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CT-2024-010

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

**BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION
AND GOOGLE LLC
VOLUME 19 OF 20**

PUBLIC

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August 22, 2025

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

Elisa K. Kearney (LSO# 49342T)
Tel: 416.367.7450
Email: ekearney@dwpv.com

Chantelle T.M. Cseh (LSO# 60620Q)
Tel: 416.367.7552
Email: ccseh@dwpv.com

Chanakya A. Sethi (LSO# 63492T)
Tel: 416.863.5516
Email: csethi@dwpv.com

Chenyang Li (LSO# 73249C)
Tel: 416.367.7623
Email: cli@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Respondents, Google
Canada Corporation and Google LLC

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TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Alexander M. Gay

Email: alexander.gay@cb-bc.gc.ca

Donald Houston

Email: donald.houston@cb-bc.gc.ca

John Syme

Email: john.syme@cb-bc.gc.ca

Derek Leschinsky

Email: derek.leschinsky@cb-bq.ca

Katherine Rydel

Email: katherine.rydel@cb-bc.gc.ca

Sanjay Kumbhare

Email: sanjay.kumbhare@cb-bc.gc.ca

Tel: 613.296.4470

Fax: 819.953.9267

Lawyers for the Applicant, the Commissioner of Competition

AND TO: THE REGISTRAR OF THE COMPETITION TRIBUNAL
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Email: Tribunal@ct-tc.gc.ca

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(1858), 169 E.R. 1079

Please see in
particular pp.
1079 and 1081

[453] 1858.

REGINA v. WILLIAM TREBILCOCK.

(The prisoner was indicted for larceny under s. 4 of The Fraudulent Trustees Act, 20 & 21 Vict. c. 54, and, in a 2nd count, for larceny at common law. It appeared that the prosecutrix having deposited a box of plate with the prisoner for safe custody, he broke open the box and took the plate out and pawned it. The jury returned a verdict of guilty, but recommended the prisoner to mercy, on the ground that they believed that he intended ultimately to return the plate to the prosecutrix:—Held, that, although, as decided in *Regina v. Holloway* (1 Den. C. C. 370), to constitute larceny there must be an intention permanently to deprive the owner of the property, the recommendation by the jury did not so qualify the verdict as to bring the case within the principle of that decision. *Semble*, that if not a larceny of the plate at common law, it was not made so by section 4 of The Fraudulent Trustees Act.)

[27 L. J. M. C. 103 ; 30 L. T. O. S. 293 ; 22 J. P. 112 ; 4 Jur. N. S. 123 ;
6 W. R. 281 ; 7 Cox C. C. 408.]

The following case was reserved by the Recorder of Plymouth.

At the General Quarter Sessions of the Peace holden in and for the borough of Plymouth on the 1st day of January 1858, before Charles Saunders, Recorder, the prisoner, William Trebilcock, was tried on an indictment which charged him,

First. With a larceny, under the statute 20 & 21 Vict. c. 54, s. 4 (a), in having, as bailee of plate the property of the prosecutrix, fraudulently converted it to his own use.

Secondly. With a common larceny of the same plate.

The jury found the prisoner guilty on both counts of the indictment, but recommended him to mercy, “believing that he intended ultimately to return the property.” The question for the opinion of the Court is, whether, consistently with the ground upon which [454] the jury recommended the prisoner to mercy, the conviction was right upon both or either of the counts.

The case was this.

The prosecutrix, Miss Palmer, resided at Plymouth, and, going to London for eight or ten days, deposited with the prisoner, a tradesman at Plymouth, who had offered to take care of anything for her during her absence, a chest of valuable plate for safe custody till she returned. The prisoner had been told that the prosecutrix would leave a parcel with him, which he said that he would put in his iron chest to keep for her. When the chest of plate was placed in the prisoner’s hands it was locked (the prosecutrix keeping the key), then covered with a wrapper, sewn together, and sealed in a great number of places, and then tied with a cord. The prisoner was not informed of the contents of this parcel, nor was any key given to him. In a day or two after the prosecutrix left for London, the prisoner had uncorded the chest, broken the seals, taken off the wrapper, procured a key, opened the chest, and taken out a part of the plate and offered it to one Woolf, at Plymouth, as a security for the advance of £50. The pawnbroker took up one of the pieces of plate, which bore the crest, and also a superscription with the name of Sir George Magrath upon it, and expressing his dislike to have anything to do with it, the prisoner said that

(a) The section is as follows:—“If any person being a bailee of any property shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny.”

he was under an engagement to be married to Lady Magrath. The prosecutrix had lived with Sir George Magrath, and when he died the plate, among other property, came into her possession. Woolf ultimately declined any advance upon it. The prisoner then communicated by letter with another pawnbroker named Druiff, at Newport in Monmouthshire, with whom the prisoner had before had bill transactions. Druiff came to the [455] prisoner at Plymouth, and advanced him £200, taking bills for the amount and the whole chest of plate, worth from £500 to £600, as a collateral security for the loan. Druiff took the plate away with him to Newport. The prisoner, by way of accounting to Druiff for the possession of the plate, represented to him that he was going to get married to the lady of the late Sir George Magrath, and that she had given him the plate to take care of till they were married. The prosecutrix went to London on the 8th day of November, and returned on the 17th of the same month. On her return, the prosecutrix tried often to see the prisoner, but could not do so till the 26th, when she first saw him and asked for the parcel; the prisoner said he would send it to her the same evening. It was not sent. The prosecutrix went often backwards and forwards to the prisoner's shops and private residence to see the prisoner, but could not see him again till the 2nd December, when, the prosecutrix insisting upon instantly having her parcel, the prisoner said she could not have it, as it was out of town; he had sent it to Bristol. Then he said it was now further than Bristol; that it was in Wales, but that he would write a letter, and she should have it on Friday. The parcel did not arrive. The prisoner refused to tell in whose hands it was, but the prosecutrix had learnt from the prisoner's father that Druiff had it. The inspector of police went to Newport, and found the chest of plate there, but Druiff refused to give it up unless upon repayment of the two hundred pounds for which it was deposited with him as security. The prisoner could not redeem it; and upon the facts being made known to the prosecutrix, she had the prisoner taken into custody on a charge of stealing, and the police took possession of the chest of plate as stolen property.

[456] Upon the finding of the jury, with the recommendation to mercy above stated, the counsel for the prisoner contended that, to support either of the counts in the indictment, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of her property, and that, as the jury believed that his intention was ultimately to return it, the verdict was wrong.

The prisoner was committed to prison, and sentence deferred until the opinion of the Judges shall have been obtained on the question raised.

If the Court shall be of opinion that the ground upon which the jury recommended the prisoner to mercy may consist with the verdict upon both or either of the counts of the indictment, the verdict to stand upon both or either of the counts accordingly.

If the recommendation may not consist with the verdict on either count, then the verdict to be set aside, and a verdict of not guilty to be recorded.

This case was argued, on 1st February 1858, before Lord Campbell C. J., Coleridge J., Martin B., Crowder J. and Watson B.

Carter appeared for the Crown, and E. W. Cox for the prisoner.

Lord Campbell C. J. (addressing the counsel for the prisoner).—You need not consider the recent statute. If it is not larceny at common law, the statute will not make it so; but how do you shew that it is not a larceny at common law?

Coleridge J.—There was no need of the count upon the statute.

E. W. Cox. I contend that the prisoner was not, upon the finding of the jury, guilty of larceny at common law, inasmuch as he had no intention to deprive the owner permanently of her property. It [457] is decided, in *Regina v. Holloway* (1 Den. C. C. 370), that an essential element of larceny is an intention to deprive the owner wholly and permanently of his property, and the law as laid down in that case is confirmed by *Regina v. Poole and Yeates* (*ante*, p. 345).

Coleridge J.—Your proposition is clear, but how do you bring this case within it?

E. W. Cox. The jury have expressly found that the prisoner intended ultimately to return the plate, and that is quite inconsistent with the admitted requisite to larceny, an intention permanently to deprive the owner of it.

Lord Campbell C. J.—That is not a part of the verdict. The jury found the prisoner guilty without qualification. They then recommended him to mercy, and they say loosely that the reason is that they think he had an ultimate intention to return the plate, that is, if ever he could raise the money, which was improbable.

Coleridge J.—The jury do not say that the prisoner intended to return the plate at the time he took it.

E. W. Cox. The larceny, if larceny it was, was complete at the moment when the prisoner deposited the box with the pledge. That is the crime the jury were trying, not what may have passed in his mind afterwards. They found that at that time, at the moment of committing the larceny, he did not intend to deprive the prosecutrix permanently of the property. Their verdict could have had reference to no other time, and if no larcenous intention existed at that time, or, which is the same thing, if the jury believe that no such intention existed, then the crime of larceny was not complete, and the prisoner was entitled to an acquittal.

[458] Carter, for the Crown, was not called upon by the Court.

Lord Campbell C. J.—The general proposition contended for by Mr. Cox is perfectly correct. To constitute larceny there must be an intention on the part of the thief to appropriate the property to his own use, and usurp an entire dominion over it; and if, at the time of the asportation, his intention is to make a mere temporary use of the chattels taken, so that the *dominus* shall again have the use of them afterwards, that is a trespass, but not a larceny; but that law does not apply to this case. Here there was abundant evidence of a larceny at common law—abundant evidence from which the jury might find that the prisoner feloniously stole the plate; and in fact the jury have so found and have returned a verdict of guilty. But they have recommended the prisoner to mercy, and accompanied that recommendation with a statement as to the prisoner's intention to return the stolen property. Now I doubt whether what the jury say, in giving their reason for recommending the prisoner to mercy, is to be considered as part of their finding; but, even assuming it to be so, all that they say is that he intended ultimately to return the property—not that at the time of the wrongful taking he had any such intention.

Coleridge J.—I am of the same opinion. There is no question about the law in this case; but the question is merely as to the facts, and upon the facts it appears that the prisoner had put it out of his power to return the plate which he had taken. Then, what must we do in order to make sense of the finding of the jury? It is to be observed that the recommendation to mercy in itself assumes that the verdict of guilty is correct; but the jury seem to have thought that the prisoner had it in his mind at some uncertain [459] time, if he could get hold of it again, to restore the property; and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding; whilst the construction put upon it by Mr. Cox renders their conduct quite inconsistent and insensible.

Martin B.—I am of the same opinion. The recommendation to mercy, and the words which accompanied it, were no part of the verdict, and had nothing to do with it; and when the jury said “guilty” there was an end of the matter, so far as the verdict was concerned. But I also think that, even if it did form part of the verdict, it would not have the effect of bringing it within the principle contended for. It seems to me quite clear that this prisoner stole the plate and then pledged it for £200; and I think that in so doing he “usurped the entire dominion over it” within the meaning of that expression as used by Parke B. in *Regina v. Holloway*. If, therefore, a special verdict had been found, in the very terms used by the jury when they recommended the prisoner to mercy, I should have said that he was still guilty of larceny.

Crowder J.—It seems to me also that upon the facts of this case no other rational conclusion could be arrived at, except that the prisoner stole the plate. He broke open the box and took out the plate and stole it; but the jury recommended him to mercy because they thought that he had an intention of restoring the property some time if he could. Probably it very often happens that if stolen goods are pawned there is an intention to get them back again, if the person pawning them should ever be able to do so, and in that case to return them; but such an intention affords no ground for setting aside a verdict of guilty [460] when the offence of larceny is satisfactorily proved by the evidence.

Watson B.—I also think that this is the clearest case of larceny possible, though the jury have recommended the prisoner to mercy because they thought that he would ultimately have restored the property if he could have got it back.

Lord Campbell C. J.—I wish to add that I think that what a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be reserved for the opinion of this Court.

Conviction affirmed.

IN THE SUPREME COURT OF BRITISH COLUMBIA**Please see in particular paras. 185-189**

Citation: ***R. v. Veranski and Bellotti*,
2011 BCSC 1322**

Date: 20111006
Docket: X72392-2
Registry: New Westminster

Regina

v.

Stoitchko Veranski & Paolo Bellotti

Before: The Honourable Madam Justice Ker

**Reasons for Judgment on *Charter* Voir Dire #1 - Reasonableness of
the Room Search and Arrest of the Accused Veranski**

Counsel for Crown:

B. Smith
A. M. Switzer

Counsel for Veranski:

P. Wilson, Q.C.
M. Richards

Counsel for Bellotti:

J. Thorhaug

Place and Date of Voir Dire:

New Westminster, B.C.
June 6 – 9, 2011
July 15, 2011

Place and Date of Judgment:

**New Westminster, B.C.
October 6, 2011**

Introduction:

[1] On the morning of May 24, 2007, Captain Jim Bleasdale (Capt. Bleasdale), a fire suppression officer with the Port Moody Fire Department (the “PMFD”) was conducting routine fire inspections of various business premises in the Spring Street area of the City of Port Moody, British Columbia. During his patrol, he was approached by an unknown and unidentified individual who advised that the PMFD should conduct a safety inspection of the business premises at 68 Williams Street (the “Premises”). Only limited information was provided by the unknown informant or tipster; essentially the informant said “they were cooking” at the location. Capt. Bleasdale interpreted this information to mean there was a possible clandestine drug lab in the business at 68 Williams Street which was located in a light industrial area of the city.

[2] Captain Bleasdale returned to the fire hall and discussed this information with the on duty fire prevention officer of the PMFD, Captain Ralph Ungless (Capt. Ungless). The PMFD eventually determined the nature of the information about a potential clandestine drug lab was too vague and the circumstances potentially too dangerous to conduct a fire safety inspection. The PMFD elected to pass on the information from the anonymous tipster to the Port Moody Police Department (the “PMPD”) so they could investigate the matter.

[3] The PMPD was contacted by the PMFD and the information about a suspected active drug lab at the Premises was first received by Cst. Travis Carroll. Upon receiving this information, Cst. Carroll immediately contacted Sgt. Daniel Smith, a 22 year veteran of the PMPD and, at the time, the supervisor of the PMPD Special Projects Team, and apprised him of the information. The focus of the Special Projects Team investigations was drug and property offences in the Port Moody area.

[4] Upon receiving the information from Cst. Carroll, Sgt. Smith did two things: (i) he telephoned Capt. Bleasdale to confirm the information Capt. Bleasdale had received from the tipster and tried to get further details about the encounter with the tipster; and, (ii) he then tasked his two team members, Cst. Shawn Faulkner and

Cst. Jodi Gormick, with setting up surveillance of the business premises at 68 Williams Street.

[5] Regrettably, one thing Sgt. Smith never did through the entirety of his investigation on May 24, 2007, was make any notes of any of his conversations, interactions or the steps he took that day. As a review of the evidence below will reveal, there were gaps in his recollection of the events and his evidence was at odds with significant aspects of the evidence of Capt. Ungless. The absence of any notes is very troubling as it undermines the reliability of aspects of Sgt. Smith's evidence. His explanation for making no notes for such a significant investigation was largely unsatisfactory.

[6] The business in question on the Premises was the Wheel to Wheel Auto Repair Shop owned and operated by the accused Paolo Bellotti. Located across Williams Street and 300 metres away from the entry to the Premises was a West Coast Express commuter railway station and parking lot. The possible existence of a clandestine drug lab so close to a busy commuter railway station raised a significant concern for public safety in the minds of all officers involved in this investigation.

[7] After some surveillance of the Premises by the members of the PMPD Special Projects Team, including an undercover walk-through of the working garage and customer service areas, and discussions between Capt. Ungless and Sgt. Smith, the Premises was inspected by Capt. Ungless. He was looking for evidence to support the assertion that there was a clandestine drug lab inside the Premises. Eventually, the door to a self-contained studio/workshop (the "Room") inside the work area of the Premises, was opened by Sgt. Smith and Capt. Ungless. The Room contained a clandestine drug lab. The Room was sub-let from Mr. Bellotti by the accused Stoitchko Veranski.

[8] The initial searches of the Room were conducted without a search warrant. Only after Cpl. Stark, the RCMP Clandestine Lab Coordinator, entered and searched the Room and confirmed that the Room contained a clandestine drug lab did Cst. Gormick start to draft an Information to Obtain a Search Warrant and subsequently

apply for a search warrant. A search warrant for the Premises, including the Room, was issued later that day.

[9] Mr. Veranski and Mr. Bellotti are both charged on a seven count indictment with a variety of offences under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [CDSA], that relate to the unlawful production of methamphetamine and possession for the purpose of trafficking of methamphetamine and precursor substances contrary to sections 7(1), 5(2) and 46 of the CDSA (the “Indictment”). Mr. Veranski is charged by himself with five counts under the CDSA that relate to the events of May 24, 2007 and the discovery of the clandestine drug lab located in the Room inside Mr. Bellotti’s business premises.

[10] Mr. Veranski and Mr. Bellotti are jointly charged with two offences of production and possession for the purpose of trafficking contrary to the provisions of the CDSA that relate to events that occurred on May 26, 2007, subsequent to the May 24, 2007 search of the Premises and Room. These two charges stem from a separate location and are not the subject of the present *voir dire* ruling.

[11] On this *voir dire* Mr. Veranski seeks declarations that his rights under ss. 8 and 9 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [Charter] were breached by the PMPD and PMFD, who acted in tandem, when they searched the Room and detained him in investigating the offences now covered by the Indictment.

[12] The Crown asserts that the two warrantless searches were not in violation of Mr. Veranski’s *Charter* rights, arguing both searches, into an area within a commercial premises open to the public, were non-intrusive brief entries authorized by law. The first entry of the Room, argues the Crown, was authorized by s. 21 of the *Fire Services Act*, R.S.B.C. 1996, c. 144 [Fire Services Act]. The Crown argues the second entry, made by Cpl. Stark, was authorized by the common law powers and duties of police officers as delineated in the *Waterfield* doctrine.

[13] This *voir dire* ruling deals only with the investigation and events of May 24, 2007, and specifically the entries of the Room by Sgt. Smith, Capt. Ungless and Cpl. Stark. Mr Veranski rented the Room from Mr. Bellotti and it was located inside the working area of Mr. Bellotti's business premises: an auto repair shop. The issue of the admissibility of the evidence as a result of the searches of the Room will be addressed at a later phase of the trial.

Factual Overview

[14] The circumstances germane to the factual overview of this application have been comprehensively summarized by the parties in their written arguments filed on this *voir dire* and their submissions at the conclusion of the *voir dire*. I propose to summarize the more salient features of the evidence and the facts as I find them to be in relation to the issues raised on this *voir dire*. Although I may not refer to all of the evidence adduced on the *voir dire*, I have considered it all and have had the benefit of hearing and reviewing the comprehensive written and oral submissions made on this *voir dire*. I propose to review the factual overview in chronological order as to how the events developed and unfolded on May 24, 2007.

The Tip received by the PMFD

[15] Sometime before 10:30 hrs. on May 24, 2007, Capt. Bleasdale, the on-duty fire suppression officer of the PMFD was conducting routine safety patrols of the businesses and buildings in the light industrial sector of Port Moody, B.C. While on Spring Street, and in the vicinity of 68 Williams Street, Capt. Bleasdale was approached by an unidentified and unknown person who suggested the PMFD should inspect the Premises at 68 Williams Street as "they were cooking" in the Premises. Capt. Bleasdale understood the reference to "cooking" to mean "cooking drugs."

[16] Capt. Bleasdale returned to the PMFD Fire Hall and at about 10:30 hrs. related the informant's tip to now retired Capt. Ralph Ungless, the fire prevention officer of the PMFD. Capt. Ungless was responsible for, among other things, conducting routine fire inspections of all residences and businesses in Port Moody

and responding to complaints of potential fire hazards or fire safety issues all pursuant to the *Fire Services Act* and other supporting legislation and by-laws. Capt. Ungless was also the Local Assistant Fire Commissioner for the PMFD.

Transmittal of the Tip by PMFD to the PMPD

[17] After speaking to Capt. Ungless, Capt. Bleasdale contacted the PMPD and spoke with Cst. Travis Carroll. Capt. Bleasdale related the tip he had received from the unknown informant and indicated that there might be an active clandestine drug lab at the Premises.

[18] Cst. Carroll contacted Sgt. Dan Smith, then supervisor of the PMPD Special Projects Team and conveyed the tip from the PMFD to Sgt. Smith (who was driving into the office at the time).

[19] Upon receiving the information from Cst. Carroll, Sgt. Smith immediately telephoned Capt. Bleasdale to obtain further details about the tip and the description of the informant. Sgt. Smith made no notes of his conversation with Capt. Bleasdale and could not recall the details of the information or description provided. Sgt. Smith did recall Capt. Bleasdale made it clear to him that he wanted the PMPD to deal with the investigation of this tip rather than have the PMFD conduct an inspection.

[20] There was conflicting evidence on the *voir dire* as to whether Sgt. Smith also had a telephone conversation with Capt. Ungless at around 10:30 hrs regarding the tip. Although Sgt. Smith had no recollection of such a conversation, Capt. Ungless certainly did and I have no reason to disbelieve Capt. Ungless on this point. He prepared a two page report on the evening of May 24, 2007, summarizing the events of the day.

[21] Capt. Ungless testified, and I accept his evidence on this point, that shortly after speaking with Capt. Bleasdale, he received a telephone call from Sgt. Smith asking him if he would be able to do an inspection of the Premises. In this telephone conversation, Sgt. Smith discussed with Capt. Ungless the two options available to addressing the tip information. One option was for the PMFD to conduct a fire

inspection of the Premises. Capt. Ungless informed Sgt. Smith that he would review this request with the Fire Chief, Mr. Lambert. The second option was for the PMPD to apply for a search warrant, which could take some time. Capt. Ungless was left with the impression that a search warrant could be obtained by that afternoon.

[22] At 11:00 hrs, a joint meeting between members of the PMFD and the PMPD was held at the PMFD Fire Hall. The purpose of the joint meeting was to consider the information that had been received in the tip, to discuss the various alternatives on how to proceed with the investigation of the tip and to make a determination about what was to be done. Present at the meeting were Capt. Ungless, Capt. Bleasdale and Fire Chief Lambert of the PMFD. Attending for the PMPD was the watch commander, Sgt. Pat Strehlau.

[23] As a result of the discussions and the vague information about the suspected active drug lab, particularly the type of drug lab it might be, a decision was made by those present that because of the potential unknown dangers associated with drug labs, essentially the uncertainty as to the safety of conducting an inspection, the PMFD would not conduct a fire inspection. The attendees at the meeting reached a consensus decision that the matter would remain within the jurisdiction of the PMPD and, according to Capt. Ungless, it was decided that the best and safest course of action was for the PMPD to apply for a search warrant.

[24] Sgt. Smith was not asked to attend this meeting, was not aware that it was being held and did not learn of it until sometime later.

[25] At the conclusion of the meeting, Capt. Ungless returned to his office, believing he was no longer involved in the matter. Had he not been contacted by Sgt. Smith later in the day with further information that appeared to minimize the personal safety concerns and asked if he could perform an inspection, which will be discussed in more detail later in these reasons, Capt. Ungless would not have gone to the Premises to conduct an inspection.

PMPD Initial Investigative Steps and Surveillance of the Premises

[26] Sgt. Smith contacted Sgt. Dave Wynes of the PMPD at about 10:40 hrs. and relayed the information he had received from Capt. Bleasdale. Sgt. Smith then contacted his two other team members on the Special Projects Team, Cst. Shawn Faulkner and Cst. Jodi Gormick, and advised them of the possibility of an active “meth” lab at the Premises and directed them to set up a surveillance position in the vicinity of 68 Williams Street to observe the dealings at the Premises. Sgt. Smith continued to update Sgt. Wynes of the status of the investigation as it progressed but was unable to recall how many conversations he had with Sgt. Wynes.

[27] At 10:58 hrs. Cst. Faulkner and Cst. Gormick set up their surveillance positions at the Premises. Part of their surveillance involved taking note of vehicle licence plates associated with the Premises. Based on their observations, the Premises appeared to be operating as a regular autobody repair shop business.

[28] At about 11:34 hrs, Cst. Faulkner was contacted by Sgt. Smith who advised him that 62 Williams Street was also part of the autobody business and that there was a separate door for that address located north of the main glass entrance door into the customer service area of the business at the Premises. Cst. Faulkner’s observations of a number of people, including those who appeared to be mechanics entering and exiting through the door at 62 Williams Street, confirmed for him that the two addresses were part of one larger business.

[29] At 12:01 hrs., Cst. Faulkner observed a man dressed in coveralls, later identified to him as Mr. Veranski, exit the Premises through the blue door at 62 Williams Street, obtain a small item such as a cell phone from the interior of a green Dodge Caravan (BC Licence Plate # 775 JRJ) parked in front of the autobody business and then return to the Premises through the door at 62 Williams Street.

[30] At about 12:11 hrs, Sgt. Smith joined Cst. Faulkner at the scene. The two discussed the situation. Sgt. Smith was advised that the observations of Cst. Faulkner suggested the Premises was operating as a regular automotive repair business with customers and employees going in and out of the business. According

to Cst. Faulkner, all the customers appeared to enter and exit through the main glass doors of the business at 68 Williams St. and the mechanics and employees appeared to be using the blue door at 62 Williams St., north of the main business entrance.

[31] Sgt. Smith and Cst. Faulkner, both dressed in plainclothes, decided to enter the business, which was open to the public, and see what they could observe in order to try and confirm the validity of the information received in the tip to the PMFD. Given their knowledge of the volatility of chemicals associated with drug labs, both officers were concerned about public safety including the employees and customers of the business, as well as the general public, given the location of the Premises to other businesses and a West Coast Express commuter station. Cst. Faulkner's task was to gain entry to the garage area and gain as much information through observation as possible.

[32] Cst. Faulkner entered the Premises through 62 Williams Street and found himself inside the garage area where vehicles were being serviced by mechanics. His observations confirmed that the Premises appeared to be a regular working garage with no sign of a drug lab in the surrounding area that he could see. However, in the northeast corner of the business, Cst. Faulkner noticed a fairly new, recently drywalled room that extended floor to ceiling [the "Room"] within the working area of the garage and it appeared to be out of place with the rest of the Premises. The Room had its own door but no windows. The presence and appearance of the Room aroused Cst. Faulkner's suspicions but he conceded in cross-examination he had no idea what might have been stored inside.

[33] After making these observations, Cst. Faulkner exited the garage and went around to the main customer area located inside the door at 68 Williams Street. Cst. Faulkner entered through the main glass door and saw Sgt. Smith speaking to Mr. Bellotti. He did not join in the conversation as he was still concentrating on looking into the garage area of the Premises. Cst. Faulkner had a fleeting glance of someone going into the Room.

[34] Sgt. Smith testified that it was his decision, in consultation with Cst. Faulkner, to enter the Premises, posing as customers, in an effort to make observations of what was going on within the Premises.

[35] Sgt. Smith entered the Premises through the main glass doors of 68 Williams St. and went into the customer service/reception area of the autobody repair business. Sgt. Smith approached the counter and had a conversation with the man behind the counter, later identified as Mr. Bellotti, about buying auto parts. From what Sgt. Smith could see of the garage area it looked to be a “regular automotive shop and business as usual in the shop.”

[36] About 10 minutes after entering, Sgt. Smith and Cst. Faulkner left the Premises.

[37] Sgt. Smith and Cst. Faulkner then had a discussion about their investigative options. They both were suspicious about the newly added Room inside the garage area and that the information initially received may have been valid. Although Sgt. Smith’s impression of the initial tip was that the lab was active, based on their observations while inside the Premises, they concluded they had insufficient information to support an application for a search warrant.

[38] Cst. Faulkner resumed his surveillance position.

Sgt. Smith’s telephone call to Capt. Ungless at 12:21 hours

[39] Although there was nothing he could do immediately, Sgt. Smith elected to continue his investigation, motivated by the perceived risk to public safety posed by active drug labs and their attendant volatility that can result in explosions, fire hazards and the release of potentially poisonous vapours. The risk to the public was heightened in Sgt. Smith’s mind given the location of a potentially active drug lab in a light industrial area and next to a commuter rail station.

[40] Given his concerns for public safety, Sgt. Smith telephoned Capt. Ungless for the second time, at 12:21 hrs. It should be noted that based solely on Sgt. Smith’s evidence this was his first telephone call to Capt. Ungless. However, as outlined

earlier, Sgt. Smith made no notes of any of his conversations or observations from May 24, 2007. He did not provide any evidence about an earlier conversation at 10:30 hrs with Capt. Ungless. Nevertheless, as also outlined above, I accept Capt. Ungless's evidence that there was an earlier telephone call at 10:30 hrs and at that time Sgt. Smith asked him for the first time if he could perform a fire inspection.

