

FILED / PRODUIT

Date: August 25, 2025

CT- 2024-010

Grainne Gannon Dubroy for / pour
REGISTRAR / REGISTRAIRE

PUBLIC

CT-2024-010

OTTAWA, ONT.

141

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

**BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION
AND GOOGLE LLC
VOLUME 12 OF 20**

PUBLIC

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August 22, 2025

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Please see in particular para. 27

SUPREME COURT OF CANADA

CITATION: R. v. Archambault,
2024 SCC 35

APPEAL HEARD: February 14,
2024

JUDGMENT RENDERED:
November 1, 2024

DOCKET: 40428

BETWEEN:

His Majesty The King
Appellant

and

Agénor Archambault and Gilles Grenier
Respondents

- and -

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

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

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

JOINT REASONS: Côté and Rowe JJ.
(paras. 1 to 80)

CONCURRING REASONS: Kasirer J. (Jamal J. concurring)
(paras. 81 to 98)

CONCURRING REASONS: Martin J.
(paras. 99 to 147)

DISSENTING REASONS: Karakatsanis J. (Wagner C.J. and O'Bonsawin and Moreau JJ. concurring)
(paras. 148 to 304)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

His Majesty The King

Appellant

v.

**Agénor Archambault and
Gilles Grenier**

Respondents

and

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

Interveners

Indexed as: **R. v. Archambault**

2024 SCC 35

File No.: 40428.

2024: February 14; **2024: November 1.**

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Preliminary inquiry — Right to preliminary inquiry — Accused charged with historical sexual offences which carried maximum term of imprisonment of 10 years at time, but for which maximum penalty was later increased to 14 years — Amendment restricting availability of preliminary inquiries to accused persons charged with offences with maximum penalty of 14 years or more of imprisonment made to Criminal Code after charges laid — Whether accused have right to preliminary inquiry — Criminal Code, R.S.C. 1985, c. C-46, s. 535.

Legislation — Interpretation — Legislative amendment — Temporal application — Temporal presumptions — Amendment made to Criminal Code restricting availability of preliminary inquiries to accused persons charged with offences with maximum penalty of 14 years or more of imprisonment — Whether amendment applies to accused persons against whom charges were laid prior to amendment — Whether amendment applies to accused persons who are charged with offences for which current maximum sentence is at least 14 years but who are not personally liable to 14 years or more of imprisonment — Criminal Code, R.S.C. 1985, c. C-46, s. 535 — Interpretation Act, R.S.C. 1985, c. I-21, ss. 43, 44.

In unrelated cases, A and G were accused of one or more historical sexual offences against a child, which at the time of their commission carried a maximum term of imprisonment of 10 years. After the dates of the alleged offences and before charges were laid, the maximum penalty for the impugned conduct was increased from 10 to 14 years' imprisonment. A and G first appeared in the Court of Québec in the summer

of 2019. At first appearance, they reserved or postponed their right to elect their mode of trial to a later date. Then, in 2020, A and G each requested a preliminary inquiry. However, under an amendment to s. 535 of the *Criminal Code* that came into force on September 19, 2019, the availability of preliminary inquiries was now restricted to accused persons charged with offences with a maximum penalty of 14 years or more of imprisonment. In both matters, the Crown argued that the court lacked jurisdiction under the new s. 535 to hold a preliminary inquiry.

The Court of Québec held that the new s. 535 applied to A and G and that it lacked jurisdiction to preside over the preliminary inquiry. In its view, preliminary inquiries are of a purely procedural nature, and applying the new rule did not impact the substantive rights of A and G. A and G each challenged that interpretation. A Superior Court judge dismissed A’s challenge, characterizing the right to a preliminary inquiry as purely procedural and concluding that the new s. 535 required the accused to be charged with an offence for which they could be personally punishable by 14 years’ imprisonment or more. A different Superior Court judge dismissed G’s challenge, holding that preliminary inquiries affected the substantive right to a discharge but that G’s entitlement had not vested by the time the new s. 535 came into force — to get the benefit of the old rule, he should have both elected his mode of trial and asked for a preliminary inquiry before September 19, 2019.

The Court of Appeal concluded that the new rule in s. 535 did not apply to A and G and that they had a vested right to preliminary inquiries. Relying on the

principle of legality, the Court of Appeal held that the right to a preliminary inquiry accrues at two different points in time: it is accruing from the moment the offence is committed, and it is vested or accrued at the date of the first appearance. Given its conclusion on the vested right, the Court of Appeal did not address the question of how the amended version of s. 535 should be interpreted. The Court of Appeal remitted each file to the Court of Québec for a preliminary inquiry.

Held (Wagner C.J. and Karakatsanis, O'Bonsawin and Moreau JJ. dissenting): The appeal should be dismissed.

1. Temporal Application of the New Section 535 of the *Criminal Code*

Per Wagner C.J. and Karakatsanis, O'Bonsawin and Moreau JJ.: There is no clear basis on which to draw a conclusion about Parliament's specific intention, so the new limitation in s. 535 should apply unless it interferes with a substantive legal interest that had vested before it came into force. The amendment to s. 535 is not purely procedural because it can interfere with a substantive legal interest by depriving an accused of the opportunity to be discharged at a preliminary inquiry. However, that substantive legal interest only vests at the time a request for a preliminary inquiry is made. Accordingly, the new limitation in s. 535 should apply to all persons where a request for a preliminary inquiry was not made before September 19, 2019.

Per Kasirer and Jamal JJ.: Because the right to a preliminary inquiry is not purely procedural, the new s. 535 does not apply with immediate effect. Where a

request for a preliminary inquiry was made before September 19, 2019, the right to an inquiry vested. However, this is not the only situation in which the right to request a preliminary inquiry vests; this right also vests each time a court agrees to reserve an accused's right to elect their mode of trial.

Per Côté and Rowe JJ.: The amendment made to s. 535 is procedural in nature but affects a substantive right, that is, an accused's right to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge. Consequently, the presumption that Parliament did not intend to interfere with vested rights or privileges in relation to preliminary inquiries applies. The right to a preliminary inquiry vests at the time charges are laid. The former s. 535 should therefore continue to apply to persons charged prior to September 19, 2019.

Per Martin J.: The amendment to s. 535 affects an accused's substantive legal interests. Accordingly, the new s. 535 must apply prospectively only. Persons alleged to have committed an offence before September 19, 2019, that rendered them eligible for a preliminary inquiry should retain that eligibility today.

2. Interpretation of the New Section 535 of the *Criminal Code*

Per Wagner C.J. and Karakatsanis, Martin, O'Bonsawin and Moreau JJ.:
The new rule in s. 535 requires that the accused actually be liable to 14 or more years'

imprisonment in respect of the offence with which they are charged for a preliminary inquiry to be available.

Per Côté and Rowe JJ.: Under the new s. 535, an accused has the right to a preliminary inquiry if their alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment; this right is not affected by the accused's right to the benefit of the lesser punishment. Where the maximum sentence for an offence was increased to 14 years between the commission of the offence and the laying of charges, a preliminary inquiry can be held even if the accused is not personally facing a maximum sentence of 14 years.

Per Kasirer and Jamal JJ.: The question of the interpretation of the new s. 535 is not addressed.

Per Côté and Rowe JJ.: The starting point in analyzing the temporal application of new legislation is always the legislation itself. In the absence of a transitional provision, and where the lawmaker's intention to give the legislation a particular effect does not appear expressly or by necessary implication upon reading the legislation, as is the case with the new s. 535, recourse must be had specifically to the rules laid down in interpretation statutes and court decisions. Three well-established principles of transitional law come into play: (1) the principle of legality; (2) the presumption against interference with vested rights; and (3) the exception based on the

immediate application of purely procedural provisions. The principle of legality is a pillar of the criminal law whose purpose is to preserve the law as it stood at the time an offence was committed. The new legislation cannot make criminal any act or omission that did not constitute an offence at the time it occurred. In addition, the new legislation cannot create more severe punishments for an offence committed before it came into force. Next, the presumption that the lawmaker does not intend to interfere with vested rights or privileges is one of the fundamental principles of transitional law. To ensure the certainty of the legal consequences attaching to facts and conduct predating a legislative amendment, a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction. Legislation that affects substantive rights can only apply prospectively to cases in respect of which these rights have not yet vested. There is one exception to this presumption: purely procedural legislation, which is meant to govern the manner in which rights or privileges are asserted without affecting their substance, is presumed to apply immediately. Sections 43 and 44 of the federal *Interpretation Act* codify the presumption against interference with vested rights and the exception based on the immediate application of purely procedural provisions.

The abolition of the preliminary inquiry for certain offences does not engage the principle of legality. This measure has no impact on the scope of criminal liability. The preliminary inquiry is not a legal rule on which accused persons may rely in adjusting their behaviour or in deciding to accept the consequences of breaking it at the time of committing an offence. However, the absence of any indication from

Parliament as to the temporal application of s. 535 triggers the presumption that the legislative amendment does not affect vested rights or privileges. There is agreement for the most part with Karakatsanis J.'s analysis with respect to the nature of the abolition of the preliminary inquiry for accused persons charged with an indictable offence punishable by less than 14 years of imprisonment: the legislative amendment cannot be considered a purely procedural amendment. It does not affect only the manner of proceeding or of conducting litigation; the limitation on the right to a preliminary inquiry has a direct impact on the liberty and security of accused persons. It is therefore procedural in nature, but it affects a substantive right. Because the amendment is not purely procedural in nature, the new enactment does not apply immediately to all proceedings. Moreover, the fact that new procedural legislation may, through its effects, interfere with a substantive right does not end the analysis: the right or privilege in question must also have been vested at the time that legislation came into force.

An individual claiming a vested right or privilege must satisfy a two-step test. First, the individual's legal situation must be tangible and concrete rather than general and abstract. Second, the individual's legal situation must be sufficiently tangible and constituted at the time the new legislation comes into force; in other words, the situation must have materialized to some degree. In this case, at the first step, the possibility that the accused's right to a preliminary inquiry vests at the time the offence is committed can be excluded: the accused's legal situation is not sufficiently tangible, concrete and distinctive at that time. It is not until charges are laid against the accused

that the criminal court process begins and the accused's legal situation becomes tangible, concrete and distinctive.

Next, under the second step, the accused's situation is sufficiently constituted at the time charges are laid. At that point, the vesting of the right is certain and not conditional on future events, because the accused will inevitably have to appear and choose to exercise or waive their right to a preliminary inquiry, or reserve their election. All of the conditions precedent to the vesting of the right are also fulfilled at that time. The request that the accused must make for a preliminary inquiry has no effect on the crystallization of the vested right. Section 535 opens with the phrase "if an accused who is charged with an indictable offence", which sets the charging of the accused as the condition for entitlement to a preliminary inquiry. The request triggers the justice's duty to conduct a preliminary inquiry, but it is not a condition precedent to the existence of the right to a preliminary inquiry itself; rather, it constitutes the exercise of the right itself.

With regard to the interpretation that the new s. 535 should receive, its text, context and purpose demonstrate that an accused has the right to a preliminary inquiry if their alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment. There is no ambiguity in the wording of s. 535: a preliminary inquiry can be held only in the case of an "accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment". Both the adjective "punishable" in English and its equivalent "*passible*" in the French version relate to the

indictable offence and not to the sentence the accused may receive. This phrasing refers to the seriousness of the alleged offence, and its logic is not directed at the accused personally. Parliament thus intended the right to a preliminary inquiry to be tied to the seriousness of the alleged offence, not to the degree of jeopardy faced by the accused; this is an objective criterion. This interpretation is also reinforced by an examination of the parliamentary debates that led to the amendment in issue.

The jeopardy actually faced by the accused as a result of the time when the offence was committed is part of the accused's individual circumstances and does not go to the seriousness of the alleged offence. An offence is not less serious today because it was committed before a certain date. In determining the right to a preliminary inquiry, Parliament did not intend to draw a distinction between charges of the same nature based on the date of commission of the offence. The objective seriousness of an offence is not confined to the maximum sentence for the offence at the time it was committed. On the contrary, the legislative amendments increasing maximum sentences indicate Parliament's determination that offences are to be treated as more grave than they had been in the past. Accordingly, where the maximum sentence for an offence was increased to 14 years between the commission of the offence and the laying of charges, a preliminary inquiry can be held even if the accused is not personally facing a sentence of 14 years. In such a case, it must be asked whether the seriousness of the alleged offence, as it is defined today, places it within the category of the most serious offences. The fact that the accused is charged and convicted on the basis of the criminal provisions in force at the time the offence was committed changes nothing in this

regard. Although an accused may receive a reduced maximum sentence for a crime committed before the sentence was increased, the accused's right to the benefit of the lesser punishment does not defeat the right to a preliminary inquiry; to conclude otherwise would lead to an absurd result, penalize the accused and disregard the sequence of stages in a criminal trial.

In this case, A and G had a vested right to a preliminary inquiry, since this right crystallizes at the time charges are laid. Moreover, regardless of whether a right vested in A and G before the legislative amendment came into force, they have such a right under the current version of s. 535, because the acts in question would be punishable by a maximum term of imprisonment of 14 years if they were committed today. The appeal should be dismissed.

Per Kasirer and Jamal JJ.: There is agreement, in substance, with Karakatsanis J.'s analysis of vested rights with regard to the temporal application of s. 535 and, in particular, with the importance she attaches to the request made by an accused for a preliminary inquiry. There is also agreement with her with that local practices regarding the administration of justice can legitimately vary from one province or territory to another and that this is not necessarily incompatible with the uniform application of substantive criminal law in Canada. However, in light of the practice followed in Quebec and its effect on the right of A and G to request a preliminary inquiry, A and G had vested rights.

In Quebec, accused persons typically reserve their election as to the mode of trial so that they can examine the evidence disclosed. The general understanding among Quebec judges and lawyers is that reserving the election as to the mode of trial with the court's authorization has the effect of preserving the right to make a request for a preliminary inquiry at a later date. All of the conditions precedent to the holding of a preliminary inquiry are indeed fulfilled when the election is reserved: the accused receives the court's assurance that they can make a request at a later date and, by the terms of s. 535, that request must be honoured. The accused's legal situation is therefore tangible, concrete and sufficiently constituted at that time. Parliament's objective of reducing the number of preliminary inquiries should not limit vested rights in the absence of a transitional provision for existing situations.

Because the Court of Québec granted the requests of A and G to reserve their election as to the mode of trial before the amendments to s. 535 came into force, A and G had a vested right to make a request for a preliminary inquiry at a later date. They were therefore governed by the former s. 535. The appeal should be dismissed.

Per Martin J.: There is agreement that the amendment at issue is not purely procedural and instead can affect an accused's substantive legal interests. However, there is disagreement as to the point in time for the application of the new s. 535; the date of the offence is the preferable option.

In light of Parliament's failure to legislate on the temporal application of the amendment, the judicial task is to determine when the new s. 535 applies, based on

the principles and presumptions concerning the temporal application of legislation, as well as the values of fairness, rule of law and reasonable reliance they protect. This task must be approached with the interests of justice top of mind. The case law and the *Interpretation Act* provide legal presumptions which guide the interpretation of legislation when Parliament has failed to clearly set out its temporal application. In particular, two presumptions apply to legislation that affects an accused's substantive rights: the presumption against the retrospective application of legislation affecting substantive legal interests, and the presumption against interfering with vested rights. The guiding principle of the first presumption is that new legislation that affects substantive rights is presumed to apply prospectively, absent clear legislative intent otherwise. New legislation that deals with procedure will also not apply immediately if, in its application, it affects substantive rights. As to the second presumption, in criminal cases, the Court's jurisprudence on vested rights has previously required that a right-holder be able to actually exercise the right and that the eventual accrual be certain, and not conditional on future events.

The new s. 535 of the *Criminal Code* should be analyzed based on the approach articulated and applied in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, the Court's most recent authority concerning the temporal application of legislation which affects substantive interests. *Dineley* makes clear that in order to engage the presumption against retrospectivity, it is sufficient that the legislation affects substantive rights. It stands for two key propositions: either substantive or vested rights

will trigger the presumption against retrospectivity, and if the accused's substantive rights are affected, the date of the offence should govern.

First, the presumption against retrospectivity is engaged when an amendment may affect either or both substantive or vested rights. Either one, standing alone, is sufficient to trigger the presumption of prospective application. Once there has been a finding that the substantive rights of the accused are affected, it is unnecessary to impose the additional requirement that those rights must also have somehow vested or accrued to the accused. There is no general requirement that all substantive rights must have also have vested before legislative amendments must be presumed to apply prospectively — but even if there is, it should be characterized sufficiently broadly to ensure that rigid legal characterizations and formalities are not favoured over fairness and an accused's substantive interests. Any dispute over whether what must vest in the instant case is the right to have a preliminary inquiry or the right to request a preliminary inquiry should be resolved to best respect fairness to an accused. Second, new criminal legislation will apply as of the date of the offence if it affects an accused's substantive legal interests.

The loss of the possibility of being discharged at the close of a preliminary inquiry is significant. It approximates the loss of a legal defence, which affects the substantive and constitutional rights of the accused. Although the accused does not have a constitutional right to a preliminary inquiry, eliminating the possibility of a discharge at the close of the preliminary inquiry may affect an accused's rights to

liberty and security of the person under s. 7 of the *Charter*. Because the new s. 535 affects the accused's substantive rights and must apply prospectively only, the date of the offence should govern its temporal application. It is preferable for many reasons: it is common to all criminal files, it is independent of any given procedure and thus adaptable to potential regional differences in criminal procedure across the country, and it is attuned to the reality of delays or variables that may arise throughout the course of the criminal process at no fault of the accused. Determining the temporal application of the new s. 535 requires a solution that applies consistently across the country. The accused's substantive rights should not be dependent on or shaped by regional differences in procedure, especially when it may result in unfairness. Accordingly, where the alleged offence date is prior to September 19, 2019, an accused who would have been eligible for a preliminary inquiry but for the amendment remains eligible, regardless of the applicable maximum punishment.

With respect to the interpretation of the new s. 535, there is agreement with Karakatsanis J. that, where the new s. 535 applies because the alleged offence date is on or after September 19, 2019, an accused is only eligible for a preliminary inquiry if they personally face a maximum punishment of 14 years or greater.

In the instant case, there is no basis to interfere with the decision of the Court of Appeal holding that the entitlement to the preliminary inquiry attaches to the offence date, and the appeal should be dismissed.

Per Wagner C.J. and **Karakatsanis**, O'Bonsawin and Moreau JJ. (dissenting): Despite previous *Criminal Code* amendments that have made the preliminary inquiry available only on request and allowed for the narrowing of its focus, concern has continued to grow over delays in criminal proceedings. In this context, Parliament opted to reform preliminary inquiries to improve the efficiency of criminal proceedings and to avoid the need for witnesses to testify twice. Since the amendment in 2019, s. 535 limits the availability of preliminary inquiries to the most serious cases based on the maximum penalty for the relevant offences.

A predictable approach to determining temporal application must clarify and build on the law interpreting the relevant presumptions developed in the Court's jurisprudence and codified by Parliament. As with any question of statutory interpretation, determining the temporal application of a new rule must be grounded in the text of the legislation read in its full context and in harmony with the legislature's intention. In conducting that analysis, courts must rely on all the principles of statutory interpretation. Where the legislature's intention as to the temporal application of specific legislation can be discerned using principles of interpretation other than those presumptions of temporal application, courts are bound to give effect to that intention. However, absent transitional provisions and where those principles fail to provide a clear answer, the general presumptions governing temporal application become central to the analysis.

The temporal application of the amendment of a *Criminal Code* provision turns on the interpretation and interrelationship between three presumptions: (1) the presumption of immediate application of purely procedural law, (2) the presumption against retrospectivity, and (3) the presumption against interference with vested rights. These presumptions have been in part codified by Parliament in the *Interpretation Act* (ss. 43 and 44). First, according to the presumption of immediate application of purely procedural legislation, where the change in the law is purely procedural, in that applying it would not, in any circumstances, affect a substantive legal interest, the new rule is presumed to apply immediately to all. A substantive legal interest is a right, privilege, obligation or liability that is not merely about how a litigant conducts litigation but has direct implications for the individual outside the courtroom. Whether legislation could be classified as procedural in the abstract is not determinative; all that matters is the presence or absence of an effect on substantive matters. Second, the presumption against retrospectivity means that change to the law is presumed not to attach new prejudicial consequences to events that occurred before the change. Third, the presumption against interference with vested rights provides that legislation is presumed not to interfere with rights held by individuals that were tangible, concrete and distinctive before it came into force. The threshold of “tangible, concrete and distinctive” has two primary facets: (1) the right must be that of the particular individual rather than belonging to a community or general class; and (2) the right must be sufficiently constituted before the coming into force of the legislative change, in that it exists and is possessed by individuals at the relevant time. If a new rule would

interfere with a right with these features, such that it has “vested”, it is presumed not to apply.

Applying the three presumptions at issue together in a principled way starts by asking whether the new rule is purely procedural since, in the affirmative, it is unnecessary to consider the other presumptions. Where it is shown that a new rule is purely procedural, it applies immediately in all circumstances. Where, however, the new rule is not purely procedural, the analysis must continue. The presumptions against retrospectivity and against interference with vested rights can be understood as different sides of the same coin. Interference with a vested right is always retrospective in that rights arise by virtue of facts that fulfil the conditions precedent to the right and subsequently impairing them changes the legal consequences of those facts in a prejudicial way. The combined effect of these presumptions is to look at the facts that had occurred before the new rule came into force and decide whether they establish a legal interest that the law is presumed to protect. Where the legal interest has vested before a new rule came into force, the new rule is presumed not to apply if it would interfere with that legal interest. And because the purely procedural presumption provides that only substantive legal interests can raise a presumption of non-application these legal interests must necessarily be substantive. Thus, in applying these three presumptions, the new rule will presumptively apply unless it interferes with a substantive legal interest that had vested before it came into force.

This inquiry requires understanding when a legal interest is “substantive” and when it has “vested”. Whether a legal interest is substantive is guided by categories settled in the jurisprudence, and the underlying legal values of fairness and the rule of law rather than the abstract procedural nature of the legislation itself. As a legal interest becomes less a means to establish other rights and liabilities through litigation and more as an end in itself independent of that litigation, it becomes more likely that the legal interest will be substantive. A legal interest vests once all the facts necessary to recognize its existence have occurred. While those facts may generally be settled for recurring categories such as criminal liability, in cases involving unique statutory rights, careful attention must be paid to the nature of the right as expressed in the statute in light of how the legislature has balanced the reasonable expectations of interest holders against the democratic evolution of the law. It will be difficult to say a legal interest is vested where it remains contingent on an intervening action or event, such as the favourable exercise of discretion by a third party or actions necessary to acquire it that are more than mere formalities.

There is no clear basis on which to draw a conclusion about Parliament’s specific intention regarding the temporal application of the new s. 535. It therefore falls to be determined using the temporal presumptions. The amendment to s. 535 was not purely procedural, because it can deprive an accused of the opportunity to be discharged at a preliminary inquiry, which is a substantive legal interest. The amendment therefore does not attract immediate application in every circumstance, and it is necessary to determine when the right to a preliminary inquiry vests. It does not

vest when the offence is alleged to have been committed. The opportunity to be discharged at a preliminary inquiry does not form part of the substantive law about criminal liability that is understood to vest at the time of the commission of the offence. Liability vesting at that time protects a person's reliance on the state of the law when they were deciding whether to risk the liability associated with breaking the law. But it strains credulity to imagine that people weigh the availability of a preliminary inquiry in determining how to conduct themselves and whether to risk criminal liability. Conduct is not made legal or illegal, nor made subject to greater or lesser penal consequence because it could be examined at a preliminary inquiry. The availability and exercise of the right to a preliminary inquiry also depends on significant contingencies standing between the commission of the offence and the preliminary inquiry, including whether a charge is actually laid and, in the case of a hybrid offence, whether the Crown will elect to proceed summarily.

The right to a preliminary inquiry vests when the request for a preliminary inquiry is made, not the point in the proceedings at which there are no further conditions outside of the control of the accused to ask for a preliminary inquiry. There is a distinction between the ability to request a preliminary inquiry and the right to a preliminary inquiry itself. Section 535 frames the request as a precondition of the existence of the right and ties the request to the election of mode of trial. Read together, the provisions surrounding the election of the mode of trial make clear that what triggers the holding of a preliminary inquiry is both the election of a mode of trial in which a preliminary inquiry is available and the request for a preliminary inquiry to be

held. Even where the accused is sure to be tried by a mode through which a preliminary inquiry is available, the statute still mandates a request. The text and statutory scheme make clear that Parliament intended to make the availability of a preliminary inquiry conditional on a request actually having been made. Accordingly, the new limitation in s. 535 applies to all accused persons where a request for a preliminary inquiry was not made before it came into force on September 19, 2019. The requirement that a request be made ensures there is a clear rule that can be given a uniform interpretation across Canada.

Whether a request for a preliminary inquiry has been made is a factual question dependent on the circumstances of each individual case. The reserve or postponement of an election of mode of trial does not amount to an actual request for a preliminary inquiry. Assimilating a reserve to a request would effectively mean that the mere possibility of making a request is enough, despite the clear intent of Parliament to make the request an essential prerequisite. In the instant case neither A nor G had made a request for a preliminary inquiry before September 19, 2019. Their proceedings were accordingly governed by the new limitation on the availability of preliminary inquiries.

The question of whether an accused in the circumstances of A and G and subject to the new rule in s. 535 would be eligible for a preliminary inquiry in accordance with its terms turns on whether they qualify as an “accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment”.

The text in s. 535, read in context and in light of the purposes of the provision, requires that the accused actually be liable to 14 or more years' imprisonment in respect of the offence for a preliminary inquiry to be available. Parliament intended for only those accused facing greater maximum jeopardy to retain the benefit of a preliminary inquiry. The focus of the text is on the accused and the accused's proceedings, and not on hypotheticals or the general nature of the offence. This focus on the specific proceedings of the accused also follows the broader context of the new provision, which makes clear that preliminary inquiries are now generally unavailable, and that their availability is restricted only to those accused who meet specific and clear conditions.

Furthermore, the overall purpose of limiting the availability of the preliminary inquiry was to reduce delays, to alleviate the burden of witnesses and victims, and to improve the efficiency of the criminal justice system. These broader purposes inform the specific objectives of s. 535, which represents an exception for serious offences. While Parliament was seeking to reduce systemic obstacles to the *Charter* right to a trial without unreasonable delay, the exception recognizes that a preliminary inquiry can still be of significant benefit to an accused facing more significant legal jeopardy. Given these purposes, it is difficult to accept that Parliament adopted a threshold meant to invite a hypothetical inquiry into what the maximum sentence for the accused would have been had it occurred at another time. Sentencing principles and current societal values are of little assistance in interpreting s. 535. The proxy for seriousness selected by Parliament is the maximum sentence carried by the

offence charged, not the fit sentence. In the instant case, neither A nor G are eligible for a preliminary inquiry under the new s. 535, as the offences with which they are charged are each punishable by a maximum of 10 years' imprisonment. Accordingly, the appeal should be allowed.

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By Karakatsanis J. (dissenting)

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Dikranian v. Quebec (Attorney General), 2005 SCC 73, [2005] 3 S.C.R. 530; *R. v. Ali*, [1980] 1 S.C.R. 221; *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612; *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880; *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136; *R. v. Puskas*, [1998] 1 S.C.R. 1207; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94; *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553; *Martin v. Perrie*, [1986] 1 S.C.R. 41; *R. v. Bourque* (2005), 193 C.C.C. (3d) 485; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Épiciers Unis Métro-Richelieu Inc., division “Éconogros” v. Collin*, 2004 SCC 59, [2004] 3 S.C.R. 257; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; *Bell Canada v. Amtelecom Limited Partnership*, 2015 FCA 126, [2016] 1 F.C.R. 29; *Sutt v. Sutt*, [1969] 1 O.R. 169; *Upper Canada College v. Smith* (1920), 61 S.C.R. 413; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Tuffnail v. Meekes*, 2020 ONCA 340, 449 D.L.R. (4th) 478; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Re Falconbridge Nickel Mines Ltd. v. Minister of Revenue for Ontario* (1981), 32 O.R. (2d) 240; *Newton v. Crouch*, 2016 BCCA 115, 384 B.C.A.C. 164; *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660; *R. v. Rao*, 2012 BCCA 275, 323 B.C.A.C. 165; *R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35; *R. v. Khela*, [1995] 4 S.C.R. 201; *R. v. George* (1991), 5 O.R. (3d) 144; *Tcheng v. Coopérative d’habitation Chung Hua*, 2016

QCCA 461; *R. v. Windebank*, 2021 ONCA 157, 154 O.R. (3d) 573; *R. v. S.S.*, 2021 ONCA 479, 493 C.R.R. (2d) 251; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *R. v. C.T.B.*, 2021 NSCA 58; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Bertrand Marchand*, 2023 SCC 26; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206; *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752.

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APPEAL from a judgment of the Quebec Court of Appeal (Vauclair, Healy and Hamilton JJ.A.), 2022 QCCA 1170, 84 C.R. (7th) 174, [2022] AZ-51877293, [2022] Q.J. No. 8583 (Lexis), 2022 CarswellQue 13108 (WL), setting aside a decision of Charbonneau J., 2021 QCCS 1966, [2021] AZ-51764185, [2021] J.Q. n° 10206 (Lexis), 2021 CarswellQue 7218 (WL), and a decision of Thibault J., 2021 QCCS 1876, [2021] AZ-51764157, [2021] J.Q. n° 34468 (Lexis), 2021 CarswellQue 24134 (WL), and remitting both matters to the Court of Québec for preliminary inquiries. Appeal dismissed, Wagner C.J. and Karakatsanis, O’Bonsawin and Moreau JJ. dissenting.

Frédérique Le Colletter, Régis Boisvert and Daphné Godin-Garito, for the appellant.

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Gilles Grenier, on his own behalf.

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Adam Weisberg and *Michelle Psutka*, for the intervener the Criminal Lawyers’ Association (Ontario).

Janani Shanmuganathan, for the intervener the Canadian Civil Liberties Association.

English version of the reasons delivered by

CÔTÉ AND ROWE JJ. —

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I.	<u>Overview</u>	

[1] This appeal raises the question of the temporal application of a legislative amendment through which the right of accused persons to a preliminary inquiry, enshrined in s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“Cr. C.”), is limited to the most serious cases, as well as the question of how the amended provision should be interpreted going forward. The appeal has become moot as regards the respondents, Agénor Archambault and Gilles Grenier, for whom preliminary inquiries were held in parallel with the appeal that has made its way to this Court. We are nevertheless of the view that it is in the public interest to address the above questions on the merits in order to clear up some continuing uncertainty over the state of the law (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 361-62; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at paras. 49-50; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 2; *R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 17).

[2] We agree with our colleague Karakatsanis J. that the amendment made to s. 535 *Cr. C.* is procedural in nature but affects a substantive right, that is, an accused's right under s. 548(1)(b) *Cr. C.* to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge. With respect, the Court of Appeal erred in holding that the right to a preliminary inquiry is governed by the law in force at the time the offence was committed.

[3] However, unlike our colleague Karakatsanis J., we are of the view that the respondents, Mr. Grenier and Mr. Archambault, had a vested right to a preliminary inquiry. The right to a preliminary inquiry crystallizes at the time charges are laid.

[4] In the absence of a transitional provision, such an interpretation is the one most consistent with both the text of s. 535 *Cr. C.* and the presumption that Parliament does not intend to interfere with the vested rights or privileges of accused persons. This interpretation is also anchored in the notion that criminal trials do not all proceed in the same purely linear fashion and that they each have their own particular features. Indeed, when it comes to the order of the various stages of the proceedings, there are a multitude of possibilities. Finding that the right vests when charges are laid, a stage common to all cases, better acknowledges the flexibility of criminal procedure and the delays that may be caused by the Crown or the delays inherent in the justice system. Such an interpretation has the advantage of preserving fairness and legal certainty in addition

to allowing for the uniform application of the new legislative provision across the country.

[5] Regardless of whether a right vested in Mr. Grenier and Mr. Archambault before the legislative amendment came into force, we are of the opinion that the respondents have such a right under the current version of s. 535 *Cr. C.* Parliament intended to preserve the preliminary inquiry for all accused persons whose alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment, and not, as the Crown argues, only for accused persons who are personally liable to 14 years or more of imprisonment. This is the interpretation most consistent with the text of the amending provision and the compromise from which it resulted. The Crown's proposed interpretation of this provision, based on an abstract purpose — reducing the number of preliminary inquiries held across the country — is not supported either by the clear text of the new s. 535 *Cr. C.* or by the circumstances in which it was enacted.

[6] We would therefore dismiss the appeal.

II. Factual Background and Judicial History

[7] On the whole, we agree with the summary of the facts and judicial history provided by our colleague Karakatsanis J. However, we will make some additional points that help to circumscribe the issues.

[8] The Court of Appeal held that the right to a preliminary inquiry accrues at two different points in time. First, relying on the principle of legality, the Court of Appeal found that the right to a preliminary inquiry is “‘accruing’ from th[e] moment” the offence is committed (2022 QCCA 1170, 84 C.R. (7th) 174, at para. 11). In Healy J.A.’s view, the classification of offences (indictable, hybrid or summary conviction) and everything that flows from it (election as to mode of trial and preliminary inquiry) are part of the law on which individuals rely in adjusting their behaviour and in assuming risks at the time of committing an offence (paras. 16-17).

[9] Second, the Court of Appeal found that the right to a preliminary inquiry is “vested or accrued at the date” of the first appearance (para. 11). Even when the accused does not request a preliminary inquiry, the first appearance confirms the vesting of the right. This interpretation is based on the importance of the legislative amendment to the rights or interests concerned, not on the characterization of the amendment as procedural or substantive in nature. As long as the accused has not elected trial before a provincial court judge, the accused’s right to request a preliminary inquiry is preserved.

[10] Given its conclusion on this point, the Court of Appeal did not address the question of how the amended version of s. 535 *Cr. C.* should be interpreted.

III. Legislative Background on the Preliminary Inquiry

[11] An inheritance from English law, the preliminary inquiry was incorporated into Canadian criminal law in 1892, in the first *Criminal Code*, 1892, S.C. 1892, c. 29 (s. 577; see also D. Pomerant and G. Gilmour, *A Survey of the Preliminary Inquiry in Canada* (April 1993), at pp. 1-24). The preliminary inquiry was originally designed as an instrument of the prosecution, for finding the perpetrator of a crime and obtaining evidence of their guilt; it later became “a shield for the defence”, allowing the accused to ascertain what evidence the prosecution had against them and also “relieving [them] from the expense and odium of a trial” if, in the opinion of the justice of the peace or provincial court judge, that evidence was not sufficient to justify holding a trial (*Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 105, quoting P. Devlin, *The Criminal Prosecution in England* (1960), at p. 10).

[12] The preliminary inquiry therefore has two important aspects. Its primary purpose is “to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process” (*Skogman*, at p. 105). It is a “screening mechanism for the purpose of determining whether the Crown has sufficient evidence to commit the accused to trial” (*R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 21, citing *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 30 and *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, at paras. 14-16). The preliminary inquiry also plays an “ancillary role as a discovery mechanism” (*Hynes*, at para. 31). In English law, the Crown’s duty to disclose evidence at the preliminary inquiry has evolved in such a way as to make it a very effective discovery mechanism, which has not historically been the

case in Canada (Law Reform Commission of Canada, *Research Paper: Discovery in Criminal Cases* (1974), at pp. 8-9).

[13] While the preliminary inquiry allows an accused to learn more about the prosecution's evidence, the disclosure of evidence is primarily assured, in Canadian law, by the accused's constitutional right to make full answer and defence, a principle of fundamental justice enshrined in s. 7 of the *Canadian Charter of Rights and Freedoms* (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. La*, [1997] 2 S.C.R. 680; *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 22; *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307; *McNeil*, at paras. 17-25; *R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35). This constitutional right to the disclosure of all relevant information is distinct from the right to a preliminary inquiry, which is what led this Court to state in *S.J.L.*, at para. 23, that "the incidental function of the preliminary inquiry as a discovery mechanism has lost much of its relevance" since the enactment of the *Charter*. Parliament's choice to limit or abolish the preliminary inquiry for certain offences therefore does not violate the principles of fundamental justice, because the accused continues to be presumed innocent and retains the right to make full answer and defence (para. 21). There is no constitutional right to a preliminary inquiry.

[14] At the beginning of this century, Parliament considered ways to reduce the number, length and scope of preliminary inquiries in response to an increase in court delays and in light of the impact of this procedure on victims and other witnesses.

However, a radical reform was ruled out (see *R. v. M. (P.)*, 2007 QCCA 414, 222 C.C.C. (3d) 393, at paras. 68-73). The solution favoured by Parliament, a more moderate one, was set out in the *Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13. One purpose of that statute was “reforming and modernizing criminal procedure with respect to . . . procedural aspects of preliminary inquiries” (summary, subpara. (f)(i)). Its provisions, which came into force on June 1, 2004, amended the *Cr. C.* in order to, among other things, make the holding of a preliminary inquiry optional, allow parties to limit the scope of an inquiry or allow a pre-hearing conference to be held, give the justice the power to regulate the course of the inquiry and authorize the justice to end any abusive examinations or cross-examinations. Those amendments maintained the accused’s “unconditional right” to a preliminary inquiry while streamlining the use of this procedure and making it optional (*House of Commons Debates*, vol. 136, No. 124, 2nd Sess., 36th Parl., September 28, 2000, at p. 8829; *Debates of the Senate*, vol. 139, No. 66, 1st Sess., 37th Parl., November 1, 2001, at p. 1612).

[15] Parliament’s intent in making those legislative amendments was to enable parties to choose mechanisms better adapted to their needs; its intent was “not the imposition [on them] of more inflexible procedures” (*S.J.L.*, at para. 24). To allow parties to decide whether a preliminary inquiry was appropriate in their circumstances, Parliament changed the wording of s. 535 *Cr. C.* as follows:

535. If an accused who is charged with an indictable offence is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of

the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

(*Criminal Law Amendment Act, 2001*, s. 24)

[16] In a report released in June 2017, the Standing Senate Committee on Legal and Constitutional Affairs observed that the *Criminal Law Amendment Act, 2001* had not succeeded in conclusively reducing the number and length of preliminary inquiries or in alleviating the burden on victims and witnesses. In its report, the Committee recommended eliminating preliminary inquiries or limiting them “to the most serious offences under the *Criminal Code*” in order to reduce delays in criminal cases (*Delaying Justice Is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (2017), at p. 48).

[17] One year earlier, in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, Moldaver, Karakatsanis and Brown JJ., writing for the majority, had invited Parliament to undertake a review of criminal rules and procedures, particularly the preliminary inquiry (at para. 140):

For provincial legislatures and Parliament, this may mean taking a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial. Legal Aid has a role to play in securing the participation of experienced defence counsel, particularly for long, complex trials. And Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations. Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced. [Emphasis added.]

[18] In response to the invitation extended by this Court in *Jordan* and the observations made by the Standing Senate Committee on Legal and Constitutional Affairs in its report, the government introduced a first version of Bill C-75 in Parliament on March 29, 2018. The original version of the bill limited the availability of preliminary inquiries to adults charged with offences punishable by life imprisonment (Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2018, s. 240 (first reading March 29, 2018); *House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19604 (Hon. J. Wilson-Raybould)).

[19] Given the concerns expressed by the legal community about that approach, and further to an amendment proposal made by the Senate, the wording of the bill was changed to expand access to preliminary inquiries by comparison with what had been set out in the original bill. A choice was made to preserve the right of accused persons to a preliminary inquiry for all of what were considered to be the most serious offences. In this context, Parliament decided to preserve access in the case of offences for which the maximum sentence was 14 years or more. We use the term “most serious offences” below to refer to such offences:

As introduced, Bill C-75 proposed to restrict the availability of preliminary inquiries to indictable offences punishable by life imprisonment, roughly 70 offences. The other place agreed that these offences should automatically include a preliminary inquiry.

However, it also expanded their availability on a discretionary basis to all other indictable offences with a maximum penalty of less than life imprisonment, which would have been an additional 393 offences. As per the other place's amendment, preliminary inquiries would be available in two circumstances: first, where one or both parties requested one; and, second, a justice was satisfied that certain criteria were met, namely that appropriate measures were taken to mitigate the impacts on victims for both approaches and, where it was on the request of one party, that it was also in the best interest of the administration of justice.

The amendment responded to concerns that preliminary inquiries were not available for more and serious offences. However, the expansion of their availability, combined with the new complex criteria, would lead, in our view, to further delays and unnecessary litigation; for example, to interpret the proper application of the criteria.

Recognizing, however, that the other place's amendment was motivated by continuing concerns by the legal community and others, I proposed to not accept the other place's amendments 3 and 4 as drafted, but to revise the bill's original approach to make preliminary inquiries also available for offences with a maximum penalty of 14 years, for example, sexual assault with a weapon.

(*House of Commons Debates*, vol. 148, No. 435, 1st Sess., 42nd Parl., June 17, 2019, at p. 29245 (Hon. D. Lametti))

[20] That version of the bill was assented to on June 21, 2019, and stipulated that the new preliminary inquiry provisions would come into force 90 days later, on September 19, 2019 (see *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 ("2019 Amendments"), s. 406). The wording of s. 535 *Cr. C.* as so amended provides only accused persons who are charged with an indictable offence punishable by 14 years or more of imprisonment with the right to a preliminary inquiry:

535 If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4)

or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[21] Overall, the purpose of the legislative amendment is to reduce the number and length of preliminary inquiries in order to address the increase in court delays in criminal cases and alleviate the burden on witnesses and victims, who have to testify twice when such a procedure is used (*House of Commons Debates*, May 24, 2018, at pp. 19602-5 (Hon. J. Wilson-Raybould); see also *House of Commons Debates*, June 17, 2019, at pp. 29245-46 (Hon. D. Lametti)). To this end, Parliament has limited the right of accused persons to request a preliminary inquiry to the offences that are considered to be the most serious. In the context of this amendment, the category of the most serious offences is understood by Parliament as consisting of indictable offences punishable by a maximum term of imprisonment of 14 years or more.

IV. Analysis

[22] This appeal requires this Court to interpret a new legislative provision and to determine how it applies temporally. Both in matters of transitional law and in statutory interpretation generally, [TRANSLATION] “the legislative intent is paramount” (P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at No. 457; see also *R. v. Ali*, [1980] 1 S.C.R. 221, at p. 235). Our role is therefore limited to discerning the true legislative intent by reading the words of the provision in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of

the legislation (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[23] Our analysis proceeds as follows. First, we discuss how the new s. 535 *Cr. C.* applies temporally. Second, we interpret the scope of s. 535 *Cr. C.* as amended. On the basis of our analysis, we conclude that the respondents, Mr. Grenier and Mr. Archambault, each have the right to a preliminary inquiry both under the former law, whose effects with respect to them survive the legislative amendment, and under the new law.

A. *The Legislative Amendment Does Not Eliminate the Right to a Preliminary Inquiry for Accused Persons Charged Before It Came Into Force*

(1) Principles of Transitional Law Applicable in This Case

[24] The starting point in analyzing the temporal application of new legislation is always the legislation itself. In the absence of a transitional provision, and where the lawmaker's intention to give the legislation a particular effect does not appear expressly or by necessary implication upon reading the legislation, as is the case here, recourse must be had specifically to the rules laid down in interpretation statutes and court decisions.

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

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

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

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

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

(*Attorney General*), 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 33). Legislation that affects substantive rights can only apply prospectively to cases in which these rights have not yet vested (*R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at para. 87).

[29] There is just one exception to this presumption, namely that “there is no vested right in procedure”, though this is subject to “a limitation to the effect that the following of the new procedure must be feasible” (*Wildman v. The Queen*, [1984] 2 S.C.R. 311, at p. 331). Purely procedural legislation, which is meant to govern the manner in which rights or privileges are asserted without affecting their substance, is presumed to apply immediately (*R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 10-11; see also *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, at p. 418; *Howard Smith Paper Mills v. The Queen*, [1957] S.C.R. 403, at pp. 419-20; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 265-67; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at paras. 57 and 62). However, this exception is merely a presumption and must therefore yield to a contrary intention expressed by the lawmaker (*Ali*, at p. 235).

[30] The following provisions of the *Interpretation Act*, R.S.C. 1985, c. I-21, codify the presumption against interference with vested rights and the exception based on the immediate application of purely procedural provisions:

43 Where an enactment is repealed in whole or in part, the repeal does not

...

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

...

44 Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

...

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

...

(ii) in the enforcement of rights, existing or accruing under the former enactment,

[31] With respect, it is not helpful to address the principle of legality from the perspective of vested rights, as the Court of Appeal did in this case, nor is it appropriate to erase the distinction between non-retroactivity and non-interference with vested rights (see *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880, at p. 906; *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, at pp. 741 and 744; *Gustavson Drilling*, at pp. 279 and 282; *Dikranian*, at para. 31). Such an approach injects more uncertainty and confusion into transitional law than it resolves. We are dealing not with a provision that might change the legal rules applicable at the time the offence was committed, which would engage the principle of legality, but rather with a legislative amendment whose purpose is to limit the use of a criminal procedure for the future.

[32] We therefore propose simply to follow the structure of ss. 43 and 44 of the *Interpretation Act*. The first question to be considered in determining how new legislation applies temporally is whether the legislative amendment is purely procedural in nature. If the amendment in issue may affect a right or privilege that vested under the prior enactment, the time at which that right or privilege vested must be determined. It will be presumed to be preserved only for persons in whom it actually vested before the legislative amendment came into force.

(2) The Abolition of the Preliminary Inquiry for Certain Offences Is Procedural in Nature but Affects a Substantive Right

[33] The absence of any indication from Parliament as to the temporal application of a provision triggers the presumption that the legislative amendment does not affect vested rights or privileges. In this case, the amending statute contains several transitional provisions, but none of them concerns the sections relating to the preliminary inquiry regime. There is nothing in the new enactment that makes it possible to clearly discern Parliament's intent with respect to its temporal application. In such circumstances, it must be concluded that Parliament intended to rely on the presumptions, not to displace them.

[34] Mr. Grenier and Mr. Archambault are asking this Court to affirm, as the Court of Appeal did, that the right to a preliminary inquiry is governed by the substantive law in force at the time the offence was committed. Reaching this conclusion would end the analysis.

[35] However, with respect for the contrary view, we are of the opinion that the abolition of the preliminary inquiry for certain offences does not engage the principle of legality. This measure has no impact on the scope of criminal liability. The preliminary inquiry is not a legal rule on which an accused may rely in adjusting his behaviour or in deciding to accept the consequences of breaking it at the moment he commits an offence (*Poulin*, at para. 59). It “is not a trial but simply a preliminary review to determine whether there is sufficient evidence to proceed to trial” (*Hynes*, at para. 4; see also A. Stylios, J. Casgrain and M.-É. O’Brien, *Procédure pénale* (2023), at para. 10-3).

[36] It must therefore be asked whether the abolition of the preliminary inquiry in the case of accused persons charged with an indictable offence punishable by less than 14 years of imprisonment affects a substantive right or whether, the amendment being purely procedural in nature, the new enactment must apply immediately to all proceedings, whether commenced before or after it came into force. Provincial court and superior court judges across the country have expressed conflicting opinions on the matter. Importantly, the Crown does not argue that the legislative amendment is purely procedural in nature, but rather questions when the right to a preliminary inquiry vests.

[37] On this point, we agree for the most part with the analysis of our colleague Karakatsanis J. It is true that Parliament’s choice to limit or abolish the right to a preliminary inquiry in the case of certain offences does not affect the accused’s right to make full answer and defence, because there is no constitutional right to a

preliminary inquiry (*S.J.L.*, at para. 21). That being said, as Doherty J.A. established in *R. v. R.S.*, 2019 ONCA 906, the limitation on the right to a preliminary inquiry affects the accused's right under s. 548(1)(b) *Cr. C.* to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge (para. 49; see also *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828). The purpose of the preliminary inquiry is in fact to “protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process” (*Hynes*, at para. 30, quoting *Skogman*, at p. 105). It may also happen that, following a preliminary inquiry, an accused will be committed for trial on offences distinct from the one initially charged, a situation that may lead to a review of the decision then in effect on the accused's interim release, pursuant to s. 523(2)(b) *Cr. C.*

[38] This is not a case in which the legislative amendment would affect only the manner of proceeding or of conducting litigation. Any limitation on the right to a preliminary inquiry therefore has a direct impact on the liberty and security of accused persons (*R.S.*, at paras. 52 and 57-58). The legislative amendment, whose purpose is to limit the preliminary inquiry to the most serious offences, cannot be considered a purely procedural amendment.

[39] We also agree with our colleague Karakatsanis J. that simply concluding that procedural legislation may affect vested or substantive rights is not sufficient to

determine the temporal application of a legislative amendment where the vesting of these rights may be questioned. In *Dineley*, this Court cautioned against categorizing the nature of a legislative amendment in an overly rigid manner without considering its effects on “vested or substantive rights” (para. 10). The use of the word “or” in the expression “vested or substantive rights” cannot be interpreted as creating two distinct classes of rights, one that protects rights from any retrospective effect and the other providing protection only if the rights in question have vested. This would amount to nullifying the presumption against interference with vested rights. Therefore, with due respect for the approach adopted by our colleague Martin J., the fact that new procedural legislation may, through its effects, interfere with a substantive right does not end the analysis. The right or privilege in question must also have been vested at the time that legislation came into force.

[40] We would add that the fact that a legislative amendment affects “interests” of a constitutional nature is not in itself determinative of how the legislative amendment applies temporally (Martin J.’s reasons, at para. 110). That would be a considerable extension of the constitutional sphere, which would have the effect of unjustifiably broadening the scope of the presumption against interference with vested rights, especially given that the constitutionality of the amendment in issue is not being challenged. In *Dineley*, it was unnecessary for this Court to consider when the right had vested, because the legislative amendment had come into force during the trial. Holding that the presumption on vested rights applied and that it was impossible for proceedings

commenced under the former enactment to be continued in conformity with the new enactment, as contemplated by *Ali*, was sufficient to dispose of the appeal.

[41] There is more. In a criminal context, the conclusion that new procedural legislation affects vested or substantive rights does not necessarily engage the principle of legality. Vested or substantive rights within the meaning of *Dineley* must not be confused with the substantive law in force at the time the offence was committed within the meaning of *Poulin*. A right may be vested or substantive without having any impact on the scope of criminal liability, that is, the nature or consequences of the commission of an offence. The reverse is also true. It is possible for an accused not to have a vested right to the rules in force at the time the offence was committed. With respect, the approach adopted by the Court of Appeal in this case creates such confusion.

[42] In light of our conclusion on this question, and in the absence of any indication that justifies concluding otherwise, the presumption that Parliament did not intend to interfere with vested rights or privileges in relation to preliminary inquiries applies. What must now be determined is when this right vests in order to decide whether Mr. Grenier and Mr. Archambault were entitled to the preliminary inquiries they obtained following an agreement with the Crown.

(3) The Right to a Preliminary Inquiry Vests at the Time Charges Are Laid

[43] The core issue in this appeal is when the right to a preliminary inquiry vests for the purposes of s. 43(c) of the *Interpretation Act*. If an amendment may affect a

right existing under the former law, the right in question will be presumed to be preserved only for accused persons in whom it actually vested before the amendment came into force.

[44] The determination of what constitutes a vested right or privilege is a delicate matter. In *Dikranian*, this Court set out two conditions to be met by an individual claiming a vested right or privilege. First, the individual's legal situation must be "tangible and concrete rather than general and abstract" (para. 37). The mere possibility of availing oneself of a statute is not a basis for arguing that a vested right exists; "the right must be vested in a specific individual" (para. 39). Second, the individual's legal situation must be sufficiently tangible and constituted at the time the new legislation comes into force; in other words, the situation must have materialized to some degree (paras. 37 and 40).

[45] For the legal situation to be sufficiently constituted, the conditions precedent to the exercise of a right must have been fulfilled. Only then can the right be vested (*R. v. Puskas*, [1998] 1 S.C.R. 1207, at para. 14). However, the right can still vest in time even if not all procedural steps required to exercise the right were taken before a legislative amendment came into force (see, e.g., *Re Falconbridge Nickel Mines Ltd. and Minister of Revenue for Ontario* (1981), 32 O.R. (2d) 240 (C.A.), at pp. 248-50; see also Côté and Devinat, at No. 638; R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 729-30). The difficulty therefore lies in distinguishing, on the one hand, what are simply the necessary procedural steps for exercising the right

from, on the other, the conditions precedent to the exercise of the right. Only the latter must be fulfilled for the right to vest.

[46] Mr. Grenier and Mr. Archambault, echoing in part the Court of Appeal's conclusions in this regard, argue principally that the right to a preliminary inquiry vests at the time the offence is committed and, in the alternative, that the right vests at the time of the first appearance. It is relevant to note that the Ontario Court of Appeal, unlike its Quebec counterpart, has found that the right to a preliminary inquiry does not vest until the date the accused requests such an inquiry (see *R.S.*, at para. 4). In the present case, the Crown is asking this Court to adopt this latter approach and to reject the one favoured by the Court of Appeal of Quebec.

[47] The Crown correctly submits that a right or a privilege cannot vest at several different points in time. It is true that there is a notable difference in formulation between the French and English versions of s. 43(c) of the *Interpretation Act*. The French version refers first to “*droits ou avantages acquis*”, and then to “*obligations contractées*” and “*responsabilités encourues*”. The English version does not use specific language for rights and privileges, referring rather to “any right, privilege, obligation or liability acquired, accrued, accruing or incurred.” In principle, the words “acquired, accrued, accruing” should have different meanings, because Parliament does not speak in vain (*Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3,

at para. 89). However, as Professor Ruth Sullivan noted, “the prolix style in which the provision is drafted (typical of the nineteenth and early twentieth centuries) blunts the force of this presumption” (p. 768). This Court therefore stated in *Puskas* that the words “acquired”, “accrued” and “accruing” used in s. 43(c) of the *Interpretation Act* essentially refer to the same idea: “. . . something can only be said to be ‘accruing’ if its eventual accrual is certain, and not conditional on future events” (para. 14 (emphasis added)).

[48] Under the first step of the test laid down in *Dikranian*, the possibility that the accused’s right to a preliminary inquiry vests at the time the offence is committed can be excluded. The time of the offence cannot be the point at which the right to a preliminary inquiry vests, since the accused’s legal situation is not sufficiently tangible, concrete and distinctive at that time. It is not until the accused is charged that their legal situation becomes tangible, concrete and distinctive. At the time charges are laid, the criminal court process begins and the accused actually faces criminal jeopardy.

[49] We are also of the view that, under the second step of the test laid down in *Dikranian*, the accused’s situation is sufficiently constituted at the time charges are laid. At that point, the vesting of the right is certain and not conditional on future events, because the accused will inevitably have to appear and choose to exercise or waive their right to a preliminary inquiry, or to reserve their election. All of the conditions precedent to the vesting of the right are also fulfilled at that time. In our opinion, the request that the accused must make to a justice is a necessary procedural step for

exercising the right to a preliminary inquiry, but it has no effect on its crystallization. This can be confirmed simply by looking at the wording of s. 535 *Cr. C.*, bearing in mind the purpose of the legislative amendments that came into force in 2004 and 2019.

[50] Section 535 *Cr. C.* opens with the phrase “[i]f an accused who is charged with an indictable offence”, which sets the charging of the accused as the condition for entitlement to a preliminary inquiry. The Court of Appeal correctly noted that “[t]hese words point unmistakably to the moment of charging as the moment at which the entitlement to a preliminary inquiry . . . is fully vested in the accused” (para. 37). It is true that s. 535 *Cr. C.* states that an accused must be “charged with an indictable offence” (“*inculpé d’un acte criminel*”). In the case of a hybrid offence, the Crown may not yet have decided on the mode of prosecution at the time charges are laid. However, this is not a consideration that makes the right less certain or concrete. There is a fundamental distinction between a right that has vested but can be challenged and a right that has not vested because the conditions precedent to its crystallization have not been fulfilled. Therefore, neither the fact that the Crown may elect to proceed summarily or by direct indictment under s. 577 *Cr. C.* nor the possibility that the accused will elect to be tried in provincial court prevents the right to a preliminary inquiry from being acquired by the accused (*R.S.*, at para. 40).

[51] The accused must make a request before a justice in order for a preliminary inquiry to be held, but the vesting of the accused’s right is not conditional on the making of such a request. Section 535 *Cr. C.* is under the heading “Jurisdiction” and concerns

the justice's duty to conduct a preliminary inquiry. This duty is separate from the accused's right to a preliminary inquiry. From a procedural standpoint, a preliminary inquiry is held only if a request to this effect is made by one of the parties (ss. 535, 536(2) and (4) and 536.1(2) and (3) *Cr. C.*); this is why *the justice's duty* to conduct an inquiry arises only if one is requested. In this context, the request for a preliminary inquiry triggers the justice's duty but is not a condition precedent to the existence of the right to a preliminary inquiry itself.

[52] In this regard, we cannot agree with our colleague Karakatsanis J.'s reading of *Puskas*. That case dealt with amendments to s. 691(2) *Cr. C.* that abolished appeals as of right to this Court for accused persons whose acquittal had been overturned by a court of appeal, where a new trial had been ordered. The right to appeal to this Court without leave was accompanied by a procedural requirement, namely the filing of a notice of appeal within the statutory time limits (see *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 58 to 60). In *Puskas*, this Court did not include the filing of the notice of appeal in the set of conditions to be met for the vesting of the right in question (para. 15). In the same way, the making of a request for a preliminary inquiry is not a *condition precedent* to the existence of the right to a preliminary inquiry, but rather constitutes *the exercise of the right itself*.

[53] To conclude otherwise would be to give the 2004 legislative amendments a scope they were not intended to have. As this Court noted in *S.J.L.*, the purpose of those amendments was to enable parties to choose a mechanism adapted to their needs,

not to impose a condition to be met for their right to materialize. The right to a preliminary inquiry remained “unconditional” (*House of Commons Debates*, September 28, 2000, at pp. 8828-29; *Debates of the Senate*, November 1, 2001, at p. 1612; see also D. M. Paciocco, “A Voyage of Discovery: Examining the Precarious Condition of the Preliminary Inquiry” (2004), 48 *Crim. L.Q.* 151, at p. 162). The addition of procedural steps that had to be taken in order to exercise the right to a preliminary inquiry did not change the scope of this right, unlike the 2019 legislative amendment, whose purpose was precisely to limit the number of such inquiries. The effects of these two amendments must not be conflated.

[54] The Court of Appeal of Quebec properly noted that accused persons regularly reserve their election as to mode of trial at the first appearance in order to avoid making a premature decision on the exercise of their right to a preliminary inquiry (paras. 40-43). This practice provides a concrete illustration of the fact that the right to a preliminary inquiry crystallizes as soon as criminal charges are laid. As our colleague Kasirer J. suggests, if an accused can in practice reserve the exercise of their right, this means that their legal situation is (1) tangible, concrete and distinctive and (2) sufficiently constituted, that is, not uncertain and not conditional on future events. As we explain, however, these conditions are already met the moment criminal charges are laid. As long as the accused has not waived the right to a preliminary inquiry by electing to be tried in provincial court and the Crown has not defeated this right by electing an incompatible mode of prosecution or by proceeding by direct indictment, the accused continues to have a right to a preliminary inquiry.

[55] In our view, there is no need in this case to decide on the appropriateness of reforming this practice. Parliament has already made the choice to limit the preliminary inquiry to the most serious cases in order to address the increase in court delays in criminal cases. Arguably, the making of informed decisions also helps to reduce delays, by comparison with the making of premature decisions that might entail higher costs. It must be kept in mind that, when an accused expresses his wish to re-elect mode of trial, consent from the prosecutor must generally be obtained (s. 561(1)(a) *Cr. C.*; *Jordan*, at para. 62). In this context, and in light of the importance of this election by an accused, we would refrain from concluding that the practice of reserving elections is a dilatory mechanism.

[56] In addition to being supported by the new enactment, the interpretation we adopt has the advantage of preserving fairness and legal certainty. Criminal trials do not all proceed in a purely linear fashion, and they each have their own particular features. When it comes to the order of the various stages of the proceedings, there are a multitude of possibilities. The flexibility of criminal procedure and the possible delays that may occur are better acknowledged by finding that the right vests when charges are laid, a stage common to all cases. Such delays may be attributable to the Crown, for example where it is slow to elect the mode of prosecution, or to the delays inherent in the justice system. Nothing suggests that Parliament intended to subject the vesting of a right as important as that to a preliminary inquiry to such contingencies. The expectation of the accused crystallizes into a right to a preliminary inquiry once charges are laid, because the accused's freedom and security are then at risk.

[57] Such an interpretation also has the advantage of allowing for the uniform application of criminal procedure across the country, without affecting the particularities of the administration of justice in certain provinces. Such particularities are permitted by Parliament in matters of criminal procedure (see ss. 482 and 482.1 *Cr. C.*). We believe that it is important for justice to be administered in a manner adapted to local circumstances and, for this reason, we consider it inappropriate to adopt an interpretation of the new text of s. 535 *Cr. C.* that would exclude such a possibility outright. Nothing in the wording of this provision is inherently incompatible with the election being reserved and the preauthorization or not of prosecutions. To conclude that the right to a preliminary inquiry only vests when an accused makes such a request risks creating situations in which accused persons in different provinces, despite being charged on the same date, would not all be vested with the right to a preliminary inquiry.

[58] The respondents, Mr. Grenier and Mr. Archambault, were charged prior to September 19, 2019. We therefore conclude that they each had a vested right to a preliminary inquiry before the legislative amendment came into force. The former s. 535 *Cr. C.* continues to apply to them by operation of the presumption against interference with vested rights, and it is unnecessary to determine whether the offences they were charged with fall within the category of the most serious offences. The Crown chose to prioritize the holding of the trials for Mr. Grenier and Mr. Archambault within a reasonable time, as well as the right of the victims to finally be heard in court, by allowing a preliminary inquiry to be held in each of the two cases. With respect for

the contrary view, we conclude that this choice was consistent in every respect with the temporal application of the legislative amendment.

B. *An Accused Whose Alleged Offence, or Its Equivalent, Is Punishable by 14 Years or More of Imprisonment Has the Right to a Preliminary Inquiry*

[59] Although our conclusion on the question of the temporal application of the new text of s. 535 *Cr. C.* is sufficient to dispose of this appeal, we shall now examine the interpretation this provision should receive.

