2 S.C.R. 170, at p. 196.

10 See Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038.

11 [1987] 1 S.C.R. 1114, at p. 1141 and 1143 ff.

12 [1987] 2 S.C.R. 84.

13 (1997), 154 D.L.R. (4th) 527 (Ont. Ct. (Gen. Div.)), at p. 541.

File No. CT-2014-002

COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act;*

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act,* by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

KOBO INC.

Applicant
(Moving Party)

- and -

**THE COMMISSIONER OF COMPETITION,
HACHETTE BOOK GROUP CANADA LTD.,
HACHETTE BOOK GROUP, INC.,
HACHETTE DIGITAL INC.,
HARPERCOLLINS CANADA LIMITED,
HOLTZBRINCK PUBLISHERS, LLC, and
SIMON & SCHUSTER CANADA, A DIVISION OF
CBS CANADA HOLDINGS CO.**

Respondents
(Responding Parties)

MEMORANDUM OF ARGUMENT OF KOBO INC.
(Motion to Strike Notice of Reference)

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