[41] Sgt. Smith testified that during this conversation with Capt. Ungless he advised of the status of the police investigation and that they intended to continue the investigation with a view to obtaining a search warrant once sufficient grounds were collected. Sgt. Smith discussed with Capt. Ungless his concerns about the danger to public safety if there was an active drug lab in the Premises. He also advised Capt. Ungless of his suspicions about the Room. Sgt. Smith decided to contact Capt. Ungless to apprise him of the status of the PMPD investigation because he was the Fire Prevention Officer for the PMFD. Sgt. Smith did not contact Capt. Bleasdale again as he had made it clear he wanted the PMPD to deal with the complaint.

[42] In direct examination, Sgt. Smith testified he never asked Capt. Ungless to do anything as he did not want to engage Capt. Ungless as an agent on behalf of the PMPD. Sgt. Smith discussed with Capt. Ungless the option of him inspecting the premises but testified he did not ask him to do an inspection and told Capt. Ungless he was not asking him to do an inspection on behalf of the PMPD and that any decision to conduct an inspection had to be his own decision for public safety reasons.

[43] Sgt Smith was adamant in cross-examination that he never asked Capt. Ungless if he could conduct a fire inspection of the Premises. He simply advised Capt. Ungless that the PMPD had come to an end in their investigation for that day and that if he chose to continue and do an inspection that was to be the decision of Capt. Ungless. Sgt. Smith testified he was quite clear in his discussion that it had to be the decision of Capt. Ungless as to whether an inspection would be conducted. He left the decision as to whether a fire inspection should be conducted up to Capt. Ungless. Sgt. Smith agreed that he would have liked Capt. Ungless to do a fire

inspection of the Premises but reiterated that he did not direct him to do so. Sgt. Smith acknowledged that if Capt. Ungless found a drug lab during an inspection, such a discovery would help the criminal investigation and the ability of the police to obtain a search warrant. However, his primary purpose in discussing the matter with Capt. Ungless was ensuring public safety.

[44] As a result of their telephone conversation, Capt. Ungless said he would conduct a fire inspection of the Premises and agreed to come down to the area and meet with Sgt. Smith near the Premises but out of view of the actual business.

[45] Capt. Ungless provided what can be described as an altogether different account of the telephone conversation he had with Sgt. Smith at 12:21 hrs and their subsequent meeting near the Premises.

[46] Capt. Ungless testified he received a telephone call from Sgt. Smith sometime after 12:00 noon. Sgt. Smith told him that members of the PMPD had been inside the Premises in an undercover capacity and seen no signs of a drug lab and that the risk of personal danger to Capt. Ungless did not appear to be that great. He was also advised that there was a room in the back corner of the Premises that the PMPD were not able to look at. As a result, Sgt. Smith asked Capt. Ungless if he “would be able to come and do an inspection.”

[47] In cross-examination Capt. Ungless agreed that Sgt. Smith asked him to come down and do an inspection in the new, changed circumstances, which appeared to be less dangerous to his personal safety. Capt. Ungless did not think he would have returned to the Premises if Sgt. Smith had not contacted him. Indeed his evidence in cross-examination by counsel for Mr. Veranski on this point was telling:

Q You told the police this not [*sic*] a routine inspection?

A It was an inspection based entirely on a complaint so it was not a routine inspection.

Q All right. Because it wouldn't have taken place but for the intervention of the police, right?

A It wouldn't have taken place without the complaint.

Q It wouldn't have taken place without the request of the police for you to come down and deal with the complaint, more accurately. Yes?

A With the newer information that I received from -- from the police at 12:20, yes, that's true.

Q So it wouldn't have taken place but for the intervention of the police and the information they gave you at 12:20 in that conversation. Fair?

A Fair enough. [Transcript Day 3, p. 71 ln. 6-22]

[48] Capt. Ungless further agreed he went to the Premises at the request of Sgt. Smith notwithstanding the decision from the joint meeting earlier in the day that the PMFD would not be doing an inspection and that the investigation of the complaint was to be a police matter. Capt. Ungless agreed he was asked by Sgt. Smith if he could conduct a fire inspection to rule out a drug lab in the Premises.

[49] Capt. Ungless agreed to meet Sgt. Smith in an alley behind and away from the Premises.

The first meeting between Sgt. Smith and Capt. Ungless

[50] In response to Sgt. Smith's 12:21 hrs telephone call and request of him, Capt. Ungless left the PMFD and attended in the vicinity of the Premises, meeting Sgt. Smith and possibly Cst. Gormick at 3030 St. Johns Street.

[51] When Capt. Ungless arrived at 3030 St. Johns Street, several doors away from the Premises, Sgt. Smith repeated the contents of their telephone conversation and, according to Sgt. Smith, reiterated the importance of Capt Ungless coming to his own decision about conducting a fire inspection. According to Sgt. Smith, Capt. Ungless decided to conduct an inspection of the Premises.

[52] Capt. Ungless testified that Sgt. Smith reaffirmed that they had been inside the Premises, seen no signs of a drug lab but had been unable to get into the Room and then "once again, asked if I'd be able to go in and do an inspection." Capt. Ungless agreed to do an inspection based in large part on the advice that Sgt. Smith conveyed to him about the circumstances inside the Premises that suggested his personal safety would not be in peril. Capt. Ungless felt a responsibility based on the

complaint received to conduct the inspection to determine whether there was a risk to public safety.

[53] Capt. Ungless testified in direct examination that Sgt. Smith was not directing him to do the inspection. However, in cross-examination, Capt. Ungless agreed he would not have attended the Premises if he had not been contacted by Sgt. Smith and asked if he could do an inspection.

The first inspection of the Premises by Capt. Ungless

[54] At 12:58 hrs. Capt. Ungless, who was in uniform, pulled up in front of the Premises in a PMFD vehicle and entered the Premises to conduct a fire inspection. He was observed by Cst. Faulkner to exit the Premises at 13:17 hrs. and leave the area in his vehicle.

[55] Capt. Ungless entered the Premises through the front door, went into the customer service reception area and spoke to the owner of the business, Paul Bellotti. According to Capt. Ungless the Premises had not been the subject of a routine fire inspection in about two years and therefore was actually overdue for an inspection.

[56] Capt. Ungless advised Mr. Bellotti he was there to conduct a fire inspection. Mr. Bellotti, who was completely co-operative and not aggressive, told him to go ahead and proceed with his inspection.

[57] Capt. Ungless then walked, unescorted, into the garage area of the Premises and started looking around for any indication of a drug lab on the Premises as well as doing an inspection. Both aspects fit within his mandate of inspecting for fire hazards as provided by the *Fire Services Act* as well as the local fire prevention by-law. He had with him a clip board with a one page "Fire Safety Inspection Report" (Ex. #3) that he completed as he walked throughout the garage area of the Premises. He agreed however that this was far from a routine fire inspection, based in part on the nature of the initial complaint.

[58] Capt. Ungless observed the Premises to be a working garage with the Room in the back corner. The only difficulties noted on the Fire Inspection Report were that both the workshop and mezzanine areas needed to be tidied up. Capt. Ungless saw no indication of the presence of a drug lab in any of the areas he was able to inspect. However, he was not able to inspect the entirety of the Premises. He asked one of the two mechanics about access to the Room but was directed back to Mr. Bellotti at the front desk.

[59] During his inspection of the garage, Capt. Ungless did not see anyone enter the Room. Given his uncertainty about the Room he did not endeavour to open the door or enter it on his own. Instead, Capt. Ungless went back to the front counter and asked Mr. Bellotti if he would accompany him to gain access to the Room.

[60] Mr. Bellotti told Capt. Ungless that the Room was sub-let by a Steve Veranski and that he did not have access to the Room. Mr. Bellotti provided Capt. Ungless with two telephone numbers to contact Steve Veranski. Capt. Ungless wrote this information down on a Memo note (Ex. #4).

[61] Capt. Ungless then left the Premises and tried to contact Mr. Veranski but was immediately transferred to voice mail or an answering service and elected not to leave a message.

[62] At 12:59 hrs, just after Capt. Ungless entered the Premises, Cst. Gormick, who was in a surveillance position on the east side of the business and looking into the Premises through the open rear service bay doors, observed a man wearing coveralls and safety glasses (later identified as Mr. Veranski) open the door to the Room on two occasions and enter the Room briefly. When he left the Room, he shut the door.

[63] At 13:22 hrs. Cst. Faulkner observed Mr. Bellotti leave the Premises briefly, talk on his cell phone for a short period of time, and then re-enter the Premises.

[64] Capt. Ungless acknowledged that at the time he performed this inspection he was under the impression that the PMPD would have a search warrant by the

afternoon. He was aware the police were standing by while he did his inspection and he believed that any information he gathered would assist the police. To that end, Capt. Ungless was endeavouring to assist the PMPD and was working as part of the team with the primary goal of all being to ensure the safety of the public from the potential hazards posed by a drug lab.

The second meeting between Sgt. Smith and Capt. Ungless

[65] After Capt. Ungless tried to contact Mr. Veranski, he returned to the alley where Sgt. Smith and Cst. Gormick were located, as they had agreed to meet in this location after the inspection. Capt. Ungless advised Sgt. Smith he had inspected everywhere within the Premises except the Room and he had not found anything that gave rise to any concern about the presence of a drug lab. Capt. Ungless advised he had tried to gain access to the Room but was not able to reach the person who sub-let the Room and so was denied access. Capt. Ungless told Sgt. Smith that Steve Veranski was the person who sub-let the Room and that he had been unable to reach him by telephone.

[66] Sgt. Smith was aware from a check of the police computer system that Mr. Veranski's name was associated to a drug file. He was also aware that the vehicle with BC licence plate 775 JRJ, observed by Cst. Faulkner during his surveillance of the Premises, was registered to Mr. Veranski. Sgt. Smith conveyed this information to Capt. Ungless telling him that Mr. Veranski was a person of interest. Capt. Ungless was told by Sgt. Smith that Mr. Veranski had previously been found to be in possession of a large quantity of cash and a shopping list for drug lab equipment.

[67] Sgt. Smith told Capt. Ungless that the information about the inability to access the Room did not accord with the surveillance observations made by the PMPD members while Capt. Ungless conducted the inspection of the Premises. Sgt. Smith told Capt. Ungless that while he was conducting his inspection, a mechanic had been observed to go back and forth into the Room. Sgt. Smith conceded in cross-examination that in fact he had not actually seen anyone entering the Room but only learned of such activity because Cst. Gormick had broadcast her observations of entries to the Room.

[68] This information led Capt. Ungless to believe that someone at the Premises could give him access to the Room and also caused him to believe that the Room was not booby trapped at the doorway. As a result, Capt. Ungless decided to telephone Mr. Bellotti to see if he could gain access to the Room. Mr. Bellotti reiterated to Capt. Ungless that it was Mr. Veranski who had access to the Room and that, to that end, he had phoned Mr. Veranski and left a message for him regarding Capt. Ungless' request to inspect the Room. Based on this information, Capt. Ungless did not make any further attempt to gain access to the Room through Mr. Bellotti.

[69] At about this point during the post-inspection meeting, an unidentified individual approached Capt. Ungless, Sgt. Smith and Cst. Gormick, walked past the group and said "it's still in there." According to Capt. Ungless, Sgt. Smith and Cst. Gormick followed the person and spoke to the individual away from Capt. Ungless.

[70] While Sgt. Smith and Cst. Gormick spoke to the person they believed to be the original informant, Capt. Ungless telephoned the Fire Chief to confer about the new information. As a result, they agreed that if Sgt. Smith felt it was safe for Capt. Ungless then he would do a second inspection to see if he could get into the Room.

[71] When Cst. Gormick and Sgt. Smith returned to Capt. Ungless, one of them informed him that the person was the informant who provided the original tip. Sgt. Smith provided no evidence about meeting with this unidentified individual.

[72] Capt. Ungless and Sgt. Smith conferred and Sgt. Smith advised Capt. Ungless that it would be safe enough to complete an inspection of the Room and that Sgt. Smith would accompany Capt. Ungless to ensure his personal safety.

[73] During the course of the meeting and surveillance behind the Premises, Sgt. Smith radioed at 13:42 hrs that there appeared to be a surveillance camera in the area behind the autobody repair business. At 13:48 hrs he radioed the location of the surveillance camera as being embedded in a nearby store sign connected to an adjacent business.

[74] While Sgt. Smith and Capt. Ungless were meeting away from the Premises, Cst. Faulkner observed Mr. Bellotti enter a truck (BC Licence Plate 0418 JF) at 13:51 hrs. and leave the Premises driving southbound on Williams Street.

[75] Sgt. Smith testified that Capt. Ungless came to his own decision to conduct a further inspection of the Premises and the Room and denied that he asked him to do so. Sgt. Smith acknowledged that, given all the information they had by this point in time, he wanted Capt. Ungless to do a second inspection but he did not compel him to do so. Sgt. Smith wanted to know whether there was a lab in the Room and wanted to ensure public safety. He testified that there was nothing more the police could do in terms of investigation, believing he did not have grounds to obtain a search warrant. Consequently, if Capt. Ungless was able to get inside the Room it might assist the police investigation and his observations might gather the information needed to obtain a search warrant.

[76] According to Sgt. Smith the combination of the presence of what appeared to be a surveillance camera in a store sign near the rear of the Premises, the initial tip complaint to the PMFD about an active drug lab, the fact that Capt. Ungless was denied access to the Room on his first inspection and the information about Mr. Veranski as the person who sub-let the Room were all factors that gave rise to a strong suspicion that there was a drug lab in the Room. Both Capt. Ungless and Sgt. Smith reached this conclusion and, according to Sgt. Smith, Capt. Ungless advised he was going to return to inspect the Room. Both were concerned about the risk to public safety.

[77] Capt. Ungless initially testified that he decided on his own to return to the Premises and conduct an inspection of the Room. However, in cross-examination he conceded he was working in tandem with Sgt. Smith, essentially as a team, and that they reached the decision to re-enter the Premises and inspect the Room in consultation with each other.

[78] It was clear from the evidence from Capt. Ungless that he was not operating in isolation but rather working in consultation with Sgt. Smith. Based on the

combination of the denial of access to the Room, the observation of a mechanic accessing the Room while Capt. Ungless did his first inspection, the background information about Mr. Veranski and that he was a person of interest in the police investigation and the potential risk to the general public if there was a drug lab in the Room, Capt. Ungless and Sgt. Smith decided together that they would go to the Room to determine if there was criminal activity occurring inside it in the form of a clandestine drug lab. While the overriding concern was, understandably, public safety, Capt. Ungless agreed the second inspection was entirely focused on whether there was criminal activity in the form of a drug lab inside the Room.

[79] Capt. Ungless also agreed this inspection would never have taken place in the manner it did without the information about the changed circumstances he received from Sgt. Smith and the assistance and intervention of the police.

[80] Given the circumstances that presented at this time and that Sgt. Smith's concern for the personal safety of Capt. Ungless had increased considerably, based on Sgt. Smith's knowledge that often those who have drug labs can be violent in their desire to protect them, Sgt. Smith decided he would accompany Capt. Ungless during the inspection.

The second inspection and entry of the Room

[81] Before Capt. Ungless re-entered the Premises, Sgt. Smith decided, for safety reasons, to freeze the area by detaining all individuals within the business and so he called in additional uniformed officers from the PMPD to assist in securing the Premises and detaining people. As he had no notes, he was unable to say when this decision was made and when the supporting officers were called in to assist. In all, eight PMPD officers, four in uniform and four plainclothes detectives, the majority of the operational complement of the PMPD, were involved in the detention of the individuals at the Premises.

[82] Two of the mechanics working in the Premises, Mr. Beauvais and Mr. Mohammed were detained. In fact, Mr. Beauvais had left the Premises and was driving out of the parking lot when he was detained. Mr. Bellotti, who had left the

Premises, was stopped by a marked police vehicle and detained for safety reasons, even though he was nowhere near the Premises. Sgt. Smith could not recall what instructions he gave to the officers on the issue of the detention of the various civilians.

[83] At 13:52 hrs., after all the individuals were detained and the Premises secured, Capt. Ungless re-entered the Premises with the intention of gaining access to the Room in order to determine whether there was a drug lab located inside it. He was accompanied by Sgt. Smith and other officers who were present to ensure his safety. They entered through the open service bay doors at the rear of the Premises and proceeded directly to the Room.

[84] Given his concerns for the safety of everyone, Capt. Ungless in particular, Sgt. Smith approached the closed door to the Room to open it for Capt. Ungless. The door was not locked and upon opening it Sgt. Smith detected a strong odour of black liquorice, an odour he understood to be associated with the production of the controlled substance known as "Ecstasy".

[85] Sgt. Smith did not go inside the Room or cross the threshold but he was able to observe a portion of the Room. The Room appeared to be a clandestine drug lab and contained the following: large plastic vats on stands, a large air conditioning unit, a counter with a large scale, graduated measuring containers, hand tools and a variety of unidentified parts. There was also an audible humming noise that sounded like fans coming from inside the Room. Sgt. Smith did not see anyone inside the Room at this time.

[86] Sgt. Smith stepped back from the threshold and warned all present that there was a lab inside the Room and that given the safety concerns everyone should leave the Premises. Capt. Ungless never did an actual inspection of the Room and only looked across the threshold. He did not smell anything but was able to look inside the room and see a plastic vat with tubes.

[87] As Sgt. Smith made this announcement, he heard the door to the Room close behind him. He turned around and found the door now locked and could hear

movement inside the room including bumping sounds. Sgt. Smith also noticed the humming sound had ceased. He directed the occupant to exit the Room and after a very brief pause, Mr. Veranski exited the Room. He was taken into custody by Cst. Morrison and arrested for production of a controlled substance. In Sgt. Smith's experience, persons with an association or proximity to a drug lab might be affiliated with it.

[88] At this time, Capt. Ungless left the Premises, went back to his vehicle and telephoned the Fire Chief to advise of the result of the search and to have a fire crew dispatched to stand by if assistance was necessary. This ended Capt. Ungless's involvement in the investigation. He stood by outside and remained on scene for about another hour.

[89] After discovering what he believed to be a drug lab in the Room, Sgt. Smith directed that all the people detained at the scene be arrested and taken to the PMPD for questioning.

[90] As the second search was commencing, Cst. Faulkner approached the Premises from the west side, and was at the threshold to the main entrance from Williams Street, when he heard someone (Sgt. Smith) yelling words to the effect of "There's a lab, there's a lab. Get out, get out, get out." Cst. Faulkner elected not to enter the Premises and immediately started to secure the scene and wait for the issuance of a search warrant.

Cpl. Stark's involvement and search of the Room

[91] At 11:30 hrs on May 24, 2007, Sgt. Dave Wynes of the PMPD contacted Cpl. Stark, a member of the RCMP and the Coordinator of the Clandestine Lab Response Unit for the Province of British Columbia, and advised him of a possible drug lab in the Premises.

[92] At 14:04 hrs, Sgt. Wynes contacted Cpl. Stark again and advised that a Fire Inspector with the PMFD had conducted a fire inspection of the Premises and located in a room at the rear of the building what appeared to be a "lab-type

apparatus” inside the room with chemicals at the door, as well as steel containers and a poly drum inside the room.

[93] At 14:46 hrs, about 54 minutes after Sgt. Smith and Capt. Ungless opened the door to the Room, Cpl. Stark arrived at the Premises. Before entering the Room, Cpl. Stark conducted a safety briefing at 15:19 hrs with the members of the PMFD and PMPD who were at the Premises. Before donning protective gear to search the Room, Cpl. Stark noticed a smell of black liquorice in the general area of the Room and in the proximity of its door.

[94] At 15:28 hrs, or nearly an hour and a half after the door to the Room was opened and the drug lab discovered inside, Cpl. Stark, dressed in protective gear, entered the Room to confirm whether there was a drug lab present and whether it posed any immediate hazard or threat to the officers at the scene. He spent 11 minutes inside the Room conducting his search of the small area that was approximately 10 feet by 15 feet. As a result of this search, Cpl. Stark confirmed the Room contained a drug lab.

[95] Only after Cpl. Stark completed his search of the Room and confirmed it contained a drug lab did Sgt. Smith assign Cst. Gormick the task of seeking a search warrant.

Conclusion

[96] I accept the evidence of Capt. Ungless about his discussions with Sgt. Smith and being asked if he could perform an inspection. He was clear, careful and thoughtful in providing his evidence. He had no reason to embellish or alter his evidence. He made detailed notes the same evening as the events unfolded in order to assist him in his recollection of the events. He conceded points when put to him that clearly impact on the issue of agency. It was clear to me he had no pre-conceptions of the legal test for agency and presented as completely unaware of the criteria and considerations that inform the assessment of agency. In that respect, indeed in all respects, his evidence was completely unvarnished.

[97] I regret that I am unable to reach a similar conclusion with respect to Sgt. Smith's evidence, particularly on the issue of agency. It defies comprehension as to how an officer of 20 plus years at the time of these events, an individual involved in officer training and who knows the critical importance of police officer notes to preserving memory of significant details, could fail to make a single note of his investigative steps throughout such a significant criminal investigation. Although Sgt. Smith's reliance upon Cst. Faulkner as the designated scribe for interactions where Cst. Faulkner was present is understandable, the most significant conversations and investigative details that Sgt. Smith was involved in did not occur in the presence of Cst. Faulkner.

[98] Sgt. Smith had no recollection of the first telephone call that Capt. Ungless attributes to him. He was unaware of the critical strategy meeting between the PMFD and the PMPD at 11:00 a.m. and not involved in any sort of communication about this aspect of the overall investigation. He only knew of the meeting after the fact. In some respects he appeared to be operating on his own, not in consultation with the PMPD higher command structure and certainly not in communication with Sgt. Strehlau, the watch commander on the day in question. He could recall no details of information received about the description of the informant. He provided no evidence about the meeting between himself and the informant at the scene as Capt. Ungless described. Because he failed to make any notes of his own about other steps and conversations in the overall investigation he was unable to advise as to when he called in the other officers to assist in the detention of individuals at the Premises, nor was he able to recall the instructions he gave those officers as to the reasons for the detention of the individuals.

[99] Significantly, Sgt. Smith was at pains to ensure in his evidence that he made absolutely clear that he never requested of the PMFD and Capt. Ungless that they perform a fire inspection. Nor did he ever ask if they would be able to do so, repeatedly explaining that he steered clear of any such request as he knew it would likely result in Capt. Ungless becoming an agent of the PMPD. His evidence is diametrically opposed to that of Capt. Ungless. As I noted earlier, Capt. Ungless had

absolutely no reason to colour his evidence on this point and was careful as to what he recalled Sgt. Smith requesting of him. I regret that I must find that I cannot rely upon Sgt. Smith's evidence as to the nature of the discussions he had with Capt. Ungless. Sgt. Smith's evidence is, at the very least, completely unreliable on this point.

[100] It should be clear from the foregoing facts that by the time Capt. Ungless left the Premises after his first inspection and had acquired the name of the accused Veranski as the lessee of the self-contained Room, coupled with the information from the unidentified and unknown informant at the scene to Sgt. Smith and Cst. Gormick just prior to the second inspection, as well as the information Sgt. Smith had as to Veranski's prior history that he shared with Capt. Ungless, and the observations of someone entering the Room that Capt. Ungless had been denied access to, that the PMPD had by 13:52 hrs sufficient information to seal or freeze the area and apply for a search warrant, even a telewarrant, as they had intended to do at the conclusion of the 11:00 a.m. joint meeting between members of the PMPD and the PMFD.

[101] Instead of proceeding in this manner, Sgt. Smith elected to try and have Capt. Ungless gain access to the Room to see if it contained what they had reason to believe it contained. To facilitate accessing the room, Sgt. Smith elected to call in most of the on-duty officers of the PMPD and detain all individuals found in and around the Premises.

[102] What is also clear from the evidence of Capt. Ungless is that at all times his primary motivation was to ensure the safety of the public and determine whether, based on the initial complaint received by the PMFD, a high fire hazard, in the form of a clandestine drug lab, existed in the Premises and the Room. The risk to public safety by the presence of such an enterprise is obvious and was addressed by the evidence of Capt. Ungless, Sgt. Smith and Cpl. Stark. They described the safety hazards associated with such drug labs as including explosions, fires, poisonous vapours, toxic fumes and booby traps. This evidence, which I accept, demonstrates

there were legitimate public safety concerns about the state of affairs at the Premises that had to be investigated.

[103] It is also clear that while the concerns for public safety motivated both officers, Sgt. Smith's main objective in asking if Capt. Ungless could inspect the Room was to determine if there was criminal activity in the form of a drug lab present.

Overview of the Charter Application

[104] Mr. Veranski contends that his rights under the *Charter* were breached when Capt. Ungless, enlisted by Sgt. Smith to conduct a fire inspection and therefore made an agent, entered the Premises to search the Room in issue. He argues the two warrantless searches of the Room, the first by Capt. Ungless and Sgt. Smith and the second by Cpl. Stark, were unreasonable and in contravention of s. 8 of the *Charter*.

[105] Alternatively, Mr. Veranski argues that Capt. Ungless exceeded the inspection authority mandated by s. 21 of the *Fire Services Act* and, if not, then the predominant purpose of his search was for a penal purpose, either of which results in the search of the Room being unreasonable and in contravention of s. 8 of the *Charter*.

[106] Mr. Veranski also asserts that his detention and arrest at the scene were arbitrary and in contravention of s. 9 of the *Charter*. And, if his detention and arrest were unlawful then the search of his person was also unlawful and in violation of his s. 8 *Charter* rights.

[107] The Crown contends that the two warrantless searches of the Room were nevertheless authorized by law and therefore not unreasonable searches in violation of s. 8 of the *Charter*.

[108] The Crown contends that the detention and arrest of Mr. Veranski were objectively reasonable in the totality of the circumstances and accordingly not in violation of s. 9 of the *Charter*.

Relevant Statutory Provisions

[109] The relevant legislative provisions engaged on this *voir dire* are ss. 8 and 9 of the *Charter*, s. 21 of the *Fire Services Act* and s.495(1) of the *Criminal Code*, R.S.C., 1985, c. C-46 (the “*Code*”). For ease of reference those provisions are as follows:

ss. 8 and 9 of the *Charter*

8. Everyone has the right to be secure against unreasonable search or seizure.
9. Everyone has the right not to be arbitrarily detained or imprisoned.

s. 21 of the *Fire Services Act*

Inspection of Fire Hazards

On complaint of a person interested or, if believed advisable, without complaint, the fire commissioner and the commissioner’s inspectors may at all reasonable hours enter any premises anywhere in British Columbia to inspect them and ascertain whether or not any of the following conditions exist:

- (a) the premises are in a state of disrepair that a fire starting in them might spread rapidly to endanger life or other property;
- (b) the premises are so used or occupied that fire would endanger life or property;
- (c) combustible or explosive material is kept or other flammable conditions exist on the premises so as to endanger life or property;
- (d) a fire hazard exists on the premises.

s. 495(1) of the *Code*

Arrest without warrant by peace officer

495(1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence; or
- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal ... is in force within the territorial jurisdiction in which the person is found.

Issues

[110] The overall issue to be decided is whether Mr. Veranski has established a breach of his rights under the *Charter*. At this juncture of the proceedings he simply

seeks declaratory relief as to the asserted breaches. The issue of the admissibility of any evidence obtained in the search is to be dealt with in the next phase of the trial, depending on the outcome of this application.

[111] The specific issues raised on this *voir dire* are as follows:

1. Was Capt. Ungless acting as an agent of the PMPD when he searched the Room?
2. In the alternative, if Capt. Ungless was not an agent of the police, did his search of the Room exceed his authority under the *Fire Services Act*?
3. In the further alternative, was the predominant purpose of Capt. Ungless's search of the Room a determination of penal liability?
4. Was the subsequent warrantless search of the Room by Cpl. Stark authorized by law or was it a further violation of Mr. Veranski's s. 8 *Charter* rights?
5. Was Mr. Veranski arbitrarily detained contrary to s. 9 of the *Charter* and, if so, was the search of his person unreasonable under s. 8 of the *Charter*?

[112] Counsel for Mr. Veranski raises one further issue: that the initial undercover entry of the Premises by Sgt. Smith and Cst. Faulkner was in effect a search and ought to attract *Charter* scrutiny. They concede however that, with the exception of the Room, Mr. Veranski does not have standing to challenge the search of the Premises. Counsel for Mr. Veranski argues that the evidence on the nature of this search is relevant to demonstrate that the members of the PMPD had a general disregard for the *Charter*.

[113] I note however, that this point was not raised in the Defence Amended Notice of Application filed in support of this *Charter voir dire*. The Crown has not responded to the point because of this deficiency, arguing the issue is not properly before the Court. I do not propose to address this issue in this set of reasons particularly in light of the fact that the matter was not raised in the *Charter* application notice and, perhaps more significantly, Mr. Veranski has no standing to make such an argument.