[60] To date, appellate courts that have considered the matter have found that a preliminary inquiry is available only to accused persons who *personally* face a term of imprisonment of 14 years or more (see *R. v. Sheppard*, 2023 ABCA 381, 69 Alta. L.R. (7th) 1; *R. v. S.S.*, 2021 ONCA 479, 493 C.R.R. (2d) 251; *R. v. C.T.B.*, 2021 NSCA 58). In the same vein, the Crown submits that the legislative amendment to s. 535 *Cr. C.* has the effect of eliminating the right to a preliminary inquiry for accused persons charged with so-called historical offences for which the term of imprisonment was not 14 years or more at the time the offence was committed.

[61] With respect, we are of the view that this interpretation is incorrect. The text, context and purpose of s. 535 *Cr. C.* demonstrate that an accused has the right to a preliminary inquiry if their alleged offence, or its equivalent, is punishable by 14 years or more of imprisonment. Section 535 *Cr. C.* must be interpreted in a manner consistent with the intent expressed by Parliament to increase the sentences applicable

to certain offences, where necessary. The right to a preliminary inquiry is therefore not affected by the accused's right to the benefit of the lesser punishment.

(1) Parliament Intended the Right to a Preliminary Inquiry To Be Tied to the Seriousness of the Offence

[62] There is no ambiguity in the wording of s. 535 *Cr. C.* A preliminary inquiry can be held only “[i]f an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for [an] inquiry”. Both the adjective “punishable” in English and its equivalent “*passible*” in the French version, which states “[l]orsqu’un prévenu inculpé d’un acte criminel passible d’un emprisonnement de quatorze ans ou plus”, relate to the indictable offence and not to the sentence the accused may receive. In addition, the English version of the provision is enlightening in this regard, since the word “that” very clearly links the adjective “punishable” to the term “indictable offence”. This phrasing refers to the seriousness of the alleged offence, and its logic is not directed at the accused personally. Parliament thus intended the right to a preliminary inquiry to be tied to the seriousness of the alleged offence, not to the degree of jeopardy faced by the accused. This is an objective criterion.

[63] The expression “*acte criminel passible d’un emprisonnement maximal de*” is used more than a hundred times in the French version of the *Cr. C.* to establish the maximum sentence that applies and thus to define the objective seriousness of offences. As this Court stated in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 96, the

maximum sentence established by Parliament for an offence determines the objective seriousness of the offence (see also *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 36; H. Parent and J. Desrosiers, *Traité de droit criminel*, t. III, *La peine* (3rd ed. 2020), at p. 53; C. C. Ruby, *Sentencing* (10th ed. 2020), at §2.19). According to the presumption of consistent expression, the meaning of the words used in statutes remains consistent, because “the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes” (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 44, citing R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217). There is therefore no reason, in interpreting the text of s. 535 *Cr. C.*, to depart from the usual meaning of this expression, which refers to the objective seriousness of the offence.

[64] This interpretation is not only supported by the text of s. 535 *Cr. C.* but is also reinforced by an examination of the parliamentary debates that led to the amendment in issue. It must be kept in mind that Parliament has always understood the category of the “most serious offences” by reference to the maximum sentence specified for the offence, which, here again, is reflected in the provision as enacted. The first version of the amendment at issue would have maintained the right to a preliminary inquiry only for accused persons charged with offences punishable by life imprisonment. As a result of a public outcry and a compromise that followed, Parliament instead chose to preserve the right to a preliminary inquiry for “the most serious offences”, meaning those punishable by a maximum term of imprisonment of

14 years or more. In doing so, Parliament presumably had in mind offences in the nature of those Mr. Grenier and Mr. Archambault were charged with, which today fall within the category of the most serious offences. Parliament made the choice to increase the maximum sentences for such offences “to convey its view of the gravity of a particular offence” (*R. v. Bertrand Marchand*, 2023 SCC 26, at para. 168).

[65] While it is not in dispute that Parliament intended to limit the right to a preliminary inquiry to the *most serious offences*, it strikes us as contradictory to adopt an approach based on the severity of the maximum sentence to which the accused is *personally* liable (or the jeopardy *actually* faced by the accused), as the Crown does in this case.

[66] In reality, the Crown’s interpretation does not rest on the text or context of s. 535 *Cr. C.*, but rather on the abstract purpose of reducing the number of offences for which a preliminary inquiry is available. With respect, such an interpretation disregards the new wording of the provision and the compromise from which it resulted. While the purpose of the amendment plays an important role in the interpretation of the new provision, it cannot serve as a basis for rewriting the provision so amended or for ignoring the clear meaning it conveys (see *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 26; *R. v. McColman*, 2023 SCC 8, at para. 36; *Reference re Impact Assessment Act*, 2023 SCC 23, at para. 193; see also Côté and Devinat, at No. 1366; Sullivan, at p. 293; M. Mancini, “The Purpose Error in the Modern Approach to Statutory Interpretation” (2022), 59 *Alta. L. Rev.* 919, at pp. 920-22). In construing a

legislative provision, “courts do not have to interpret — let alone implement — the objective underlying a legislative scheme or provision; what they must interpret is the text through which the legislature seeks to achieve [its] objective” (*MediaQMI inc. v. Kamel*, 2021 SCC 23, [2021] 1 S.C.R. 899, at para. 39). It is clear that Parliament did not seek to achieve at any cost its purpose of reducing the number of offences for which a preliminary inquiry is available, but rather confined itself to a very specific compromise, which is reflected in the wording of the provision (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 174; see also Mancini, at pp. 920-21).

[67] The Crown relies in part on *R. v. Windebank*, 2021 ONCA 157, 154 O.R. (3d) 573, to argue that any interpretation of s. 535 *Cr. C.* that increased the number of offences for which a preliminary inquiry is available would be contrary to Parliament’s purpose. In that case, the accused was charged with assault causing bodily harm and assault by choking, suffocation or strangulation, offences punishable by imprisonment for a term of 10 years (s. 267(b) and (c) *Cr. C.*). The Crown advised the accused that it intended to apply to have him remanded for an assessment under s. 752.1 *Cr. C.* if he was convicted. In response, the accused requested a preliminary inquiry, alleging that he was now at risk of indefinite detention (s. 753(4) *Cr. C.*). The Ontario Court of Appeal, per Nordheimer J.A., rightly rejected that argument on the ground that the language and legislative history of s. 535 *Cr. C.* point to an emphasis on the seriousness of the offence, not on the jeopardy faced by the accused:

There is nothing ambiguous about the language used in s. 535. The words used are plain. An offender is entitled to a preliminary inquiry if “charged with an indictable offence that is punishable by 14 years or more of imprisonment”. The respondent is not charged with any such offence.

In my view, the flaw, both in the respondent’s argument and in the decisions below, is that they confuse the seriousness of the offence with the seriousness of the offender, that is, their individual circumstances. Proceedings by way of a dangerous offender designation are separate and apart from the proceedings leading to a conviction for the offence. It is a proceeding that may only be invoked *after* a finding of guilt has been made on the offence charged. It requires a separate process where separate factual findings are made, and its determination turns on the nature of the offender, not the nature of the offence. While a specific offence may trigger the dangerous offender proceeding, its determination goes well beyond the originating offence: *R. v. Wilson*, [2020] O.J. No. 30, 2020 ONCA 3, 384 C.C.C. (3d) 355, at para. 66.

As s. 535 makes clear, it is the seriousness of the offence that dictates the entitlement to a preliminary inquiry. This conclusion is reinforced by the legislative history leading to the changes to s. 535, including the change from offences carrying a maximum sentence of life imprisonment to offences carrying a maximum sentence of 14 years. It is also reinforced by the various speeches made in Parliament regarding the purpose behind the amendments. [Underlining added; paras. 35-37.]

[68] Clearly, and with respect for the distinction drawn by the Ontario Court of Appeal in *S.S.*, the jeopardy actually faced by the accused as a result of the time when the offence was committed is part of the accused’s individual circumstances and does not go to the seriousness of the alleged offence. An offence is not less serious today because it was committed before a certain date. In determining the right to a preliminary inquiry, Parliament did not intend to draw a distinction between charges of the same nature based on the date of commission of the offence. To conclude otherwise would only create more complexity and uncertainty, which would be contrary to Parliament’s intent (*Windebank*, at para. 31).

[69] The objective seriousness of an offence is not confined to the maximum sentence for the offence *at the time it was committed*. On the contrary, the legislative amendments increasing maximum sentences “indicate Parliament’s determination that . . . offences . . . are to be treated as more grave than they had been in the past” (*Friesen*, at para. 99; see also *Bertrand Marchand*, at para. 168). The jeopardy faced by an accused who is not personally liable to a maximum sentence of 14 years is similar to that faced by an accused who is personally liable to that maximum sentence. In applying the principles of sentencing, courts are required to impose sentences higher than those imposed prior to the increases, in accordance with the will of Parliament (*Friesen*, at para. 100; see, e.g., *R. v. Fruitier*, 2022 QCCA 1225, at paras. 32-40). Parliament did not intend to exclude historical offences from the category of the most serious offences.

[70] Finally, like the appellate courts that have considered the matter (see *S.S.*, at paras. 17-20; *C.T.B.*, at paras. 21 and 42-43), the Crown supports its interpretation of the new s. 535 *Cr. C.* by drawing an analogy between this provision and the one in dispute in *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289. With respect, that analogy does not hold up. In *Tran*, the accused had committed an offence that was punishable by a maximum sentence of seven years at the time it was committed. After the accused was charged, but before he was convicted, a legislative amendment increased the maximum sentence for that offence to imprisonment for 14 years. Under s. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the accused was inadmissible to Canada on

grounds of serious criminality for having been convicted in Canada of a federal offence punishable by a maximum term of imprisonment of at least 10 years. That provision, which has since been amended, was worded as follows:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

[71] On the basis of this wording, the parties were divided on the question of whether the maximum sentence should be assessed by reference to the Act of Parliament defining the offence or the maximum sentence that could be imposed on the person. In that particular context, this Court departed from the usual meaning of the words “punishable by a maximum term of imprisonment of at least 10 years”. Such an interpretation was justified by the context of the provision, given the temporal marker (set at the time of conviction) and the disjunctive clauses (the maximum term of imprisonment and the actual term imposed), as well as by the purpose of the *Immigration and Refugee Protection Act* (*Tran*, at paras. 36-40). The opposite interpretation would have led to the conclusion that one and the same conviction could both entitle a permanent resident to remain in the country at the time the conviction was entered and lead to their deportation later, without any indication from Parliament that such a retroactive effect was intended (paras. 43-53). In light of all of these considerations, this Court held that the provision could refer only to the maximum

sentence that could have been imposed on the accused at the time the offence was committed (para. 36).

[72] Uniformly transposing the interpretation of s. 36(1)(a) of the *Immigration and Refugee Protection Act* to s. 535 *Cr. C.* disregards the text, context and purpose of each of the two provisions. Statutory interpretation is meant to determine the intent reflected in a particular enactment and cannot be reduced to an artificial comparative exercise that does not take account of the context in which the words are used.

[73] Where the maximum sentence for an offence was increased to 14 years between the commission of the offence and the laying of charges, a preliminary inquiry can be held even if the accused is not personally facing a maximum sentence of 14 years. In such a case, it must be asked whether the seriousness of the alleged offence, as it is defined today, places it within the category of the most serious offences. The fact that the accused is charged and convicted on the basis of the criminal provisions in force at the time the offence was committed changes nothing in this regard.

(2) An Accused's Right to the Benefit of the Lesser Punishment Does Not Affect the Determination of the Right to a Preliminary Inquiry

[74] Although an accused may receive a reduced maximum sentence for a crime committed before the sentence was increased, the accused's right to the benefit of the lesser punishment does not defeat the right to a preliminary inquiry. To conclude

otherwise would lead to an absurd result, in addition to penalizing the accused and disregarding the sequence of the various stages of a trial.

[75] In establishing an accused's right to a preliminary inquiry, s. 535 *Cr. C.* is closely linked to the right set out in s. 548(1)(b) *Cr. C.*, that is, the right to be discharged of any charge if, on the whole of the evidence adduced during the preliminary inquiry, no sufficient case is made out to put the accused on trial on the charge. In this sense, it is a provision favourable to the accused. Section 535 *Cr. C.* cannot be interpreted narrowly in light of other provisions that are equally favourable to the accused, such as s. 11(i) of the *Charter* and ss. 43(d) and 44(e) of the *Interpretation Act*, which establish the accused's right to the benefit of the lesser punishment. Concluding that accused persons who enjoy such protection have no right to a preliminary inquiry leads to an absurdity, which results from the application of provisions whose purpose is precisely to preserve their interests.

[76] We are also unable to agree with the conclusion of our colleague Karakatsanis J. that Mr. Grenier and Mr. Archambault would not be penalized by such an interpretation. While an accused's right to the benefit of the lesser punishment guarantees a maximum sentence of 10 years' imprisonment because of the date of the alleged offence for which the statutory sentence has since been increased, the accused can be given a sentence heavier than the one that would have been imposed at the time, as we explained above (*Friesen*, at paras. 3, 5 and 107; *Bertrand Marchand*, at para. 31). There is therefore a significant difference between the situation of an accused

charged with an offence punishable by imprisonment for a term of 10 years and that of an accused charged with a historical offence for which the statutory sentence has since been increased.

[77] We reiterate that *Tran* does not support the conclusion that the accused must be personally facing a maximum term of imprisonment of 14 years in order to have the right to a preliminary inquiry. Drawing an analogy with s. 36(1)(a) of the *Immigration and Refugee Protection Act*, as our colleague Karakatsanis J. does, overlooks the sequence of stages in criminal trials. The preliminary inquiry and sentencing occur at different times and are separated by the trial. The order in which these stages proceed plays an important role, because the preliminary inquiry takes place well before sentencing. To hold otherwise could lead to results that are absurd in practice, if not harmful. There are circumstances in which the justice cannot say with certainty that the accused will have the rights set out in s. 11(i) of the *Charter*. Adopting the reasoning proposed by our colleague would create the risk of denying a preliminary inquiry to an accused who should be entitled to one. The application of s. 11(i) of the *Charter* is a question of law, which a judge decides only at the sentencing stage.

(3) Application to the Facts

[78] It must be kept in mind that, since 2015, offences in the nature of those with which Mr. Grenier and Mr. Archambault were charged, or the equivalent offences, have been punishable by a maximum term of imprisonment of 14 years. Under s. 11(i) of the *Charter*, the respondents are entitled to the benefit of the lesser maximum

punishment in effect at the time the alleged acts were committed, that is, a maximum of 10 years' imprisonment. The fact remains that the intent expressed by Parliament is to toughen the sentences applicable to the offences charged against Mr. Grenier and Mr. Archambault. Section 535 *Cr. C.* must be interpreted in a manner consistent with that intent.

[79] The offences with which Mr. Grenier and Mr. Archambault were charged fall within the category of the most serious offences, because if the acts in question were committed today, they would be punishable by a maximum term of imprisonment of 14 years. This is not in dispute. They therefore have the right, under the new s. 535 *Cr. C.*, to request a preliminary inquiry.

V. Conclusion

[80] For these reasons, we would dismiss the appeal.

English version of the reasons of Kasirer and Jamal JJ. delivered by

KASIRER J. —

[81] I have had the advantage of reading the reasons prepared by my colleagues, but, with respect, I do not share their views. In my opinion, given the respondents' particular circumstances, their right to request a preliminary inquiry vested prior to the coming into force of the new s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46

(“*Cr. C.*”), on September 19, 2019. This allowed for their preliminary inquiries to be held at a later date. I would therefore dismiss the Crown’s appeal, but, again with respect, for reasons that differ from those of the Court of Appeal.

[82] In substance, I agree with Karakatsanis J.’s analysis of vested rights with regard to the temporal application of s. 535 *Cr. C.* In particular, I agree with the importance my colleague attaches to the request made by an accused for a preliminary inquiry. I also agree with her that local practices regarding the administration of justice can legitimately vary from one province or territory to another and that this is not necessarily incompatible with the uniform application of substantive criminal law in Canada in a context similar to that of this appeal. However, in light of the practice followed in Quebec and its effect on the respondents’ right to request a preliminary inquiry, I am of the view that the respondents had vested rights in the circumstances. This conclusion should not be seen as a way of circumventing the effect of legislation duly passed by Parliament. Given that Parliament did not enact a transitional provision specifying how the new s. 535 *Cr. C.* was to apply to an existing situation, it is for the courts to interpret it to determine whether accused persons had vested rights at the time it came into force. There is no justification for excluding the Quebec practice from the analysis.

[83] The rule governing vested or acquired rights was stated as follows by this Court in *R. v. Puskas*, [1998] 1 S.C.R. 1207: “A right can only be said to have been ‘acquired’ when the right-holder can actually exercise it” (para. 14). As Lamer C.J.

explained, “a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled” (*ibid.*; see also *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 37; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 52).

[84] Both as it read at the time of each respondent’s first appearance before the Court of Québec and in its amended form, s. 535 *Cr. C.* grants certain accused persons what the Superior Court judge in Mr. Grenier’s case rightly called [TRANSLATION] “the right to request a preliminary inquiry” (2021 QCCS 1876, at para. 32 (CanLII)). Once a preliminary inquiry has been requested, the justice “shall” inquire into the charge (s. 535 *Cr. C.*).

[85] I agree with Karakatsanis J. that once an accused requests a preliminary inquiry, “all conditions precedent” to the exercise of the right are then fulfilled within the meaning of *Puskas*. Accordingly, where a request was made before the amendment to s. 535 *Cr. C.* came into force on September 19, 2019, but the inquiry was not held before that date, the right to an inquiry at a later date had vested. In my opinion, however, this is not the only situation in which all of the “conditions precedent” are fulfilled, such that the right to request a preliminary inquiry for the existing situation vests. In my respectful view, to conclude otherwise would undermine the judicially endorsed practice that allows an accused to reserve their right to elect the mode of trial at a later date, a practice that determined the outcome for the two respondents in this case.

[86] In Quebec, by all accounts, accused persons proceed [TRANSLATION] “as is customary” in that province, that is, by “reserv[ing] their election . . . so that they [can] examine the evidence disclosed” (*R. v. Chrétien-Barrette*, 2023 QCCQ 5857, at para. 27 (CanLII)). It is also [TRANSLATION] “customary for judges to agree to requests made by accused persons to reserve their election” as to the mode of trial, a practice recognized both by the courts and in legal scholarship (para. 29; see also *Aucoin v. R.*, 2023 QCCS 3024, at paras. 41 and 43 (CanLII); A. Stylios, J. Casgrain and M.-É. O’Brien, *Procédure pénale* (2023), at pp. 704-5; author Nicolas Bellemare uses the term [TRANSLATION] “postpone” to refer to the same practice: “Les procédures précédant le procès en matière criminelle”, in *Collection de droit de l’École du Barreau du Québec 2024-2025*, vol. 12, *Droit pénal – Procédure et preuve* (2024), 39, at pp. 70-71). It is therefore not surprising in this case that the Crown and Mr. Archambault both point to this practice in their submissions to the Court, by referring to [TRANSLATION] “reserv[ing] [the] election as to the mode of trial” (A.F., at para. 8) and [TRANSLATION] “reservation of [the] election” (R.F. (Archambault), at paras. 68-71), and do not dispute its existence. Healy J.A., writing for the unanimous panel of the Court of Appeal, made the same observation when noting that “[a]t the first appearance, at least in Quebec, the accused typically reserves the right of election to a future date” and that, in doing so, “the accused has effectively preserved the entitlement to request a preliminary inquiry” (2022 QCCA 1170, 84 C.R. (7th) 174, at paras. 40 and 43).

[87] This is what occurred in respect of the two respondents. When they first appeared before the Court of Québec, the accused each asked the court to reserve their election as to the mode of trial, and their request was granted (see 2021 QCCS 1966, at paras. 12 and 15; C.Q. reasons (Grenier), reproduced in A.R., vol. I, at pp. 7-8; A.F., at para. 8). All of this happened before the amendments to s. 535 Cr. C. came into force, that is, before September 19, 2019. The respondents’ understanding — which is generally shared by Quebec judges and lawyers — was that reserving the election as to the mode of trial had the effect of preserving the right to make a request for a preliminary inquiry at a later date, so that the right could be exercised in an informed manner (see, e.g., C.A. reasons, at para. 42; R.F. (Archambault), at para. 68). By agreeing to their requests, the Court of Québec was thus assuring them that they could request a preliminary inquiry at a later date.

[88] This understanding is clearly reflected in the record, including in the following exchange between a Court of Québec judge and counsel for Mr. Archambault:

[TRANSLATION]

BRIGITTE MARTIN:

The time of the request for a preliminary inquiry. And what I wanted to add is that once the accused reserves their election, because that’s what he did, in the case of Mr. Agénor [Archambault], not just Mr. Agénor, but in the majority of cases, what’s done at the appearance stage is to appear and reserve the election. And the purpose of reserving the election is to make an informed decision . . .

THE COURT:

Ah, I understand all of that.

BRIGITTE MARTIN:

. . . to examine . . .

THE COURT:

Of course.

BRIGITTE MARTIN:

. . . to examine the evidence. And what I wanted to put to you is that once that election is reserved, the possibility of making an election that will lead to a preliminary inquiry is reserved for them.

So if the election is reserved, well at that point, it follows that . . .

THE COURT:

Well in fact, what you're arguing is a vested right. By reserving the election.

BRIGITTE MARTIN:

It's . . . you're ahead of me. It's a vested right.

THE COURT:

Exactly.

BRIGITTE MARTIN:

And that was Mr. Archambault's position, through what you were able to read in the arguments. But I still wanted to come back to this concept of reserving the right . . . [Emphasis added.]

(A.R., vol. I, at pp. 17-18)

[89] To be clear, I am not quoting this exchange as evidence of what actually occurred earlier, when Mr. Archambault reserved his election as to the mode of trial. Moreover, there is no disputing the fact that such exchanges between a judge and counsel are not binding on the court and do not constitute evidence in the strict sense. However, this exchange is an indication, drawn from the record before us, that at the time, the parties, counsel and the judge concerned all understood that the reservation had been approved by the court in keeping with the established practice.

[90] It is true that the judge did not accept Mr. Archambault's argument, but this was because he was of the view that even an accused with a vested right lost their right to a preliminary inquiry when s. 535 *Cr. C.* came into force, given that the judge had held that the provision applied with immediate effect. Indeed, while the Court of Québec judge recognized that reserving the right to elect the mode of trial could result in a vested right to request a preliminary inquiry, he adopted an interpretation of s. 535 *Cr. C.* that denied Mr. Archambault the benefit of such an inquiry. According to the judge, who relied on *R. v. Lamoureux*, 2019 QCCQ 6616, the right to request a preliminary inquiry is purely procedural, such that the new s. 535 *Cr. C.* applied with immediate effect, an interpretation that Karakatsanis J. rightly rejects. That being so, the question of whether a vested right exists, in accordance with *Puskas* and on the basis of Mr. Archambault's decision to reserve his election, remains an open one. Although the question has become factually moot in this case, this does not alter the importance of answering it for the benefit of other individuals who might find themselves in the same situation as the respondents.

[91] According to this understanding of reserving the election as to the mode of trial, which is an understanding I adopt, the effect of a reservation authorized by the court is to preserve the accused's rights pursuant to the rule stated in *Puskas*. All of the conditions precedent to the holding of a preliminary inquiry are indeed fulfilled when the election is reserved: the accused receives the court's assurance that they can make a request at a later date and, by the terms of s. 535 *Cr. C.*, that request *must* be honoured. The accused's legal situation is therefore tangible, concrete and sufficiently constituted

at that time (P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at Nos. 619-20, citing, among others, *Dikranian*, at paras. 37 et seq.). These criteria serve to distinguish the vested rights of the respondents in this case from what would be mere expectations. Reserving the right to elect the mode of trial is thus different from where the accused simply puts off their election without a judicial undertaking that entails the preservation of their rights. Moreover, the effectiveness of reserving the election as to the mode of trial does not turn on the fact that certain accused persons, having received this assurance from the court, were or were not represented by counsel at the time, which could create an injustice for a class of accused persons who nevertheless face the same potential deprivation of liberty.

[92] It remains true that, by assuring the accused that a request for a preliminary inquiry can be made at a later date, the fact of reserving the right to elect the mode of trial ensures that all of the conditions precedent are fulfilled within the meaning of *Puskas*. It may well be that other local practices have the same effect. It is equally possible that the Court of Appeal for Ontario was correct to find in *R. v. R.S.*, 2019 ONCA 906, that the right to a preliminary inquiry cannot vest until the accused has made a request to that effect in that province. However, this does not take away from the fact that, in Quebec, this right vests each time a court agrees to reserve an accused's right to elect their mode of trial, in keeping with the standard practices. I wish to make clear that this must not be seen as a special rule for Quebec, but only as a reflection of the application of *Puskas* to a legitimate procedure used in part of the country.

[93] I would add that to conclude otherwise could lead to injustices and undermine public confidence in the administration of justice. The respondents relied on the assurance that they each obtained from the court on the basis of a well-established local practice. The respondents relied — to their detriment — on the local practice of reserving their rights, with the court’s approval. It is true that the respondents will not actually suffer any injustice, since the appeal is moot as far as they are concerned. However, I am mindful that other individuals — the numbers are of course uncertain — could find themselves in the same situation. In my opinion, public confidence in the administration of justice and in the rule of law might well be undermined if accused persons — especially those whose liberty is at stake — cannot rely on the assurances they receive from the very court that administers the proceedings brought against them. The Crown may be right in arguing that the amendment of s. 535 *Cr. C.* is a change that [TRANSLATION] “should have been anticipated” and “caught no one by surprise” (A.F., at para. 88), but accused persons in Quebec who believed that their right was reserved will surely be caught by surprise if they later discover that this right has been taken away from them despite the assurances they received. Nonetheless, I would add that my interpretation of s. 535 *Cr. C.* and of its impact on vested rights is based on the application of *Puskas* and not solely on the observation that an injustice could result from a contrary interpretation. In other words, the question at the heart of this appeal remains the interpretation of what constitutes a vested right following the amendment to s. 535 *Cr. C.*, a question that was settled in *Puskas*.

[94] However, I also hasten to note that, given Parliament’s silence regarding the application of s. 535 *Cr. C.* to existing situations, interpreting the new legislation on the basis of presumptions would face a second difficulty. The fact is that authors warn the courts against interpreting new legislation in a manner that may cause injustice. Pierre-André Côté has written that [TRANSLATION] “the courts try to reserve protection from the application of the new legislation for those who would actually be prejudiced by its application, that is, those whose expectations based on the former legislation have had practical consequences, have led them to take specific actions, to compromise themselves, to change their situation” (“Le juge et les droits acquis en droit public canadien” (1989), 30 *C. de D.* 359, at p. 419).

[95] Here, the purpose of reducing the number of preliminary inquiries that Parliament seeks to advance should not have a disproportionately unjust impact on accused persons like Mr. Grenier and Mr. Archambault, given the absence of a transitional provision for existing situations. In a context analogous to that of this case, authors Côté and Devinat explain as follows:

[TRANSLATION] However, denying the existence of vested rights and opting for the immediate application of the new legislation also has its share of disadvantages for individuals or, to state matters otherwise, involves individual costs that may be very high. The life of the law needs a degree of stability in order to develop: legal reform, if not carried out gradually, can entail serious prejudice for individuals. The perception of injustice in relation to affected individuals weighs heavily in the judicial determination of whether it is appropriate for the former legislation to survive.

(No. 614, quoting *Ciecierski v. Fenning*, 2005 MBCA 52, 258 D.L.R. (4th) 103, at para. 31, per Steel J.A. (“The presumption against interference with

vested rights is not as weighty as the presumption against retroactivity and the question of unfairness is a critical component”); see also R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at § 25.13.)

[96] In this case, both of the accused reserved their right at the time of their respective first appearance before the Court of Québec, and thus before September 19, 2019, when the new s. 535 *Cr. C.* came into force. They were therefore governed by the former s. 535 *Cr. C.*, which recognized their right to request a preliminary inquiry. In the circumstances, I am of the view that they could request a preliminary inquiry.

[97] Before concluding, I would add the following. It is apparent that this practice, which was followed in this case by the two respondents, may not be ideal in light of the time limits imposed by *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. As the Crown noted before this Court, [TRANSLATION] “it is a practice that is certainly a source of problems in that it results in significant delays. If you look at the number of times, for example, that these cases here were postponed pro forma without any decision having been made, without the judge putting the accused to an election, it can be seen here that there was a postponement, a postponement and no decision that was made in each instance” (transcript, at p. 18). Given its impact on court delays, it might be appropriate to rethink the wisdom of the practice of reserving the right to elect the mode of trial in the future.

[98] For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

MARTIN J. —

I. Overview

[99] Parliament’s decision to remain silent about when many provisions in former Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 (“2019 Amendments”), apply has created considerable legal uncertainty across all levels of court (see *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at paras. 86-87). This is the second time this Court has been asked to provide clarity on the temporal application of amendments introduced by this Act. The first time, in *Chouhan*, a majority of this Court determined that the Act’s changes to the jury selection process were procedural in nature and could therefore apply retrospectively (paras. 103, 109 and 124).

[100] However, in this case, my colleagues and I agree that the amendments at issue, which restrict preliminary inquiry eligibility only to offences attracting a maximum punishment of at least 14 years, are not purely procedural and instead can affect an accused’s substantive legal interests. Accused persons no longer entitled to preliminary inquiries under the new s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“Cr. C.”), have lost the opportunity to be discharged at the close of a preliminary inquiry should the evidence prove insufficient to order the accused to stand trial. This loss is significant as a discharge usually puts an early end to criminal liability for those charges. A discharge will also often mean that there will be no trial at all, or that the

accused will be released from custody pending trial or relieved from restrictive pre-trial release conditions (Karakatsanis J.'s reasons, at para. 158).

[101] In light of Parliament's failure to legislate on the timing of these amendments, the judicial task is to determine when the new s. 535 applies based on the principles and presumptions concerning the temporal application of legislation, as well as the values of fairness, rule of law and reasonable reliance they protect. This task must be approached with the interests of justice top of mind.

[102] The parties and the courts below proposed different points in time for the application of the new s. 535 of the *Criminal Code*:

- the date of the alleged offence (argued by the respondents Agénor Archambault and Gilles Grenier, and accepted by the Court of Appeal of Quebec);
- the date of the accused's first appearance (an alternative argument raised by Mr. Archambault and Mr. Grenier, and addressed by the Court of Appeal of Quebec); and
- the date the accused requests a preliminary inquiry (argued by the Crown, and adopted by my colleague Karakatsanis J.).

My colleagues Côté and Rowe JJ. prefer the date on which the charge is laid and Kasirer J. suggests that any vesting must take into account if and when the accused reserves their right to request a preliminary inquiry at a future date.

[103] To some extent, all of these possibilities represent reasonable alternatives and have their respective benefits and drawbacks. None of these possibilities offers a perfect answer. In my view, however, the date of the offence is the preferable option.

[104] The date of the offence best protects the accused's ability to have a preliminary inquiry, and in turn, potentially to be discharged, released from pre-trial custody, or relieved from onerous bail conditions. It is a principled choice that is consistent with the time ordinarily used as a reference point for legislative changes made to the availability of ancillary orders, constituent elements of offences, applicable maximum sentences, and legal defences to criminal charges (see *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 1-3; *R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 45; *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at paras. 18-20). It reflects that the accused person's interests at stake are significant and carry great weight in the interpretative exercise. Further, it does not subject these interests to a determination of when, why, or how the Crown decides to prosecute a charge, or the many factors that may influence the timing of an accused's choice as to their mode of trial. It also establishes a bright-line rule that operates fairly and consistently across the country, irrespective of regional differences in procedure.

[105] Accordingly, I see no basis to interfere with the decision of the Court of Appeal of Quebec holding that the entitlement to the preliminary inquiry attaches to the offence date, and I would dismiss the appeal. Accused persons alleged to have committed an offence that rendered them eligible for a preliminary inquiry before September 19, 2019, the date on which the new s. 535 of the *Criminal Code* came into force, should retain that eligibility today. I agree with my colleague Karakatsanis J. that going forward, under s. 535, an accused is only eligible for a preliminary inquiry if they personally face a maximum punishment of 14 years or greater.

II. Analysis

A. *The New Section 535 of the Code Impacts Substantive Rights*

[106] I agree that limiting the availability of the preliminary inquiry can interfere with the accused's substantive rights and is not purely procedural. An accused who is no longer entitled to a preliminary inquiry under the new s. 535 loses the substantive right to be discharged at the close of the preliminary inquiry, if the Crown does not meet the required threshold to order the accused to stand trial (*Cr. C.*, s. 548(1)(b); *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at para. 33; *R. v. R.S.*, 2019 ONCA 906, at paras. 47-58).

[107] A discharge will issue following a preliminary inquiry when, “on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction” (*Cr. C.*,

s. 548(1)(b)). A discharge cannot be appealed and is reviewable only for *certiorari*: “... the reviewing court should only intervene where the preliminary inquiry judge committed a jurisdictional error” (*R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, at para. 14). Other than *certiorari*, if the Crown wishes to proceed with the charges against the accused, its only option is to prefer an indictment under s. 577 of the *Criminal Code*, which requires the personal written consent of either the Attorney General or the Deputy Attorney General. Aside from these two narrow avenues to continue the proceedings, being discharged at the close of the preliminary inquiry effectively ends the criminal case against the accused.

[108] In my view, the loss of the possibility of being discharged at the close of a preliminary inquiry is significant. Although not a perfect analogy, it approximates the loss of a legal defence, which the majority in *Dineley* held affected the substantive and constitutional rights of the accused (paras. 18-21; see also *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 266-67). *Dineley* considered a legislative change to the *Criminal Code* that eliminated access to the “*Carter* defence” in impaired driving cases, which had formerly allowed the accused to rely on an expert opinion to argue that the amount of alcohol consumed was inconsistent with the breathalyzer test results. A majority of the Court in *Dineley* held that removing this defence affected the accused’s substantive rights and therefore the legislative change applied prospectively only. Just as mounting a successful *Carter* defence would often have left a trial judge with a reasonable doubt as to the accused’s criminal responsibility prior to the change, being discharged at the close of a preliminary inquiry, in most cases, will end the

criminal case against the accused on those charges (see paras. 17-18; *Arcuri*, at paras. 20-21).

[109] The impact of the amendments on the accused's constitutionally protected interests must also be considered in determining whether the legislation affects the accused's substantive rights. In *Dineley*, this Court considered that "[w]hen constitutional rights are affected, the general rule against the retrospective application of legislation should apply" (para. 21 (emphasis added); see also *Chouhan*, at para. 93). The respondents in this case make no claim that the removal of this screening mechanism violated rights under the *Canadian Charter of Rights and Freedoms*. However, they argue that the impact of its loss on the accused's substantive legal interests, which include constitutionally protected interests, must be considered when interpreting this new legislation to determine when and to whom it applies.

[110] Although this Court in *R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, held that the accused does not have a constitutional right to a preliminary inquiry, the question of whether legislation is constitutional is distinct from the question of its temporal application (paras. 21-22; see also *R.S.*, at para. 55). In determining the temporal application of legislation, the lack of a formal finding of unconstitutionality does not prevent a court from considering whether the accused's constitutionally protected interests may be affected by the change in the law. In other words, an amendment to a provision like s. 535 may affect a *Charter* right in the substantive

manner required to give rise to the presumption against retrospectivity without there being an actual infringement of the implicated *Charter* right.

[111] For example, *Dineley* did not involve a constitutional challenge to the legislative changes to the *Carter* defence. It was in the companion case of *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, that the majority of this Court held that the amendments infringed neither s. 7 nor s. 11(c) of the *Charter*. While the Court held that the amendments did infringe s. 11(d) of the *Charter*, it found that the infringement of s. 11(d) was justified under s. 1 (para. 101). Nevertheless, despite not having found a constitutional violation in *St-Onge Lamoureux*, when considering the *temporal application* of the amendments in *Dineley*, the Court emphasized that the amendments intersected with the presumption of innocence and that the constitutional, and therefore “necessarily substantive”, rights of the accused were affected (*Dineley*, at paras. 20-21).

[112] Eliminating the possibility of a discharge at the close of the preliminary inquiry may also affect the accused’s constitutionally protected interests. The opportunity to obtain a timely judicial evaluation of the Crown’s case, and to be discharged should that case prove insufficient, implicates an accused’s rights to liberty and security of the person under s. 7 of the *Charter*, especially for those in custody pending trial or on stringent bail terms (*R.S.*, at para. 52). Even where a discharge is ordered in respect of only some charges, the accused’s jeopardy is reduced accordingly, which may lead to loosening their bail conditions or to their pre-trial release from

detention (*R.S.*, at para. 58; *Cr. C.*, s. 523(2)(b)). This, in turn, may cause the Crown to revisit the strength of the remaining case against the accused, thereby opening avenues for plea negotiations or withdrawals of other charges.

[113] Further, the “paramount purpose [of the preliminary inquiry] is to ‘protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process’” (*R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 30, citing *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 105). A preliminary inquiry is a pre-trial screening mechanism and does not determine guilt (*S.J.L.*, at para. 21). Nevertheless, a case ought not proceed to trial without meeting the low threshold for an order to stand trial — meaning there is *no* evidence “upon which a reasonable jury properly instructed could return a verdict of guilty” (*Arcuri*, at paras. 20-21; see also *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080).

[114] In summary, limiting the availability of the preliminary inquiry is not purely procedural; it affects the accused’s substantive rights.

B. *The Proper Interpretive Approach for Legislation That Affects Substantive Rights*

[115] Given “the need for certainty as to the legal consequences that attach to past facts and conduct, courts have long recognized that the cases in which legislation has retrospective effect must be exceptional” (*Dineley*, at para. 10). As thoroughly discussed by some of my colleagues, the case law and the *Interpretation Act*, R.S.C.

1985, c. I-21, provide legal presumptions which guide the interpretation of legislation when Parliament has failed to clearly set out its temporal application (see also *Dineley*; *Chouhan*, at paras. 86-87; *R. v. Puskas*, [1998] 1 S.C.R. 1207, at paras. 5-7; *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at paras. 29-40). I will focus on two presumptions which apply to legislation that affects an accused's substantive rights.

[116] The first is the presumption against the retrospective application of legislation affecting substantive legal interests. This presumption is clearly reflected in this Court's most recent jurisprudence on the temporal application of amendments to the *Criminal Code*. The guiding principle is that new legislation that affects substantive rights is presumed to apply prospectively, absent clear legislative intent otherwise. New legislation that deals with procedure will also not apply immediately if, in its application, it *affects* substantive rights (*Dineley*, at paras. 10-11; *Chouhan*, at paras. 87 and 91).

[117] The second is the presumption against interfering with vested rights. This presumption frequently arises in the civil context, for example, when discussing the inability of legislation to interfere with rights already accrued under contract (see, e.g., *Dikranian*, at para. 32; see also R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 762-63). In criminal cases, this Court's jurisprudence on vested rights has previously required that a right-holder be able to "actually exercise" the right and that

the “eventual accrual [be] certain, and not conditional on future events” (see, e.g., *Puskas*, at para. 14).

[118] There is a difference of opinion as to which pre-amendment criminal cases — and which accused — these two presumptions protect. I analyze the new s. 535 of the *Criminal Code* based on the approach articulated and applied in *Dineley*, this Court’s most recent authority concerning the temporal application of legislation which affects substantive interests. *Dineley* makes clear that in order to engage the presumption against retrospectivity, it is sufficient that the legislation affects substantive rights. While *Chouhan* came later and addressed the changes to the jury selection procedures under the 2019 Amendments, a majority in that case applied the presumption that procedural law applies retrospectively. The majority was not concerned with, and did not address, the framework of analysis for amendments which affect substantive rights (para. 103).

[119] Conversely, in *Dineley*, which involved a substantive right and not a purely procedural one, a majority of this Court held that legislative amendments that eliminated the availability of the *Carter* defence in impaired driving cases applied prospectively, as of the date of the offence. In doing so, the majority explicitly set out the governing test for legislation that affects substantive rights. In describing the rules of interpretation that can be helpful in identifying the situations to which new legislation applies, the Court explained at para. 10 that:

More specifically, where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable. New legislation that affects substantive rights will be presumed to have only prospective effect unless it is possible to discern a clear legislative intent that it is to apply retrospectively. However, new procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases. [Citations omitted.]

[120] The above represents this Court’s most recent statement concerning the timing of amendments that affect substantive rights. Overall, *Dineley* stands for two key propositions that directly impact my conclusion on the outcome of this appeal.

(1) *Either Substantive or Vested Rights Will Trigger the Presumption Against Retrospectivity*

[121] Writing for the majority in *Dineley*, Deschamps J. stated there would be no retrospectivity when the legislative provisions affect “either” vested or substantive rights (para. 10). On its face, this is a disjunctive requirement built upon the separate existence of the two presumptions noted above. The express inclusion of the word “either” can only mean that the presence of one *or* the other engages the presumption against retrospectivity. This either-or formulation is based upon, reflects, and best respects the separate existence of these two presumptions. While some amendments may affect *both* substantive and vested rights, in employing this clear language, the Court in *Dineley* conveyed that either of these two avenues is available to a claimant seeking to have legislation apply prospectively only.

[122] Dissenting in *Dineley*, Cromwell J. was of the view that the amendments were purely procedural and therefore applied retrospectively. Nevertheless, his reasons also identify the two presumptions as “distinct” and refer to them as “substantive or vested rights”, effectively positioning them as two alternative paths to reaching the same result (see, e.g., paras. 46, 52 and 54-55).

[123] Further, the majority in *Dineley* treated its conclusion that the amendments affected substantive rights as fully dispositive of the appeal. Paragraph 10 of *Dineley*, cited above, largely references legislation that affects substantive rights, with little discussion of the second presumption relating to vested rights. Once Deschamps J. found that the elimination of a defence affected the accused’s substantive rights, she did not consider it necessary to conduct a subsequent, separate analysis of whether the defence had somehow “vested” or “accrued” in the accused (*Puskas*, at paras. 6 and 14). The majority canvassed other relevant decisions on the temporal application of legislation without ever referencing the need for vesting. The majority did not even cite to *Puskas* and it cannot simply be assumed that they somehow neglected to do so. A more compelling explanation is that the majority did not need to refer to *Puskas*, because the impact on substantive interests alone was sufficient to allow the Court to conclude that the legislation could not apply retrospectively.

[124] Thus, in my view, *Dineley* makes clear that legislation which affects “either vested or substantive rights” offers two alternative routes to the presumption of prospective application (para. 10 (emphasis added); see also I.F. (Canadian Civil

Liberties Association), at paras. 23-28). As a result, once there has been a finding that the substantive rights of the accused are affected, it is unnecessary to impose the additional requirement that those rights must also have somehow vested or accrued to the accused.

[125] The majority's approach in *Dineley* is also complementary and consistent with this Court's decision in *Dikranian*, in which the Court held that new legislation modifying certain rules concerning interest for student loan payments did not apply retrospectively based on the presumption against interfering with vested rights (*Dikranian*, at paras. 32-40 and 49-54). Just as the majority in *Dineley* did not consider whether the substantive right to a legal defence had also vested in the accused, the Court in *Dikranian* did not consider whether the interest rate entitlement under the old regime was a substantive right or a procedural one. The simple explanation for why the Court did not analyze both presumptions in either case is that it did not have to: either one, standing alone, was sufficient to trigger the presumption of prospective application, which was not rebutted in either case.

[126] I therefore do not think it is necessary to also show that any substantive interest the legislation affects must *also* have vested in the accused before the presumption against retrospectivity can apply. There is no need to combine or collapse the presumption against retrospectivity where substantive rights are affected and the presumption against interfering with vested rights because they have distinct purposes and separate spheres of application. They may share the goal of protecting people who

have relied on the state of law prior to the amendments, but in my view, courts should preserve the independent integrity of each. Although in some cases these presumptions may arise together, there will equally be some interferences with substantive interests that do not qualify as interference with a vested right, or for which the idea of vesting may create theoretical or practical problems, or even generate unfairness. The separate definitions and distinct roles of the presumption against retrospectivity and the presumption against interference with vested rights has been recognized in the jurisprudence, in legislation and by legal scholars (see, e.g., *Interpretation Act*, s. 43(b) to (e); R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 342; see also pp. 357-61 and 363; Sullivan (2022), at pp. 726-27 and 729-30).

[127] In my view, *Dineley* is most closely analogous to the case before us. Both the repeal of the “*Carter* defence” in *Dineley* and the amendments to preliminary inquiry eligibility in this case eliminated one way in which the criminal charges could be resolved in the accused’s favour and implicated the accused’s constitutionally protected interests. *Puskas*, which concerned the elimination of the accused’s right of appeal to this Court without leave after a lower court of appeal had overturned their acquittal at trial, is a different type of case (para. 1). While the amendment in *Puskas* affected the accused’s substantive rights, it did not implicate the accused’s constitutionally protected interests. Removing a right to appeal at the last possible stage in a criminal case is not the same as taking away a substantive legal defence at trial (*Dineley*) or the choice of whether to have a preliminary inquiry — matters which are not only substantive but also implicate the accused’s constitutional rights.

[128] The nature of the entitlement in *Puskas* depended upon four preconditions. The specificity of these preconditions is perhaps one reason why it has only been cited twice by this Court (see *Dineley*, at para. 72, per Cromwell J., dissenting; *R. v. R.V.*, 2021 SCC 10, [2021] 1 S.C.R. 131, at para. 76). The right to appeal to this Court, which the amendments limited in *Puskas*, could only have arisen *after*: (1) the accused had been charged with an indictable offence; (2) the accused had been acquitted at trial; (3) the accused’s conviction had been reversed on appeal; and (4) a new trial had been ordered (para. 15). In that particular context, where there were legal preconditions necessary before the particular right to appeal could even arise, it made some sense for the Court to focus on vesting and ensuring that all “conditions precedent” had been met (para. 15). I do not read dicta from that case as creating a general requirement that all substantive rights must also have vested before legislative amendments must be presumed to apply prospectively.

[129] In any event, if a vesting of the substantive right is also required, it should be characterized sufficiently broadly to ensure that rigid legal characterizations and formalities are not favoured over fairness and an accused’s substantive interests (see Sullivan (2016), at p. 365; Sullivan (2022), at pp. 735-36). Any dispute over whether what must vest in this case is the right to a preliminary inquiry or the right to request to have a preliminary inquiry should be resolved to best respect fairness to an accused. A substantive legal interest that intersects with, implicates or affects constitutional rights, does not depend on the fulfilment of future conditions precedent in order to bear on the analysis. In respect of the constitutional rights at play in this matter, s. 7 *Charter*

rights are held by “[e]veryone” and s. 11 protects “[a]ny person charged with an offence”.

[130] Given the significance of the preliminary inquiry and the possibility of a discharge to the accused, it appears unjust to require the fulfilment of all statutory prerequisites to render the accrual of that right certain, including to require that the accused actually have exercised that choice themselves. As noted by my colleague Kasirer J., public confidence in the administration of justice should not be compromised (para. 93).

[131] In sum, where Parliament is silent as to the temporal application of an amendment to criminal legislation, a determination that such an amendment affects the substantive rights of the accused will normally be sufficient to conclude that the legislation applies prospectively. This conclusion considers the actual impact of the impugned legislation on the accused’s interests and underscores how courts should protect as fully as possible both the substantive and vested rights of those affected by changes in legislation. It also reflects the animating principles behind the presumption against retrospectivity — fairness and the rule of law — and is consistent with the rule that cases departing from such a presumption “must be exceptional” (*Dineley*, at para. 10; see also *K.R.J.*, at para. 25; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 45). Treating substantive rights and vested rights as two distinct concepts and giving full effect to each presumption in no way limits Parliament’s capacity to legislate. Subject to

constitutional challenges to the legislation itself, rebutting the presumption of prospective application of new legislation that affects substantive or vested rights will often simply require Parliament to stipulate its intent in express terms. When Parliament does not do so, it also understands that the courts will rely upon the jurisprudence on temporal application to aid in the interpretation of its legislation.

(2) If the Accused's Substantive Rights Are Affected, the Date of the Offence Should Govern

[132] Second, I also rely on *Dineley* for the proposition that new criminal legislation will apply as of the date of the offence if it affects an accused's substantive legal interests (para. 18). The question before the Court in *Dineley* was whether the amendments at issue applied “retrospectively, that is, to conduct which occurred before the Amendments came into force” (para. 3 (emphasis added)). The Court held that the amendments did *not* apply retrospectively and instead applied prospectively only, meaning to conduct occurring only after the amendments came into force (*Dineley*, at paras. 3 and 25). The temporal application of amendments therefore hinged on the date of the impugned “conduct” — or the date of the alleged offence.

[133] Similarly, because the new s. 535 of the *Criminal Code* affects the accused's substantive rights, and in turn because it must apply prospectively only, the date of the offence should govern its temporal application. Although the Court of Appeal of Quebec took a somewhat different reasoning path, it ultimately decided that

the entitlement to the preliminary inquiry attaches to the date of the offence, and I see no reason to interfere with that conclusion.

[134] The court below duly focused on the impact on the accused in determining the temporal application of the new s. 535 of the *Criminal Code* (2022 QCCA 1170, 84 C.R. (7th) 174, at para. 11). With reference to this Court’s decision in *Dineley*, as well as the Ontario Court of Appeal’s decision in *R.S.*, the court considered that the temporal application of a legislative amendment depends not “on a formal and categorical distinction between procedural and substantive law but on a functional assessment [of] whether the amendment affects an acquired right or interest” (para. 26, citing *Dineley* and *R.S.*). The key question to be determined, in its view, was “whether the effect of an amendment is to create a negligible or significant risk to a party in the range of possible outcomes in a proceeding as a result of forced compliance with the amendment or voluntary reliance upon it” (C.A. reasons, at para. 29). In other words, the more significant the impact on the party affected, the stronger the argument for prospective application. This reasoning is sound, well supported by this Court’s jurisprudence, and properly reflective of the concrete impact of the legislation on the individuals most affected by it (see also Sullivan (2016), at p. 365; Sullivan (2022), at pp. 735-36).

[135] To the extent I would depart from the reasoning of the court below, it is with respect to its finding that the entitlement to a preliminary inquiry “vested or accrued” as of the date of the accused’s first appearance (paras. 11 and 39-40). For the

reasons discussed above, having found that the offence date was the appropriate reference point in light of the impact of the amendment on the accused, in my respectful view, it was unnecessary to turn to a further assessment of whether and when the right vested. In any event, the right to have a preliminary inquiry could be said to have also vested on the date of the offence.

[136] I add that the offence date remains preferable for a variety of reasons. It is a feature common to all criminal files. It is independent of any given procedure such as the accused's first appearance, and thus adaptable to potential regional differences in criminal procedure across the country. It is also attuned to the reality of delays or variables that may arise throughout the course of the criminal process, at no fault of the accused.

[137] Importantly, the date of the offence is the same across Canada and is not subject to significant variations in procedure, at the first appearance or otherwise, depending on the province or territory. For example, while the respondents before us were able to formally reserve their right to a preliminary inquiry at their first appearances given local practice in Quebec, in other jurisdictions, the first appearance may allow for no such option (I.F. (Attorney General of Ontario), at paras. 13-14; see also oral submissions of the Criminal Lawyers' Association (Ontario), transcript, at p. 115). Determining the temporal application of the new s. 535 of the *Criminal Code* requires a solution that applies consistently across the country. The accused's

substantive rights should not be dependent on or shaped by regional differences in procedure, especially when it may result in unfairness.

[138] In my view, the accused's request is not the preferable time as it is, under recent versions of the *Criminal Code*, the final procedural step that must take place to ensure they can *exercise* their right to a preliminary inquiry. However, that does not mean such a request is necessary for that right to have been initially acquired by the accused, with the *choice* to exercise it at a later stage in the proceedings. Furthermore, such an analysis would not align well with some of s. 535's pre-2004 iterations, which imposed a mandatory preliminary inquiry. For certain historical offences committed under previous versions of the *Criminal Code*, there may be no *request* to mark the time the right was acquired. Additionally, the possibility that the Crown may proceed summarily on a hybrid charge, or that the accused may ultimately elect trial in the provincial court, does not mean the accused never acquired the right to a preliminary inquiry. The right may no longer exist from that point forward, but this does not make its existence in the first place conditional on the accused's request. I note that this rationale is in fact consistent with *Puskas*, in which the final condition precedent associated with the accused's right to appeal was that the court of appeal below had ordered a new trial. The accused was not required to actually exercise his right — i.e., by filing a notice of appeal — in order to have acquired it (para. 15).

[139] I would add this: in my respectful view, when a change in the law deprives the accused of a substantive right and Parliament is silent as to the temporal application

of that change, it is hard to see why a court should insist that accused persons must act in a particular manner to preserve that right. In this case, requiring an actual request for a preliminary inquiry in order to remain entitled to one after September 19, 2019, has significant consequences for the accused, which run against the animating principle of fairness that guides the presumption against retrospectivity (*K.R.J.*, at para. 25; *Tran*, at para. 45). Namely, there is a risk that the accused will be forced to choose between their right to a preliminary inquiry, and their right to make a free and fully informed election.

[140] The accused’s ability to request a preliminary inquiry is, in all provinces and territories other than Nunavut, intrinsically linked to their election as to mode of trial. An accused who elects trial in the superior court, either by judge alone or by judge and jury, may be eligible for a preliminary inquiry, whereas an accused who elects trial in the provincial court is not (see *Cr. C.*, ss. 536(2) and 536.1(2)). In turn, the accused’s election as to mode of trial has been recognized as one of the most fundamental decisions they can make in their case — often considered, along with how to plead and whether to testify, as one of few decisions so important that the accused’s counsel cannot make it on their behalf (*R. v. White*, 2022 SCC 7, at para. 5; *R. v. W. (R.)*, 2023 ONCA 250, 167 O.R. (3d) 1, at paras. 20-21, citing G. A. Martin, “The Role and Responsibility of the Defence Advocate” (1970), 12 *Crim. L.Q.* 376, at pp. 387-88).

[141] Given the significance of the election, the accused should be free to make it without fear of potentially jeopardizing other rights. As the Court of Appeal of

Quebec held, to suggest that a failure to formalize an election or request until after September 19, 2019, diminishes the accused’s entitlement to a preliminary inquiry would “eviscerate the election of its content [and imperil] a variety of entitlements”, including the right to choose trial by judge and jury or judge alone and, if the latter, at which level of court that trial will occur (para. 37). The accused should also, within the limits expressly set out in the *Criminal Code*, in rules of court and by individual justices, remain in control of the *timing* of their own election, which in turn may be subject to a range of considerations. For example, in the context of s. 11(b) of the *Charter*, accused persons may be entitled to hold off on electing the mode of trial if they have not yet received sufficient disclosure to enable them to make a fully informed decision — a problem that, at its core, may in fact overlap with the same delay-related concerns Parliament intended to address with the amendment to s. 535 (see, e.g., *R. v. L. (L.)*, 2023 ONCA 52, 166 O.R. (3d) 561, at paras. 15-18). Indeed, this Court in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, noted that timely requests for initial disclosure should be complied with “so as to enable the accused sufficient time before election . . . to consider the information” (p. 343 (emphasis added)).

[142] If the accused, at first, elects a mode of trial that allows them to preserve their right to request a preliminary inquiry within a limited time, and then later wishes to re-elect to be tried by provincial court judge, in many cases their ability to do so is subject to the written consent of the Crown (*Cr. C.*, s. 561(1)(a); *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 62). If the Crown refuses to consent, as the *Criminal Code* allows, a court may only review the scope of prosecutorial discretion

when there is an abuse of process (see *R.W.*, at para. 31, and references cited therein). Because the Crown is not required to provide reasons for its refusal, an abuse of process claim on this basis often proves “extraordinarily difficult” (para. 32, citing S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at §9.02). Therefore, an accused seeking to preserve their right to a preliminary inquiry by electing early risks locking themselves into that decision should the Crown refuse to consent to a re-election down the road. The unfairness of this situation, which is to the accused’s detriment, give me great pause about grounding the entitlement to a preliminary inquiry on the accused having made a request prior to September 19, 2019. Nor does the 90-day notice period between when the amendments received royal assent and when they came into effect alleviate these concerns. Without suggesting that, in some cases, ignorance of the law should be an excuse or defence, the reality is that despite efforts by Parliament and the government to publicize the amendments, many accused persons may not actually have learned of the change, particularly if they were self-represented. Mere knowledge that the law will be changing is also of little assistance to an accused holding off on their election for valid, unrelated reasons. Such an accused would remain in the same undesirable position described above of having to choose between preserving their entitlement to a preliminary inquiry, and making a free and fully informed election as to mode of trial. Finally, the notice provided would simply have communicated that the law *would be changing* on September 19, 2019. It would not have specifically communicated that the accused had to *request* a preliminary inquiry before that date in order to claim the protections of the old regime.

[143] The offence date is neither insufficiently concrete nor overly speculative as a reference point. The fact that the accused may not ultimately be charged with the offence does not prevent other substantive entitlements from attaching to the offence date. For example, in addition to defences to criminal charges as this Court determined in *Dineley*, the applicable maximum punishment is also determined with reference to the offence date, subject to the entitlement to the lesser punishment if it has changed between the date of the offence and sentencing under s. 11(i) of the *Charter* (see, e.g., *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752, at para. 93; *R. v. Fones*, 2012 MBCA 110, 288 Man. R. (2d) 86, at para. 60; *L.L. v. R.*, 2016 QCCA 1367, at paras. 134 and 150 (CanLII); *K.R.J.*, at para. 25). Furthermore, by the time a court is in a position to determine whether an accused is eligible for a preliminary inquiry, the accused has *indeed* been charged — transforming what was once a mere possibility into a concrete reality, with plain consequences for an accused who is deemed ineligible.

C. Summary

[144] Preliminary inquiry eligibility following the 2019 Amendments should be determined based on the date of the alleged offence. Where the alleged offence date is prior to September 19, 2019, an accused who would have been eligible for a preliminary inquiry but for the amendments remains eligible, regardless of the applicable maximum punishment. As mentioned above, where the alleged offence date is on or after September 19, 2019, the accused must personally be facing a maximum

punishment of at least 14 years' imprisonment in order to be eligible for a preliminary inquiry under the new regime.

[145] Had Parliament intended this amendment to apply retrospectively, it was free to have said so expressly. Because Parliament chose to remain silent on this amendment's temporal application, courts should interpret the amendment based on the relevant presumptions and their animating purposes. In this case, tying preliminary inquiry eligibility to the date of the alleged offence is preferable, both in principle and in practice. The rule this Court sets in respect of offences committed prior to the new s. 535 of the *Criminal Code* will involve a limited number of cases, which will reduce with the passage of time.

[146] As Parliament continues to exercise its exclusive jurisdiction to legislate amendments to the *Criminal Code*, it would be well advised to clearly articulate the intended temporal application of those changes. Absent clear direction, when presented with a range of reasonable options, courts will prefer the one which best protects the accused's substantive rights.

III. Disposition

[147] I would dismiss the appeal.

The reasons of Wagner C.J. and Karakatsanis, O'Bonsawin and Moreau JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[148] Faced with significant delays in criminal proceedings — threatening the right of accused persons to be tried within a reasonable time, and resulting in stays of criminal charges — Parliament sought to improve the efficiency of the justice system by eliminating preliminary inquiries for all but the most serious cases. This appeal raises two interpretative questions about the amendments. First, to which pre-existing criminal proceedings do they apply? Second, what is the scope of cases in which a preliminary inquiry remains available under the new rule?

[149] In 2019, s. 535 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), was changed to restrict the availability of preliminary inquiries to accused persons charged with offences with a maximum penalty of 14 years or more of imprisonment. Before the amendment, there was no condition related to the maximum penalty for the offences. There is no explicit transitional provision governing the temporal application of this amendment. Both immediately before and after the 2019 amendment, a preliminary inquiry was only available upon request by either the accused or the Crown.

[150] Each respondent before this Court was accused of one or more historical sexual offences against a child. After the dates of the alleged offences and before charges were laid, the maximum penalty for the impugned conduct was increased from

10 to 14 years' imprisonment. Because the penalty for a criminal offence is presumed to be that in force when the offence was committed — and because of the guarantee under s. 11(i) of the *Canadian Charter of Rights and Freedoms* to the lesser punishment — they are each liable to a maximum of 10 years' imprisonment.

[151] The amendment of s. 535 came into effect a few months after the charges were laid and after the respondents first appeared in court. At each of their first appearances the respondents reserved their right to elect their mode of trial to a later date, meaning their election was postponed to a future appearance. Neither respondent requested a preliminary inquiry until months after the new s. 535 came into force. If the new rule applies to them, they must meet the condition that they be charged with an offence with a maximum penalty of 14 years or more of imprisonment.

[152] The Crown's position is that because the requests were not made before the new s. 535 came into force, the new rule applies. As the respondents were not charged with offences for which they could be personally liable to 14 years or more of imprisonment, the Crown says a preliminary inquiry was not available under that rule. In separate proceedings, the Court of Québec and the Superior Court agreed and concluded that Mr. Grenier and Mr. Archambault had no right to a preliminary inquiry.

[153] The Court of Appeal allowed the appeals, remitting the files to the Court of Québec for preliminary inquiries. It concluded that the respondents were not subject to the new limitation in s. 535 of the *Criminal Code* as amended because their entitlement to a preliminary inquiry arose on the commission of the alleged offences.

Thus, they were entitled to request a preliminary inquiry under the provision as it read at that time, which did not restrict availability to those charged with offences punishable by 14 or more years' imprisonment. The Court of Appeal declined to consider whether they would have had the right to a preliminary inquiry under s. 535 as it now reads.

[154] The Crown appeals to this Court. My colleagues would dismiss the appeal. They conclude, for different reasons, that the new rule in s. 535 does not apply to the respondents. My colleague Justice Martin concludes, like the Court of Appeal, that the new rule does not apply because it came into force after the time of the alleged offences. My colleagues Justices Côté and Rowe conclude that the new rule does not apply because it came into force after the respondents had been charged with those offences. Finally, my colleague Justice Kasirer concludes that the new rule does not apply because it came into force after the respondents reserved their right to elect their mode of trial at first appearance.