Analysis

[114] The primary issue raised on this *voir dire* is whether the actions of Sgt. Smith, Capt. Ungless and later Cpl. Stark in searching the Room were unreasonable and in violation of s. 8 of the *Charter*.

[115] The purpose of the *Charter* is, as was noted by Dickson J. (as he then was) in *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156, 14 C.C.C. (3d) 97 [*Hunter*], to protect, within the limits of reason, the rights it enshrines. Thus, the *Charter*, in s. 8, is intended to constrain governmental action inconsistent with the right to be free from unreasonable searches and seizures. It is a limitation on the powers of search and seizure that generally requires, where feasible, prior judicial authorization.

[116] As a consequence of *Hunter*, a warrantless search is *prima facie* unreasonable. The party seeking to justify the warrantless search must rebut the presumption of unreasonableness and do so on a balance of probabilities: *Hunter* at 161.

[117] Recently, in *R. v. Collings*, 2010 BCSC 1658, 224 C.R.R. (2d) 49 [*Collings*], Mr. Justice Verhoeven summarized the essence of the basic principles engaged by a s. 8 challenge to a search of a building. In *Collings*, members of the Surrey Fire Department responded to a call about a fire in a shed on a residential property. They extinguished the blaze but became suspicious about the circumstances of the fire and what might be going on inside the residence as equipment in the shed appeared connected to the residence. The Deputy Fire Chief eventually entered the residence, over the objections of the occupant, searched it and discovered a grow operation. Members of the Surrey R.C.M.P were standing by waiting expectantly for the results of the search by the fire department. In that case the learned trial judge determined the Deputy Fire Chief had exceeded his lawful authority under s. 10 of the *Fire Services Act* and the ensuing warrantless search was in violation of s. 8 of the *Charter*. At paras. 66-68 of *Collings*, Verhoeven J. noted:

[66] Section 8 of the *Charter* guarantees protection against unreasonable search and seizure. In *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97 [*Hunter v. Southam* cited to S.C.R.], the Supreme Court of Canada held that where it is feasible to obtain authorization prior to a search, such authorization is a pre-condition for a valid search and seizure (at p. 161(a)). At a minimum, the person granting authorization must be capable of acting judicially. And, in most cases, judicial authorization for a search and seizure requires proof of a belief, on reasonable and probable grounds, established upon oath, that an offence has been committed, and that there is evidence to be found at the place of the intended search.

[67] A search without prior authorization by warrant is presumed to be unreasonable and hence in violation of section 8: *Hunter v. Southam*, at p. 161(g). If a search is made without a warrant, then the Crown has the burden of showing that the search was nonetheless reasonable, on a balance of probabilities.

[68] Pursuant to *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1 [*Collins* cited to S.C.R.], at p. 278(c), a search will be reasonable if three conditions are met:

1. the search is authorized by law;
2. the law authorizing the search is reasonable; and
3. the manner in which the search is carried out is reasonable.

[118] In the case at bar, both searches of the Room (first by Sgt. Smith and Capt. Ungless and then subsequently by Cpl. Stark) were warrantless.

[119] The place in issue in this case was a self-contained Room located in the garage area of commercial premises that was largely open to the public. Moreover both areas, the Premises and the Room, were subject to fire inspections. And while there may well be an expectation of privacy with respect to the Room, it is certainly diminished because it was within commercial premises and subject to fire inspection: *Arkininstall v. City of Surrey*, 2010 BCCA 250, 4 B.C.L.R. (5th) 199, at para. 69. Accordingly, Mr. Veranski would have had a reasonable expectation of privacy with respect to the rented Room and thus s. 8 of the *Charter* is engaged. However the expectation of privacy would be of a lesser degree than that of a private residence, given the commercial nature of the building the Room was located in and the fact that the entire Premises was subject to routine fire inspections. A diminished expectation of privacy will influence the analysis of s. 8 and a consideration of what constitutes an unreasonable search or seizure: *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, [1998] S.C.J. No. 83 [*M. (M.R.)*], at paras. 32-33.

[120] I turn now to an examination of each of the issues raised on this *voir dire*. In doing so I will summarize the positions of counsel on the issue. I will then review the relevant legal principles that inform the analysis of the issue and engage in an examination of the principles as applied to the circumstances of this case and outline the conclusions that I have reached.

Was Capt. Ungless acting as an agent of the PMPD when he entered and searched the Room?

[121] The defence argues that Sgt. Smith's requests of Capt. Ungless to perform a fire inspection rendered Capt. Ungless a state agent when he searched the Premises and Room as the search would not have occurred or taken place in the form and manner it did "but for" the intervention of the PMPD.

[122] The Crown argues that Capt. Ungless did not act on behalf of the police, regardless of the information sharing engaged in by Sgt. Smith. Rather, argues the Crown, the focus must be on why Capt. Ungless did what he did and what his motivations were at the time. According to the Crown, when the totality of the circumstances are assessed from a more holistic perspective of the underlying motivations and purposes, instead of a strict application of the "but for" causality test to the "superficial interactions" of Sgt. Smith and Capt. Ungless, it is apparent that Capt. Ungless was not acting on behalf of the police as contemplated by the jurisprudence developed on the issue of state agents.

[123] The legal principles applicable to whether an individual has become an agent of the state and their action subject to *Charter* scrutiny are not disputed by the parties. The jurisprudence addressing the issue of agency is contained in three Supreme Court of Canada decisions: *R. v. Broyles*, [1991] 3 S.C.R. 595, [1991] S.C.J. No. 95 [*Broyles*]; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 [*Buhay*]; and *M. (M.R.)*. These principles were reviewed extensively in *R. v. Wallis*, 2004 BCPC 577, affirmed 2006 BCCA 481 [*Wallis*].

[124] In *Broyles*, a case involving a police informer, the police enlisted the assistance of a friend of the accused and had him wear a body pack to tape-record

his conversations with the accused when he visited the accused in custody. The accused alleged a breach of his s. 7 *Charter* right to silence and the Supreme Court of Canada agreed finding the friend/informer acted as a state agent when his conversations with the accused were recorded. Mr. Justice Iacobucci, writing for the Court formalized the test to be applied in determining whether an individual has become a state agent, stating at 608:

...In determining whether or not the informer is a state agent, it is appropriate to focus on the effect of the relationship between the informer and the authorities on the particular exchange or contact with the accused. A relationship between the informer and the state is relevant for the purposes of s. 7 only if it affects the circumstances surrounding the making of the impugned statement. A relationship between the informer and the authorities which develops after the statement is made, or which in no way affects the exchange between the informer and the accused, will not make the informer a state agent for the purposes of the exchange in question. Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange. I would accordingly adopt the following simple test: would the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?

[Emphasis added]

[125] In *M. (M.R.)* a high-school student suspected of dealing in drugs was searched by the vice-principal in the presence of a police officer notified by the vice-principal in accordance with an established school policy. As a result of the search, a bag of marijuana was seized from the student who was then charged with possession of marijuana.

[126] On appeal to the Supreme Court of Canada, Mr. Justice Cory, writing for the majority, concluded the vice-principal had not acted as an agent for the police when he conducted the search and seized the bag of marijuana because there was no connection between the vice-principal's behaviour and that of the police officer. In so concluding, Cory J. reiterated at para. 29 the test for agency stating:

29. The issue as to whether an individual is acting as an agent of the police was considered by this Court in *R. v. Broyles*, [1991] 3 S.C.R. 595. While that case involved a police informer, the essential elements of the test applied in that case are equally applicable to the case at bar. There it was said at p. 608:

Only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange. . . . [W]ould the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?

Applying the test to this case, it must be determined whether the search of the appellant would have taken place, in the form and in the manner in which it did, but for the involvement of the police. The evidence, in my opinion, demonstrates that it would have taken place and was not materially different than it would have been if there had been no police involvement. Although Mr. Cadue knew that criminal charges might result, the primary motive for the search was the enforcement of school discipline, for which he was responsible. There is nothing in the evidence to suggest that the vice-principal initiated the search or conducted it differently because of police intervention. It is thus apparent that the vice-principal was not acting as an agent of the police.

[127] In *Buhay*, private security guards employed by Greyhound Canada detected a strong odour of marijuana in the vicinity of the storage lockers at the Winnipeg bus depot. They unlocked the storage locker, searched it and discovered a duffle bag containing some marijuana. The security guards placed the items back in the locker, locked it and contacted the police. The police attended, an agent for Greyhound opened the locker for the officers and the officers seized the duffle bag of marijuana. They had no search warrant.

[128] The security guards, employees of a private entity to whom the *Charter* did not ordinarily apply, were found not to be acting as agents of the police when they searched the locker. On appeal to the Supreme Court of Canada, the acquittal at trial was restored as the police had failed to obtain a search warrant and the warrantless search was found to be unreasonable. The accused had a reasonable expectation of privacy with respect to the storage locker and the actions of the police in searching without a warrant were determined to be in violation of s. 8 of the *Charter*.

[129] Germane to the case at bar from *Buhay* is the analysis of the agency question engaged in by Arbour J. (as she then was) where the test for agency was reiterated at para. 29 as follows:

... Based on the test set out in *Broyles, supra*, and *M. (M.R.), supra*, the proper question is whether the security guards would have searched the contents of locker 135 but for the intervention of the police.

[Emphasis added]

[130] Applying that test to the circumstances in *Buhay* it was clear the private security guards had acted on their own initiative, totally independent from the police when they opened and searched the locker and discovered the duffle bag with the contraband inside.

[131] It is critical to recall that in any assessment of whether an agency relationship exists, volunteer participation in the detection of crime by private actors, or general encouragement by the police directed to the citizenry to participate in the detection of crime, will not usually be sufficient direction by the police to engage an agency relationship and trigger the application of the *Charter*. Instead, the intervention of the police must be specific to the case being investigated: *Buhay*, at para. 30.

[132] Moreover, the mere fact that the police and another agency or body cooperate in an investigation is not sufficient to create an agency relationship between the two entities: *M. (M.R.)*, at para. 28. Nor does the fact that the police and another organization share or overlap in responsibilities, such as the protection of the public, create an agency relationship between the police and the other organization: *Buhay*, at para. 28.

[133] In *Wallis*, the trial judge found no agency relationship between a police officer (Cst. Moller) and a BC Hydro Contractor (Mr. Ogilvie) when Cst. Moller contacted Mr. Ogilvie about a suspected marijuana grow operation at a specific residence. Upon receiving the information from Cst. Moller, Mr. Ogilvie attended at the residence and conducted a hydro check to determine if there was a suspected hydro bypass. The testing conducted by Mr. Ogilvie disclosed the existence of a hydro bypass. Mr. Ogilvie conveyed the results of his check to Cst. Moller who then applied for a search warrant based on the information obtained by Mr. Ogilvie during the hydro equipment check.

[134] Although Cst. Moller may have had more than one motive in contacting Mr. Ogilvie and his primary motivation was to further his investigation, the fact that the officer had multiple motives and hoped that there would be collateral benefits to his own investigation did not render the police conduct “colourable” such that Cst. Moller engaged Mr. Ogilvie as an agent: *Wallis*, at para. 130.

[135] The trial judge in *Wallis* noted that if the police were prohibited from advising Hydro of tips they have received about theft of electricity for fear of tainting their criminal investigation with illegality they would be failing in their duty to protect the public and investigate crime: *Wallis* at para. 131. The Crown argues that a similar irrational result will occur here if I were to accept Mr. Veranski’s argument of agency in this case. With respect, however, I do not agree that this is so when considered in the context of the unique circumstances in this case.

[136] One other case of assistance on the assessment of agency relationships is the decision in *R. v. Huynh*, [2005] O.J. No. 2745, 32 C.R. (6th) 142 (Ont. S.C.J.) [*Huynh*]. In that case, members of a local fire department attended at a residence in response to an anonymous call about an odour emanating from a particular property. Upon arrival at the residence, the Fire Chief could not detect any smoke or fire. No one was at the residence when the fire department attended. The Fire Chief was able to gain access to the garage and encountered a significant amount of heat and an acrid smell. He then located a stairwell in the garage, went down it and noticed a high glare in the area of the door and thought there might be an actual fire. He directed one of the firefighters to don protective gear and investigate further. The firefighters found no sign of a fire but did discover a marijuana grow operation. They backed out of the premises and contacted the police and hydro. Based on the observations of the firefighters and his own sensory observations of the smell of marijuana, the police officer prepared an affidavit in support of a search warrant.

[137] The trial judge in *Huynh* determined that the firefighters in that case were not acting as agents of the state when they investigated the anonymous tip, stating at paras. 14-15:

14. The firefighters started their investigation based on an anonymous complaint that was received and without any instructions or directions from police. In *R. v. Buhay*, [2003] 1 S.C.R. 631, 174 C.C.C. (3d) 97 (S.C.C.) at para. 29, p. 111, Arbour J. in determining whether or not the security guards who searched the locker in question were considered state agents, found that the proper question to ask is "whether the security guards would have searched the contents of locker 135 but for the intervention of the police."

15. Applying this test, it is clear on the evidence before me that the firefighters attended at, investigated and entered the garage and home on their own initiative subject to their own responsibilities and obligations. The police were not contacted until after the search. In my view, these firefighters would not be considered state agents. Accordingly, the actions of the firefighters cannot give rise to any alleged Charter breach.

[138] The test developed in the jurisprudence on whether a particular entity or person is an "agent of the state" requires a case-by-case assessment which focuses on the actions that have given rise to the alleged *Charter* breach and the relationship between the parties. While the test is cast as outlined above, it ought not be applied on a strict causality basis without regard for the context in which the interactions occurred.

[139] In the case at bar, then, the question to be asked is whether Capt. Ungless would have inspected and searched the Premises and the Room but for the intervention of Sgt. Smith.

[140] I am satisfied from the totality of the evidence and having considered the arguments advanced that it is quite clear from Capt. Ungless's evidence that he would not have attended at the Premises and inspected it without Sgt. Smith contacting him and asking him if he could do an inspection.

[141] Sgt. Smith's first call at 10:30 hrs requesting an inspection was met with Capt. Ungless advising he would speak with the Fire Chief about the matter. Thereafter a joint determination was made that the PMFD would not conduct an inspection and that the PMPD would handle the matter.

[142] It is clear from the evidence of Capt. Ungless that before receiving Sgt. Smith's request at 12:20 hrs and his further information about the status of the Premises, Capt. Ungless had no intention of attending the Premises to conduct an

inspection given the result of the joint meeting earlier that morning. It is evident then that “but for” Sgt. Smith’s intervention, request and information, the inspection and search by Capt. Ungless would never have taken place in the form or manner in which it did.

[143] Moreover, the information from Sgt. Smith to Capt. Ungless about the perceived reduced risk to personal safety was part of the information that provided Capt. Ungless with the impetus to inspect the Premises the first time.

[144] After his first inspection of the Premises, Capt. Ungless was, in accordance with his usual inspection policy where a sub-let tenant is involved, prepared to wait to have the tenant to the Room present and to provide him access to the Room. However, as a result of the information received from Sgt. Smith about observations of a mechanic going in and out of a room, coupled with his discussions with Sgt. Smith and the information that Mr. Veranski was a person of interest to the investigation, Capt. Ungless, in consultation with his Fire Chief and Sgt. Smith elected to conduct the second inspection, this time of the Room.

[145] Capt. Ungless acknowledged that this was not a routine fire inspection and that it was not normal to have the police attend an inspection with him. He also admitted that he was trying to determine whether there was a drug lab in the Room; this feature of the inspection also made it differ from one that was usual and routine.

[146] Also of importance to the assessment of whether the search would have occurred in the form and manner it did but for the involvement of Sgt. Smith and the police is the acknowledgment by Capt. Ungless that he would not have gone directly to inspect the Room without the information he had received from the police and without their assistance. In fact, he doubted he would have approached the Room on his own.

[147] Sgt. Smith testified he never requested that Capt. Ungless conduct a fire inspection, knowing such a request would likely create an agency relationship. I simply cannot accept Sgt. Smith’s evidence on this point; it is abundantly clear from Capt. Ungless that Sgt. Smith asked him if he could do an inspection. It is also

abundantly clear from Capt. Ungless that in the absence of Sgt. Smith's repeated intercessions and imparting of information, that he would not have attended the Premises to search it or the Room, leaving the matter instead for the PMPD to investigate as agreed to earlier that day.

[148] Capt. Ungless and Sgt. Smith were no doubt both motivated by their concerns for public safety and the risk presented by a possible clandestine drug lab. In many respects their responsibilities for public safety overlapped. It nevertheless remains that Sgt. Smith's entreaties to Capt. Ungless about conducting a fire inspection and the changed information are what precipitated Capt. Ungless's attendance and are what prompted him to conduct an inspection. While the sharing of information between first responders may not always necessarily result in an agency relationship between the police and fire official, in the unique circumstances of this case it did as it was clear by the conclusion of the 11:00 a.m. meeting that the PMPD would conduct the investigation of the tip by proceeding to obtain a search warrant for the Premises.

[149] The inability to gain any further grounds for a search warrant through their own investigative means, coupled with his concerns for public safety, prompted Sgt. Smith to contact Capt. Ungless to apprise him of status of the investigation and request if he could do an inspection given the further information. The information sharing that occurred here not only impacted on Capt. Ungless's assessment of the situation; it caused him to act on behalf of the police in an effort to determine whether there was a drug lab in the Premises and the Room. To that end, then, Capt. Ungless was acting as an agent of the police. Accordingly the search of the Room was a warrantless search that is *prima facie* unreasonable.

[150] By enlisting Capt. Ungless and relying upon his inspection powers to gain access to the Room in order to assist in the PMPD criminal investigation, Sgt. Smith circumvented the prerequisite of having reasonable grounds to conduct the search. By engaging Capt. Ungless as an agent, and essentially misusing his authority to gain access to the Room, in circumstances where they believed they had no grounds for a warrant also renders the manner of the search unreasonable and

inconsistent with the requirements set out in *R. v. Collins*, [1987] 1 S.C.R. 265 at 278.

[151] In the end, I conclude that Capt. Ungless was acting as an agent of the state when he attended the Premises and searched the Room on May 24, 2007. The search would not have occurred but for the intervention of Sgt. Smith who engaged Capt. Ungless as an agent of the state. On that basis Mr. Veranski has established a breach of his rights under s. 8 of the *Charter*.

[152] Although this finding effectively disposes of the s. 8 argument in respect of the first inspection of the Room, for completeness I will address the remaining, alternative arguments advanced by the defence as to the nature of Capt. Ungless's search of the Room.

If Capt. Ungless was not an agent of the PMPD did his first search of the Room exceed his authority under the *Fire Services Act*?

[153] Mr. Veranski argues that if Capt. Ungless was not an agent of the police, he was only entitled to conduct a search of the Premises in accordance with his authority under the *Fires Services Act*. The defence makes the point that Capt. Ungless would not exceed his authority if his actions of searching had been carried out for the genuine purpose of exercising his lawful authority. However, in this instance, it is argued that Capt. Ungless exceeded his authority because he was investigating a criminal matter as opposed to a fire safety matter. The defence relies upon the decision in *Collings* to support its position that the search by Capt. Ungless exceeded his statutory authority, was not authorized by law and was not carried out in a reasonable manner.

[154] The Crown argues the evidence clearly establishes Capt. Ungless was acting pursuant to his statutory authority. The Crown distinguishes the decision in *Collings* and relies upon the decision in *Wallis* to argue that while there may have been an overlap in responsibilities between the PMPD and PMFD, Capt. Ungless was acting pursuant to his authority as set out in s. 21 of the *Fire Services Act*.

[155] The overall scheme of the *Fire Services Act* was addressed by Mr. Justice Romilly in *Crown Point Hotel (1981) Ltd. v. British Columbia (Public Safety and Solicitor General)*, 2007 BCSC 1048, 62 R.P.R. (4th) 248 [*Crown Point Hotel*], stating at para 15:

[15] This Act is the principal provincial legislation to ensure fire safety in buildings in the province. It establishes the Office of the Fire Commissioner and grants the Commissioner broad powers to investigate and identify fire hazards and to make orders that subject persons do what is necessary to make buildings reasonably safe.

[156] Pursuant to s. 21 of the *Fire Services Act* the Fire Commissioner or his local assistants may carry out inspections of any premises in the province, either in response to a complaint or otherwise. The purpose of the inspection power is to determine, among other things, whether a fire hazard exists on the premises in question. It is undisputed on the evidence before me that the possible presence of a drug lab in a premises, particularly a working garage that contains other flammable materials, constitutes a fire hazard. The *Fire Services Act* as a whole grants broad powers to the Fire Commissioner and the Commissioner's deputies or inspectors to conduct inspections and issue orders regarding fire safety violations: *Crown Point Hotel*, at para. 26. Indeed, under s. 7 of the *Fire Services Act* the Commissioner, Inspectors and local assistants have the powers of a peace officer for the purposes of the *Act*.

[157] As noted in *Crown Point Hotel* at para. 16, adopting the dicta of Jenkins J. in *McKenna's Furniture Store v. Prince Edward Island (Fire Marshal)* (1997), 152 Nfld. & P.E.I.R. 212, [1997] P.E.I.J. No. 33 (P.E.I.S.C. (T.D.)) at para. 20, the language employed in s. 21 of the *Act* and the overall scheme of the *Act*, including the substantial powers and responsibilities conferred upon the Fire Commissioner and the deputies, demonstrate the Legislature's intention that fire prevention and fire safety matters, including the determination of whether a fire hazard exists on a premises, are to be treated with priority and urgency given the obvious risk to public safety.

[158] The circumstances that arose in *Collings* are distinguishable to those in the case at bar. In *Collings*, the Surrey Fire Department attended at a residence in

response to a report of a fire in a shed on the property. The fire was quickly extinguished and it was determined that a large commercial generator in the shed likely had something to do with the fire. It aroused the suspicions of the firefighters of the possibility of a grow operation on the property. The firefighters on scene observed an electrical conduit running between the shed and the residence and had concerns about the possible involvement of the house. They also noticed the windows to the residence were blacked out. Members of the Surrey R.C.M.P. were also on scene, responding first to the need for traffic control because of the fire, and remained on scene because of the suspected presence of a grow operation.

[159] Members of the fire department decided they would try to gain access to the residence and eventually did enter over the objections of Mr. Collings, the occupant of the residence. Indeed the police in that case first tried to gain access to the residence, telling the occupant they suspected criminal activity. Permission was refused but the owner's personal information was provided to the police.

[160] The occupant continued to refuse permission to enter the residence and eventually the attending Deputy Fire Chief, suspecting there was a grow operation inside the residence, decided to use what he thought was his authority under s. 10 of the *Fire Services Act* to demand entry to the residence. This occurred after he received legal advice from the City Solicitor that indicated at least that members of Surrey's Electrical and Fire Safety Inspection Team, also on scene, had no authority to enter the residence.

[161] In *Collings*, Verhoeven J. concluded that in all the circumstances the search was not one that fell within the parameters of exigent circumstances and that the warrantless searches by the Deputy Fire Chief were not carried out for the genuine purpose of exercising his lawful authority under the *Fire Services Act*. In addition, the Deputy Fire Chief knew the police were standing by expectantly hoping to obtain evidence for criminal charges and was also aware the police required a search warrant to enter the residence but they did not have the requisite grounds to obtain one. There was nothing in the evidence to support the conclusion there were any exigent circumstances or that there was any hazard to the home presented by the

shed fire that had been extinguished. There simply was no objective basis in the evidence to support a conclusion about any concerns for a fire safety hazard in the residence.

[162] Mr. Justice Verhoeven concluded in *Collings* that the Deputy Fire Chief was not motivated to attend inside the residence for the genuine purpose of fulfilling his regulatory powers under the *Fire Services Act* but rather was motivated by a desire to collect information for the police, an improper purpose in the circumstances.

[163] The manner in which the search was conducted in *Collings* was also found to be unreasonable. There was nothing in the evidence to support the conclusion that a search could not have taken place later. Moreover, the Deputy Fire Chief's "undue co-operation" with the police in collecting evidence for them far exceeded the need of confirming the existence or otherwise of an immediate fire hazard. The trial judge concluded that the Deputy Fire Chief was not authorized to search the premises and exceeded his authority in so doing. Consequently, a breach of Mr. Collings' s. 8 *Charter* rights was established.

[164] As noted, *Collings* is distinguishable to the circumstances in the case at bar. In this case there were significant and objective safety concerns about the fire hazards posed by the existence of a clandestine drug lab.

[165] Although Mr. Veranski argues that any legitimate public safety concern would have been readily apparent when the officers first entered the Premises, that, with respect, ignores the reality of the newly constructed and inaccessible Room. He further argues that because Capt. Ungless did not smell or observe anything after he conducted his first inspection at 12:58 hrs., there was no objective basis for believing the Premises were a risk to public safety. This point, however, ignores the fact that the first inspection was not complete as Capt. Ungless was unable to gain access to the Room. Although he smelled no "suspicious" odours during his first inspection, that is not determinative, particularly in light of the fact that he was in a working garage which would be filled with odours of motors, grease, oil, gasoline and the like

which might mask or overpower the more “pleasant” black liquorice odour frequently associated with clandestine drug labs.

[166] The argument also ignores the totality of the circumstances and in particular the seeming contradiction between the denial of access to the Room by Mr. Bellotti and the observations of the surveillance team of a mechanic entering and exiting the Room. Taken collectively, these points served to strengthen the concerns about the risk to public safety held by Capt. Ungless and Sgt. Smith.

[167] The first entry into the Premises by Capt. Ungless at 12:58 hrs on May 24, 2007, was squarely within the parameters of the *Fire Services Act*. Although the PMFD and PMPD initially determined it was too dangerous for fire department personnel to enter, given the uncertainties of what was within the Premises, and that the matter should be dealt with by the PMPD, that determination was not immune from review or revision if there was a change in circumstances. The change in circumstances occurred when Sgt. Smith and Cst. Faulkner were able to make a better assessment of the situation when they walked through the Premises and found no sign of a drug lab in the areas they could see. The Room however remained inaccessible and also presented as a place where a fire hazard such as a drug lab could be situated.

[168] Based on the information received from Sgt. Smith and his request about whether Capt. Ungless would be able to perform an inspection, Capt. Ungless was satisfied that the danger to his personal safety was reduced. His primary concern remained the safety of the public and the need to determine whether a fire hazard existed on the Premises. His first entry into the Premises was entirely in keeping with his duties and responsibilities as a fire inspector and was entirely within the authority conferred upon him by s. 21 of the *Fire Services Act*.

[169] Capt. Ungless’s joint decision with Sgt. Smith to conduct a second inspection with a focus on gaining access to the Room was also within the exercise of his authority under s. 21 of the *Fire Services Act*.

[170] While he may have been working jointly with the police on this matter, the nature of the complaint, the seeming inconsistency on the issue of access to the Room, the overall circumstances of a legitimate and significant concern about the safety of the public and the risk a fire hazard like that presented by a drug lab still conferred authority upon Capt. Ungless to enter the Premises, a commercial enterprise open to the public, and the Room, to inspect and ascertain whether a fire hazard existed.

[171] Moreover, the actual steps taken by Capt. Ungless are entirely consistent with the exercising of his authority under s. 21 of the *Fire Services Act*. He simply went up to the Room, albeit accompanied by Sgt. Smith who was there to ensure his safety, and when the door was opened was able to see signs of equipment consistent with a drug lab. He did not search further nor collect any evidence and in fact left the Premises and contacted the Fire Chief to advise him of the situation and to request that a fire crew be sent to stand by in case it was required to respond to any potential dangers within the Room.

[172] In this respect, then, I agree with the Crown, that the circumstances of this case are much more closely aligned with those of *Wallis* than those of *Collings*. In this case there may well have been overlapping responsibilities between the PMPD and the PMFD but it is clear that Capt. Ungless was continuing to conduct his fire inspection when he re-entered the Premises and went to the Room. The totality of the circumstances included the fact that while conducting the first part of his inspection Capt. Ungless was told he could not have access to the Room because a tenant sublet it. Significantly, however, while he was denied access, the Room was accessed by a mechanic, indeed by Mr. Veranski, the purported tenant of the Room, at the very time that Capt. Ungless was conducting his inspection and endeavouring to get into the Room to determine whether a fire hazard existed in it.

[173] The position of the defence that Capt. Ungless exceeded his statutory authority in looking into the Room is, with respect, not sustainable. Much like the argument advanced in *Wallis*, the defence argument, if acceded to, would, in circumstances that raise both the potential of an immediate fire hazard and a

criminal enterprise, amount to a blanket prohibition on contact between two types of first responders: police and fire personnel, both agencies having an overriding mandate and primary duties of protection of the public.