[155] I am unable to agree with any of the positions advanced by my colleagues on the issue of temporal application. In my view, the correct interpretation of the new s. 535, firmly grounded in the applicable provisions of the *Criminal Code*, is that it applies to accused persons where no request for a preliminary inquiry was made prior to its coming into force.

[156] Assuming there are no constitutional constraints, the ultimate question when determining the temporal application of a new rule is whether the legislature

intended it to apply in the circumstances. Ordinary principles of legislative interpretation may disclose legislative intent regarding whether the rule applies — for example where there are explicit transitional provisions. Where legislative intent is not clear, the jurisprudence has developed presumptions, now codified in the *Interpretation Act*, R.S.C. 1985, c. I-21, to guide courts in determining how Parliament has balanced the underlying legal values engaged by applying new law to circumstances that existed before that law's coming into force.

[157] Here, it is not immediately clear whether Parliament intended the amended s. 535 to apply to the respondents. Intent must therefore be determined in reference to the presumptions of temporal application. The relevant inquiry in determining the application of s. 535 can be summarized as follows: new rules are presumed not to apply where they interfere with a substantive legal interest that has vested before their coming into force.

[158] Limiting access to a preliminary inquiry can interfere with an accused's opportunity to obtain a discharge, which is a substantive legal interest. Like the right to an appeal, and unlike merely evidentiary hearings in the criminal trial process, the opportunity to obtain a discharge could put an end to the risk of criminal liability. If successful, an accused person will not face the ordeal of an unjustified criminal trial, and may be freed from custody or restrictive conditions pending trial. These interests are not merely relevant to how an accused person conducts their criminal defence — they exist separately from that litigation and have a direct, immediate impact on the

accused's life outside the courtroom. I conclude this substantive legal interest only vests once a preliminary inquiry has been requested, given the statutory right is expressly conditioned on this request. Absent a request, the accused holds no statutory right to a preliminary inquiry. Thus, where there has been no request before it came into force, the new limitation can apply without interfering with a vested substantive legal interest.

[159] As to the interpretation of the new limitation in s. 535, a preliminary inquiry is available only to “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment”. In this context, the objective seriousness of the offence is determined by the maximum prison sentence the accused actually faces for the offence as charged, not the maximum penalty for an equivalent offence were it committed today. This interpretation is grounded in the ordinary meaning of the text, the broader context and Parliament's purpose of reducing the number of preliminary inquiries based on a clear criterion limiting eligibility.

[160] For the reasons that follow, I conclude that a preliminary inquiry is only available to an accused person where either: a request was made before the coming into force of the amendment on September 19, 2019; or the accused actually faces criminal liability of 14 years' imprisonment or more in respect of an indictable offence with which they are charged. The respondents had no right to a preliminary inquiry because they do not meet either criterion. I would therefore allow the appeal.

II. Background

[161] The respondent Agénor Archambault was charged with committing, between the years 1958 and 1960, the historical crime of indecent assault against another male person, an indictable offence carrying a maximum term of imprisonment of 10 years (*Criminal Code*, S.C. 1953-54, c. 51, s. 148). The crime was repealed in 1983 (*An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 8).

[162] The respondent Gilles Grenier was charged with committing, between the years 2003 and 2007, the crimes of sexual interference and sexual assault against a person under 14, both hybrid offences which at the time carried a maximum term of imprisonment of 10 years (*Cr. C.*, ss. 151 and 271(1)(a) as they read before August 9, 2012). In 2015, Parliament raised the maximum imprisonment from 10 to 14 years (*Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23, ss. 2 and 14).

[163] The respondents first appeared in the Court of Québec in the summer of 2019. At first appearance, they reserved or postponed their right to elect their mode of trial to a later date, and the matters were adjourned. Regarding Mr. Archambault, he agrees with the Crown that he had not yet elected his mode of trial at first appearance despite contrary findings below.

[164] On September 19, 2019, the amendment to s. 535 came into force (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 (“2019 Amendments”),

ss. 238 and 406). While both respondents could have elected their mode of trial and requested a preliminary inquiry before that date, they had not yet done so.

[165] In 2020, each respondent requested a preliminary inquiry. In both matters, the Crown argued that the Court of Québec lacked jurisdiction under s. 535 to hold a preliminary inquiry.

III. Decisions Below

A. *Court of Québec*

[166] On February 4, 2020, the Court of Québec (per Rousseau J.C.Q.) held that it lacked jurisdiction to preside over Mr. Grenier’s preliminary inquiry. The court concluded that applying the new rule did not impact Mr. Grenier’s substantive rights because it was procedural. Mr. Grenier had no right to a preliminary inquiry under the new rule because the offences with which he was charged were punishable by a maximum of 10 years’ imprisonment. The court concluded the new rule therefore denied Mr. Grenier the right to a preliminary inquiry.

[167] On December 21, 2020, the Court of Québec (per Délisle J.C.Q.) dismissed Mr. Archambault’s request for a preliminary inquiry for similar reasons. The court concluded that preliminary inquiries were of a purely procedural nature, as they could always be set aside should the prosecution decide to move forward by way of a direct indictment.

B. *Superior Court of Quebec*

[168] Mr. Grenier and Mr. Archambault each challenged these decisions, applying to the Superior Court for *certiorari* and *mandamus* on two grounds. They argued first they had the right to a preliminary inquiry because the new rule in s. 535 did not apply to them. They said it would violate the presumption against retrospective application of legislation. Second, even if the new rule applied to them, they argued they nevertheless had the right to a preliminary inquiry, since the offences with which they were charged *currently* carry a liability of up to 14 years' imprisonment.

[169] On April 29, 2021, the Superior Court (2021 QCCS 1966, per Charbonneau J.) issued reasons for having dismissed Mr. Archambault's application, characterizing the right to a preliminary inquiry as purely procedural. Moreover, the court concluded that the new s. 535 required the accused to be charged with an offence for which they could be personally punishable by 14 years' imprisonment or more. Thus, it did not apply to Mr. Archambault, given he benefited from the *Charter* protection under s. 11(i) that brings the maximum punishment for the offences below 14 years. Section 535 [TRANSLATION] "is unambiguous" in that regard (para. 52 (CanLII)).

[170] On May 4, 2021, the Superior Court (2021 QCCS 1876, per Thibault J.) dismissed Mr. Grenier's application. As for the temporal application of the amendment to s. 535, the court relied on the decision of the Court of Appeal for Ontario in *R. v. R.S.*, 2019 ONCA 906, and held preliminary inquiries affected an accused's substantive

right to a discharge. It concluded, however, that Mr. Grenier's entitlement had not vested by the time the amendment to s. 535 came into force. To get the benefit of the old rule, he should have both elected his mode of trial and asked for a preliminary inquiry before September 19, 2019, the date the amendment came into force.

C. *Court of Appeal of Quebec*

[171] The Court of Appeal released one set of reasons disposing of both appeals (2022 QCCA 1170, 84 C.R. (7th) 174). The court concluded that the new rule in s. 535 of the *Criminal Code* did not apply to Mr. Grenier and Mr. Archambault and that they were therefore each entitled to a preliminary inquiry. It allowed the appeals, finding it unnecessary to address whether they would have the right to preliminary inquiries under the new rule.

[172] Writing for a unanimous court, Healy J.A. (Vauclair and Hamilton JJ.A. concurring) interpreted the jurisprudence, including this Court's decision in *R. v. Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, as holding that "the temporal application of a legislative amendment does not depend on a formal and categorical distinction between procedural and substantive law but on a functional assessment whether the amendment affects an acquired right or interest" (para. 26).

[173] In his view, the analysis required "an evaluation of the interests at stake as a result of the amendment" (para. 26). The greater their significance, the more likely an amendment would apply on a prospective basis only. Here, the amendment would

deprive the accused of the possibility of a discharge and the opportunity for enhanced disclosure under oath. Given these significant interests, the rights at stake were acquired from the moment of the commission of the offence and that was the relevant date for determining the entitlement to ask for a preliminary inquiry. The Court of Appeal allowed the appeals and remitted each file to the Court of Québec for a preliminary inquiry.

IV. Issues

[174] Following the release of the Court of Appeal’s judgment, both respondents had the benefit of a preliminary inquiry. Thus, the Crown’s appeal is moot (A.F., at para. 20). The Crown, however, obtained leave and asks this Court to address the important issues at stake given conflicting appellate court decisions interpreting s. 535 of the *Criminal Code* (para. 21). This Court has residual discretion to hear a moot appeal on the merits (*R. v. Poulin*, 2019 SCC 47, [2019] 3 S.C.R. 566, at para. 26; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). Given the disagreement between appellate courts on these issues of national importance and the fact that the issues raised have been fully argued by adversarial parties both here and in the courts below, it is in the interests of justice to address the appeal on the merits.

[175] The parties raise two questions of law on this appeal, about the proper interpretation of the amended s. 535 of the *Criminal Code*:

1. Are accused persons subject to the new rule, limiting eligibility for a preliminary inquiry, where no request for a preliminary inquiry was made before the coming into force of the new s. 535?

I would answer yes. Accused persons are subject to the new limitation if a request for a preliminary inquiry was not made before its coming into force.

2. Are preliminary inquiries available under the new s. 535 where an accused has been charged with an indictable offence for which they are not personally liable to imprisonment for 14 years or more, even though the offence, if committed today, would carry maximum liability of 14 years' imprisonment?

I would answer no. Under the amended provision, only those who are charged with an offence for which they actually face imprisonment of 14 years or more are entitled to a preliminary inquiry on request.

V. Analysis

A. *The History and Availability of Preliminary Inquiries*

[176] Preliminary inquiries have been part of the criminal process in Canada since before Confederation (Department of Justice of Canada, Working Document prepared by D. Pomerant and G. Gilmour, *A Survey of the Preliminary Inquiry in Canada* (April 1993), Annex D, at pp. 19-20). They trace their roots to procedures of criminal investigation in early English law, in which justices of the peace performed investigative or prosecutorial functions (pp. 2-4). Over time, the role of the justice of the peace has evolved considerably to take on judicial characteristics (*Skogman v. The*

Queen, [1984] 2 S.C.R. 93, at pp. 105-6, citing Law Reform Commission of Canada, *Study Report: Discovery in Criminal Cases* (1974), at p. 8; see also pp. 64-65).

[177] The preliminary inquiry primarily acts as a procedural safeguard — a screening mechanism to put an end to cases where the evidence is insufficient to order the accused to stand trial (*R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at para. 30, citing *Caccamo v. The Queen*, [1976] 1 S.C.R. 786; see also *Patterson v. The Queen*, [1970] S.C.R. 409, at p. 412, per Judson J.). Where the threshold is not met (*Cr. C.*, s. 548(1)(a); *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, at paras. 21-22), the justice must discharge the accused, ending criminal proceedings regarding that offence (*Cr. C.*, s. 548(1)(b); see generally A. D. Gold and J. R. Presser, “Let’s Not Do Away with the Preliminaries: A Case in Favour of Retaining the Preliminary Inquiry” (1996), 1 *Can. Crim. L.R.* 145, at pp. 147-48 and 164).

[178] As this Court noted in *Hynes*, “[o]ver time, the preliminary inquiry has assumed an ancillary role as a discovery mechanism” (para. 31). Preliminary inquiries offer strategic benefits to the defence. They can be useful to test the evidence and gauge the strength of the Crown’s case and to provide testimony on which to test credibility at trial (see, e.g., D. M. Paciocco, “A Voyage of Discovery: Examining the Precarious Condition of the Preliminary Inquiry” (2004), 48 *Crim. L.Q.* 151, at pp. 160-61; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 40). The discovery function has, however, lost some of its significance given the Crown’s constitutional disclosure

obligations, following this Court's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (*R. v. S.J.L.*, 2009 SCC 14, [2009] 1 S.C.R. 426, at para. 23).

[179] It is settled law that there is no constitutional right to a preliminary inquiry (*S.J.L.*, at para. 21). This is because, even without it, the accused keeps the presumption of innocence and the right to make full answer and defence (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 32). The Crown must in all cases prove guilt beyond a reasonable doubt at the eventual trial.

[180] The availability of a preliminary inquiry to an accused is grounded in statute. Before June 2004, the text of s. 535 of the *Criminal Code* read:

535 Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[181] Over time, questions about the continuing utility and relevance of the preliminary inquiry (see generally J. A. Epp, "Abolishing Preliminary Inquiries in Canada" (1996), 38 *Crim. L.Q.* 495, at pp. 502-3) resulted in reforms reducing its availability. *Criminal Code* amendments made the preliminary inquiry available only on request and allowed for the narrowing of its focus (*Criminal Law Amendment Act*, 2001, S.C. 2002, c. 13; see also Library of Parliament, *Bill C-15A: An Act to amend the Criminal Code and to amend other Acts*, Legislative Summary LS-410E, October 12, 2001, at pp. 13-15). These amendments have generally reduced the number of

preliminary inquiries and their length (see *S.J.L.*, at para. 24). As of June 2004, s. 535 made clear that the preliminary inquiry would be held only where it has been requested:

535 If an accused who is charged with an indictable offence is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[182] Despite these changes, concern continued to grow over delays in criminal proceedings, sparking further consideration of the need for preliminary inquiries. In *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, this Court specifically encouraged Parliament to consider “the value of preliminary inquiries in light of expanded disclosure obligations” to ensure the criminal process “focusses on what is truly necessary to a fair trial” (para. 140; see also Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)* (2017), at pp. 47-48).

[183] In that context, Parliament opted to reform preliminary inquiries to improve the efficiency of criminal proceedings, notably with the desire to “unclog” court resources, reduce delays, and to avoid the need for witnesses to testify twice (*House of Commons Debates*, vol. 148, No. 300, 1st Sess., 42nd Parl., May 24, 2018, at p. 19604).

[184] Section 535 was changed in 2019 to eliminate preliminary inquiries except in the most serious cases. Since then, the availability of preliminary inquiries has been subject to an additional limitation related to the maximum penalty for the relevant offences:

535 If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall, in accordance with this Part, inquire into the charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this Part.

[185] The amendment to s. 535 came into force on September 19, 2019, 90 days after the amending legislation received royal assent (2019 Amendments, ss. 238 and 406). This amendment is the focus of this appeal.

B. *Determining Whether the New Rule Applies*

[186] When Parliament provides no explicit transitional provisions, determining whether the new rules apply to a particular case can be challenging. The principles relating to the temporal application of legislation are sometimes in tension, and relationships between the presumptions that may apply to a situation can be unclear (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at pp. 724-25; P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at paras. 416-18; *Canada (Attorney General) v. Almalki*, 2016 FCA 195, [2017] 2 F.C.R. 44, at paras. 26-28).

[187] Here, lower courts have come to different solutions as to when the new restrictions apply. The Court of Appeal, citing difficulties in the application of the presumptions governing the temporal application of legislation, adopted an open-textured analysis focused on factors such as the importance of the amendment and the impact on the accused (paras. 26-31). Applying that analysis, it concluded that the “entitlement to a preliminary inquiry is determined with reference to the state of the law at the date of the commission of the alleged offence” (para. 11).

[188] Several courts across the country, including all four judges from the Court of Québec and Superior Court in this case, have differed from the Court of Appeal in how they characterized the effect of the amendments and their temporal application (see, e.g., *R.S.*; *R. v. B.J.M.*, 2021 BCPC 151; *R. v. Lamoureux*, 2019 QCCQ 6616; *R. v. Kozak*, 2019 ONSC 5979, 148 O.R. (3d) 396; *R. v. A.S.*, 2019 ONCJ 655; *R. v. N.F.*, 2019 ONCJ 656, 383 C.C.C. (3d) 550; *R. v. Fraser*, 2019 ONCJ 652; *R. v. Corneillier*, 2019 QCCQ 6028). Some courts have concluded that the s. 535 right to a preliminary inquiry is of a purely procedural nature such that the new limitation applies immediately in all cases (see, e.g., *Lamoureux*). Still others have found that although the amendment is not purely procedural, it only impacts substantive rights where a preliminary inquiry had been requested before the rule came into force, such that it applies where no request had been made (see, e.g., *R.S.*).

[189] As I shall explain, a predictable approach to determining temporal application must clarify and build on the law interpreting the relevant presumptions

developed in this Court's jurisprudence and codified by Parliament (*Interpretation Act*, ss. 43 and 44). I would clarify and summarize the relationship among the three presumptions relevant to the disposition of this appeal in line with the underlying legal values they engage, not abandon them.

(1) Principles Governing the Temporal Application of Legislation

[190] Questions about the temporal application of legislation concern whether new legislative rules apply to a given circumstance or whether the previous state of the law continues to apply (*Côté and Devinat*, at paras. 341-42; see also *Sullivan*, at p. 770).

[191] Underlying legal values like fairness and the rule of law may militate against applying new rules when to do so would negatively affect people who had reasonably relied on the previous state of the law in governing their affairs (see generally *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289, at paras. 44-45 and 48; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at paras. 23-25; *Poulin*, at paras. 59 and 62).

[192] Issues of temporal application are sometimes framed in terms of whether a particular legislative amendment is prospective, retroactive, retrospective or of immediate application in the abstract (see, e.g., C.A. reasons, at paras. 11 and 15). However, this terminology can be confusing and difficult to apply in practice (*Sullivan*, at p. 735; see also *Côté and Devinat*, at paras. 518-27; *Benner v. Canada (Secretary of*

State), [1997] 1 S.C.R. 358, at para. 39; *Almalki*, at paras. 26-28; J. P. Salembier, “Understanding Retroactivity: When the Past Just Ain’t What It Used to Be” (2003), 33 *Hong Kong L.J.* 99, at pp. 99-100). And it is often insufficient to resolve the actual issue before the court. Here the parties agree that the new rule does not apply to all immediately; the disagreement is about the class of accused persons to whom it applies. The better framing in a case like this is to ask in which circumstances the new rule applies.

[193] In the criminal context, some principles of temporal application have constitutional protection (*Charter*, s. 11(g) and (i); *K.R.J.*, at paras. 22-24). Where, as here, constitutional constraints do not arise, the legislature’s intent is paramount (*Côté and Devinat*, at paras. 452-53 and 457). Did Parliament intend the new rule to apply in the circumstances?

[194] As with any question of statutory interpretation, determining the temporal application of a new rule must be grounded in the text of the legislation read in its full context and in harmony with the legislature’s intention (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In conducting that analysis, courts “must rely on all the principles of statutory interpretation” (*Dikranian v. Quebec (Attorney General)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at para. 36, citing R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 576). Presumptions of temporal application function as “tool[s]” (*Tran*, at para. 48) or “guide[s]” (*R. v. Ali*, [1980] 1 S.C.R. 221, at p. 235) in this interpretative exercise.

[195] Where the legislature's intention as to the temporal application of specific legislation can be discerned using principles of interpretation other than those presumptions of temporal application, courts are bound to give effect to that intention (*R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612, at paras. 10-11; see also *Ali*, at p. 239).

[196] However, absent transitional provisions and where those principles of interpretation fail to provide a clear answer, the general presumptions governing temporal application become central to the analysis. They have been developed in the jurisprudence, drawing on first principles, to guide courts in determining what legislatures must have intended regarding the temporal application of new legislative provisions. These presumptions are themselves expressed in legislation, such as the federal *Interpretation Act* (see, e.g., ss. 43 and 44). Among them are the presumption of immediate application of purely procedural law, the presumption against retrospectivity, and the presumption against interference with vested rights, discussed in further detail below.

[197] Parliament of course remains free to depart from the default rules it prescribes (*Interpretation Act*, s. 3(1)), including by specifying how the temporal presumptions are to be applied in given circumstances (see, e.g., *Venne v. Quebec (Commission de protection du territoire agricole)*, [1989] 1 S.C.R. 880, at p. 909). Throughout the analysis, courts must thus be mindful of indicators of Parliament's contrary intention.

[198] As I will explain, using these presumptions to determine whether the new limitation in s. 535 applies in a given circumstance requires asking the following question: would applying the new rule interfere with a substantive legal interest that has vested before the coming into force of the new rule? If so, the new rule is presumed not to apply in the circumstances. Otherwise, the new rule is presumed to apply.

[199] To answer that question, we must first look to the definition of a “substantive legal interest”; and second, ask whether such an interest has “vested”. As I shall elaborate below, a substantive legal interest is a right, privilege, obligation or liability that is not merely about how a litigant conducts litigation but has direct implications for the individual outside the courtroom (see *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at paras. 91-92). Whether the substantive legal interest has vested before the coming into force of the new rule depends on whether all factual prerequisites to its recognition have occurred (see *R. v. Puskas*, [1998] 1 S.C.R. 1207, at para. 14).

[200] Prior jurisprudence may already provide whether a given rule presumptively applies. Thus, where the new rule bears directly on criminal liability (i.e., offences, defences and sentence), which is clearly substantive, it is presumed not to apply where the alleged criminal offence was committed before the coming into force of the new rule (*Poulin*, at para. 58). Conversely, if jurisprudence establishes that a new rule is purely procedural (e.g., new judicial investigative hearings as in *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R.

248), it is presumed to apply immediately in all circumstances (*Chouhan*, at paras. 91-92 and 103).

[201] Otherwise, where the application of the presumptions has not been authoritatively determined, the presumptions must be directly considered (*Puskas*, at para. 14). As explained by this Court in *Tran* and *Poulin*, the presumptions are rooted in the inherent tension between the legal values of fairness and the rule of law.

[202] In the sections that follow, I explain why the question of temporal application before us turns on whether applying the new rule would interfere with a substantive legal interest that vested before it came into force. First, I consider the three relevant presumptions of temporal application as identified in the jurisprudence and in the *Interpretation Act*. I next address the combined effect of these presumptions. Finally, I review the distinction between “substantive” as opposed to “procedural” legal interests and provide guidelines to identify when a substantive legal interest can be said to have “vested”.

(a) *The Presumptions of Temporal Application*

[203] The present case asks this Court to determine the temporal application of the amendment of a *Criminal Code* provision. It turns on the interpretation and interrelationship between three presumptions: (1) the presumption of immediate application of purely procedural legislation; (2) the presumption against retrospective

application of legislation; and (3) the presumption against interference with vested rights.

[204] I turn first to the presumption of immediate application of purely procedural legislation. Where the change in the law is purely procedural, in that applying it would not, in any circumstances, affect a substantive legal interest, such as a substantive right or liability, the new rule is presumed to apply immediately to all (*Dineley*, at paras. 10-11; see also *Application under s. 83.28*, at para. 56; *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at pp. 331-32; *Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, at pp. 95-96; *Interpretation Act*, s. 44(c) and (d)). Whether the legislation could be classified as procedural in the abstract is not determinative. As recognized by this Court in *Dineley*, all that matters for this presumption is the presence or absence of an effect on substantive matters (para. 11; see also *Chouhan*, at paras. 91-92; *Yew Bon Tew v. Kenderaan Bas Mara*, [1983] 1 A.C. 553 (P.C.), at pp. 562-63, cited in *Martin v. Perrie*, [1986] 1 S.C.R. 41, at pp. 48-49). The corollary of the purely procedural presumption is that only effects on substantive legal interests provide grounds to presume a new rule does not apply.

[205] Although the inquiry has sometimes been expressed in terms of substantive rights (see, e.g., *Dineley*, at paras. 10-11), it also involves other substantive legal interests that may not be commonly understood as rights, such as substantive liabilities and obligations (Sullivan, at p. 786; *R. v. Bourque* (2005), 193 C.C.C. (3d) 485 (Ont. C.A.), at para. 11; *Yew Bon Tew*, at pp. 562-63). Past decisions of this Court make it

clear that the term “right” in this context has a broad meaning and clearly includes, for example, matters touching the accused’s criminal liability, such as available defences or sentence (*Chouhan*, at para. 92, citing *Dineley*, at paras. 52-66, per Cromwell J., dissenting, but not on this point). The term “legal interests” may be more appropriate when describing this broad category of substantive effects, because as Professors Pierre-André Côté and Mathieu Devinat have observed, it may be unnatural to speak of an accused person having a *right* to be tried in accordance with the law as it existed at the time of an alleged offence that has since been repealed, for example (para. 600). As a result, I refer to the more general term substantive “legal interests” rather than substantive “rights”, encompassing the full breadth of this category reflected in this Court’s jurisprudence.

[206] Second, the presumption against retrospectivity means that a change to the law is presumed not to attach “new prejudicial consequences” to events that occurred before the change (*Tran*, at para. 43, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 186; Sullivan, at p. 750, citing E. A. Driedger, “Statutes: Retroactive Retrospective Reflections” (1978), 56 *Can. Bar Rev.* 264, at p. 276). Professor Ruth Sullivan notes that while the presumption is “sometimes invoked . . . in an attempt to protect a common law or statute-based right” it is more often invoked where new prejudicial consequences are attached to “an offence committed before the legislation came into force” (pp. 750-51; see, e.g., *Poulin*, at paras. 58-59; *K.R.J.*, at para. 23). While the presumption is subject to certain exceptions including an exception related to public protection (*Tran*, at paras. 47 and 50, citing *Brosseau v. Alberta*

Securities Commission, [1989] 1 S.C.R. 301), they are not relevant here. The presumption is focused on whether the new rule interferes with the legal consequences flowing from events that occurred before the change. If so, the new rule is presumed not to apply.

[207] This Court has said that retrospectivity should not be confused with retroactivity (*Épiciers Unis Métro-Richelieu Inc., division “Éconogros” v. Collin*, 2004 SCC 59, [2004] 3 S.C.R. 257, at para. 46; see also Côté and Devinat, at paras. 519-20; Sullivan, at pp. 728-29). In broad strokes, the retroactive application of law does not merely attach new consequences to past facts (as is the case with retrospective application), but rather deems the law applicable to those facts to have been different from what it actually was (Sullivan, at pp. 737-38; Driedger (1978), at pp. 268-69; *Benner*, at para. 39). Here, the new s. 535 of the *Criminal Code* does not deem the law to have been different than it was in the past and the parties did not argue that it does.

[208] Third, there is the presumption against interference with vested rights. This presumption has a different focus than the presumption against retrospectivity but can be similar in effect. Legislation is presumed not to interfere with rights held by individuals that were “tangible, concrete and distinctive” before it came into force (*Dikranian*, at paras. 32-34 and 39). These rights may arise in private law, such as rights in property, contractual rights or rights to damages, or may be statutory creations, such as certain substantive rights in the litigation process (Sullivan, at pp. 760 and 762). The threshold of “tangible, concrete and distinctive” has two primary facets: (1) the right

must be that of a particular individual rather than belonging to a community or general class; and (2) the right must be sufficiently constituted before the coming into force of the legislative change, in that it exists and is possessed by individuals at the relevant time (*Dikranian*, at paras. 37 and 39). If a new rule would interfere with a right with these features, such that it has “vested”, it is presumed not to apply.

[209] These presumptions of temporal application and others have been in part codified by Parliament in the *Interpretation Act*, which provides:

3 (1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

...

43 Where an enactment is repealed in whole or in part, the repeal does not

...

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.

44 Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

...

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment in so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto

(i) in the recovery or enforcement of fines, penalties and forfeitures imposed under the former enactment,

(ii) in the enforcement of rights, existing or accruing under the former enactment, and

(iii) in a proceeding in relation to matters that have happened before the repeal;

(b) *The Combined Effect of the Presumptions*

[210] How are we to understand the relationship among these three relevant presumptions such that we can apply them together in a principled way? The inquiry starts by asking whether the new rule is purely procedural, since, in the affirmative, it is unnecessary to consider the other temporal presumptions. This is because, as I have said, where it is shown that a new rule is purely procedural, it applies immediately in all circumstances. The longstanding principle that there can be no vested rights in procedure (see *Wright*, at pp. 95-96; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at pp. 265-66; *Wildman*, at p. 331; *Application under s. 83.28*, at para. 62; *Chouhan*, at para. 99) means there is no need to ask about vesting where only procedure

is affected. Where, however, the new rule is not purely procedural, the analysis must continue to consider the other presumptions.

[211] Some argue before us, to the contrary, that a finding that an amendment is not purely procedural ends the analysis and renders recourse to other presumptions of temporal application unnecessary. According to this theory, as soon as substantive rights are “engaged”, the new rule presumptively does not apply to any accused alleged to have committed an offence before the change in the law (I.F. (Canadian Civil Liberties Association (“CCLA”)), at para. 30; see also R.F. (Archambault), at para. 41). The CCLA, in particular, relies on the statement in *Dineley*, at para. 10, that “where legislative provisions affect either vested or substantive rights, retrospectivity has been found to be undesirable”. This statement means, the CCLA says, that if an amendment affects a substantive right, the amendment does not apply to any accused whether or not the right has vested (I.F., at para. 23).

[212] I do not accept this interpretation of *Dineley*. There is no indication that this Court in *Dineley* intended “vested or substantive rights” to suggest the existence of two distinct types of rights for the purpose of the temporal presumptions, as opposed to offering two adjectives to describe the same class of rights (para. 10). None of the references cited in *Dineley* (*Angus*, at pp. 266-67; *Application under s. 83.28*, at para. 57; *Wildman*, at pp. 331-32) appear to apply that bifurcation. Further, while this Court relied on *Dineley* more recently in *Chouhan*, there is nothing in the reasons of Moldaver and Brown JJ. on this issue that purports to apply “substantive” and “vested”

rights as disjunctive ideas (see paras. 91-92 and 96). That language from *Dineley* is absent from their restatement of the relevant principles (paras. 91-92) and at para. 96 they wrote that “even where a procedure operates more favourably to the accused than its replacement, there is no vested interest, and by extension, no substantive right to a specific procedure”, expressly equating them. This Court in *Dineley* did not have to consider vesting in any detail given, in that case, the amendment at issue was found to affect a criminal defence and only came into force midway through trial.

[213] How then do the other two presumptions described above apply where the new rule is not purely procedural? The relationship between the presumptions against retrospectivity (against a change in the law attaching new prejudicial consequences to events that occurred before the change) and against interference with vested rights (against legislation interfering with an individual’s rights that were vested before it came into force) can be vexing, because while they are framed to focus on different elements of temporal application, they can be understood as overlapping, or as “different sides of the same coin” (Sullivan, at p. 770). They are both invoked in circumstances, as here, where parties seek to protect rights (p. 750). As Ruth Sullivan explains, “[i]nterference with a vested right is always retrospective in that rights arise by virtue of facts that fulfil the conditions precedent to the right and subsequently impairing them changes the legal consequences of those facts in a prejudicial way” (pp. 750-51, fn. 91). The two presumptions both target legislation that “change[s] the future legal consequences of past facts” (p. 770). It is unsurprising that this Court referenced the presumptions in the same breath in *Dineley* (at para. 10) and that other courts have

done the same (see, e.g., *Bell Canada v. Amtelecom Limited Partnership*, 2015 FCA 126, [2016] 1 F.C.R. 29, at paras. 34-35).

[214] This overlap is consistent with the codification of the vested rights presumption in the *Interpretation Act*, which makes clear that repeal does not affect “any right, privilege, obligation or liability” arising under the repealed legislation (s. 43(c); see also Sullivan, at p. 761). In all these cases, whether conceived as the presumption against retrospectivity or the presumption against interference with vested rights, the presumption prevents changes to legal interests that have arisen because of past facts. The presumption against retrospectivity says that if the new rule attaches new prejudicial consequences to those facts, for example because it eliminates a right that those facts gave rise to under the previous state of the law, it is presumed not to apply. The presumption against interference with vested rights and the remainder of s. 43(c) of the *Interpretation Act* say that the new rule will also be presumed not to apply if applying it would affect any pre-existing right, privilege, obligation or liability (i.e., legal interest), for example by eliminating a pre-existing right.

[215] The combined effect of these presumptions, therefore, is to look at the facts that had occurred before the new rule came into force and decide whether they establish a legal interest that the law is presumed to protect. If so, the new rule will be presumed not to apply where it would interfere with that interest.

[216] Our jurisprudence refers to a legal interest as “vested” when all the facts, or in the language of *Puskas* “conditions precedent” (para. 14), have occurred for the

law to recognize it. Where the legal interest has vested before a new rule came into force, the new rule is presumed not to apply if it would interfere with that legal interest. And because the purely procedural presumption provides that only substantive legal interests can raise a presumption of non-application — there is no vested substantive legal interest in procedure — these legal interests must necessarily be substantive.

[217] Thus, in applying these three presumptions, the key question is whether the new rule would interfere with a substantive legal interest that had vested before its coming into force.

[218] Answering that question requires understanding when a legal interest is “substantive” and when it has “vested”. These two thresholds are the heart of the presumptions relevant to the disposition of this appeal. Both concepts are thresholds seeking to balance the underlying legal values of fairness and the rule of law (see, e.g., *Tran*, at paras. 44-45; *Poulin*, at para. 62).

(c) *The Substantive Threshold*

[219] It has sometimes proven difficult for courts to identify whether a new rule can interfere with a substantive legal interest or whether it is purely procedural (*Côté* and *Devinat*, at para. 707, citing *Dineley*). Reconciling all past precedents may be an “impossible task” (*Dineley*, at para. 15).

[220] The balance of fairness and the rule of law in the presumption of immediate application of purely procedural legislation is reflected in the “substantive” threshold, which starts from the premise that interference with existing legal interests and other unjust results of applying new legislation should be avoided (Sullivan, at p. 786). However, if those legal interests are to be protected, it is necessary to have effective procedural rules that allow them to be vindicated in court. Giving procedural reform immediate effect ensures that courts do not continue to carry out procedures that the legislature has decided are less than ideal for that purpose (see Côté and Devinat, at para. 690; see also P. Roubier, *Le droit transitoire: conflits des lois dans le temps* (2nd ed. 1993), at p. 548; D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed. 2020), at pp. 271-72). In this way, applying new procedural rules immediately to all is “deemed beneficial for all” and protects, rather than interferes with, settled expectations (*Application under s. 83.28*, at para. 62). As a legal interest becomes less a means to establish other rights and liabilities through litigation and more as an end in itself independent of that litigation, it becomes more likely that the legal interest will meet the “substantive” threshold (see *Chouhan*, at para. 92, per Moldaver and Brown JJ.).

[221] The appropriate balance as reflected in the “substantive” threshold should be guided by the case law on temporal application, which shows how it is achieved in particular contexts. The jurisprudence reveals at least three broad categories of recognized interference with substantive legal interests in the criminal litigation context. In the first category are those effects that can be said to bear directly on

criminal liability, specifically the penal consequences the law will attach to impugned conduct (see, e.g., *Poulin*, at paras. 58-59). This group includes material changes to the elements of the offence, applicable defences and sentences, which could leave the accused facing different consequences for the impugned conduct at the close of litigation (*Chouhan*, at para. 92; see, e.g., *Dineley*). The second category are effects on the jurisdiction of courts to hear matters and related appeals (Sullivan, at pp. 788-89; *Puskas*, at paras. 6-7). Changes to the availability of these hearings could also ultimately leave the accused facing different consequences. For example, an accused erroneously convicted at trial may be in a very different position in terms of their criminal record and liberty interest depending on whether they have a right of appeal. The third category includes effects to constitutional protections that attach to the criminal process, given these rights are “necessarily substantive” (*Dineley*, at para. 21).

[222] In determining whether a new rule can interfere with a substantive legal interest, courts should be mindful that substantive law “creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained” (*Sutt v. Sutt*, [1969] 1 O.R. 169 (C.A.), at p. 175, cited in *Chouhan*, at para. 94). As noted in *Chouhan*, procedural amendments will generally “alter the method by which a litigant conducts an action or establishes a defence or asserts a right” (para. 92 (emphasis added)). However, even if a right is dependent on litigation to exist, it may still be substantive. Many of our constitutional rights, including the right to be tried within a reasonable time, depend on litigation. Section

11 of the *Charter* provides explicitly that the rights it protects arise where a person is “charged with an offence”. They remain, however, “necessarily substantive” (*Dineley*, at para. 21), because their protection is not merely instrumental but an end our law seeks to guarantee.

[223] In addition, where a potentially relevant substantive legal interest has been identified, the new rule must “affect [its] content or existence” to establish an interference with that interest for the purpose of the temporal presumptions; a mere impact on “the manner of its enforcement or use” does not amount to interference unless it renders enforcement or use practically impossible (*Angus*, at pp. 265-66 (emphasis in original); see also *Dineley*, at paras. 15-16; *Côté and Devinat*, at para. 707).

(d) *The Vesting Threshold*

[224] The presumptions against retrospectivity and against the interference with vested rights can also be understood in light of the underlying legal values, namely fairness and the rule of law, which the “vesting” threshold seeks to hold in balance (see generally *Côté and Devinat*, at paras. 615-16). On the one hand, the law acknowledges that people have the right to proceed in reliance on their substantive legal interests such that it could be unfair to abruptly change these interests by legislation (*Sullivan*, at p. 761, citing *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, at p. 417). Setting the threshold too high could undermine public confidence in the law’s stability necessary to uphold the rule of law. But the legislature must have the flexibility to

change the law to achieve evolving public policy goals. Setting the threshold too low could frustrate the democratic evolution of the law (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at pp. 282-83). As the affected substantive legal interest becomes one on which people are likely to place greater reasonable reliance in conducting their affairs, the less likely it is that the new rule should apply.

[225] Many different words have been used in our jurisprudence and in the *Interpretation Act* to capture the idea that legal interests must be sufficiently constituted to benefit from a presumptive protection against interference (“acquired”, e.g. *Interpretation Act*, s. 43(c); “accrued”, e.g. *Interpretation Act*, s. 43(c), *Gustavson Drilling*, at p. 284, and *Dikranian*, at para. 39; “vested”, e.g. *Gustavson Drilling*, at p. 282; “crystallize[d]”, e.g. *Benner*, at para. 51, and *Dikranian*, at paras. 30 and 43; “materialized”, e.g. *Dikranian*, at para. 40; “tangible and concrete”, e.g. *Dikranian*, at para. 37). Thus, “vesting”, as the term is used here, must be understood to capture the full breadth of these circumstances.

[226] For some legal interests the jurisprudence will provide clear answers about when it has vested. For example, it is clear from the authorities that criminal liability, that is the substantive law governing elements of the offence, corresponding defences and applicable sentence, vests at the time of the commission of the alleged offence (*Poulin*, at paras. 58-59; *R. v. Johnson*, 2003 SCC 46, [2003] 2 S.C.R. 357, at para. 41; *K.R.J.*, at para. 1; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*,

[1990] 1 S.C.R. 1123, at pp. 1151-52; *Interpretation Act*, s. 43(c) to (e)). The accused's criminal liability is determined under the law prevailing at the time of the alleged offence and law coming into force after that date is presumed not to interfere with the liability so incurred.

[227] As compared with criminal liability, determining when vesting occurs will be more difficult when dealing with unique statutory rights created to achieve specific legislative goals. As Professor Sullivan has observed, the methods of enforcing such rights and claims “follow no fixed pattern” (p. 762). The legislature has the freedom to craft the features of such a right, including when it can be considered to have vested. A court's task is to identify the conditions precedent to vesting based on the unique right the legislature has created, which requires careful attention to the statutory context and to the purposes of the threshold described above.

[228] The facts that must occur for a statutory legal interest to vest therefore depend on its unique nature (*Dikranian*, at para. 40). In the tax context, for example, it is “imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed” (*Gustavson Drilling*, at pp. 282-83). In contrast, in the immigration law context, it is imperative that permanent residents be able to organize their lives, such that clear “obligations must be communicated to them in advance” (*Tran*, at para. 41). In examining when a legal interest vests under the *Criminal Code*, courts should thus be mindful of the delicate

balancing exercise underlying the threshold in light of the specific context in which the statutory right arises.

[229] That said, it will be difficult to say a legal interest is vested where it remains contingent on an intervening action or event. For example, when the creation of the legal interest requires a third party to exercise discretion in a particular way, and that discretion could lawfully be exercised differently, the threshold is unlikely to be met (Sullivan, at pp. 766-67; see, e.g., *Tuffnail v. Meekes*, 2020 ONCA 340, 449 D.L.R. (4th) 478, at para. 104). In other words, the favourable exercise of that discretion by the third party is likely to be considered a condition precedent for the legal interest to vest. Likewise, if people had the ability to take the action necessary to acquire a certain benefit but failed to do so before the coming into force, it is more difficult to conclude that any reliance placed on that unrealized possibility deserves to be protected (see, e.g., *Attorney General of Quebec v. Expropriation Tribunal*, [1986] 1 S.C.R. 732, at pp. 742-43; *Abbott v. Minister for Lands*, [1895] A.C. 425 (P.C.), at pp. 430-31). Alternatively, where actions are not required to obtain the interest under the law but are only mere formalities in exercising it, they are unlikely to be preconditions to the vesting of that interest (see, e.g., *Re Falconbridge Nickel Mines Ltd. v. Minister of Revenue for Ontario* (1981), 32 O.R. (2d) 240 (C.A.), at p. 250).

(e) *Conclusion on the Applicable Principles*

[230] The presumptions governing temporal application are tools used to determine the legislature's intent. There may be other bases on which courts will

decline to apply a new rule, in accordance with other principles of interpretation. But where other principles fail to provide a clear answer regarding the temporal application of a new rule, the presumptions become central to the analysis.

[231] The three presumptions at issue all direct careful focus on the effects to an individual's legal interests of applying the new rule. Together, they provide that the new rule will presumptively apply unless it interferes with a substantive legal interest that had vested before it came into force. This inquiry can be understood in two stages.

[232] First, if the new rule is purely procedural, in that applying it could not interfere with *any* substantive legal interest, it is presumed to apply immediately in all circumstances. Whether a legal interest is substantive is guided by categories settled in the jurisprudence, and the underlying legal values of fairness and the rule of law rather than the abstract procedural nature of the legislation itself.

[233] Second, if the new rule *can* interfere with a substantive legal interest, the next question is whether applying it in the circumstances would affect a substantive legal interest that vested before it came into force. A legal interest vests once all the facts necessary to recognize its existence have occurred. While those facts may generally be settled for recurring categories such as criminal liability, in cases involving unique statutory rights, careful attention must be paid to the nature of the right as expressed in the statute in light of how the legislature has balanced the reasonable expectations of interest holders against the democratic evolution of the law.

(2) The Temporal Application of Section 535

[234] To answer the question of which accused are subject to the new limitation on the right to a preliminary inquiry in s. 535 (that the offence charged be punishable by 14 years or more imprisonment), the parties have proposed three possibilities. First, the Crown's position is that the new rule applies immediately, unless a preliminary inquiry was in progress or a request to hold one had been made before it came into force (A.F., at para. 77). It argues that preliminary inquiries are not part of the substantive law that is presumptively determined by the law in force at the time of the commission of the alleged offence (paras. 49-62). In the Crown's view, changes to the availability of preliminary inquiries should not be put on the same footing as the changes to the elements of an offence or contemporaneous defences (paras. 64-65).

[235] Second, the respondents answer that because it is substantive, the right to a preliminary inquiry arose at the time of the alleged commission of the offence (R.F. (Archambault), at para. 41; R.F. (Grenier), at para. 1). Courts are and should be reluctant to apply penal provisions retrospectively. Under the principle of legality, according to the respondents, substantive law includes not only the elements of the offence, any relevant defences and the maximum sentence, but also incidental procedures like the preliminary inquiry. The new limitation therefore only applies to accused persons whose offences were allegedly committed after its coming into force.

[236] And third, the respondents submit in the alternative that the new limitation only applies to accused who had not yet had their first appearance. They submit that

the entitlement to a preliminary inquiry vested at first appearance, because accused persons then have their first possibility to make a request (R.F. (Archambault), at para. 45; R.F. (Grenier), at para. 3). Because there was no impediment to their election as to the mode of trial, and depending on their election, to ask for a preliminary inquiry, their statutory right to a preliminary inquiry was vested (R.F. (Archambault), at paras. 48 and 54-65; transcript, at pp. 91-96). On the facts of this case, the respondents had specifically reserved or deferred their election and request before the coming into force of the new limitation (R.F. (Archambault), at para. 46).

[237] Looking first to the legislation, there are no explicit transitional provisions that apply to s. 535. While Parliament's general purpose of eliminating delay in the criminal justice system is well understood (see, e.g., *House of Commons Debates*, at pp. 19602-4), courts must be careful not to equate the purpose of the new rule with Parliament's specific intention as to temporal application. Regardless of the conclusion as to the class of accused to which it applies, the amendment here would still limit the availability of preliminary inquiries, thus serving Parliament's general purpose.

[238] The delayed coming into force of the amendment by 90 days can, like the rest of the statutory context, be a relevant factor to consider in the broader analysis (Sullivan, at p. 775; *Newton v. Crouch*, 2016 BCCA 115, 384 B.C.A.C. 164, at para. 78). Here, it may be an indication that Parliament intended to provide notice to people that could immediately be impacted by the new rule (i.e., accused persons already in the criminal justice system). However, a delay in coming into force is not on its own

determinative of legislative intent (*Ali*, at pp. 242-43), and it is insufficient here to give a definitive answer as to the circumstances in which Parliament meant the new rule to apply.

[239] The Crown notes that the sponsoring Minister's department later stated that the amendment applied to those who had not asked for a preliminary inquiry by the time of coming into force (Department of Justice, *Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)* (2019), at p. 24, fn. 68; A.F., at para. 90). This Court cannot, though, put undue weight on these statements made outside of Parliament after enactment, since it is intent of the enacting Parliament that determines the proper interpretation (see *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at para. 98).

[240] As there is no clear basis on which to draw a conclusion about Parliament's specific intention regarding the temporal application of the new s. 535, the temporal application therefore falls to be determined using the temporal presumptions, in line with the framework set out above.

- (a) *Can the Limitation on the Right to a Preliminary Inquiry Impact a Substantive Legal Interest?*

[241] One of the effects of denying accused persons a preliminary inquiry is the loss of the benefits derived from its discovery function, including the opportunity to cross-examine witnesses before trial, and to test the strength of the case. Even though the discovery function of preliminary inquiries has lost some of its significance over time, in practice, the discovery function still offers important strategic value to accused persons (see, e.g., *N.S.*, at para. 40; *R. v. Rao*, 2012 BCCA 275, 323 B.C.A.C. 165, at para. 95). For many accused, that may be its “real worth” (Paciocco, at p. 160; see also K. Roach, “Preserving Preliminary Inquiries” (1999), 42 *Crim. L.Q.* 161, at p. 162). The preliminary inquiry “enables the defence to flesh out a Crown witness’s story and commit the witness to a specific and detailed account. If a witness’s testimony at trial conflicts with his or her evidence at the preliminary inquiry, such inconsistencies will provide a basis for impeachment” (S. Penney, V. Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶9.126; see also M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales* 2024 (31st ed. 2024), at pp. 579-80).

[242] An accused has a constitutional right to disclosure under *Stinchcombe* (*R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35, at para. 18), and constitutional protections in the criminal process are “necessarily substantive” (*Dineley*, at para. 21). However, the removal of the preliminary inquiry does not interfere with this constitutional right. Whether a change is said to be strategically important to the accused does not, on its own, establish that it interferes with a substantive legal interest (*Chouhan*, at paras. 96-98, per Moldaver and Brown JJ.). Here, the Crown’s duty to

disclose does not extend to making witnesses available for examination (*R. v. Khela*, [1995] 4 S.C.R. 201, at para. 18). The Crown must meet its duty regarding disclosure despite the availability of the preliminary inquiry. Thus, losing an additional discovery function cannot interfere with the constitutional right to disclosure.

[243] Moreover, although proceeding without a preliminary inquiry may affect how an accused *conducts* their defence, for example by losing the possibility of cross-examining to establish an evidentiary basis for trial (see *R. v. George* (1991), 5 O.R. (3d) 144 (C.A.), at pp. 144-45), changing a purely evidentiary hearing will generally be relevant only to the *means* (or method) by which the related litigation is resolved. Cross-examining witnesses at a preliminary inquiry is simply “not a component of the right to make full answer and defence” (*Bjelland*, at para. 32). Changes to hearings in the criminal context for the purpose of gathering evidence or information have been understood as purely procedural (see, e.g., *Application under s. 83.28*, at para. 61).

[244] Still, I agree with Doherty J.A. in *R.S.* that the rule limiting the right to a preliminary inquiry can interfere with a substantive legal interest when its effect is to eliminate the opportunity for accused persons to be discharged at the close of the inquiry (para. 49). Where the Crown cannot meet its low evidentiary burden for an accused to be ordered to stand trial, the accused must be discharged following the preliminary inquiry (*Cr. C.*, s. 548(1)(b)). In my view, the opportunity available at a preliminary inquiry to be “spare[d] . . . the ordeal of an unjustified criminal trial” (*Penney, Rondinelli and Stribopoulos*, at ¶9.131) is a substantive legal interest. As

noted by our Court in *Skogman*, the screening function of the preliminary inquiry “is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process” (p. 105).

[245] This opportunity to be discharged at the preliminary inquiry may also be an opportunity for the accused to remove limits on their liberty, where the accused is remanded to custody or subject to restrictive terms pending trial. When there is no preliminary inquiry, the accused may remain subject to these restrictions on liberty until the proceedings are concluded (Gold and Presser, at pp. 147-48 and 164; C. M. Webster and H. H. Bebbington, “Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations” (2013), 55 *C.J.C.C.J.* 513, at p. 521; see also *R.S.*, at paras. 57-58). These effects cannot be understood only in the litigation; they do not merely change how the accused advances their defence. The opportunity to avoid the stigma and personal stress related to an unresolved criminal charge, to avoid a needless trial where evidence is insufficient, and to be free of any restrictions on liberty, exists apart from the methods or means of conducting the litigation. This opportunity is thus a substantive legal interest that can be interfered with should the availability of a preliminary inquiry be removed.

[246] The right to a preliminary inquiry is analogous in this way to the right to have an appeal heard, which is a substantive right (*Côté and Devinat*, at para. 718, citing *Puskas*). Like the right to an appeal, the right to a preliminary inquiry entitles the

holder to a further opportunity to challenge or mitigate their criminal liability. Although they arise at different times in the proceedings (one before trial and the other after judgment), both may end in a disposition that bears on the accused's (or appellant's) circumstances outside the courtroom. They are in this way distinct from hearings that are merely evidentiary and do not culminate in this kind of determination (see, e.g., *Application under s. 83.28*).

[247] In sum, adding this new limitation on the right to a preliminary inquiry can interfere with a substantive legal interest. It can affect the very existence of the opportunity to obtain a discharge. It is not purely procedural and does not attract immediate application in every circumstance. To determine whether or not the new rule is presumed to apply in a given circumstance, we must ask whether applying it in that circumstance would interfere with a substantive legal interest that had vested before its coming into force.

(b) *When Does the Right to a Preliminary Inquiry Vest?*

[248] Here, the parties disagree as to which preconditions are essential for the right to a preliminary inquiry to have vested. As this is a statutory right that has never been considered by this Court, we must determine the necessary preconditions by looking to the statutory construction of the right, understood in light of the underlying values of fairness and the rule of law that govern this area of the law. In line with the submissions of the parties, I examine three key points in the criminal process: first, the time of the commission of the alleged offence; second, the point in the proceedings at

which there are no further conditions outside the control of the accused to ask for a preliminary inquiry; and third, when the request is made. As I shall explain, I conclude that requesting a preliminary inquiry is a necessary precondition to exercising the right, such that the right only vests at that third point.

[249] First, the right to a preliminary inquiry does not vest when the offence is alleged to have been committed. While the removal of the right to a preliminary inquiry interferes with a substantive legal interest, it does not follow that the opportunity to be discharged at a preliminary inquiry forms part of the “substantive law” about criminal liability that is understood to vest at the time of the commission of the offence. Respectfully, the Court of Appeal erred to the extent it held otherwise (para. 17). It is clear from our jurisprudence that not all substantive legal interests will vest at the time of the commission of the offence. For example, the right to an appeal, while substantive, is determined in reference to the date when the judgment below is issued, not the date the underlying offence was committed (see *Puskas*, at para. 14; see also *Tcheng v. Coopérative d’habitation Chung Hua*, 2016 QCCA 461, at paras. 36-38 and 59-60). The elements of the offence establishing guilt, the existence of a defence and the applicable sentence all determine the criminal liability the law attaches, if any, to the impugned conduct. The availability of an appeal or a preliminary inquiry have no such impact and do not fall within the “substantive law” described in *Poulin*.

[250] In *Poulin*, our Court explained that the substantive law which directly governs criminal liability is generally determined as of the commission of the offence

(paras. 58-59; see also *Tran*, at paras. 43-45). The reasoning outlined in that case is the principle of legality — the idea that we ought to protect a person’s reliance on the state of the law when they were deciding how to conduct themselves and whether to “risk the liability” associated with breaking the law (*Poulin*, at para. 59; see also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, at p. 1152). As I have said, the preliminary inquiry, like an appeal, does not directly affect the criminal liability the law attaches to impugned conduct. Conduct is not made legal or illegal, nor made subject to greater or lesser penal consequence because it could be examined at a preliminary inquiry or on appeal. Thus, it does not implicate the principle of legality in the same way as a change to the substantive law defining whether that conduct is subject to the consequences of criminal liability. It strains credulity to imagine that people weigh the availability of a preliminary inquiry, or of an appeal, in determining how to conduct themselves and whether to risk criminal liability. At the time of the commission of the offence, no expectation is created with which it would be unfair to interfere.

[251] The availability and exercise of the right ultimately depends on significant contingencies standing between the commission of the offence and the holding of a preliminary inquiry, including whether a charge will actually be laid and, in the case of a hybrid offence, whether prosecutorial discretion will be exercised to proceed summarily. The existence of these discretionary steps before a preliminary inquiry could ever be available is fundamentally incompatible with a vested legal interest (*Sullivan*, at pp. 766-67; *Tuffnail*, at para. 104). There is nothing unfair about changing

a person's entitlement to a preliminary inquiry when it is unclear if they will ever have the right to one, depending on the Crown's exercise of discretion on whether to charge or what charge to lay, or how to prosecute the charge that is laid.

[252] I now turn to the respondents' alternative submission, that the first appearance of the accused is the point where there is no additional contingency and the right has vested, given the accused can make a request for a preliminary inquiry at any time (R.F. (Archambault), at paras. 9 and 45; R.F. (Grenier), at para. 3). The respondents say that, in Quebec, an accused generally reserves their election at first appearance (R.F. (Archambault), at para. 68). After that point they may elect their mode of trial, and if they elect to be tried in the Superior Court, they may request a preliminary inquiry.

[253] The *Criminal Code* provides that where an accused does not elect a mode of trial when put to their election they will be deemed to have elected to be tried by judge and jury (ss. 536(2) and (2.1) and 565(1)(b); see also Vauclair, Desjardins and Lachance, at p. 574; *Martin's Annual Criminal Code 2025* (2024), by M. Henein and M. R. Gourlay, at pp. 1150-51). The accused may re-elect to another mode of trial where permitted by the *Criminal Code* (s. 561).

[254] It is in this context that the respondents say a practice has developed in Quebec where an accused generally postpones (“*reporte*”) their election to a future time. According to Nicolas Bellemare [TRANSLATION] “[i]n practice, at the appearance, the election as to the mode of trial is postponed” (“Les procédures précédant le procès

en matière criminelle”, in *Collection de droit de l’École du Barreau du Québec* 2024-2025, vol. 12, *Droit pénal - Procédure et preuve* (2024), 39, at p. 70 (emphasis added); see also A. Gagnon-Rocque and J. Héroux, “Arrestation, comparution et mise en liberté”, in *JurisClasseur Québec — Collection Droit pénal — Preuve et procédure pénales* (loose-leaf), fasc. 5, at No. 110). By deferring the election, the accused will obtain the benefit of disclosure and the opportunity to retain and be advised by counsel (*ibid.*; see also Henein and Gourlay, at p. 1150). In that sense, the “reserve” of the election, noted by the court in the indictment, may be taken to confirm the accused can elect and request a preliminary inquiry at any time. From that point on, whether the accused will ultimately have a preliminary inquiry is dependent only on the law and their own actions.

[255] Although this may be true of the first appearance in Quebec, this may not be true of the first appearance across the country. In post-charge screening jurisdictions — which, according to the Attorney General of Ontario, include Ontario, Saskatchewan, Nova Scotia, Newfoundland, and Prince Edward Island (I.F., at para. 15) — the eligibility for a preliminary inquiry remains contingent even after first appearance, as the accused may not yet have the possibility to elect the mode of trial (*ibid.*; see also Penney, Rondinelli and Stribopoulos, at ¶9.43). However, at some point in the pre-trial stage of a criminal proceeding, there may be no impediment to the accused’s election and potential request for a preliminary inquiry.

[256] We must, of course, remain mindful that while criminal procedure is national in scope, there is important variation in the specifics of how that procedure is applied across jurisdictions and levels of court (see, e.g., S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 29). Local practices regarding the administration of justice can vary throughout the country, as long as they remain consistent with the enacted criminal law provisions.

[257] The general issue here is whether the right to a preliminary inquiry vests once the accused is able, through their own choices and actions, such as electing their mode of trial and making a request for a preliminary inquiry, to ensure they have a preliminary inquiry. The respondents submit the right vests when accused persons have their first opportunity to make a request. In Quebec, therefore, this occurs on first appearance because that is when the election as to mode of trial is put to the accused. In other provinces and territories, the manner in which the court acknowledges the accused's deferral of these rights may vary.

[258] There are fewer contingencies here than at earlier points in the criminal process, such as the moment of the commission of the offence or the point at which the accused is charged. In effect, the choice between the Crown's position and the respondents' alternative depends on the answer to the question of whether actually making a request — rather than the ability to make a request — is a precondition of vesting. Not every formal requirement in a proceeding is necessary for a right to vest. Because the right to a preliminary inquiry is a statutory right, the answer turns on the

terms through which Parliament defines that right as seen through the lens of the legal values underlying transitional law.

[259] Under the legislation considered in *Puskas*, the right to appeal was not framed as contingent on a notice of appeal being filed (*Cr. C.*, s. 691(2)), even though an existing right to appeal could be lost if the appellant did not file a notice of appeal within the applicable time limit (see, e.g., *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 58 to 60). It is unsurprising then that the notice of appeal was not identified as a condition precedent to the right of appeal at issue in that case (*Puskas*, at para. 15).

[260] In contrast to the right of appeal in *Puskas*, s. 535 frames the request as a precondition of the existence of the right. Section 535 expressly provides that “[i]f . . . a request has been made for a preliminary inquiry, the justice shall . . . inquire into the charge”. The French version reads: “*Lorsqu’un[e] . . . demande a été présentée en vue de la tenue d’une enquête préliminaire . . . , le juge de paix doit . . . enquêter sur l’accusation . . .*” The *Criminal Code* ties the request to the election of mode of trial (or deemed election). A preliminary inquiry will not be available if the accused elects “to be tried by a provincial court judge without a jury and without having had a preliminary inquiry” (s. 536(2)). Section 536(2) further requires that where an accused is charged with an indictable offence punishable by 14 years or more of imprisonment, other than an offence that is listed in s. 469, the justice put the accused to an election in words that include: “. . . you will have a preliminary inquiry only if you or the prosecutor requests one”.

[261] There is no express requirement of form as to how an accused may make that request other than that it be made under s. 536(4) of the *Criminal Code*. Section 536(4) provides (and provided prior to the 2019 amendments to the *Criminal Code*) that where an accused elects (or is deemed to have elected) to be tried other than before a judge of the provincial court, “the justice shall, . . . on the request of the accused or the prosecutor made at that time or within the period fixed by rules of court . . . or . . . by the justice, hold a preliminary inquiry into the charge”. Under s. 536(4.1) the information must be endorsed to show “whether the accused or the prosecutor has requested that a preliminary inquiry be held”. The request also has concrete legal consequences that go beyond the obligation of the justice to hold the preliminary inquiry. For instance, it may also fix the conditions on which the accused has a right to re-elect the mode of trial (see *Cr. C.*, s. 561). Read together, the provisions surrounding the election of the mode of trial make clear that what triggers the holding of a preliminary inquiry is both the election of the mode of trial in which a preliminary inquiry is available (trial other than before a judge of the provincial court for an offence that is punishable by 14 years or more of imprisonment), and the request for a preliminary inquiry to be held. Indeed, even where the accused is sure to be tried by a mode through which a preliminary inquiry is available, the statute still mandates a request (s. 536(4)). And absent a request, the justice “shall” fix the date for the trial (s. 536(4.3)).

[262] Thus, s. 535 (as well as s. 536(2), (2.1) and (4)) makes clear that there is a distinction between the ability to make a request, and the right to a preliminary inquiry.

The latter can only be sufficiently vested once a request has been made (see also s. 555(1.1) and (1.2)).

[263] In some cases, recourse to the broader statutory context may reveal that explicit textual requirements are only mere formalities, as opposed to preconditions, or reveal more preconditions that may not be directly apparent from the text itself. However, this is a statutory right and the text and statutory scheme make clear that Parliament intended to make the availability of a preliminary inquiry conditional on a request actually having been made. It therefore cannot be dismissed as a mere procedural or formal step required to exercise a right that has already vested. Rather, it defines whether a preliminary inquiry can be held.

[264] Granted, where the contingencies that are dependent on third parties have been removed (i.e., a charge has been laid and the prosecution has decided to proceed by way of indictment), the accused may have a greater expectation that depending on their election of mode of trial, they would be able to eventually request a preliminary inquiry. In Quebec for example, the accused may formally postpone or “reserve” their election. But in my view, whether the accused postpones or “reserves” their election, or merely indicates they are not ready to elect, cannot be determinative of the temporal application of s. 535. This distinction finds no basis in the *Criminal Code*. Whether the accused has the opportunity, based on the jurisdiction in which they find themselves, to reserve their right, or whether they are at a point in the process at which they could elect and make a request at any time, the further steps the accused needs to take to

secure a preliminary inquiry are substantively identical: they must elect, or be deemed to elect, their mode of trial and then make a request for a preliminary inquiry for which they are eligible under the *Criminal Code*. In each case, the accused may have expected that acquiring the right to a preliminary inquiry was entirely within their control. However, the classification of a right as vested is based on the facts as they exist when the new rule comes into force, not on facts that could have existed had the accused chosen to proceed differently. In light of the manner in which Parliament has framed the statutory right to a preliminary inquiry, it is not the ability to make a request, but rather the request itself that acts as a statutory precondition to acquiring the right.