[174] The complaint to the PMFD about a clandestine drug lab at the Premises engaged the fire hazard and attendant public safety issues that legitimately reside within the mandate of responsibilities bestowed on fire inspectors such as Capt. Ungless by s. 21 of the *Fire Services Act*. While it may also constitute a criminal enterprise and engage the jurisdiction of the police to investigate, it does not mean that someone in the position of Capt. Ungless, a local fire inspector and assistant fire Commissioner, must abdicate his responsibilities of investigating and determining whether a fire hazard exists as mandated by s. 21 of the *Fire Services Act*.

Was the predominant purpose of Capt. Ungless's search of the Room a determination of penal liability?

[175] The defence advances the alternative argument that Capt. Ungless was not actually engaged in the exercise of his authority under the *Fire Services Acts* but instead engaged in a search, the predominant purpose of which was the determination of penal liability. The defence relies upon the principles enumerated by the Supreme Court of Canada in *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 [*Jarvis*] to support his position.

[176] The Crown argues that Capt. Ungless was not an agent and not conducting himself in a manner consistent with a criminal investigation. Rather, the Crown submits, Capt. Ungless was simply carrying out his inspection duties pursuant to the *Fire Services Act* when he entered the Premises the first time and decided of his own volition to re-enter the Premises a second time and inspect the Room.

[177] In *Jarvis*, the Supreme Court of Canada determined that in the context of the *Income Tax Act*, the audit function and the investigation functions carried out by tax officials with the Canada Customs and Revenue Agency (CCRA) had to be treated differently. Justices Iacobucci and Major, writing for the Court, concluded that while taxpayers are statutorily bound to co-operate with CCRA auditors for tax

assessment purposes, there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry is the determination of penal liability.

[178] The determination of when the relationship between the state and the individual has reached the point where it is effectively adversarial is a contextual one, which takes account of all relevant factors. The Court in *Jarvis*, at paras. 93-94, set out a list of factors to assist in ascertaining whether the predominant purpose of an inquiry is the determination of penal liability. Apart from a clear decision to pursue a criminal investigation, no one factor is necessarily determinative in and of itself. Instead the courts must assess the totality of the circumstances, and make a determination as to whether the inquiry or question in issue engages the adversarial relationship between the state and the individual: *Jarvis*, at para. 93.

[179] The factors enumerated in *Jarvis* which are relevant to the inquiry in this case include the following:

- a. Did the authorities have reasonable grounds to lay charges?
- b. Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- c. Was the conduct of Capt. Ungless such that he was effectively acting as an agent for the investigators?
- d. Does it appear that the police intended to use the fire inspector as their agent in the collection of evidence?
- e. Is the evidence sought relevant to penal liability?
- f. Are there any other circumstances or factors that can lead the trial judge to the conclusion that the inspection had become a criminal investigation?

[180] The Court in *Jarvis* concluded at para. 98 that "wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply."

[181] The principles developed in *Jarvis* were applied by the Court of Appeal in *R. v. Alexander*, 2003 BCCA 386, 176 C.C.C. (3d) 366 in the context of a search of a cube van in a remote area where the sounds of unauthorized logging could be heard by forestry officials. The R.C.M.P. was notified by the forestry officials and an officer attended to assist by stopping the suspect vehicle. The officer indicated they had grounds to believe illegal cedar was in the back of the van. The accused advised that the van belonged to a friend and he did not know the contents. The officer opened the back of the van and located stolen cedar blocks inside the vehicle. The R.C.M.P. officer had no search warrant to inspect the vehicle.

[182] The Court had to determine whether the search of the van fell within the scope of the regulatory inspection power under s. 108 of the *Forest Practices Code*, R.S.B.C. 1996, c. 159 [*Forest Practices Code*], or outside the scope of the inspection power as it was conducted in an effort to determine penal liability. The Court concluded the purpose of opening the vehicle and searching it was not pursuant to the authorized regulatory power but was for the predominant purpose of determining penal liability and therefore not authorized by the *Forest Practices Code*. As the search was warrantless and not authorized by law it was found to be a breach of the accused's s. 8 *Charter* rights.

[183] In *R. v. Campbell*, 2005 BCPC 713, the Honourable Judge Bayliff applied the *Jarvis* principles to a search of a property conducted under the *Waste Management Act*, R.S.B.C. 1996, c. 482 and concluded that a Conservation Officer's entry on to a property to search out a complaint about burning materials was not an investigation pursuant to the regulatory powers of inspection to determine whether an activity was capable of producing or disposing of waste materials. Although the officer's first attendance was pursuant to the legislative authority permitting inspections, by the time the officer returned to conduct his second inspection (about four and a half hours later) he believed the accused had committed an offence.

[184] Bayliff P.C.J. concluded that the first attendance was pursuant to the inspection power but by the time of the second inspection, the purpose had changed and the officer was searching to collect evidence to establish penal liability and was

no longer authorized under the governing legislation to conduct an inspection. Instead he required a search warrant, something the officer had in fact obtained but was quashed as invalid at the trial: *Campbell* at paras. 33-38, 56-58.

[185] Bearing the above jurisprudence in mind, the question before me then is this: what was the predominant purpose of the inquiry or search of the Room by Capt. Ungless and Sgt. Smith? Was the predominant purpose of opening the door to the Room to determine whether there was a fire hazard such that this was part of the regulatory inspection power under s. 21 of the *Fire Services Act*? Or was the predominant purpose of opening the door to the Room done for the purpose of determination of penal liability? If done for the latter purpose, then it cannot be said the activity was authorized by s. 21 of the *Fire Services Act* as an inspection but rather must be seen as a warrantless search within the parameters of *Charter* principles and jurisprudence.

[186] Applying the relevant *Jarvis* factors to the case at bar, it can be seen that:

- a. in the totality of the circumstances, by the time the second inspection was launched, the authorities may well have had reasonable grounds to obtain a search warrant;
- b. the overall conduct of the authorities, in particular Sgt. Smith was consistent with the pursuit of a criminal investigation. While the form and manner of Capt. Ungless's first inspection was consistent with his statutory inspection powers, including his use of a clip board and report sheet to check off his observations, his second attendance was altogether different as he was entering to look for a drug lab;
- c. the conduct of Capt. Ungless was consistent with him acting as an agent for the PMPD, he had attended upon request and agreed to re-enter after consultation with Sgt. Smith and a joint determination, reached after reviewing the totality of the circumstances, that a second inspection should be done to see if there was a drug lab;
- d. Sgt. Smith believed he could take the PMPD investigation no farther at the point an inspection was requested and so appears to have employed Capt. Ungless's services and inspection powers as a means to secure evidence he felt the PMPD could not obtain;

- e. the totality of the circumstances support the position that the authorities collectively were conducting a criminal investigation based on the following:
- i. extensive police surveillance was conducted on the Premises, including a walk through, prior to entry into the Premises by Capt. Ungless;
 - ii. a number of members of the PMPD entered the Premises to conduct the search of the Room along with Capt. Ungless;
 - iii. all occupants of the Premises were detained for investigative purposes prior to the search of the Room;
 - iv. the police conducted computer checks into the accused's name and determined he was a person of interest based on the information received back;
 - v. Capt. Ungless admitted the predominant purpose of his second inspection was to determine if some criminal activity, in the form of a drug lab, existed in the Room; and,
 - vi. upon the door to the Room being opened by Sgt. Smith, Capt. Ungless simply looked inside but conducted no actual inspection of the Room himself.

[187] Even if it could be said that in opening the door to the Room Sgt. Smith, along with Capt. Ungless was engaged in an inspection under s. 21 of the *Fire Services Act* to determine if a fire hazard existed, it is nevertheless clear on the evidence of both Sgt. Smith and Capt. Ungless that the main or predominant purpose of opening the door to the Room, while motivated by public safety concerns, was to search it to obtain evidence to establish penal liability. They wanted to find out whether there was a clandestine drug lab behind the door to the Room. In this case, the inspection of the Room, ostensibly for public safety concerns, was mainly a search to determine penal liability.

[188] Since Capt. Ungless's attendance to the Room for the second inspection was to determine if there was criminal activity in the form of a drug lab, he was no longer inspecting pursuant to his statutory authority under s. 21 of the *Fire Services Act*. His predominant purpose had changed from inspection for a fire hazard to determining whether criminal activity was occurring. Although he collected no actual evidence

himself, his attendance with the police provided them the ability to collect evidence to establish criminal liability. And so, the purpose of his second attendance at the Premises and search of the Room was to facilitate the collection of evidence to establish penal liability. Accordingly, his re-entry into the Premises, attendance at and search of the Room were no longer authorized by s. 21 of the *Fire Services Act*.

[189] To be reasonable a search and seizure must be authorized by law. Capt. Ungless's second inspection, which focused directly on the Room, in the company of members of the PMPD, was for the predominant purpose of establishing penal liability and therefore not authorized by either statute or a search warrant. It was therefore not authorized by law and I conclude that Mr. Veranski's s. 8 *Charter* right was breached.

Was the subsequent warrantless search of the Room by Cpl. Stark within the scope of his duties and a justifiable use of the common law police powers established in the *Waterfield* doctrine?

[190] The defence argues that the warrantless search of the Room by Cpl. Stark at 15:28 hrs is *prima facie* unreasonable and does not fall within the exigent circumstances exception to the requirement of a search warrant. The defence cites *R. v. McCormack*, 2000 BCCA 57, 143 C.C.C. (3d) 260 in support of its argument that Cpl. Stark's warrantless search of the Room does not fall within the limited exigencies exception.

[191] The Crown argues that the emergency situation presented by the presence of a possible clandestine drug lab near a commuter rail station falls precisely within the common law powers and duties of the police, frequently referred to as the principles of the *Waterfield* doctrine as outlined in English decision of *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.A.) [*Waterfield*]. Under the *Waterfield* doctrine, where, as in the case at bar, the police conduct constitutes a *prima facie* interference with a person's property, the court must consider two questions:

1. Does the conduct fall within the general scope of any duty imposed by statute or recognized at common law?

2. Does the conduct involve a justifiable use of powers associated with the duty?

[192] The Crown argues Cpl. Stark was acting within his lawful authority to conduct the search pursuant to the common law powers and public safety obligations of the police to protect life and prevent injury and that he did so justifiably. The Crown relies upon the decisions in *R. v. Godoy*, [1999] 1 S.C.R. 311, 131 C.C.C. (3d) 129 [Godoy]; *R. v. Jamieson*, 2002 BCCA 411, 166 C.C.C. (3d) 501 [Jamieson]; and *R. v. Sanderson*, [2003] O.J. No. 1481, 64 O.R. (3d) 257 (C.A.) [Sanderson].

[193] Recently in *R. v. Kelsy*, 2011 ONCA 605 [Kelsy], Mr. Justice Rosenberg addressed both the exigent circumstances exception for warrantless searches and the separate common law powers and police duties exception as expressed in the *Waterfield* doctrine. Of importance to the case at bar is the admonition at paras. 51-52 of *Kelsy* that it is preferable to keep the two concepts distinct when examining whether police conduct is justified.

[194] At para. 52 of *Kelsy*, Rosenberg J.A. explains that keeping the two concepts distinct is required because they “are meant to address different concerns and are context-specific.” Expanding on this, he states the following:

[52] ... Reasonableness in the exigent circumstances doctrine rests primarily on the fact that the officer did have grounds to obtain prior judicial authorization. The fact that it is not feasible to obtain a warrant merely sets the scene for possibly engaging the exigent circumstances doctrine, it does not justify the search. While there is a vague and ill-defined basis for search in exigent circumstances involving officer or public safety, even then there must be some reasonable basis for the search. Reasonableness in the *Waterfield* context rests on the reasonable necessity of the police action. Again, the fact that officers were acting generally in the course of their duties merely sets the scene; but is only one half of the test that must be met. By combining the two doctrines and taking only certain elements from each, the core safeguard of reasonableness may be lost.

[195] The circumstances of *Kelsy* involved the police responding to a 911 call about an early morning hostage taking and home invasion at an apartment building with the possible involvement of a handgun. The apartment was the residence of the accused’s boyfriend and the accused had spent the previous night there with their young daughter. The police entered the apartment after being directed there by the accused’s boyfriend, the victim of the hostage taking which had occurred outside his

apartment, who had advised the police that one of his assailants had gone to his apartment where his girlfriend and daughter were staying. The police knocked on the apartment door and the accused came out with her daughter. She was carrying a knapsack and two shopping bags. Inside the knapsack was a loaded handgun and a plastic bag containing heroin. The accused had found the handgun in the apartment the day before, wrapped it in a towel and hid it in her knapsack with the intention of turning it in to the police.

[196] The police took the knapsack from the accused who asked for it back, saying it contained belongings for her daughter and that she had to take the child to daycare. The accused and her daughter were directed outside to wait for the area to be cleared by the police and an officer retained her knapsack. On a hunch, he looked inside the knapsack and found the handgun, the heroin and other items. The officer explained he searched the knapsack as he wanted to ensure there was nothing inside the bag that could harm anyone.

[197] The trial judge found no breach of s. 8 of the *Charter* but went on to conclude that if there had been the evidence was nevertheless admissible under the s. 24(2) analysis. The Court of Appeal, however, found that there was a violation of the accused's s. 8 rights but also found that the evidence was admissible under s. 24(2). The search of the knapsack failed the exigent circumstances test as the officer did not have grounds to obtain a search warrant and it was not impractical to obtain a warrant had requisite grounds existed: *Kelsey*, at para. 36. The search of the knapsack also failed under the second branch of the *Waterfield* test as it was not necessary in the circumstances and there were reasonable alternatives by which the police could have carried out the search: *Kel/sy*, at paras. 55, 57-58.

[198] Mr. Justice Rosenberg summarized the state of the jurisprudence on the issue of exigent circumstances at paras. 24-35 of the decision. At para. 24 of *Kel/sy* Rosenberg J.A. noted that two bases exist for searching property without warrant in exigent circumstances: (i) imminent risk of loss or destruction of the evidence or contraband before judicial authorization could be obtained; and, (ii) concern for the safety of the police or the public.

[199] The first basis, imminent risk of loss or destruction of the evidence was reviewed at paras. 25-31 of *Kel/sy*. Given the factual circumstances in the case at bar, I find this exception to the requirement that a warrant be obtained prior to the execution of a search does not apply.

[200] At paras. 32-35 of *Kel/sy*, Rosenberg J.A. addressed the public and police safety branch of the exigent circumstances test, stating:

[32] The second set of exigent circumstances that appears to have been recognized is where there is a concern for the safety of the public or the police. The parameters of the power to search without warrant in such circumstances appear somewhat vague except where they have been codified as in s. 529.3(2)(a) and this common law power has largely been overtaken by the *Waterfield* doctrine. In any event, even in this context, something close to reasonable grounds appear to be a prerequisite to a valid search.

[33] Thus, in a somewhat different context where exigent circumstances were invoked, in *R. v. Golden*, [2001] 3 S.C.R. 679, the court required reasonable grounds as a precondition to a field strip search said to be required for officer safety. Iacobucci and Arbour JJ. wrote as follows, at para. 102:

Strip searches should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported to the police station. *Such exigent circumstances will only be established where the police have reasonable and probable grounds to believe that it is necessary to conduct the search in the field rather than at the police station.* Strip searches conducted in the field could only be justified where there is a demonstrated necessity and urgency to search for weapons or objects that could be used to threaten the safety of the accused, the arresting officers or other individuals. The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field. Strip searches conducted in the field represent a much greater invasion of privacy and pose a greater threat to the detainee's bodily integrity and, for this reason, field strip searches can only be justified in exigent circumstances. [Emphasis added.]

[34] I should not be taken as having held that reasonable grounds are required in other circumstances where the exigent circumstances doctrine is invoked to justify a search for the purpose of protecting the public or police officers. It may be that a lesser standard, such as articulable cause or reasonable suspicion, as codified in s. 529.3(2)(a), will be appropriate in some circumstances. Thus, see *R. v. Golub* (1997), 34 O.R. (3d) 743 (Ont. C.A.) at p. 759.

(3) General comments re: exigent circumstances

[35] However, whether exigent circumstances are invoked to search for evidence or to protect the public or for officer safety, it is the nature of the exigent circumstances that makes some less intrusive investigatory procedure insufficient. By their nature, exigent circumstances are extraordinary and should be invoked to justify violation of a person's privacy only where necessary. Sopinka J. made that point in *R. v. Feeney* at para. 52:

According to James A. Fontana (*The Law of Search and Seizure in Canada* (3rd ed. 1992), at pp. 786-89), exigent circumstances arise usually where immediate action is required for the safety of the police or to secure and protect evidence of a crime. With respect to safety concerns, in my view, it was not apparent that the safety of the police or the community was in such jeopardy that there were exigent circumstances in the present case. The situation was the same as in any case after a serious crime has been committed and the perpetrator has not been apprehended. *In any event, even if they existed, safety concerns could not justify the warrantless entry into the trailer in the present case. A simple watch of the trailer in which the police were told the appellant was sleeping, not a warrantless entry, would have sufficiently addressed any safety concerns involving the appellant.*

[Emphasis added]

[201] As cited above in para. 32 of *Kelsy*, Rosenberg J.A. suggests that the public safety branch of the exigent circumstances doctrine is somewhat vague but at least codified by the provisions in s. 529.3(2)(a) of the *Code* (where warrantless entry of a dwelling house is authorized to prevent death or imminent bodily harm to another person) and largely overtaken by the *Waterfield* doctrine.

[202] In the case at bar, while the officers had concerns about the safety of the community and the safety of the first responders standing by, this was not a situation of a 911 call that required an immediate search of the premises to check for injured people. Indeed, immediate action was not even taken as nearly an hour and a half had elapsed between the determination by Sgt. Smith and Capt. Ungless to enter the premises for a second time and search the Room and the arrival and further search by Cpl. Stark was conducted. In that period of time the authorities had more than ample opportunity to take other steps to seal the area and apply for a telewarrant to search the premises.

[203] The reasonableness or otherwise of Cpl. Stark's warrantless search of the Room therefore falls to be determined under the test established by the *Waterfield* doctrine.

[204] In *Kelsy* at para. 39, Rosenberg J.A. noted that despite the numerous statutory investigative powers Parliament has created since the inception of the *Charter*, it remains well-established that the courts will continue to recognize the exercise of police powers that comply with the common law *Waterfield* test (see also *R. v. Kang-Brown*, 2008, SCC 18, [2008] 1 S.C.R. 456 per Binnie J. at paras. 49-51).

[205] For ease of reference, I will restate the *Waterfield* test. In circumstances like the case at bar, where the police conduct constitutes a *prima facie* interference with a person's property, the court must consider two questions:

1. Does the conduct fall within the general scope of any duty imposed by statute or recognized at common law?
2. Does the conduct involve a justifiable use of powers associated with the duty?

[206] As noted in *Kelsy* at para. 40, the *Waterfield* doctrine has been considered in a number of different contexts. Those contexts were reviewed in *Kelsy* at paras. 39-50 and, from that analysis, it can be distilled that the principles of necessity and the availability of other reasonable alternatives are the critical features in the assessment of whether the police conduct in issue is a justifiable use of the police power, the second consideration under the *Waterfield* test. In *Kelsey* there was nothing to suggest that the warrantless search of the knapsack was necessary and there were other reasonable alternatives by which the police could carry out their duties in response to the 911 call.

[207] In *Godoy*, the police were responding to a disconnected 911 call at a dwelling house. The officers forcibly entered the residence to determine the reasons for the 911 call and to ascertain whether any of the occupants' lives were in danger. Upon entry into the home the police located the accused's common law wife in the bedroom and determined she had been assaulted. In the ensuing arrest, the

accused resisted and assaulted a police officer. The *Waterfield* test was applied to the totality of the circumstances and the forced warrantless entry was found to be both within the general statutory and common law powers of the police and a justifiable use of the police powers in the circumstances. The police however were not granted unlimited rights to enter and search the premises. The intrusion was limited only to investigating the 911 call and whether the caller needed assistance. The power did not permit them to conduct any further search of the premises: *Godoy*, at para. 22.

[208] In *Jamieson*, the police attended at a residence in response to a 911 call made by neighbours. Upon arrival they were advised by the neighbours that a man had run out of the residence and was yelling. He had acid burns to his face and body. Another occupant of the residence ran out and was asking if the police had found a person named Jessica. A state of confusion enveloped the scene. Believing there might be a clandestine drug lab in the residence, the police decided to enter the residence and check it in the interests of safety for other potential occupants who may not have been able to answer the door. After obtaining and donning protective gear, police officers entered the residence, without a warrant, and observed numerous objects in plain view that appeared to be connected to a drug lab. They did not find any injured occupants inside the residence. At trial, the officers testified they entered the residence for safety concerns for the occupants and what might be inside the residence, even though they believed they did not have sufficient grounds to obtain a search warrant. A search warrant was obtained based on the officers' observations and the premises re-entered and fully searched. The accused was convicted at trial.

[209] On his appeal Mr. Jamieson argued the initial search was not justified and the ensuing search warrant was invalid. The Court of Appeal dismissed the appeal. In rejecting the appellant's argument, Madam Justice Saunders, writing for the Court, agreed with the trial judge's finding that the primary motive for conducting the search was safety and therefore the officers' actions fell within the first branch of the *Waterfield* test. On this point Saunders J.A. held at para. 36:

[36] On the conclusion that the primary motive was safety, the trial judge was correct, in my view, to find that the police were within the scope of their duties to protect life imposed by statute and common-law when they entered the premises. In addition to the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, to which she referred and which was binding upon Constable McNamara, I would add the *Police Act*, R.S.B.C. 1996, c. 367 which was binding upon Constables Massine and Bruschetta. Thus, the first question posed in *Godoy*, "does the police conduct fall within the general scope of any duty imposed by statute or recognized by common-law", is answered in the affirmative.

[210] In finding that the officers actions in *Jamieson* were not an unjustified use of the police powers, Madam Justice Saunders determined that in the circumstances the officers' actions were justified as they had no way of determining whether a lab was cooking or whether there were others injured in the residence without entering to make that determination. The purpose of the first entry was "to look for "bodies" and was of limited duration": *Jamieson*, at para. 39. At para. 40 Saunders J.A. concluded as follows:

[40] Notwithstanding the appellant's privacy interest in the residence, it is my view that the trial judge was correct to conclude that the law permitted the police to enter the home, provided the entry was no more extensive than required to ensure safety. In this case the entry was of limited duration, considering the deliberation required to avoid chemical accident. I conclude that there was strong and persuasive evidence on which the trial judge could conclude that in the circumstances presented, the entry on December 19, 1999 was legally justified in the circumstances, and thus not an unreasonable search within the meaning of s. 8 of the *Charter*.

[211] The circumstances in *Sanderson* involved similar emergency concerns. There the police responded to a 911 call by the accused's girlfriend. The accused had threatened to kill his girlfriend's dog, chased the animal with a hammer and when the girlfriend intervened, assaulted her. She left the apartment in her pyjamas and went to a friend's neighbouring apartment. When they returned to the accused's apartment to collect the dog and the woman's personal belongings a further assault occurred. They retreated to the neighbouring apartment and the accused followed. A 911 call was made and four police officers attended to assist the complainant retrieve her belongings from her boyfriend's apartment. When the accused refused to let his girlfriend into the bedroom with the officers and gather her belongings, a scuffle ensued between the accused and the officers. The accused was arrested and charged with a variety of offences.

[212] Noting the significant and commendable changes in the response of Canadian police to domestic violence situations, MacPherson J.A., writing for the Court, found the actions of the police in this case were a justifiable use of their powers to assist the complainant in extricating herself and her belongings from the situation. It was a volatile domestic dispute where the complainant had been twice assaulted by her boyfriend and forced to flee in the middle of the night without shoes, clad only in pyjamas. The boyfriend had also threatened to burn all her belongings. In the face of this information and the boyfriend's refusal to let the police and the girlfriend enter the bedroom to collect her belongings, the police decision to arrest him was justified. The police conduct in this case, acting on the complaint immediately instead of waiting until the morning, was described as "logical, laudable and lawful": *Sanderson*, at para. 51.

[213] What constitutes a justifiable use of police power depends on the circumstances. In *Godoy*, at para. 18, Chief Justice Lamer adopted the explanation of what is meant by a "justifiable" use of police power contained in *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 at 499 (Ont. C.A.) where Mr. Justice Doherty wrote:

... the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

[214] This explanation of what constitutes a "justifiable" use of police power was also referred to by the Court in *Kelsey* at para. 41.

[215] Applying the principles of the *Waterfield* test to the case at bar, it is clear that in the circumstances the entry by Cpl. Stark falls within the general statutory and common law duties of the police to protect life and safety, particularly where there is a concern as to the existence of a potential drug lab. But that conclusion would apply in any situation involving a suspected clandestine drug lab and potentially even to some marijuana grow operations. In any event, the entry by Cpl. Stark satisfies the first stage of the *Waterfield* test.

[216] This case turns on the determination of the second question under the *Waterfield* test: whether there was a justifiable use of the police powers.

[217] With those principles in mind, I turn to the Crown's argument on this point. Counsel argues that Cpl. Stark's entry into the Room was entirely appropriate in the circumstances due to the attendant dangers presented by clandestine drug labs containing volatile and toxic substances. As there were other first responders outside the Premises and a commuter rail station nearby, Cpl. Stark needed to first confirm there was not an immediate risk to either the first responders providing scene security or to the general public. Accordingly, the Crown asserts that Cpl. Stark's actions were completely within the scope of his duties as a police officer and did not involve an unjustifiable use of his powers.

[218] With respect, I must disagree with this proposition. If such a premise were correct, then police officers would always be acting entirely within the scope of their duties and not resorting to an unjustifiable use of powers any time they entered any premises they suspected might contain a clandestine drug lab. The law does not permit the warrantless entry into a premises simply for "safety reasons" in the absence of a pressing emergency like those arising in the cases enumerated above, such as where attendance is precipitated by a 911 call which usually necessitates entry to determine whether others are at risk inside the premises or to preserve evidence or belongings. If I were to accept the Crown's position, a warrantless search would always be justified on the basis of a belief there was a risk to public and officer safety. On this line of reasoning, state authorities would seemingly have a built in power to circumvent the prior judicial authorization process any time they suspected a clandestine drug lab might exist in an area. That, however, is not the law.

[219] Moreover, the elapsed time between the confirmation of a suspected drug lab in the Room by Sgt. Smith and Cpl. Stark's attendance inside the Room was over an hour and a half. This was not a case of officers rushing into premises in response to a 911 call that an individual was in danger. The Premises were sealed and no one could enter prior to the attendance at the Room by Sgt. Smith and Capt. Ungless at

approximately 13:52 hrs. Once they entered and Mr. Veranski was placed under arrest, no one had access to the Room.

[220] Unlike the cases enumerated above, the officers in the case at bar were not responding to a 911 call type of emergency in which entry into the premises was required to look for and retrieve bodies, evidence or belongings. They were dealing with an ongoing criminal investigation that included a significant lapse in time between discovery of the lab by Sgt. Smith and the final entry by Cpl. Stark. By that time they had the requisite grounds to obtain a search warrant; indeed they had those grounds before Sgt. Smith entered the Room with Capt. Ungless. The Premises had been frozen or sealed by the time Mr. Veranski was arrested and all people associated with the Premises had been detained.

[221] The volatility of the circumstances the officers found themselves in is something to be considered under this branch of the *Waterfield* doctrine: *Kelsy*, at para. 56-57. However, this case, unlike the 911 cases cited above, did not involve a particularly chaotic or fast-moving and quickly-evolving situation. On the contrary, it included a delay of at least an hour and a half. Moreover, if the safety concerns regarding the volatility of the substances were as grave as suggested, then one is left to wonder why Cpl. Stark, who was first notified of the possibility of a drug lab in the Premises at 11:30 a.m., was not summonsed to the scene to be on standby immediately rather than waiting a further two and a half hours to be called out and taking yet further time to arrive and brief those present before entering to determine the state of the lab. Accordingly, a further warrantless entry was not reasonably necessary on an objective view of the totality of the circumstances since other less intrusive measures could have been used, i.e. a telewarrant obtained in the intervening period of time. The warrantless search of the Room was not reasonable in the circumstances as it does not fall within the justifiability parameters of the second branch of the *Waterfield* doctrine and therefore Mr. Veranski's s. 8 right to protection against unreasonable search and seizure was further violated by Cpl. Stark's warrantless entry of the Room at 15:28 hrs and the 11 minute search he conducted thereafter.

Was Mr. Veranski arbitrarily detained contrary to s. 9 of the *Charter* and, if so, was the search of his person unreasonable under s. 8 of the *Charter*?

[222] The defence argues Mr. Veranski's detention and arrest by Cst. Morrison, acting on the direction of Sgt. Smith, was arbitrary and in violation of s. 9 of the *Charter* as the police lacked objective reasonable grounds to believe Mr. Veranski had committed an indictable offence. Instead, argues the defence, Mr. Veranski was arrested for the purpose of furthering the police investigation.

[223] The Crown argues that there were reasonable grounds to affect the arrest of Mr. Veranski when he exited the Room after being directed to do so by Sgt. Smith.

[224] The legal principles applicable to whether an arrest is reasonable or in violation of s. 9 of the *Charter* are not disputed by the parties.

[225] Section 495(1)(a) of the *Code* authorizes a peace officer to arrest a person without a warrant where the officer has reasonable grounds to believe an indictable offence has been committed.

[226] The indictable offence that Sgt. Smith believed had been committed was production of a controlled substance contrary to s. 7(1) of the *CDSA*.

[227] The standard of "reasonable grounds" requires an arresting officer to subjectively have reasonable grounds to make the arrest. The grounds must also be justifiable from an objective point of view. In *R. v. Storrey*, [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316 at 324 [*Storrey*], Mr. Justice Cory, writing for the Court, explained this meant that "a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest."

[228] And, as noted by Madam Justice Bennett in *R. v. Luong*, 2010 BCCA 158, 286 B.C.A.C. 53, at para. 24, the determination of whether objective grounds exist is done by first looking at the observations of the officer "through the lens of someone who has the same experience, training, knowledge and skills as the officer who is

making the observations, and then deciding if a reasonable person with the same lens would come to the same conclusion as the police officer.”

[229] While the reasonable grounds standard requires something more than mere suspicion, it is not so high as to require a *prima facie* case for conviction before an arrest can be made: *Storrey* at 324. Nor is the standard so high as to require satisfaction of the civil standard of proof: *R. v. Jir*, 2010 BCCA 497, 264 C.C.C. (3d) 64 [*Jir*], at para. 27.

[230] The reasonable grounds determination requires a practical, non-technical and common sense approach that considers the “totality of the circumstances”: *Jir* at para. 28. In *Jir* at para. 29, Mr. Justice Frankel, writing for the Court, states that whether the grounds to arrest are objectively reasonable involves an assessment of the factual matrix as it existed at the time the decision to arrest was made.

[231] The defence argues that the police had no information to support the notion that Mr. Veranski had anything to do with the suspected lab at the time of his arrest and relies upon the decision in *R. v. Orr*, 2010 BCCA 513, 297 B.C.A.C. 54, at para. 14 to support its contention that something more was required than mere presence in the Room. In *Orr*, the accused was arrested for theft of hydro as the officers executed a search warrant at the residence and the arrest was made before any evidence of criminal activity had been discovered. There was no evidence known to the police at the time, apart from his presence in the house, to tie the accused to the residence or the marijuana grow operation found inside it. Mr. Justice Low, speaking for the Court in *Orr*, concluded something more was required to connect the presence of the accused in the residence to the illegal drug activity to justify an outright arrest as opposed to the less intrusive and restrictive step of an investigative detention.

[232] In this case, although the police were initially acting on the basis of an anonymous tip received by the PMFD which had little in the way of detail apart from the suggestion that “they were cooking” in the Premises, by the time the detention

and arrest of Mr. Veranski had been effected, they had considerably more information than a simple anonymous tip.

[233] The totality of the circumstances included the following points:

- the informant's tip about the need to inspect as "they were cooking" in the Premises;
- the informant's encounter with Sgt. Smith and Cst. Gormick before the second entry of the Premises at 13:52 hours as observed by Capt. Ungless;
- the appearance of a newly constructed and self-contained room inside a dirty working garage appeared out of place in the ordinary business circumstances;
- the information from Mr. Bellotti that Steve Veranski sub-let the Room inside the Premises and that Mr. Bellotti could not access the Room;
- the apparent contradiction between Mr. Bellotti's information about not being able to provide access to the Room and the surveillance observations of one of the mechanics going in and out of the Room while Capt. Ungless conducted his first inspection;
- the observations of Mr. Veranski's vehicle at the Premises suggesting his presence at the Premises;
- the information that the police had about Mr. Veranski's prior affiliation with a drug file, i.e. carrying a large quantity of cash and a shopping list for drug lab equipment;
- the brief observation of the Room when Sgt. Smith and Capt. Ungless opened the door and saw a lab type apparatus and Sgt. Smith detected an odour described as black liquorice, an odour he had learned was associated with certain types of drug labs;
- Mr. Veranski being found inside the Room;
- Sgt. Smith's knowledge that people found near drug labs are often affiliated with them;

[234] Although Sgt. Smith had all other persons either at the Premises or who had been at the Premises (Mr. Bellotti and Mr. Beauvais) detained before the search of the Room was conducted in order to ensure the safety of the officers on scene and to try and figure out who was involved in the lab, arguably an excessive step, his

decision to detain and arrest Mr. Veranski after the discovery of the lab and the discovery of Mr. Veranski inside the Room was objectively reasonable. As a consequence, I find that the detention and arrest of Mr. Veranski was not of the type disapproved in *R. v. Feeney*, [1997] 2 S.C.R. 13, [1997] S.C.J. No. 49 at para. 35, an arrest made solely for the purpose of investigation. Rather, reasonable grounds existed on a subjective and objective basis for the arrest and the fact that the police continued the investigation to determine who precisely was involved does not invalidate the arrest. Mr. Veranski's s. 9 *Charter* rights were not breached when he was detained and arrested. Accordingly, the search of Mr. Veranski following his arrest was not unlawful either.

Conclusion

[235] For the foregoing reasons, I am satisfied that Mr. Veranski has established a violation of his s. 8 *Charter* rights by the Port Moody Police and Fire Departments. The evidence of Captain Ungless establishes he became a police agent at the instance of Sgt. Smith.

[236] In the alternative I am satisfied on the evidence of Capt. Ungless that although initially exercising his statutory authority under the *Fire Services Act*, the predominant purpose of his second "inspection" and attendance at the Room was to assist the police by conducting a search to determine penal liability.

[237] The subsequent search of the Room by Cpl. Stark was a warrantless search and does not fall within the common law police powers as enunciated in the *Waterfield* doctrine. Accordingly the search conducted by Cpl. Stark was also done in violation of Mr Veranski's s. 8 *Charter* right not to be subjected to unreasonable search and seizure.

[238] Accordingly, Mr. Veranski is entitled to a declaration that his s. 8 *Charter* right to be protected against an unreasonable search and seizure was breached by both Capt. Ungless when he searched the Room as an the agent of the PMPD and by Cpl. Stark in his subsequent warrantless search.

“Ker J.”

ONTARIO COURT OF JUSTICE

Please see in particular para. 75

CITATION: *R. v. Volkswagen AG*, 2020 ONCJ 398

DATE: 2020 09 08

B E T W E E N :**HER MAJESTY THE QUEEN****— AND —****VOLKSWAGEN AKTIENGESELLSCHAFT**

Before Justice Rondinelli

Reasons released on September 8, 2020

T. Lemon, J. Morische and B. Gluckman.....
 D. Humphrey, S. Weinstein and M. Biddulph counsel for the Defendant

counsel

Rondinelli J.:

[1] On January 22, 2020, Volkswagen Aktiengesellschaft (“VW AG”), a German-based car manufacturer, pleaded guilty before me to 60 charges for offences under the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 (“CEPA”). VW AG pleaded guilty to 58 counts of contravening section 154 of the CEPA by unlawfully importing into Canada vehicles that do not conform to prescribed vehicle emissions standards, which is an offence under paragraph 272(1)(a) of CEPA. The company further pleaded guilty to two counts of providing misleading information, an offence under paragraph 272(1)(k) of CEPA.

[2] Also on January 22, 2020, I delivered brief oral reasons for sentence, ordering VW AG to pay a fine of \$196,500,000, payable in 30 days, with detailed reasons to follow. These are those reasons.

Agreed Statement of Facts

[3] As part of the guilty plea proceedings, the following agreed statement of facts was read into the record.

[4] Emissions regulations, vehicle standards and diesel engine variants vary significantly from country to country. The matters addressed herein relate solely to this proceeding in Canada, and nothing contained herein shall be construed as any admission in other proceedings, including with respect to Volkswagen

Aktiengesellschaft's ("VW AG") alleged conduct outside Canada. Unless otherwise specified, all references to legal terms and emissions standards, to the extent contained herein, should be understood to refer exclusively to applicable Canadian laws and regulations, and such legal terms contained in this Statement of Facts are not intended to apply to, or affect, VW AG's rights or obligations under the laws or regulations of any jurisdiction outside Canada.

Relevant Entities

[5] During the charge period, VW AG was a motor vehicle manufacturer based in Wolfsburg, Germany. Under Canadian law, a company acts through its employees, and conduct undertaken by VW AG, as described herein, reflects conduct undertaken by certain employees in the course of their VW AG employment. VW AG admits, accepts, and acknowledges that under Canadian law it is responsible for the acts of its supervisors and other employees set forth in this Statement of Facts, which acts VW AG acknowledges were within the scope of the employees' employment. Any reference to "certain" supervisors or employees below are references to these supervisors and employees acting in the course of their employment within the meaning of Canadian law. Pursuant to applicable German stock corporation law, VW AG was led by a Management Board that was supervised by a Supervisory Board. Solely for purposes of this Statement of Facts, unless otherwise indicated, references in this Statement of Facts to "employees" and "supervisors" are to employees below the level of the VW AG Management Board. "Supervisors" include supervisors in charge of the VW (Volkswagen) Brand Engine Development department.

[6] During the charge period, AUDI AG was a motor vehicle manufacturer based in Ingolstadt, Germany and a subsidiary approximately 99.55% owned by VW AG. Conduct undertaken by AUDI AG, as described herein, reflects conduct undertaken by certain employees in the course of their AUDI AG employment.

[7] VW AG and AUDI AG are collectively referred to herein as "VW."

Canadian NOx Emissions Standards

[8] The purpose of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 ("CEPA") is to prevent pollution and to protect the environment and human health in order to contribute to sustainable development.

[9] Part 7, Division 5 of CEPA, together with its applicable regulations, establish Canada's vehicle, engine and equipment emissions regime.

[10] Under CEPA, the On-Road Vehicle and Engine Emission Regulations (the "Regulations") came into effect on January 1, 2004. The Regulations harmonized vehicle emissions standards in Canada with those of the U.S. Environmental Protection Agency ("EPA"). The U.S. *Clean Air Act* required the EPA to promulgate federal emissions standards for new motor vehicles, including light-duty diesel vehicles. The EPA established standards and test procedures for new light-duty motor vehicles imported and sold in the United States, which apply by extension in Canada as a result of Canada's adoption of the EPA standards in the Regulations.

[11] In particular, the EPA established federal emissions standards that were implemented in separate steps, or Tiers. The Tier II program included emissions standards for nitrogen oxide (“NOx”) emissions for diesel vehicles (the “Prescribed EPA NOx Standards”). These Prescribed EPA NOx Standards were applicable to the United States. Canada adopted these standards as a result of the harmonization of CEPA and the Regulations with the EPA emissions regime for new light-duty vehicles.

[12] Under the Regulations, each new light-duty vehicle in Canada was required to be certified by its manufacturer to one of the Tier standards corresponding to those of the EPA for which there were specific emissions standards, including for NOx. In choosing a Tier standard to which individual vehicle models were certified in a given model year, a company was obligated to comply with the fleet average NOx standards associated with that model year. Certification to the Prescribed EPA NOx Standards, which were introduced in Canada in the 2009 model year (“MY”), applied through to MY 2016.

[13] Under subsection 153(1) of CEPA, companies were prohibited from importing into Canada new MY 2009-2016 light-duty vehicles for the purposes of sale unless such vehicles conformed to the Prescribed EPA NOx Standards at the time their main assembly or manufacture was completed, and unless evidence of such conformity was obtained. Subsection 153(3) of CEPA and the Regulations allowed companies to rely on the EPA certificate of conformity to U.S. federal emissions standards as evidence in Canada of conformity to the Prescribed EPA NOx Standards.

[14] Under section 35 of the Regulations, if a MY 2009-2016 light-duty vehicle sold in Canada was also sold concurrently in the United States, meaning that at least one equivalent vehicle of the same model year was sold in the United States during the model year specified on the EPA certificate of conformity, a company could rely upon the EPA certificate of conformity as evidence in Canada of such vehicle’s compliance with the Prescribed EPA NOx Standards.

[15] When a vehicle fell under section 35 of the Regulations, the EPA certificate of conformity was to be submitted by a company to Environment and Climate Change Canada (“ECCC”) upon written request from ECCC. It need not have been submitted before the vehicle left the control of the company and before the vehicle was presented for registration. Regardless of any written request from ECCC, the EPA certificate of conformity must have been obtained and capable of being produced in order to comply with subsection 153(1) of CEPA.

[16] To obtain a certificate of conformity from the EPA, a manufacturer was required to submit an application to the EPA for each model year and for each test group of vehicles that it intended to sell in the United States. The application was required to be in writing and to be signed by an authorized representative of the manufacturer. It was to include, among other things, the results of testing done pursuant to the published U.S. Federal Test Procedures that measure NOx emissions, and a description of the engine, emissions control system, and fuel system components, including a detailed description of each Auxiliary Emission Control Device (“AECD”) to be installed on the vehicle.

[17] An AECD was defined under U.S. law as “any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system.” The manufacturer was also required to include a justification for each AECD. If the EPA, in reviewing the application for a certificate of conformity, determined that the AECD “reduced the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use,” and that (1) it was not substantially included in the U.S. Federal Test Procedure, (2) the need for the AECD was not justified for protection of the vehicle against damage or accident, or (3) it went beyond the requirements of engine starting, the AECD was considered a “defeat device.”

[18] The Regulations defined an “AECD” and “defeat device” in an identical manner to U.S. law. Whenever the term “defeat device” is used in this Statement of Facts, it refers to a defeat device as defined by U.S. law and the Regulations.

[19] The EPA would not certify motor vehicles equipped with defeat devices. Manufacturers could not sell motor vehicles in the United States without a certificate of conformity from the EPA. CEPA and the Regulations prohibit the import into Canada of vehicles equipped with defeat devices.

[20] Without a valid certificate of conformity from the EPA covering a vehicle, a vehicle could not be imported into Canada unless other evidence of conformity for the purpose of subsection 153(1) of CEPA was obtained and capable of being produced to ECCC before the vehicle left the control of the company and before the vehicle was presented for registration.

[21] In addition, subsection 157(1) of CEPA required that a company that imported any vehicle of a class for which standards were prescribed must have provided notice to ECCC of a defect in the design, construction or functioning of the vehicle that affected or was likely to affect its compliance with a prescribed standard, upon becoming aware of such defect.

VW Diesel Vehicles Imported into Canada

[22] The following vehicles containing 2.0 litre diesel engines were imported into Canada for the purpose of sale (“2.0 Litre Subject Vehicles”):

- (a) MY 2009-2015 VW Jetta;
- (b) MY 2009 VW Jetta Wagon;
- (c) MY 2010-2013, 2015 VW Golf;
- (d) MY 2010-2014 VW Golf Wagon;
- (e) MY 2015 VW Golf Sportwagon;
- (f) MY 2010-2013, 2015 Audi A3;

- (g) MY 2013-2015 VW Beetle; and
- (h) MY 2012-2015 VW Passat.

[23] The following vehicles containing 3.0 litre diesel engines were imported into Canada for the purpose of sale (“3.0 Litre Subject Vehicles”):

- (a) MY 2009-2016 VW Touareg;
- (b) MY 2009-2015 Audi Q7;
- (c) MY 2014-2016 Audi A6;
- (d) MY 2014-2016 Audi A7;
- (e) MY 2014-2016 Audi A8/A8L; and
- (f) MY 2014-2016 Audi Q5.

[24] VW AG developed the engines for the 2.0 Litre Subject Vehicles. AUDI AG developed the engines for the 3.0 Litre Subject Vehicles and MY 2013-2016 Porsche Cayenne diesel vehicles imported into and sold in Canada (the “Porsche Vehicles”). Conduct undertaken in respect of the 2.0 Litre Subject Vehicles, as described herein, reflects conduct undertaken by certain VW AG supervisors and other employees in the course of their VW AG employment. Conduct undertaken in respect of the 3.0 Litre Subject Vehicles and Porsche Vehicles, as described herein, reflects conduct undertaken by certain AUDI AG employees in the course of their AUDI AG employment.

[25] VW caused the 2.0 Litre Subject Vehicles and 3.0 Litre Subject Vehicles (collectively, the “Subject Vehicles”) to be imported into Canada from VW and Audi plants located in the U.S., Mexico and Europe. The main manufacture and assembly of the Subject Vehicles was complete at the time of their import.

[26] Equivalent vehicles of the same model year as the Subject Vehicles were sold in the United States. Applications were prepared and submitted for certificates of conformity to the EPA to obtain authorization to sell each of the equivalent Subject Vehicles in the United States (the “Applications”).

[27] The Applications to the EPA were accompanied by the following signed statement:

The Volkswagen Group states that any element of design, system, or emission control device installed on or incorporated in the Volkswagen Group’s new motor vehicles or new motor vehicle engines for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group’s information and belief, cause the emission into the ambient air of pollutants in the operation of its motor vehicles or motor vehicle engines which cause or contribute to an unreasonable risk to public health or welfare except as specifically permitted by the standards prescribed under section 202 of the Clean Air Act. The Volkswagen Group further states that any

element of design, system, or emission control device installed or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk to public safety.

...

All vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

[28] Based on the representations in the Applications, the EPA issued certificates of conformity for these vehicles (the "EPA Certificates"), allowing the equivalent Subject Vehicles to be sold in the United States.

[29] When the Subject Vehicles were imported into Canada for the purpose of sale, the EPA Certificates were relied upon as valid evidence of the vehicles' conformity with the Prescribed EPA NOx Standards, and VW affixed or caused to be affixed an emissions label to each of the Subject Vehicles' engines. These labels stated that the vehicles conformed to the Prescribed EPA NOx Standards. In addition, a National Emissions Mark ("NEM") was affixed to MY 2015-2016 VW and Audi Subject Vehicles.

Conduct at Issue

[30] VW, through certain employees, deceived the EPA, which, due to the harmonization of CEPA and the Regulations with the EPA emissions regime for new light-duty vehicles, had the effect of also deceiving ECCC, about whether the Subject Vehicles and the Porsche Vehicles, which were imported into North America from approximately December 2008 to approximately November 2015, complied with the Prescribed EPA NOx Standards. During their involvement with design, marketing and/or importation of the Subject Vehicles and the Porsche Vehicles in North America, certain VW supervisors and other employees: (a) knew that the Subject Vehicles and the Porsche Vehicles did not meet the Prescribed EPA NOx Standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles and the Porsche Vehicles met the Prescribed EPA NOx Standards when, in fact, they satisfied the U.S. testing only by using a defeat device; and (c) attempted to and did conceal these facts from U.S. regulators and, therefore, ECCC.

The 2.0 Litre Defeat Device in the United States and Canada

[31] In or about 2006, VW AG employees were designing the new EA 189 2.0 litre diesel engine (later known as the Generation 1 or "Gen 1") for use in North America that would be the cornerstone of a new project to sell passenger diesel vehicles in the United States. Selling diesel vehicles in the U.S. market was a strategic goal of VW AG. This project became known within VW AG as the "US'07" project. The same diesel vehicles sold in the U.S. market would also be sold in Canada.

[32] Certain VW AG supervisors and employees, however, realized that they could not design a diesel engine that would both meet the Prescribed EPA NOx Standards that would become effective in the U.S. in 2007 and attract sufficient customer demand in the U.S. market. Instead of bringing to market a diesel vehicle that could legitimately meet the Prescribed EPA NOx Standards, VW AG employees acting at the direction of certain supervisors designed, created, and implemented a software function to detect, evade and defeat these U.S. emissions standards, which also applied in Canada.

[33] Certain VW AG supervisors and employees knew that U.S. regulators, including the EPA, would measure VW's diesel vehicles' emissions through standard U.S. tests with specific, published drive cycles. ECCC relies on these same prescribed cycles when measuring emissions during its own independent testing. VW AG employees acting at the direction of these supervisors and employees designed the 2.0 litre defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or "dyno") or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. and Canadian regulators. If the vehicle's software detected that it was being tested, the vehicle performed in one mode, which satisfied the Prescribed EPA NOx Standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx, up to sometimes 27 times higher than the prescribed standard as determined by ECCC testing.

[34] In or around 2006, a certain VW AG supervisor authorized certain VW AG engineers to use the defeat device in the development of the US'07 project, despite concerns expressed by particular VW AG employees about the propriety of designing and activating the defeat device software.

[35] Starting with the first MY 2009 of the new engine for the 2.0 Litre Subject Vehicles through MY 2015, certain VW AG supervisors and employees then caused the defeat device software to be installed in the 2.0 Litre Subject Vehicles imported for purpose of sale in the United States and Canada.

The 3.0 Litre Defeat Device in the United States and Canada

[36] Starting in or around 2006, AUDI AG engineers designed a 3.0 litre diesel engine for the U.S. market. The 3.0 litre engine was more powerful than the 2.0 litre engine, and was included in larger and higher-end model vehicles. The 3.0 litre engine was ultimately placed in the 3.0 Litre Subject Vehicles and the Porsche Vehicles. In order to pass U.S. emissions tests, certain AUDI AG engineers designed and installed software designed to detect, evade and defeat U.S. emissions standards, which constituted a defeat device under U.S. law and under CEPA and the Regulations.

[37] Specifically, these AUDI AG engineers calibrated a defeat device for the 3.0 Litre Subject Vehicles and the Porsche Vehicles that varied injection levels of a solution consisting of urea and water ("AdBlue") into the exhaust gas system based on whether the vehicle was being tested or not, with less NOx reduction occurring during regular driving conditions. In this way, the vehicle consumed less AdBlue, and avoided a

corresponding increase in the vehicle's AdBlue tank size, which would have decreased the vehicle's trunk size, and made the vehicle less marketable in the United States. In addition, the vehicle could drive further between service intervals, which was also perceived as important to the vehicle's marketability in the United States.

Certification of VW Diesel Vehicles in the United States

[38] There were meetings with U.S. regulators, including the EPA, to seek the certifications required to sell the Subject Vehicles to U.S. customers. During these meetings, certain VW employees misrepresented, or caused to be misrepresented, that the Subject Vehicles complied with the Prescribed EPA NOx Standards, when they knew the vehicles did not. During these meetings, these VW employees described, or caused to be described, VW's diesel technology and emissions control systems in detail but omitted the fact that the engines could not meet U.S. emissions standards without using the defeat device software.

[39] Also as part of the certification process for each new model year, certain VW supervisors and employees certified, or caused to be certified, to the EPA that the Subject Vehicles met U.S. emissions standards and complied with standards prescribed by the U.S. *Clean Air Act*. These VW supervisors and employees knew that if they had told the truth and disclosed the existence of the defeat device, VW would not have obtained the requisite EPA Certificates for the Subject Vehicles and could not have sold any of them in the United States.

Importation of VW Diesel Vehicles into Canada

[40] When the Subject Vehicles were imported into Canada, VW relied upon the same EPA Certificates as valid evidence of the vehicles' conformity with the Prescribed EPA NOx Standards, and affixed or caused to be affixed an emissions label to the vehicles' engines.

[41] Certain VW employees caused to be stated on the labels that the vehicles complied with the Prescribed EPA NOx Standards. If it had been disclosed that the Subject Vehicles did not meet the Prescribed EPA NOx Standards, VW would not have been able to import the vehicles into the United States. These vehicles also could not have had a NEM affixed to them, nor could they have been imported into Canada.

The Improvement of the 2.0 Litre Defeat Device in the United States and Canada

[42] Following the launch of the Gen 1 2.0 Litre Subject Vehicles in North America, certain VW AG supervisors and employees worked on a second generation of the vehicle (the "Gen 2"), which also contained software designed to detect, evade and defeat U.S. emissions tests. The Gen 2 2.0 Litre Subject Vehicles were launched in North America in or around 2011.

[43] In or around 2012, hardware failures developed in certain of the 2.0 Litre Subject Vehicles that were being used by customers on the road in North America. VW AG engineers hypothesized that vehicles equipped with the defeat device stayed in "dyno" mode (i.e., testing mode) even when driven on the road outside of test conditions

employed by U.S. regulators. Since the 2.0 Litre Subject Vehicles were not designed to be driven for longer periods of time in “dyno” mode, VW AG engineers suspected that the increased stress on the exhaust system from being driven too long in “dyno” mode could be the root cause of the hardware failures.

[44] In or around July 2012, engineers from the VW Brand Engine Development department met, in separate meetings, with certain supervisors to explain that they suspected that the root cause of the hardware failures in the 2.0 Litre Subject Vehicles was the increased stress on the exhaust system from being driven too long in “dyno” mode as a result of the use of software designed to detect, evade and defeat U.S. emissions tests.

[45] VW AG engineers, having informed the supervisor in charge of the VW AG Engine Development department and within the VW AG Quality Management and Product Safety department of the existence and purpose of the defeat device in the 2.0 Litre Subject Vehicles, then sought ways to improve its operation in existing 2.0 Litre Subject Vehicles to avoid the hardware failures. To solve the hardware failures, VW AG engineers decided to start the 2.0 Litre Subject Vehicles in “street mode” and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to “dyno mode.” To increase the likelihood that the vehicle in fact realized that it was being tested on the dynamometer for compliance with U.S. emissions standards, the VW AG engineers activated a “steering wheel angle recognition” feature. The steering wheel angle recognition interacted with the software by enabling the vehicle to detect whether it was being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road.

[46] Some VW AG employees again expressed concern, specifically about the expansion of the defeat device through the steering wheel angle detection, and sought approval for the function from more senior supervisors within the VW AG Engine Development department. In or about April 2013, activation of the software underlying the steering wheel angle recognition function was authorized by a certain supervisor. VW AG employees then installed the new software function in new 2.0 Litre Subject Vehicles being sold in North America, and later installed it in existing 2.0 Litre Subject Vehicles in North America through software updates during maintenance. Specifically, the new software function was downloaded and installed into existing 2.0 Litre Subject Vehicles in Canada when an owner brought a vehicle into the dealership or an authorized service centre to be serviced. The service technician would download the software update and install it directly into the vehicle. The service technician at the dealership or an authorized service centre simply facilitated the transfer of the software update to the owner’s vehicle, without knowing the specific purpose or effect of the software update.

[47] Certain VW AG employees falsely told, or caused others to tell, ECCC by way of Notices of Defect on or about December 12, 2014 for the Gen 2 2.0 Litre Subject Vehicles, and March 10, 2015 for the Gen 1 2.0 Litre Subject Vehicles, that the software update beginning in or around 2014 was intended to improve these 2.0 Litre Subject Vehicles when, in fact, these employees knew that the update also used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was

undergoing prescribed-cycle emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems. These vehicles continued to have the defeat device that reduced the effectiveness of the emissions control systems, which caused the vehicles to emit substantially higher NO_x than the prescribed standard.

The Disclosure of the Defeat Device in the United States – 2.0 Litre

[48] In or around March 2014, certain VW AG employees learned of the results of a study undertaken by West Virginia University's Center for Alternative Fuels, Engines and Emissions and commissioned by the International Council on Clean Transportation (the "ICCT study"). The ICCT study identified substantial discrepancies in the NO_x emissions from certain 2.0 Litre Subject Vehicles when tested on the road compared to when these vehicles were undergoing prescribed drive cycle tests on a dynamometer as used by the EPA and ECCC.

[49] Following the ICCT study, U.S. regulators attempted to work with VW AG to determine the cause for the higher NO_x emissions in the 2.0 Litre Subject Vehicles when being driven on the road as opposed to on the dynamometer undergoing standard emission test cycles. Certain VW AG employees decided not to disclose to U.S. regulators that the tested vehicle models operated with a defeat device. Instead, they decided to pursue a strategy of concealing the defeat device in responding to questions from U.S. regulators, while appearing to cooperate. By mid-2015, U.S. regulators threatened not to certify MY 2016 VW vehicles for sale in the United States.

[50] On or about September 3, 2015, it was admitted to the EPA that VW AG had installed a defeat device in the 2.0 Litre Subject Vehicles.

[51] On or about September 18, 2015, the EPA issued a public Notice of Violation to VW AG stating that the EPA had determined that VW AG had violated the U.S. *Clean Air Act* by manufacturing and installing defeat devices in the 2.0 Litre Subject Vehicles.

The Disclosure of the Defeat Device in the United States – 3.0 Litre

[52] On or about November 2, 2015, the EPA issued a Notice of Violation to VW AG, AUDI AG and Porsche AG, citing violations of the U.S. *Clean Air Act* related to the EPA's discovery that the 3.0 Litre Subject Vehicles and the Porsche Vehicles contained a defeat device that resulted in excess NO_x emissions when the vehicles were driven on the road.