[265] The statutory text of s. 535 makes plain that the request is central to the right to the preliminary inquiry. This has been so since 2004 when the previous amendment came into force transforming the right to a preliminary inquiry as one conditional on a request being made (*Criminal Law Amendment Act, 2001*, s. 24). Because there was a 90-day period before the amendment at issue came into force, the accused had notice of the rule change. In this context, Parliament signaled that any unfairness resulting from depriving the accused of expectations that a request *could* be made would give way in favour of the clear legislative direction that a request *must* be made. There is always an element of unfairness, to a lesser or greater extent depending on the circumstances, when Parliament changes a rule that an accused may have thought would be of benefit. The presumptions of temporal application recognize, however, that only where all the preconditions mandated by Parliament have been met

will an accused have a statutory right with which Parliament presumably wished not to interfere.

[266] There are important rule of law considerations animating the availability of preliminary inquiries in s. 535. The requirement that a request be made ensures there is a clear rule that can be given a uniform interpretation across Canada, and avoids the need for a factual inquiry into whether there are any impediments to a given accused's ability to make a request. Parliament intended to create clear and readily ascertainable conditions limiting the right to a preliminary inquiry in s. 535. And in determining the temporal application of legislation, Parliament's intent remains key. Recognizing the importance of the actual request as a condition to the right to the inquiry therefore follows Parliament's choice of text and its intent. Thus, I conclude that a preliminary inquiry is not available under s. 535 until an actual request has been made.

[267] Whether a request has been made is a factual question dependent on the circumstances of each individual case. As the Crown suggested in its oral arguments, an informal demand made outside of court (as for example during the 90-day period between the new rule's enactment and its coming into force) may be enough to constitute the equivalent of a "request" within the meaning of ss. 535 and 536(4) (transcript, at pp. 10-11; see also *R.S.*, at para. 15). It may depend on the rules of practice of the particular court. In sum, where the accused has not expressed a clear demand for a preliminary inquiry, the right to a preliminary inquiry has not vested. To conclude otherwise would be to ignore the specific way Parliament designed this right

— and its relationship to the rest of the criminal process. The *Criminal Code* permits courts to set out rules that are best suited to the local context, provided they are not inconsistent with the *Criminal Code* itself (ss. 482 and 482.1). Variation in practice across jurisdictions and courts can ensure that justice is administered in a manner responsive to local circumstances.

[268] My colleagues Justices Côté and Rowe advance another possibility, namely that the right to a preliminary inquiry could have vested at the time charges were laid. While the laying of a charge removes one of the most obvious conditions precedent for the exercise of the right, the availability of a preliminary inquiry still remains subject to the numerous contingencies described above. Beyond the need for a request, the Crown will not necessarily have elected how to proceed at the time charges are laid, depending on the jurisdiction. In those circumstances, the accused cannot expect that they will have a preliminary inquiry, given the Crown may either decide to continue to proceed by indictment, where a preliminary inquiry would be possible, or summarily, where it would not.

[269] My colleague Justice Kasirer advances a final possibility, that an accused has a vested right as soon as they reserve the election of their mode of trial, due to the assurance they receive from the court about the future availability of a preliminary inquiry (paras. 91-92). There is no evidence in the record that when an accused reserves their election as to mode of trial, they receive a “judicial undertaking” that they will be provided a preliminary inquiry on request (para. 91), a practice which has no basis in

the legislation. My colleague relies on transcript of the Court of Québec’s decision denying Mr. Archambault a preliminary inquiry, which occurred more than a year after he had reserved his election (para. 88). The submissions made on behalf of Mr. Archambault during that hearing are not evidence of what occurred at the time of the reserve. Even if there were evidence that the local practice of courts in Quebec actually creates, in accused persons, some kind of reasonable reliance, the right at issue is conferred by Parliament, not by the courts. Courts do not, through their informal practices and representations, have the power to vest a statutory right in an accused that was never extended to them by the legislation.

(c) *Conclusion on the Temporal Application of Section 535*

[270] The amendment to s. 535 was not purely procedural because it can interfere with a substantive legal interest by depriving an accused of the opportunity to be discharged at a preliminary inquiry. As that right vests only once a request for a preliminary inquiry is made, the new rule is presumed to apply unless the request has been made before the amendment came into force.

[271] Therefore, properly interpreted, the new limitation in s. 535 applies to all accused persons where a request for a preliminary inquiry was not made before the amendment came into force on September 19, 2019.

(3) Application to the Respondents

[272] As of September 19, 2019, no request for a preliminary inquiry had been made by Mr. Archambault, nor by Mr. Grenier. They each eventually made a request, but only months later. Can their reserve or deferral of their election, which occurred before September 19, 2019, amount to a request? In other words, is it possible, to characterize the “reserve” of the election of the mode of trial at first appearance in Quebec as the equivalent of a “request” for a preliminary inquiry as required by s. 535?

[273] As noted above, a “reserve” amounts to delaying the accused’s election to a later date. It does not mean the accused has elected a mode of trial, or made their intention for a preliminary inquiry known. There is no factual basis on which this Court could conclude that a reserve or deferral of the election by the respondents indicated an actual desire to have a preliminary inquiry. In the case of Mr. Grenier, for example, the Court of Québec merely noted on the indictment that at first appearance, he had [TRANSLATION] “postponed his election to a later date” (A.R., vol. I, at pp. 7-8). The “reserve” or postponement of an election does not amount to an actual request for a preliminary inquiry for the purposes of s. 535 *Cr. C.*

[274] Assimilating a reserve to a request would effectively mean that the mere “possibility” of making a request is enough, despite the clear intent of Parliament to make the request an essential prerequisite to the existence of this statutory right. Merely leaving open the possibility that a request may be made in the future is insufficient for this purpose.

[275] The respondents had no vested right at the time the new rule came into force, but merely the possibility of acquiring such a right had they made requests before the ninetieth day after its enactment. As this Court held in *Expropriation Tribunal*, at p. 742: “A vested right . . . does not include a right which could have been exercised but was not, and which is no longer available under the law”.

C. *Interpreting the New Rule*

[276] Having found that an accused in the circumstances of the respondents is subject to the new rule at s. 535, I turn to whether such an accused would be eligible for a preliminary inquiry in accordance with its terms. This question turns on whether they qualify as “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment” within the meaning of s. 535. This case raises the issue squarely.

[277] Mr. Grenier is charged with sexual interference and sexual assault, which, where the victim is a person under the age of 16 years, are now punishable by up to 14 years. As for Mr. Archambault, he is charged with indecent assault on another male person (who was under the age of 16 years at the time of the alleged offence), which has no modern equivalent. He argues that the alleged criminal conduct would likely now be charged under either s. 271 or ss. 151 to 153 of the *Criminal Code* (R.F. (Archambault), at para. 76); these offences are all now punishable by up to 14 years’ imprisonment.

[278] In each case, the respondents have the benefit of s. 11(i) of the *Charter* which, consistent with the presumptions discussed above, limits their personal liability to the maximum term of imprisonment in force at the time of the commission of the offences charged. Thus, the respondents face a maximum of 10 years' imprisonment in respect of each offence with which they are charged — although the acts they are alleged to have committed would, if committed today, each be punishable by imprisonment for a maximum of 14 years. None of the offences charged attract a maximum penalty of 14 years or more of imprisonment.

[279] The Crown submits that only an accused facing a *personal liability* of 14 years' imprisonment or more for an offence can ask for a preliminary inquiry (A.F., at para. 120). For this new rule, the yardstick by which the seriousness of an offence is measured is the maximum sentence faced by the accused regarding that offence.

[280] The respondents answer that Parliament's intent was to keep the availability of preliminary inquiries for the most serious offences, as determined by reference to contemporaneous societal values and the current maximum sentence of the offence (R.F. (Archambault), at paras. 82 and 89; R.F. (Grenier), at paras. 35-37). They agree with the intervener the Criminal Lawyers' Association (Ontario) that the focus cannot be the personal liability of the accused, because what matters is the seriousness of the *offence*, not the *offender* (I.F., at para. 8, citing *R. v. Windebank*, 2021 ONCA 157, 154 O.R. (3d) 573, at paras. 36-37). The respondents submit that modern societal views on the seriousness of the offence are reflected in the sentencing principles and

the actual sentences that an accused would receive today. In addition, they say it is not fair to penalize them based on the fact that they benefit from *Charter* rights.

[281] For the reasons that follow, I conclude that the text in s. 535, read in context and in light of the purposes of the provision, requires that the accused actually be liable to 14 or more years' imprisonment in respect of the offence for a preliminary inquiry to be available. Parliament intended for only those accused facing greater maximum jeopardy to retain the benefit of a preliminary inquiry.

(1) The 14-Year Imprisonment Threshold

[282] This issue requires interpreting the scope of the 14-year imprisonment threshold in s. 535 of the *Criminal Code*. While the respondents and the Crown agree that the maximum penalty has been used in s. 535 as a marker of the seriousness of the offences for which preliminary inquiries remain available (A.F., at paras. 108-11; R.F. (Archambault), at para. 77; R.F. (Grenier), at para. 37), the question is whether the maximum penalty is that of the specific offence with which the accused is charged — or whether it is that of the broader class of offence. In undertaking this statutory interpretation exercise, I will consider the text, context and purpose of the provision, and then address specific concerns raised by the parties.

[283] I turn first to the text of s. 535. A preliminary inquiry is only available when “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a

preliminary inquiry under subsection 536(4)”. The French text similarly centres on “*un prévenu inculpé d’un acte criminel passible d’un emprisonnement de quatorze ans ou plus*”. The focus of the text is on the accused and the accused’s proceedings: the offence with which “an accused . . . is charged”, and whether a request has been made for them to have a preliminary inquiry. It is not focused on hypotheticals or the general nature of the offence. The indictment sets out the particulars (including the date) of the offence that the accused must answer and limits the criminal proceedings. As illustrated in the case of Mr. Archambault, there is no modern equivalent to the offence with which he is charged; he is charged with indecent assault on another male person, which is punishable by 10 years’ imprisonment.

[284] Of course, the seriousness of an offence is not measured in reference to the individual circumstances surrounding the offender, such as the possibility of a dangerous offender designation (*Windebank*, at paras. 35-37). Rather, as Nordheimer J.A. explained in *R. v. S.S.*, 2021 ONCA 479, 493 C.R.R. (2d) 251, the relevance of the accused is that the provision speaks to the specific offence with which that accused actually has been charged (para. 19), as opposed to a hypothetical offence involving the similar alleged actions occurring in the present day.

[285] This interpretation of these words in the *Criminal Code* is also consistent with how those words have been understood in other statutes dealing with similar subject matter. The presumption of consistent expression provides that the meaning of recurring patterns of expression is presumed to remain the same “both within a statute

and across statutes” (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 44).

[286] In *Tran*, this Court was concerned with s. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which defined the “serious criminality” of a permanent resident or foreign national to include “having been convicted . . . of an offence . . . punishable by a maximum term of imprisonment of at least 10 years”. The maximum penalty for the offence with which Mr. Tran was convicted had been raised from a maximum term of imprisonment of 7 to 14 years between its commission and sentencing. This Court unanimously concluded Mr. Tran’s conviction did not fall under the umbrella of serious criminality, within the meaning of s. 36(1)(a), as the only acceptable interpretation was that the provision referred to the maximum term “that [Mr. Tran] could have received at the time of the commission of the offence” (para. 35). The language of the provision was taken to refer to the circumstances of the offender, i.e., the maximum penalty he had faced, rather than the “abstract maximum penalty” (para. 38).

[287] There is no reason to think Parliament meant something different in s. 535 of the *Criminal Code* by the analogous formulation “an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment”. That s. 36(1)(a) of the *Immigration and Refugee Protection Act* speaks to the relevant offences after conviction, while s. 535 speaks to offences on which persons have been charged but not convicted, is a distinction without a difference. In both contexts Parliament is

distinguishing offences based on their severity in reference to their maximum term of imprisonment. This Court held in *Tran* we must look to the actual offence committed by the person directly referenced in the provision, not a hypothetical offence committed in other circumstances where it would attract a higher maximum sentence.

[288] This focus on the specific proceedings of the accused also follows the broader context of the new provision, which makes clear that preliminary inquiries are now *generally* unavailable. Their availability is now restricted only to those accused who meet specific and clear conditions. The accused's personal jeopardy is usually readily ascertainable. The maximum liability of the offence with which an accused has actually been charged and convicted must be determined in sentencing them. If the accused may be liable for at least 14 years of imprisonment in respect of an offence charged, then a preliminary inquiry should be available if either the accused or the prosecution requests one.

[289] Thus, I disagree with the intervenor the Criminal Lawyers' Association (Ontario) that relying on personal liability would lead to uncertainty or absurd results, for example when the dates of the offence straddle the date of the increase in the maximum penalty (I.F., at paras. 13-17). Rather, it is determining maximum liability by reference to a hypothetical that introduces uncertainty: what would the maximum punishment be for the alleged conduct underlying those offences if that conduct occurred in the present day, or on September 19, 2019, the date s. 535 came into force? Obviously, an accused actually facing 14 years' imprisonment (no matter when s. 535

came into force) should have the right to request a preliminary inquiry. The efficiency and coherence of the scheme is focused on maintaining the benefit of a preliminary inquiry for the accused facing serious jeopardy, where the preliminary inquiry is requested.

[290] Finally, the overall purpose of limiting the availability of the preliminary inquiry was to reduce delays, to alleviate the burden of witnesses and victims of testifying twice, and more generally, to improve the efficiency of the criminal justice system (see *R. v. C.T.B.*, 2021 NSCA 58, at para. 39; *Windebank*, at paras. 19-22; *S.S.*, at para. 14). In limiting the availability of a preliminary inquiry, Parliament decided that it was not a necessary procedural step to a fair trial.

[291] These broader purposes in reducing the availability of the preliminary inquiry inform the specific objectives of s. 535. Although Parliament kept the availability of preliminary inquiries in serious cases, the exception for serious offences must itself be read “in light of the problem [the legislation] was intended to address” (*Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 36).

[292] Thus, s. 535 represents an exception for serious offences. While Parliament was seeking to reduce systemic obstacles to the *Charter* right to a trial without unreasonable delay, the exception recognizes that a preliminary inquiry can still be of significant benefit to an accused facing more significant legal jeopardy. The Parliamentary debates reveal a key concern that the rule limiting access to preliminary inquiries be clear and certain. Other proposed amendments to Bill C-75, which would

have expanded the eligibility for preliminary inquiries based on the opinion of the justice as to the “best interests of the administration of justice”, were ultimately not adopted by Parliament (*Windebank*, at paras. 24-25). In speaking against that proposal, the Minister of Justice expressed the concern that their complex criteria would lead to further litigation and delay (*House of Commons Debates*, vol. 148, No. 435, 1st Sess., 42nd Parl., June 17, 2019, at p. 29245). Given these purposes, it is difficult to accept that Parliament adopted a threshold meant to invite a hypothetical inquiry into what the maximum sentence for the accused would have been had it occurred at another time.

[293] The respondents and the interveners Association québécoise des avocats et avocates de la defense (“AQAAD”) and Association des avocats de la défense de Montréal-Laval-Longueuil (“AADM”) argue those accused of historical child sexual offences, even where they benefit from a lesser *maximum* punishment, actually face the same criminal jeopardy as those accused of more recent offences, since a judge considers the current maximum liability in determining the proper sentence (R.F. (Archambault), at para. 93; I.F. (AQAAQ and AADM), at para. 13). The actual sentences imposed — and the associated stigma — will be more severe than they would have been at the time of the commission of the offence (R.F. (Grenier), at para. 37).

[294] Granted, in exercising discretion in sentencing, a sentencing judge must consider the current values of society, as reflected by the maximum sentences in force for the offence (*R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 100; see also *R. v. Bertrand Marchand*, 2023 SCC 26, at paras. 31, 46-47, 153 and 167-68; *Poulin*,

at paras. 3-5). Sentences must not only be proportionate to an individual's culpability (*Cr. C.*, s. 718.1), they must serve sentencing's fundamental purpose of maintaining a "just, peaceful and safe society" (s. 718). In particular, for sexual offences against children, sentencing serves the primary objectives of denunciation and deterrence (s. 718.01). The principle of parity requires that courts impose similar sentences for similar offenders in similar circumstances (s. 718.2(b)). By nature, the court's role in sentencing includes consideration of "society's legitimate shared values and concerns" (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 49; see also *R. v. Stuckless*, 2019 ONCA 504, 146 O.R. (3d) 752, at para. 112).

[295] But sentencing principles and societal values are of little assistance in interpreting the intention of Parliament under s. 535. The proxy for seriousness selected by Parliament here is the *maximum* sentence carried by the offence charged — not the fit sentence. The maximum sentence is not determined in reference to the discretionary sentencing regime. Even if the fit sentence would now be more severe than it would have been at the time of the commission of the offence, the maximum sentence the accused faces is the same. To ensure its objective of a clear and predictable standard on which to determine eligibility for a preliminary inquiry, Parliament opted to focus on the maximum sentence. Sentencing principles do not help to interpret this statutory right to a preliminary inquiry which is determined by reference to the *maximum* penalty an accused faces for the conduct that gives rise to the offence with which they are charged.

[296] The respondents argue that it would be unfair to penalize accused persons, by denying them a preliminary inquiry, simply because they benefit from the protection under s. 11(i) of the *Charter* (R.F. (Archambault), at paras. 83-85; R.F. (Grenier), at para. 50). In my view, however, the respondents are not penalized; they are simply in the same position of any accused who faces a maximum sentence of less than 14 years.

[297] Section 11(i) of the *Charter* provides: “Any person charged with an offence has the right . . . if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.” Even setting aside the constitutional protection provided by s. 11(i), there is a common law rule that an accused’s penal consequences must generally be determined in reference to the law in force at the time of the commission of the offence (*Poulin*, at para. 60; *K.R.J.*, at para. 22). An accused would, presumptively, still be liable only for the lesser punishment in force at the time of the commission of the offence (*S.S.*, at para. 16; *C.T.B.*, at paras. 25, 34 and 45-46; *Interpretation Act*, s. 43(d) and (e)), in this case a maximum of 10 years’ imprisonment.

[298] That the same type of alleged criminal conduct would today give rise to the benefit of a preliminary inquiry works no injustice, as contemporaneous offenders face greater jeopardy, as reflected by the current 14-year maximum sentence. The result for both offenders may be different, but they are “treated fairly [and] they each receive protections which are connected to them and their proceedings” (*Poulin*, at para. 96 (emphasis deleted)).

[299] Thus, I cannot accept the interpretation urged by the respondents. It contradicts the ordinary meaning of the text and would blunt Parliament’s goals of reducing the number of preliminary inquiries and of creating a clear criterion limiting eligibility for a preliminary inquiry.

[300] The 14-year requirement imposed by s. 535, read in its entire context, leaves room for only one interpretation. Parliament chose to restrict preliminary inquiries based not on the general nature of the conduct underlying the offence, as it could have done, but through the proxy of the maximum jeopardy faced by an accused for the actual offence with which they are charged. I agree with the Nova Scotia Court of Appeal that the requirement imposed by the text of s. 535 is “clear and unequivocal” (*C.T.B.*, at para. 38; see also *S.S.*, at paras. 15-16). As noted in *S.S.*, to achieve its purpose of restricting the entitlement to preliminary inquiries, Parliament “expressly coupled [that] entitlement . . . to the maximum sentence for the offence charged” (para. 15; see also *C.T.B.*, at para. 29).

[301] I conclude that an accused has the right to make a request for a preliminary inquiry if charged with an offence for which their maximum sentence is imprisonment of 14 years or more.

(2) Application to the Respondents

[302] Here, neither respondent’s request for a preliminary inquiry met the requirements of the new s. 535, as the offences with which they are charged are each

punishable by a maximum of 10 years' imprisonment. Mr. Grenier, even though the alleged offences with which he is charged would now each be punishable by up to 14 years if they occurred today, benefits from the lesser sentences in force at the time of the alleged commission of the offences. Mr. Archambault is charged under a section of the *Criminal Code* that has been repealed, but the alleged offence with which he is charged remains punishable by 10 years' imprisonment. Even if we were to conclude that the impugned conduct underlying this offence, if it happened today, would be an offence punishable by a term of 14 years, Mr. Archambault is not subject to that jeopardy.

VI. Conclusion

[303] The respondents had no right to preliminary inquiries. As no request had been made before the coming into force of the new s. 535, their proceedings were governed by the new limitation on the availability of preliminary inquiries. These respondents are not charged with an offence for which they are punishable by 14 years or more of imprisonment and do not meet the requirements for eligibility under the new rule. The Court of Appeal erred in remitting the respondents' files for preliminary inquiries.

[304] I would allow the appeal. As the appeal is moot, I would make no further order.

Appeal dismissed, WAGNER C.J. and KARAKATSANIS, O'BONSAWIN and MOREAU JJ. dissenting.

Solicitor for the appellant: Director of Criminal and Penal Prosecutions, Longueuil.

Solicitors for the respondent Agénor Archambault: Méline Le Blanc, Montréal; Hugo T. Marquis, Montréal; Michel Pelletier, Montréal.

Solicitor for the intervener the Attorney General of Canada: Department of Justice Canada, National Litigation Sector, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Crown Law Office — Criminal, Toronto.

Solicitors for the interveners Association québécoise des avocats et avocates de la défense et de l'Association des avocats de la défense de Montréal-Laval-Longueuil: Bolduc Paquet, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Weisberg Law Criminal Lawyers, Toronto; Fenton Law Barristers, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Shanmuganathan Law, Toronto.

1995 CarswellQue 2219

Cour supérieure du Québec

Please see in particular paras. 1-4

R. c. Assoc. québécoise des pharmaciens propriétaires

1995 CarswellQue 2219, [1995] R.J.Q. 1498, J.E. 95-1085, EYB 1995-75628

Sa Majesté la Reine, c. L'Association Québécoise des Pharmaciens Propriétaires (A.Q.P.P.), Le Groupe Jean Coutu (PJC) Inc., McMahon-Essaim Inc., Les Magasins Koffler de l'Est Inc., Famili-Prix Inc., Pharmacentres Cumberland (Merivale) Ltée, Uniprix Inc.

Juge Ginette Piché

Jugement: 19 mai 1995

Dossier: C.S. Montréal 500-27-008234-900

Avocat: *Me François-Bernard Côté*, Procureur de la Couronne.

Me Bruno Pateras, Avocat-conseil des accusées.

Me Yves Bériault, Avocat de l'association québécoise des pharmaciens propriétaires.

Sujet: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

Ginette Piché, J.C.S.:

1 La Cour doit décider aujourd'hui de la peine qui doit être imposée aux accusées, suite à leurs plaidoyers de culpabilité. La décision est d'autant plus importante qu'elle implique les compagnies et associations pharmaceutiques parmi les plus influentes au Québec, dont le Groupe Jean-Coutu, l'Association Québécoise des Pharmaciens Propriétaires, McMahon-Essaim Inc., les Famili-Prix, les Pharmacentres Cumberland, Uniprix, et les Magasins Koffler de l'Est Inc. A eux seuls, ils comptent 595 pharmacies.

2 Les accusées corporatives ont plaidé coupable à l'accusation d'avoir, entre le 1er décembre 1987 et le 30 septembre 1988, dans la ville de Montréal, et ailleurs dans la province de Québec, illégalement comploté, des être coalisées, concertées ou entendues ensemble, l'une avec l'autre ou avec d'autres individus et corps politiques inconnus, pour empêcher ou diminuer indûment la concurrence dans la vente ou la fourniture des pilules anticonceptionnelles et des narcotiques de prescription et les frais d'honoraires s'y rapportant vendus au comptant au public ou offerts en vente au comptant au public.

3 Il s'agit d'une accusation portée par la Couronne en vertu de la *Loi sur la concurrence* (L.R. 1985, ch. C-34).

4 Voyons immédiatement l'article 45(1)c) en vertu duquel l'accusation a été portée. Cet article se retrouve dans la Partie VI de la loi concernant les infractions relatives à la concurrence:

45.(1) Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne:

(...)

c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens.

1.- Les Faits

5 En *septembre 1988*, des représentants du Directeur des enquêtes et recherches, bureau de la politique de concurrence, Consommation et Corporation Canada, ont exécuté des mandats de perquisition dans les locaux de l'A.Q.P.P., du Groupe Jean-Coutu, de McMahon-Essaim, de Pharmaprix, de Cumberland et d'Uniprix.

6 En *avril 1990*, il y a dénonciation accusant sept individus et seize personnes morales. Elles sont accusées « de s'être entendue pour réduire indûment la concurrence », contrairement à l'article 45(1)c) de la *Loi sur la concurrence*. Suivra une longue contestation constitutionnelle de la *Loi sur la concurrence* au cours des années 1990 à 1993.

7 Le *16 décembre 1993*, de consentement, les accusées sont envoyées à procès. Un acte d'accusation est déposé contre sept individus, quinze compagnies, et contre l'A.Q.P.P. La comparution sur l'acte d'accusation et le procès sont fixés à *septembre 1994*.

8 Le *30 août 1994*, c'est le procureur général qui décide de retirer l'accusation du *16 décembre 1993* et qui le remplace par deux nouveaux actes d'accusation: un acte d'accusation contre sept personnes morales et un acte d'accusation contre sept individus. Le procès contre les sept personnes morales débute le *7 septembre 1994*, devant l'honorable juge Dionysia Zerbisias. Il y a présentation d'une requête pour casser l'acte d'accusation et un jugement est prononcé, cassant l'acte d'accusation et libérant les sept personnes morales le *22 septembre 1994*.

9 Le *30 novembre 1994*, le procureur général dépose cependant un nouvel acte d'accusation contre les sept personnes morales.

10 Lors de l'audition du *12 mai 1995*, les sept personnes morales accusées dans la présente cause plaident coupable sur l'acte d'accusation du *30 novembre 1994*.

11 Quant aux accusations contre les sept individus, la Couronne a décidé de retirer ses plaintes et la Cour a prononcé une ordonnance d'interdiction à leur égard, le tout selon l'article 34(2) de la *Loi sur la concurrence*. Cette ordonnance d'interdiction, prononcée le 12 mai 1995, a été faite de consentement. Les accusées ne devront donc poser aucun geste tendant à la répétition des actes visés par la plainte et devront se conformer à la politique de l'A.Q.P.P. relativement au respect de la *Loi sur la concurrence*. Elles devront entre autre être présentes à une séance d'information organisée par l'A.Q.P.P. où on expliquera aux membres les dispositions de la Loi et notamment l'article 45.

12 Dans son énoncé des faits le procureur de la Couronne donne certaines informations sur les accusées. Ainsi, l'A.Q.P.P. est une association qui est dûment constituée en vertu de la *Loi sur les syndicats professionnels* (L.R.Q. 1978, ch. S-40). Pour être membre de l'A.Q.P.P. il faut, selon sa constitution, être pharmacien licencié, inscrit en règle avec l'Ordre des pharmaciens de la Province de Québec et propriétaire d'une officine. Notons enfin que les membres de l'A.Q.P.P. sont propriétaires d'environ 1318 des pharmacies du Québec, soit environ 90%.

13 Quant au *Groupe Jean-Coutu (PJC) Inc.*, c'est une personne morale dûment constituée en vertu des lois du Canada, dont le siège social est situé à Longueuil et qui compte aujourd'hui 193 pharmacies faisant affaires sous l'une ou l'autre des raisons sociales suivantes: *PJC Jean-Coutu* et *SuperEscompte Jean-Coutu*. A l'époque pertinente, le Groupe Jean-Coutu regroupait environ 130 pharmacies.

14 De son côté, *McMahon-Essaim Inc.* est aussi une personne morale constituée en vertu des lois du Canada, dont le siège social est situé à Montréal. C'est un grossiste qui, au 30 septembre 1988, avait un contrat d'approvisionnement avec 152131 Canada Inc., regroupant environ 140 pharmacies de détail sous la bannière *Essaim* et était le franchiseur des pharmacies de détail sous les bannières *Cloutier* et *Brunet*. Aujourd'hui ce grossiste approvisionne et est le franchiseur d'environ 50 pharmacies qui arborent une bannière dont il est propriétaire, en l'occurrence la bannière « Brunet ».

15 De son côté, *Les Magasins Koffler de l'Est Inc.* sont aussi une personne morale constituée en vertu des lois du Canada, dont le siège social est situé à St-Léonard et qui regroupait, à l'époque pertinente, 44 pharmacies sous la raison sociale de *Pharmaprix*. Aujourd'hui ce regroupement compte 65 pharmacies.

16 Enfin, *Famili-Prix Inc.* est une personne morale incorporée en vertu des lois du Canada, avec siège social situé à Québec et qui regroupait, à l'époque pertinente, 125 pharmacies. Aujourd'hui, ce regroupement compte 90 pharmacies faisant affaires sous la raison sociale de *Famili-Prix*.

17 Finalement, les *Pharmacentres Cumberland (Merivals) Ltée* et *Uniprix Inc.* sont des personnes morales dûment constituées en vertu des lois du Canada et qui d'abord pour *Cumberland*,

regroupait, à l'époque 40 pharmacies de détail et en compte aujourd'hui 51, alors que *Uniprix* regroupait à l'époque 138 pharmacies et en compte aujourd'hui 146 faisant affaires sous la raison sociale *Uniprix*.

18 On doit aussi savoir que les produits en cause ici, soit les pilules anticonceptionnelles et les narcotiques de prescription, sont des médicaments qui exigent une ordonnance. Au Québec, les pilules anticonceptionnelles et les narcotiques de prescription sont donc vendus uniquement dans les pharmacies, suite à l'obtention d'une ordonnance d'un médecin. Il est intéressant aussi de savoir que le prix de détail du médicament sur ordonnance payé par le consommateur est constitué du prix du médicament et d'un honoraire professionnel versé au pharmacien. L'honoraire professionnel est le montant exigé par le pharmacien pour les services rendus relativement à l'exécution d'une ordonnance.

19 Ici, au Québec, les achats de médicaments disponibles sur ordonnance s'effectuent selon deux modes de paiement. Soit que le client paie comptant ou encore qu'il ne paie pas mais que le pharmacien soit payé par un tiers-payeur, qu'il s'agisse d'un assureur privé ou de la RAMQ et ce, en vertu de la *Loi sur l'assurance-maladie*.

20 Dans le présent cas, *on ne parle que de la situation où le client paie comptant* ce qui, en 1988, représentait approximativement entre 52% et 55% de la vente des médicaments sur ordonnance.

21 Au paragraphe 24 de l'énoncé des faits du procureur de la Couronne, on peut lire ceci:

24. Les pharmaciens propriétaires regroupés sous les bannières des six (6) entreprises accusées ont vendu sur le marché au comptant de pilules anticonceptionnelles et de narcotiques de prescription pour toute l'année 1988 pour environ treize millions de dollars, ce qui représente pour la durée des ententes mentionnées ci-dessous, des ventes d'environ dix millions de dollars.

25. Les ventes au comptant de médicaments d'ordonnance en officine représentent environ 20% des revenus totaux des ventes en pharmacie; pour leur part, les anovulants et les narcotiques, ensemble, représentent environ 5 à 7% des ventes de médicaments d'ordonnance; les narcotiques représentent environ 1% des ventes des médicaments d'ordonnance.

22 Dans son exposé de faits, la Couronne explique que les accusées ont participé à des ententes sur les pilules anticonceptionnelles et narcotiques de prescription sur un prix minimum de vente au comptant des pilules anticonceptionnelles, soit « cost Régie » plus certains honoraires.

23 Il nous faut noter finalement que l'A.Q.P.P. et les six accusées corporatives ont cessé de se conformer aux ententes qu'elles avaient faites pour fixer un prix minimum dès que les mandats de perquisition ont été exécutés. Il faut donc noter que cette entente sur les honoraires des pilules

anticonceptionnelles a duré environ 7 mois, alors que l'entente sur les honoraires de narcotiques de prescription n'a duré qu'environ 2 mois et demi.

24 Tels sont les faits qui ont été expliqués à la Cour.

2.- Rappel Historique et Jurisprudence

25 La nouvelle *Loi sur la concurrence* qui a été adoptée en 1986, remplace la *Loi relative aux enquêtes sur les coalitions*. Dans son volume sur *La nouvelle Loi sur la concurrence*¹, consistant en des analyses et commentaires faits sous la direction de Me Serge Bourque, la Cour reprendra certains propos retrouvés principalement dans une analyse faite par Mes Simon Potter et Denis Gascon sur les complots et plus particulièrement sur l'article 45 de la loi. A la page 111 de leur étude, les auteurs rappellent d'abord que bien évidemment l'infraction de complot de l'article 45 ne serait pas complète sans une sanction. Ils diront ceci:

La nouvelle *Loi sur la concurrence* n'a pas chambardé le domaine des amendes. Préoccupée de donner au champ pénal restant une efficacité accrue, la réforme de 1986 s'est essentiellement limitée à une augmentation sensible des amendes imposables. (p. 111)

26 Et lorsqu'on parle de l'héritage d'avant la loi, i.e. avant 1986, au chapitre des amendes:

L'héritage qu'ont légué le *Code criminel* et la *Loi relative aux enquêtes sur les coalitions* se résume en fait à deux choses: d'une part, le montant des amendes imposées par les tribunaux s'est avéré peu élevé et, d'autre part, la jurisprudence a développé certains outils permettant une analyse plus rationnelle du montant de l'amende à prescrire.

27 Sous le *Code criminel*, le montant maximal des amendes était donc fixé à 10 000 \$ et sous la *Loi relative aux enquêtes sur les coalitions*, le montant après avoir été laissé à la discrétion des juges, avait été fixé à un maximum de 1 million de dollars. Toutefois, nous disent les auteurs Potter et Gascon, toutes les amendes au delà de 100,000 \$ étaient demeurées très rares et en fait, le montant des amendes en dollars réels avait très peu augmenté depuis le début du siècle.

28 En 1956, M. le juge Rand de la Cour suprême disait ceci dans l'arrêt *Goodyear Tire and Rubber Co. of Canada Ltd c. The Queen*²:

The burden of proving the combination and its operation is, for obvious reasons, complicated and time consuming and the procedure of enforcement by conviction and fine has tended to exhibit a course of things bearing a close likeness to periodic licensing of illegality.

29 Peut-être que ce faible montant des amendes peut être attribué au fait que les tribunaux considéraient que la violation des lois sur la concurrence était moins grave que la commission de crimes de droit commun.

30 C'est ce qu'on mentionnait d'ailleurs dans la cause de *R. c. Electric Reduction Co.*³.

31 Dans son volume *Competition/Antitrust: Canada and the United States*⁴, l'auteur R.J. Roberts dira ceci à la page 468:

Until December 1966, fines in criminal prosecutions under the Act never exceeded \$25,000 for any corporate defendant. This was due in part to the fact that the *Combines Investigation Act* which was in effect until 1960, limited the penalty for violations of its criminal prohibitions to a maximum of \$10,000. Fines began to creep upward after the 1960 amendments to the Act, which removed the maximum fine and made the monetary penalties of the *Criminal Code* applicable.

(...) the 1976 and 1986 amendments to the Act increased the penalty provisions of the criminal prohibitions.

It is safe to say that as a result of the above changes the tendency of prosecutors is to ask for substantially increased fines and for courts to impose fines substantially exceeding those in the past

32 On sait qu'une amende doit toujours être à la fois *dissuasive, retributive* et *réhabilitante*. On retrouve ceci dans la décision de *R. c. Kroehler Manufacturing Co.*⁵.

33 Toutefois, rappelleront les auteurs Potter et Gascon:

L'élément fondamental sur lequel les cours se sont fondées demeure toutefois l'effet *dissuasif* que la sanction doit avoir sur les défendeurs et sur les autres producteurs: il faut que l'amende soit plus qu'"une tape sur les doigts", plus qu'un droit de licence pour continuer une pratique illégale. Comme le soulignait *R. c. R.L. Thorpe Sales Ltd*⁶, l'amende "doit faire mal" et ne devrait pas se situer en deçà d'un certain seuil minimal⁷ (p. 112)

34 D'autres considérations se sont aussi greffées à cet élément de dissuasion. Ainsi, les Tribunaux ont tenu compte de la *protection de l'intérêt public, de la durée du complot, de la taille des entreprises et de leur part de marché, de l'action particulière de l'entreprise et de la région géographique*. On a aussi regardé les amendes déjà décernées pour le même type d'infraction, examiné s'il y avait des *condamnations antérieures* et regardé la capacité de payer des accusées.

35 On dira que:

La sentence est donc plus qu'un problème arithmétique⁸

36 L'auteur Roberts⁹, quant à lui, *résume les facteurs qui doivent être examinés par le juge dans l'imposition du montant de l'amende*:

The factors that appear to be most influential in determining the size of the fine imposed by the courts in anti-combines cases are as follows:

1. The income and ability to pay of the defendant;
2. The size and scale of operation of the defendant;
3. The share of the market of the defendant;
4. The length of time in which the anti-competitive behaviour existed;
5. The position or influence of the defendant in the anti-competitive behaviour;
6. The geographic area affected by the behaviour;
7. Previous convictions, if any, of the defendant; and
8. Mitigating circumstances brought to the attention of the court, including obtaining and relying upon legal advice from anti-combines counsel which approved for behaviour as not a violation of anti-combines law and the voluntary cessation of the activity prior to prosecution

37 Dans *R. c. Canadian General Electric Co. Ltd.*¹⁰, le juge Pennell a imposé une amende de 300 000 \$. Dans cette affaire, il y avait eu des profits de plus de 16 millions, et le fait que Canadian General Electric avait déjà été trouvée coupable pour les mêmes offenses. Il y avait le fait que Canadian General Electric était l'âme dirigeante dans cette affaire de complot. Le juge a reconnu qu'il avait eu de la difficulté à évaluer la gravité de l'infraction et la justesse de l'amende car, disait-il, les effets du complot sur les prix n'avaient pas été mis en preuve. Il aurait éallu, selon le juge, une enquête complète sur l'organisation pour avoir les outils requis pour démontrer le profit engendré, l'impact sur le marché et l'amendé justifiée.

38 Les auteurs Potter et Gascon diront ceci:

C'est la que le bât blesse. Les tribunaux encensent le rôle *dissuasif* de l'amende et en font son objet premier; or, pour remplir ce rôle, il faudrait que l'amende puisse éliminer partiellement ou totalement le gain illicite généré par le complot. Cependant, il semble répugner aux juges de faire une analyse économique pour apprécier une infraction de complot. Et, sans une analyse complète du marché, il est impossible aux juges d'évaluer précisément le bénéfice économique engendré par l'infraction, et donc l'amende appropriée.¹¹

39 En fait, *l'amende ne doit pas devenir le paiement d'un droit à l'illégalité*. Et c'est à cela que la majoration des amendes de 1986 a voulu remédier. La *Loi sur la concurrence* a donc haussé le montant maximum des amendes imposables en vertu de l'article 45, de 1 000 000 \$ à 10 000 000 \$. On peut facilement comprendre que ceci démontre que le législateur *attache une grande importance à la protection de la concurrence et « juge les complots anti-concurrentiels comme étant fort lucratifs, du moins potentiellement »*¹².

40 Voyons ce que nous dit l'article 1.1 de la *Loi sur la concurrence* sur les objets de cette loi:

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

41 C'est donc dit clairement. La loi veut que la petite et moyenne entreprise bénéficie d'une chance honnête de participer à l'économie canadienne et, en même temps, s'assurer que les consommateurs, les gens ordinaires, aient des prix compétitifs et un choix dans les produits qu'ils veulent acheter.

Contrairement aux souches du *Code criminel*, il n'y a donc pas de jugement moral à la base de la *Loi sur la concurrence*; on y trouve plutôt le fruit d'une analyse économique rationnelle qui confère aux forces du marché un rôle d'optimisation des ressources et des bénéfices qui en émanent. Il serait logique que cette analyse économique préside à toute l'interprétation de cette loi et de ces sanctions. Au chapitre des amendes, il serait donc conséquent que la punition imposée soit tributaire des effets concrets du complot sur le prix et la qualité du produit offert.¹³

42 Il s'agira donc, non pas de poser un jugement moral sur les actes qui ont été faits, mais bien plutôt d'examiner de façon rationnelle les coûts et les avantages économiques dont les accusées ont pu bénéficier et que les consommateurs n'ont pu obtenir. Il faudra toujours qu'une amende ait véritablement une force dissuasive si on veut que la loi ait tout son effet.

3.- Les Recommandations Faites

43 Dans la présente cause, le procureur de la Couronne et le procureur des accusées ont fait une représentation commune. Ils ont suggéré que l'amende soit pour un montant de 2 000 000 \$, en insistant qu'il s'agissait d'une amende sérieuse. Ils ont demandé à la Cour de répartir l'amende au *pro rata*, selon le nombre de pharmacies que chacune des accusées corporatives avait sous sa bannière ou détenait. Ainsi, le Groupe Jean-Coutu - (PJC) Inc. avec 193 pharmacies aurait à payer

une amende, de 289 500 \$, alors que le Groupe McMahon Essaim Inc. avec 50 pharmacies aurait une amende de 75 000 \$ et les Pharmacentres Cumberland (Merival) Ltée avec 51 pharmacies - 76 500 \$. La Cour reproduira ici le tableau représentant la répartition de l'amende telle que proposée par les procureurs:

ACCUSEES	NOMBRE DE PHARMACIES X 15	AMENDES
L'ASSOCIATION QUEBECOISE DES PHARMACIENS PROPRIETAIRES		107 500 \$
LE GROUPE JEAN COUTU (PJC) INC.	193	289 500 \$
McMAHON ESSAIM INC.	50	75 000 \$
LES MAGASINS KOFLER DE L'EST INC.	65	97 500 \$
FAMILI-PRIX INC.	90	135 000 \$
PHARMACENTRES CUMBERLAND (MERIVALE) LTEE	51	76 500 \$
UNIPRIX	146	219 000 \$
TOTAL		2 000 000 \$

44 On a indiqué à la Cour qu'on avait pris en considération le montant de l'ensemble des ventes, soit 10 000 000 \$ et qu'on avait retenu un pourcentage de 20%. Ce pourcentage est raisonnable, soumet-on, car il est en ligne avec ce que les cours ont déjà retenu comme critères.

45 Ainsi, dans la cause de *Regina c. Davis Wire Industries Ltd. et al.*¹⁴ M. le juge Campbell disait ceci:

My task is to impose an appropriate sentence under those circumstances. That has been made somewhat easier in the light of the joint submissions with regard to an appropriate sentence. Nevertheless, I must consider all the circumstances independently as well as the principles of sentencing in coming to a conclusion as to an appropriate sentence to impose. (p. 397)

46 M. le juge Campbell avait retenu les principes énoncés dans la cause de *R. c. Armco Canada Ltd and 9 other corporations (No. 2)*¹⁵:

The principles applicable to the sentencing of corporations for participation in a conspiracy to unduly lessen competition contrary to s. 32(1)(c) ... [which I note is now s. 45 of the *Competition Act*] require that the fines imposed be of sufficient size, (1) to act as a deterrent to other corporations, and (2) to discourage the accused corporations from engaging in similar

activity in the future. The fine must not amount to a mere "licence fee" to permit the accused to continue to violate the Act. The factors to be considered in determining what penalty will fulfil these general principles are related to the degree of involvement of the particular corporation in the conspiracy, the corporation's relative size in terms of both share of the market and its won operation, its influence on the conspiracy, and any previous convictions under the Act and the length of time the conspiracy was active.

47 M. le juge Campbell dira qu'il applique les critères pour sa décision finale:

Of course I apply those principles in determining the appropriateness of sentence here.¹⁶

48 Dans notre affaire, il est évident qu'il s'agit d'une infraction qui a eu lieu dans la seule province de Québec et qui impliquait la quasi-totalité des pharmaciens du Québec. C'est l'Association québécoise des pharmaciens propriétaires du Québec qui avait en effet envoyé les avis pour fixer les prix.

49 Le fait que les accusées plaident coupables est certainement un facteur qui doit être pris en considération, puisque'il aurait fallu certainement un procès de plusieurs mois pour régler toute la question. Il faut se rappeler que c'est en 1988 que les perquisitions ont eu lieu.

50 Dans *Regina c. Davis Wire Industries Ltd. et al.*, déjà citée, M. le juge Campbell a retenu la proposition faite par les procureurs et condamné à des amendes de 725 000 \$, 200 000 \$, 30 000 \$ et 325 000 \$, les conspirateurs. Il s'agissait, notons-le, d'un marché d'une valeur de 11 millions de dollars. Le pourcentage retenu était de 12%¹⁷.

51 Quant à la décision prononcée par M. le juge Rothstein, dans la cause de *The Queen c. Kanzaki Specialty Papers Inc.*¹⁸, un pourcentage de 30% avait été retenu par le juge suite à une conspiration concernant la vente de papier "thermo-fax". Ici encore, une proposition avait été faite à la Cour qu'une amende de 950 000 \$ était appropriée dans les circonstances.

52 Dans la présente cause, nous reprendrons les facteurs qui ont été étudiés déjà par nos tribunaux pour examiner si la proposition faite d'imposer une amende de 2 000 000 \$ est juste et raisonnable. Voyons la situation.

53 La Cour reprendra d'abord certains propos du juge Grant dans l'affaire de *Regina c. Alpa Industries Ltd.*¹⁹. Il dira ceci:

It is always a matter of credit to an accused to plead guilty as these accused have. The experience of the Court is that Combines prosecution in most cases, if fought out, last a long time and take a great deal of the time of the Court and the Bar and of the officials. So that it

is a matter of great assistance in the administration of justice when a plea of guilty is entered as it was here.

54 Par ailleurs, dans la cause de *Regina c. A & M Records of Canada Ltd.*²⁰, M. le juge Honsberger énoncera ceci au sujet de la philosophie et du but du législateur dans la *Loi sur la concurrence*:

It is not for me to indulge in a monologue as to what the philosophy of legislative intervention into the market-place should be; whether the small retailer should be able to compete with the wholesaler who also acts as a retailer and hence harm the customer, or whether the customer is to be the protected specie at the expense of the small dealer. The policy of the legislation, however, is directed towards protecting the ultimate customer; the public.

(...) A penalty must be more than a mere licence fee and must bear some relationship to the size of the company, its scale of operations and the nature of its product.

(...)

A criminal offence has been committed which has produced an economic benefit to the accused and no one should profit from criminal activity. In such cases the penalty should be directed to eliminating to some degree such illicit gain.

55 La Cour ne peut être qu'en parfait accord avec ces propos à l'effet que *l'objet ultime de la loi est de protéger le public, le consommateur*. Dans ce sens, une amende qui ne serait pas raisonnable ne pourrait être considérée par ceux qui ont été en quelque sorte les victimes des agissements des accusées, comme étant véritablement dissuasive et punitive. Comme on peut lire dans l'arrêt de *R. c. R.L. Thorpe Sales Ltd.*²¹:

The courts must uphold the integrity of the tender system. Cheating of this sort is very easy to arrange and very difficult to discover. It must be made clear to the commercial public that the game is not worth the candle. The fines must hurt.

56 Ce qui est proposé ici, c'est une amende de 2 millions. Le chiffre est imposant et l'amende est importante. La Cour doit tenir compte du fait que la quasi-totalité des pharmaciens ont agi illégalement. Toutefois, ce ne fut que pendant une courte période, c'est-à-dire entre décembre 1987 et septembre 1988 dans le cas des anovulants et pour une période encore plus courte dans le cas des narcotiques. Les pharmaciens propriétaires regroupés sous les bannières des six entreprises accusées ont vendu des pilules anticonceptionnelles et des narcotiques de prescription pour un total d'environ 13 millions de dollars pour l'année 1988. On a indiqué à la Cour qu'il y a eu en fait des ventes d'environ 10 millions de dollars pendant la durée de l'entente. Les ventes au comptant de médicaments d'ordonnance représentent environ 20% des revenus totaux des

ventes en pharmacie. Les pilules anticonceptionnelles et les narcotiques de prescription qui nous intéressent ici représentent 5 à 7% de ces ventes.

57 Dans ce sens, la Cour estime qu'une pénalité de l'ordre de 20% de l'ensemble des ventes de produits pharmaceutiques, c'est-à-dire du dix millions obtenu, est raisonnable et que le but du législateur, par la *Loi sur la concurrence* est bien rencontré. La Cour a pris soin de prendre la présente cause en délibéré et d'examiner minutieusement les représentations faites par les parties. Il fallait s'assurer que les recommandations étaient justes.

58 L'examen des circonstances de ce dossier amène la Cour à la conclusion que les recommandations quant à la sentence sont justes et raisonnables et qu'elles peuvent être retenues. L'amende est suffisamment importante pour donner à réfléchir aux accusées. On devra se rappeler que la loi a été conçue afin de permettre à tous, les petites comme les moyennes et les grandes entreprises, de participer honnêtement à l'économie, de même que d'assurer à tous les consommateurs ordinaires que les produits qui leur sont offerts, même si ce sont des produits extrêmement populaires tels les pilules anovulantes, sont des produits qui doivent être vendus à des prix compétitifs.

59 Tel que demandé, un délai allant jusqu'au 30 décembre 1995 sera accordé aux diverses accusées pour le règlement des amendes. Les montants des amendes seront répartis entre les diverses accusées, selon le nombre de pharmacies qui sont au sein de chacun des groupes corporatifs.

Pour ces Motifs, La Cour:

60 *CONDAMNE* les accusées à verser la somme totale de 2 000 000 \$ (*deux millions de dollars*), répartie comme suit:

ACCUSEES	AMENDES
L'ASSOCIATION QUEBECOISE DES PHARMACIENS PROPRIETAIRES	1 107 500 \$
LE GROUPE JEAN COUTU (PJC) INC.	289 500 \$
McMAHON ESSAIM INC.	75 000 \$
LES MAGASINS KOFLER DE L'EST INC.	97 5000 \$
FAMILI-PRIX INC.	135 000 \$
PHARMACENTRES CUMBERLAND (MERIVALE) LTEE	76 500 \$
UNIPRIX	219 000 \$

TOTAL

2 000 000 \$

61 *LE TOUT* sans frais.

APPENDIX — Autorités Consultées par le Tribunal

Goodyear Tire and rubber Co. of Canada Ltd. c. The Queen, [1956] 2 D.L.R. (2d) 1 (S.C.C.);

R. c. Electric Reduction Co., [1970] 61 C.P.R. 235 (Ont. H.C.J.);

R. c. Kroehler Manufacturing Co., [1979] 45 C.P.R. (2d) 227 (Ont. Co. Ct.);

R. c. R.L. Thorpe Sales Ltd, [1983] 49 A.R. 354 (C.A.);

R. c. Alpa Industries Ltd, [1974] 22 C.P.R. (2d) 231 (Ont. H.C.J.);

R. c. Armco Canada Ltd, [1976] 24 C.P.R. (2d) 145 (Ont. C.A.);

R. c. Ocean Construction Supplies Ltd, [1974] 18 C.P.R. (2d) 166 (B.C.C.A.);

R. c. Canadian General Electric Co. Ltd., [1977] 2 B.L.R. 230, 35 C.P.R. (2d) 210 (Ont H.C.J.);

Regina c. Davis Wire Industries Ltd et al., [1992] 47 C.P.R. (3d) 394;

The Queen c. Kanzaki Specialty Paper Inc., [1994] 56 C.P.R. (3d) 467;

Regina c. A & M Records of Canada Ltd., [1980] 51 C.P.R. (2d) 225;

Regina c. A.B.C. Ready-Mix Ltd., [1972] 17 C.P.R. (2d) 91;

ROBERTS, R.J. *Competition/Antitrust: Canada and United States*, Butterworth, 1992;

BOURQUE, Serge et al., *La nouvelle loi sur la concurrence*, Analyses et commentaires sous la direction de, Les Editions Yvon Blais Inc., 1989;

Revue canadienne du droit de commerce, volume 10, 1985, Canada Law Book Inc., Aurora, Ont.;

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Notes de bas de page

1 Serge Bourque, *La nouvelle Loi sur la concurrence*, Analyses et commentaires sous la direction de, Les Éditions Yvon Blais Inc., Cowansville, 1989, 256 p.;

- 2 [1956] 2 D.L.R. (2d) 11 (S.C.C.), 13 (monopole des compagnies de fabrication de caoutchouc);
- 3 [1970] 61 C.P.R. 235 (Ont. H.C.J.), 237 (situation de monopole);
- 4 R.J. Roberts, *Competition/Antitrust: Canada and the United States* Second Edition, Butterworths, 1992;
- 5 [1979] 45 C.P.R. (2d) 227 (Ont. Co.Ct.);
- 6 [1983] 49 A.R. 354 (C.A.) (truquage des offres par des compagnies d'équipement de chauffage).
- 7 Voir *R. c. Alpa Industries Ltd.*, [1974] 22 C.P.R. (2d) 231 (Ont. H.C.J.) (entente sur le prix du bois utilisé pour la construction de maisons à Toronto); *R. c. Armco Canada Ltd.*, [1976] 24 C.P.R. (2d) 145 (Ont. C.A.); *R. c. Ocean Construction Supplies Ltd.*, (1974) 18 c.p.r. (2D) 166 (B.C.C.A.) (complot dans l'industrie du ciment et du béton).
- 8 *Supra* note 1, p. 113;
- 9 *Supra* note 4, p. 470;
- 10 [1977] 2 B.L.R. 230, 35 C.P.R. (2d) 210 (Ont H.C.J.).
- 11 *Supra* note 1, p. 114;
- 12 *Idem*;
- 13 *Supra* note 1, p. 115;
- 14 [1992] 4 C.P.R. (3d) 394;
- 15 [1975] 19 C.P.R. (2D) 273, 24 C.C.C.(2d) 147, 8 O.R. (2d) 573 (H.C.J.).
- 16 *Supra* note 14, p. 397;
- 17 *Supra* note 14;
- 18 [1994] 56 C.P.R. (3d) 467;
- 19 [1974] 22 C.P.R. (2d) 231, p. 235;
- 20 [1980] 51 C.P.R. (2d) 225, p. 230;
- 21 [1983] 49 A.R. 354;

Antal Babos *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Sergio Piccirilli *Appellant*

v.

Her Majesty The Queen *Respondent*INDEXED AS: **R. v. BABOS****2014 SCC 16**

File No.: 34824.

2013: October 9; **2014: February 21.**Present: McLachlin C.J. and LeBel, Abella, Cromwell, **Moldaver**, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Stay of proceedings — Abuse of process — Accused charged with offences related to firearms and importation, production and trafficking of methamphetamine — Accused alleging Crown misconduct in obtaining medical records, police collusion to mislead court, and Crown threats pressuring accused to plead guilty — Trial judge staying proceedings — Whether stay of proceedings necessary to protect integrity of justice system.

The accused were charged with numerous firearms offences, as well as offences related to the importation, production and trafficking of methamphetamine. During the course of the trial, the accused brought an application to stay the proceedings for abuse of process. They took issue with three forms of state misconduct: attempts by the Crown to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty, collusion on the part of two police officers to mislead the court about the seizure of a firearm, and improper means used by the Crown in obtaining the medical records of one of the

Please see in particular paras. 31 and 35

c.

Sa Majesté la Reine *Intimée*

- et -

Sergio Piccirilli *Appelant*

c.

Sa Majesté la Reine *Intimée*RÉPERTORIÉ : **R. c. BABOS****2014 CSC 16**

N° du greffe : 34824.

2013 : 9 octobre; 2014 : 21 février.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Arrêt des procédures — Abus de procédure — Accusés inculpés d'infractions relatives aux armes à feu et à l'importation, à la production et au trafic de méthamphétamine — Accusés allèguent des comportements répréhensibles du ministère public en ce qui a trait à l'obtention d'un dossier médical, à de la collusion entre policiers pour induire le tribunal en erreur et à des menaces proférées par la substitut du procureur général pour inciter les accusés à plaider coupable — Arrêt des procédures ordonné par le juge du procès — L'arrêt des procédures était-il nécessaire pour protéger l'intégrité du système judiciaire?

Les accusés ont été inculpés de nombreuses infractions liées aux armes à feu et d'autres infractions relatives à l'importation, à la production et au trafic de méthamphétamine. Durant le procès, les accusés ont présenté une demande d'arrêt des procédures pour abus de procédure. Ils se plaignaient de trois actes répréhensibles du ministère public, soit du fait que la substitut du procureur général a essayé plusieurs fois de les intimider pour qu'ils renoncent à leur droit à un procès en les menaçant de porter d'autres accusations contre eux s'ils décidaient de nier leur culpabilité; que deux agents de police se sont concertés pour induire le tribunal en erreur au sujet

accused. The trial judge stayed the proceedings. The Court of Appeal set aside the stay and ordered a new trial.

Held (Abella J. dissenting): The appeals should be dismissed.

Per McLachlin C.J. and LeBel, Cromwell, Moldaver, Karakatsanis and Wagner JJ.: A stay of proceedings for an abuse of process will only be warranted in the clearest of cases. Two types of state conduct may warrant a stay. The first is conduct that compromises the fairness of an accused's trial (the "main" category). The second is conduct that does not threaten trial fairness but risks undermining the integrity of the judicial process (the "residual" category). The test for determining whether a stay of proceedings is warranted is the same for both categories and consists of three requirements: (1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome, (2) there must be no alternative remedy capable of redressing the prejudice, and (3) where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

When the residual category is invoked, the first stage of the test is met when it is established that the state has engaged in conduct that is offensive to societal notions of fair play and decency, and that proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. At the second stage of the test, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward. Finally, the court must decide whether staying the proceedings or having a trial despite the impugned conduct better protects the integrity of the justice system. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.

de la saisie d'une arme à feu; et que le ministère public a utilisé des moyens irréguliers pour obtenir le dossier médical d'un des accusés. Le juge du procès a ordonné l'arrêt des procédures. La Cour d'appel a annulé l'arrêt des procédures et ordonné la tenue d'un nouveau procès.

Arrêt (la juge Abella est dissidente) : Les pourvois sont rejetés.

La juge en chef McLachlin et les juges LeBel, Cromwell, Moldaver, Karakatsanis et Wagner : Un arrêt des procédures pour abus de procédure n'est justifié que dans les cas les plus manifestes. Deux types de conduite de l'État justifient un tel arrêt. Le premier concerne la conduite qui compromet l'équité du procès d'un accusé (la catégorie « principale »). Le second concerne la conduite qui ne présente aucune menace pour l'équité du procès, mais risque de miner l'intégrité du processus judiciaire (la catégorie « résiduelle »). Le test servant à déterminer si l'arrêt des procédures est justifié est le même pour les deux catégories et comporte trois exigences : (1) il doit y avoir une atteinte au droit de l'accusé à un procès équitable ou à l'intégrité du système de justice qui sera révélée, perpétuée ou aggravée par le déroulement du procès ou par son issue, (2) il ne doit y avoir aucune autre réparation susceptible de corriger l'atteinte et (3), s'il subsiste une incertitude quant à l'opportunité de l'arrêt des procédures à l'issue des deux premières étapes, le tribunal doit mettre en balance les intérêts militant en faveur de cet arrêt, d'une part, et l'intérêt que représente pour la société un jugement définitif statuant sur le fond, d'autre part.

Lorsque c'est la catégorie résiduelle qui est invoquée, il est satisfait à la première étape du test s'il est établi que l'État a adopté une conduite choquant le sens du franc-jeu et de la décence de la société et que la tenue d'un procès malgré cette conduite serait préjudiciable à l'intégrité du système de justice. À la deuxième étape du test, l'accent est plutôt mis sur la question de savoir si une autre réparation, moindre que l'arrêt des procédures, permettra au système de justice de se dissocier suffisamment à l'avenir de la conduite reprochée à l'État. Finalement, le tribunal est appelé à décider quelle des deux solutions suivantes assure le mieux l'intégrité du système de justice : l'arrêt des procédures ou la tenue d'un procès en dépit de la conduite contestée. Cette analyse suppose nécessairement une mise en balance. Le tribunal doit prendre en compte des éléments comme la nature et la gravité de la conduite reprochée — que celle-ci soit un cas isolé ou la manifestation d'un problème systémique et persistant —, la situation de l'accusé, les accusations auxquelles il doit répondre et l'intérêt de la société à ce que les accusations soient jugées au fond.

In the instant case, the three forms of state misconduct that are at issue fall squarely within the residual category. The trial judge erred in his assessment of the impugned misconduct and in concluding that a stay of proceedings was warranted. As regards the medical records, the trial judge made a palpable and overriding error in finding that the Crown's conduct occasioned prejudice to the integrity of the justice system. With respect to the police collusion, apart from its limited extent, the trial judge failed to consider the existence of another remedy that would have overcome the threat posed to the integrity of the justice system — namely, excluding the firearm from evidence in respect of both accused. As for the threats made by the Crown, while they were reprehensible and should not be repeated, the trial judge failed to consider that they were made more than a year before the trial began, and that the accused took no steps for over a year to address the Crown's conduct. These factors shed light on how seriously the accused took the threats. The trial judge also failed to consider that the Crown prosecutor who made the threats was removed from the case months before the trial started. Moreover, the trial judge failed to balance the need for a stay against society's interest in a trial on the merits. When the impugned misconduct is weighed against society's interest in a trial, this is not one of the clearest of cases where the exceptional remedy of a stay of proceedings is warranted.

Per Abella J. (dissenting): A stay of proceedings may be imposed when the state conduct is so profoundly and disproportionately inconsistent with the public perception of what a fair justice system requires, that proceeding with a trial means condoning unforgiveable conduct. A Crown who makes threats intended to bully an accused into foregoing his or her right to a trial, takes fatal aim at the heart of the public's confidence in that integrity.

The unjustifiable nature of the Crown's conduct in this case was not mitigated by the length of time between the threats and the trial. Time is not a legal remedy for a fundamental breach of the Crown's role and the passage of time does not attenuate her unpardonable conduct. It was the mere fact that the threats were made at all that was key, not when they were made.