[53] On or about November 2, 2015, VW AG issued a statement that "no software has been installed in the 3-liter V6 diesel power units to alter emissions characteristics in a forbidden manner."

[54] On or about November 19, 2015, AUDI AG representatives admitted to the EPA that the 3.0 Litre Subject Vehicles contained at least three undisclosed AECDS. Upon questioning from EPA, AUDI AG representatives conceded that one of these three undisclosed AECDS met the criteria of a defeat device under U.S. law.

[55] On or about July 19, 2016, AUDI AG representatives conceded that elements of two of its undisclosed AECDs met the definition of a defeat device under U.S. law.

[56] Certain VW supervisors and employees caused defeat device software to be installed on all of the approximately 128,000 Subject Vehicles, which includes approximately 11,000 with a NEM affixed, and approximately 2,000 Porsche Vehicles imported into Canada from 2008 through 2015.

[57] VW AG has no prior infractions in Canada.

[58] On or about April 26, 2018, VW AG was notified that it was the subject of the ECCC investigation. ECCC received full cooperation with its investigation.

Remedial Efforts and other Settlements in Canada

[59] VW AG has devoted significant resources to, and undertaken extensive measures for, the remediation of the Subject Vehicles and Porsche Vehicles in Canada.

[60] VW settled Canadian consumer claims by providing compensation and benefits for emissions modification and buyback options to remediate the Subject Vehicles and Porsche Vehicles, or remove them from the road. These settlements provided for benefits of up to a potential maximum of CAD \$2.39 billion. The settlement programs were completed by August 31, 2019.

[61] VW incurred costs to develop EPA-approved emissions modifications for the Subject Vehicles and Porsche Vehicles in the U.S. and Canadian markets. The Porsche Vehicles and some of the 3.0 Litre Subject Vehicles are eligible for emissions modifications that bring the vehicles' NOx emissions into compliance with originally certified emissions standards. Most of the remaining population of Subject Vehicles are eligible for EPA approved emissions modifications that will reduce the vehicles' NOx emissions. ECCC has confirmed that all the emissions modifications meet their relevant NOx emissions standards through its own independent testing. VW has incurred and continues to incur costs to implement the emissions modifications in the Canadian market. Customer vehicles can receive the emissions modifications. Since the emissions modifications became available, Volkswagen Group Canada Inc. has been using best efforts to cause all eligible vehicles in its and its dealers' inventory, including vehicles with a NEM affixed, to receive their applicable emissions modifications before sale or re-sale. In addition, for those Subject Vehicles and Porsche Vehicles that receive the emissions modification, extended emissions warranty coverage is provided that covers the emissions control system of the vehicles for approximately up to four years from the date of completing the emissions modification.

[62] In Canada, VW AG supported the resolution of the Commissioner of Competition's consumer protection investigations into the Subject Vehicles and Porsche Vehicles, and accepted the civil administrative penalty of CAD \$17.5 million.

[63] VW AG has instituted a more rigorous global compliance program and strengthened ethics policies.

The Governing Sentencing Principles

[64] The sentencing principles in CEPA are set out in s. 287.1 of the Act:

Sentencing principles

287.1 (1) In addition to the principles and factors that the court is otherwise required to consider, including those set out in sections 718.1 to 718.21 of the *Criminal Code*, the court shall consider the following principles when sentencing a person who is convicted of an offence under this Act:

- (a) the amount of the fine should be increased to account for every aggravating factor associated with the offence, including the aggravating factors set out in subsection (2); and
- (b) the amount of the fine should reflect the gravity of each aggravating factor associated with the offence.

Aggravating factors

(2) The aggravating factors are the following:

- (a) the offence caused damage or risk of damage to the environment or environmental quality;
- (b) the offence caused damage or risk of damage to any unique, rare, particularly important or vulnerable component of the environment;
- (c) the offence caused harm or risk of harm to human health;
- (d) the damage or harm caused by the offence is extensive, persistent or irreparable;
- (e) the offender committed the offence intentionally or recklessly;
- (f) the offender failed to take reasonable steps to prevent the commission of the offence despite having the financial means to do so;
- (g) by committing the offence or failing to take action to prevent its commission, the offender increased revenue or decreased costs or intended to increase revenue or decrease costs;
- (h) the offender committed the offence despite having been warned by an enforcement officer of the circumstances that subsequently became the subject of the offence;
- (i) the offender has a history of non-compliance with federal or provincial legislation that relates to environmental or wildlife conservation or protection; and
- (j) after the commission of the offence, the offender
 - (i) attempted to conceal its commission,

(ii) failed to take prompt action to prevent, mitigate or remediate its effects, or

(iii) failed to take prompt action to reduce the risk of committing similar offences in the future.

[65] By operation of s. 287.1(1) of CEPA, further consideration is to be made of the principles contained in s. 718.21 of the *Criminal Code*. That is:

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

- (a) any advantage realized by the organization as a result of the offence;
- (b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;
- (c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution;
- (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;
- (e) the cost to public authorities of the investigation and prosecution of the offence;
- (f) any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
- (g) whether the organization was — or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;
- (h) any penalty imposed by the organization on a representative for their role in the commission of the offence;
- (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; and
- (j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.

Aggravating Factors

[66] It is clear that the aggravating factors set out in s. 287.1(2)(a), (c), (e), (f), (g), and (j) of CEPA apply in this case. This was a very sophisticated illegal scheme. It was far from a simple plan like surreptitiously dumping pollutants in a river under cover of darkness. The deception in this case was prolonged, involved complex technology, and

spanned throughout the global. Much to the detriment of the environment and human health, and primarily for the benefit of the company's bottom line.

Mitigating Factors

[67] VW AG has no prior infractions in Canada. The company instituted resolution discussions from the outset of the Canadian investigation with a view of resolving this matter without a trial. There is little doubt that a trial in this matter would have been lengthy due to the anticipated expert testimony and the number of triable issues to be resolved. With courtroom time being a scarce commodity, it goes without saying that the saving of court time is an important factor in mitigation.

[68] Further, VW AG's commitment to resolve this matter went beyond simply admitting wrongdoing and paying a fine. As described in paragraphs 60-63 above, VW AG has undertaken significant remedial action in Canada that includes settling consumer claims and instituting a more rigorous global compliance program.

The Joint Position

[69] The Crown and VW AG have jointly submitted that a fine totaling \$196,500,000 be imposed.

[70] In *R. v. Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada held that a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. The Court noted at para. 34, "[r]ejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down."

[71] Although *Anthony-Cook* dealt with a joint position in a criminal proceeding, CEPA has been declared to be valid legislation under the criminal law power: see *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 SCR 213 at para. 110. As such, the principles stipulated in *Anthony-Cook* apply in this case.

[72] In considering the joint position, I cannot overlook the risk of damage to the environment and risk of harm to human health that was created by VW AG's actions. As Justice La Forest put it in *Hydro-Québec* at para. 123, environmental legislation is "a public purpose of superordinate importance; it constitutes one of the major challenges of our time." The importance of environmental protection has been recognized in legislative provisions such as the Declaration and Preamble of CEPA. Those provisions are worth repeating here:

Declaration

It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.

Preamble

Whereas the Government of Canada seeks to achieve sustainable development that is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government and private entities;

Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection;

Whereas the Government of Canada acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented;

Whereas the Government of Canada recognizes the importance of an ecosystem approach;

Whereas the Government of Canada will continue to demonstrate national leadership in establishing environmental standards, ecosystem objectives and environmental quality guidelines and codes of practice;

Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;

Whereas the Government of Canada recognizes that all governments in Canada have authority that enables them to protect the environment and recognizes that all governments face environmental problems that can benefit from cooperative resolution;

Whereas the Government of Canada recognizes the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development;

Whereas the Government of Canada recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

Whereas the Government of Canada recognizes the integral role of science, as well as the role of traditional aboriginal knowledge, in the process of making decisions relating to the protection of the environment and human health and that environmental or health risks and social, economic and technical matters are to be considered in that process;

Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the “polluter pays” principle;

Whereas the Government of Canada is committed to ensuring that its operations and activities on federal and aboriginal lands are carried out in a manner that is consistent with the principles of pollution prevention and the protection of the environment and human health;

Whereas the Government of Canada will endeavour to remove threats to biological diversity through pollution prevention, the control and management of the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes, and the virtual elimination of persistent and bioaccumulative toxic substances;

Whereas the Government of Canada recognizes the need to protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology;

And whereas the Government of Canada must be able to fulfil its international obligations in respect of the environment.

[73] The proposed fine in this case lends legitimacy to Canada’s role in fulfilling its international obligation in respect of the environment. It is difficult to see how the quantum of the proposed fine could be construed merely as “the price of doing business” – even in light of the size of this global corporate offender. It is approximately 26 times more than the largest fine ever imposed for environmental infractions in Canada to date.¹ In my view, the proposed fine signals a new era of substantial fines for environmental infractions and is sufficient in achieving the required deterrence and denunciation.

Conclusion

[74] Very experienced counsel have presented a joint position that has been meticulously crafted over a significant period of time. In my view, the proposed sentence adequately addresses the sentencing principles set out in both CEPA and the *Criminal Code*. Further, it provides an adequate degree of deterrence and denunciation in seeking to protect the environment and the health of Canadians.

[75] For the above reasons, I accede to the joint submission and the fine imposed is as follows: for counts 1 to 19, a fine of \$754,000 per count; for counts 20 to 58, a fine of \$4,466,000 per count; and for counts 59 to 60, a fine of \$4,000,000 per count. The total amount of the fine is \$196,500,000, payable in 30 days.

¹ See, “Bloom Lake General Partner must pay \$7.5 million for environmental infractions,” December 24, 2014, Government of Canada website:
<https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications/bloom-lake-general-partner-infractions.html>

[76] Finally, as requested by the parties, an order is made under s. 294.1(2) of CEPA, recommending that, to the extent possible, the fines credited to the Environmental Damages Fund as a result of these convictions be paid out to support the implementation of projects, proposals or programs nationally or in a province or territory on the basis of excess NOx emissions occurring in each province or territory, taking into account the number of vehicles equipped with a defeat device that were imported into a province or territory.

Released: September 8, 2020

Signed: Justice Roudinelli

1987 CarswellSask 385

Supreme Court of Canada

R. v. Wigglesworth

Please see in particular paras. 21,
28, 30, 33, 36

1987 CarswellSask 385, 1987 CarswellSask 519, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71, [1988] 1 W.W.R. 193, 24 O.A.C. 321, 28 Admin. L.R. 294, 32 C.R.R. 219, 37 C.C.C. (3d) 385, 3 W.C.B. (2d) 130, 45 D.L.R. (4th) 235, 60 C.R. (3d) 193, 61 Sask. R. 105, 81 N.R. 161, J.E. 87-1249, EYB 1987-67959

WIGGLESWORTH v. R. et al.

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

Heard: March 3 and 4, 1987

Judgment: November 19, 1987

Docket: No. 18613

Counsel: *G.N. Allbright, Q.C.*, for appellant.

C. Snell and *G.G. Mitchell*, for respondent.

J. Isaac, Q.C., and *Y. Vanasse*, for intervener the Attorney General of Canada.

D.W. Brown, Q.C., and *P.R. Jervis*, for intervener the Attorney General for Ontario.

Y. de Montigny and *F. Saint-Martin*, for intervener the Attorney General of Quebec.

Subject: Public

Headnote**Law enforcement agencies --- Police — Organization of police forces — Disciplinary proceedings — Relation to criminal charges**

Accused Royal Canadian Mounted Police (R.C.M.P.) constable was found guilty by a R.C.M.P. service tribunal of unnecessary violence towards a prisoner, a major service offence under the Act. A \$300 fine was imposed — Accused was also charged with common assault under the Code — The trial Judge held that the common assault charge was the same offence for which accused had already been found guilty under the Act and s. 11(h) of the Charter barred a second trial — Crown's appeal was allowed — Accused's appeal as to whether s. 11(h) of the Charter had been violated — The appeal should be dismissed — A prosecution for common assault in relation to an act for which accused had already been convicted under the Act did not violate s. 11(h) of the Charter — Accused was not being tried and punished for the same offence — Disciplinary offences were separate and distinct from criminal offences [Constitution Act, 1982, s 11\(h\)](#).

The accused was a Royal Canadian Mounted Police constable who, in the process of questioning a person from whom a breath sample had been demanded, grabbed the person by the throat and slapped him across the face. The constable was tried and found guilty by an R.C.M.P. service

tribunal of unnecessary violence towards a prisoner, a major service offence under the [Royal Canadian Mounted Police Act](#). A fine of \$300 was imposed. The accused was also charged under the [Criminal Code](#) with common assault. The trial judge held that the charge of common assault was the same offence for which the accused had already been found guilty under the [Royal Canadian Mounted Police Act](#) and that [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#) barred a second trial. The Crown's appeal was allowed and a conviction entered. The accused's appeal was dismissed, and a further appeal was heard on two constitutional questions: (1) Was a prosecution for common assault in relation to an act for which the accused had been convicted under the [Royal Canadian Mounted Police Act](#) in violation of [s. 11\(h\) of the Charter](#)? (2) If the prosecution did violate [s. 11\(h\)](#), was the prosecution justified by [s. 1 of the Charter](#)?

Held:

Appeal dismissed; Question 1 answered "No".

Per Wilson J. (Dickson C.J.C., Beetz, McIntyre, Lamer and La Forest JJ. concurring):

[Section 11 of the Charter](#) is available to persons prosecuted by the state for public offences involving punitive sanctions, that is, criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. The language of the section contains terms which are classically associated with and have no meaning outside of criminal proceedings. Although the section refers to "offences", and not to "criminal offences" as does [s. 2\(f\) of the Canadian Bill of Rights](#), the intent is to ensure the section applies to provincial, as well as federal, laws. The marginal note to [s. 11](#), which refers to "Proceedings in criminal and penal matters", supports this interpretation. Although marginal notes are not an integral part of [the Charter](#) and the case for their utilization as aids to statutory interpretation is therefore weaker than for statutory headings, marginal notes can be used and this distinction recognized by the degree of weight attached to them. Finally, [s. 11](#) should be restricted to criminal or penal matters because of the serious difficulty otherwise, in giving the section a consistent application; other "offences" should be left subject to the more flexible criteria of fundamental justice in [s. 7 of the Charter](#).

A matter will fall under [s. 11](#) either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. If a matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, it falls within [s. 11](#) because of its nature. However, if it is a private, domestic or disciplinary matter, which is primarily intended to maintain discipline, professional integrity and professional standards, or to regulate conduct within a limited sphere of activity, it is not an "offence" proceeding within [s. 11](#); nor are proceedings of an administrative nature instituted for the protection of the public in accordance with statutory policy. At the same time, however, private, domestic or disciplinary matters which involve the imposition of true penal consequences, that is, imprisonment or a fine designed to redress the wrong done to society, will fall within [s. 11](#), and a person subject to such consequences should be entitled to the highest procedural protection known to our law.

Although proceedings under the [Royal Canadian Mounted Police Act](#) are neither criminal nor quasi-criminal proceedings, an officer charged with a major service offence faces a true penal consequence, since imprisonment for one year is a sentence available under [s. 36\(1\) of the Act](#).

Accordingly, s. 11 of the Charter applies to a major service offence before the Royal Canadian Mounted Police Service Court.

In this case, however, the accused was not being tried and punished for the same offence. Disciplinary offences are separate and distinct from criminal offences for the purposes of the rule against multiple convictions. The major service offence was an internal disciplinary matter under which the accused accounted to his profession, and the charge of common assault required the accused to account to the public at large. The answer to the first constitutional question was "no" and it was therefore unnecessary to answer the second question.

Per Estey J. (dissenting in part):

When a matter has a true penal consequence, s. 11 of the Charter applies and, accordingly, a proceeding with respect to a major service offence under the Royal Canadian Mounted Police Act is an offence under s. 11. The offence of which the accused was convicted under that Act and the offence with which he was charged under the Criminal Code were the same, and accordingly s. 11(h) barred the Criminal Code proceeding. In this case there was only one factual assault for which the accused had been tried and punished. The test as to whether the two proceedings are in respect of the same offence is practical, and involves determining whether by registering a conviction the tribunal was performing a task in which the general public's interest in the administration of criminal law was recognized over and above the limited interest of internal discipline. Here, considering the possibility of imprisonment for one year under s. 36 of the Royal Canadian Mounted Police Act and of dismissal from the force under s. 38, it was clear that the first procedure was in the nature of punishment to redress a social wrong. Finally, the breach of s. 11(h) could not conceivably be justified under s. 1 of the Charter.

Table of Authorities

Cases considered:

Considered by majority:

Barry and Alta. Securities Comm., Re (1986), 25 D.L.R. (4th) 730, 24 C.R.R. 9, 67 A.R. 222 (C.A.) [leave to appeal to S.C.C. granted 74 A.R. 160, 72 N.R. 76] — referred to

Belhumeur v. Discipline Ctee. of Que. Bar Assn. (1983), 34 C.R. (3d) 279 (C.S. Que.) — considered

Bridges and Bridges, Re, Ont. Prov. Ct., Colter Prov. J. (unreported) — referred to
C.P. Ltd. v. A.G. Can., [1986] 1 S.C.R. 678, 11 C.C.E.L. 1, 27 D.L.R. (4th) 1, 86 C.L.L.C. 14,032, 66 N.R. 321 [Fed.] — referred to

Eastern Counties & London & Blackwall Ry. Cos. v. Marriage (1860), 9 H.L. Cas. 32, 11 E.R. 639 — referred to

Fang v. College of Physicians & Surgeons of Alta., [1986] 2 W.W.R. 380, 42 Alta. L.R. (2d) 89, 25 D.L.R. (4th) 632, 66 A.R. 352 (C.A.) referred to

Howard v. Stony Mountain Inst., Presiding Officer of Inmate Disciplinary Ct., 8 C.C.C. (3d) 557, 4 D.L.R. (4th) 147, 8 C.R.R. 301, reversed [1984] 2 F.C. 642, 11 Admin. L.R. 63, 45 C.R. (3d) 242, 19 C.C.C. (3d) 195, 19 D.L.R. (4th) 502, 17 C.R.R. 5, 57 N.R. 280 (C.A.)

[leave to appeal to S.C.C. granted 45 C.R. (3d) 242n, 19 C.C.C. (3d) 195n, 19 D.L.R. (4th) 502n, 17 C.R.R. 5n, 61 N.R. 78] — *referred to*

Inkster v. Radey, [1979] 2 F.C. 457, (sub nom. *Re Radey and Supt. of R.C.M.P.*) 47 C.C.C. (2d) 148 (C.A.) — *applied*

James, Re, [1982] 2 W.W.R. 316, 42 B.C.L.R. 10, (sub nom. *Re James and Law Soc. of B.C.*) 143 D.L.R. (3d) 379, 4 C.R.R. 293 (S.C.) — *referred to*

Kienapple v. R., [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 [Ont.] — *referred to*

Knockaert v. Can. (Commr. of Corrections), [1986] 2 F.C. 361, 51 C.R. (3d) 183, 18 Admin. L.R. 273, 25 C.C.C. (3d) 373, 2 F.T.R. 179, affirmed [1987] 2 F.C. 202, (sub nom. *Knockaert v. Commr. of Corrections*) 55 C.R. (3d) 171, 22 Admin. L.R. 1, 32 C.C.C. (3d) 288, 8 F.T.R. 321n, 72 N.R. 161 (C.A.) [leave to appeal to S.C.C. refused 55 C.R. (3d) xxxii, 22 Admin. L.R. xxviii, 32 C.C.C. (3d) 288n] — *referred to*

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, 3 O.A.C. 321, 53 N.R. 169 — *applied*

Law Soc. of Man. v. Savino, [1983] 6 W.W.R. 538, 1 D.L.R. (4th) 285, 23 Man. R. (2d) 293 (C.A.) — *considered*

Lazarenko (Lazarendo), Re, [1984] 2 W.W.R. 24, 29 Alta. L.R. (2d) 28, (sub nom. *Re Lazarenko and Law Soc. of Alta.*) 4 D.L.R. (4th) 389, 9 C.R.R. 114, 50 A.R. 337 (Q.B.) — *referred to*

MacDonald v. Marriott (1984), 52 B.C.L.R. 346, 7 D.L.R. (4th) 697 (S.C.) — *referred to*
Malartic Hygrade Gold Mines (Can.) Ltd. v. Ont. Securities Comm. (1986), 54 O.R. (2d) 544, 9 O.S.C.B. 2286, 19 Admin. L.R. 21, 27 D.L.R. (4th) 112, 24 C.R.R. 1, 15 O.A.C. 124 (Div. Ct.) [leave to appeal to Ont. C.A. refused 19 Admin. L.R. xlv (C.A.)] — *referred to*

McCutcheon v. Toronto (1983), 41 O.R. (2d) 652, 20 M.V.R. 267, 22 M.P.L.R. 139, 147 D.L.R. (3d) 193 (H.C.) — *applied*

Nash and R., Re (1982), 70 C.C.C. (2d) 490 (Nfld. Prov. Ct.) — *not followed*

Pelissero and Loree, Re (1982), 140 D.L.R. (3d) 676 (Ont. Div. Ct.) — *referred to*

Peltari v. Dir. of Lower Mainland Regional Correctional Centre (1984), 42 C.R. (3d) 103, 15 C.C.C. (3d) 223 (B.C.S.C.) [quashed 18 C.C.C. (3d) 571 (B.C.C.A.)] — *referred to*

R. v. B & W Agricultural Services Ltd. (1982), 3 C.R.R. 354 (B.C. Prov. Ct.) — *not followed*

R. v. Belliveau; Belliveau v. Warden of Dorchester Penitentiary (1984), 55 N.B.R. (2d) 82, 144 A.P.R. 82 (C.A.) — *referred to*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81 — *applied*

R. v. DeBaie (1983), 60 N.S.R. (2d) 78, 128 A.P.R. 78 (C.A.) — *referred to*

R. v. Mingo (1982), 2 C.C.C. (3d) 23, 4 C.R.R. 18 (B.C.S.C.) — *considered*

R. v. Prince, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119 — *applied*

R. v. White, [1956] S.C.R. 154, 114 C.C.C. 77, 1 D.L.R. (2d) 305 [B.C.] — *applied*
Rosenbaum v. Law Soc. of Man., [1983] 5 W.W.R. 752, 2 Admin. L.R. 210, 6 C.C.C. (3d) 472,
 150 D.L.R. (3d) 352, 22 Man. R. (2d) 260 (Q.B.) [affirmed [1984] 4 W.W.R. 95, 7 Admin.
 L.R. 77, 8 C.C.C. (3d) 256, 3 D.L.R. (4th) 768, 25 Man. R. (2d) 154, leave to appeal to S.C.C.
 refused 27 Man. R. (2d) 159n, 55 N.R. 400] *referred to*
Russell v. Radley, [1984] 1 F.C. 543, 5 Admin. L.R. 39, 11 C.C.C. (3d) 289 (T.D.) — *referred*
to
Sheffield Waterworks Co. v. Bennett (1872), L.R. 7 Ex. 409 — *referred to*
Stephens v. Cuckfield Rural Dist. Council, [1960] 2 Q.B. 373, [1960] 3 W.L.R. 248, [1960]
 2 All E.R. 716 (C.A.) — *referred to*
Trumbley v. Fleming (1986), 55 O.R. (2d) 570, 21 Admin. L.R. 232, 29 D.L.R. (4th) 557,
 24 C.R.R. 333, (sub nom. *Trumbley v. Toronto Police Force*) 15 O.A.C. 279 (C.A.) [leave
 to appeal to S.C.C. granted 57 O.R. (2d) 320, 24 C.R.R. 333n, 21 O.A.C. 238, 74 N.R. 235]
 — *applied*
Van Rassel v. Can. (Commr. of R.C.M.P.), [1987] 1 F.C. 473, 31 C.C.C. (3d) 10, (sub nom.
Van Rassel v. R.C.M.P.) 7 F.T.R. 187 (T.D.) — *considered*
Yeomans, Commr. of Corrections v. Gaw, [1985] 1 F.C. 561, [1986] 6 W.W.R. 72, 22 C.C.C.
 (3d) 311 (C.A.) — *referred to*

Considered in dissent:

R. v. Prince, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33
 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119 — *distinguished*

Statutes considered:

Canadian Bill of Rights, R.S.C. 1970, App. III

s. 2(f)

Canadian Charter of Rights and Freedoms

s. 7

s. 11

s. 24(1)

Constitution Act, 1867

s. 92(15)

Criminal Code, R.S.C. 1970, c. C-34

s. 11

s. 245(1) [re-en. 1972, c. 13, s. 21]

Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9

s. 25(1)

s. 36(1)

s. 38

s. 45

Regulations considered:

Penitentiary Act, R.S.C. 1970, c. c. P-6 — Penitentiary Service Regulations, C.R.C. 1978, c. 1251

Words and phrases considered:

CRIMINAL AND PENAL MATTERS

The phrase "criminal and penal matters" which appears in the marginal note [of s. 11 of the *Charter*] would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.

OFFENCE

. . . the narrower interpretation of s. 11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. A number of factors impel me to this conclusion.

.

. . . if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is a kind of matter which falls within s. 11 [of the *Charter*]. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regular conduct within a limited private sphere of activity . . . There is also a fundamental distinction between proceedings undertaken to promote public order and

welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply. . . . a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

TRUE PENAL CONSEQUENCE

. . . a true penal consequence which would attract the application of s.11 [of the *Canadian Charter of Rights and Freedoms*] is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

Appeal from judgment, *R. v. Wigglesworth* (1984), [1984] 3 W.W.R. 289, 38 C.R. (3d) 388, 31 Sask. R. 153, 7 D.L.R. (4th) 361, 11 C.C.C. (3d) 27, 9 C.R.R. 47, 1984 CarswellSask 546, [1984] S.J. No. 204 (Sask. C.A.), dismissing appeal from judgment, *R. v. Wigglesworth* (1983), 25 Sask. R. 149, 35 C.R. (3d) 322, 150 D.L.R. (3d) 748, 7 C.C.C. (3d) 170, 1983 CarswellSask 39, [1983] S.J. No. 554 (Sask. Q.B.), allowing Crown appeal from judgment, *R. v. Wigglesworth* (1983), 33 C.R. (3d) 44, 1983 CarswellSask 34, [1983] S.J. No. 1137 (Sask. Prov. Ct.), quashing common assault charge against R.C.M.P. constable previously found guilty in disciplinary proceedings arising from same incident.

Estey J. (dissenting in part):

1 I am in complete agreement with the judgment of Madame Justice Wilson through the first 21 pages [pp. 199-213, post] of 25 of the judgment, particularly the conclusion that where there is a "true penal consequence" it cannot be said as a matter of law that a tribunal with the responsibility of conviction and sentencing is but a disciplinary court administering justice to a professional or other body of specialized persons segregated for this purpose from the general community. Therefore I agree with Madame Justice Wilson when she concludes that s. 11 of the *Charter* applies to a trial conducted pursuant to the *Royal Canadian Mounted Police Act* for a "major service offence".

2 With much reflection and all due respect I do not follow the line thereafter pursued in the concluding few pages of my colleague's judgment in this appeal [from case reported at [1984] 3 W.W.R. 289, 38 C.R. (3d) 388, 11 C.C.C. (3d) 27, 7 D.L.R. (4th) 361, 31 Sask. R. 153, affirming

35 C.R. (3d) 322 7 C.C.C. (3d) 170 150 D.L.R. (3d) 748 25 Sask. R. 149, which reversed 33 C.R. (3d) 44].

3 The distinguishing feature of the tribunal sitting under the [Royal Canadian Mounted Police Act](#) is that this tribunal was equipped by Parliament to apply, following the registration of a conviction, a scale of punishment ranging from a reprimand through a fine up to \$500 to an ultimate penalty of one year imprisonment. The statute in addition (s. 38) empowers the convicting officer of the accused to recommend his removal from the force upon conviction. It can hardly be said, given the power under the [Royal Canadian Mounted Police Act](#) to couple a one-year imprisonment sentence with a virtually inevitable dismissal from the force upon conviction, that Parliament intended that the scale of punishment would reflect only the internal disciplinary interest of the R.C.M.P. and not the larger community interest in the suppression of the crime of assault wherever committed.

4 It is not irrelevant to note that Parliament when enacting the [Criminal Code](#) did anticipate the existence of a body outside the traditional courts administering criminal law in or outside the [Criminal Code](#) when it enacted s. 11 of the Code:

11. Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

The section makes no reference to any particular tribunal but deals entirely with a prohibition against punishment more than once for the same offence. There is no question but that here the one accused committed the single offence of common assault and that he has been convicted and sentenced for that offence in a court established by Parliament for that purpose and is now faced with the like prosecution under another Act of Parliament, the [Criminal Code](#), and before another court.