En l'instance, les trois actes répréhensibles de l'État en cause sont manifestement de ceux qui entrent dans la catégorie résiduelle. Le juge du procès a commis des erreurs dans l'appréciation des trois actes répréhensibles et en concluant qu'il était justifié d'ordonner l'arrêt des procédures. En ce qui concerne le dossier médical, le juge du procès a commis une erreur manifeste et dominante en concluant que la conduite du ministère public avait miné l'intégrité du système de justice. Pour ce qui est de la collusion policière, abstraction faite de sa portée limitée, le juge du procès n'a pas tenu compte du fait qu'une autre réparation, soit l'exclusion de l'arme à feu à l'égard des deux accusés, aurait contré toute menace que la collusion policière représentait pour l'intégrité du système de justice. Quant aux menaces proférées par la substitut du procureur général, bien qu'elles aient été répréhensibles et ne doivent pas se reproduire, le juge du procès a omis de tenir compte du fait qu'elles avaient été faites plus d'un an avant l'ouverture du procès, et que les accusés n'ont pris aucune mesure durant plus d'un an avant de s'en plaindre. Ces facteurs jettent un éclairage sur le niveau de gravité attribué par la défense à ces menaces. Le juge du procès a aussi omis de tenir compte du fait que la substitut du procureur général qui a proféré les menaces avait cessé d'occuper dans le dossier des mois avant le début du procès. En outre, le juge du procès a omis de mettre en balance la nécessité de l'arrêt des procédures, d'une part, et l'intérêt de la société à ce qu'un procès soit jugé sur le fond, d'autre part. Lorsque la conduite répréhensible attaquée est soupesée par rapport à l'intérêt pour la société à ce qu'un procès soit tenu, il ne s'agit pas de l'un des cas les plus manifestes où la réparation exceptionnelle que constitue l'arrêt des procédures est justifiée.

La juge Abella (dissidente) : L'arrêt des procédures peut être ordonné lorsque la conduite de l'État est si profondément et disproportionnellement incompatible avec ce qu'exige, aux yeux du public, un système de justice équitable, que la tenue d'un procès revient à tolérer une conduite impardonnable. Le substitut du procureur général qui profère des menaces dans le but d'intimider l'accusé pour qu'il renonce à son droit à un procès porte un coup fatal au cœur de la confiance du public dans cette intégrité.

Le caractère injustifiable de la conduite du ministère public en l'espèce n'a pas été atténué par le temps qui s'est écoulé entre la prolifération des menaces et la tenue du procès. Le temps n'est pas une réparation prévue par la loi en cas de manquement fondamental à la fonction du ministère public et il n'a pas pour effet d'atténuer ce qui constitue une conduite impardonnable. C'est la prolifération des menaces en tant que telle qui était déterminante, et non le moment où elles ont été proférées.

Moreover, a further balancing exercise was not required in the circumstances. The trial judge was unequivocal in concluding that the conduct justified a stay, and there was none of the uncertainty as to the propriety of a stay that is a condition precedent to the need for a balancing exercise. When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public's sense of justice, it is conceptually inconsistent to ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public's interest in trials on the merits. The public has an interest not only in trials on the merits, it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.

Cases Cited

By Moldaver J.

Referred to: *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Waugh* (1985), 68 N.S.R. (2d) 247; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *Boucher v. The Queen*, [1955] S.C.R. 16; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587.

By Abella J. (dissenting)

R. v. O'Connor, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *R. v. Conway*, [1989] 1 S.C.R. 1659; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509.

En outre, une mise en balance en plus de l'examen préalable ne s'imposait pas en l'espèce. Le juge du procès a conclu sans équivoque que l'abus justifiait l'arrêt des procédures et on ne retrouvait aucunement dans la présente affaire l'incertitude quant au bien-fondé de l'arrêt des procédures qui constitue une condition préalable au besoin de procéder à une mise en balance. Lorsque le juge du procès conclut à l'impossibilité de tolérer la conduite en question parce qu'elle choque aussi profondément le sens de la justice du public, il est conceptuellement illogique de demander au tribunal d'affaiblir sa propre conclusion en pesant de nouveau le côté de la balance où se trouve l'intérêt du public dans la tenue d'un procès sur le fond. Le public a non seulement intérêt à ce qu'il y ait des procès sur le fond, il a aussi bien davantage intérêt à savoir que l'État privilégie l'équité aux dépens de la célérité lorsqu'il participe à des procédures, notamment celles susceptibles d'entraîner la perte de liberté. La justice ne se limite pas aux résultats, elle s'étend aussi à la manière de les atteindre. Lorsqu'un substitut du procureur général menace l'accusé de porter d'autres accusations contre lui s'il n'avoue pas sa culpabilité, l'intérêt du public dans l'issue d'un procès doit céder le pas à l'intérêt transcendant d'assurer la confiance du public dans l'intégrité du système de justice.

Jurisprudence

Citée par le juge Moldaver

Arrêts mentionnés : *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *R. c. O'Connor*, [1995] 4 R.C.S. 411; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391; *R. c. Keyowski*, [1988] 1 R.C.S. 657; *R. c. Waugh* (1985), 68 N.S.R. (2d) 247; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509; *R. c. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721; *R. c. Conway*, [1989] 1 R.C.S. 1659; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651; *Boucher c. The Queen*, [1955] R.C.S. 16; *États-Unis d'Amérique c. Cobb*, 2001 CSC 19, [2001] 1 R.C.S. 587.

Citée par la juge Abella (dissidente)

R. c. O'Connor, [1995] 4 R.C.S. 411; *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391; *R. c. Conway*, [1989] 1 R.C.S. 1659; *États-Unis d'Amérique c. Shulman*, 2001 CSC 21, [2001] 1 R.C.S. 616; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297; *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 11(b), 24.
Criminal Code, R.S.C. 1985, c. C-46, ss. 574(1)(b), 577.

APPEALS from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Chamberland and Doyon JJ.A.), 2012 QCCA 471, [2012] J.Q. n° 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, setting aside the stay of proceedings entered by Garneau J. and ordering a new trial, 2008 QCCQ 11373, [2008] J.Q. n° 12838 (QL), 2008 CarswellQue 12200, SOQUIJ AZ-50525272. Appeals dismissed, Abella J. dissenting.

Franco Schiro and Xuan Trung Nguyen, for the appellant Antal Babos.

Guylaine Tardif, Jean-Pierre Pilon and Maxime Wilkins, for the appellant Sergio Piccirilli.

Gilles Villeneuve and François Lacasse, for the respondent.

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

MOLDAVER J. —

I. Introduction

[1] This appeal provides the Court with an opportunity to revisit the law of abuse of process as it relates to state conduct that impinges on the integrity of the justice system but does not affect trial fairness — sometimes referred to as the “residual category” of cases for which a judicial stay of proceedings may be ordered. In particular, we are tasked with clarifying the approach to be followed when determining whether a stay of proceedings should be ordered where such conduct is uncovered.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 8, 11b), 24.
Code criminel, L.R.C. 1985, ch. C-46, art. 574(1)b), 577.

POURVOIS contre un arrêt de la Cour d’appel du Québec (la juge en chef Duval Hesler et les juges Chamberland et Doyon), 2012 QCCA 471, [2012] J.Q. n° 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, qui a annulé l’arrêt des procédures ordonné par le juge Garneau et ordonné la tenue d’un nouveau procès, 2008 QCCQ 11373, [2008] J.Q. n° 12838 (QL), 2008 CarswellQue 12200, SOQUIJ AZ-50525272. Pourvois rejetés, la juge Abella est dissidente.

Franco Schiro et Xuan Trung Nguyen, pour l’appellant Antal Babos.

Guylaine Tardif, Jean-Pierre Pilon et Maxime Wilkins, pour l’appellant Sergio Piccirilli.

Gilles Villeneuve et François Lacasse, pour l’intimée.

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

LE JUGE MOLDAVER —

I. Introduction

[1] Le présent pourvoi donne à la Cour l’occasion de revoir les règles régissant l’abus de procédure auxquelles sont assujettis les comportements de l’État qui portent atteinte à l’intégrité du système de justice, mais ne nuisent pas à l’équité du procès. Ce sont les comportements qui font partie de ce qu’on appelle parfois la « catégorie résiduelle » de cas où le tribunal peut ordonner l’arrêt des procédures. Plus particulièrement, il nous incombe de préciser la marche à suivre pour décider s’il y a lieu d’ordonner l’arrêt des procédures lorsqu’une telle conduite est dévoilée.

[2] As we shall see, the appellants, Antal Babos and Sergio Piccirilli, complain about three forms of state misconduct:

- (1) Attempts by the original provincial Crown Attorney to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty;
- (2) Collusion on the part of two police officers to mislead the court about the seizure of a firearm from Mr. Babos's car; and
- (3) Improper means used by a federal Crown Attorney in obtaining Mr. Piccirilli's medical records from the detention centre where he was being detained pending trial.

[3] Notably, the appellants do not argue that they cannot receive a fair trial as a result of the alleged incidents of misconduct — they accept that they can. They submit instead that this is one of the clearest of cases in which a stay of proceedings is necessary to preserve and protect the integrity of the justice system. Anything short of that would amount to judicial condonation of egregious misconduct and erode the public's confidence in the administration of justice.

[4] And that, the appellants say, is the basis upon which the trial judge ordered a stay of proceedings in their case. In doing so, he made no error. His decision was discretionary and entitled to deference, and the Quebec Court of Appeal should not have interfered. Hence, the appellants seek to have the order of the trial judge reinstated.

[5] For the reasons that follow, I would not give effect to the appellants' submissions. In my respectful view, the trial judge committed errors in

[2] Comme nous le verrons, les appelants, Antal Babos et Sergio Piccirilli, se plaignent de trois actes répréhensibles commis par des représentants de l'État :

- (1) La première substitut du procureur général provincial a essayé plusieurs fois de les intimider pour qu'ils renoncent à leur droit à un procès, en les menaçant de porter d'autres accusations contre eux s'ils décidaient de nier leur culpabilité;
- (2) Deux agents de police se sont concertés pour induire le tribunal en erreur au sujet de la saisie d'une arme à feu qu'ils ont trouvée à l'intérieur de la voiture de M. Babos;
- (3) Une procureure fédérale, agissant à titre de substitut du procureur général, a utilisé des moyens irréguliers pour obtenir le dossier médical de M. Piccirilli auprès du centre de détention où il était incarcéré en attendant son procès.

[3] Soulignons que les appelants ne plaident pas l'impossibilité de subir un procès équitable en raison des présumés incidents d'inconduite : ils admettent pouvoir compter sur un procès équitable. Ils soutiennent plutôt que la présente affaire est l'un des cas les plus manifestes où l'arrêt des procédures s'impose pour préserver et protéger l'intégrité du système de justice. Si le tribunal optait pour une solution moins draconienne, cela reviendrait selon eux à absoudre judiciairement une conduite inacceptable et minerait la confiance du public envers l'administration de la justice.

[4] Selon les appelants, c'est la raison pour laquelle le juge du procès a ordonné l'arrêt des procédures à leur endroit et, ce faisant, n'a commis aucune erreur. En outre, puisque sa décision a été, à leur avis, le fruit de l'exercice de son pouvoir discrétionnaire, elle commande la déférence et la Cour d'appel n'aurait pas dû la modifier. Ainsi, les appelants demandent-ils le rétablissement de l'ordonnance du juge de première instance.

[5] Pour les motifs qui suivent, je suis d'avis de ne pas faire droit aux arguments des appelants. Selon moi et avec respect, le juge du procès a commis des

assessing all three forms of state misconduct. As regards Mr. Piccirilli's medical records, he made a palpable and overriding error in assessing the Crown's conduct. With respect to the police collusion, apart from its limited extent, the trial judge failed to consider that excluding the fire-arm found in Mr. Babos's trunk would have overcome whatever threat it posed to the integrity of the justice system. As for the threats by the provincial Crown, while they were reprehensible and should not be repeated, the trial judge overstated their seriousness and failed to balance the need for a stay against society's interest in a trial on the merits.

[6] When the impugned misconduct is properly considered and the correct legal framework is applied, a stay is unwarranted. Accordingly, I would dismiss the appeals.

II. Background Facts

[7] On February 17, 2006, Mr. Babos was pulled over by Constables Guy Brière and Marc Sénéchal. The officers believed that Mr. Babos was transporting guns. Upon searching the trunk of his car, they found a semi-automatic firearm. Mr. Babos was arrested.

[8] On June 21, 2006, Mr. Piccirilli was arrested. Both he and Mr. Babos were ultimately charged with numerous firearms related offences, as well as offences related to the importation, production and trafficking of methamphetamine.

[9] The instances of threatening conduct by Crown counsel are said to have occurred between June 2006 and February 2007. Specifically, the provincial prosecutor assigned to the case, Ms. Valérie Tremblay, was accused of threatening Mr. Piccirilli on three separate occasions with additional charges if he did not plead guilty.

[10] According to Mr. Patrice Duliot, Mr. Piccirilli's former lawyer, Ms. Tremblay told him, in the

erreurs dans l'appréciation des trois actes répréhensibles posés par des représentants de l'État. Quant au dossier médical de M. Piccirilli, le juge du procès a commis une erreur manifeste et dominante dans l'appréciation de la conduite de l'État. Pour ce qui est de la collusion policière, abstraction faite de sa portée limitée, le juge du procès n'a pas tenu compte du fait que l'exclusion de l'arme à feu retrouvée dans le coffre de la voiture de M. Babos aurait contré toute menace que la collusion policière représentait pour l'intégrité du système de justice. En ce qui concerne les menaces proférées par la substitut du procureur général provincial, bien qu'elles aient été répréhensibles et ne doivent pas se reproduire, le juge du procès a surestimé leur gravité et n'a pas mis en balance la nécessité de l'arrêt des procédures, d'une part, et l'intérêt de la société à ce qu'un procès soit jugé sur le fond, d'autre part.

[6] Lorsqu'on tient dûment compte de l'inconduite reprochée et qu'on applique le bon cadre juridique, l'arrêt des procédures est injustifié. Je suis donc d'avis de rejeter les pourvois.

II. Contexte factuel

[7] Le 17 février 2006, croyant que M. Babos transportait des armes à feu, les policiers Guy Brière et Marc Sénéchal ont intercepté son véhicule. En fouillant le coffre de ce dernier, ils ont trouvé une arme semi-automatique. M. Babos a été arrêté.

[8] Le 21 juin 2006, M. Piccirilli a été arrêté. Par la suite, M. Babos et lui ont été accusés de nombreuses infractions liées aux armes à feu et d'autres relatives à l'importation, à la production et au trafic de méthamphétamine.

[9] La substitut du procureur général aurait proféré ses menaces entre juin 2006 et février 2007. Plus précisément, la poursuivante provinciale affectée au dossier, M^e Valérie Tremblay, a été accusée d'avoir menacé M. Piccirilli, à trois occasions distinctes, de porter d'autres accusations contre lui s'il n'avouait pas sa culpabilité.

[10] Selon M^e Patrice Duliot, l'ancien avocat de M. Piccirilli, M^e Tremblay lui a dit, en présence de

presence of Mr. Piccirilli, that [TRANSLATION] “if your client doesn’t settle, he’s gonna be hit by a train” (A.R., vol. V, at p. 5). Mr. Piccirilli claimed that on another occasion, either in June or September 2006, Ms. Tremblay threatened him personally in the courtroom. According to Mr. Piccirilli, she said “if you proceed, we’ll bring other charges against you” and that she would “use section 577” and go “straight to trial” (pp. 65 and 69).¹ Another of Mr. Piccirilli’s counsel, Ms. Guylaine Tardif, deposed in an affidavit that in November 2006 or February 2007, Ms. Tremblay told her that Mr. Piccirilli would be charged with money laundering and organized crime offences if he did not plead guilty. Ms. Tremblay asked Ms. Tardif to relay this message to her client. Although Mr. Babos was not threatened directly, no issue is taken with the fact that the threats conveyed to Mr. Piccirilli would have come to his attention.

[11] The appellants’ trial began in April 2008. Notably, by February 2008, Ms. Tremblay was no longer on the file. She had been removed for health reasons and replaced by a federal prosecutor, Ms. Kovacevich, when the charges against the appellants were joined in a single indictment. It was at this juncture that the appellants were charged with four additional offences relating to organized crime, firearms and drug trafficking. The additional charges stemmed from evidence led at the appellants’ preliminary hearings. By this point, neither the appellants nor their counsel had mentioned the alleged threats made by Ms. Tremblay. Indeed, the threats did not surface until they were brought to the attention of the trial judge some six months into the trial and at least eighteen months after they were made.

[12] At the outset of the trial, Mr. Babos alleged that the police had illegally searched the trunk of his car and he sought to have the firearm they seized excluded from evidence under s. 24(2) of the

son client, que, « si ton client [ne] règle pas, le train va le frapper » (d.a., vol. V, p. 5). M. Piccirilli a soutenu qu’à une autre occasion, en juin ou septembre 2006, M^e Tremblay l’avait menacé en personne dans la salle d’audience en lui tenant les propos suivants : « si tu procèdes, on va te mettre d’autres charges », « mettre [l’]article 577 » et aller « *straight to trial* » [« directement à procès »] (p. 65 et 69)¹. Une autre avocate de M. Piccirilli, M^e Guylaine Tardif, a mentionné dans un affidavit que, en novembre 2006 ou février 2007, M^e Tremblay lui a dit que M. Piccirilli serait accusé de blanchiment d’argent et d’infractions d’organisation criminelle s’il ne reconnaissait pas sa culpabilité. M^e Tremblay a demandé à M^e Tardif de transmettre ce message à son client. Même si les menaces n’étaient pas adressées directement à M. Babos, personne ne conteste le fait qu’il aurait eu vent des menaces transmises à M. Piccirilli.

[11] Le procès des appelants s’est ouvert en avril 2008. Soulignons que M^e Tremblay n’occupait plus dans le dossier depuis février 2008. On l’en avait retirée pour des raisons de santé et elle avait été remplacée par M^e Kovacevich, une procureure fédérale agissant à titre de substitut du procureur général, quand les accusations pesant contre les appelants ont été regroupées dans un seul acte d’accusation. C’est à ce stade que les appelants ont été inculpés de quatre autres infractions liées au crime organisé, aux armes à feu et au trafic de drogue. Les accusations supplémentaires ont découlé de la preuve produite durant les enquêtes préliminaires visant les appelants. Ni ces derniers, ni leurs avocats n’avaient alors mentionné les menaces reprochées à M^e Tremblay. De fait, ces menaces n’ont pas émergé avant d’être portées à l’attention du juge du procès quelque six mois après l’ouverture du procès et au moins dix-huit mois après qu’elles eurent été proférées.

[12] Au début du procès, M. Babos a reproché aux policiers d’avoir fouillé illégalement le coffre de sa voiture et il a cherché à faire exclure, en application du par. 24(2) de la *Charte canadienne des droits*

¹ “577” is a reference to s. 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, which empowers a Crown to prefer a “direct indictment”, bypassing an accused’s right to a preliminary inquiry.

¹ Le numéro « 577 » désigne l’art. 577 du *Code criminel*, L.R.C. 1985, ch. C-46, qui confère au substitut du procureur général le pouvoir de présenter un « acte d’accusation », contournant ainsi le droit de l’accusé à une enquête préliminaire.

Canadian Charter of Rights and Freedoms. On the s. 24(2) application, a key factual issue was whether Mr. Babos consented to the search and opened the trunk himself. Constables Brière and Sénéchal testified at the hearing. Cst. Brière testified that it was Mr. Babos who opened the trunk of the car. This testimony differed from the version of events he had given at the preliminary inquiry.² When defence counsel confronted Cst. Brière with the change, Cst. Brière explained that he had spoken to Cst. Sénéchal while they were waiting to testify, and that Cst. Sénéchal had [TRANSLATION] “convinced” him that the new version of events was the truth.

[13] The trial judge concluded that the trunk had been illegally searched and that Mr. Babos’s rights under s. 8 of the *Charter* had been violated. He also found that the officers had colluded for the purpose of misleading the court. The firearm found in the trunk was excluded.

[14] In June 2008, during the continuation of the trial, the Crown attempted to adduce the same firearm against Mr. Piccirilli. Mr. Piccirilli objected. The Crown took the position that Mr. Piccirilli had no standing to allege a violation of his s. 8 rights because the car from which the firearm was seized belonged to Mr. Babos. Again Cst. Brière testified, and again his evidence was somewhat different than before.³ The trial judge ruled in favour of the Crown on the issue of standing, but did so provisionally; he reserved to Mr. Piccirilli the right to present another motion [TRANSLATION] “in due course if necessary” (A.R., vol. III, at p. 124).⁴

et libertés, l’arme à feu qu’ils avaient saisie. Cette demande fondée sur le par. 24(2) soulève une question de fait clé : M. Babos a-t-il consenti à la fouille et ouvert lui-même le coffre? Les policiers Brière et Sénéchal ont témoigné à l’audience. Selon l’agent Brière, c’est M. Babos qui a ouvert le coffre de la voiture. Or, ce témoignage était différent de la version des faits qu’il avait donnée à l’enquête préliminaire². Lorsque l’avocat de la défense lui a signalé ce changement de version, l’agent Brière a expliqué que lui et l’agent Sénéchal s’étaient parlé avant de témoigner et que ce dernier l’avait « convaincu » que la nouvelle version des faits était exacte.

[13] Le juge du procès a conclu que les policiers avaient fouillé illégalement le coffre et violé les droits garantis à M. Babos par l’art. 8 de la *Charte*. Il a aussi conclu que les policiers s’étaient concertés dans le but d’induire le tribunal en erreur. Il a écarté l’arme à feu découverte dans le coffre.

[14] En juin 2008, toujours au cours du procès, le ministère public a tenté de présenter en preuve la même arme à feu contre M. Piccirilli, qui s’y est opposé. Le ministère public a soutenu que M. Piccirilli n’avait pas qualité pour alléguer une violation des droits que lui garantit l’art. 8, puisque la voiture où se trouvait l’arme à feu saisie appartenait à M. Babos. L’agent Brière a témoigné de nouveau et, là encore, sa déposition différait quelque peu des précédentes³. Le juge du procès a tranché en faveur du ministère public sur la question de la qualité pour agir, mais de façon provisoire; il a accordé à M. Piccirilli le droit de présenter une autre requête « en temps et lieu si nécessaire » (d.a., vol. III, p. 124)⁴.

2 At the preliminary inquiry, Cst. Brière testified that he had opened the trunk of the car.

3 Cst. Brière testified that Mr. Babos opened the trunk most of the way, and that he opened the trunk [TRANSLATION] “a little bit” (A.R., vol. III, at p. 217).

4 As matters turned out, the trial judge never did make a final ruling on the admissibility of the firearm against Mr. Piccirilli. Instead, he ended up staying the proceedings against Mr. Piccirilli and in doing so, he took into account the Crown’s attempt to introduce the firearm against him despite his earlier finding of collusion on the part of the officers.

2 À l’enquête préliminaire, l’agent Brière a dit avoir ouvert le coffre de la voiture.

3 L’agent Brière a affirmé que M. Babos avait ouvert le coffre en majeure partie et que lui-même l’avait ouvert « un petit peu » (d.a., vol. III, p. 217).

4 En fin de compte, le juge du procès n’a jamais statué de façon définitive sur l’admissibilité en preuve de l’arme à feu à l’égard de M. Piccirilli. Il a plutôt fini par arrêter les procédures engagées contre lui et, ce faisant, il a pris en considération la tentative du ministère public de présenter l’arme à feu en preuve contre M. Piccirilli même s’il avait conclu plus tôt à la collusion des policiers.

[15] On October 3, 2008, with the trial still on-going, Mr. Babos brought an application to stay the charges for unreasonable delay under s. 11(b) of the *Charter*. That same week, on October 7, 2008, Mr. Piccirilli had a heart attack and the trial was adjourned. Mr. Piccirilli applied for bail, alleging that the detention centre in which he was being held was unable to adequately care for his health. As part of his application, Mr. Piccirilli undertook to provide the court with his medical report and list of medications.

[16] Ms. Kovacevich contacted the detention centre directly and spoke to Mr. Piccirilli's doctor. Ms. Kovacevich asked him to provide an affidavit explaining whether medical staff at the detention centre had followed up on Mr. Piccirilli's health since his heart attack and whether Mr. Piccirilli had been receiving his medication since his hospitalization. On October 23, 2008, Mr. Piccirilli's doctor provided the Crown with medical documents pertaining to Mr. Piccirilli. Ms. Kovacevich immediately disclosed these documents to Mr. Piccirilli's counsel, but she initially refused to divulge their source. A few days later, in an affidavit dated October 30, 2008, she explained that the medical records had been sent from the detention centre by Mr. Piccirilli's doctor.

[17] When Mr. Babos's s. 11(b) application resumed in late October, Mr. Babos's former counsel (Mr. Duliot) testified. It was in the course of his testimony that Ms. Tremblay's threatening conduct came to light for the first time. After hearing evidence regarding Ms. Tremblay's conduct, the trial judge asked Ms. Kovacevich if she wanted to call any witnesses or have Ms. Tremblay prepare an affidavit. Ms. Kovacevich declined. She explained that the only response she could make was that the state of Ms. Tremblay's health did not allow her to testify, that the alleged threats were not admitted, and that no postponement was requested to have her testify.

[18] Both appellants brought an application to stay the proceedings for abuse of process shortly

[15] Le 3 octobre 2008, pendant que le procès était toujours en cours, M. Babos a présenté une demande d'arrêt des procédures pour délai déraisonnable en vertu de l'al. 11b) de la *Charte*. Plus tard cette semaine-là, soit le 7 octobre 2008, M. Piccirilli a subi une crise cardiaque et le procès a été ajourné. M. Piccirilli a demandé sa mise en liberté sous caution, soutenant que le centre de détention où il était incarcéré ne pouvait pas lui fournir des soins médicaux adéquats. Dans le cadre de sa demande, il s'est engagé à fournir au tribunal son dossier médical et la liste de ses médicaments.

[16] M^e Kovacevich a communiqué directement avec le centre de détention et s'est entretenu avec le médecin de M. Piccirilli. Elle lui a demandé de fournir un affidavit indiquant si le personnel médical du centre de détention avait surveillé l'état de santé de M. Piccirilli depuis sa crise cardiaque et si M. Piccirilli avait reçu ses médicaments depuis son hospitalisation. Le 23 octobre 2008, le médecin de M. Piccirilli a remis au ministère public des documents médicaux concernant son patient. M^e Kovacevich a communiqué sans tarder ces documents à l'avocat de M. Piccirilli, mais elle a refusé au départ de révéler leur provenance. Quelques jours plus tard, dans un affidavit daté du 30 octobre 2008, elle a précisé que le dossier médical avait été envoyé par le médecin de M. Piccirilli à partir du centre de détention.

[17] Lorsque l'audition de la demande présentée par M. Babos en vertu de l'al. 11b) a repris à la fin octobre, l'ancien avocat de M. Babos (M^e Duliot) a témoigné. C'est durant son témoignage que le comportement menaçant de M^e Tremblay a été dévoilé pour la première fois. Après avoir entendu des témoignages au sujet de ce comportement, le juge du procès a demandé à M^e Kovacevich si elle désirait citer des témoins ou faire préparer un affidavit par M^e Tremblay. M^e Kovacevich a décliné cette offre, expliquant être seulement en mesure de répondre que l'état de santé de M^e Tremblay l'empêchait de témoigner, que la véracité des menaces alléguées n'était pas admise, et qu'aucune remise n'était sollicitée pour la faire témoigner.

[18] Peu après, les appelants ont tous deux présenté une demande d'arrêt des procédures pour

thereafter. On November 14, 2008, the trial judge granted the application and the charges against the appellants were stayed.

III. Judgments Below

A. *The Quebec Court, 2008 QCCQ 11373 (CanLII)*

[19] Garneau J. stayed the proceedings against both appellants. He based his decision to do so on three instances of state misconduct: (1) Ms. Tremblay's threats to the appellants that they would face additional charges if they did not plead guilty; (2) collusion on the part of Constables Brière and Sénéchal to mislead the court; and (3) Ms. Kovacevich's improper conduct in securing Mr. Piccirilli's medical records from the detention centre without first obtaining his consent.

[20] Commencing with Ms. Tremblay's threatening conduct, the trial judge described the threats as [TRANSLATION] "unacceptable, intolerable, unjustifiable, illegal and, above all, undemocratic" (para. 59). The trial judge was also critical of the Crown attorney's office for failing to take any steps to address Ms. Tremblay's conduct, noting that "nothing, absolutely nothing had been done by the representative of the Attorney General to remedy or even try to remedy the situation" (para. 66). Instead, the Crown had "remained entrenched in its position" (para. 66). The trial judge found that the threats had tarnished the reputation of the judicial system and impacted the fairness of the accused's trial. Allowing the trial to continue in the face of these threats would be "shocking and outrageous" (para. 78). According to the trial judge, Ms. Tremblay's misconduct was sufficient in and of itself to warrant a stay of proceedings.

[21] With respect to collusion, the trial judge made a finding that Constables Brière and Sénéchal colluded in order to mislead the court. This finding was based on Cst. Brière's admission that he had spoken to Cst. Sénéchal before testifying, and

abus de procédure. Le 14 novembre 2008, le juge du procès a fait droit à la demande et ordonné l'arrêt des procédures intentées contre les appelants.

III. Les décisions des juridictions inférieures

A. *La Cour du Québec, 2008 QCCQ 11373 (CanLII)*

[19] Le juge Garneau a ordonné l'arrêt des procédures intentées contre les deux appelants en se fondant sur trois actes répréhensibles commis par des représentants de l'État : (1) les menaces adressées par M^e Tremblay aux appelants selon lesquelles ils répondraient à d'autres accusations s'ils n'avaient pas leur culpabilité; (2) la collusion entre les policiers Brière et Sénéchal en vue d'induire le tribunal en erreur; (3) le comportement inapproprié dont a fait preuve M^e Kovacevich en se faisant remettre par le centre de détention le dossier médical de M. Piccirilli, et ce, sans avoir d'abord obtenu le consentement de ce dernier.

[20] Tout d'abord, en ce qui concerne le comportement menaçant de M^e Tremblay, le juge du procès a dit que ses menaces étaient « inacceptables, intolérables, injustifiables, illégales et surtout antidémocratiques » (par. 59). Il a aussi reproché au bureau du substitut du procureur général de n'avoir pris aucune mesure pour réagir à la conduite de M^e Tremblay, faisant remarquer que « rien, absolument rien n'a[vait] été fait par le Procureur général pour remédier ou même tenter de remédier à la situation » (par. 66). Au contraire, le ministère public « s'est cambré dans ses positions » (par. 66). Le juge du procès a conclu que les menaces avaient terni la réputation du système judiciaire et porté atteinte à l'équité du procès des accusés. Selon lui, il aurait été « choquant et outrageant » (par. 78) de laisser le procès suivre son cours malgré ces menaces. Enfin, il a estimé que la conduite répréhensible de M^e Tremblay était suffisamment grave en soi pour justifier l'arrêt des procédures.

[21] Pour ce qui est de la collusion, le juge du procès a conclu que les policiers Brière et Sénéchal s'étaient concertés pour induire le tribunal en erreur. Cette conclusion reposait sur l'aveu de l'agent Brière suivant lequel il avait parlé à l'agent

that Cst. Sénéchal had [TRANSLATION] “convinced” him that Mr. Babos had opened the trunk of the car (para. 12). The trial judge also found that the Crown’s later attempt to lead the firearm seized from the trunk against Mr. Piccirilli perpetuated the officers’ collusion.

[22] Finally, regarding Mr. Piccirilli’s medical records, the trial judge concluded that the Crown should have taken the [TRANSLATION] “necessary precautions” to ensure that the confidentiality of Mr. Piccirilli’s records was respected (para. 53). The trial judge also found that there had been a “lack of transparency” because the Crown had “always refused” to disclose the source of the information once she had obtained it (para. 56).

[23] In the face of these three instances of misconduct, but particularly Ms. Tremblay’s threats, the trial judge stayed the proceedings against both appellants.

B. *The Quebec Court of Appeal, 2012 QCCA 471 (CanLII)*

[24] Doyon J.A., writing for a unanimous court, set aside the stay of proceedings and ordered a new trial. A stay of proceedings was only to be granted in [TRANSLATION] “extreme cases” where no other remedy was possible (para. 56). This was not such a case.

[25] Acknowledging that Ms. Tremblay’s threats were [TRANSLATION] “unacceptable” and “outrageous”, Doyon J.A. noted that the impact of the threats was lessened by the fact that they were made over a year before the trial began and that Ms. Tremblay had long since been replaced as the prosecutor in charge of the case (paras. 59 and 73).

[26] As for the trial judge’s finding that Constables Brière and Sénéchal colluded to mislead the court, Doyon J.A. considered this finding to be a palpable and overriding error. Cst. Brière explained why his testimony had changed. The trial judge’s

Sénéchal avant de témoigner et que ce dernier l’avait « convaincu » que M. Babos avait ouvert le hayon de la voiture (par. 12). Toujours selon le juge du procès, le ministère public a perpétué la collusion entre les agents en tentant par la suite de produire en preuve contre M. Piccirilli l’arme à feu saisie à l’intérieur du coffre.

[22] Enfin, s’agissant du dossier médical de M. Piccirilli, le juge du procès a conclu que le ministère public aurait dû prendre les « précautions nécessaires » pour en assurer la confidentialité (par. 53). Le juge du procès a aussi conclu à un « manque de transparence », vu que la substitut du procureur général avait « toujours refusé » de révéler la provenance des renseignements après les avoir obtenus (par. 56).

[23] Au vu des trois actes répréhensibles décrits précédemment, mais en particulier des menaces de M^e Tremblay, le juge du procès a ordonné l’arrêt des procédures intentées contre les deux appelants.

B. *La Cour d’appel du Québec, 2012 QCCA 471 (CanLII)*

[24] Au nom des juges unanimes de la Cour d’appel, le juge Doyon a annulé l’arrêt des procédures et ordonné la tenue d’un nouveau procès. L’arrêt des procédures est réservé « aux cas extrêmes », quand aucune autre réparation n’est possible (par. 56). Tel n’était pas le cas en l’espèce.

[25] Le juge Doyon a certes reconnu que les menaces de M^e Tremblay étaient « inacceptable[s] » et « outrageante[s] », mais il a signalé qu’elles avaient eu une incidence moindre du fait qu’elles avaient été proférées plus d’un an avant l’ouverture du procès et que M^e Tremblay avait été remplacée depuis longtemps comme poursuivante responsable du dossier (par. 59 et 73).

[26] Quant à la conclusion du juge du procès selon laquelle les policiers Brière et Sénéchal s’étaient concertés pour induire le tribunal en erreur, le juge Doyon l’a considérée comme une erreur manifeste et dominante. L’agent Brière a expliqué pourquoi il avait

determination that the officers' conduct amounted to collusion lacked an evidentiary foundation.

[27] With respect to Ms. Kovacevich's conduct in securing Mr. Piccirilli's medical records, Doyon J.A. concluded that there was no misconduct and that the trial judge committed another palpable and overriding error in finding otherwise. Mr. Piccirilli put his medical condition in issue and at least implicitly waived his right to invoke confidentiality in the information. The Crown was free to seek evidence to contradict Mr. Piccirilli's assertions for purposes of resisting his application for interim release.

[28] Having reassessed the facts, Doyon J.A. observed that Ms. Tremblay's threats remained the sole cause of concern. In assessing whether those threats warranted a stay, he noted that they were uttered months before trial, by a Crown who was replaced before trial, and about whom the appellants did not complain until after their trial had been in progress for at least six months. In his view, this did not amount to an extreme case that required a stay of proceedings.

IV. Issues

[29] The narrow issue on appeal is whether the trial judge erred in granting a stay of proceedings. More broadly, we are tasked with clarifying the proper analysis to be undertaken when a stay of proceedings is sought for prior state conduct that is said to impinge on the integrity of the justice system.

V. Analysis

A. *Abuse of Process and Stays of Proceedings*

[30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It

livré des témoignages différents. La décision du juge du procès que la conduite des agents était assimilable à de la collusion n'était fondée sur aucune preuve.

[27] Pour ce qui est de l'obtention, par M^e Kovacevich, du dossier médical de M. Piccirilli, le juge Doyon a conclu qu'il ne s'agissait pas d'un acte répréhensible et que le juge du procès avait commis une autre erreur manifeste et dominante en concluant le contraire. M. Piccirilli a mis en cause ses problèmes de santé et a renoncé, à tout le moins implicitement, à son droit d'invoquer le caractère confidentiel des renseignements. Ainsi, il était loisible au ministère public de tenter d'obtenir des éléments de preuve pour contredire les affirmations de M. Piccirilli dans le but de s'opposer à sa demande de libération provisoire.

[28] Après avoir réexaminé les faits, le juge Doyon a fait observer que seules les menaces de M^e Tremblay posaient encore problème. Au moment de déterminer si ces menaces justifiaient l'arrêt des procédures, il a souligné qu'elles avaient été proférées des mois avant le procès par une substitut du procureur général remplacée avant le procès et que les appelants ne s'en sont pas plaints avant au moins six mois après l'ouverture du procès. À son avis, il ne s'agissait pas d'un cas extrême où l'arrêt des procédures s'impose.

IV. Questions en litige

[29] La question précise qui se pose en l'espèce est celle de savoir si le juge du procès a eu tort d'ordonner l'arrêt des procédures. D'un point de vue plus général, nous sommes appelés à clarifier l'analyse qu'il convient de faire lorsqu'on demande l'arrêt des procédures en raison d'actes antérieurs de l'État qui porteraient atteinte à l'intégrité du système de justice.

V. Analyse

A. *Abus de procédure et arrêt des procédures*

[30] L'arrêt des procédures est la réparation la plus draconienne qu'une cour criminelle puisse accorder (*R. c. Regan*, 2002 CSC 12, [2002]

permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[31] Nonetheless, this Court has recognized that there are rare occasions — the “clearest of cases” — when a stay of proceedings for an abuse of process will be warranted (*R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused’s trial (the “main” category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the “residual” category) (*O’Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

- (1) There must be prejudice to the accused’s right to a fair trial or the integrity of the justice system that “will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome” (*Regan*, at para. 54);
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against “the interest that society has in having a final decision on the merits” (*ibid.*, at para. 57).

1 R.C.S. 297, par. 53). Il met un terme de façon définitive à la poursuite de l’accusé, ce qui a pour effet d’entraver la fonction de recherche de la vérité du procès et de priver le public de la possibilité de voir justice faite sur le fond. En outre, dans bien des cas, l’arrêt des procédures empêche les victimes alléguées d’actes criminels de se faire entendre.

[31] La Cour a néanmoins reconnu qu’il existe de rares cas — les « cas les plus manifestes » — dans lesquels un abus de procédure justifie l’arrêt des procédures (*R. c. O’Connor*, [1995] 4 R.C.S. 411, par. 68). Ces cas entrent généralement dans deux catégories : (1) ceux où la conduite de l’État compromet l’équité du procès de l’accusé (la catégorie « principale »); (2) ceux où la conduite de l’État ne présente aucune menace pour l’équité du procès, mais risque de miner l’intégrité du processus judiciaire (la catégorie « résiduelle ») (*O’Connor*, par. 73). La conduite attaquée en l’espèce ne met pas en cause la catégorie principale. Elle fait plutôt nettement partie de la deuxième catégorie.

[32] Le test servant à déterminer si l’arrêt des procédures se justifie est le même pour les deux catégories et comporte trois exigences :

- (1) Il doit y avoir une atteinte au droit de l’accusé à un procès équitable ou à l’intégrité du système de justice qui « sera révélé[e], perpétué[e] ou aggravé[e] par le déroulement du procès ou par son issue » (*Regan*, par. 54);
- (2) Il ne doit y avoir aucune autre réparation susceptible de corriger l’atteinte;
- (3) S’il subsiste une incertitude quant à l’opportunité de l’arrêt des procédures à l’issue des deux premières étapes, le tribunal doit mettre en balance les intérêts militant en faveur de cet arrêt, comme le fait de dénoncer la conduite répréhensible et de préserver l’intégrité du système de justice, d’une part, et « l’intérêt que représente pour la société un jugement définitif statuant sur le fond », d’autre part (*ibid.*, par. 57).

[33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids “schizophrenia” in the law (*O’Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the “main” or “residual” category is invoked.

[34] Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused’s right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused.

[35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society’s sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

[36] In *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, this Court described the residual category in the following way:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society’s sense of justice. Ordinarily, the latter condition will not be met unless the former is as well — society will not

[33] Le test est le même pour les deux catégories parce que les problèmes touchant l’équité du procès et ceux touchant l’intégrité du système de justice sont souvent liés et se posent couramment dans la même affaire. Le recours à un seul test pour les deux catégories crée un cadre cohérent qui permet d’éviter une « dichotomie » inutile dans le droit (*O’Connor*, par. 71). Cela dit, bien que le cadre d’analyse soit le même pour les deux catégories, le test pourra s’appliquer — et s’appliquera souvent — différemment, selon qu’on invoque la catégorie « principale » ou la catégorie « résiduelle ».

[34] Passons d’abord à la première étape du test. Lorsqu’on invoque la catégorie principale, la question est celle de savoir s’il y a eu atteinte au droit de l’accusé à un procès équitable et si cette atteinte sera perpétuée par le déroulement du procès; autrement dit, il faut chercher à savoir s’il y a une injustice *persistante* envers l’accusé.

[35] Par contre, lorsque la catégorie résiduelle est invoquée, il s’agit de savoir si l’État a adopté une conduite choquant le sens du franc-jeu et de la décence de la société et si la tenue d’un procès malgré cette conduite serait préjudiciable à l’intégrité du système de justice. Pour dire les choses plus simplement, il y a des limites au genre de conduite que la société tolère dans la poursuite des infractions. Parfois, la conduite de l’État est si troublante que la tenue d’un procès — même un procès équitable — donnera l’impression que le système de justice cautionne une conduite heurtant le sens du franc-jeu et de la décence qu’a la société, et cela porte préjudice à l’intégrité du système de justice. Dans ce genre d’affaires, la première étape du test est franchie.

[36] La Cour décrit la catégorie résiduelle en ces termes dans *Canada (Ministre de la Citoyenneté et de l’Immigration) c. Tobiass*, [1997] 3 R.C.S. 391 :

Pour que la suspension des procédures soit appropriée dans un cas visé par la catégorie résiduelle, il doit ressortir que la conduite répréhensible de l’État risque de continuer à l’avenir ou que la poursuite des procédures choquera le sens de la justice de la société. Ordinairement, la dernière condition ne sera pas remplie

take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

[37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), 68 N.S.R. (2d) 247 (S.C., App. Div.)).

[38] Second, in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such

à moins que la première ne le soit aussi — la société ne s'offusquera pas de la poursuite des procédures à moins qu'une forme de conduite répréhensible soit susceptible de persister. Il peut y avoir des cas exceptionnels où la conduite reprochée est si grave que le simple fait de poursuivre le procès serait choquant. Mais de tels cas devraient être relativement très rares. [par. 91]

[37] Deux points d'intérêt se dégagent de cette description. Premièrement, bien qu'il soit généralement vrai que l'on invoque la catégorie résiduelle à la suite d'une *conduite répréhensible* de l'État, il n'en est pas toujours ainsi. Il peut y avoir des situations où l'intégrité du système de justice est en jeu en l'absence d'une conduite répréhensible. Poursuivre plusieurs fois un accusé pour la même infraction après que des jurys successifs ne soient pas parvenus à rendre un verdict en est un exemple (voir, p. ex., *R. c. Keyowski*, [1988] 1 R.C.S. 657), tout comme le fait d'avoir recours aux tribunaux criminels pour percevoir une dette civile (voir, p. ex., *R. c. Waugh* (1985), 68 N.S.R. (2d) 247 (C.S., Div. app.)).

[38] Deuxièmement, dans un cas relevant de la catégorie résiduelle, peu importe le type de conduite dont on se plaint, la question à laquelle il faut répondre à la première étape du test demeure la même : la tenue d'un procès en dépit de la conduite reprochée causerait-elle un préjudice supplémentaire à l'intégrité du système de justice? Je ne remets pas en question la distinction entre la conduite répréhensible persistante et la conduite répréhensible antérieure, mais cette distinction ne résout pas totalement la question de savoir si la tenue d'un procès cause un préjudice supplémentaire au système de justice. Le tribunal doit tout de même déterminer si la tenue d'un procès reviendrait à absoudre judiciairement la conduite reprochée.

[39] À la deuxième étape du test, il s'agit de déterminer si une autre réparation, moindre que l'arrêt des procédures, permettrait de corriger le préjudice. Différentes réparations peuvent être accordées, selon que le préjudice touche le droit de l'accusé à un procès équitable (la catégorie principale) ou l'intégrité du système de justice (la catégorie résiduelle). Quand c'est l'équité du procès qui est en cause, l'objectif est de rétablir le droit de l'accusé

as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these “clearest of cases”, the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is

à un procès équitable. En l’espèce, les réparations procédurales, comme la tenue d’un nouveau procès, ont plus de chance de corriger le préjudice causé par une injustice persistante. En revanche, lorsque la catégorie résiduelle est invoquée et que le préjudice dénoncé porte atteinte à l’intégrité du système de justice, les réparations doivent s’attaquer à ce préjudice. Il faut se rappeler que, dans les affaires entrant uniquement dans la catégorie résiduelle, l’objectif *n’est pas* d’accorder réparation à l’accusé pour un tort qui lui a été causé auparavant. L’accent est plutôt mis sur la question de savoir si une autre réparation, moindre que l’arrêt des procédures, permettra au système de justice de se dissocier suffisamment à l’avenir de la conduite reprochée à l’État.

[40] Enfin, la mise en balance des intérêts effectuée à la troisième étape du test revêt une importance accrue lorsque la catégorie résiduelle est invoquée. La Cour a indiqué que la mise en balance n’est nécessaire que s’il subsiste une incertitude quant à l’opportunité de l’arrêt des procédures à l’issue des deux premiers volets du test (*Tobiass*, par. 92). Lorsque la catégorie principale est invoquée, il est souvent clair, au moment où le tribunal atteint l’étape de la mise en balance, qu’il n’y a pas eu atteinte à l’équité du procès ou que, en cas d’atteinte à celle-ci, une autre réparation, moindre que l’arrêt des procédures, permettrait de régler la question. Aucune mise en balance n’est nécessaire dans ces circonstances. Dans de rares cas, la conduite de l’État a manifestement empêché en permanence la tenue d’un procès équitable. Dans ces « cas les plus manifestes », la troisième et dernière étape, la mise en balance, ajoute souvent peu de choses à l’analyse, parce que la société n’a aucun intérêt dans la tenue de procès inéquitables.

[41] Par contre, lorsque c’est la catégorie résiduelle qui est invoquée, l’étape de la mise en balance revêt une importance accrue. Si on allègue une atteinte à l’intégrité du système de justice, le tribunal est appelé à décider quelle des deux solutions suivantes assure le mieux l’intégrité du système de justice : l’arrêt des procédures ou la tenue d’un procès en dépit de la conduite contestée. Cette analyse suppose nécessairement une mise en balance. Le tribunal doit prendre en compte des

isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.⁵ Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[42] This Court's recent decision in *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, attests to the need for balancing when the conduct in question falls solely within the residual category. In *Bellusci*, the accused was assaulted in the back of a van by a prison guard while he was shackled and handcuffed. The accused was charged with assaulting the guard and intimidating a justice system participant. Fish J., writing for a unanimous Court, upheld the trial judge's decision to issue a stay of proceedings for state misconduct falling in the residual category. In doing so, he noted that the trial judge had

appreciated the need to balance the competing interests at play in contemplating a stay of proceedings. He expressly took into account the difficult position of prison guards, the importance to the justice system of ensuring their protection, the seriousness of the charges against the accused, the integrity of the justice system, and the nature and gravity of the violation of Mr. Bellusci's rights. Only then did he conclude that a stay was warranted. [Emphasis added; para. 29.]

⁵ At this stage, whether the impugned conduct is a systemic and ongoing problem or lies purely in the past may also become relevant. Where the conduct is ongoing and systemic, it may be more difficult for the court to dissociate itself from it with anything less than a stay.

éléments comme la nature et la gravité de la conduite reprochée — que celle-ci soit un cas isolé ou la manifestation d'un problème systémique et persistant —, la situation de l'accusé, les accusations auxquelles il doit répondre et l'intérêt de la société à ce que les accusations soient jugées au fond⁵. De toute évidence, plus la conduite de l'État est grave, plus il est nécessaire que le tribunal s'en dissocie. Lorsque la conduite en question choque la conscience de la communauté ou heurte son sens du franc-jeu et de la décence, il est peu probable que l'intérêt de la société dans la tenue d'un procès complet sur le fond l'emporte au terme de la mise en balance. Or, dans les cas faisant partie de la catégorie résiduelle, il faut toujours tenir compte de l'équilibre.

[42] L'arrêt récent *R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, illustre la nécessité d'une mise en balance dans le cas d'une conduite entrant uniquement dans la catégorie résiduelle. Dans cette affaire, l'accusé avait été agressé à l'arrière d'une fourgonnette par un agent de détention alors qu'il était enchaîné et menotté. L'accusé a été inculpé de voies de fait contre l'agent de détention et d'intimidation à l'endroit d'une personne associée au système judiciaire. Rédigeant l'arrêt unanime de la Cour, le juge Fish a confirmé la décision du juge du procès d'ordonner l'arrêt des procédures en raison de la conduite répréhensible d'un représentant de l'État qui entre dans la catégorie résiduelle. Ce faisant, il a signalé que le juge du procès avait

reconn[u] la nécessité de mettre en balance les intérêts en jeu qui s'opposent avant d'ordonner l'arrêt des procédures. Il [a] consid[éré] expressément la difficulté inhérente au travail d'agent de détention, la nécessité que le système de justice assure la protection de ce dernier, la gravité des accusations portées contre l'accusé, l'intégrité du système de justice, ainsi que la nature et la gravité de l'atteinte aux droits de M. Bellusci. Ce n'est qu'à l'issue de cet examen qu'il [a] concl[u] que l'arrêt des procédures [était] justifié. [Je souligne; par. 29.]

⁵ La question de savoir si la conduite reprochée constitue un problème systémique et persistant ou est uniquement chose du passé peut également s'avérer pertinente à ce stade. Si la conduite en question se poursuit et est systémique, il peut être plus difficile pour le tribunal de s'en dissocier en optant pour une solution moins draconienne que l'arrêt des procédures.

[43] The Ontario Court of Appeal has also recently emphasized the importance of the balancing stage when the residual category is in issue:

In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. [Emphasis added.]

(*R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, at para. 60)

[44] Undoubtedly, the balancing of societal interests that must take place and the “clearest of cases” threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be “exceptional” and “very rare” (*Tobiass*, at para. 91). But this is as it should be. It is only where the “affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases” that a stay of proceedings will be warranted (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

[45] To recapitulate, while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the “main” or “residual” category is invoked.

[46] The following hypothetical may serve as a useful illustration. Take a case where it is discovered, after trial, that the police have tampered with the jury in order to secure the conviction of an accused. Manifestly, the police conduct would impinge on the accused’s right to a fair trial — but it would also impinge on the integrity of the justice system.

[43] La Cour d’appel de l’Ontario a également souligné récemment l’importance que revêt l’étape de la mise en balance lorsque la catégorie résiduelle est en jeu :

[TRADUCTION] En un sens, l’accusé qui obtient un arrêt des procédures au titre de la catégorie résiduelle bénéficie d’une aubaine. Il importe donc de se demander si le prix de l’arrêt des procédures contre un accusé en vaut la peine. L’avantage que présente l’arrêt des procédures contre cet accusé l’emporte-t-il sur l’intérêt à ce que l’affaire soit tranchée au fond? Pour répondre à cette question, le tribunal doit presque inévitablement procéder à une mise en balance du type de celle dont il est question au troisième critère. [Je souligne.]

(*R. c. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, par. 60)

[44] La mise en balance nécessaire des intérêts de la société et le critère des « cas les plus manifestes » imposent sans aucun doute un lourd fardeau à l’accusé qui demande l’arrêt des procédures au titre de la catégorie résiduelle. En fait, les cas faisant partie de la catégorie résiduelle qui justifient l’arrêt des procédures sont « exceptionnels » et « très rares » (*Tobiass*, par. 91). Mais les choses sont comme elles doivent être. Ce n’est que lorsque l’« atteinte au franc-jeu et à la décence est disproportionnée à l’intérêt de la société d’assurer que les infractions criminelles soient efficacement poursuivies » que l’arrêt des procédures est justifié (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667).

[45] Bref, bien que le cadre soit le même pour les deux catégories, le test pourra s’appliquer — et s’appliquera souvent — différemment, selon qu’on invoque la catégorie « principale » ou la catégorie « résiduelle ».

[46] La situation hypothétique suivante peut servir d’exemple utile. Prenons le cas où l’on constate, à l’issue du procès, que les policiers ont corrompu le jury pour qu’il déclare l’accusé coupable. Manifestement, la conduite des policiers porterait atteinte au droit de l’accusé à un procès équitable, mais aussi à l’intégrité du système de justice.

[47] Ordering a new trial would probably redress the unfairness of the original trial. But the inquiry would not end there. The court would also have to decide whether ordering a new trial, or some other remedy, would suffice to dissociate it from the prejudice occasioned to the integrity of the justice system by the police misconduct. If no remedy would suffice, the court would have to engage in the balancing process and determine whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits. Given the seriousness of the misconduct — jury tampering strikes at the very heart of the criminal justice system — the residual category might well necessitate a stay of proceedings to redress the threat to the integrity of the justice system, even though the unfairness that marred the first trial could be cured by a second trial.

B. *Whether a Stay of Proceedings Was Warranted in the Instant Case*

[48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is “so clearly wrong as to amount to an injustice” (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

[49] In the instant case, the appellants acknowledge that trial fairness is not in issue. They accept that the trial judge viewed the misconduct as coming within the residual category. Approaching the matter from that perspective, I am respectfully of the view that the trial judge erred in assessing all three forms of alleged state misconduct.

(1) The Medical Records

[50] In order for the Crown’s conduct in securing Mr. Piccirilli’s medical records to factor into a decision to stay proceedings, it must pass the first

[47] La tenue d’un nouveau procès corrigerait vraisemblablement l’iniquité du premier procès, mais l’analyse ne se terminerait pas là. Le tribunal aurait aussi à décider si la tenue d’un nouveau procès ou une autre réparation serait suffisante pour lui permettre de se dissocier du préjudice causé à l’intégrité du système de justice par la conduite répréhensible des policiers. Si aucune réparation n’est adéquate, le tribunal doit procéder à la mise en balance et décider si l’intégrité du système de justice serait mieux servie par un arrêt des procédures ou par un procès complet sur le fond. Vu la gravité de la conduite répréhensible — la corruption du jury va à l’encontre de l’essence même du système de justice pénale — l’arrêt des procédures pourrait fort bien s’imposer dans la catégorie résiduelle pour neutraliser la menace à l’intégrité du système de justice, bien qu’un deuxième procès aurait permis de remédier à l’iniquité ayant entaché le premier.

B. *L’arrêt des procédures était-il justifié en l’espèce?*

[48] La norme de contrôle applicable à une réparation accordée en vertu du par. 24(1) de la *Charte* est bien établie. Une cour d’appel n’est justifiée d’intervenir que si le juge du procès s’est fondé sur des considérations erronées en droit, a commis une erreur de fait susceptible de contrôle ou a rendu une décision « erronée au point de créer une injustice » (*Bellusci*, par. 19; *Regan*, par. 117; *Tobiass*, par. 87; *R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15 et 51).

[49] Dans la présente affaire, les appelants reconnaissent que l’équité du procès n’est pas en cause. Ils conviennent que, selon le juge du procès, la conduite répréhensible entre dans la catégorie résiduelle. En abordant la question sous cet angle, j’estime avec égards que le juge du procès a mal apprécié les trois actes répréhensibles qu’auraient commis les représentants de l’État.

(1) Le dossier médical

[50] Pour que la conduite du ministère public consistant à obtenir le dossier médical de M. Piccirilli joue dans la décision d’arrêter les procédures, elle doit

stage of the test. That is, the appellants must show that Ms. Kovacevich's conduct was prejudicial to the integrity of the justice system. The trial judge appears to have found that this requirement was met when, after considering her conduct, he held that [TRANSLATION] "[t]his conduct will be taken into consideration in reviewing the abuse of process motion" (para. 57).

[51] The trial judge committed a palpable and overriding error in reaching the conclusion that this conduct impinged on the integrity of the justice system. In the first place, he erred in concluding that the Crown's conduct was marked by a lack of transparency because the Crown had [TRANSLATION] "always refused to disclose the source of the information" (para. 56). In fact, the Crown disclosed the source of the information within a matter of days. In addition, the trial judge failed to consider that Mr. Piccirilli had put his health in issue in his application for interim release and had undertaken to provide the court with his medical records. The trial judge also failed to consider that Ms. Kovacevich had asked the medical staff at the jail to provide an affidavit explaining the medical care Mr. Piccirilli had received since his heart attack. It appears that Mr. Piccirilli's doctor took it upon himself to forward the appellant's medical records to the Crown.

[52] In my view, when the Crown's conduct is considered free of the trial judge's errors, it is clear that it occasioned no prejudice to the integrity of the justice system. Mr. Piccirilli had put the state of his health in issue. Ms. Kovacevich sought an affidavit from the jail Mr. Piccirilli was being held in. When she received more than she asked for — Mr. Piccirilli's confidential medical records — she immediately disclosed the information to Mr. Piccirilli's counsel. Within a matter of days, she also disclosed the source of the information.⁶ Accordingly, the appellants' argument fails at the first stage of the test.

⁶ Admittedly, the Crown's initial refusal to disclose the source of the information was bizarre, but this refusal was short-lived.

franchir la première étape du test. Cela veut dire qu'il incombe aux appelants de démontrer que la conduite de M^e Kovacevich a porté préjudice à l'intégrité du système de justice. Le juge du procès semble avoir conclu que cette condition était remplie quand, après avoir examiné la conduite de la substitut du procureur général, il a affirmé que « [c]e comportement sera pris en considération dans l'évaluation de la requête en abus de procédure » (par. 57).

[51] Le juge du procès a commis une erreur manifeste et dominante en arrivant à la conclusion que ce comportement portait atteinte à l'intégrité du système de justice. Tout d'abord, il a conclu à tort que le ministère public avait manqué de transparence parce qu'il avait « toujours refusé de dévoiler la provenance des renseignements obtenus » (par. 56). En fait, le ministère public l'a dévoilée à peine quelques jours plus tard. De plus, le juge du procès n'a pas tenu compte du fait que M. Piccirilli avait mis en cause sa santé dans sa demande de libération provisoire et s'était engagé à fournir son dossier médical au tribunal. Le juge du procès n'a pas tenu compte non plus du fait que M^e Kovacevich avait demandé au personnel médical du centre de détention de remettre un affidavit expliquant les soins administrés à M. Piccirilli depuis sa crise cardiaque. C'est le médecin de M. Piccirilli qui a, semble-t-il, pris l'initiative de transmettre le dossier médical de ce dernier au ministère public.

[52] À mon avis, lorsqu'on examine la conduite du ministère public en faisant abstraction des erreurs du juge du procès, il est évident qu'elle n'a aucunement porté préjudice à l'intégrité du système de justice. M. Piccirilli a mis son état de santé en cause. M^e Kovacevich a demandé un affidavit au personnel du centre de détention où était incarcéré M. Piccirilli. Lorsqu'elle a reçu plus que ce qu'elle avait demandé, en l'occurrence le dossier médical confidentiel de M. Piccirilli, elle a immédiatement communiqué ces renseignements à l'avocat de ce dernier. Elle a aussi dévoilé leur provenance à peine quelques jours plus tard⁶. L'argument des appelants ne franchit donc pas la première étape du test.

⁶ Certes, le refus initial du ministère public de dévoiler la provenance des renseignements était étrange, mais il fut de courte durée.

(2) The Police Collusion

[53] The Court of Appeal disagreed with the trial judge's finding that Constables Brière and Sénéchal colluded to mislead the court. I too have serious reservations with the trial judge's finding. Indeed, had I been the trial judge, I doubt that I would have reached the same conclusion. However, having seen the witnesses, the trial judge was in a better position to assess the matter. Accordingly, his finding is entitled to deference.

[54] That said, at the first stage of the test, the officers' conduct must be looked at in context. Cst. Brière changed his testimony on a central issue: whether he or Mr. Babos opened the trunk of the car. He did so, however, after having testified at the preliminary inquiry. As an officer, he surely knew that this change would be the subject of questioning by defence counsel. Changes in an officer's testimony are routinely exposed in cross-examination. And when Cst. Brière was predictably questioned about why his story had changed, he immediately explained that he had spoken with Cst. Sénéchal and had been [TRANSLATION] "convinced" of the true version of events. There was no attempt by the officers to cover up their discussions or to hide anything from the court. To the extent this amounts to collusion, it does so in the most technical sense. Whatever threat it poses to the integrity of the justice system must surely be slight.

[55] However, given the trial judge's finding, it is necessary to proceed to the second stage of the test and ask whether there is another remedy, short of a stay, capable of redressing the prejudice to the integrity of the judicial system occasioned by the collusion.

[56] Two concerns to the integrity of the justice system arise out of the trial judge's finding of collusion: (1) the impropriety of police collusion

(2) La collusion policière

[53] La Cour d'appel a exprimé son désaccord avec la conclusion du juge du procès selon laquelle les policiers Brière et Sénéchal s'étaient concertés pour induire le tribunal en erreur. J'ai aussi de sérieuses réserves au sujet de sa conclusion. En effet, si j'avais été le juge du procès, je ne crois pas que je serais parvenu à la même conclusion. Cependant, comme il a observé les témoins, le juge du procès était mieux placé pour examiner la question. Sa conclusion commande donc la retenue.

[54] Cela dit, à la première étape du test, il faut examiner la conduite des policiers dans son contexte. L'agent Brière a modifié son témoignage sur une question fondamentale : celle de savoir si c'est lui ou M. Babos qui a ouvert le hayon de la voiture. Il l'a toutefois fait après avoir témoigné à l'enquête préliminaire. À titre de policier, il savait sûrement que l'avocat de la défense l'interrogerait à propos de ce changement de version. En effet, les modifications au témoignage d'un policier sont couramment mises en évidence lors du contre-interrogatoire. Or, lorsque l'agent Brière s'est fait demander, comme on pouvait s'y attendre, pourquoi il avait modifié sa version des faits, il a tout de suite expliqué qu'il avait parlé avec l'agent Sénéchal et que ce dernier l'avait « convaincu » de la version exacte des faits. Les policiers n'ont pas tenté de dissimuler leurs entretiens, ni de cacher quoi que ce soit au tribunal. Dans la mesure où leur comportement est assimilable à de la collusion, il l'est au sens le plus technique du terme. Quelle que soit la menace qu'il représente pour l'intégrité du système de justice, c'est assurément une faible menace.

[55] Par contre, vu la conclusion du juge du procès, il faut passer à la deuxième étape du test et se demander si une autre réparation, moindre que l'arrêt des procédures, permettrait de corriger le préjudice causé à l'intégrité du système de justice par la collusion.

[56] Deux problèmes touchant l'intégrité du système de justice se dégagent de la conclusion de collusion tirée par le juge du procès : (1) le caractère

designed to mislead the court, and (2) the Crown's attempt to introduce the firearm against Mr. Piccirilli in the wake of the trial judge's finding of collusion. Manifestly, both are improper. But there was another remedy before the trial judge that would have addressed both, namely: refusing to admit the firearm against Mr. Piccirilli even though he had no standing under s. 8 of the *Charter* to challenge its admissibility. The trial judge erred in failing to consider that alternative.

[57] Excluding the firearm against Mr. Piccirilli would serve to dissociate the court from the officers' collusion and the Crown's misguided attempt, in the face of that finding, to introduce the firearm against Mr. Piccirilli. Both forms of misconduct were intended to achieve the same end — admission of the firearm into evidence. Excluding the firearm against Mr. Piccirilli — even though it was likely admissible against him — purges the problematic evidence from the trial, thereby dissociating the court from the misconduct in question. By doing so, it cannot be said that the misconduct has a lingering effect on the integrity of the justice system. In my view, this remedy fully addresses any prejudice occasioned to the justice system by the impugned conduct. Hence, there is no need to go further in the analysis.

(3) The Crown's Threatening Conduct

[58] In the end, I view this case as turning on the Crown's threatening conduct.

[59] The distinction between the Crown's conduct in this case and legitimate plea bargaining practices should be made clear at the outset. It is perfectly proper for the Crown to indicate that it will drop certain charges, grounded in the evidence, if the accused pleads guilty. It is also proper for a Crown to advise counsel that if evidence arises at

irrégulier de la collusion policière visant à induire le tribunal en erreur et (2) la tentative du ministère public de produire en preuve l'arme à feu contre M. Piccirilli dans la foulée de cette conclusion. Ces deux actes sont manifestement inopportuns. Pourtant, le juge du procès disposait d'une autre mesure de réparation qui lui aurait permis de remédier à ces deux actes : refuser d'admettre en preuve l'arme à feu contre M. Piccirilli même si l'art. 8 de la *Charte* ne conférait pas à ce dernier qualité pour en contester la recevabilité. Le juge du procès a commis une erreur en négligeant d'examiner cette solution de rechange.

[57] L'exclusion de l'arme à feu à l'égard de M. Piccirilli aurait pour effet de dissocier le tribunal de la collusion des policiers et de la tentative malavisée du ministère public de la produire en preuve contre M. Piccirilli en dépit de la conclusion de collusion. Ces deux actes répréhensibles visaient la même fin : faire admettre l'arme à feu en preuve. Le fait de l'exclure à l'endroit de M. Piccirilli — même si elle était vraisemblablement admissible contre lui — aurait écarté du procès cet élément de preuve problématique, et permis au tribunal de se dissocier de l'acte répréhensible en question. Une fois l'arme à feu exclue, on ne pourrait pas affirmer que l'acte répréhensible a encore une incidence sur l'intégrité du système de justice. À mon avis, cette réparation corrigerait entièrement tout préjudice causé au système de justice par la conduite reprochée. Il n'est donc pas nécessaire de poursuivre l'analyse.

(3) Le comportement menaçant du ministère public

[58] En définitive, c'est le comportement menaçant du ministère public qui me semble déterminant en l'espèce.

[59] Il faut dès le départ établir clairement la distinction entre la conduite du ministère public en l'espèce et les méthodes légitimes de négociation d'un plaidoyer. Le substitut du procureur général est parfaitement en droit de dire qu'il retirera certaines accusations fondées sur la preuve si l'accusé avoue sa culpabilité. Il est aussi en droit d'aviser l'avocat

the preliminary inquiry that would support additional charges, they may be added to the indictment under s. 574(1)(b) of the *Criminal Code*.⁷ Where discussions of this sort occur with counsel after substantial disclosure has been provided, the accused and his or her lawyer are able to make an informed decision as to how to proceed and nothing improper has occurred.

[60] The Crown's conduct in this case was of a different nature. The impugned comments were made early on in the proceedings, before the appellants and their counsel had sufficient disclosure to make an informed decision as to how they wished to proceed. Moreover, in at least one instance, the comments occurred in the presence of one of the appellants, Mr. Piccirilli. And the Crown's language was nothing short of threatening. Mr. Piccirilli was told, for example, that if he did not settle, he was going to be [TRANSLATION] "hit by a train". Put simply, the Crown's threats were intended to pressure the appellants into foregoing their right to a trial.

[61] Without question, the bullying tactic to which Ms. Tremblay resorted was reprehensible and unworthy of the dignity of her office. It should not be repeated by her or any other Crown. In her capacity as a Crown, Ms. Tremblay's role was that of a quasi-judicial officer. Her function was to be "assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party" (*Boucher v. The Queen*, [1955] S.C.R. 16, at p. 25). In threatening to charge Mr. Piccirilli with more offences if he did not plead guilty, Ms. Tremblay betrayed her role as a Crown. Manifestly it is the type of conduct the court should dissociate itself from.

de la défense que, si des éléments de preuve présentés à l'enquête préliminaire étayent d'autres accusations, celles-ci seront peut-être ajoutées à l'acte d'accusation en vertu de l'al. 574(1)b) du *Code criminel*⁷. Dans les cas où le procureur du ministère public a des discussions de ce genre avec l'avocat de la défense après la communication d'une partie importante des renseignements, l'accusé et son avocat sont à même de prendre une décision éclairée sur la marche à suivre, et il n'y a aucune irrégularité.

[60] La conduite du ministère public en l'espèce était toutefois d'une autre nature. Les commentaires qui lui sont reprochés ont été formulés au début des procédures, soit avant que les appelants et leurs avocats n'aient reçu suffisamment de renseignements pour être en mesure de décider de façon éclairée de la stratégie qu'ils voulaient adopter. Qui plus est, les commentaires ont été faits au moins une fois en présence d'un des appelants, M. Piccirilli. En outre, les propos de la substitut du procureur général n'étaient rien de moins que menaçants. M. Piccirilli s'est fait dire notamment que, s'il ne réglait pas, le « train [allait] le frapper ». Autrement dit, les menaces de la substitut du procureur général visaient à faire pression sur les appelants pour qu'ils renoncent à leur droit à un procès.

[61] La tactique d'intimidation à laquelle a eu recours M^e Tremblay était indubitablement répréhensible et indigne de sa charge. Elle ne doit être utilisée de nouveau ni par M^e Tremblay, ni par aucun autre substitut du procureur général. À ce titre, M^e Tremblay exerçait une fonction quasi judiciaire. Son travail consistait à [TRADUCTION] « aider le tribunal à rendre justice, et non à agir comme avocat[e] d'une personne ou d'une partie » (*Boucher c. The Queen*, [1955] R.C.S. 16, p. 25). En menaçant M. Piccirilli de l'inculper d'autres infractions s'il n'avouait pas sa culpabilité, M^e Tremblay a trahi sa fonction de substitut du procureur général. C'est manifestement le genre de conduite dont le tribunal doit se dissocier.

⁷ Section 574(1)(b) of the *Criminal Code* allows the Crown to lay additional charges, supported by the evidence that has been adduced at the preliminary inquiry.

⁷ L'alinéa 574(1)b) du *Code criminel* permet au ministère public de porter des accusations additionnelles qui sont étayées par la preuve présentée à l'enquête préliminaire.

[62] However, the threats must be considered in their context. With respect, the trial judge did not do so. Here, there were several factors which the trial judge failed to consider. With respect, he erred in this regard.

[63] The threats were made more than a year before the trial began. The 18-month long silence of the appellants and their counsel sheds some light on how seriously they took the threats. Had they been taken seriously, one might have expected counsel to respond immediately. Surely the proper course of action was not to sit back for over a year before applying, mid-trial, for a stay of proceedings. Instead, counsel should have confronted Ms. Tremblay and, failing an adequate response by her, brought the matter immediately to the attention of a senior Crown or a judge. That way, Ms. Tremblay could have been removed from the file during the early stages of the proceedings. Be that as it may, as it turned out, she was removed from the case months before the trial started — and it was not until six months after the trial was underway that the threats first came to light.

[64] As indicated, context is essential in considering the seriousness of the threatening conduct. By the time the misconduct came to light, Ms. Tremblay had long since been removed from the case and no longer played any part in it. The trial judge acknowledged this fact but did not consider it to be an attenuating factor because the Crown's office had taken no steps [TRANSLATION] "to remedy or even try to remedy the situation" once the threats were revealed and had instead "remained entrenched in its position" (para. 66). With respect, this observation does not accurately reflect the facts. At the point when the threats first came to light, they were unproven and Ms. Tremblay's health did not allow her to testify.⁸ The Crown's office did not condone Ms. Tremblay's actions, but

⁸ Fresh evidence was tendered before this Court in which Ms. Tremblay denies ever having made the threats in question. Given the disposition of the appeal, this evidence is irrelevant and there is no need to consider the Crown's motion to adduce it.

[62] Les menaces doivent toutefois être replacées dans leur contexte. Avec égards, le juge du procès ne l'a pas fait. En effet, en l'espèce, le juge du procès a négligé de tenir compte de plusieurs facteurs. En toute déférence, il a commis une erreur à cet égard.

[63] Les menaces ont été proférées plus d'un an avant l'ouverture du procès. Les 18 mois de silence des appelants et de leurs avocats jettent un certain éclairage sur la mesure dans laquelle ils ont pris les menaces au sérieux. Si elles avaient été prises au sérieux, on aurait pu s'attendre à ce que les avocats réagissent sur-le-champ. Il ne convenait assurément pas de ne rien faire pendant plus d'un an avant de demander l'arrêt des procédures au milieu du procès. L'avocat aurait plutôt dû sommer M^e Tremblay de s'expliquer et, à défaut d'une réponse adéquate de sa part, porter sur-le-champ la question à l'attention d'un des supérieurs de M^e Tremblay ou d'un juge. Ainsi, il aurait été possible de retirer M^e Tremblay du dossier dès le début de l'instance. Quoi qu'il en soit, en fin de compte, elle a été retirée du dossier des mois avant le début du procès et c'est seulement six mois après le début du procès que les menaces ont été dévoilées pour la première fois.

[64] Je le rappelle, le contexte est crucial lorsqu'il s'agit d'examiner la gravité du comportement menaçant. Quand la conduite répréhensible a été dévoilée, M^e Tremblay n'occupait plus et n'intervenait plus dans le dossier depuis longtemps. Le juge du procès a certes pris acte de ce fait, mais il n'a pas considéré que c'était un facteur atténuant, parce que le bureau du substitut du procureur général n'a rien fait « pour remédier ou même tenter de remédier à la situation » après le dévoilement des menaces. Au contraire, ce bureau « s'est cambré dans ses positions » (par. 66). Avec égards, cette observation ne traduit pas fidèlement les faits. Au moment où on a révélé les menaces pour la première fois, elles n'étaient pas établies et l'état de santé de M^e Tremblay ne lui permettait pas de témoigner⁸.

⁸ On a présenté à la Cour un nouvel élément de preuve dans lequel M^e Tremblay nie avoir, à quelque moment que ce soit, proféré les menaces en question. Étant donné l'issue du pourvoi, cet élément de preuve n'est pas pertinent et point n'est besoin d'examiner la requête du ministère public en vue de le présenter.

simply left it to the appellants to prove the threats. Surely the Crown's office cannot be faulted for taking that approach, especially in the absence of any evidence suggesting that Ms. Tremblay's conduct was systemic.

[65] Moreover, the trial judge did not consider the passage of time between when the threats were made and when they were first brought to light. He made no mention of this in his reasons. In this regard, while I agree in general with Justice Abella that the passage of time itself cannot "retroactively cure intolerable state conduct" (para. 82), its significance here is that it serves as a yardstick against which to measure just how serious Ms. Tremblay's conduct was perceived by the defence. The fact that defence counsel took no steps for over a year to raise concerns — and then, almost by accident in the context of a s. 11(b) delay motion — sheds important light on this subject. The trial judge erred in failing to take this into account.

[66] Manifestly, Ms. Tremblay's misconduct was serious enough to warrant proceeding to the second stage of the test. That said, in my respectful view, when the mitigating factors which the trial judge failed to consider are taken into account, the trial judge's conclusion that the threats amounted to [TRANSLATION] "an abuse of the worst kind" is simply not borne out (para. 78).

[67] Turning to the second stage of the test, as no argument was made that there was an alternate remedy capable of redressing the particular harm caused to the integrity of the justice system by the threats, I need not finally decide whether such a remedy was available. Instead, I turn to the third stage of the test, namely, whether Ms. Tremblay's conduct was sufficiently egregious to warrant a stay of proceedings.

Le bureau du substitut du procureur général n'a pas cautionné les agissements de M^e Tremblay, mais il a simplement laissé aux appelants le soin de prouver les menaces. On ne peut certainement pas reprocher au bureau du substitut du procureur général d'avoir procédé de cette façon, surtout en l'absence de preuve laissant croire que M^e Tremblay agissait systématiquement ainsi.

[65] De surcroît, le juge du procès n'a pas tenu compte du temps écoulé entre le moment où les menaces avaient été proférées et celui où elles avaient été révélées la première fois. Il n'en a d'ailleurs pas parlé dans ses motifs. Bien que je convienne de façon générale à cet égard avec la juge Abella que le passage du temps en soi ne saurait « remédier rétroactivement à une conduite intolérable de l'État » (par. 82), l'importance qu'il revêt en l'espèce tient au fait qu'il sert de jalon pour mesurer le niveau de gravité attribué par la défense à la conduite de M^e Tremblay. Le fait que l'avocat de la défense n'a pris aucune mesure pendant plus d'un an pour exprimer ses préoccupations — et qu'il les a exprimées de manière presque fortuite dans le cadre d'une requête concernant le délai fondée sur l'al. 11b) — jette un éclairage important à ce sujet. Le juge du procès a commis une erreur en n'en tenant pas compte.

[66] De toute évidence, la conduite répréhensible de M^e Tremblay était suffisamment grave pour que le tribunal passe à la deuxième étape du test. Cela dit, j'estime avec égards que, si on prend en considération les facteurs atténuants dont le juge du procès n'a pas tenu compte, sa conclusion selon laquelle les menaces ont constitué « un abus des plus graves » n'est tout simplement pas établie (par. 78).

[67] Passons à la deuxième étape du test. Puisque personne n'a soutenu qu'il existait une autre réparation permettant de corriger le préjudice causé à l'intégrité du système de justice par les menaces, je n'ai pas à décider en définitive si une telle réparation existait bel et bien. Je passe plutôt à la troisième étape du test, soit celle de déterminer si la conduite de M^e Tremblay était suffisamment grave pour justifier l'arrêt des procédures.

[68] The answer lies in the balancing process — an exercise which the trial judge did not undertake. The question at this stage is whether the integrity of the justice system is better preserved by staying the proceedings, or proceeding to a trial in the face of the Crown’s threatening conduct.

[69] This balancing requires weighing the seriousness of the misconduct against the societal interest in having a trial. At this stage, the very serious nature of the charges facing the appellants — 22 charges concerning firearms, illegal drugs, and organized crime — looms large. Society has a profound interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits. When the impugned misconduct — threats uttered more than a year before trial by a Crown no longer on the case — is weighed against society’s interest in a trial, I am satisfied that this is not one of the “clearest of cases” where the exceptional remedy of a stay of proceedings is warranted.

[70] The appellants contend that this case is analogous to *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, a case in which this Court upheld a stay of proceedings. In *Cobb*, the accused were facing extradition proceedings from Canada to the United States. They were granted a stay after the American prosecutor on the file hinted to the media that uncooperative fugitives would be subjected to rape in prison, and the judge presiding over their trial in the United States commented that uncooperative defendants would get the maximum jail sentence legally available.

[71] This case is a far cry from *Cobb*. In *Cobb*, the American prosecutor had threatened the accused with sexual violence. Here, the Crown threatened to charge the accused with additional offences if they did not plead guilty. While that was improper, the threats related to something she could have done

[68] La réponse réside dans la mise en balance, un exercice auquel ne s’est pas livré le juge du procès. Il s’agit à cette étape de déterminer si l’intégrité du système de justice est mieux préservée par l’arrêt des procédures ou par la tenue d’un procès malgré le comportement menaçant de la substitut du procureur général.

[69] Cette mise en balance exige que l’on soupèse la gravité de la conduite répréhensible par rapport à l’intérêt de la société dans la tenue d’un procès. Le caractère très grave des accusations portées contre les appelants — 22 accusations relatives aux armes à feu, aux drogues illégales et au crime organisé — revêt une grande importance à cette étape. La société tient énormément à ce que justice soit faite par un tribunal et que la culpabilité ou l’innocence des appelants soit établie au terme d’un procès complet sur le fond. Lorsque la conduite répréhensible attaquée — des menaces proférées plus d’un an avant le procès par une substitut du procureur général n’occupant plus au dossier — est soupesée par rapport à l’intérêt pour la société à ce qu’un procès soit tenu, je ne suis pas convaincu qu’il s’agit de l’un des « cas les plus manifestes » où la réparation exceptionnelle que constitue l’arrêt des procédures est justifiée.

[70] Les appelants soutiennent que la présente affaire s’apparente à *États-Unis d’Amérique c. Cobb*, 2001 CSC 19, [2001] 1 R.C.S. 587, une affaire où la Cour a confirmé l’arrêt des procédures. Les accusés dans *Cobb* faisaient l’objet de procédures d’extradition du Canada vers les États-Unis. L’arrêt des procédures leur a été accordé après que le poursuivant américain au dossier a laissé entendre aux médias que les fugitifs refusant de collaborer seraient victimes de viol en prison, et que le juge chargé de présider leur procès aux États-Unis a dit que les défendeurs refusant de collaborer se verraient infliger la peine d’emprisonnement la plus lourde prévue par la loi.

[71] La présente espèce est très différente de l’affaire *Cobb*, dans laquelle le poursuivant américain avait menacé les accusés de violence sexuelle. En l’espèce, la substitut du procureur général a menacé de porter d’autres accusations contre les accusés s’ils n’avaient pas leur culpabilité. Malgré

legally under s. 574(1)(b) of the *Criminal Code*. Moreover, the decision to stay the proceedings in *Cobb* was motivated in large part by the fact that the prosecutor who made the threats remained in charge of the prosecutions. This Court noted that extraditing the accused would return them to an “ominous climate” in which the American prosecutor and judge would play a “large, if not decisive role” in determining their “ultimate fate” (*Cobb*, at para. 43). Here, Ms. Tremblay was off the case long before trial. In my view, *Cobb* provides little or no assistance to the appellants.

VI. Conclusion

[72] In deciding that a stay of proceedings is unwarranted in this case, I have assessed the three forms of alleged misconduct individually. The Crown’s conduct in securing Mr. Piccirilli’s medical records occasioned no prejudice to the integrity of the justice system. The harm caused by the finding of police collusion was curable through an alternate remedy: excluding the firearm from evidence against both appellants. And the Crown’s threatening conduct, while reprehensible, did not approximate the type of shocking conduct needed to justify a stay.

[73] This case lent itself to an individualistic approach. The three alleged instances of misconduct were separate and distinct, committed at different times by different players. There was no link between them. And in only one instance — the Crown’s threatening behaviour — was it necessary to consider the third stage of the test and balance the Crown’s misconduct against society’s interest in a trial on the merits. That said, I should not be taken as suggesting that an individualistic approach should always be followed. Indeed, a judge who is required to balance several instances of misconduct against the societal interest in a trial will almost certainly wish to consider the conduct cumulatively

leur caractère inapproprié, les menaces visaient quelque chose qu’elle aurait pu faire à bon droit en vertu de l’al. 574(1)b) du *Code criminel*. Par ailleurs, la décision d’arrêter les procédures dans *Cobb* était motivée en grande partie par le fait que le poursuivant ayant proféré les menaces est demeuré responsable des poursuites. En effet, dans cette affaire, la Cour a souligné que, s’ils étaient extradés, les accusés feraient face à un « climat [. . .] hostile » dans lequel le poursuivant et le juge américains joueraient un « rôle important, voire décisif », dans la détermination de leur « sort ultime » (*Cobb*, par. 43). En l’espèce, M^e Tremblay a cessé d’occuper dans le dossier bien avant l’ouverture du procès. À mon sens, *Cobb* n’aide guère, voire pas du tout, la cause des appelants.

VI. Conclusion

[72] Pour décider que l’arrêt des procédures est injustifié en l’espèce, j’ai étudié séparément les trois actes répréhensibles allégués. La conduite du ministère public consistant à obtenir le dossier médical de M. Piccirilli n’a aucunement porté préjudice à l’intégrité du système de justice. Quant au tort causé par la conclusion de collusion policière, il était possible d’y remédier en accordant une autre mesure de réparation, soit l’exclusion de l’arme à feu de la preuve présentée contre les deux appelants. Finalement, le comportement menaçant du ministère public, quoique répréhensible, ne se rapprochait pas du type de conduite choquante nécessaire pour justifier l’arrêt des procédures.

[73] La présente affaire se prêtait à une approche fractionnée. Les trois actes répréhensibles reprochés étaient distincts et ils ont été commis à des moments différents par des auteurs différents. Il n’y avait aucun lien entre eux. En outre, c’est dans un seul des cas, soit le comportement menaçant de la substitut du procureur général, qu’il fallait passer à la troisième étape du test et mettre en balance la conduite répréhensible du ministère public, d’une part, et l’intérêt pour la société qu’un procès soit tenu sur le fond, d’autre part. Cela dit, je n’affirme pas que l’on devrait toujours adopter une telle approche fractionnée. En effet, le juge tenu de mettre en balance plusieurs incidents d’inconduite

and in its full context. As well, there may be cases where the nature and number of incidents, though individually unworthy of a stay, will require one when considered together. But this is not such a case.

[74] For these reasons, I would dismiss the appeals.

The following are the reasons delivered by

[75] ABELLA J. (dissenting) — A stay should only be imposed in the clearest of cases, as Justice Moldaver points out, since it has the effect of precluding proceedings which determine the merits of a case, something to which the public — and the parties — are entitled. But the public is also entitled to have confidence in the integrity of the justice system. A Crown who makes threats intended to bully an accused into foregoing his or her right to a trial, takes fatal aim at the heart of the public's confidence in that integrity.

Analysis

[76] A stay may be justified for an abuse of process under the residual category when the state's conduct "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73). A stay may be justified, in exceptional circumstances, when the conduct "is so egregious that the mere fact of going forward [with the trial] in the light of it [would] be offensive" (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 91).

[77] There are two public interests at play: "the affront to fair play and decency" and "the effective prosecution of criminal cases". Where the affront is "disproportionate", the administration of justice is "best served by staying the proceedings" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667).

et l'intérêt de la société dans la tenue d'un procès voudra presque assurément examiner la conduite globalement et dans son contexte intégral. De plus, il peut y avoir des cas où la nature et le nombre des incidents considérés globalement nécessiteraient l'arrêt des procédures même si, pris isolément, ils ne le justifieraient pas. Mais tel n'est pas le cas ici.

[74] Pour ces motifs, je suis d'avis de rejeter les pourvois.

Version française des motifs rendus par

[75] LA JUGE ABELLA (dissidente) — L'arrêt des procédures ne doit être ordonné que dans les cas les plus manifestes, comme le souligne le juge Moldaver, puisqu'il a pour effet d'empêcher la tenue d'un procès qui tranche l'affaire sur le fond, ce à quoi ont droit le public et les parties. Cependant, le public est aussi en droit d'avoir confiance dans l'intégrité du système de justice. Le substitut du procureur général qui profère des menaces dans le but d'intimider l'accusé pour qu'il renonce à son droit à un procès porte un coup fatal au cœur de la confiance du public dans cette intégrité.

Analyse

[76] En cas d'abus de procédure, l'arrêt des procédures peut se justifier s'agissant de la catégorie résiduelle dans les cas où la conduite de l'État « contrev[ient] aux notions fondamentales de justice et [. . .] min[e] ainsi l'intégrité du processus judiciaire » (*R. c. O'Connor*, [1995] 4 R.C.S. 411, par. 73). L'arrêt des procédures peut se justifier dans des cas exceptionnels, lorsque la conduite « est si grave que le simple fait de poursuivre le procès serait choquant » (*Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391, par. 91).

[77] Deux intérêts publics entrent en jeu : « l'atteinte au franc-jeu et à la décence » et l'intérêt à ce que « les infractions criminelles soient efficacement poursuivies ». Lorsque l'atteinte est « disproportionnée », l'administration de la justice est « mieux servie par l'arrêt des procédures » (*R. c. Conway*, [1989] 1 R.C.S. 1659, p. 1667).

[78] In other words, when the conduct is so profoundly and demonstrably inconsistent with the public perception of what a fair justice system requires, proceeding with a trial means condoning unforgivable conduct.

[79] The Crown who is the focus of this appeal threatened one of the co-accused, Sergio Piccirilli, on three separate occasions. The threats were made twice to Mr. Piccirilli personally and once to his lawyer. All were to the effect that if Mr. Piccirilli did not plead guilty, he would be charged with additional, serious offences. By the time the trial started several months after the last threat, the Crown was on medical leave and a new Crown was assigned to the case. New charges were in fact brought.

[80] The trial judge concluded that the Crown's conduct was in "bad faith", "unacceptable", "intolerable", "unjustifiable", and was one of the "exceptional and rare cases" that justified a stay.

[81] The Court of Appeal agreed that the threats were "unacceptable" and "outrageous", but found that the trial judge erred in imposing a stay because he did not undertake a sufficient balancing or sufficiently consider the context. That context included the fact that the threats were made more than a year before the trial began, that counsel did not react immediately, and that the Crown was replaced for health reasons months before the trial started. In other words, the impact of the threats was mitigated by the passage of time and the change in personnel.

[82] With great respect, however, the passage of time does not operate to attenuate what was unpardonable conduct. Time is not a legal remedy for a fundamental breach of the Crown's role, and cannot retroactively cure intolerable state conduct. The reason, therefore, that the trial judge did not

[78] Autrement dit, lorsque la conduite est si profondément et manifestement incompatible avec ce qu'exige, aux yeux du public, un système de justice équitable, la tenue d'un procès revient à tolérer une conduite impardonnable.

[79] La substitut du procureur général sur qui porte principalement le présent pourvoi a menacé un des accusés, Sergio Piccirilli, à trois occasions distinctes. Les menaces ont été adressées deux fois à M. Piccirilli en personne et une fois à son avocat. Selon toutes ces menaces, M. Piccirilli serait accusé d'autres infractions graves s'il ne plaiderait pas coupable. À l'ouverture du procès, plusieurs mois après la dernière menace, la substitut du procureur général était en congé de maladie et une nouvelle procureure avait été affectée au dossier. De nouvelles accusations ont effectivement été déposées.

[80] Le juge du procès a conclu que le comportement de la substitut du procureur général était « fait de mauvaise foi », « inacceptable », « intolérabl[e] », « injustifiable », et que c'était un des « cas exceptionnels et rares » où l'arrêt des procédures se justifiait.

[81] La Cour d'appel a elle aussi jugé que les menaces étaient « inacceptable[s] » et « outrageante[s] », mais elle a conclu que le juge du procès avait fait erreur en ordonnant l'arrêt des procédures parce qu'il n'avait ni procédé à une mise en balance adéquate, ni tenu compte suffisamment du contexte. Ce contexte comprenait le fait que les menaces remontaient à plus d'un an avant le début du procès, que l'avocat n'avait pas réagi sur-le-champ, et que la substitut du procureur général avait été remplacée pour des raisons de santé des mois avant l'ouverture du procès. Autrement dit, le passage du temps et le changement de personnel auraient atténué l'incidence des menaces.

[82] Or, avec égards, le passage du temps n'a pas pour effet d'atténuer ce qui constitue une conduite impardonnable. Le temps n'est pas une réparation prévue par la loi en cas de manquement fondamental à la fonction du ministère public, et il ne saurait remédier rétroactivement à une conduite

mention the passage of time in assessing the impact of the threats on the public's confidence in a fair justice system, is that it was not relevant. It was the fact that the threats were made at all that was key, not when they were made (*United States of America v. Shulman*, [2001] 1 S.C.R. 616).

[83] Moreover, I am not persuaded that a balancing exercise was required here. The trial judge was unequivocal in concluding that the abuse justified a stay. There was none of the uncertainty as to the propriety of a stay that this Court said was a condition precedent to the need for a balancing exercise (*Tobiass*, at para. 92; *R. v. Regan*, [2002] 1 S.C.R. 297, at para. 57).

[84] But in any event, it is not at all clear to me how one goes about such a balancing. When a trial judge has concluded that conduct is “so egregious that the mere fact of going forward in the light of it will be offensive” (*Tobiass*, at para. 91), against what does one balance that singularly egregious state conduct? When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public's sense of justice, it seems to me to be conceptually inconsistent to nonetheless ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public's interest in trials on the merits. It is one thing to require that trial judges look at the “competing interests at play” (*R. v. Bellusci*, [2012] 2 S.C.R. 509, at para. 29) before concluding that the state conduct could not be condoned, but how, having concluded that it could not be condoned, can such conduct be subjected to yet *another* balancing of factors to determine whether it is nonetheless pardonable?

[85] Of course the public has an interest in trials on the merits, but it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will put fairness above

intolérable de l'État. Par conséquent, le fait que le juge du procès n'a pas mentionné le passage du temps lorsqu'il a évalué l'incidence des menaces sur la confiance du public dans un système de justice équitable découle précisément du fait que ce n'était pas pertinent. C'est la profération des menaces en tant que telle qui était déterminante, et non le moment où elles ont été proférées (*États-Unis d'Amérique c. Shulman*, [2001] 1 R.C.S. 616).

[83] Par ailleurs, je ne suis pas convaincue qu'une mise en balance s'imposait en l'espèce. Le juge du procès a conclu sans équivoque que l'abus justifiait l'arrêt des procédures. On ne retrouvait aucunement dans la présente affaire l'incertitude quant au bien-fondé de l'arrêt des procédures qui, selon la Cour, constitue une condition préalable au besoin de procéder à une mise en balance (*Tobiass*, par. 92; *R. c. Regan*, [2002] 1 R.C.S. 297, par. 57).

[84] Quoi qu'il en soit, je ne vois pas du tout comment cette mise en balance devrait se faire. Lorsque le juge du procès conclut qu'une conduite est « si grave que le simple fait de poursuivre le procès serait choquant » (*Tobiass*, par. 91), avec quoi faut-il mettre en balance cette conduite particulièrement grave de l'État? Lorsque le juge du procès conclut à l'impossibilité de tolérer la conduite en question parce qu'elle choque aussi profondément le sens de la justice du public, il me paraît conceptuellement illogique de demander malgré tout au tribunal d'affaiblir sa propre conclusion en pesant de nouveau le côté de la balance où se trouve l'intérêt du public dans la tenue d'un procès sur le fond. C'est une chose d'exiger du juge du procès qu'il considère les « intérêts en jeu qui s'opposent » (*R. c. Bellusci*, [2012] 2 R.C.S. 509, par. 29) avant de conclure à l'impossibilité de tolérer la conduite de l'État, mais comment, après avoir tiré cette conclusion, le juge peut-il soumettre pareille conduite à une *autre* mise en balance des facteurs afin de déterminer si elle est néanmoins pardonnable?

[85] Certes, le public a intérêt à ce qu'il y ait des procès sur le fond, mais il a bien davantage intérêt à savoir que l'État privilégie l'équité aux dépens de la célérité lorsqu'il participe à des procédures, notamment celles susceptibles d'entraîner la perte

expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.

[86] In *Bellusci*, this Court cautioned appellate courts to exercise restraint with respect to the findings of the trial judge, intervening only if the trial judge “misdirects himself or if his decision is so clearly wrong as to amount to an injustice” (para. 17; see also *Regan*, at para. 117; *Tobiass*, at para. 87). There was no such misdirection or injustice here. On the contrary, the trial judge concluded that a stay was justified in order to *prevent* an injustice to the justice system itself. I agree.

[87] I would allow the appeals.

Appeals dismissed, ABELLA J. dissenting.

Solicitors for the appellant Antal Babos: Étude Légale Franco Schiro, Montréal.

Solicitors for the appellant Sergio Piccirilli: Pilon & Associés, Montréal.

Solicitor for the respondent: Public Prosecution Service of Canada, Montréal and Ottawa.

de liberté. La justice ne se limite pas aux résultats, elle s'étend aussi à la manière de les atteindre. Lorsqu'un substitut du procureur général menace l'accusé de porter d'autres accusations contre lui s'il n'avoue pas sa culpabilité, l'intérêt du public dans l'issue d'un procès doit céder le pas à l'intérêt transcendant d'assurer la confiance du public dans l'intégrité du système de justice.

[86] Dans l'arrêt *Bellusci*, la Cour a souligné à l'intention des tribunaux d'appel l'importance de faire preuve de retenue à l'égard des conclusions du juge du procès et de n'intervenir que si ce dernier « s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice » (par. 17; voir aussi *Regan*, par. 117; *Tobiass*, par. 87). Il n'y a eu ni erreur, ni injustice de ce genre en l'espèce. Au contraire, le juge du procès a conclu que l'arrêt des procédures se justifiait pour *empêcher* que le système de justice lui-même subisse une injustice. Je suis d'accord.

[87] Je suis d'avis d'accueillir les pourvois.

Pourvois rejetés, la juge ABELLA est dissidente.

Procureurs de l'appellant Antal Babos : Étude Légale Franco Schiro, Montréal.

Procureurs de l'appelant Sergio Piccirilli : Pilon & Associés, Montréal.

Procureur de l'intimée : Service des poursuites pénales du Canada, Montréal et Ottawa.

1999 CarswellNat 6381

Federal Court of Canada — Trial Division

R. v. BASF Aktiengesellschaft

Please see in
particular para. 48-49,
64

1999 CarswellNat 6381

**Her Majesty the Queen, Applicant and Basf Aktiengesellschaft, Accused
and F. Hoffmann-Laroche Ltd., Accused and Rhone-Poulenc S.A., Accused
and Eisai Co. Ltd., Accused and Daiichi Pharmaceutical Co. Ltd., Accused**

Sharlow J.

As she then was

Judgment: September 22, 1999

Docket: T-1664-99, T-1665-99, T-1666-99, T-1666-99, T-16667-99, T-16668-99

Counsel: D. Martin Low, Q.C., for Applicant

David Kent, for Accused, BASF

William Vanveen, for Accused, Hoffman-LaRoche

Calvin Goldman, Q.C., Brian Facey, for Accused, Rhone-Poulenc S.A.

Katherine Kay, for Accused, Eisai Co. Ltd.

Calvin Goldman, Q.C, Mark Katz, Q.C., for Daiichi Pharmaceutical Co. Ltd.

Subject: Contracts; Corporate and Commercial; Criminal; Customs; International

Headnote

International trade and customs --- Offences and penalties — Practice and procedure — Sentence

Five Corporate accused pleaded guilty to their particular involvement in eight counts of unlawfully conspiring, combining, agreeing or arranging to prevent or lessen, unduly, competition in production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of product — Each count related to separate vitamin product — Accused collectively controlled world supply of those eight vitamins — Sentencing hearing held — Accused sentenced to fine of \$48 million, \$19 million, \$14 million, \$2 million and \$2.5 million, respectively — Fine proposed was three times amount of previous record penalty in prosecution under Competition Act and would be highest fine that had ever been imposed in criminal case in Canada — These conspiracies were in view of Crown most widespread, detailed and successful anti-competitive conspiracies that had ever been encountered in Canada by Competition Bureau and involved largest volume of sales of very significant products, over longest period of time, most detailed level of organization among conspirators of any conspiracy that had ever been detected and prosecuted — It affected Canadian businesses, feed producers, livestock and poultry farmers and affected makers of food for human consumption as well as pharmaceutical producers — There was very, very limited number of

producers of these vitamins in world — There were no Canadian producers and there were no Canadian production facilities of any of participants — All supplies to Canadian market were imports — Accused were virtually entire sources of supply to our markets and by virtue of these conspiracies, those companies were very, very closely coordinated on production, distribution, marketing, sales and prices of these products — Over at least nine years, range of bulk vitamins were object of illegal conspiracies with different participants and different durations on different vitamins — Canada was important not for size of its market but because of its contribution to whole of conspiracy through NAFTA — Foreign penalties had led Crown to temper severity of penalty that it would seek — First corporate accused accepted responsibility fully, had disciplined senior managers involved and had implemented new compliance duties on its senior employees to avoid repeat — Second accused played central, essential role, but had no prior Competition convictions — Level of third accused's cooperation with investigation was unparalleled — Fourth and fifth accused did not cooperate early with investigation but had more limited role than others.

Table of Authorities

Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 45 — referred to

s. 45(1)(c) — pursuant to

Criminal Code, R.S.C. 1985, c. C-46

s. 655 — referred to

s. 718(a) — considered

s. 718.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 156] — considered

s. 718.2(b) [en. 1995, c. 22, s. 6 — considered

SENTENCING HEARING held for five corporate accused who pleaded guilty to their particular involvement in eight counts of unlawfully conspiring, combining, agreeing or arranging to prevent or lessen, unduly, competition in production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of product.

Sharlow J.:

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THE REGISTRAR: This special sitting of the Federal Court of Canada at Toronto is now in session. The Honourable Madame Justice Sharlow is presiding.

The Court calls File T-1665-99, the *Competition Act v. Hoffmann-LaRoche Ltd.*, For the applicant, Mr. D. Martin Low, Q.C.; for the respondent, Mr. William Vanveen.

MR. LOW: Good afternoon, my Lady. This is an indictment of the accused Hoffmann-LaRoche by the Crown. We come before the Court after some discussions between counsel for the accused and the Crown by which the accused is prepared to plead guilty to the offences that have been charged in the indictment that is before the Court. If it please the Court, it would be appropriate for the Clerk to arraign the accused and ask for the plea.

THE COURT: Yes.

THE REGISTRAR: The accused stands charged:

1. THAT it did, between January, 1990 and February, 1999, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft and Rhone-Poulenc S.A., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin A, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.
2. THAT it did, between January, 1990 and February, 1999, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, Rhone-Poulenc S.A., and Eisai Co. Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin E, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.
3. THAT it did, between 1991 and December, 1997, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin premixes, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.
4. THAT it did, between January, 1991 and the Fall of 1995, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, Merck KGaA and Takeda Chemical Industries, Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely,

vitamin C, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

5. THAT it did, between July, 1991 and Fall 1995, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, and Takeda Chemical Industries, Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin B2, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

6. THAT it did, between January, 1991 and December, 1998, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, and Daiichi Pharmaceutical Co., Ltd., the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, vitamin B5 (Calpan), in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

7. THAT it did, between Fall, 1991 and December, 1998, the exact dates being unknown, in various locations outside Canada, unlawfully conspire, combine, agree or arrange with BASF Aktiengesellschaft, the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, beta carotene, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

8. THAT it did, between July, 1991 and June 27, 1995, in Toronto and various other locations, unlawfully conspire, combine, agree or arrange with Haarmann & Reimer Corporation, Jungbunzlauer International AG. and Archer Daniels Midland Company, the one with the other or others of them, together with a person or persons known or unknown, to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, namely, citric acid, in Canada, contrary to paragraph 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-34.

How do you plead, guilty or not guilty?

MR. VANVEEN: On behalf of Hoffmann-LaRoche Ltd., I plead guilty to all counts.

THE COURT: Thank you, counsel. I will endorse the indictment with the guilty plea and subject to your comments, I've read the statement of agreed facts and agree that the

statement of agreed facts indicates the commission of offences under the *Act*. So unless there's something further to say, I will endorse the conviction in the indictment.

MR. LOW: That will be fine, my Lady.

Submissions by Mr. Low:

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MR. LOW: On the conviction of the accused, the Crown has a number of submissions to make on the appropriate sentence.

I should say to you that the accused and the Crown have jointly agreed on the appropriate sentence, but clearly you have the responsibility to ensure that what we propose is consistent with the sentencing principles that are laid down in the Criminal Code.

The fine that we will propose to you is three times the amount of a previous record penalty in a prosecution under the *Competition Act*. If accepted by the Court, it would be the highest fine that has ever been imposed in a criminal case in Canada.

My submissions will try to explain why a fine of this magnitude is neither too high nor too low. Pursuant to s.718.1 of the Criminal Code, we must satisfy the Court that the sentence is proportionate to the gravity of the offence and the degree of responsibility of the offender.

My submissions will reflect the view of the Competition Bureau, the investigators of these offences, and the position of the Crown as to the implications that can properly be drawn from the facts that have been admitted.

There are aggravating circumstances in this case and there are in the case of this accused some significant mitigating factors that have led to the conclusion by the Crown that the penalty we will propose is a proper one. I emphasize, of course, that my submissions are no more than that and that the only facts that can be taken and be proven are those that are set out in the agreed statement of facts.

THE COURT: At this point it occurs to me that we might be wise to mark that statement as an exhibit.

MR. LOW: My view, my Lady, is that it need not be an exhibit. It is on the record and the Court can properly take account of it as admissions which are for the purpose of dispensing with the proof under s.655 of the Criminal Code, so it is not technically an exhibit, but it is something that you can take into account.

THE COURT: Mr. Vanveen, do you agree with that?

MR. VANVEEN: Yes, I concur.

MR. LOW: If that's satisfactory, my Lady, the accused has admitted its participation in the offences charged which have been described by the Supreme Court of Canada in the conspiracy provisions of the *Competition Act* as the core of the criminal provisions of that *Act*, as the epitome of competition law.

3 And these conspiracies were in the view of the Crown the most widespread, detailed and successful anti-competitive conspiracies that have ever been encountered in Canada by the Competition Bureau. They involve the largest volume of sales of very significant products, over the longest period of time, the most detailed level of organization among the conspirators of any conspiracy that has ever been detected and prosecuted in this country.

4 It affected Canadian businesses, feed producers, livestock and poultry farmers. It affected the makers of food for human consumption.

5 It had effect on the producers of pharmaceutical products. Vitamins are essential components of human and animal nutrition and they contribute to the health, well-being and proper development of humans and animals. A consequence of deficiencies are inadequate nutrition, inefficient feed processing by animals that are raised for agricultural purposes, less than optimal production of animal products, meat, poultry, eggs and milk. And the necessary nutritional requirements of vitamins either cannot at all or cannot economically be obtained from natural sources in the recommended amounts.

6 The production processes for vitamins are highly capital intensive, based on proprietary technology and patented processes, and they require very sophisticated manufacturing facilities. As a consequence, there are very, very limited number of producers of these vitamins in the world. There are no Canadian producers and there are no Canadian production facilities of any of the participants. All the supplies to the Canadian market were imports.

7 Now, throughout the period of these offences, there were some minor offshore producers but their entire capacity appears to have been absorbed outside Canada. And there was no noticeable imports into Canada according to the information that the Bureau has obtained.

8 Later in the life of some of these conspiracies, other products, other sources began to appear, vitamin C in particular, but not in Canada at the time that the conspiracy was ongoing.

9 The companies who are pleading guilty today were virtually the entire sources of supply to our markets and by virtue of these conspiracies, those companies were very, very closely coordinated on the production, distribution, marketing, sales and prices of these products.

10 Now, these vitamins are in the nature of commodities. There are not very many distinguishing features or characteristics. They're used as inputs in the production of other products. For example, these bulk vitamins are the core ingredient in vitamin supplements that are sold as tablets or

capsules. Animal feeds have to be enhanced with vitamins and this is done either directly or through what are called premixes which are multiple formulations which are specific for the particular users for specific kinds of animal nutrition.

11 Human food loses vitamins through processing and common foods that are very low in vitamins are enriched or supplemented, for example, flour which is enriched to produce enriched bread. Cereal, cheese, or orange juice, milk, all of these have vitamins added to them.

12 Over at least nine years, a range of those bulk vitamins were the object of illegal conspiracies with different participants and different durations on different vitamins. Parties agreed on the volume of sales or sales quotas in different regions throughout the world and they also agreed to fix and increase the prices at which their vitamins would be sold. For all of these products there were no alternative Canadian sources of supply to the buyers who are intermediate users who then produced end products for use in animal nutrition, processed foods or pharmaceutical products.

13 As an economic matter, the effect of these conspiracies on the Canadian buyers of bulk vitamins, therefore had to be one of two options. If an intermediate producer passed on the price increase to the end user, then the end user paid an increased price for feed, food or pharmaceuticals. Alternatively the intermediate producer could choose to absorb the price increase and thereby reduce the profit margin that he received on the sale of the end product.

14 Now, there's no doubt that the price increases on any individual's daily requirements for a given vitamin or any animal's requirement would be probably impossible to compute. The recommended daily intake, which is how they are measured on the side of your cereal box, for example, is measured in milligrams. So any dosage, any particular dosage, the costs and the value of the vitamins is very, very slight. But on the sales of vitamins to Canadian business users that were in the order of \$650-million, a very small percentage price increase produces a very significant dollar return at the expense of the Canadian business people and to the detriment, in our submission, to their overall competitiveness.

15 Now, at the outset Roche together with BASF and Rhone-Poulenc entered into agreements to stabilize the market after a period that had been characterized by some volatility and limited profitability in the late 1980s. Through their worldwide contacts in the industry, key executives in each company cooperated with one another to manage these products and where necessary to bring other producers into the fold. So far as the Crown is aware, none of the participants had to be forced to participate. It was all voluntary on the part of all of the participants in the conspiracies. The initial agreements related to vitamins A and E which are major components of animal feed and other applications. From at least the beginning of 1990, these agreements operated among the three European producers. With respect to vitamin E, Eisai was brought into the conspiracy through meetings that occurred the end of 1990 or the beginning of 1991.

16 And the parties then controlled virtually the entire world production. They set budgets or sales quotas for each of the parties on an annual basis by senior executives. They did that based on estimates of worldwide demand which in turn were produced for them at more frequent meetings among lower level representatives from each of the companies.

17 Price levels or targets were set on a periodic basis, having regard to market conditions in different regions and different countries. The Canadian market was specifically discussed at some of these periodic meetings and these agreements on these products went on until early in 1999.

18 For the other products, premix, vitamins B2, B5, C, beta carotene, the nature of the agreements were very similar and I won't go over the matters that are set out in the agreed statement of facts.

19 For vitamins B2 and C, which terminated in 1995, we understand that it was a decision on the part of this accused, Hoffmann-LaRoche, that led to the end of those conspiracies. There's no doubt that the effect of these conspiracies on each of these products was to unduly lessen or prevent competition in Canada. It's equally true that the offence was complete once the parties entered into the agreement and without regard to whether they, in fact, implemented it in this country.

20 But in my submission, it is apparent from paragraph 15 of the agreed statement of facts that these conspiracies were implemented in Canada. While that may not be an essential ingredient of the offence, it is relevant to the sentence to be imposed.

21 Sales by Roche in Canada throughout the period of these conspiracies on a consolidated basis - we haven't gone into the individual sales for the individual products - that total sales were in the order of \$382-million, with a total sales of all the producers who are indicted today being something around \$668-million over the period.

22 It's important to understand the worldwide scale of these offences which have been described - and we have no way of verifying this - but have been described publicly as involving billions of dollars.

23 The Canadian market is really tiny if that's true, but Canada had some real importance to these conspirators because of the openness of the North American economy. The ability of products to flow from Canada to other parts of North America under the NAFTA agreement would have the effect that if there were disruptions in the prices in Canada, as there were in the early days, the effect of this agreement elsewhere might have been disrupted. So Canada was important not for the size of its market but because of its contribution to the whole of the conspiracy.

24 The fines that we will jointly recommend on this prosecution is precedentially high, but the accused have been or may be penalized in some other jurisdictions. It is already the case that in the United States, Roche and BASF have paid a total of \$725-million U.S. Eisai and Daiichi

have paid \$65-million. There may be proceedings in other jurisdictions. When the parties to an international cartel simultaneously commit offences that are directed at multiple countries, they obviously expose themselves to liability under the laws of those countries. That doesn't affect their exposure to prosecution in this country, but in the particular circumstances of this case, these foreign penalties have led the Crown to temper the severity of the penalty that we would seek. And I'll explain that very shortly.

25 The principles that govern sentencing, in the submission of the Crown, under s.45 of the *Competition Act* principally are predicated on the concept deterrence, both specific deterrence to inhibit repetition of the offence by the party concerned, and more generally, deterrence that this will inhibit the commission of similar offences by other parties.

26 In 1986, Parliament increased the fine from a level of \$1-million per count to \$10-million per count. And the sentencing policy behind that change is pretty evident in my view. The Court has the ability to take the profit out of these competition offences to send the message that these kinds of economic crimes do not pay.

27 There have been speculation about whether or not it's realistic for a court to expect that an economic penalty will really deter a party from these kinds of offences if the returns are high enough. Justice LaForet once voiced some thought on that line. Other Courts have insisted that in these kinds of cases, the fine has to be sufficient that it will hurt. And the question of whether or not deterrence operates here remains, but we believe that this case will clearly answer that question.

28 It's our submission that from this time on, any rational business executive who sees the conviction of these companies in Canada and the imposition of a fine of the magnitude that we will propose, who sees the fines that have been imposed in the United States and the potential for other penalties elsewhere, must recognize the devastating consequences to the firm that they represent of engaging in price-fixing and volume agreements.

29 We say that these proceedings, given the risk of downstream liability for these companies, with multiple legal fees to be paid, we say that these proceedings will drive home that deterrent message. The message really is this, this kind of international cartel can be detected. It will be pursued and it will be prosecuted. Conducting conspiratorial activity offshore will no longer ensure safety for a cartel. The consequences of being caught, the shame and the bad press, the commercial disadvantage of being perceived as a company that is prepared to disregard the laws of the place where they do business, all those are components of an overall deterrent message.

30 The particular sentencing factors that have been laid down in previous cases under s.45 are obviously relevant here. The factors - and I won't dwell on the cases - but the factor include consideration of the size and the influence of the accused, both among the conspirators and generally in terms of their market share, sales and volume of commerce.

31 The value of the commerce in this case was unprecedented, and these are extremely substantial world scale corporations. The role of the party concerned, whether it initiated or resisted participation in the conspiracy, is important in sentencing. The duration of the offences is critical. Here, of course, the length of the offences was unusually extended. Geographical scope is a factor that the courts have thought about, and clearly we are dealing with an offence that applied throughout Canada and elsewhere.

32 The level of the persons who acted on behalf of the companies concerned is a pertinent sentencing element because, of course, the seniority of the people who took part clearly indicate whether or not this is affecting the guiding minds of the corporation. Clearly, the seniority of the officials here engaged the responsibility of the corporation beyond any reasonable doubt.

33 Whether the parties acted in a covert or clandestine fashion showing a consciousness of guilt is a factor. And we say that the parties went to considerable lengths to avoid detection, and they were successful in that for an extended period.

34 Let me turn briefly to the substance of the citric acid conspiracy, the conspiracy that is charged in Count 8. The co-conspirators of the accused have already been convicted and sentenced in this Court in 1998. Summarily, the charge is that Roche and their co-conspirators met and agreed on a pretty sophisticated price-fixing conspiracy for citric acid which is a very wide spread product in human food and cleaning materials.

35 They allocated volumes and the amount that was to be sold and in the period of the offence for which it is charged, Roche sold about \$11-million of citric acid, of a total volume of commerce of all sales in Canada of about \$100-million.

36 Let me turn to the issue of mitigation, my Lady, because it will be the submission of the Crown that the most recent conduct of Roche involves some important mitigating circumstances. It came forward unconditionally to cooperate with the Competition Bureau. And it did that at a time when the Crown did not have evidence sufficient to prove the case against it, although the circumstances were such that we were dealing simultaneously with another party.

37 But that being said, this accused came forward very early to assist. Since that time it has provided a level of cooperation, including particular information about other products and other parties unknown to the Commissioner, that has been unusually helpful to the ongoing inquiry.

38 The company also decided - and this is a significant factor that applies to the other accused that are before the court today - it decided not to take advantage of the jurisdictional and procedural advantages that it might have utilized in a contested case. Instead it has returned voluntarily to the jurisdiction of the Court for the purpose of this proceeding alone. It has agreed to plead guilty and to pay a fine and it could have decided to contest this matter.

39 There is no doubt that had it done so, it would have been a very long, very expensive and very difficult prosecution. We think that decision would have been misguided and to its credit, so did Roche, and it is entirely to credit for the decision to plead guilty and to save society and the court system the costs of a contested prosecution. It has acted in a completely appropriate way since it decided to accept its responsibility. It had not sought to diminish or explain away its behaviour or to transfer the blame to other parties.

40 Secondly, Roche has very recently imposed certain compliance duties on its senior personnel to ensure that they are conscious of the competition laws of countries like Canada and that will dovetail with the prohibition order that we will propose to you to ensure that that has an approach to the law in this country. Roche has disciplined the executives who were involved in these offences. We believe that that will lend a certain degree of credence to its compliance program and that Roche personnel should in the future be counted on to respect their obligation.

41 I mentioned the multiple exposure of Roche elsewhere and while that is not a factor that would ordinarily carry any weight in sentencing for a Canadian offence, in the circumstances of this case, the extent of the collective liabilities that they face has in our view justified a moderating effect on the amount of the penalty.

42 The sentence we recommend, my Lady, on Counts 1 and 2, vitamins A and E - and those vitamins go together in the sales of these - we jointly recommend a fine of \$8-million on each of those counts.

43 Premixes are essentially a subset of vitamins A and E because the formulations of premixes generally include a significant amount of vitamins A and E. In view of the economic importance of premix in Canada, the Crown is also proposing a fine of \$8-million and the accused joins with us in that recommendation.

44 Count 4, vitamin C, again a fine of \$8-million.

45 On Count 5, riboflavin or vitamin B2, the jointly recommended fine is \$4-million, given that the value of that product was substantially less than the other products that I mentioned.

46 Count 6 on Calpan or vitamin B5, the recommended fine is again \$4-million in recognition of the lesser economic impact of this product in Canada.

47 Beta carotene is the subject of Count 7. Beta carotene is technically - I'm afraid I have to use a bit of jargon - a precursor to vitamin A we understand in that the body can assimilate beta carotene and transform it to vitamin A. It was a valuable product and in the circumstances, the jointly recommended fine is again \$8-million.

48 The total of these fines on \$382-million of commerce is \$48-million. That is a proportion of the commerce of Roche which is substantially less than it might otherwise have had to contend with in a contested case. That proportion, as a rule of thumb, we would normally seek a fine in the order of 20 per cent. We think that in the circumstances of this case with the value of the cooperation and the demonstration of a recognition of its misconduct, that it is appropriate to impose a total fine of \$48-million for its role in the vitamins.

49 On the citric acid, we're recommending a fine of \$2,900,000. Roche in this case was the last party to come forward and to try to resolve its exposure long after the other parties had pleaded guilty. The Crown was put to the difficulty and the cost of preparing a case to state what charges would be laid and the fine levelled in this case represents about 26 per cent of the commerce of Roche. And we say that that is a proper amount in this case.

50 Now, my Lady, the Court has to assess those fines in light of the gravity of the offence and the responsibility of the offender and it is your discretion. Under the law you have the discretion to accept that penalty or not.

51 It is also the law that a joint recommended sentence by the Crown and the accused should not be rejected unless the court is satisfied on the evidence that the sentence that is proposed would be an abuse of process, would bring the administration of justice into disrepute. We say that a fine at this level could be characterized as nothing else than precedential. \$48-million, taken in conjunction with the other exposure of this company, is a serious financial penalty even to a major company like Roche.

52 These penalties will not go unnoticed. The economic effect on the bottom line of a company like Roche will be influential in promoting a spirit of conformity with the *Competition Act* and its counterparts around the world. We say that it seems evident to the Crown that Roche has learned a lesson and that is the primary objective of sentencing in a case like this. We think Roche will be a fair competitor in the future and that justifies the fine that is recommended to you.

53 Those are my submissions. This is a severe sentence but it is responsible and fair and we would ask you to impose the fines that I have recommended to you.

THE COURT: Thank you.

Mr. Vanveen?

MR. VANVEEN: Thank you, my Lady.

Submissions by Mr. Vanveen:

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MR. VANVEEN: My Lady, as Mr. Low has said the facts that were agreed to are the ones that are in the agreed statement of facts and they are agreed and uncontested. And as he said, this is a joint submission and on behalf of the accused, I join in that.

55 I would like to make some brief comments with, your Ladyship's permission. No doubt this is a serious offence for which my client is profoundly sorry and it wishes to face and deal with. And that started, my Lady, with the company voluntarily going to the Competition Bureau as Mr. Low has said and admitting to these matters and entering the discussions. And it was with another company the first to do so.

56 And as Mr. Low has said but I would like to emphasize again, it went in to the Competition Bureau and to the Attorney General with no preconditions. It sought no preconditions or concessions before it gave information or cooperation. It went in completely openly. And as the Crown has properly acknowledged, my client gave early and extensive and very useful cooperation and assistance.

57 My client is a foreign company not present in this jurisdiction. It has a Canadian subsidiary but the Crown acknowledges that it is not — that subsidiary is not implicated and is not charged in any offence, so the accused before the court is a foreign corporation and as such — and also because this matter is very complex, there were a large number of difficult legal and factual issues. And as Mr. Low has said, if this matter had been contested, it would have been very long, very complex and very expensive both in investigation and trial. It would have been costly to the government and a burden on the justice system. My client has waived all that and voluntarily attorned to the jurisdiction of this Court, voluntarily pled and provided the information that's been referred to.

58 My client acknowledges its wrong as a corporate position. The misconduct was within a single division of the company. The company has many businesses; the vitamins and chemicals is only one. It was within a single division and it was initiated by a few individuals who are no longer with the company as Mr. Low mentioned.

59 But the company must and does take responsibility for their conduct. And I've been dealing with people at the top of the company in the process of doing this case and I can assure the court that it is committed to obeying Canadian laws and specifically the *Competition Act*. As Mr. Low has indicated it has initiated an extensive compliance program to ensure that all employees are aware of the ethical and legal responsibilities and comply with them under threat of discipline in future if there's any further problems. It is a genuine effort on their part in terms of compliance and it is acknowledged by the Crown.

60 My client has no past record in Canada which of course is a relevant consideration. It's not getting off lightly in this matter at all as Mr. Low has emphasized. The total fines being recommended are substantial and as he said a precedent far and above the prior highest fine.

61 It's clearly not a licence. It is a deterrent to it. Certainly it does not want to go through this again. It's certainly a deterrent to others. One of the principles of sentencing that I would like to emphasize to your Lady is the totality principle whereby the court is to consider the totality of the sentence when there are multiple charges as there are in this case.

62 Here, when you take the fine in its totality, it is very substantial. For most of the counts, there are five counts, my Lady, where the fine is \$8-million. The maximum is \$10-million per count so on most of the counts, the fine is near the maximum which acknowledges the seriousness of the matter, but also as Mr. Low has stated, gives appropriate allowance for the substantial mitigation that is present.

63 The Attorney General and the Commissioner of Competition, the Competition Bureau, my Lady, have a public policy of favourable treatment to encourage companies to come in and disclose wrongdoing and provide assistance to investigators. This is an important and valuable public policy which benefits the public. The Courts, I submit, should support this policy and encourage it by accepting a reasonable joint recommendation as here for companies that came within the policy and disclosed because that benefits the public and the administration of justice. Otherwise, companies may not support in future this policy and it is a valuable public policy to encourage companies to come in and clear the air and provide help.

64 And so I urge my Lady to support that policy and accept the joint recommendation that is put before you by the Crown and the defence.

THE COURT: Thank you, Mr. Vanveen.

Anything further?

MR. LOW: Nothing at all, my Lady. The total is \$50.9-million I'm afraid.

Decision of the Court:

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THE COURT: I have listened very carefully to the submissions. I have, as I indicated earlier, read the statement of agreed facts and the particulars of the unlawful agreements to which Roche is a party and I have considered also very carefully the very strong mitigating factors that were outlined by both counsel.

I note that one piece of information that's missing is that I do not know the profit, if any, that Roche gained from these activities. I know only its gross sales, Canadian sales, from the products in question. I take it from the fact that that information is not there that either the Crown thought it not helpful or it was too complex to determine. I only note that that

information is not there which makes it rather difficult to apply the factor, the sentencing factor, of taking away the profit from the wrongful act.

However, I note also that in light of the total sales of \$382-million approximately, \$58.9-million is a significant percentage of that, so I'm prepared to infer that the profit is substantially reduced, if not eliminated, by a fine of that kind.

So for all of those reasons I will accept the joint submissions as to sentence and I will endorse the indictment forthwith.

MR. VANVEEN: Thank you, my Lady, there is a matter of in terms of payment, I think that Mr. Low is going to undertake that the Crown would not execute against the company for 90 days. This is just to permit the mechanics of dealing with such a large sum of money in paying this fine and I think that is our agreement.

MR. LOW: That is our agreement, my Lady. I'm afraid I neglected to say that as a matter of law, the Court is obligated to impose the fine payable forthwith. We recognize that that can pose some difficulty for a corporation that cannot know in advance how much the fine will be, and so the way I have accommodated this problem in the past is to undertake on behalf of the Attorney General that we will not take enforcement action until 90 days from today, if that's satisfactory.

THE COURT: That is satisfactory. Does the endorsement need to reflect that?

MR. LOW: The endorsement need not reflect that. That is a certain undertaking that is on the record. The Clerk might wish to take note of it to avoid having people ring us up and ask us where the money is.

THE COURT: I will endorse the indictment after the proceedings are over.

MR. LOW: My Lady, there is also a matter of a prohibition order against this company which is on consent. There need not be any originating notice or other materials. Again the originating document is the indictment. If that is satisfactory, I can say to your Ladyship that that order is virtually in the same form and same terms as other orders that have been given by this Court in a multitude of cases over the last four or five years.

THE COURT: Thank you.

Mr. Vanveen, on the order?

MR. VANVEEN: Yes, my Lady, that's absolutely correct in terms of it being in the usual form and we consent to the prohibition order. As I've told my Lady, the company before this has already initiated a substantial compliance program and is content to enter into the prohibition order.

THE COURT: Thank you. Counsel, I have read the order. I think it is an appropriate order and I will sign it.