5 In *R. v. Prince*, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119, the Chief Justice, in discussing the principles underlying the rule against multiple convictions, states (at pp. 498-99):

I conclude therefore, that the requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle.

6 The facts in *Prince* are quite different from the circumstances in this case. Not only were there two victims of the one stabbing action but, also, the two offences under consideration, viz., causing bodily harm and manslaughter, required proof of different elements. The first required proof of bodily harm and the second required proof of the death of the baby. Clearly there was an insufficient legal nexus to apply the rule against multiple convictions in that case.

7 This case is completely different. Only one factual assault has occurred for which the appellant has been tried and punished. The potential imposition of a one-year imprisonment pursuant to a "trial" by the tribunal clearly points to this procedure as being in the nature of punishment to redress a social wrong and not only in the nature of disciplinary proceedings. The possibility of dismissal from the force pursuant to [s. 38](#) of the statute reinforces this view. With respect, I cannot agree with the view of Wilson J. that the two offences are in any way totally separate from or different from each other.

8 The test must be the practical one of determining whether the first court upon registering a conviction was performing a task assigned by Parliament which by the scale of punishment available to the tribunal is readily recognizable as a process in which the general public's interest in the administration of criminal law is recognized over and above the limited interest of internal discipline.

9 For the reasons given above it is my view that this test is met in this case. The subsequent proceeding under [s. 245\(1\) of the Criminal Code](#) falls squarely within the prohibition in [s. 11\(h\) of the Charter](#) that any person "finally found guilty and punished for the offence" has the right "not to be tried or punished for it again". Furthermore, a breach of [s. 11\(h\)](#) rights cannot be justified by any conceivable [s. 1](#) reasonable limits analysis. In any case, the Crown here has made no attempt to do so. The right to be tried and punished only once for an offence cannot, in my view, be fettered or circumscribed by Parliament. I would allow the appeal and answer the first constitutional question "yes", and the second constitutional question "no".

Wilson J. (Dickson C.J.C., Beetz, McIntyre, Lamer and La Forest JJ. concurring):

10 The central issue on this appeal is whether the appellant's conviction of a "major service offence" under the [Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9](#), precludes subsequent proceedings under the [Criminal Code](#) for the same mis conduct. The resolution of this issue requires a decision as to whether such a major service offence constitutes an "offence" within the meaning of [s. 11 of the Canadian Charter of Rights and Freedoms](#) and, if so, whether proceedings under the [Criminal Code](#) would violate the appellant's right under [s. 11\(h\) of the Charter](#) not to be tried and punished again for the same offence. Before turning to a consideration of these issues it is necessary to examine briefly the facts of the case.

I The Facts

11 The appellant was at all material times a constable of the Royal Canadian Mounted Police ["R.C.M.P."]. On 21st August 1981 one Donald Kerr was brought to the R.C.M.P. detachment in Yorkton, Saskatchewan, for a breathalyzer test. Kerr was taken into a room where he met the appellant.

12 The appellant started to question Kerr concerning the incident giving rise to his arrest. He asked Kerr who was driving the car at the time. Kerr indicated that his sister was driving. The appellant suspected he was lying. He repeated the question a couple of times, receiving the same response each time. The appellant then grabbed Kerr, who was seated in a chair at the time, by the throat and pushed him against a wall. The grab around the throat was sufficient to cause a choking sensation to Kerr.

13 After a few seconds the appellant questioned Kerr again as to who was driving the car. Kerr continued to maintain that his sister was driving. The appellant slapped Kerr across the face with his open hand and repeated the question. Kerr gave the same answer. However, after three or four slaps Kerr admitted that he had been driving the car. At no time did Kerr respond physically to the appellant's slaps. The defence has admitted, on these facts, that the appellant committed a common assault as defined in the [Criminal Code](#). As a result of the assault Kerr suffered a sore throat, a ringing in his ears and several minor marks on his face.

14 Two charges were laid following this incident. On 21st August 1981 the appellant was charged with common assault contrary to [s. 245\(1\) of the Criminal Code, R.S.C. 1970, c. C-34](#). The appellant was also charged under the [Royal Canadian Mounted Police Act](#) as follows:

That at or near Yorkton, in the Province of Saskatchewan, on the 21st day of August, 1981, that you were unnecessarily violent towards a prisoner, to wit: Donald Kerr, by forcibly grabbing him and slapping him in the face, contrary to Section [*sic*] (L), [Section 25 of the Royal Canadian Mounted Police Act](#).

II The Courts Below

15 On 2nd June 1982 the appellant appeared before Inspector S.G. Wilcox of the Royal Canadian Mounted Police Service Court for trial of the charge laid under the [Royal Canadian Mounted Police Act](#). The appellant was found guilty of a "major service offence" under s. 25(1) of that Act. The section reads as follows:

25. Every member who

(1) is cruel, harsh or unnecessarily violent to any prisoner or other person;

is guilty of an offence, to be known as a major service offence, and is liable to trial and punishment as prescribed in this Part.

The maximum penalty imposed by s. 36(1) of the Act for such an offence is imprisonment for one year. The appellant was assessed a fine of \$300.

16 On 2nd February 1983 the appellant appeared before His Honour Judge Meagher of the Saskatchewan Provincial Court for trial of the charge of common assault under [s. 245\(1\) of the Criminal Code](#) [reported at [33 C.R. \(3d\) 44](#)]. His counsel submitted that it would be improper to proceed with this charge following the conviction under the [Royal Canadian Mounted Police Act](#) since this would violate the accused's right under [s. 11\(h\) of the Charter](#) not to be tried and punished twice for the same offence. The trial judge accepted this submission and quashed the information pursuant to [s. 24\(1\) of the Charter](#). He held that both the proceeding before the service tribunal and the proceeding before the criminal court were penal in nature — both involved a trial for an alleged "offence" and a possible term of imprisonment following a determination of guilt. In his view, if punishment were meted out in each case, the appellant would be punished twice for the same offence.

17 The Crown appealed to the Court of Queen's Bench for Saskatchewan [reported at [35 C.R. \(3d\) 322](#) [7 C.C.C. \(3d\) 170](#) [150 D.L.R. \(3d\) 748](#) [25 Sask. R. 149](#)]. On 5th July 1983 that court allowed the appeal. Kindred J. held that the trial judge had erred in law in holding that the conviction under the [Royal Canadian Mounted Police Act](#) precluded him from trying the appellant under the [Criminal Code](#). The two constituted different offences. The former was a trial before a service tribunal for a breach of discipline amounting to a major service offence applicable only to members of the force, while the latter was a trial in a court of record for a criminal offence applicable to all. The court found the appellant guilty as charged and assessed a fine of \$250 to be paid within one month or imprisonment for 15 days.

18 The appellant appealed to the Court of Appeal for Saskatchewan. On 16th February 1984 the appeal was dismissed [reported at [\[1984\] 3 W.W.R. 289](#), [38 C.R. \(3d\) 388](#), [11 C.C.C. \(3d\) 27](#), [7 D.L.R. \(4th\) 361](#), [31 Sask. R. 153](#)]. The Court of Appeal held that the proceeding before the R.C.M.P. service tribunal was purely "disciplinary". In its view that proceeding was concerned only with the professional aspect of the appellant's conduct. It was still necessary for the appellant to answer to society for the criminal aspect of his conduct. It held that [s. 11\(h\) of the Charter](#) did not prevent the appellant from being tried and charged for the criminal offence of assault because he was not found guilty and punished for that "offence" within the meaning of [s. 11 of the Charter](#). Cameron J.A. stated [at pp. 294-95]:

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages, for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal

conviction at the behest of the state; to a judgment for damages, at the instance of the patient; and to an order of discipline on the motion of the governing council of his profession. Similarly a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.

Cameron J.A. concluded [at p. 295]:

In the light of this I think Constable Wigglesworth's contention must fail, since the proceeding before the R.C.M.P. service tribunal was purely disciplinary. It was concerned only with the professional aspect of his conduct: the "offence" of which he was found guilty, a "major service offence", lay in the breach by him of his policeman's duty not to treat his prisoners harshly, cruelly, or with unnecessary violence. He must still answer to society for the criminal aspect of his conduct, or for his "criminal offence".

Cameron J.A. also added that he expressed no opinion as to the constitutionality of the power given to the R.C.M.P. under the [Royal Canadian Mounted Police Act](#) to imprison members of its force found guilty of major service offences.

19 By order dated 22nd May 1986, Dickson C.J.C. stated the following constitutional questions:

1. Is a prosecution by the Crown for the offence of common assault pursuant to [s. 245\(1\) of the Criminal Code of Canada](#), in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to [s. 25\(1\)](#) and [Part II of the Royal Canadian Mounted Police Act](#), in violation of [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#)?
2. If a prosecution by the Crown for the offence of common assault pursuant to [s. 245\(1\) of the Criminal Code of Canada](#) in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to [s. 25\(1\)](#) and [Part II of the Royal Canadian Mounted Police Act](#) violates [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#), is the subsequent prosecution by the Crown justified by [s. 1 of the Canadian Charter of Rights and Freedoms](#) and therefore not inconsistent with the *Constitution Act, 1982*?

III The Issue

20 [Section 11 of the Charter](#) reads as follows:

11. Any person charged with an offence has the right:
 - (a) to be informed without reasonable delay of the specific offence;
 - (b) to be tried within a reasonable time;

- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

21 As mentioned above, the first question to be considered is whether the appellant has been "charged with an offence" within the meaning of the opening words of s. 11. The proper approach to *Charter* interpretation was set out by this court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81. At p. 344 Dickson J. [now C.J.C.] stated:

The meaning of a right or freedom guaranteed by *the Charter* [is] 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.

... this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of *the Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of *the Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of *the Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that *the Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*,

[1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

22 There have been a large number of cases decided on the issue whether the accused has been "charged with an offence" within the meaning of the section. A number of these cases have recognized a so-called "disciplinary exception" to the application of s. 11. Thus, in *R. v. Mingo* (1982), 2 C.C.C. (3d) 23, 4 C.R.R. 18(B.C.S.C.), s. 11(h) was held to be inapplicable to a criminal prosecution for the same conduct which had been the subject of disciplinary proceedings against an inmate. A similar result has been reached in cases dealing with proceedings following a conviction for a disciplinary offence under the Penitentiary Service Regulations: for example, *Yeomans, Commr. of Corrections v. Gaw*, [1985] 1 F.C. 561, [1986] 6 W.W.R. 72, 22 C.C.C. (3d) 311(C.A.), and *Howard v. Stony Mountain Inst., Presiding Officer of Inmate Disciplinary Ct.* (1983), 8 C.C.C. (3d) 557, 4 D.L.R. (4th) 147, 8 C.R.R. 301(Fed. T.D.), subsequently reversed but in reliance on s. 7 of the Charter at [1984] 2 F.C. 642, 11 Admin. L.R. 63, 45 C.R. (3d) 242, 19 C.C.C. (3d) 195, 19 D.L.R. (4th) 502, 17 C.R.R. 5, 57 N.R. 280(C.A.); contra *Russell v. Radley*, [1984] 1 F.C. 543, 5 Admin. L.R. 39, 11 C.C.C. (3d) 289(T.D.); *Peltari v. Dir. of Lower Mainland Regional Correctional Centre* 1984 42 C.R. (3d) 103 15 C.C.C. (3d) 223(B.C.S.C.); and *Knockaert v. Can. (Commr. of Corrections)*, [1986] 2 F.C. 361, 51 C.R. (3d) 183, 18 Admin. L.R. 273, 25 C.C.C. (3d) 373, 2 F.T.R. 179(T.D.), subsequently upheld by the Federal Court of Appeal in a judgment rendered on 21st November 1986 [now reported at [1987] 2 F.C. 202Knockaert v. Commr. of Corrections55 C.R. (3d) 171 22 Admin. L.R. 1 32 C.C.C. (3d) 288 8 F.T.R. 321n 72 N.R. 161]. The same conclusion that s. 11 does not apply to disciplinary proceedings has been reached in cases involving proceedings brought pursuant to professional disciplinary statutes: see, for example, *Re James* [1982] 2 W.W.R. 316 42 B.C.L.R. 10, (sub nom. *Re James and Law Soc. of B.C.*) 143 D.L.R. (3d) 379, 4 C.R.R. 293(S.C.) ; *Rosenbaum v. Law Soc. of Man.*, [1983] 5 W.W.R. 752, 2 Admin. L.R. 210, 6 C.C.C. (3d) 472, 150 D.L.R. (3d) 352, 22 Man. R. (2d) 260(Q.B.); *Belhumeur v. Discipline Ctee. of Que. Bar Assn.* 198334 C.R. (3d) 279(C.S. Que.); *Law Soc. of Man. v. Savino*, [1983] 6 W.W.R. 538, 1 D.L.R. (4th) 285, 23 Man. R. (2d) 293(C.A.); and *Fang v. College of Physicians & Surgeons of Alta.*, [1986] 2 W.W.R. 380, 42 Alta. L.R. (2d) 89, 25 D.L.R. (4th) 632, 66 A.R. 352(C.A.).

23 The breadth of the opening words of s. 11, "Any person charged with an offence", suggests that the section may well apply to non-criminal proceedings. A few cases support this interpretation, holding that the rights guaranteed by s. 11 of the Charter are available to those "charged" with disciplinary offences. In *Re Nash and R.* (1982), 70 C.C.C. (2d) 490(Nfld. Prov. Ct.), it was submitted before Kennedy Prov. J. that an internal disciplinary panel of the Royal Newfoundland Constabulary contravened s. 11(d) of the Charter because it was not an independent and impartial tribunal. In considering the meaning of the word "offence" in s. 11(d), Kennedy Prov. J. stated at p. 494:

The word "offence" is broad enough to apply to any breach or charge whereby an accused can be punished. "Offence" is broad enough to apply to any of the actions taken against members of self-governing professional groups and associations and is also applicable to offences involving breaches of codes of conduct for such groups as police forces and members of the armed services.

24 An equally broad interpretation of the word "offence" appears in *Re Lazarenko (Lazarendo)*[1984] 2 W.W.R. 2429 Alta. L.R. (2d) 28*Re Lazarenko and Law Soc. of Alta.* 4 D.L.R. (4th) 389 at 3989 C.R.R. 11450 A.R. 337(Q.B.), subsequently disapproved by the Alberta Court of Appeal in *Fang v. College of Physicians & Surgeons of Alta., supra*. In *R. v. B & W Agricultural Services Ltd. (1982)*, 3 C.R.R. 354(B.C. Prov. Ct.), the accused was charged with a violation of the *Aeronautics Act* even although his licence had already been suspended for 30 days by an Air Transport Committee. Shupe Prov. J., noting that the term "offence" in s. 11 of the Charter was much broader than the term "criminal offence" in s. 2(f) of the Canadian Bill of Rights, R.S.C. 1970, App. III, granted the accused's request for a stay of proceedings based on s. 11(h) of the Charter. There is also some academic support for the broader interpretation of the word "offence" in s. 11. Morris Manning in *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (1983) states at p. 362 that the breach of a law which carries a penalty is a "penal matter" and is thus an "offence". He adds that the absence of the word "criminal" is indicative of the intent of the framers of the Charter to have s. 11 apply to more than purely criminal offences. At p. 83 in his text on *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources* (1982), D.C. McDonald J. states:

... "offence" may include ... offences which may be committed only by persons who are members of certain organizations such as the Armed Forces and the Royal Canadian Mounted Police ... The word "offence", which signifies "a breach of law" or "an infraction of law", may be so broad as to include conduct which constitutes a ground upon which, by statute, a professional body may impose discipline upon its members, by disqualification, suspension or a fine.

25 It is my view that the narrower interpretation of s. 11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s. 11 of the Charter are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. A number of factors impel me to this conclusion.

26 I turn first to the text of s. 11. The Ontario Court of Appeal in *Trumbley v. Fleming* 198655 O.R. (2d) 57021 Admin. L.R. 23229 D.L.R. (4th) 55724 C.R.R. 333*Trumbley v. Toronto Police Force* 15 O.A.C. 279, in concluding that s. 11 is concerned with only criminal or penal matters, properly observed [at p. 583] that "the clear impression created by s. 11, read as a whole, is

that it is intended to provide procedural safeguards relating to the criminal law process." [Section 11](#) contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence". Indeed, some of the rights guaranteed in [s. 11](#) would seem to have no meaning outside the criminal or quasi-criminal context. As Hugessen A.C.J.S.C. stated in *Belhumeur v. Discipline Ctee. of Que. Bar Assn.*, [supra](#), at p. 281, [s. 11](#) [translation] "is directed exclusively at procedure in criminal and penal matters". This same observation was made by Stevenson J.A. in *Re Barry and Alta. Securities Comm.* (1986), 25 D.L.R. (4th) 730 at 734, 24 C.R.R. 9, 67 A.R. 222(C.A.), and by Monnin C.J.M. in *Law Soc. of Man. v. Savino*, [supra](#), at p. 292.

27 The Ontario Court of Appeal in *Trumbley* noted that the legislative history of the section indicates that it was not intended to be restricted solely to criminal law but was meant to extend to "penal proceedings" as well. Section 2(f) of the Canadian Bill of Rights reads as follows:

2. ... no law of Canada shall be construed or applied so as to

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause. [emphasis added.]

Section 2(f) differs from [s. 11 of the Charter](#) in that it refers to a "criminal offence" whereas [the Charter](#) refers only to an "offence". As already mentioned, some authorities see this difference as intended to give [s. 11](#) a broader application than mere "criminal offences": see *R. v. B & W Agricultural Services Ltd.*, [supra](#); Morris Manning, *Rights, Freedoms and the Courts*. But this leaves open the issue of how much broader the application of [s. 11](#) should be. One possible inference is that the word "criminal" was deleted in order to ensure that [s. 11](#) would also be applicable to summary conviction and provincial offence prosecutions under quasi-criminal public welfare statutes. The Canadian Bill of Rights was a federal statute which had no application to prosecutions of provincial offences created pursuant to [s. 92\(15\) of the Constitution Act, 1867](#). I would agree with the conclusion of Toy J. in *R. v. Mingo*, [supra](#), at p. 36:

In my respectful view, the authors of the new [Charter](#), when they employed the unqualified word "offence" as opposed to "criminal offence", were doing nothing more than providing for the equal protection of Canadian citizens from breaches of their rights under provincial as well as federal laws in so far as public as opposed to private or domestic prohibitions were concerned.

The same view was expressed by Monnin C.J.M. in *Law Soc. of Man. v. Savino*, [supra](#), at p. 292:

[Section 11](#) speaks of a person charged with an offence; its nine subsections deal with criminal matters ...

Its main purpose is matters dealing with criminal offences ...

Section 11 certainly was primarily meant to cover crimes or *quasi*-crimes whether under federal or provincial legislation.

28 The marginal note to s. 11 seems to support this interpretation of the section. It reads "Proceedings in criminal and penal matters". The Attorney General of Ontario and the respondent submitted, however, that the court ought not to place any emphasis on the marginal note to s. 11 in interpreting the section. There is no doubt that the traditional view was that marginal notes could not be used as aids to interpretation as they formed no part of the Act which was passed by Parliament: see E.A. Driedger, *The Construction of Statutes*, 2nd ed. (1983), at p. 133; P.B. Maxwell, *Maxwell on the Interpretation of Statutes*, 12th ed. (1969), at p. 10; W.F. Craies, *Craies on Statute Law*, 7th ed. (1971), at p. 195. But reference to marginal notes has been made in some English authorities: see, for example, *Eastern Counties & London & Blackwall Ry. Cos. v. Marriage* 18609 H.L. Cas. 32 at 41, 11 E.R. 639; *Sheffield Waterworks Co. v. Bennett* 1872 L.R. 7 Ex. 409 at 421; and *Stephens v. Cuckfield Rural Dist. Council*, [1960] 2 Q.B. 373, [1960] 3 W.L.R. 248, [1960] 2 All E.R. 716 at 720 (C.A.). And this court has used statutory headings to assist in interpreting sections of the Charter: see *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, 3 O.A.C. 321, 53 N.R. 169. In that case, Estey J., writing for a unanimous court, held that the headings were deliberately included as part of the Charter and formed part of the resolution which Parliament debated. At pp. 376-77 he stated:

It is clear that these headings were systematically and deliberately included as an integral part of the Charter for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the Charter. The extent of the influence of a heading in this process will depend upon many factors including (but the list is not intended to be all-embracing) the degree of difficulty by reason of ambiguity or obscurity in construing the section; the length and complexity of the provision; the apparent homogeneity of the provision appearing under the heading; the use of generic terminology in the heading; the presence or absence of a system of headings which appear to segregate the component elements of the Charter; and the relationship of the terminology employed in the heading to the substance of the headlined provision.

... I conclude that an attempt must be made to bring about a reconciliation of the heading with the section introduced by it. If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning. Even in that midway position, a court should not, by the adoption of a technical rule of construction, shut itself off from whatever small assistance might be gathered from an examination of the heading as part of the entire constitutional document.

It must be acknowledged, however, that marginal notes, unlike statutory headings, are not an integral part of the Charter: see *C.P. Ltd. v. A.G. Can.*, [1986] 1 S.C.R. 678 at 682, 11 C.C.E.L. 1, 27 D.L.R. (4th) 1, 86 C.L.L.C. 14,032, 66 N.R. 321 [Fed.]. The case for their utilization as aids to statutory interpretation is accordingly weaker. I believe, however, that the distinction can be adequately recognized by the degree of weight attached to them. I find some support in the marginal note therefore for the proposition that the opening words of s. 11, "charged with an offence", restrict the application of the section to criminal or quasi-criminal proceedings and proceedings giving rise to penal consequences.

29 Another factor which leads me to adopt a somewhat narrow definition of the opening words of s. 11 is a concern for the future coherent development of the section if it is made applicable to a wide variety of proceedings. Unless the section is restricted to criminal or penal matters there may be serious difficulty in giving the section a reasonably consistent application. The particular content of the various rights set out in s. 11 may well vary according to the type of proceeding if a broader definition is given to the opening words of the section. It is beyond question that those rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the state and who may well suffer a deprivation of liberty as a result of the exercise of that power. The content of those rights ought not to suffer from a lack of predictability or a lack of clarity because of a universal application of the section. As is obvious from a study of the various rights enumerated in the section, they are crucial fundamental rights whose meaning ought to be made crystal clear to the authorities who prosecute the offences falling within the section. For this reason it is, in my view, preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters, and to leave other "offences" subject to the more flexible criteria of "fundamental justice" in s. 7.

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

31 There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s. 11 of the Charter. It cannot be seriously contended that just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s. 11. I would agree, therefore, with the comments made by Linden J. in *McCutcheon v. Toronto* (1983), 41 O.R. (2d) 652, 20 M.V.R.

267, 22 M.P.L.R. 139, 147 D.L.R. (3d) 193(H.C.). In that case, the accused claimed the benefit of s. 11 following the alleged commission of a parking offence. At p. 205 Linden J. said:

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

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

32 In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Law Soc. of Man. v. Savino*, at p. 292; *Malartic Hygrade Gold Mines (Can.) Ltd. v. Ont. Securities Comm.* (1986), 54 O.R. (2d) 544 at 549, 9 O.S.C.B. 2286, 19 Admin. L.R. 21, 27 D.L.R. (4th) 112, 24 C.R.R. 1, 15 O.A.C. 124(Div. Ct.); and *Re Barry and Alta. Securities Comm.*, *supra*, at p. 736, per Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.

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

limited sphere of activity. In "Annotation to *R. v. Wigglesworth*" 198438 C.R. (3d) 388, at p. 389, Professor Stuart states:

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

I would agree with this comment but with two caveats. First, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One indicium of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If, as in the case of proceedings under the Royal Canadian Mounted Police Act, the fines are not to form part of the Consolidated Revenue Fund but are to be used for the benefit of the force, it is more likely that the fines are purely an internal or private matter of discipline: Royal Canadian Mounted Police Act, s. 45. The second caveat I would raise is that it is difficult to conceive of the possibility of a particular proceeding failing what I have called the "by nature" test but passing what I have called the "true penal consequence" test. I have grave doubts whether any body or official which exists in order to achieve some administrative or private disciplinary purpose can ever imprison an individual. Such a deprivation of liberty seems justified as being in accordance with fundamental justice under s. 7 of the Charter only when a public wrong or transgression against society, as opposed to an internal wrong, is committed. However, as this was not argued before us in this appeal I shall assume that it is possible that the "by nature" test can be failed but the "true penal consequence" test passed. Assuming such a situation is possible, it seems to me that in cases where the two tests conflict the "by nature" test must give way to the "true penal consequence" test. If an individual is to be subject to penal consequences such as imprisonment — the most severe deprivation of liberty known to our law — then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.

34 Before turning to the application of the law to the facts of this case, I want to emphasize that nothing in the above discussion takes away from the possibility that constitutionally guaranteed procedural protections may be available in a particular case under s. 7 of the Charter even although s. 11 is not available. The appellant in this case has chosen to base his case solely on s. 11 of the Charter. In view of this I make no comment on the applicability of s. 7.

35 It is clear that the R.C.M.P. Code of Discipline is concerned with the maintenance of discipline and integrity within the force. It is designed to regulate conduct within a limited private sphere of activity, i.e., conduct relevant to one's position as a member of the R.C.M.P. In considering the

offences set out in the *Royal Canadian Mounted Police Act* in *R. v. White*, [1956] S.C.R. 154 at 158, 114 C.C.C. 77, 1 D.L.R. (2d) 305 [B.C.], Rand J. stated:

... the delinquencies in s. 30 [of the *Royal Canadian Mounted Police Act*] are strictly of domestic discipline, that is, the member, by joining the Force, has agreed to enter into a body of special relations, to accept certain duties and responsibilities, to submit to certain restrictions upon his freedom of action and conduct and to certain coercive and punitive measures prescribed for enforcing fulfilment of what he has undertaken. These terms are essential elements of a status voluntarily entered into which affect what, by the general law, are civil rights, that is, action and behaviour which is not forbidden him as a citizen.

At p. 168 Abbott J. stated:

The *Royal Canadian Mounted Police Act* and the regulations made thereunder constitute a code of law regulating the recruitment, administration and discipline of the Force.

36 In *Inkster v. Radey* [1979] 2 F.C. 457 *Re Radey and Supt. of R.C.M.P.* 47 C.C.C. (2d) 148 at 150 (C.A.), Le Dain J. stated:

The major service offences specified in s. 25 of the Act obviously relate to matters of discipline. They are not, generally speaking, offences of the public character punishable under the *Criminal Code* or other statutes of a criminal law nature, although they might in some cases give rise to prosecution under the criminal law.

It would therefore seem that the proceedings before the Royal Canadian Mounted Police Service Court fail what I have called the "by nature" test. They are neither criminal proceedings nor quasi-criminal proceedings. They do not appear to be the kind of proceedings which fall within the ambit of s. 11. But it is apparent that an officer charged under the Code of Discipline faces a true penal consequence. He or she may be imprisoned for one year pursuant to s. 36(1) of the *Royal Canadian Mounted Police Act* if he or she is found guilty of a major service offence. As was stated by Joyal J. in *Van Rassel v. Can. (Commr. of R.C.M.P.)* [1987] 1 F.C. 473 at 484 31 C.C.C. (3d) 10 *Van Rassel v. R.C.M.P.* 7 F.T.R. 187 (T.D.), a case which also dealt with a s. 11(h) claim with respect to proceedings for a major service offence under the *Royal Canadian Mounted Police Act*, "The statute as a consequence [of the provision for imprisonment] is as much a penal statute as is the *Criminal Code*". This would seem, therefore, to be that unusual case where proceedings have failed the "by nature" test but have passed the "true penal consequence" test. As I have indicated above, in a case of conflict the "by nature" test must give way to the "true penal consequence" test. I find, therefore, that s. 11 applies to proceedings in respect of a major service offence before the Royal Canadian Mounted Police Service Court. Is the appellant entitled then to have the prosecution for the alleged criminal assault stayed on the ground that punishment for that offence would result in double punishment of the appellant for the same offence contrary to s. 11(h) of the Charter?