MR. LOW: Thank you, my Lady. That terminates matters as it relates to this particular prosecution.

THE REGISTRAR: The Court calls File T-1664-99, the *Competition Act v. BASF Aktiengesellschaft*. For the applicant, Mr. D. Martin Low, Q.C.; for the defendant, Mr. David Kent.

MR. LOW: My Lady, I hope that the proceedings henceforth will be substantially briefer. My friend I think is free to waive the reading of the indictment, to take it as read, and to enter a plea if requested. And it's my hope that I will be able to adopt some of what I've said as being applicable to BASF.

MR. KENT: My Lady, I'm quite happy to waive the reading of the indictment if I could.

THE COURT: Are you content?

MR. KENT: Yes, I am. If I just take a look at what the Registrar has in his hands so I make sure that it all lines up.

That's fine, my Lady. I'm happy to waive it and take it as read.

THE COURT: Thank you. The indictment is taken as read.

And the plea?

MR. KENT: Guilty, my Lady.

THE COURT: Thank you. The plea is entered.

MR. LOW: My Lady, submissions on sentence? I take it that the conviction will be entered as against BASF?

THE COURT: Yes.

Submissions by Mr. Low:

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MR. LOW: I've described the nature and the degree of the conspiracies in the preceding case, and I would ask if your Ladyship would accept my adoption of the submissions that I have made as to the seriousness of the offence, the nature of the products and the need for a deterrent sentence, and just go on to deal in particular with mitigation in connection with BASF.

THE COURT: I think that's appropriate and should a transcript be required, there would be a single transcript for all the proceedings today.

MR. LOW: That's very satisfactory, my Lady.

67 Now, it is clear that BASF played an essential role in the conception, operation and effectiveness of the conspiracies. BASF had to participate or these conspiracies could not have occurred.

68 Each of the sentencing factors that I have discussed apply to BASF, large multinational, integrated in the production process. BASF had to be involved for it to work.

69 I would like to take a few moments to discuss the matter of choline chloride which is Count 8 in the indictment. Choline chloride is a product which is added to feed for swine and poultry and there are a very few number of manufacturers worldwide. It's very similar to the other products in issue today. The effect of the relationship between BASF and its European and North American co-conspirators was that agreements upon price and on volume allocations were again reached.

70 The nature of the volume allocation agreement is one that causes particular concern to the Commissioner of Competition. The effect of that agreement was that the parties essentially undertook to respect each other's own markets. BASF and its counterparts in the conspiracy from Europe agreed that they would not sell their product in Canada or in North America, and in return North American producers, including a highly efficient Canadian participant in this industry called Chinook, were guaranteed that European producers would not sell here if the North American producers did not sell in Europe.

71 Now, I call that a forbearance agreement. I suppose I could call it a Balkanization agreement but that's a bit of a tender topic these days. But the purpose of it and the effect of it was that by a private agreement for private profit, these conspirators simply re-established barriers to international trade in this product that governments around the world have been working for years to break down.

72 Now, the effect in Canada was that the dominance of the Canadian producer in the Canadian market was assured. Essentially, the other parties agreed that they would not seek customers in Canada and it sustained the dominance of Chinook by artificial agreement during the period of this conspiracy. BASF did not sell any product in Canada, or an inconsequential amount, if they sold any, and it appears that they still do not sell. We say that is utterly beside the point.

73 The point of the agreement was to allocate this market, and Canada is particularly vulnerable to such agreements. And so the Crown submits that this is of enormous precedential value for the Court to impose a sentence that will focus on denunciation of this kind of conduct, a sentencing factor that is clearly contemplated in s.718(a) of the Criminal Code.

74 Having said that, my Lady, I'd like to turn again to mitigation. BASF was an applicant for lenient treatment amounting in some cases to immunity from prosecution by its decision to come forward prior to other parties to offer cooperation to the Competition Bureau. It turned out that it was really indistinguishable in time from the offer from Roche. From the time of initial contact by BASF, it provided complete and unconditional assistance. The quality of its cooperation has been exemplary with the presentation of witnesses who are prepared to explain what had happened in detail — I interject to say as did Roche and as did another party. Witnesses were really properly prepared to convey their evidence and to provide corroboration for the offence.

75 BASF took some pains to ensure that the officials did not overstate or understate their responsibility. It has provided very specific information to the Commissioner regarding illegal cooperation on products that were unknown to the Commissioner prior to their involvement with us. And it has provided information relating to other parties not before the court today who are subject to ongoing investigation. It offered its full and continuing cooperation in whatever proceedings may flow from these inquiries. And the fines that will be proposed reflect that contribution to the investigation and this prosecution.

76 We have seen the documents that BASF has issued to its staff by way of a formal competition compliance program. It aims to ensure that its employees will comply fully with the competition laws, and I suppose the other laws, in every country where it does business.

77 Once again, the prohibition order that we will recommend in effect will interact with that corporate initiative and give it the force of law in this country. The company, on discovery of these offences, has taken its responsibility with Competition authorities in numerous jurisdictions, including in Canada. And it had replaced its entire top management team. Once again there is a very, very strong message in that action to other employees of the company and the Commissioner expects that that will strongly militate against any repetition of these offences.

78 Now, under the Commissioner's policy on cooperating parties, and having regard to sentencing precedents in previous competition cases, one of the issues that can be addressed is that of restitution to victims of the offences. We understand that there are eight class-action proceedings in Canada. It's clear that civil remedies are available to the plaintiffs in these actions and they are being invoked. Canadians will have redress for these offences. It seems evident that in this proceeding neither the Government nor the Court, with the information that is available at this stage to the Court, needs to get involved in how these private claims will be resolved.

79 As with the other parties, BASF has shown a commitment to resolving this matter in a way that is recognized by the cases as a significant mitigating factor. It too didn't need to come to Canada to plead guilty and pay a huge fine. It chose to do so voluntarily and it indicated to the Crown from the very outset that it was prepared to do that. They accepted the jurisdiction of the

Court, once again for purposes of this proceeding, and it will plead guilty to these offences — it has pleaded guilty to these charges.

80 As with Roche, if it had taken another course, there would have been very significant difficulty and expense in bringing it to trial. At the time that they offered their cooperation with Roche, the Commissioner needed the cooperation in order to move an investigation which had been going on for many months without having probative evidence that would break the case. BASF helped to do that.

81 After some very careful consideration, in all of these cases, the Crown decided that for Roche as well the appropriate fine as a proportion of their sales in Canada would be a fine that would be at the order of twelve and a half per cent. And that recognizes the value of their cooperation to the Crown and the clear deterrent effect of the consequences that BASF is facing, not only in Canada, but elsewhere.

82 We will be proposing a fine in the total amount of \$19-million. Of that amount, \$18-million is related to the offences encompassed by the vitamins' inquiry which are Counts 1 to 7.

83 And on Count 8 we propose a fine of \$1-million as a purely deterrent denunciatory penalty.

84 On Counts 1 and 2, the jointly proposed fine is \$4-million each.

85 On Counts 3 to 7, the fine that we recommend is \$2-million on each count.

86 Now, those fines are obviously not precisely correlated with the amount of sales of each product again, although they do recognize the higher sales or higher value of vitamins A and E in Canada.

87 On the whole, my Lady, for the reasons that were given in the previous case, having regard to the exemplary help that BASF and its counsel have provided, we are prepared to recommend a fine in that amount.

88 Thank you very much. Those are my submissions.

THE COURT: Mr. Low, just before you sit down, could you tell me again about the civil actions. I wasn't quite clear on whether you were suggesting that they were not a factor because they're not concluded or whether...

MR. LOW: My Lady, we take the view that while a corporation may have an aggressively defensive attitude or an entirely open attitude to claims by civil parties, it is a factor that the Court may take into account. There have been previous cases in which as a matter prior to the plea the Crown and the accused saw to it that restitution in particular specific outcomes would be provided. In this case these are very, very complicated factual issues.

You mentioned in the previous matter the question of how much extra did companies make. And in some of the finer points of competition law, that's called the overcharge question. And that is a very, very difficult complex issue of fact, economic analysis and expert evidence which I have seen virtually entire trials devoted to. Those are issues that are going to be dealt with in the course of proceedings between plaintiffs who believe that they have been victimized and these parties in actions that are perfectly tenable in Canada. It is not a factor, in our submission, that either the Government needs to intervene in or the Court needs to take consideration for the purpose of dealing with a penalty that is a condition to the responsibility of this offender and the gravity of this offence.

THE COURT: Thank you. I understand that point.

Submissions by Mr. Kent:

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MR. KENT: My Lady, why don't I just pick up on that last point. There are indeed actions on the go and Mr. Low correctly alludes to the fact that there are one or two other cases where accused have been in a position of having settled with the civil claimants prior to coming before the criminal court.

In the situation at hand however, the eight actions that have been commenced in three different jurisdictions are all class actions. None has yet been certified. Plaintiffs' counsel are still trying to sort out who's going to run them and so it wouldn't be possible even in a perfect world to be anywhere on them yet because there is no one with whom to deal as of yet for those who are on the defence side, which is different from some of the other cases that have come before this Court.

And also to pick up one lingering fact, you asked perhaps rhetorically during the last proceeding whether there was any information about the so-called profit that had been accumulated out of all this and I can tell you with respect to this matter involving BASF, that analysis, there is no analysis that would permit a number to flow. Mr. Low is quite right, it's highly complex econometric modelling that's required and that doesn't exist for these purposes.

THE COURT: Yes, okay. I understand.

MR. KENT: Why don't I then, without repeating some of Mr. Low's comments, just pick up on and capture the flavour of some of the mitigating aspects and other aspects of this matter from the accused's perspective, starting with the understanding that this is a joint submission as to sentence. It underwent considerable discussion before we came here today and it does

reflect the product of our joint assessment of what would be an appropriate outcome, given the circumstances in this case, both aggravating and mitigating.

90 However, in this case there are a number of mitigating circumstances which aren't always present. One is — and we all come back to this but this is everybody's starting point in a *Competition Act* conspiracy case, and that is, how do the Commissioner's guidelines on cooperating parties apply. One of the key items is always who came in from out of the cold first, in other words, when they didn't have to as opposed to who came in once the jig was up.

91 And as Mr. Low says, BASF it sounds like in a dead heat with Roche came in although independent of Roche at a time when neither one knew that anyone else was in there. And so certainly BASF deserves and the Commissioner's policy requires that there be considerable credit given for that because the policy just doesn't work unless there's a sliding scale of credit so to speak for those who come in first, second and further on down the pack. So that's a key item.

92 A second key item, and this does play out in same cases, is that this accused is a foreign accused. It's a German company, so obviously offshore. Its people are offshore, its assets are offshore and its entity is offshore. However, it has from a procedural perspective agreed to plead guilty, thereby saving the process. It's agreed to waive jurisdictional issues, thereby relieving us from that consideration and it's agreed to a prohibition order, and a formal prohibition order, again relieving us all from the need to have a debate or discussion about the form that would take.

93 I do note in passing that the prohibition order issue was made a bit easier by the fact that the company had already put in place certain steps which would have been required by a prohibition order but long before the prohibition order was ever put forward in draft form. So the company, in fact, was ahead of the curve, if you will, on considering what steps ought to be taken to ensure that there's no repetition of these events. And that has taken a number of forms, both in terms of a lengthy and formal letter from the board of the company to mid and senior managers and executives, as well as to a broadcast letter from the board to every single employee in the organization. So it's hit high and it's hit low and everywhere across the organization.

94 The company has indicated it was wrong and it ought not ever to occur which is the least one would expect I think but it has, in fact, happened.

95 Now, Mr. Low noted that there has been considerable and unconditional cooperation. This happened from the first communication. In other words, it was unconditional from the first phone call and has been considerable thereafter. It has included — Mr. Low alluded to the witnesses being brought forward, and to elaborate on that a little bit, these are witnesses who were not in this jurisdiction. In other words, they were people who came forward in a fully briefed sense who would have been difficult, if not impossible, for Canadian authorities to otherwise interview in circumstances like this. They were brought forward from Europe and from Asia, so there's been an open expenditure of good will, but also an expenditure of resources to implement the cooperation

that all of us understood should go forward. And this obviously is part of the ongoing commitment and there will be ongoing cooperation as the circumstances require.

96 This did give rise to the Bureau, to the Commissioner, becoming aware of people, companies and products of which the Bureau was not previously aware, and so there's been material brought to the table by these witnesses in addition to the mere confirmation of things which the Bureau already knew or suspected. So there's been cooperation which has actually resulted in some material benefit to the Bureau.

97 Last, a couple of things, as I say, the company has very publicly in its corporate communications made it clear that what happened was wrong, what happened is contrary to company spirit and policy and it ought never to happen again.

98 I do note two things. First, this company has never had a prior problem under the Canadian *Competition Act*. This is a first offence for it here. And second, it was certainly a central player in these events but you will have seen or maybe inferred from reading the materials that while it wasn't a resistor being dragged to the table, it was neither a ringleader who was organizing the party either. It was central but doesn't fall in the aggravating category nor in the mitigating category as someone who has been coerced into it.

99 Given the constant references to this company made in some of the other indictments, I did want to make it clear that it's a more neutral position in that hierarchy of roles that can be played.

100 Those I think are my submissions, my Lady. We obviously jointly submit to the sentence and the fines as Mr. Low has set out to you before and those are my submissions.

THE COURT: Thank you. Anything further, Mr. Low?

MR. LOW: No, thank you, my Lady.

Decision of the Court:

101

THE COURT: Thank you for those submissions. That was helpful. For the same reasons as before I think that the analysis presented does justify the joint submissions. I can think of no reason to depart from them, so the sentences will be endorsed as suggested by the joint submissions.

Again, I don't know, counsel, if you want to put on the record the same undertaking as to payment?

MR. LOW: My Lady, BASF asked for slightly less time. I think it was —

MR. KENT: It was thirty but I would be quite happy to move to ninety days if that would give my friend any — if it kept his paperwork straight.

MR. LOW: My Lady, the Crown is happy enough with the amount of the fine, my Lady, but I won't forego the interest for the 60 days but I'm happy to extend that to 90 days if that's satisfactory.

THE COURT: Thank you.

MR. LOW: And there is the issue of the prohibition order again, my Lady, and I've asked that if you would be prepared to impose that order.

MR. KENT: That's satisfactory, my Lady.

THE COURT: And again I've read the order and I think it's appropriate and I will sign it.

MR. LOW: Thank you.

MR. KENT: Thank you, my Lady.

MR. LOW: If we could perhaps move to the third item this afternoon, the matter of Rhone-Poulenc.

THE REGISTRAR: The Court calls File T-1666-99, the *Competition Act v. Rhone-Poulenc, S.A.*. For the applicant, Mr. E. Martin Low, Q.C.; for the respondent, Mr. Calvin Goldman, Q.C. and Mr. Brian Facey.

MR. LOW: My Lady, in this case the indictment is briefer but once again it might be that my friend would like to have it waived in the interests of time.

THE COURT: Thank you. Mr. Goldman?

MR. GOLDMAN: Thank you, my Lady. If I could just look at the indictment, please. That's fine. Thank you.

THE COURT: The reading of the indictment is waived.

MR. LOW: Thank you, my Lady. Would you ask for the plea then?

THE COURT: Yes.

MR. GOLDMAN: Yes, on behalf of the accused corporation I'm authorized to state that it pleads guilty to the two counts under s.45(1)(c) as set forth in the indictment presented to the Court today.

THE COURT: Thank you. The indictment will be so endorsed.

Mr. Low?

MR. LOW: Thank you, my Lady.

Submissions by Mr. Low:

102

MR. LOW: Well, my Lady, this is the third prosecution in an exceptional case. Rhone-Poulenc has admitted its guilt today in the conspiracy that's charged for the sale of its feed grade of vitamins A and E. And those are the products that it sold. It was not I understand in the business of food or pharmaceuticals. It has agreed to join with the Crown in a submission whereby it will be required to pay a very significant fine as a penalty for the offence.

103 Once again, I would adopt the previous observations that I've offered on the description of the market and the product and the acts that constitute the offences, as well as the implications for the Canadian market.

104 But the position of Rhone-Poulenc is one which is really quite exceptional. I said the case is exceptional. The Crown does not ever expect to be confronted with three parties engaged in such serious offences who are falling over themselves to help. It is really quite an unparalleled circumstance.

105 In the case of Rhone-Poulenc, there is an additional factor. I would say that as with both the preceding parties, Rhone-Poulenc has voluntarily provided full, frank, truthful disclosure to the Competition Bureau. From the instant that it was in contact with the Competition Bureau, it has provided extraordinarily valuable assistance to the investigation. It too has gone to the ends of the earth literally to bring its personnel forward to provide assistance to the Commissioner. And it has done that completely voluntarily, completely openly. The level and the quality of its cooperation has been outstanding, and of course, as with the other two parties, it will continue to cooperate until these matters are entirely wound up.

106 Now, the unique factor that I need to bring to your Ladyship's attention is that Rhone-Poulenc was not the first party to offer its cooperation and to help the Competition Bureau break the case. But it did step forward as the first party to assist in an investigation in the United States and for that assistance it was granted immunity from prosecution in the United States.

107 By the time Rhone-Poulenc did come forward in Canada, the Bureau was in the process of evaluating evidence that it had in hand that would turn out to produce a provable case against Rhone-Poulenc. Now, in the circumstances, we believe that while Rhone-Poulenc has from the moment it approached us made a valuable contribution to the case, it was in the unhappy position of, in relation to these products, not having very much to offer to the Commission. Rhone-Poulenc

did have evidence and information on other products which it has provided and other parties which it has provided and that will be of assistance in an investigation in relation to those conspiracies.

108 But we understand that in about February of this year, it went to the United States Department of Justice, received immunity from prosecution - or full amnesty as they call it there - and in a sense it may be that it was its initiative there that led to this case breaking open in the rush to assist on the part of all the parties. We don't know if that's the case because at the time that we were dealing with the other parties, we had no knowledge of circumstances in the United States.

109 Rhone-Poulenc has told us that it always intended to come into Canada to cooperate and it believed that it was doing so at the first opportunity when it became appropriate in the course of its dealings with the United States Department of Justice. Of course, that was unknown to the Bureau and by the time they had informed us, as I say, the Bureau already had a provable case. And so this is a unique case.

110 There is one other case which is pending in which a party has found itself in similar circumstances, a case as yet to be finalized. But there is in this case because of the rather unique circumstances that apply to the investigation that is directly connected to the investigation we were doing, we have decided as a matter of the sentencing discretion of the Attorney General of Canada to take this into account as a mitigating factor.

111 I can say that the Crown is of the view that there are no future circumstances in which any credit will be given to a party that cooperates with a foreign competition authority that does not come forward to cooperate with Canada and thereby presents an opportunity for other parties to provide assistance to the Crown.

112 Now, in this case we have no indication that Rhone-Poulenc was the instigator or the principal proponent or beneficiary of these agreements. Once again it has no prior convictions. There are no particular aggravating circumstances that would cause us to be concerned that the exercise of some degree of leniency to Rhone-Poulenc in return for its assistance, having regard to these circumstances in the other investigation, are justified.

113 As with the other parties, the decision of Rhone-Poulenc to come forward, accept the jurisdiction of the Court for the purposes of this prosecution and to plead guilty has saved us enormous costs.

114 We understand that Rhone-Poulenc has a compliance program under development and whether it does or not, its submission to the prohibition order will require that it comply with these kinds of deterrent policies.

115 I can't say that it was a very difficult decision in this case, but that we felt on balance that the equities of a decision to approach sentencing on the same basis in terms of the proportion of

Rhone-Poulenc's commerce that would be exacted as a fine was based on the proposition that is set out again in the Criminal Code, that the Court is really required under s.718.2(b) of the Code to consider the imposition of a sentence that is similar to the sentences that are imposed on similar offenders for similar offences committed in similar circumstances.

116 But for the novelty of a company getting caught in the race when it was cooperating elsewhere, but for some indication perhaps that the company and its advisors felt that it was perhaps to their detriment to come forward any earlier than they did, the fine would have been higher because their value to the investigation would have been proportionately reduced. But we believe that in the circumstances an appropriate fine is a fine of \$14-million, having regard to the commerce of Rhone-Poulenc of \$112-million in Canada in the feed business. We recommend jointly that a fine of \$7-million on each of Counts 1 and 2 should be imposed.

117 Those are my submissions, my Lady.

THE COURT: Thank you.

Mr. Goldman?

MR. GOLDMAN: Thank you, my Lady.

Submissions by Mr. Goldman:

118

MR. GOLDMAN: May I initially make a few comments on the agreed statement of facts that has been filed with the Court before I turn to support for the joint submission that Mr. Low has made to you.

119 First, certain of the facts which relate to the other parties, for example, paragraphs 4 to 6, are not necessarily known or specifically agreed to. They identify other parties - I just want to make it clear for the record - as are acknowledged in that document. We don't dispute them but we're not in a position to agree to those particular facts.

120 Also as Mr. Low indicated, while vitamins are used for animal feed, food and pharmaceuticals, I must emphasize that Rhone-Poulenc is only involved in animal feed products and is not involved with respect to premixes even within the animal feed segment, so Rhone-Poulenc has more limited involvement than some others.

121 Going to the matter of appropriate sentence - and I do support the submission that Mr. Low has conveyed to you - the Commissioner is continuing to conduct an extensive inquiry into the bulk vitamins industry. We have been informed of that. Rhone-Poulenc has provided full, frank and truthful disclosure to the Competition Bureau. In an effort to assist that ongoing inquiry, it's

agreed to provide continuing cooperation and because of the complex nature of the industry and the international ramifications of jurisdictional issues, as Mr. Low pointed out, Rhone-Poulenc's conduct in cooperating with the Bureau at a very early stage in the Commissioner's inquiry has made a significant contribution to the government's investigation of the bulk vitamins inquiry.

122 But in particular, as Mr. Low highlighted, there are unique elements to what transpired in this case. And of considerable significance, referring once again to the point touched on by Mr. Low, in February of this year, it was Rhone-Poulenc and Rhone-Poulenc alone, my Lady, that was the first entity to bring this matter to the attention of the United States Department of Justice and provide to the United States Department of Justice the relevant details that were acknowledged by the United States Department of Justice and I have their news release here which my friend and his colleagues from the Bureau have seen repeatedly. It was Rhone-Poulenc that allowed the United States Department of Justice to crack what was stated by the U.S. Department of Justice as the largest anti-trust conspiracy uncovered to date. It effectively broke the conspiracy open in the United States, and in our respectful submission, that can only be done once. In other words, the house of cards can only come down one time. It can't be rebuilt.

123 So it's our submission that it was Rhone-Poulenc that facilitated the matters, not only in the United States, but the matters that are before the Court today. And I can confirm that it was Rhone-Poulenc's intention to come to Canada to cooperate with the Canadian authorities as soon as it believed it was appropriate to do so in the course of its amnesty dealings with the United States. So there are unique elements to this situation that is before the Court today, my Lady.

124 I should also add that Rhone-Poulenc was clearly not the instigator. It wasn't the principal proponent or beneficiary with respect to the agreements pertaining to vitamins A or E. It does not have any prior convictions. It is embarking on the development of a company-wide compliance program, and importantly, all such activities have been terminated and Rhone-Poulenc I'm authorized to say sincerely regrets its involvement in this matter.

125 Those are the points that I wanted to add by way of a joint submission.

THE COURT: Thank you. Anything further, Mr. Low?

MR. LOW: I may be repeating myself, my Lady. I just remind the Court that the position we have come to is a matter of discretion. We do not believe that the role that a party plays elsewhere is pertinent to the sentence that is to be levied against them in Canada. I'm not disputing what my friend has said. We've given credit in this case. We will not be inclined to grant credit again. We think it is not pertinent as a recognized sentencing factor. Thank you.

Decision of the Court:

126

THE COURT: Thank you. The submissions of counsel in this case indicate that there's an additional factor here relating to the U.S. involvement of this corporation that played a role in the determination to give a mitigating factor on the point of disclosure and cooperation. I'm far from clear that every sentencing judge would agree with that additional credit being given but in my view there's no error in principle in taking that view and in light of the agreement of counsel on both sides and the fact that the fine is substantial in light of the sales, I will accept the joint recommendation for this party and the indictment will be so endorsed.

MR. LOW: Thank you, my Lady. The prohibition order will go as before?

THE COURT: Yes.

MR. GOLDMAN: My Lady, we would ask for the same time to pay as the other two accused.

THE COURT: The undertaking, Mr. Low?

MR. LOW: That's fine, my Lady, I'll give that undertaking, 90 days.

THE COURT: Thank you.

MR. GOLDMAN: Thank you, my Lady.

MR. LOW: The next matter is Eisai Co.

THE REGISTRAR: The Court calls File T-1667-99, *Her Majesty the Queen v. Eisai Co. Ltd.*. For applicant, Mr. D. Martin Low, Q.C.; for the respondent, Ms. Katherine Kay.

MS. KAY: My Lady, if I can just check the indictment, I think we can save a bit of time.

THE COURT: Yes.

MS. KAY: We can treat it as having been read if that's satisfactory to your Ladyship.

THE COURT: Thank you, Ms. Kay. And the plea?

MS. KAY: Guilty.

THE COURT: Thank you. The indictment will be endorsed with the guilty plea and conviction.

MR. LOW: Thank you, my Lady.

Submissions by Mr. Low:

MR. LOW: With respect to sentence, my Lady, Eisai was at the end of a spoke in what is described in some of the vernacular as a hub and spoke conspiracy. The company was brought into the conspiracy as it relates to vitamin E, the only product which Eisai makes in which it cooperated with other parties, and it was brought in bilateral contacts with representatives of Roche who were acting as emissaries on behalf of itself, its co-conspirators, BASF and Rhone-Poulenc. The European parties had entered into an agreement and by the beginning of 1991, they realized that the participation of Eisai was essential if it was to be an effective agreement. Eisai has admitted that it entered into the agreement, that it participated in setting the quotas for sales of vitamin E, and in return was allocated a specific proportion of the world market.

128 It is not accepted that Eisai specifically agreed to price increases, though on the basis of our information, it appears that Eisai more or less followed along with price increases which were announced by others but that is not to say they necessarily could be shown to have been directly participating in the agreements on individual prices.

129 Once again, Eisai is a foreign corporation with no presence or assets in this jurisdiction. It sells its material in Canada through a distributor and it too has voluntarily attorned to the jurisdiction or the court for the purpose of the plea. It chose to offer its cooperation and to plead guilty after a sufficient body of evidence had been amassed to warrant the laying of charges against it.

130 By the time Eisai came forward, it was really unable to provide any cooperation that would be of particular value to the investigation, although it has once again provided complete cooperation with the investigation. I've outlined the circumstances of the product and the conspiracy. The basis for the offence is set out in the agreed statement of facts and the Crown contends that the offence was clearly complete in its application to Canada and Eisai did participate and thereafter sold its product.

131 There are no aggravating factors that apply to Eisai. It is clearly culpable of an enormously serious offence that involved one dimension of a massive conspiracy involving other products. But the Crown submits that in a circumstance like this where Eisai did not come forward and had to be approached, the appropriate fine would be a fine of \$2-million on the indictment. That involves a penalty at what I call the rule of thumb standard. This is not a mathematical formula as other courts have observed but we need a sentence that recognizes deterrence and that supports the interest of the Commissioner and the Crown in having parties come forward at the earliest possible date to cooperate with the authorities.

132 The rule of thumb is that where a serious offence has been committed under s.45, that notionally a fine in the order of about 20 per cent will take away any prospect of there having been a profit in this country. Once again, that's purely notional. I understand that. But that is the

standard which I've advanced in a dozen or so of these cases over the last four or five years and judges of this court have had no difficulty with that proposition.

133 And so, my Lady, briefly, we would propose that the sentence that will properly deter is a fine at a slightly higher level in terms of volume of commerce but it will be a fine much lower in overall magnitude of \$2-million.

134 Thank you, my Lady.

THE COURT: Thank you.

MS. KAY : Thank you, my Lady.

Submissions by Ms. Kay:

135

MS. KAY: To the extent that my friend has spoken of facts that are not in the agreed statement of facts, you'll understand that my client hasn't agreed with them.

136 Having said that, we have a joint submission on sentencing and our submission is that the penalty proposed is appropriate. Please allow me to express on behalf of the company its remorse for having committed the offence and restate the nature of their involvement as Mr. Goldman has inferred which is they were latecomers and they were deemed essential but they were brought along as opposed to having been an instigator.

137 There are issues about that and clearly jurisdictional issues, which as my friend said with respect to the other defendants, expensive and lengthy litigation regarding those issues has been avoided by their decision to attorn to this jurisdiction for the purposes of this proceeding.

138 And they are also - my friend hasn't mentioned it but as the others will, it is proposing to have a prohibition order entered against it which brings home the severity of this and the ongoing need for compliance.

139 So for all these reasons, I agree with what my friend is submitting with respect to penalty.

THE COURT: Thank you. Anything further, Mr. Low?

MR. LOW: Nothing, my Lady. Thank you.

Decision of the Court:

140

THE COURT: In this case I again agree with the joint submissions and I will endorse the indictment with a fine of \$2-million.

MR. LOW: Thank you, my Lady. And the prohibition order?

THE COURT: Prohibition order will go.

MR. LOW: Thank you very much.

MS. KAY: And my friend's generosity as to time will extend?

MR. LOW: My Lady, I've obviously out negotiated myself in this matter. The Queen could use the money as quickly as it could be brought in. I would make that offer to everyone. But if there are difficulties in making payment before ninety days, I'm prepared in the circumstance of this case to give an undertaking not to try to levy execution against this nonresident corporation for that period.

THE COURT: All right.

MS. KAY: Thank you, my Lady.

MR. LOW: My Lady, we're almost there. This is the next case, the matter of Queen and Daiichi Pharmaceutical Co. Ltd.

THE REGISTRAR: The Court calls File T-1668-99, the *Competition Act v. Daiichi Pharmaceutical Co. Ltd.*, For the applicant, Mr. D. Martin Low, Q.C.; for the respondent, Mr. Calvin Goldman, Q.C., and Mr. Mark Katz.

THE COURT: Mr. Goldman, on the indictment?

MR. GOLDMAN: Yes, my Lady. May I just read it, please. Thank you.

THE COURT: Do you waive the reading, Mr. Goldman?

MR. GOLDMAN: Yes, I do, my Lady?

THE COURT: And the plea?

MR. GOLDMAN: On behalf of the accused corporation, I'm authorized to plead guilty to the two offences stated in the indictment presented to the Court today.

THE COURT: Thank you. The indictment will be so endorsed.

Mr. Low?

MR. LOW: Thank you, my Lady.

Submissions by Mr. Low:

141

MR. LOW: Daiichi is a Japanese corporation again which has no presence or assets here. It sells its products through a trading house, I believe Sumitomo Canada. And between 1991 and 1998, a fairly lengthy period, Daiichi participated in a conspiracy to allocate markets and fix prices for both vitamin B5 (Calpan) and vitamin B6. The period in relation to vitamin B6 is between 1991 and sometime in the last half of 1994.

142 I've indicated previously that vitamin B5 (Calpan) is an important ingredient for cattle feed, valuable for healthy hooves and assists in metabolism and it really is of considerable significance in the agri-business sector.

143 Vitamin B6 once again is an important vitamin. The participants in the conspiracy on B5 were Roche and BASF, who were before the Court and have taken their responsibility in this matter. With respect to vitamin B6, the co-conspirators were Roche and another Japanese firm, Takeda.

144 For both of these products, Daiichi and its co-conspirators supplied the majority of the world market, and on the information of the Commissioner at least, virtually the totality of the Canadian market.

145 Now, in terms of the volume of sales of these products, Calpan or B5 was substantially greater than vitamin B6 in terms of Daiichi's sales. The total volume of commerce for both of these products was in the range of about \$12-million.

146 Once again, there are no particularly aggravating circumstances disclosed in Daiichi's role. Certainly it was not the instigator or initiator of the offence but it was a very active participant in these two conspiracies.

147 In mitigation, we have once again a situation where a company was not prepared or did not come forward to cooperate at a time when it could have provided assistance to the investigators and therefore earn some credit that would have been applied to mitigation of the sentence. On the other hand, Daiichi again could have stayed offshore and it could have caused the prosecution fairly considerable cost, delay and difficulty had it chosen to do so. Instead we recognize that Daiichi has chosen the responsible course. It's accepted its guilt, voluntarily submitted to the jurisdiction of the court for this case, pleaded guilty and is prepared to join with us in recommending a fine that is significant in terms of the volume of its sales.

148 We've agreed with counsel for Daiichi that, having regard to all of the circumstances, its role, its participation, its responsibilities for the ongoing success of these conspiracies, that the appropriate fine would be a total of \$2.5-million.

149 Now, once again we have not broken down the precise amount of their actual sales in Canada on each of these products on the basis of specified import records. Your Ladyship will know that as a result of the decision of this court in a matter involving Glaxo that the Commissioner would have had to get an order from the Court under s.11 of the *Competition Act* in order to obtain the precise verifiable information on how much product had come in from Daiichi. And we were not prepared to open up the fact of this inquiry even to that extent, and so we have an estimate of the amount of sales. But we do say that the fine that is proposed in total is proportional with the fines that have been imposed in similar cases, including the fine that has just been imposed on Eisai, where aggravating and mitigating circumstances are in relative balance.

150 Once again it's the rule of thumb approach to taking the profit away of a fine that's somewhere in the order of about 20 per cent. In the circumstances, we would say that an appropriate fine on Count 1, relating to vitamin B5, would be a fine of \$2.4-million.

151 On Count 2, we would ask for the imposition of a fine of \$100,000.

152 Those are my submissions, my Lady, unless you have some questions.

THE COURT: Thank you.

Mr. Goldman?

MR. GOLDMAN: Thank you, my Lady.

Submissions by Mr. Goldman:

153

MR. GOLDMAN: Again by way of joint submission, I fully support what my friend has stated to the Court today.

154 Daiichi also submits that a total fine of \$2.5-million is fair and appropriate in the circumstances at hand for both counts. That is approximately 20 per cent of the effect of commerce and that's at the higher end of ranges in recent years, not the highest but certainly not at the low end.

155 In these circumstances Daiichi certainly regrets, it sincerely regrets its involvement in the matter. All such activities I can advise the Court have been terminated and it is taking steps to ensure that there will be compliance in full with Canadian competition law and it is agreed to be bound by the order of prohibition that is before the Court today.

156 Other mitigating factors include the fact that Daiichi did voluntarily come forward to the Bureau. Again it's a corporation that is not in this jurisdiction. It has made full, frank and truthful

disclosure to the Bureau with respect to matters that are before the Court today and other matters that the Bureau has asked of it.

157 As the Attorney General has acknowledged in paragraph 14 of the agreed statement of facts, the cooperation has - I quote:

...made a significant contribution to the investigation of other individuals and corporations for violations of the Competition Act in relation to bulk vitamins.

158 That's at paragraph 14. So Daiichi is providing continuing cooperation to the Government of Canada, again on a voluntarily basis. It has by submitting to the jurisdiction of the court today, as Mr. Low has acknowledged, in this case has saved the Government of Canada considerable costs in relation to this matter.

159 Finally, Daiichi was not the ringleader, was not the principal beneficiary, has no prior convictions and its involvement in the overall perspective of today's proceedings, my Lady, must be recognized as being limited to only vitamins B5 and B6.

160 Those are my submissions in support of the submission of \$2.5-million before you.

THE COURT: Thank you. Anything further, Mr. Low?

MR. LOW: No, thank you, my Lady.

Decision of the Court:

161

THE COURT: Again I'm in agreement with the joint submission and I will endorse the indictment with the fine suggested. And prohibition order, same one?

MR. LOW: Prohibition order, is it the same terms, my Lady?

THE COURT: Yes.

MR. GOLDMAN: It's agreed to, my Lady.

THE COURT: It will go.

MR. GOLDMAN: Thank you. [missing text] ability to present these cases today is the result of some very, very demanding work by some very talented people.

THE COURT: Thank you, Mr. Low. I'm sure that their task is rather a complex one as we can see just from the surface that we get to look at here. Thank you.

Order accordingly.

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Please see in particular paras.
40 and 144

1985 CarswellAlta 316
Supreme Court of Canada

R. v. Big M Drug Mart Ltd.

1985 CarswellAlta 316, 1985 CarswellAlta 609, [1985] 1 S.C.R. 295, [1985] 3 W.W.R.
481, [1985] A.W.L.D. 610, [1985] A.W.L.D. 635, [1985] A.W.L.D. 638, [1985]
S.C.J. No. 17, 13 C.R.R. 64, 14 W.C.B. 157, 18 D.L.R. (4th) 321, 18 C.C.C. (3d)
385, 37 Alta. L.R. (2d) 97, 58 N.R. 81, 60 A.R. 161, 85 C.L.L.C. 14,023, J.E. 85-405

R. v. BIG M DRUG MART LTD.

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

As he then was

Heard: March 6 and 7, 1984

Judgment: April 24, 1985

Docket: No. 18125

Counsel: *W. Henkel, Q.C.* , and *I. Freund* , for appellant.

J. J. Boyle and *W. S. Klym* , for respondent.

J. A. Isaac, Q.C. , and *V. L. Davies* , for intervener the Attorney General of Canada.

R. Speight , for intervener the Attorney General of New Brunswick.

J. C. MacPherson , for intervener the Attorney General of Saskatchewan.

Subject: Criminal; Constitutional; Civil Practice and Procedure; Public

Headnote

Constitutional Law --- Charter of Rights and Freedoms — Scope of application — Who having rights under Charter — Corporations

Constitutional Law --- Procedure in constitutional challenges — Jurisdiction of courts — Under Charter of Rights and Freedoms

Sunday Observance and Public Holidays --- Federal legislation

Sunday Observance and Public Holidays --- Effect of Charter of Rights and Freedoms — Freedom of religion

Lord's Day Act unconstitutional.

After police witnessed several sales transactions at the accused store on a Sunday, the accused was charged with unlawfully carrying on the sale of goods contrary to the Lord's Day Act. An acquittal was granted at trial for two reasons: 1) the Act infringed the guarantee of religious freedom in the [Canadian Charter of Rights and Freedoms](#), and 2) it was no longer justified under the federal criminal law power in s. 91(27) of the Constitution Act, 1982. In dismissing a Crown appeal, the court held that the Act was valid criminal law legislation but agreed that it violated [the Charter](#). The Crown brought a further appeal.

Held:

Appeal dismissed.

Per Dickson J. (Beetz, McIntyre, Chouinard and Lamer JJ. concurring):

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. The accused therefore had standing to challenge the Lord's Day Act without first establishing that a corporation can enjoy freedom of religion. The nature of the law, not the status of the accused, was at issue. The accused was not challenging the Act under s. 24(1) of the Charter on the basis that only its religious rights were infringed, nor voluntarily as an interested person pursuant to s. 52. Further, Provincial Courts have always had the power to declare legislation invalid in criminal cases since no one may be convicted of an offence under an invalid statute. The Provincial Judge in the first instance was not called upon to make either a prerogative declaration or a s. 24(1) order. It was accordingly within his jurisdiction to prevent a violation of a fundamental principle of the Charter by dismissing the charges.

Both the purpose and effect of impugned legislation are relevant in determining constitutionality. If a statute has a purpose which violates the Charter, it must be held invalid regardless of its actual effect. Effect need only be considered to defeat legislation with a valid purpose; effect can never be relied upon to save legislation with an invalid purpose. A finding that the Lord's Day Act has a secular purpose is simply not possible. Its religious purpose in compelling sabbatical observance has been long established and consistently maintained and this purpose offends religious freedom. It is unnecessary to consider the actual effects of Sunday closing upon religious freedom. Even if the effects were found inoffensive, this could not save legislation with a purpose violating the Charter's guarantees. It is also not possible to conclude that the purpose of the Act has shifted with changing social conditions. Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable. While the effect of the Lord's Day Act may be more secular today than previously, this cannot justify a conclusion that its purpose has also changed.

To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. Compelling universal observance of the day of rest preferred by one religion is also not consistent with the preservation and enhancement of the multicultural heritage of Canadians secured by s. 27 of the Charter.

Although the Charter does not include a clause similar to the American Bill of Rights prohibiting laws respecting an establishment of religion, it does not follow that the religious freedom protected by the Charter extends only to the "free exercise" of religion. As well, the meaning of "freedom of conscience and religion" in the Charter does not have the same meaning recognized by the Canadian Bill of Rights since the Charter is not limited to guaranteeing rights which were enjoyed by Canadians prior to its proclamation. The meaning of religious freedom should be understood in light of the interests it was meant to protect and as such should be given a generous interpretation

aimed at fulfilling the purpose of the guarantee, rather than a legalistic interpretation. Accordingly, freedom of conscience and religion must at least mean that government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

The Lord's Day Act, especially s. 4, infringes the freedom of conscience and religion guaranteed in [s. 2\(1\) of the Charter](#). This infringement cannot be justified on the basis of s. 1 as a reasonable limit, demonstrably justifiable in a free and democratic society. There is secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States. However, this was not the motivation for the Act, and it cannot offend [the Charter](#) by compelling observance of a Christian religious duty, yet still be a reasonable limit because it achieves the secular objective the legislators did not primarily intend. Parliament cannot rely on an ultra vires purpose under [s. 1 of the Charter](#).

The Lord's Day Act is valid legislation in relation to the criminal law because, at risk of penalty, it compels the observance of a religious obligation, intending to safeguard public morality. Were its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under s. 92(13), property and civil rights in the province, falling within provincial competence instead of federal.

Per Wilson J. (concurring in the result):

There is a distinction in the analytic approach to a division of powers case under the [Constitution Act, 1982](#), and a Charter case. The analytic focal point in a division of powers case is the pith and substance or primary purpose of the legislation. The effect of an impugned statute is important only insofar as it serves to reflect the underlying statutory purpose. The appropriate analytic starting point for a Charter case, however, is the statute's effect rather than its purpose.

The Lord's Day Act infringes upon the right to religious freedom guaranteed by [the Charter](#), not because the statute was enacted for this purpose, but because it has this effect by compelling Sunday observance.

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Words and phrases considered:

FREE SOCIETY

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person.

FREEDOM

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

FREEDOM OF CONSCIENCE AND RELIGION

... whatever else freedom of conscience and religion [as found in s. 2(a) of the *Charter*] may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

I conclude therefore that a definition of freedom of conscience and religion incorporating freedom from compulsory religious observance is not only in accord with the purposes and traditions underlying the *Charter*, it is also in line with the definition of that concept as found in the Canadian jurisprudence.

FREEDOM OF RELIGION

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

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

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

Appeal from judgment of Alberta Court of Appeal, 28 Alta. L.R. (2d) 289, [1984] 1 W.W.R. 625, 9 C.C.C. (3d) 310, 5 D.L.R. (4th) 121, 7 C.R.R. 93, 49 A.R. 194, dismissing appeal from judgment of Stevenson Prov. J., 25 Alta. L.R. (2d) 195, [1983] 4 W.W.R. 54, 5 C.R.R. 281.

The judgment of the court was delivered by Dickson J. (Beetz, McIntyre, Chouinard and Lamer JJ. concurring):

1 Big M Drug Mart Ltd. was charged with unlawfully carrying on the sale of goods, on Sunday, 30th May 1982, in the city of Calgary, Alberta, contrary to the [Lord's Day Act](#), R.S.C. 1970, c. L-13.

2 Big M has challenged the constitutionality of the [Lord's Day Act](#), both in terms of the division of powers and the [Canadian Charter of Rights and Freedoms](#). Such challenge places in issue before this court, for the first time, one of the fundamental freedoms protected by the [Charter](#), the guarantee of "freedom of conscience and religion" entrenched in [s. 2](#).

3 The constitutional validity of Sunday observance legislation has in the past been tested largely through the division of powers provided in [ss. 91 and 92 of the Constitution Act, 1867](#). Freedom of religion has been seen to be a matter falling within federal legislative competence. Today, following the advent of the [Constitution Act, 1982](#), we must address squarely the fundamental issues raised by individual rights and freedoms enshrined in the [Charter](#), as well as those concerned with legislative powers.

I

The Facts and the Legislation

4 On Sunday, 30th May 1982, police officers of the city of Calgary attended at premises owned by Big M and open to the public. They witnessed several transactions including the sale of groceries, plastic cups and a bicycle lock. Big M was charged with a violation of [s. 4 of the Lord's Day Act](#).

(A) The Lord's Day Act

5 An understanding of the scheme of [that Act](#) and its basic purpose and effect is integral to any analysis of its constitutional validity. [Section 2](#) defines, inter alia, the Lord's Day:

"Lord's Day" means the period of time that begins at midnight on Saturday night and ends at midnight on the following night ...

Section 4 contains the basic prohibition against any work or commercial activity upon the Lord's Day:

4. It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law in force on or after the 1st day of March 1907, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business or labour.

6 Section 5 provides that any worker, required to work by an employer operating on Sunday in conformity with the Act, be given a substitute day of rest; s. 6 prohibits any games or performances where an admission fee is charged; s. 7 prohibits any transportation operated for pleasure where a fee is charged; s. 8 prohibits any advertisement of anything prohibited by the Act; s. 9 prohibits any shooting of firearms; s. 10 prohibits any sale or distribution of a foreign newspaper.

7 It is important to note that any person may be exempted from the operation of ss. 4, 6, and 7 by provincial legislation or municipal charter. The following exemptions are also contained in the legislation: s. 3 — the railways may be operated for passenger traffic; s. 11 — any person may do any work of necessity or mercy which covers a broad range of activities listed in paras. (a) to (x).

8 The Act makes it an offence punishable on summary conviction for: any person to violate the Act (s. 12); any employer to direct any violation of the Act (s. 13); any corporation to authorize, direct or permit any violation of the Act (s. 14).

9 Section 16 requires the Attorney General's fiat before any prosecution may be commenced for a violation of the Act. The Attorney General of Alberta granted his fiat before commencement of proceedings against Big M.

(B) The Charter

10 Section 2 of the Charter contains the basic guarantee of religious freedom:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion ...

11 Various provisions of the Charter must also be considered when analyzing the nature of the guarantee contained in s. 2. The preamble states:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law ...

12 Section 27 makes the multicultural heritage of Canada an interpretive guideline for the Charter:

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

13 Section 29 preserves the rights of denominational schools guaranteed under s. 93 of the Constitution Act, 1867:

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

14 The following provisions of the Charter of general application are relevant as well:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances ...

32(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and ...

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

II

Alberta Courts

(A) Provincial Court

15 At trial, in a decision reported at 25 Alta. L.R. (2d) 195, [1983] 4 W.W.R. 54, 5 C.R.R. 281, Stevenson Prov. J. found on the evidence that Big M had offered items for sale on a Sunday contrary to s. 4 of the Lord's Day Act and that such items did not fall within the exceptions set out in s. 11 of the Act. Big M was nonetheless acquitted on two grounds: (i) the Lord's Day Act could no longer be justified on the basis of Parliament's criminal law power under s. 91(27) of

the [Constitution Act, 1867](#), and (ii) the [Lord's Day Act](#) infringed freedom of religion guaranteed in [s. 2\(a\)](#) of the [Charter](#).

16 Stevenson Prov. J. summarized his reasons for concluding the [Lord's Day Act](#) no longer fell within federal competence at pp. 71-72:

1. In Canada, following Confederation in 1867, it was generally believed that legislative authority over Sunday observance was committed to the provincial legislatures under [s. 92](#) of the B.N.A. Act;
2. This situation was changed by the [Hamilton Street Ry. reference](#) [\[\[1903\] A.C. 524\]](#) in 1902, when the Judicial Committee held that Sunday observance legislation was "criminal law in its widest sense"
3. Courts in Canada have "religiously" followed the [Hamilton Street Ry.](#) ratio to the present day, with the exception of Riley J. in the 1972 Alberta [Boardwalk Merchandise Mart Ltd. case](#) [\[\[1972\] 6 W.W.R. 1\]](#);
4. The scope of the definition of the criminal law power as set out in the [Hamilton Street Ry.](#) case has been substantially narrowed in Canada;
5. There is serious doubt that Christianity was ever part of the common law of the realm;
6. Adoption of this precept in subsequent decisions (to the [Hamilton Street Ry.](#) case) may, as a result, bring their conclusions into question;
7. Even if Christianity was at one time part of the common law of the realm, its influence on the criminal law has been virtually eliminated by changed social conditions and attitudes, and by statutes; and
8. Without the moral grounds that the common law may have provided, there is no public purpose, nor is there any evil or menace to suppress. Therefore, there can no longer be any valid reason for the [Lord's Day Act](#) to be upheld as valid criminal law. As Riley J. held in [Boardwalk Merchandise Mart Ltd.](#), *supra*, at p. 20: "It is deprived of its constitutional underpinnings".

17 The judgment upon which Stevenson Prov. J. relied, that of Riley J. in [Boardwalk Merchandise Mart Ltd. v. R.](#), [\[1972\] 6 W.W.R. 1](#), [9 C.C.C. \(2d\) 548](#), [31 D.L.R. \(3d\) 162](#), was reversed by the Alberta Court of Appeal ([\[1973\] 1 W.W.R. 190](#), [10 C.C.C. \(2d\) 50](#), [31 D.L.R. \(3d\) 452](#)), without calling upon counsel for the appellant. Leave to appeal to the Supreme Court of Canada was denied [\[1972\] S.C.R. ix](#).

18 The second main point taken by Stevenson Prov. J. was that [s. 4 of the Lord's Day Act](#) represented an infringement of "freedom of religion" guaranteed under [the Charter](#) which must be

struck down. With respect to *Robertson v. R.*, [1963] S.C.R. 651, 41 C.R. 392, [1964] 1 C.C.C. 1, 41 D.L.R. (2d) 485, the judge made several comments (at p. 75):

The first is that the Canadian Bill of Rights, R.S.C. 1970, App. III, is not an *entrenched* Bill of Rights and therefore does not necessarily attract the same broad and liberal interpretation principles. Secondly, the Bill of Rights is couched in much narrower terms than is [the Charter](#). Finally, implicitly, at least, the court in the *Robertson* case acknowledged that the "purpose" of the [Lord's Day Act](#) *could* amount to an "abrogation, abridgement or infringement of religious freedom". That was a unique case in that the "purpose" of the legislation was given little consideration by the courts.

Ritchie J., speaking for the majority in the *Robertson* case said [at p. 657] the effect of [s. 4 of the Lord's Day Act](#) was "purely secular and financial" on non-Christians. He does not mention that there are Christians who do not observe Sunday as a day of worship, such as Seventh Day Adventists and others. [The italics are Stevenson Prov. J.'s.]

Stevenson Prov. J. adverted to the preamble of [the Charter](#) (at p. 76):

A purpose of the [Lord's Day Act](#) is to recognize Sunday as the day of rest for certain Christian denominations. If one now turns to the preamble of [the Charter](#) we see that, "Canada is founded upon principles that recognize the supremacy of God". Bearing in mind that the preamble may not carry the force of law, it still shows that [the Charter](#) does not recognize any particular denomination, and (noticeable by its absence) it does not refer to a *Christian* God. The preamble surely is intended to reflect the multicultural and multi-denominational make-up of Canada. If, then, a law which in any way adversely affects the religious freedoms of Canadians is in conflict with [the Charter](#), it must be struck down in accordance with [s. 52 of the Charter](#).

19 Stevenson Prov. J. concluded (at p. 78) that the appropriate remedies were:

... a dismissal of charges against the corporate accused under [s. 24\(1\) of the Charter](#) and a declaration pursuant to [s. 52\(1\) of the Constitution Act, 1982](#), that [s. 4 of the Lord's Day Act](#) is of no force or effect, as being inconsistent with [the Charter](#).

(B) The Alberta Court of Appeal

20 The Attorney General of Alberta appealed the acquittal by stated case pursuant to [s. 762 of the Criminal Code](#). The Alberta Court of Appeal dismissed the appeal: now reported at 28 Alta. L.R. (2d) 289, [1984] 1 W.W.R. 625, 9 C.C.C. (3d) 310, 5 D.L.R. (4th) 121, 7 C.R.R. 93, 49 A.R. 194. All five judges held the [Lord's Day Act](#) to be valid federal legislation under the criminal law power. On [the Charter](#), the court divided. The two judgments delivered reflect, with clarity, the

conflicting values, concerns and interests raised in this litigation. It is difficult to do justice to the judgments in brief compass.

21 Laycraft J.A., Harradence and Stevenson JJ.A. concurring, delivered the majority judgment. Laycraft J.A. began with a consideration of the [Lord's Day Act](#) and its characterization. For division of powers purposes he found it to be intra vires by virtue of Parliament's criminal law powers. In reference to the "seventh reason" of Stevenson Prov. J. respecting a shifting purpose, Laycraft J.A. said (pp. 632-33):

In my view, however, [the Charter](#) did not intend to effect a redistribution of legislative powers in Canada. Indeed, [s. 31 of the Charter](#) expressly so provides: "Nothing in this charter extends the legislative powers of any body or authority". Moreover, [s. 33](#) provides that Parliament or a legislature may override [the Charter](#). Thus if a legislative power had been transferred by [the Charter](#) either Parliament or a provincial legislature could retransfer it by its unilateral action. That would be an odd result of enactment of [the Charter](#). In my view the [Charter of Rights](#) did not remove Sunday observance legislation from the field of criminal law ...

Even assuming for the purpose of argument that changing public perceptions or attitudes could render ultra vires a statute found repeatedly by the courts over three quarters of a century to be within federal powers, nothing demonstrates the profound change in public attitudes in the last six years which would be required to warrant the conclusion reached. In my opinion the [Lord's Day Act](#) is valid federal legislation under the criminal law power specified in [s. 91\(27\) of the Constitution Act, 1867](#).

22 In the present case, all five judges in the Alberta Court of Appeal rejected the division of powers argument. Even the respondent, in its submissions before this court, did not seek to support the trial judge's conclusions on this point, but rather acceded to the Crown's submissions that the [Lord's Day Act](#) was within the federal Parliament's legislative jurisdiction pursuant to the criminal law power under [s. 91\(27\) of the Constitution Act, 1867](#).

23 Having concluded that the [Lord's Day Act](#) is a statute with a religious purpose, Laycraft J.A. went on to consider whether the Act infringed the fundamental freedom of conscience and religion. He concluded that it did. He contrasted the majority judgment of this court in *Robertson*, supra, with the view expressed by Brennan J. in the Supreme Court of the United States in a case decided in the same year: *Sherbert v. Verner*, [374 U.S. 398](#), [10 L. Ed. 2d 965](#), [83 S. Ct. 1790](#) (1963).

24 In that case the appellant held religious beliefs which required her to observe the Sabbath on Saturday. She lost her job in consequence of her refusal to work on Saturday and was subsequently denied benefits under state unemployment legislation on the ground that she was "not available" to work. Brennan J. stated, at p. 404, in holding that the denial of benefits infringed the First Amendment to [the Constitution](#):

The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

25 Laycraft J.A. expressed himself as being in agreement with the dissenting judgment of Cartwright J. in *Robertson*. He concluded that *Robertson* did not preclude a finding that the [Lord's Day Act](#) infringed freedom of religion and conscience under [the Charter](#).

26 The first difference between the Bill and [the Charter](#) was, in his view, that the Bill is declaratory. He noted (at p. 645) that the declaratory language, "It is hereby recognized and declared ..." was the foundation of this court's decision in *Robertson*.

Thus the declaratory language of s. 1 of the Canadian Bill of Rights had a double effect; the right itself is defined by the state of the law in 1960 and the protection afforded is limited by the same definition.

The most fundamental difference between the Charter and the Bill, in the opinion of Laycraft J.A., was the enhanced status of [the Charter](#) as part of "the supreme law of Canada" (s. 52(1)); it was not merely a declaration of existing law or a tool for use in statutory construction. The status of [the Charter](#) as well as the declaratory language in which the Bill was expressed required the conclusion that *Robertson* did not apply to [Charter](#) cases.

27 Belzil J.A., McGillivray C.J.A. concurring, began by noting (at p. 650) the "startling departure from settled authority" of the judge of first instance, in finding that:

... had these previous decisions been considered in the light of today's social conditions, they would not have been the same and are therefore not binding on him.

Belzil J.A. referred to this (at p. 650) as:

... a novel but erroneous proposition in law. The vires of legislation is determined as at the date of the passing of the legislation, and does not thereafter fluctuate with social change.

Belzil J.A. referred inter alia to art. 18 of the Universal Declaration of Human Rights, G.A. Res. 217A, 3 U.N. GAOR., Pt. I, U.N. Doc. A-810 (1948), adopted by the General Assembly of the United Nations on 10th December 1948; to art. 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November 1950, 213 U.N.T.S. 221, signed on 4th November 1950, coming into force on 3rd September 1953; and to art. 18 of the International Covenant on Civil and Political Rights, G.A. Res. 2200 A, 21 U.N. GAOR., Supp. 16, U.N. Doc. A-6316 (1966), adopted by the General Assembly on 16th December 1966 and which entered into

force on 23rd March 1976. Canada adopted the covenant 19th May 1976 and it came into force for Canada on 19th August 1976.

28 Belzil J.A. then said (at p. 655):

Thus it can be seen that the [Canadian Charter](#) was not conceived and born in isolation. [I agree.] It is part of the universal human rights movement. It guarantees that the power of government in Canada shall not be used to abridge or abrogate the fundamental rights to which every Canadian, as well as every other human being in the world, is entitled by birth.

29 In the view of Belzil J.A. the effect of the [Lord's Day Act](#) upon religious freedom had been effectively and authoritatively settled in *Robertson*, supra, and the distinction made in the nature of the right to freedom of religion secured by the Canadian Bill of Rights is not valid. The judge said (at p. 659):

[The Charter](#) does not purport to change the meaning of words and in particular the meaning of "freedom of conscience and religion" as traditionally and universally understood and earlier defined as the birthright of every human being. The "freedom of religion" declared and secured by the Canadian Bill of Rights in 1960 and considered by the Supreme Court of Canada in *Robertson* has the same meaning as the "freedom of conscience and religion" guaranteed by the [Charter of Rights](#) in 1981. The effect of the [Lord's Day Act](#) upon that same freedom of conscience and religion has been decided in *Robertson*. While it may be technically true that this court is not bound in this case by *Robertson* because the two cases deal with different documents, yet the interpretation by the Supreme Court of Canada of the same provision of the [Lord's Day Act](#) and the same fundamental right of freedom of conscience and religion is compelling.

30 Later, alluding to the dissenting judgment of Cartwright J. in *Robertson* he said (at p. 659):

... it is inaccurate to say that the [Lord's Day Act](#) compels the observance of Sunday *as a religious holy day* by all the inhabitants of Canada. The Lord's Day Act does no such thing; it compels neither Christian nor non-Christian to observe Sunday *as a religious holy day*. A distinction must be made between mere observance of Sunday as a day of rest by observing the prohibitions in the Act and the observance of Sunday *as a religious holy day*. While the legislation was undoubtedly religiously motivated to conform to the desires of the large Christian majority of the day its purpose was not compulsion or interference with the religions of others.

The judge continued (at p. 660):

Nor does the [Lord's Day Act](#) have the *effect* of compelling observance of Sunday *as a religious holy day*. The compulsion to attend church services found in predecessor English statutes has

been removed. The sale of goods or the performance of labour are, per se, void of religious significance, and so is the abstention from these activities.

31 Belzil J.A. said it was realistic to recognize that the Canadian nation is part of "Western" or "European" civilization, moulded in and impressed with Christian values and traditions, and that these remain a strong constituent element in the basic fabric of our society. The judge quoted a passage from the Oxford Companion of Law expatiating on the extent of the influence of Christianity on our legal and social systems and then appears the cri de coeur central to the judgment (pp. 663-64):

I do not believe that the political sponsors of [the Charter](#) intended to confer upon the courts the task of stripping away all vestiges of those values and traditions, and the courts should be most loathe to assume that role. With the [Lord's Day Act](#) eliminated, will not all reference in the statutes to Christmas, Easter, or Thanksgiving be next? What of the use of the Gregorian Calendar? Such interpretation would make of [the Charter](#) an instrument for the repression of the majority at the instance of every dissident and result in an amorphous, rootless and godless nation contrary to the recognition of the Supremacy of God declared in the preamble. The "living tree" will wither if planted in sterilized soil.

Two further passages should be quoted from the judgment (at p. 664):

As much as it may be desirable and fair that all religious preferences be treated equally, there are times when that is not possible. The [Lord's Day Act](#) is an example. Civil authority, while bowing to pressure from religious groups, recognized the moral value of a day of rest. That it should have selected the day of the week regarded as holy by the great majority of Canadians is not inconsistent with the basic principles of democracy. That is political reality. Majority rule is restricted by [the Charter](#) only when it abridges or abrogates the guaranteed rights of others.

And (at p. 665):

[What the Canadian Charter](#), the United Nations Covenant and the European Convention have in common is a guarantee that no person shall be subjected to oppression or repression on religious grounds, or be compelled to conform to religious cult, doctrine or belief. The [Lord's Day Act](#) does not offend that guarantee.

I hope that I have fairly presented the position, strongly held and expressed, of the dissenting justices.

III

The Constitutional Questions

32 The constitutional questions stated by this court are:

1. Does the *Lord's Day Act*, R.S.C. 1970, c. L-13, and especially s. 4 thereof infringe upon the freedom of conscience and religion guaranteed in s. 2(a) of the *Canadian Charter of Rights and Freedoms*?
2. Is the *Lord's Day Act*, R.S.C. 1970, c. L-13, and especially s. 4 thereof justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Is the *Lord's Day Act*, R.S.C. 1970, c. L-13, and especially s. 4 thereof enacted pursuant to the criminal law power under s. 91(27) of the *Constitution Act, 1867*?

33 The Attorney General of Canada and the Attorneys General of New Brunswick and of Saskatchewan have intervened in support of the appellant Attorney General of Alberta.

IV

Standing and Jurisdiction

34 As a preliminary issue the Attorney General for Alberta challenges the standing of Big M to raise the question of a possible infringement of the guarantee of freedom of conscience and religion and the jurisdiction of the Provincial Court to declare the *Lord's Day Act* inoperative.

35 As best I understand the first submission, the assertion is that Big M is not entitled to any relief pursuant to s. 24(1) of the *Charter*. It is urged that freedom of religion is a personal freedom and that a corporation, being a statutory creation, cannot be said to have a conscience or hold a religious belief. It cannot, therefore, be protected by s. 2(a) of the *Charter*, nor can its rights and freedoms have been infringed or denied under s. 24(1); Big M's application under that section must consequently fail.

36 The second preliminary submission of the Attorney General for Alberta is that the Provincial Judge lacked jurisdiction to make any form of declaration under s. 52 of the *Charter*. In oral argument the Attorney General did not press this point. In his factum, however, it was his submission that prior to the enactment of the *Constitution Act, 1982*, any tribunal was competent to find a statute ultra vires under s. 2 of the Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63), and s. 7(1) of the Statute of Westminster, 1931 (R.S.C. 1970, App. II, No. 26). These provisions have, however, been repealed and they have been replaced by s. 52(1) of the *Constitution Act*,

1982. The Attorney General submitted that only a court of superior jurisdiction has the prerogative powers to make a declaratory order under s. 52.

37 Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the Constitution Act, 1867, or with respect to the limits imposed on the legislatures by the Constitution Act, 1982.

38 Section 24(1) sets out a remedy for individuals (whether real persons or artificial ones such as corporations) whose rights under the Charter have been infringed. It is not, however, the only recourse in the face of unconstitutional legislation. Where, as here, the challenge is based on the unconstitutionality of the legislation, recourse to s. 24 is unnecessary and the particular effect on the challenging party is irrelevant.

39 Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfil the status requirements laid down by this court in the trilogy of "standing" cases (*Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1, 1 N.R. 225 ; *N.S. Bd. of Censors v. McNeil*, [1976] 2 S.C.R. 265, 32 C.R.N.S. 376, 55 D.L.R. (3d) 632, 12 N.S.R. (2d) 85, 5 N.R. 43 ; and *Min. of Justice of Can. v. Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97, 24 C.R. (3d) 352, 24 C.P.C. 62, 64 C.C.C. (2d) 97, 130 D.L.R. (3d) 588, 12 Sask. R. 420, 39 N.R. 331) but that was not the reason for its appearance in court.

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

41 Whether a corporation can enjoy or exercise freedom of religion is therefore irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion — if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An accused atheist would be equally entitled to resist a charge under the Act. The only way this question might be relevant would be if s. 2(a) were interpreted as limited to protecting only those persons who could prove a genuinely held religious belief. I can see no basis to so limit the breadth of s. 2(a) in this case.

42 The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the Charter, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone,

inconsistent with [s. 2\(a\) of the Charter](#) and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. As Laycraft J.A. observed in the Alberta Court of Appeal (at p. 636):

The task of the court is to see whether all or part of the [Lord's Day Act](#) is inconsistent with freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience.

Cartwright J., dissenting in *Robertson v. R.*, supra, though not in conflict with the majority of the court on this point, stated at p. 661:

It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican Church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

43 As the respondent submits, if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation which offends one's religious tenets.

44 In my view there can be no question that the respondent is entitled to challenge the validity of the [Lord's Day Act](#) on the basis that it violates [the Charter](#) guarantee of freedom of conscience and religion.

45 The second objection is to the jurisdiction of the Provincial Court regarding the exercise of a prerogative power to declare legislation invalid. It must also be rejected. There are two prevailing views as to the meaning of "court of competent jurisdiction" in [s. 24\(1\) of the Charter](#). On one view, the competent court in which to bring a constitutional challenge is the court with jurisdiction over the remedy sought: Gibson, "[Enforcement of the Canadian Charter of Rights and Freedoms](#)" in Tarnopolsky and Beaudoin (eds.), [The Canadian Charter of Rights and Freedoms: Commentary](#) (1982), at p. 500. In contrast is the view that the competent court is that which has jurisdiction over the subject matter being litigated: Hogg, *Canada Act, 1982, Annotated* (1982), at p. 65.

46 Advancing the first view, the Crown argues that Big M should not have been able to bring a s. 52 application in a Provincial Court because it does not have prerogative powers. Even under the Crown's interpretation of "court of competent jurisdiction" the majority of the Alberta Court of Appeal held that the Provincial Court has independent jurisdiction, aside from [the Charter](#), in the case at bar.

47 The appellant overlooks the fact that it has always been open to Provincial Courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute.

48 The respondent Big M was commanded by Her Majesty the Queen to face prosecution for a violation of an Act of Parliament. It came to court, not for the purpose of having the Act declared unconstitutional, but in order to secure a dismissal of the charges against it. The Provincial Judge was not called upon to make either a prerogative declaration or a s. 24(1) order. He simply was asked to prevent a violation of the fundamental principle of constitutional law embodied in s. 52(1) by dismissing the charges.

V

The Characterization of the Lord's Day Act

(A) *The Problem*

49 There are obviously two possible ways to characterize the purpose of Lord's Day legislation, the one religious, namely securing public observance of the Christian institution of the Sabbath, and the other secular, namely providing a uniform day of rest from labour. It is undoubtedly true that both elements may be present in any given enactment, indeed it is almost inevitable that they will be, considering that such laws combine a prohibition of ordinary employment for one day out of seven with a specification that this day shall be the Christian Sabbath — Sunday. In the Anglo-Canadian tradition this intertwining is to be seen as far back as early Saxon times in such laws as that promulgated by Ine, King of Wessex from 688-725:

If the theoman [slave] work on Sunday by his lord's command, let him be free; and let the lord pay thirty shillings as a fine. But if the theow work without his knowledge, let him suffer in his hide, or in hide-gild [money paid in lieu of corporal punishment]. But if a freeman work on that day without his lord's command, let him forfeit his freedom, or sixty shillings; and be a priest doubly liable.

50 The presence of both secular and religious elements in Sunday observance legislation was noted by Blackstone, Commentaries (1897 ed. Lewis), vol. IV, at p. 63:

[B]esides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their Maker.

51 Despite this inevitable intertwining, it is necessary to identify the "matter" in relation to which such legislation is enacted and thereby to decide within which of the heads of [s. 91](#) or [s. 92 of the Constitution Act, 1867](#), such legislation falls.

(B) The Historic Underpinnings

52 Historically, there seems little doubt that it was religious purpose which underlay the enactment of English Lord's Day legislation. From early times the moral exhortation found in the Fourth Commandment (Exodus 20: 8-11), "Remember the Sabbath day, to keep it holy", increasingly became a legislative imperative. The first major piece of legislation, the Sunday Fairs Act, 1448 (27 Hen. 6, c. 5), prefaced its prohibition of fairs and markets on Sunday with a recital of "abominable injuries and offences done to Almighty God, and to his Saints" because of bodily labour, deceitful bargaining, drunkenness and religious non-observance associated with fairs. Following the Reformation under Henry VIII, religious observance acquired an added political significance and a number of statutes aimed at securing religious conformity were promulgated, including the Act of Uniformity, 1552 (5 & 6 Edw. 6, c. 1), the Act for the Keeping of Holy-Days and Fasting-Days, 1552 (5 & 6 Edw. 6, c. 3), and the Act of Uniformity, 1558 (1 Eliz. 1, c. 2). All these Acts contained provisions making Sunday worship and observance compulsory obligations, as did the later Act against Sectaries, 1593 (35 Eliz. 1, c. 1), and Act against Papists, 1593 (35 Eliz. 1, c. 2), which, as their names suggest, were designed not only to enforce mandatory religious observance as provided for by the Church of England, but also to prohibit religious observance as practised by other Christian denominations.

53 Under Charles I the first modern Sunday observance statutes were enacted and their religious purpose is reflected in their titles, An Act for Punishing Divers Abuses Committed on the Lord's Day called Sunday, 1625 (1 Car. 1, c. 1), and An Act for the Further Reformation of Sundry Abuses Committed on the Lord's Day commonly called Sunday, 1627 (3 Car. 1, c. 2). During the Commonwealth or Interregnum period, the Puritan Parliament passed strict laws prohibiting

the profanation of the Lord's Day by any form of marketing, travel, worldly labour, sports or recourse to taverns, tobacco shops or restaurants. With the Restoration came An Act for the Better Observation of the Lord's Day commonly called Sunday, 1676 (26 Car. 2, c. 7), also known as the Sunday Observance Act. As its full title indicates, the primary object of this legislation, like that of its predecessors, was clearly religious rather than secular. It aimed at securing observance of the Lord's Day by prohibiting all persons from engaging on a Sunday in "any worldly labour or business or work of their ordinary calling" except "works of necessity or charity".

54 The Sunday Observance Act of 1677 served as a model for Canadian pre-Confederation legislation, especially An Act to prevent the Profanation of the Lord's Day, commonly called Sunday, 1845 (8 Vict., c. 45) (U.C.), which substantially re-enacted the English law with only minor alterations designed to suit it to the specific conditions and activities of Upper Canada. It was this statute, as re-enacted by the post-Confederation legislature of Ontario ([An Act to prevent the Profanation of the Lord's Day] [R.S.O. 1897, c. 246](#)), that the Privy Council found to be beyond the competence of the province to enact in *A.G. Ont. v. Hamilton Street Ry. Co.*, [1903] [A.C. 524](#), [2 O.W.R. 672](#), [7 C.C.C. 326](#), a decision which lay behind the passage in 1906 of the federal [Lord's Day Act](#). Like the Ontario Act, the federal Act embodied the basic framework and much of the language of the English Sunday Observance Act of 1677. After four consolidations, it still exhibits these same essential characteristics in its present form.

(C) Canadian Case Law

55 From the time of Confederation until the Privy Council decision in 1903 in *Hamilton Street Ry.*, it was the widely held view that Sunday observance legislation fell within provincial purview under the [Constitution Act, 1867](#), as being a matter falling under either [s. 92\(13\)](#), property and civil rights within the province, or [s. 92\(16\)](#), a matter of merely local or private nature in the province. Several of the provinces passed laws prohibiting Sunday activities. In the *Hamilton Street Ry.* case the Ontario statute fell to be considered. Aylesworth K.C. argued before the Privy Council that the primary object of the Act under consideration was the promotion of public order, safety and morals, and not the regulation of civil rights as between subject and subject. That view would seem to have prevailed, as their Lordships held that the Act as a whole was beyond the competence of the Ontario legislature to enact. The Lord Chancellor stated, at pp. 528-29:

The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sect. 91, subs-s. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of Courts of criminal jurisdiction". It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships

have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law.

56 In a special case referred by the Governor General in Council to this court for hearing two years after *Hamilton Street Ry.*, the question was asked whether a province has jurisdiction to legislate prohibition or regulation of labour so as to prevent any work, business or labour from being performed within the province upon the first day of the week, commonly called "Sunday", subject to certain exemptions. The court answered in *Re the Jurisdiction of a Province to Legislate Respecting Abstention From Lab. on Sunday* (1905), 35 S.C.R. 581 at 592, (sub nom. *Re Sunday Laws*) 25 C.L.T. 77 :

... it appears to us that the day, commonly called Sunday, or the Sabbath, or the Lord's Day, is recognised in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the *Hamilton Street Railway* reference before referred to and is within the jurisdiction of the Dominion Parliament.

The Parliament of Canada passed the federal *Lord's Day Act, 1906 (Can.)*, c. 27, with what would appear to have been some degree of reluctance because, firstly, s. 14 provided that nothing in the Act should be construed to repeal or in any way affect "any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when this Act comes into force". Sunday observance legislation in force in a province at the time it entered Confederation was expressly preserved. Secondly, while the Act prohibited a very few activities unconditionally, such as shooting in such a manner as to disturb public worship or observance of the day, or selling foreign newspapers, the most important sections of the Act made other activities unlawful only to the extent that provincial legislation did not provide otherwise.

57 Acting under the authority of the federal *Lord's Day Act*, the provinces have enacted legislation such as the *Lord's Day (Ontario) Act*, R.S.O. 1980, c. 253, and the *Lord's Day (Saskatchewan) Act*, R.S.S. 1978, c. L-34. Provincial legislation of this nature was upheld by the Judicial Committee of the Privy Council in *Lord's Day Alliance of Can. v. A.G. Man.*, [1925] A.C. 384, [1925] 1 W.W.R. 296, 43 C.C.C. 185, [1925] 1 D.L.R. 561, and more recently by this court in *Lord's Day Alliance v. A.G.B.C.*, [1959] S.C.R. 497, 30 C.R. 193, 123 C.C.C. 81, (sub nom. *Re Constitutional Questions Determination Act and Vancouver Charter*) 19 D.L.R. (2d) 169.

58 The next case is *Ouimet v. Bazin* (1912), 46 S.C.R. 502, 11 E.L.R. 482, 20 C.C.C. 458, 3 D.L.R. 593. The Quebec statute there impugned professed to forbid certain acts calculated to interfere with the proper observance of Sunday. Ouimet was charged with having, for profit and

without necessity or urgency, carried on a business and given theatrical representations on Sunday. The Chief Justice, Sir Charles Fitzpatrick, was of the opinion, at p. 507, that:

In the *Hamilton Street Railway Case* their Lordships hold, impliedly at least, that Christianity is part of the common law of the realm; that *the observance of the Sabbath is a religious duty*; and that a law which forbids any interference with that observance is, in its nature, criminal. [The italics are mine.]

He considered that the evident object of the legislation impugned was to conserve public morality and to provide for the peace and order of the public on the Lord's Day. He felt confirmed in this belief by the title of the Act, described as "A law concerning the observance of Sunday". Duff J. was equally explicit, at p. 525:

The enactment appears to me, in effect, to treat the acts prohibited as constituting a profanation of the Christian institution of the Lord's Day and to declare them punishable as such. Such an enactment we are, in my opinion, bound to hold, on the authority of *The Attorney General v. Hamilton Street Railway Co.*, to be an enactment dealing with the subject of the criminal law.

59 In dictum, Duff J. used language which I would wish to adopt, at pp. 525-26:

It is perhaps needless to say that it does not follow from this that the whole subject of regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion Parliament. It is not at all necessary in this case to express any opinion on the question, and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday, but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion Parliament. But it may be noted that since the decision of the Judicial Committee in *Hodge v. The Queen* [(1883), 9 App. Cas. 117], it has never been doubted that the Sunday-closing provisions in force in most of the provinces affecting what is commonly called the "liquor trade" were entirely within the competence of the provinces to enact: and it is, of course, undisputed that for the purpose of making such enactments effective when within their competence the legislatures may exercise all the powers conferred by sub-section 15 of section 92 of the "British North America Act."

60 It is perhaps needless for me to say that if the [Lord's Day Act](#), as presently drafted, falls because it is in conflict with the freedom of religion guaranteed by [the Charter](#), it does not ineluctably follow that the whole subject of a day of rest and recreation for Canadians is exclusively committed to the provincial legislatures. As Laycraft J.A. observed, however, it would be necessary for Parliament to demonstrate that any amending legislation had shed its sectarian robes and, further, that the "re-classified" law rested upon some constitutional foundation within its competence. As Laycraft J.A. noted, "we need not decide the feasibility of that course until it is attempted" (at p. 640).

61 The *Ouimet* decision was said in *St. Prosper v. Rodrigue* (1918), 56 S.C.R. 157 at 160, 40 D.L.R. 30 , to be founded upon the common notion of a peculiar sanctity found in religious observances, which leads to viewing their desecration with such abhorrence as to constitute something that is criminal in its nature and hence, legislation relative thereto as criminal in character.

62 Although the issue in *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, 106 C.C.C. 289, [1953] 4 D.L.R. 641 , was the validity of a by-law of the city of Quebec, attacked by a member of the Jehovah's Witnesses, forbidding distribution in the streets of any book or pamphlet without permission, the judgments in the case are wide-ranging. There is a passage in the judgment of Rand J. touching upon religious freedom, found at p. 327:

From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

63 In *Henry Birks & Sons (Montreal) Ltd. v. Montreal*, [1955] S.C.R. 799, 113 C.C.C. 135, [1955] 5 D.L.R. 321 , Rand J. spoke again of the recognitions and observances ordained by religious bodies and churches, saying at p. 812:

The Sabbath, the last day of the week, has been claimed by some teachers to be of Divine fiat and Sunday is, to most Christians, its present day equivalent.

And later, on the same page:

Their compelled observance by any means involves the acknowledgement of the authority of a church to ascribe to them their special character, and of a duty in relation to them. Being the creation of a church, under a secular legislature and in the circumstances here they possess no significance unless by positive legislative enactment; and such an enactment cannot be taken otherwise than as having that character and that duty as the reason and purpose for the enjoined observance.

64 In *Birks* , a Quebec statute purporting to authorize municipal councils to pass by-laws for the closing of stores on certain feast days was in issue. The statute was struck down as infringing on criminal law and beyond provincial legislative competence. Rand J., at p. 813, spoke of the statute as "enacted in relation to religion; it prescribes what is in essence a religious obligation". Kellock J. said, at p. 818, "[i]t is concerned with the observance of these days as holy days and not simply as holidays". And at p. 823:

While Sunday is often and popularly referred to as the Sabbath, the original Sabbath was, of course, not that day at all. Blackstone long ago pointed out (vol. 4, p. 63) that Sunday became a special object of the attention of Parliament not only because of its significance in the Christian religion but because the keeping of one day in seven "as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution". No such twofold significance attaches to any of the six days mentioned in the present legislation. Their significance is based entirely on their religious aspect. To citizens of a faith other than Christian or of no faith, they have no significance. Accordingly, the enforcement of their observation as such by legislation of the character here in question can only be from the standpoint of the religious faith of those citizens to whom they have such significance and legislation from that standpoint or for that purpose is, in my opinion, competent only to Parliament.

65 The decision in *Chaput v. Romain*, [1955] S.C.R. 834, 114 C.C.C. 170, 1 D.L.R. (2d) 241 , contains a frequently quoted passage from the judgment of Taschereau J. at p. 840:

Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité. Ce serait une erreur fâcheuse de croire qu'on sert son pays ou sa religion, en refusant dans une province à une minorité, les mêmes droits que l'on revendique soi-même avec raison, dans une autre province.

66 We come now to the case of *Robertson v. R.* , supra, to which much attention was directed during argument. The appellants were convicted on a charge of operating a bowling alley on a Sunday, contrary to the [Lord's Day Act](#). They contended that the Canadian Bill of Rights, R.S.C. 1970, App. III, had in effect repealed [s. 4 of the Lord's Day Act](#) or, in any event, rendered it inoperative. The court, Cartwright J. dissenting, rejected the contention and dismissed the appeal.

67 By s. 1 of the Canadian Bill of Rights, it is:

... recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely [as statutory provisions] ...

(c) freedom of religion ...

68 Ritchie J., writing for the majority, noted at the outset that the Canadian Bill of Rights is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather

with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. He then quoted from the passage in the decision of Taschereau J. in *Chaput v. Romain*, reproduced above, and the passage from the judgment of Rand J. in *Saumur v. Quebec (City)*, quoted earlier. Ritchie J. concluded from these passages [at p. 655] that "complete liberty of religious thought" and "the untrammelled affirmation of 'religious belief' and its propagation, personal or institutional" were recognized by this court as existing in Canada before the Canadian Bill of Rights and notwithstanding the provisions of the [Lord's Day Act](#).

69 Ritchie J. acknowledged that there had been statutes in this country since long before Confederation passed for the express purpose of safeguarding the sanctity of the Sabbath (Sunday), and since the decision in *A.G. Ont. v. Hamilton Street Ry.*, supra, it had been accepted that such legislation and the penalties imposed for its breach constituted a part of the criminal law in its widest sense and thus reserved to the Parliament of Canada by [s. 91\(27\) of the Constitution Act, 1867](#).

70 In response to the argument advanced on behalf of the appellants that freedom of religion means "freedom to enjoy the freedom which my own religion allows without being confined by restrictions imposed by Parliament for the purpose of enforcing the tenets of a faith to which I do not subscribe", Ritchie J. said, at pp. 657-58:

My own view is that the *effect* of the [Lord's Day Act](#) rather than its *purpose* must be looked to in order to determine whether its application involves the abrogation, abridgement or infringement of religious freedom, and I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.

The practical result of this law on those who religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases this is no doubt a business inconvenience, but it is neither an abrogation nor an abridgement nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned. [The italics are Ritchie J.'s.]

71 In a strong dissent, Cartwright J., at p. 660, wrote:

I can find no answer to the argument of counsel for the appellant, that the purpose and the effect of the [Lord's Day Act](#) are to compel, under the penal sanctions of the Criminal law, the observance of Sunday as a religious holy day by all the inhabitants of Canada; that this is an infringement of religious freedom I do not doubt.

And:

In my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion.

Cartwright J. continued, on p. 661 (part of this passage has already been quoted at p. 114):

A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which commands a purely religious course of conduct on that day, such as for example, the attendance at least once at divine service in a specified church.

It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

I have reached the conclusion that construed by the ordinary rules of construction [s. 4 of the Lord's Day Act](#) is clear and unambiguous and does infringe the freedom of religion contemplated by the *Canadian Bill of Rights* .

72 In 1963 this court rendered judgment in *Bernstein v. Thurston*, [\[1963\] S.C.R. 643, 41 C.R. 325, \[1964\] 1 C.C.C. 82, 41 D.L.R. \(2d\) 125](#) . The judgment of the court was delivered by Ritchie J. Lieberman, convicted for keeping a bowling alley open on Sunday, contrary to the provisions of a by-law of the city of Saint John, contended that [s. 3](#) of the by-law was invalid as being an encroachment on the field of criminal law. The court thought otherwise. The conviction was affirmed on the ground that the by-law was primarily concerned with secular matters, that it had "for its true object, purpose, nature or character" the hours at which businesses of special classes should close, a matter of a merely private nature in the province [p. 649].

73 The final case to which I would refer in this review of the Canadian authorities is a recent decision of this court in *Hamilton v. Can. Tpt. Comm.*, [\[1978\] 1 S.C.R. 640, 77 C.L.L.C. 14,103, 80 D.L.R. \(3d\) 263, 17 N.R. 573](#) . The respondent companies, common carriers operating a trucking service between Montreal and Vancouver, applied, in respect of their "long haul" operations, to the Canadian Transport Commission for exemption from the operation of the [Lord's Day Act](#). The city of Hamilton intervened and sought to show that the operation of the carriers would cause

congestion, noise and pollution and create safety problems. The C.T.C. excluded the evidence as irrelevant and this court affirmed the correctness of that action. Martland J. for the court said, at pp. 642-43:

This appeal involves a determination of the "object of the Act" to which the Commission must have regard in making its decision. It is necessary to consider the Act as a whole in order to make that determination. Its general purpose is to maintain Sunday observance, and it is because of that that its constitutional validity has been supported as being legislation in relation to criminal law under s. 91(27) of the *British North America Act*. That purpose is, however, sought to be achieved by preventing the transaction of business, the pursuing of a gainful calling, or the employment of any person to do work, business or labour on a Sunday.

And at p. 644:

The Act does not purport to regulate the conduct of individuals so as to prevent their interfering with the sanctity of Sunday, or with Sunday observance by others. The provisions making it unlawful to provide or be present at public games or public performances on a Sunday apply only if the public game is for gain, prize or reward or a fee is charged for admission to the performance. Similarly with respect to Sunday excursions, it is only if they are operated for hire that they are forbidden. This emphasizes the fact that the purpose of the Act is not to protect Sunday observance from the conduct of others. The Act seeks to obtain Sunday observance by persons by prohibiting them from engaging in a gainful occupation or employment on that day.

(C) *The American Authorities*

74 The United States Supreme Court has sustained the constitutionality of Sunday observance legislation against First Amendment challenges: *McGowan v. Maryland*, 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); *Braunfeld v. Brown*, 366 U.S. 599, 6 L. Ed. 2d 563, 81 S. Ct. 1144 (1961); *Gallagher v. Crown Koshers Super Market of Massachusetts*, 366 U.S. 617, 6 L. Ed. 2d 536, 81 S. Ct. 1122 (1961); and *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582, 6 L. Ed. 2d 551, 81 S. Ct. 1135 (1961). Despite the undoubted religious motivation of the state laws in question at the time of their passage and their clear origin in the religiously coercive statutes of Stuart England, Warren C.J., writing for the majority, found that those statutes had evolved to become purely secular labour regulation. In his view, none of the impugned state statutes violated the First Amendment guarantee of freedom of religion. Whatever religious terminology still appeared in the legislation (such as the use of the term "Lord's Day" in the Maryland statute) was to be seen simply as a historical curiosity.

75 Frankfurter J., Harlan J. concurring, wrote a separate concurring opinion. His reasons also focused on the evolution of a civil institution of Sunday rest. The fact that such a civil institution harmonizes with religious doctrine could not, alone, justify a finding of unconstitutionality.

Moreover, any violation of an individual right of free exercise was justified by an overriding state interest in securing a uniform day of rest.

76 In the *McGowan* case, the Maryland statute was found neither in its purpose nor in its effect to enlist the aid of the state's coercive power to aid religion. Though the statute's origins were religious, it had lost that character. It had been substantially changed and re-enacted to prescribe the secular goals of rest and recreation for the citizens. In reaching this conclusion, the court noted that numerous legislative changes since the original enactment had made "the air of the day ... one of relaxation rather than religion" (at p. 448).

77 In *Braunfeld v. Brown* the court held that the impugned Pennsylvania statute did not by its purpose nor by its direct effect impede the observance of one or all religions nor discriminate invidiously among religions. In the result the statutes impugned were held not to offend the First Amendment.

78 It is somewhat ironic that the United States courts upheld the validity of Sunday observance laws, characterizing them as secular in order not to run afoul of the religion clauses of the First Amendment, while in contrast, in *Robertson*, supra, the court found in the same type of legislation, a religious purpose in order to sustain its vires as criminal law. At the same time it accorded to the legislation a secular effect in order not to bring it into conflict with the religious freedom recognized and declared in the Canadian Bill of Rights. The contrast between the United States and Canadian decisions has been cogently stated by J. A. Barron, in "[Sunday in North America](#)" (1965), 79 *Harv. L. Rev.* 42, at p. 43:

In the United States, the religious purpose of Sunday legislation is denied as sternly as it is insisted upon in Canada. The legislation is declared to be today entirely secular in purpose, providing the citizenry with a uniform day of rest and recreation. If the United States Supreme Court had found a continuing religious purpose behind the Sunday legislation, the no-establishment principle would have commanded invalidation.

On the same page Professor Barron writes:

In Canada, Sunday legislation is frankly conceded to be religious in purpose; indeed, if it were otherwise the basis for federal jurisdiction would be questionable. But the Supreme Court of Canada claims purpose can be separated from effect, and the effect of the Canadian Sunday legislation is said to be entirely secular.

VI

Purpose and Effect of Legislation

79 A finding that the [Lord's Day Act](#) has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long established and consistently maintained by the courts of this country.

80 The Attorney General for Alberta concedes that the Act is characterized by this religious purpose. He contends, however, that it is not the purpose but the effects of the Act which are relevant. In his submission, *Robertson*, supra, is support for the proposition that it is effects alone which must be assessed in determining whether legislation violates a constitutional guarantee of freedom of religion.

81 I cannot agree. In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation's object and its ultimate impact are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.

82 Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in [the Charter](#). The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of [Charter](#) rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

83 This approach to the relevance of purpose and effect is explicit in the American cases. In *McGowan v. Maryland*, supra, Warren C.J. stated at p. 453:

We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose — evidence either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.

Similarly, in *Braunfeld v. Brown*, supra, he wrote at p. 607:

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

84 I would note that this approach would seem to have been taken by this court, in its unanimous decision in *A.G. Que. v. Que. Assn. of Protestant Sch. Bd.*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, 9 C.R.R. 133, 54 N.R. 196 . When the court looked for an obvious example of legislation that constituted a total negation of a right guaranteed by the Charter, and therefore one to which the limitation in s. 1 of the Charter could not apply, it recited the following hypothetical at p. 88:

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

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

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

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

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

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

90 First, there are the practical difficulties. No legislation would be safe from a revised judicial assessment of purpose. Laws assumed valid on the basis of persuasive and powerful authority could, at any time, be struck down as invalid. Not only would this create uncertainty in the law, but it would encourage relitigation of the same issues and, it could be argued, provide the courts with a means by which to arrive at a result dictated by other than legal considerations. It could effectively end the doctrine of stare decisis in division of power cases. This concern underlay the judgment of Viscount Simon L.C. in *A.G. Ont. v. Can. Temperance Fed.*, [1946] A.C. 193, [1946] 2 W.W.R. 1, 1 C.R. 229, 85 C.C.C. 225, [1946] 2 D.L.R. 1 (P.C.), wherein he refused to re-characterize the [Canada Temperance Act](#), R.S.C. 1927, c. 196 (at p. 206):

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

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

92 As Laskin C.J.C. has suggested in *R. v. Zelensky*, [1978] 2 S.C.R. 940 at 951, [1978] 3 W.W.R. 693, 2 C.R. (3d) 107, 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179, 21 N.R. 372, "new appreciations" and "re-assessments" may justify a reinterpretation of the scope of legislative power. While this may alter over time the breadth of the various heads of power and thereby affect the classification of legislation, it does not affect the characterization of the purpose of legislation, in this case the *Lord's Day Act*. As the Law Reform Commission of Canada observed in its Report on Sunday Observance (1976) (at p. 42):

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

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

VII

Freedom of Religion

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

95 Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or

morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

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

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

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

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

27. [This Charter](#) shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

As Laycraft J.A. wrote (at p. 642):

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

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

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

For the Justice, Sunday has a very special and ceremonial significance in our culture, because of the religious meaning that has historically attached to the day. It is the enforced homage to that religious Sunday of history that constitutes a forced abandonment of one of the precepts of the Sabbatarian's religion: the belief that only the Sabbath is a day of rest proclaimed by God. It is this homage that constitutes a burden on the free exercise of his religion. The Sabbatarian, the agnostic, and the indifferent Christian may not be required to observe Sunday in church; neither should they be compelled to acknowledge that day as a religious idea. The legislature may be able to divorce the secular Sunday from the religious Sunday of history, but the Orthodox Jew, the Seventh Day Adventist, and the athiest cannot.

102 The main submission of the Attorney General of Alberta, and the federal and provincial Attorneys General who intervened in his support, is that, regardless of the religious purpose of the [Lord's Day Act](#), none of its provisions offend the freedom of conscience and religion guaranteed by [s. 2\(a\) of the Charter](#). This argument draws on several sources.

(i) *The Absence of an "Establishment Clause"*

103 Much of the argument before this court on the issue of the meaning of freedom of conscience and religion was in terms of "free exercise" and "establishment". These categories derive from the guarantee of freedom of religion in the First Amendment to the Constitution of the United States. The relevant part of the First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...

104 It is the appellant's argument that, unlike the American Bill of Rights, the Canadian Charter of Rights and Freedoms does not include an "establishment clause." He urged therefore that the protection of freedom of conscience and religion extends only to the "free exercise" of religion. In the American cases to which I have referred, *McGowan v. Maryland*; *Braunfeld v. Brown*; *Gallagher v. Crown Koshier Super Market of Massachusetts*; and *Two Guys from Harrison-Allentown v. McGinley*, all supra, Sunday observance legislation has been dealt with by a majority of the court as only presenting a potential violation of the anti-establishment principle. It is said to follow from the purported absence of such a principle in [the Charter](#) that the [Lord's Day Act](#) does not in any way affect the guarantee in [s. 2\(a\)](#).

105 In my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under [the Charter](#). The adoption in the United States of the categories "establishment" and "free exercise" is perhaps an inevitable consequence of the wording of the First Amendment. The cases illustrate, however, that these are not two totally separate and distinct categories, but rather, as the Supreme Court of the United States has frequently recognized, in specific instances "the two clauses may overlap". Indeed, according to Professor Tribe in his leading textbook, *American Constitutional Law* (1978), at p. 815, Sunday closing cases are paradigmatic examples of such overlap. Perhaps even more important is the fact that neither "free exercise" nor "anti-establishment" is a homogeneous category; each contains a broad spectrum of heterogeneous principles. This heterogeneity is reflected in the not infrequent conflict that arises between the two clauses, evident in the opposing views of Harlan J. and Stewart J. in *Sherbert v. Verner*, *supra*. Another recent and particularly telling example of this conflict is *Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981).

106 Thus while it is true that in its four Sunday closing cases the United States Supreme Court does categorize compulsory religious observance as a potential violation of the "anti-establishment" principle, more frequently and more typically these same words signify the very different principle of the prohibition of preferential treatment of, or state financial support to, particular religions or religious institutions.

107 In further support for this line of argument the appellant cites [s. 29 of the Charter](#) quoted earlier, and [s. 93 of the Constitution Act, 1867](#). These provisions were cited as proof of the non-existence of an anti-establishment principle because they guarantee existing rights to financial support from the state for denominational schools. The respondent replies that these express provisions constitute specific and limited exceptions to the general principle of religious freedom which would otherwise prohibit any support or preference to denominational schools. Subsequent cases will decide the extent to which [the Charter](#) allows for state financial support for, or preferential treatment of, particular religions or religious institutions. That issue is not before us in the present case.

108 Nonetheless, even assuming *arguendo* that the appellant were correct, it does not follow that [s. 2\(a\)](#) is not offended by Sunday observance laws. If I were to accept the notion that the sections cited are proof that there is no constitutional obstacle to such support or preference, that conclusion has no necessary implications for the question of whether the state may constitutionally compel religious behaviour or observance. The fact that both practices are prohibited by the American "anti-establishment" principle offers no support for the contention that the putative lack of prohibition of the one in the Canadian Constitution necessarily imports at the same time permission to do the other.

109 In my view the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an "anti-establishment principle" in the Canadian Constitution, a principle which can only further obfuscate an already difficult area of the law. The acceptability of legislation or governmental action which could be characterized as state aid for religion or religious activities will have to be determined on a case by case basis.

(ii) "Freedom of Religion" under the Canadian Bill of Rights

110 The Attorney General for Alberta draws support for his restrictive reading of freedom of conscience and religion from the majority judgment in *Robertson v. R.*, supra. It was the view of Ritchie J. that the meaning of freedom of religion, as recognized by the Bill of Rights, was well described in two excerpts which he set forth, quoted earlier in these reasons, the first from the judgment of Taschereau J. in *Chaput v. Romain*, the second from the judgment of Rand J. in *Saumur v. Quebec (City)*, both supra.

111 Ritchie J. was of opinion that it was this "complete liberty of religious thought" and "untrammelled affirmation of 'religious belief' and its propagation, personal or institutional" which the Bill of Rights recognized under the rubric of "freedom of religion". On testing the provisions of the Lord's Day Act against this definition he concluded at p. 657:

... I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.

It was his view therefore that the Lord's Day Act did not abrogate, abridge or infringe "freedom of religion" as guaranteed by the Canadian Bill of Rights.

112 The appellant contends that "freedom of conscience and religion" as guaranteed by s. 2(a) of the Charter has the same meaning as "freedom of religion" as recognized by the Canadian Bill of Rights and that Ritchie J. was correct in restricting it to "liberty of religious thought" and untrammelled affirmation of religious belief and its propagation. It follows therefore, in the appellant's submission, that the Lord's Day Act no more violates the guarantee in s. 2(a) of the Charter than it did the analogous guarantee in the Canadian Bill of Rights.

113 I cannot agree with these submissions. In my view the meaning attributed by the majority in *Robertson v. R.* to the concept of "freedom of religion" under the Canadian Bill of Rights depends on the majority's view of the distinctive nature and status of that document. An examination of the reasoning that underlies the majority's interpretation demonstrates that it cannot easily be transferred to a constitutional document like the Charter and the fundamental guarantees it enshrines.

114 The basis of the majority's interpretation in *Robertson* is the fact that the language of the Bill of Rights is merely declaratory: by s. 1 of the Bill of Rights, certain existing freedoms are "recognized and declared", including freedom of religion. For Ritchie J. this language dramatically narrowed the possible interpretation of the rights and freedoms enunciated by the Canadian Bill of Rights (at p. 654):

It is to be noted at the outset that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted ... It is therefore the "religious freedom" then existing in this country that is safe-guarded by the provisions of s. 2 ...

It is on this basis that the excerpts from *Chaput v. Romain* and *Saumur v. Quebec (City)* were seen to be significant, since they articulate descriptions of religious freedom that, in the words of the majority "were recognized by this Court as existing in Canada before the *Canadian Bill of Rights* and notwithstanding the provisions of the *Lord's Day Act* " (at p. 655).

115 It is not necessary to reopen the issue of the meaning of freedom of religion under the Canadian Bill of Rights, because whatever the situation under that document, it is certain that the [Canadian Charter of Rights and Freedoms](#) does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of [the Charter's](#) entrenchment. The language of [the Charter](#) is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion ...

116 I agree with the submission of the respondent that [the Charter](#) is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of [the Charter](#). For this reason, *Robertson* , supra, cannot be determinative of the meaning of "freedom of conscience and religion" under [the Charter](#). We must look, rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

(iii) The Purpose of Protecting Freedom of Conscience and Religion

117 This court has already, in some measure, set out the basic approach to be taken in interpreting [the Charter](#). In *Hunter v. Southam Inc.* (decision rendered 17th September 1984 [now reported *Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*, [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, (sub nom. *Dir. of Investigations & Research, Combines*

Investigation Branch v. Southam Inc.) [1984] 6 W.W.R. 577, 41 C.R. 97, 27 B.L.R. 297, (sub nom. *Hunter v. Southam Inc.*) 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 A.R. 291, 9 C.R.R. 355]) this court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

118 In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this court's decision in *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 53 N.R. 169, 3 O.A.C. 321, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

119 With regard to freedom of conscience and religion, the historical context is clear. As they are relevant to the Charter, the origins of the demand for such freedom are to be found in the religious struggles in post-Reformation Europe. The spread of new beliefs, the changing religious allegiance of kings and princes, the shifting military fortunes of their armies and the consequent repeated redrawing of national and imperial frontiers led to situations in which large numbers of people — sometimes even the majority in a given territory — found themselves living under rulers who professed faiths different from, and often hostile to, their own and subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share.

120 English examples of such laws, passed during the Tudor and Stuart periods, have been alluded to in the discussion above of the criminal law character of Sunday observance legislation. Opposition to such laws was confined at first to those who upheld the prohibited faiths and practices, and was designed primarily to avoid the disabilities and penalties to which these specific adherents were subject. As a consequence, when history or geography put power into the hands of these erstwhile victims of religious oppression, the persecuted all too often became the persecutors.

121 Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendant religion, came to voice opposition to the use of the state's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this

opposition was no longer simply a conviction that the state was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our [Charter](#), the single integrated concept of "freedom of conscience and religion".

122 What unites enunciated freedoms in the American First Amendment, [s. 2\(a\) of the Charter](#) and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam*, supra, the purpose of [the Charter](#) was identified, at p. 13 [p. 155 S.C.R.], as "the unremitting protection of individual rights and liberties". It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection.

123 It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the [Canadian Charter of Rights and Freedoms](#) as "fundamental". They are the sine qua non of the political tradition underlying [the Charter](#).

124 Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously held beliefs and manifestations and are therefore protected by [the Charter](#). Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(a) might otherwise prohibit.

125 It is the contention of the respondent that the [Lord's Day Act](#) violates freedom of conscience and religion by coercing the observance of the religious institution of the Christian Sabbath. It is, therefore, important in the appellant's argument that freedom from such coercion forms no part of "freedom of religion" as it has been articulated in the Canadian jurisprudence. The definition of freedom of conscience and religion proposed above, including freedom from compulsory religious observance, corresponds precisely to the description of religious freedom in Canada offered by Taschereau J. in the passage in *Chaput v. Romain* , supra, when he noted that all adherents of various religious faiths are entirely free to think as they wish. This is not to endorse that part of the passage from the judgment of Taschereau J. where he states that religions are on a footing of equality. The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

126 The general lack of comment through the cases on the effect of Sunday closing legislation on freedom of religion may be attributable to the fact that, before the passage of the Canadian Bill of Rights and the entrenchment of [the Charter](#), human rights and freedoms, no matter how fundamental, were constitutionally vulnerable to government encroachment. As Rand J. noted in *Saumur v. Quebec (City)* , supra, at p. 329:

... freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.

He also recognized, however, [at p. 329] that:

It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery . [The italics are mine.]

127 Canadian law has recognized freedom of religion, though until [the Charter](#) this principle was subject to statutory law. Nonetheless, some legislation did expressly recognize freedom of religion. As early as 1851, the legislature of the United Canadas enacted the following in An Act to Repeal an Act as related to Rectories, 1851 (Can.), c. 175:

That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of this Province be allowed to all Her Majesty's subjects within the same.

The preamble stated as follows:

Whereas the recognition of legal equality among all Religious Denominations is an admitted principle of Colonial legislation; And whereas in the state and condition of this Province, to which such a principle is peculiarly applicable, it is desirable that the same should receive the sanction of direct Legislative Authority, recognizing and declaring the same as a fundamental principle of our civil polity.

128 Freedom of religion was among those rights protected by the Bill of Rights. It was this guarantee that was the subject of inquiry in *Robertson v. R.*, supra. I have already noted that, for the majority in *Robertson v. R.*, the positive law had circumscribed freedom of religion so as to prevent the [Lord's Day Act](#) from breaching the guarantee in the Canadian Bill of Rights. Notwithstanding its conclusion, however, the majority in that case approved the description of freedom of religion given by Frankfurter J. in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 at 653, 87 L. Ed. 1628 (1943):

Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. [The italics are mine.]

While the majority apparently interpreted the latter clause as confirming the supremacy of positive law such as the [Lord's Day Act](#), its approval of the first clause indicates that absent such legislative incursion freedom of religion would include freedom from compulsory religious observance.

129 With the entrenchment of [the Charter](#) the definition of freedom of conscience and religion is no longer vulnerable to legislative incursion. I conclude therefore that a definition of freedom of conscience and religion incorporating freedom from compulsory religious observance is not only in accord with the purposes and traditions underlying [the Charter](#); it is also in line with the definition of that concept as found in the Canadian jurisprudence.

130 Two bases for restricting the scope of s. 2(a) have been suggested by the appellant and his supporting interveners. First was the approach, adopted by Belzil J.A. in the court below, which maintained that there is no compulsion of religion. Abstention from work on Sunday does not, in itself, have any religious significance. Its effect is, therefore, merely secular.

131 This argument cannot be accepted for reasons already outlined. Once the purpose has been classified as offensive, then the legislation cannot be saved by permissible effect. As a result it is unnecessary to determine whether the secular effect here in issue is sufficient, or whether a secular effect could ever be relevant, once a finding has been made that the legislation is invalid by reason of an impermissible purpose.

132 A second basis for urging a more restricted reading of freedom of conscience and religion was the position of the American courts on Sunday observance legislation. Such legislation has been sustained by the United States Supreme Court, though it has been recognized that such

legislation might offend the non-establishment clause of the First Amendment. The absence of such a clause in [the Charter](#), it was submitted, indicated that this court should sustain the [Lord's Day Act](#).

133 Such a finding is not possible, in light of the earlier discussion in these reasons on the relevance of the absence of an anti-establishment provision in [s. 2\(a \) of the Charter](#).

134 In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is non-action rather than action that is being decreed, but in my view compulsion is nevertheless what it amounts to.

135 I would like to stress that nothing in these reasons should be read as suggesting any opposition to Sunday being spent as a religious day; quite the contrary. It is recognized that for a great number of Canadians, Sunday is the day when their souls rest in God, when the spiritual takes priority over the material, a day which, to them, gives security and meaning because it is linked to Creation and the Creator. It is a day which brings a balanced perspective to life, an opportunity for man to be in communion with man and with God. In my view, however, as I read [the Charter](#), it mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion.

136 In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since [the Charter](#), it is no longer legitimate. With [the Charter](#), it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise. The state shall not use the criminal sanctions at its disposal to achieve a religious purpose, namely, the uniform observance of the day chosen by the Christian religion as its day of rest.

137 On the authorities and for the reasons outlined, the true purpose of the [Lord's Day Act](#) is to compel the observance of the Christian Sabbath and I find the Act, and especially s. 4 thereof, infringes upon the freedom of conscience and religion guaranteed in [s. 2\(a \) of the Charter](#). The answer to the first constitutional question will be in the affirmative.

VIII

Section 1 of the Charter

138 Is the Lord's Day Act, and especially s. 4 thereof, justified on the basis of [s. 1 of the Canadian Charter of Rights and Freedoms](#)? That is the second question posed.

139 The appellant submits that even if the [Lord's Day Act](#) does involve a violation of freedom of conscience and religion as guaranteed by [s. 2\(a\) of the Charter](#), the provisions of the Act constitute a reasonable limit, demonstrably justifiable in a free and democratic society on that right and that therefore the Act can be saved pursuant to [s. 1 of the Charter](#). In support of this submission the Attorney General for Alberta maintains that public convenience, order and health necessitate standardized working hours and a standardized day of rest. As evidence he cites a study undertaken for the United Nations by Professor Arcot Kreshnaswami. The Attorney General for Canada supplements these arguments with submissions as to the venerable history of the "secondary principle" underlying Sunday observance legislation, namely the provision of a uniform day of rest for labouring people. He also cites numerous statutes enacted in such free and democratic societies as Great Britain, Australia and New Zealand whose purpose is to mandate a compulsory day of rest on Sunday.

140 At the outset, it should be noted that not every government interest or policy objective is entitled to s. 1 consideration. Principles will have to be developed for recognizing which government objectives are of sufficient importance to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant government interest is recognized, then it must be decided if the means chosen to achieve this interest are reasonable — a form of proportionality test. The court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.

141 Two reasons have been advanced to justify the legislation here in issue as a reasonable limit. It can be urged that the choice of the day of rest adhered to by the Christian majority is the most practical. This submission is really no more than an argument of convenience and expediency and is fundamentally repugnant because it would justify the law upon the very basis upon which it is attacked for violating s. 2(a).

142 The other more plausible argument is that everyone accepts the need and value of a universal day of rest from all work, business and labour and it may as well be the day traditionally observed in our society. I accept the secular justification for a day of rest in a Canadian context and the reasonableness of a day of rest has been clearly enunciated by the courts in the United States of America. The first and fatal difficulty with this argument is, as I have said, that it asserts an objective which has never been found by this court to be the motivation for the legislation. It seems disingenuous to say that the legislation is valid criminal law and offends s. 2(a) because it compels

the observance of a Christian religious duty, yet is still a reasonable limit demonstrably justifiable because it achieves the secular objective the legislators did not primarily intend. The appellant can no more assert under s. 1 a secular objective to validate legislation which in pith and substance involves a religious matter than it could assert a secular objective as the basis for the argument that the legislation does not offend s.2(a). While there is no authority on this point, it seems clear that Parliament cannot rely upon an ultra vires purpose under [s. 1 of the Charter](#). This use of s. 1 would invite colourability, allowing Parliament to do indirectly what it could not do directly.

143 The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced.

144 If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the Charter, s. 52(1), is to give the court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer "of force or effect". That, in my view, is the position in respect of the Lord's Day Act. The answer to the second question will be in the negative.

IX

Classification

145 The third question put in issue by this court is this:

Is the *Lord's Day Act*, R.S.C. 1970, c. L-13, and especially s. 4 thereof enacted pursuant to the criminal law power under [s. 91\(27\) of the Constitution Act, 1867](#)?

146 All members of the Alberta Court of Appeal agreed that settled authority compelled the conclusion that the [Lord's Day Act](#) was competent to Parliament pursuant to its power to legislate in relation to criminal law under [s. 91\(27\)](#). The appellant and his supporting interveners submit that the Court of Appeal was correct in their conclusion and the respondent concedes the point.

147 The [Lord's Day Act](#) has been held "early, regularly and recently" to be in relation to a criminal law matter because, at risk of penalty, it compels the observance of a religious obligation, specifically the preservation of the sanctity of the Christian Sabbath. The [Lord's Day Act](#) is legislation in relation to a matter which falls within [s. 91\(27\)](#), one of the classes of subjects reserved to the exclusive authority of Parliament, because it is directed towards the maintenance of public order and public morals. As expressed by Rand J. in *Ref. re S. 5(a) of the Dairy Indust. Act* ("*Margarine Case*"), [1949] S.C.R. 1 at 50, [1949] 1 D.L.R. 433, the "ordinary though not exclusive ends" of the criminal law are "[p]ublic peace, order, security, health, [and] morality".

There can be no doubt that legislation such as the [Lord's Day Act](#), which has as its purpose the compulsion of religious observance, is intended to safeguard public morality.

148 Whether or not Christianity is part of the common law is relevant to the theoretical question of whether, absent legislation, "Sabbath breaking" would be indictable as a criminal offence in England, where common law crimes still exist. It has no relevance to the correct classification of a statute prohibiting the profanation of the Sabbath, which in England, as in Canada, has historically been characterized as criminal legislation: see, e.g., *Henry Birks & Sons*, supra, at p. 813 per Rand J. and at pp. 820-22 per Kellock J.

149 The evolution of Canada as a pluralistic, multicultural society, as well as the reference to "God" rather than to an identifiably Christian conception of God, can have no bearing either on the characterization of laws aimed at enforcing specifically Christian observances nor on the classification of such legislation as being within Parliament's criminal law power.

150 It should be noted, however, that this conclusion as to the federal Parliament's legislative competence to enact the [Lord's Day Act](#) depends on the identification of the purpose of the Act as compelling observance of Sunday by virtue of its religious significance. Were its purpose not religious but rather the secular goal of enforcing a uniform day of rest from labour, the Act would come under [s. 92\(13\)](#), property and civil rights in the province, and hence fall under provincial rather than federal competence: *A.G. Can. v. A.G. Ont. (Ref. re Weekly Rest in Indust. Undertakings Act, etc.)*, [1937] A.C. 326, [1937] 1 W.W.R. 299, [1937] 1 D.L.R. 673 (P.C.), and *Ref. re Hours of Lab.*, [1925] S.C.R. 505, [1925] 3 D.L.R. 1114. The answer to the third question will be in the affirmative.

Conclusion

151 In my view the majority in the Alberta Court of Appeal was correct in its disposition of the issues in this appeal. The [Lord's Day Act](#) is enacted pursuant to the criminal law power under [s. 91 \(27\) of the Constitution Act, 1867](#). In providing for the compulsory observance of the religious institution of the Sabbath (Sunday), the Act and especially [s. 4](#) thereof does infringe on the guarantee of freedom of conscience and religion in [s. 2\(a\) of the Canadian Charter of Rights and Freedoms](#) and this infringement cannot be justified on the basis of [s. 1 of the Charter](#). I would declare the [Lord's Day Act](#) to be of no force or effect, by reason of [s. 52 \(1\) of the Constitution Act, 1982](#).

152 I would consequently dismiss the appeal, with costs, and answer the questions posed in the following manner:

- (1) The [Lord's Day Act](#), and especially [s. 4](#) thereof, does infringe upon the freedom of conscience and religion guaranteed in [s. 2 \(a\) of the Canadian Charter of Rights and Freedoms](#).

(2) The *Lord's Day Act*, and especially s. 4 thereof, is not justified on the basis of s. 1 of the *Canadian Charter of Rights and Freedoms*.

(3) The *Lord's Day Act*, and especially s. 4 thereof is enacted pursuant to the criminal law power under s. 91 (27) of the *Constitution Act, 1867*.

Wilson J.:

153 The issue to be addressed on this appeal is the constitutional validity of the *Lord's Day Act*, R.S.C. 1970, c. L-13, having regard in particular to its impact on the guarantee of freedom of conscience and religion entrenched in s. 2(a) of the *Canadian Charter of Rights and Freedoms*.

154 In his reasons for judgment the Chief Justice (Dickson J. at the date of the hearing) has canvassed in a most thorough fashion all the substantive questions entailed in the analysis of constitutionality and has come to the conclusion that the *Lord's Day Act* is validly enacted pursuant to the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. He has concluded, however, that it infringes upon the right to freedom of religion in s. 2(a) of the *Charter* and that such infringement cannot be justified under s. 1 of the *Charter*. I agree with those conclusions and the only issue I wish to address in these reasons is the appropriate analytic approach to a *Charter* case, in a word, the distinction between the analysis demanded by the *Charter* and the analysis traditionally pursued in resolving division of powers litigation under ss. 91 and 92 of the *Constitution Act, 1867*.

155 It is, of course, trite law that the analytic starting point in a division of powers case is the determination of the "pith and substance" of the challenged enactment. In the words of Professor Bora Laskin (as he then was), the court endeavours to achieve a "distillation of the 'constitutional value' represented by the challenged legislation ... and its attribution to a head of power": Laskin, *Canadian Constitutional Law*, 3rd ed. (1969), p. 85. This distillation is achieved through an examination of the primary legislative purpose with a view to distinguishing the central thrust of the enactment from its merely incidental effects. As Professor Hogg points out, identification of the purpose of an impugned piece of legislation is a way of assessing whether, in terms of ss. 91 and 92, the enacting government has pursued a function within the class of subject matters in relation to which it can validly legislate or function as a government: Hogg, *Constitutional Law of Canada* (1977), pp. 80-81, 85.

156 When viewed in this way it becomes evident that the primary legislative purpose must be abstracted from the broader spectrum of legislative effects. Given that the heads of power listed in ss. 91 and 92 are not watertight compartments, the "pith and substance" approach, concentrating as it does on the analysis of legislative purpose and generally ignoring incidental effects, is essential for a functional delineation of the constitutional jurisdiction of the two tiers of government. Thus, for example, a provincial legislature can legislate in relation to taxation within the province despite

the impact of such a tax on a federally regulated subject matter such as the banking industry: *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575 (P.C.) . Similarly, the federal government can validly enact legislation for the purpose of creating a national capital region in Ottawa despite the evident impact of such legislation on property and civil rights in the province: *Munro v. Nat. Capital Comm.*, [1966] S.C.R. 663, 57 D.L.R. (2d) 753 .

157 The division of powers jurisprudence is replete with instances where the analytic focal point in determining whether a given piece of legislation is ultra vires the enacting legislature is the purpose or primary function of the legislation. Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance: see, e.g., *Ref. Re Alta. Legislation*, [1939] A.C. 117, [1938] 3 W.W.R. 337, (sub nom. *A.G. Alta. v. A.G. Can.*) [1938] 4 D.L.R. 433 (P.C.) . As indicated by Locke J. in *Texada Mines Ltd. v. A.G.B.C.*, [1960] S.C.R. 713, 32 W.W.R. 37, 24 D.L.R. (2d) 81 , the effects of an impugned statute are important in the division of powers analysis only insofar as they serve to reflect the underlying statutory purpose and thereby its primary function.

158 Nowhere is this analytic focus on purpose more clearly stated than in those pre-Charter division of powers cases in which legislation was being attacked as impinging on the civil liberties of the subject. For example, in *Walter v. A.G. Alta.; Fletcher v. A.G. Alta.*, [1969] S.C.R. 383, 66 W.W.R. 513, 3 D.L.R. (3d) 1 , a provincial statute prohibiting communal ownership of land was upheld as valid legislation pursuant to s. 92(13) of the *Constitution Act, 1867*, despite its impact on members of the Hutterite faith whose existence as a religious community was dependent on such communal land holdings. Martland J. acknowledged that legislation in relation to religion and religious freedom was exclusively within the domain of the federal Parliament. He also recognized that it was essential to the Hutterite faith that communal colonies be permitted to exist. Accordingly, any legislative prohibition in this regard would touch upon a fundamental religious tenet of the Hutterite community. He then went on to reason [at p. 393] that "the [provincial] legislation in question here undoubtedly affects the future expansion and creation of Hutterite colonies in Alberta, but that does not mean it was enacted in relation to a matter of religion." The direct impact on a religious practice was seen as incidental to the intra vires purpose of the legislation and therefore did not enter into the constitutional characterization of the legislative purpose embodied in the statute. Martland J. stated at p. 392:

It is a function of a provincial legislature to enact those laws which govern the holding of land within the boundaries of that province. It determines the manner in which land is held. It regulates the acquisition and disposition of such land, and, if it is considered desirable in the interests of the residents in that province, it controls the extent of the land holdings of a person or group of persons. The fact that a religious group uphold tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect to property.

159 A similar approach was taken in *Quong-Wing v. R.* (1914), 49 S.C.R. 440, 6 W.W.R. 270, 23 C.C.C. 113, 18 D.L.R. 121 ; *Co-op. Ctee. on Japanese Canadians v. A.G. Can.*, [1947] A.C. 87, [1947] 1 D.L.R. 577 (P.C.) ; and *Morgan v. A.G.P.E.I.*, [1976] 2 S.C.R. 349, 55 D.L.R. (3d) 527, 7 Nfld. & P.E.I.R. 537, 5 N.R. 455 .

160 In my view, the constitutional entrenchment of civil liberties in the [Canadian Charter of Rights and Freedoms](#) necessarily changes the analytic approach the courts must adopt in such cases. As Burger C.J. indicated in the celebrated anti-discrimination case of *Griggs v. Duke Power Co.*, 401 U.S. 424 at 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1970), the starting point for any analysis of a civil rights violation is "the *consequences* of the [discriminatory] practices, not simply the motivation". Speaking in the context of equality rights as they pertain to employment, Burger C.J. stated at p. 432:

... good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups ...

While it remains perfectly valid to evaluate the purpose underlying a particular enactment in order to determine whether the legislature has acted within its constitutional authority in division of powers terms, [the Charter](#) demands an evaluation of the impingement of even intra vires legislation on the fundamental rights and freedoms of the individual. It asks not whether the legislature has acted for a purpose that is within the scope of the authority of that tier of government, but rather whether in so acting it has had the effect of violating an entrenched individual right. It is, in other words, first and foremost an effects-oriented document.

161 In *A.G. Que. Assn. of Protestant Sch. Bd.*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321, 9 C.R.R. 133, 54 N.R. 196 , this court had occasion to assess the constitutionality of s. 73 of Quebec's Charter of the French Language, R.S.Q. 1977, c. C-1, which imposed restrictions on those children who could receive English language education in the province. It was alleged that the provision violated minority language education rights entrenched in [s. 23 of the Charter](#). Although much of the discussion in that case centred upon the question of the applicability of [s. 1 of the Charter](#), the argument was made that [s. 73](#) could not possibly have been intended to represent a violation of [s. 23 of the Charter](#) of Rights since [the Charter](#) had not come into existence when [s. 73](#) was drafted. In its unanimous reasons for decision, this court dismissed that argument somewhat summarily, stating at pp. 87-88:

... but its [the Quebec legislature's] intent is not relevant. What matters is the effective nature and scope of [s. 73](#) in light of the provisions of [the Charter](#) , whenever the section was enacted.

162 It seems, with respect, to be inconsistent to hold legislative intent irrelevant when dealing with a statute whose effect is to violate one [Charter](#) right and to emphasize, as does the Chief Justice in his reasons in the present case [at p. 128], that "the legislation's purpose is the initial test of

constitutional validity" when dealing with [another Charter](#) right. For the sake both of consistency and analytic clarity it would seem preferable to avoid confusing the traditional approach to division of powers cases with the approach demanded by [the Charter](#). The first stage of [any Charter](#) analysis, I believe, is to inquire whether legislation in pursuit of what may well be an intra vires purpose has the effect of violating an entrenched right or freedom.

163 Applying such reasoning to the case at bar, one can agree with the Chief Justice that in enacting the [Lord's Day Act](#) "[t]he arm of the state requires all to remember the Lord's day of the Christians and to keep it holy" [p. 131], and that "[t]he protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity" [p. 131]. Accordingly, the Act infringes upon the freedom of conscience and religion guaranteed in [s. 2\(a\) of the Charter](#). This is not, however, because the statute was enacted for this purpose but because it has this effect. In my view, so long as a statute has such an actual or potential effect on an entrenched right, it does not matter what the purpose behind the enactment was.

164 Moreover, it seems to me that placing the analytic focus on the effect of legislation impugned under [the Charter](#) rather than on its purpose will impose a less heavy evidentiary burden on the plaintiff. Once the plaintiff can point to an actual or potential impingement on a protected right, it will not matter that the underlying legislative purpose is subject to conjecture. In the case at bar the effect of the [Lord's Day Act](#) is to compel adherence to the Christian Sabbath by requiring the uniform observance of the day chosen by the Christian religion as a day of rest. It is this effect which infringes upon the freedom of conscience and religion guaranteed by [the Charter](#).

165 Although [the Charter](#) is, as indicated above, an effects-oriented document in the first instance, the analysis required under [s. 1 of the Charter](#) will entail an evaluation of the purpose underlying the impugned legislation. I agree with the Chief Justice when he states in his reasons [at p. 142] that [s. 1](#) demands an assessment of the "government interest or policy objective" at stake, followed by a determination as to whether this interest is of sufficient importance to override a Charter right and whether the means chosen to achieve the objective are reasonable. In addition, it would seem correct to say that the objective asserted as a reasonable limit under [s. 1](#) will necessarily reflect the purpose of the enactment in the division of powers analysis. As the Chief Justice points out, the [Lord's Day Act](#) has been found to be within federal legislative competence based on its characterization as legislation in relation to religious observance. Given that the federal government cannot rely on an ultra vires purpose in attempting to uphold the legislation under [s. 1](#), any attempt to characterize the [Lord's Day Act](#) as a reasonable limit on [the Charter](#) right to freedom of religion must fail. To hold otherwise would be to find that the [s. 2\(a\)](#) right to religious freedom can be legitimately curtailed where Parliament acts for the purpose of curtailing religious freedom. Without having to determine at this point the principles upon which an evaluation of a given governmental objective and its reasonableness as a limit on a Charter right will be premised, it is possible to state with certainty that this governmental objective or interest cannot pass the

s. 1 test. Indeed, it was made clear in *Que. Protestant Sch. Bd.*, supra, that legislation cannot be regarded as embodying legitimate limits within the meaning of s. 1 where the legislative purpose is precisely the purpose at which the Charter right is aimed.

166 Accordingly, I agree with the Chief Justice that the appeal in this case must be dismissed. The Lord's Day Act is in pith and substance legislation with a criminal law purpose and is therefore enacted by Parliament pursuant to the federal criminal law power in s. 91(27) of the Constitution Act, 1867. Insofar as the Charter of Rights is concerned, however, I believe that the appropriate analytic starting point is the effect rather than the purpose of the enactment. Inasmuch as the effect of the Lord's Day Act is to compel the observance of Sunday as a day of rest, it violates the guarantee of freedom of conscience and religion in s. 2(a) of the Charter. Moreover, the legislative purpose or governmental objective underlying the Act does not represent a reasonable limit on the right to freedom of conscience and religion which can be justified under s. 1 of the Charter.

Appeal dismissed.

Footnotes

* Ritchie J. did not take part in the judgment.