37 This court in *R. v. Prince*, [1986] 2 S.C.R. 480, [1987] 1 W.W.R. 1, 54 C.R. (3d) 97, 30 C.C.C. (3d) 35, 33 D.L.R. (4th) 724, 45 Man. R. (2d) 93, 70 N.R. 119, recently examined the scope of the rule against multiple convictions enunciated in *Kienapple v. R.*, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 [Ont.]. In *Prince* the accused's single act caused injury to one person and allegedly caused the death of another person. The accused was convicted of causing bodily harm in respect of the injured victim. The court considered whether she could also be tried for manslaughter in respect of the deceased victim. The court held that she could be so tried. In its view, although a single act of the accused grounded both charges, there was not sufficient correspondence between the elements of the two offences to sustain the operation of the rule against multiple convictions. The two offences, the court found, involved distinct elements. In the course of his reasons Dickson C.J.C. discussed the requirement that there be a sufficient nexus between the offences charged before the rule against multiple convictions is triggered. He said at pp. 494-95:

In my opinion, the weight of authority since *Kienapple* also supports the proposition that there must be sufficient nexus between the offences charged to sustain the rule against multiple convictions. In a unanimous judgment in *McKinney v. The Queen*, [1980] 1 S.C.R. 401, delivered orally by Laskin C.J., the Court saw no reason for interfering with a decision of the Manitoba Court of Appeal ... McKinney and others were charged and convicted of hunting out of season and hunting at night with lights contrary to ss. 16(1) and 19(1), respectively, of the *Wildlife Act*, R.S.M. 1970, c. W140. Both charges arose out of the same hunting incident. O'Sullivan J.A. for the majority held that the case involved two "delicts". Monnin J.A., dissenting on another issue, said that hunting out of season and hunting with lights were two different "matters", totally separate one from the other and not alternative one to the other. The judges of the Court of Appeal all agreed that *Kienapple* was inapplicable. Thus, notwithstanding there was but a single act of hunting, there were distinct delicts, causes or matters which would sustain separate convictions ... If an accused is guilty of several wrongs, there is no injustice in his or her record conforming to that reality.

In the context of proceedings before disciplinary tribunals there is ample authority for the view that disciplinary offences are separate and distinct from criminal offences for the purpose of the rule against multiple convictions: see *Re Pelissero and Loree* 1982 140 D.L.R. (3d) 676 (Ont. Div. Ct.); *MacDonald v. Marriott* 1984 52 B.C.L.R. 346 7 D.L.R. (4th) 697 (S.C.); *Van Rassel v. Can.*, *supra*; *Re Bridges and Bridges*, Ont. Prov. Ct., per Colter Prov. J. (unreported); *R. v. DeBaie* (1983), 60 N.S.R. (2d) 78, 128 A.P.R. 78 (C.A.); and *R. v. Belliveau*; *Belliveau v. Warden of Dorchester Penitentiary* (1984), 55 N.B.R. (2d) 82 at 86, 144 A.P.R. 82 (C.A.). In their text on *The Doctrine of Res Judicata*, 2nd ed. (1969), Spencer Bower and Turner state at pp. 279-80:

An example is readily found in an inquiry instituted by the disciplinary authority of a professional body, with a view to the expulsion of one against whom conduct infamous in a

professional respect is alleged. In such a case it may be that the conduct alleged is no more and no less than conduct in respect of which the accused person has already been acquitted by a criminal court on a criminal charge. Neither a conviction nor an acquittal before a criminal court on a criminal charge will bar the use of the same conduct before such a tribunal on an application to suspend or expel; for the purpose of the proceeding is not to punish the practitioner for the commission of an offence as such, but to exercise disciplinary power over the members of a profession so as to ensure that their conduct conforms to the standards of the profession.

38 I would hold that the appellant in this case is not being tried and punished for the same offence. The "offences" are quite different. One is an internal disciplinary matter. The accused has been found guilty of a major offence and has, therefore, accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain, as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the R.C.M.P. and as a member of the public at large. To borrow from the words of the Chief Justice quoted above, I am of the view that the two offences were "two different 'matters', totally separate one from the other and not alternative one to the other". While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions. I would respectfully adopt the following passage from the reasons of Cameron J.A. in the court below [at pp. 294-95]:

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public ... And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers. For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the same instance of the patient; and to an order of discipline on the motion of the governing council of his profession. Similarly, a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for damage he caused; and to the police force for discipline.

39 For these reasons I would dismiss the appeal. I would answer the constitutional questions as follows:

1. Is a prosecution by the Crown for the offence of common assault pursuant to [s. 245\(1\) of the Criminal Code of Canada](#), in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to [s. 25\(1\)](#) and [Part II of the Royal Canadian Mounted Police Act](#), in violation of [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#)?

40 Answer: No.

2. If a prosecution by the Crown for the offence of common assault pursuant to [s. 245\(1\) of the Criminal Code of Canada](#) in relation to an act for which the accused has been previously convicted and fined for an offence of unnecessary violence towards a prisoner contrary to [s. 25\(1\)](#) and [Part II of the Royal Canadian Mounted Police Act](#) violates [s. 11\(h\) of the Canadian Charter of Rights and Freedoms](#), is the subsequent prosecution by the Crown justified by [s. 1 of the Canadian Charter of Rights and Freedoms](#) and therefore not inconsistent with the *Constitution Act, 1982*?

41 Answer: In view of the answer to Q. 1 it is not necessary to answer this question.

Appeal dismissed. <?page 216> <?page 217> <?page 218> <?page 219> <?page 220> <?page 221> <?page 222> <?page 223> <?page 224> <?page 225> <?page 226> <?page 227> <?page 228> <?page 229> <?page 230> <?page 231> <?page 232> <?page 233> <?page 234> <?page 235> <?page 236> <?page 237> <?page 238> <?page 239> <?page 240> <?page 241>

1985 CarswellBC 398
Supreme Court of Canada

Please see in particular para. 37

Reference re s. 94(2) of Motor Vehicle Act (British Columbia)

1985 CarswellBC 398, 1985 CarswellBC 816, [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73,
[1986] 1 W.W.R. 481, [1986] D.L.Q. 90, 15 W.C.B. 343, 18 C.R.R. 30, 23 C.C.C. (3d) 289, 24
D.L.R. (4th) 536, 36 M.V.R. 240, 48 C.R. (3d) 289, 63 N.R. 266, 69 B.C.L.R. 145, J.E. 86-99

Reference re SECTION 94(2) OF THE MOTOR VEHICLE ACT, R.S.B.C. 1979, c. 288

Dickson C.J.C., Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

Heard: November 15, 1984

As he then was

Judgment: December 17, 1985

Docket: 17590

Counsel: *A. Stewart, Q.C.*, for appellant Attorney General of British Columbia.

G. R. Garton, for intervener the Attorney General of Canada.

I. MacDonnell and *M. D. Lepofsky*, for intervener the Attorney General for Ontario.

A. Petter and *J. MacPherson*, for intervener the Attorney General for Saskatchewan.

W. Henkel, Q.C. and *D. W. Kinloch*, for intervener the Attorney General for Alberta.

C. G. Stein, for those contending for a negative answer (respondent).

J. J. Camp and *P. G. Foy*, for intervener the British Columbia branch of the Canadian Bar Association.

Subject: Public; Constitutional; Public; Human Rights

Headnote

Motor vehicles --- Constitutional issues — Effect of Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice

Meaning of "principles of fundamental justice" — Minutes of proceedings and evidence of joint committee of Legislature admissible in determining meaning of term "fundamental justice" — Minutes carrying little weight, however, as intention of Legislature not determinable from minutes — Jurisprudence under [Canadian Bill of Rights](#) interpreting "fundamental justice" not determinative of meaning of words in — [Canadian Charter of Rights and Freedoms, ss. 1, 7, 8-14](#) — [Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94](#) Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, [s 7](#).

Per LAMER J. (DICKSON C.J.C., BEETZ, CHOUINARD and LE DAIN JJ. concurring): An absolute liability offence for which imprisonment is available as a penalty offends the principles of fundamental justice and the right to liberty under s. 7 of the Charter. Accordingly, [s. 94\(2\) of the British Columbia Motor Vehicle Act](#), which provides that the offence of driving a motor vehicle

while a person is prohibited from driving or while the right to obtain a driving licence is suspended, is one of absolute liability, is offensive to s. 7 of the Charter and is of no force or effect.

The role of the court in interpreting s. 7 of the Charter is to secure for persons the full benefit of the Charter's protections while avoiding adjudication of the merits of public policy. The court can accomplish this only by a purposive analysis and the articulation of objective and manageable standards for the operation of the section within such a framework. The interests which the section is meant to protect are the life, liberty and security of the person. The right not to be deprived of these rights "except in accordance with the principles of fundamental justice" is a qualifier of those rights and is not itself a protected right; it serves to establish the parameters of the protected interests, and it cannot be interpreted so narrowly as to frustrate or stultify them. Accordingly, "fundamental justice" does not have the same meaning as "natural justice", for such an interpretation would strip the protected interests of most of their content. Sections 8-14 of the Charter illustrate some of the parameters of the right to life, liberty and security in s. 7 and provide a key to the meaning of "principles of fundamental justice". Those principles are to be found in the basic tenets of our legal system as a system for the administration of justice founded upon a belief in the dignity and worth of the human person and on the rule of law. The principles are not limited solely to procedural guarantees.

It is part of our system of laws that the innocent not be punished, and absolute liability in penal law offends the principles of fundamental justice. An absolute liability offence does not per se violate s. 7 of the Charter. A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving a person of life, liberty or security. Accordingly, the combination of imprisonment and of absolute liability violates s. 7 and legislation providing for such can only be salvaged if it can be justified under s. 1 of the Charter. [Section 94\(2\) of the Motor Vehicle Act](#) creates an absolute liability offence which effects a deprivation of liberty for a limited number of persons, and that is sufficient for it to be in violation of s. 7 of the Charter. Although administrative expediency might justify such legislation under s. 1, it can only do so in cases arising out of exceptional conditions such as natural disasters, the outbreak of war, epidemics and the like. Although it is desirable that bad drivers be kept off the road, the government of British Columbia did not demonstrate that the legislation was a reasonable limit in a free and democratic society within s. 1 of the Charter.

The minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons are admissible as extrinsic aids to the interpretation of Charter provisions. However, the minutes are inherently unreliable and the comments of a few federal civil servants cannot be determinative of the intent of the legislative bodies which adopted the Charter. Moreover, to interpret the provisions of the Charter in terms of the minutes would freeze the rights in time with little possibility of growth and development. Accordingly, the minutes should be given little weight.

Nor are decisions interpreting the [Bill of Rights](#) of much assistance in construing the meaning of "principles of fundamental justice". While in the [Bill of Rights](#) the phrase is used to qualify the right to a fair hearing, in the Charter the phrase qualifies much more fundamental rights. In any

event, the meaning of the words in the Charter must not be limited to meanings given by judicial decisions at the time the Charter was enacted: the adoption of the Charter was a clear message to the courts that the restrictive attitude which at times characterized their approach to the [Bill of Rights](#) ought to be re-examined.

Per MCINTYRE J.: "Fundamental justice", as the term is used in s. 7 of the Charter, involves more than natural justice and includes a substantive element. The imposition of minimum imprisonment for an offence in respect of which no defence can be made and which may be committed unknowingly and without wrongful intent, deprives or may deprive of liberty and offends the principles of fundamental justice.

Per WILSON J.: Section 7 of the Charter provides that a person may be deprived of the rights to life, liberty and security if the deprivation is effected "in accordance with the principles of fundamental justice". This provision is not a qualification of the right to life, liberty and security of the person but is, rather, intended to protect the rights against deprivation or impairment except in accordance with the principles of fundamental justice. [Section 7](#) is not limited to procedural injustice: there is nothing in the section to support such a limited construction. If a limit upon the right to life, liberty and security is in accordance with the principles of fundamental justice, it then has to meet the tests in [s. 1](#). However, if the limit on the [s. 7](#) right has been effected through a violation of the principles of fundamental justice, it cannot be justified under [s. 1](#) because such a limit cannot be "reasonable" or "demonstrably justified in a free and democratic society".

An absolute liability offence will only violate [s. 7](#) if it impairs the right to life, liberty or security of the person. Accordingly, absolute liability offences do not per se violate [s. 7](#).

Although there is a presumption at common law that mens rea is an essential feature of criminal legislation, the legislature may create liability in the absence of mens rea if it does so in clear and unambiguous terms. [Section 94\(2\) of the Motor Vehicle Act](#) creates a statutory offence, guilt of which is established by proof of the act itself. Attaching a mandatory term of imprisonment to an absolute liability offence, however, violates the principles of fundamental justice. Such a penalty is totally disproportionate to an offence which may be committed unknowingly and unwittingly and after the exercise of due diligence. In such a case mandatory imprisonment is grossly excessive and inhumane and is incompatible with the objectives of a penal system. Accordingly, [s. 94\(2\)](#) is inconsistent with s. 7 of the Charter and is of no force and effect under [s. 52 of the Constitution Act, 1982](#).

Annotation

Over the more than two years between the decision of the British Columbia Court of Appeal and the Supreme Court decision, observers and analysts of the growing body of Charter jurisprudence attached more importance to this case than to any other. The reason for this is alluded to in the majority opinion of Lamer J. Section 7 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, requires that governmental measures be struck down whenever they impair life, liberty or security of the person in a way not in accordance with the principles of fundamental justice; if the concept of fundamental justice were to be measured by reference to ideas of substantive justice, the implication, it was felt, would be that courts could question the

"wisdom" of a very wide range of executive and legislative acts. This would be particularly so if "security of the person" were to be read widely to include the imposition of any burden that affected the vital interests of persons.

The Charter is, of course, full of substantive policies. It speaks in favour of free speech, the mobility of citizens, equal treatment and privacy interests. Hence the significance of the *Motor Vehicle Act Reference* was not that it presented the possibility of substantive review by courts, but that it presented that possibility detached from any identifiable, determinate policy and based on the vague idea that public ordering should be fundamentally just. Lamer J. in deciding that s. 7 does permit review of the substantive justice of measures, is at pains to explain that this conclusion does not constitute the court as a super-legislature. The court's job continues to be enforcing the supremacy of law, including the constitution. They do not become guarantors of the appropriateness or prudence of governmental policies. Nevertheless, the line between the administration of legal norms and general political supervision by the courts has grown a little dimmer by this decision. Notwithstanding this consequence, Lamer J. is surely correct in pointing out that the words of the Charter cannot be rewritten by the court, or given unnatural meaning, in order to keep the scope of judicial review in Canada within more comfortable or more traditional limits.

The question is: Do the words of s. 7 in themselves, or in their context within the Charter, compel substantive review? Lamer J.'s chief interpretative strategy is to claim that ss. 8 to 14 of the Charter (which, together with s. 7, constitute the "Legal Rights" part of the Charter) are instances of a general protection expressed in s. 7. Some of the protections in ss. 8 to 14, he says, go "beyond what could be characterized as 'procedural'" (p. 309), therefore, since s. 7 includes all of the protections in ss. 8 to 14, s. 7 must contain substantive protections. This logic is flawless except for its starting point. Lamer J. does not demonstrate his claim that the sections following s. 7 should be understood to be preceded by a phrase stating they are illustrative of s. 7 but do not limit its generality. However, something can be inferred from the structure of the Charter, and in particular from the inclusion of ss. 7 to 14 within "Legal Rights". It is that all the rights in that part pertain to the administration of justice. Although this does not mean they are procedural protections only, it does mean that the substantive rights included are ones that bear on the processes for determining legal liability, and in the case of s. 12 (the prohibition against cruel and unusual treatment or punishment) the consequences of such determinations. What s. 7 requires is that, in the administration of justice, the principles of fundamental justice (those fundamental principles which constrain legal proceedings that impose liability) be adhered to. Under this view s. 7 would not give rise to constitutional challenges on the ground only that the substance of the regulatory order is unjust.

It appears that this limited version of substantive review is what Lamer J. asserts. The "fundamental justice" principles of s. 7 are principles which, he says, have been recognized "as essential elements of a system for the administration of justice" (p. 317). Lamer J.'s contribution is to begin by noting

that the distinction between procedural and substantive protection is not compelled by the language of s. 7 (this distinction would in any event create a classification system the unworkability of which would lead to arbitrary results) and then to show that there is another distinction, suggested by the structure of the Charter, which keeps s. 7 from being seen as a mandate for limitless judicial supervision. In the context of this case, the substantive side of law erected by the British Columbia legislature (those who drive without a licence, whether they knew it or not, or could have known it, are liable to imprisonment) is bad not because British Columbia has decided to impose harsh punishment on unlicensed drivers but because the rule relates directly to and abridges a principle of fundamental criminal justice: in the normal course of events there should be no absolute liability criminal offences. To use the opening words of Lamer J.'s judgment, it is contrary to principles of fundamental justice "to convict a person who has not really done anything wrong" (p. 300).

The distinction at work here is between substantive review which evaluates the distributive and redistributive justice of all measures and substantive review under which legal processes are truncated or made particularly onerous for some classes of persons. It seems to be this latter, more limited, notion of substantive review which the Ontario Court of Appeal adopted in *R. v. Morgentaler* (1985), 48 C.R. (3d) 1 at 39:

"... we have concluded that, in applying the principles of fundamental justice, the court is not limited to procedural review but may also review the substance of legislation ... such substantive review should take place only in exceptional cases where there has been a marked departure from the norm of civil or criminal liability, resulting in the infringement of liberty or in some other injustice."

It would be wrong, however, to assume that this distinction is capable of more straightforward administration than the distinction between substantive review and the mere enforcement of procedural guarantees. For instance, the creation of a new offence, say, against possessing certain kinds of telecommunications equipment could not be challenged, since any such challenge would be based on the overall justice of creating such a crime. However, under the distinction drawn in this case, the creation of a new absolute liability offence could be challenged as being contrary to the principles of fundamental justice. While both pieces of legislation could be seen as substantive — they both create new classes of persons liable for punishment — only review of the latter is possible, since it alone changes an established pattern of legal administration. The results of these two situations have an element of arbitrariness. Notwithstanding this difficulty with Lamer J.'s judgment, it has contributed to the development of an understanding of s. 7 which promises to be fruitful.

There are a number of other important features in this case. The first is Lamer J.'s attempt to minimize the impact of the decision on some classes of absolute liability offences. In particular, he seems intuitively to accept that imposing absolute liability on corporations for despoiling the environment would not be unjust. This recognition of the difficulties in coming to a fixed

opinion about the requirements imposed by the principles of fundamental justice is sensible. He advances two possible ameliorating strategies. First, he suggests that s. 7 may not be available to corporations. It is true that the section extends its protection to "everyone", whereas s. 11 uses "person", a word which more clearly includes corporate persons. However, "everyone" is used in s. 2 and s. 8, two sections which the Supreme Court of Canada has already applied for the benefit of corporations: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 85 C.L.L.C. 14,023, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81, and *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97 (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*), [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241, respectively. It might be possible to argue that a corporation cannot lose life, liberty or security of the person. However, it is certainly possible that the last category will be construed to include important business assets the loss of which would frustrate the operation of a corporation.

The other strategy suggested by Lamer J. is that s. 1 might be used to justify absolute liability offences relating to the environment. One might wonder, as Wilson J. does, if it is possible for a court to determine that a law does not accord with the principles of fundamental justice yet conclude that it is a reasonable limit on a right. Of course, in an emergency situation it might make sense to say that a law does not meet fundamental justice but that the abridgment is tolerable in the particular political context. However, in the instance of environmental protection that Lamer J. addresses it would be preferable for a court simply to acknowledge that not in every circumstance do absolute liability offences violate principles of fundamental justice.

Another significant feature of Lamer J.'s opinion is his treatment of two interpretative devices which have been increasingly used since the advent of the Charter: legislative history and American "rights" jurisprudence. His rejection of the argument based on legislative history is, in the context of this case, particularly significant. The making of the Charter did not lead to a great deal of analytical debate or very many crisply-expressed decisions about what was wanted. The scope of review created by s. 7 was one of the very few matters on which there was a clear preference and a clear answer. In both the Joint Parliamentary Committee and the House of Commons, members voiced concern that the Charter, particularly s. 7, would permit court review of the substantive merits of legislation. In both places, assurances were given that this would not be the result: see Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, no. 40 (27th January 1981) and House of Commons Debates, 32nd Parl., 1st Sess., 13438 (27th November 1981). Consequently, Lamer J.'s decision to give this evidence "minimal weight" (p. 314) represents a significant blow to the efficacy of any argument based on the legislative record.

One of the reasons given by Lamer J. for not paying regard to legislative history is that to do so would rob the Charter of its adaptability. As he states at p. 314, "the rights, freedom and values

embodied in the Charter [would] in effect become frozen in time to the moment of adoption". In general terms, Lamer J. is right. It would be absurd to limit the Charter to circumstances that the legislators anticipated or to let legislators' ideas of specific applications become determinative. However, the issue raised in this case is not one of specific application. Whether s. 7 is limited to procedural protections is a large, general and constitutive question. The legislative record examined in the case goes to the question of the Charter's fundamental purposes. However, Lamer J. cannot be faulted for rejecting the message of the legislative history pertaining to s. 7; he concludes, on the basis of the text and structure of the Charter, that the meaning is clear (s. 7 is not designed to guarantee procedural requirements only), and therefore he is right not to be influenced by the views of Parliamentarians and public officials.

With respect to Lamer J.'s rejection of the relevance of American precedents, this will provide great comfort to counsel faced with jurisprudence from the United States Supreme Court which weakens their case. Lamer J.'s words, however, should not be taken at face value. It is true that there are, as he says at p. 305, "fundamental structural differences between the two constitutions". This case illustrates one of them. This does not mean, however, that other constitutional values embodied in the Charter are so distinctive that American jurisprudence could not shed light on possible meanings. The Charter's guarantee of equality rights or freedom of association, for instance, could well be informed by United States cases under the First and Fourteenth Amendments. The inclusion of s. 1 or s. 33 in the Charter (for which there are no parallels in the United States Constitution) does not render cases under the latter constitution irrelevant in coming to an initial understanding of the content of some of our entrenched values.

Finally, Wilson J.'s exploration, in her concurring opinion, of the relationship between s. 7 and s. 1 is noteworthy, if perplexing. She states that s. 7 protects life, liberty and security of the person against deprivation unless the deprivation accords with the principles of fundamental justice. In [s. 1](#) she sees a second condition that must be satisfied if the deprivation is to be permissible — it must be a reasonable limit prescribed by law. In other words, she takes the converse view to Lamer J.'s. He says deprivation must be either in accordance with principles of fundamental justice *or* a reasonable limit of s. 7 rights. She requires deprivations to be both just and reasonable before being valid. Although Wilson J.'s reading is syntactically plausible, it leads to surprising results. It leads to the conclusion that a deprivation of liberty might accord with principles of fundamental justice but would nevertheless be an unreasonable limit on the liberty right. The two tests would seem to draw on similar factors and, except for the circumstance of an emergency, it is not clear how different results would arise. One explanation is, however, possible. A deprivation of liberty might accord with principles of fundamental justice in the sense that the administration of the criminal proscription did not entail abridgements of fundamental criminal law principles. However, the crime and the resultant loss of liberty might not be reasonable when measured against a general standard of social justice. This strategy of raising liberty to an independent right and requiring all deprivations to satisfy the [s. 1](#) test of reasonable limit leads to the fullest substantive review possible, a conclusion which the rest of the court was careful not to come to.

John D. White

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Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94 [re-en. 1982, c. 36, s. 19].

Motor Vehicle Amendment Act, 1982 (B.C.), c. 36, s. 19.

Words and phrases considered:

FUNDAMENTAL JUSTICE

... I am of the view that it would be wrong to interpret the term "fundamental justice" [in s. 7 of the Charter] as being synonymous with natural justice as the Attorney-General of British Columbia and others have suggested.

To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of Charter rights in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481 ... per Estey J. and [Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., [1984] 2 S.C.R. 145].

.....

... it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely.

.....

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

.....

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of [those] principles within the judicial process and in our legal system, as it evolves.

Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

PRINCIPLES OF FUNDAMENTAL JUSTICE

The term "principles of fundamental justice" [in s. 7 of the Charter] is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures . . . This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principle of fundamental justice is quite simply one in which, as Professor Tremblay has written, "future growth will be based on historical roots": 18 U.B.C.L. Rev. 201 at p. 254 (1980).

Appeal from judgment of [British Columbia Court of Appeal](#), 42 B.C.L.R. 364, [1983] 3 W.W.R. 756, 33 C.R. (3d) 22, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 5 C.R.R. 148, 147 D.L.R. (3d) 539, ruling that s. 94(2) of the Motor Vehicle Act is inconsistent with s. 7 of the Charter and of no force and effect.

Mcintyre J.:

1 I agree with Lamer J. that [s. 94\(2\) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288](#), as amended by the Motor Vehicle Amendment Act, 1982 (B.C.), c. 36, s. 19, is inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms. I agree that fundamental justice, as the term is used in the Charter, involves more than natural justice (which is largely procedural) and includes as well a substantive element. I am also of the view that on any definition of the term "fundamental justice" the imposition of minimum imprisonment for an offence in respect of which no defence can be made, and which may be committed unknowingly and with no wrongful intent, deprives or may deprive of liberty and it offends the principles of fundamental justice.

2 I would accordingly dismiss the appeal [from case reported at 42 B.C.L.R. 364[1983] 3 W.W.R. 75633 C.R. (3d) 2219 M.V.R. 634 C.C.C. (3d) 2435 C.R.R. 148147 D.L.R. (3d) 539] and answer the constitutional question in the negative.

3 LAMER J. (DICKSON C.J.C., BEETZ, CHOUINARD and LE DAIN JJ. concurring)

Introduction

4 A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the Charter of Rights and Freedoms (Constitution Act, 1982, as enacted by the Canada Act, 1982 (U.K.), c. 11).

5 In other words, absolute liability and imprisonment cannot be combined.

The Facts

6 On 16th August 1982 the Lieutenant Governor in Council of British Columbia referred the following question to the Court of Appeal of that province, by virtue of s. 1 of the Constitutional Question Act, R.S.B.C. 1979, c. 63:

Is s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, as amended by the *Motor Vehicle Amendment Act, 1982*, consistent with the *Canadian Charter of Rights and Freedoms*?

7 On 3rd February 1983 the Court of Appeal handed down reasons in answer to the question in which it stated that s. 94(2) of the Act is inconsistent with the Canadian Charter of Rights and Freedoms: 42 B.C.L.R. 364[1983] 3 W.W.R. 75633 C.R. (3d) 2219 M.V.R. 634 C.C.C. (3d) 2435 C.R.R. 148147 D.L.R. (3d) 539. The Attorney General for British Columbia launched an appeal to this court.

The Legislation

8 *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 94, as amended by the Motor Vehicle Amendment Act, 1982 (B.C.), c. 36, s. 19:

94.(1) A person who drives a motor vehicle on a highway or industrial road while

(a) he is prohibited from driving a motor vehicle under section 90, 91, 92 or 92.1, or

(b) his driver's licence or his right to apply for or obtain a driver's licence under section 82 or 92 as it was before its repeal and replacement came into force pursuant to the *Motor Vehicle Amendment Act, 1982*,

commits an offence and is liable,

(c) on a first conviction, to a fine of not less than \$300 and not more than \$2000 and to imprisonment for not less than 7 days and not more than 6 months, and

(d) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than \$300 and not more than \$2000 and to imprisonment for not less than 14 days and not more than one year.

(2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

Canadian Charter of Rights and Freedoms , Constitution Act, 1982:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society ...

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

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

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

52. 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.

The Judgment of the Court of Appeal of British Columbia

9 The court was of the view that the phrase "principles of fundamental justice" was not restricted to matters of procedure, but extended to substantive law, and that the courts were "therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of legislation" [pp. 763-64 W.W.R.].

10 Relying on the decision of this court in [R. v. Sault Ste. Marie](#)[1978] 2 S.C.R. 12993 C.R. (3d) 307 C.E.L.R. 5340 C.C.C. (2d) 35385 D.L.R. (3d) 16121 N.R. 295 [Ont.], the Court of Appeal found [at p. 764] "that [s. 94\(2\) \[of the Motor Vehicle Act\]](#) is inconsistent with the principles of fundamental justice". They did not heed the invitation of counsel opposing the validity of [s. 94\(2\)](#) to declare that, as a result of that decision by our court, all absolute liability offences violated s. 7 of the Charter and could not be salvaged under [s. 1](#). Quite the contrary, the Court of Appeal said [at p. 764] that "there are, and will remain, certain public welfare offences, e.g., air and water pollution

offences, where the public interest requires that the offences be absolute liability offences". Their finding was predicated on the following reasoning [p. 765]:

The effect of s. 94(2) is to transform the offence from a mens rea offence, to an absolute liability offence, hence giving the defendant no opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. Rather than placing the burden to establish such facts on the defendant and thus making the offence a strict liability offence, the legislature has seen fit to make it an absolute liability offence coupled with a mandatory term of imprisonment.

11 It can therefore be inferred with certainty that, in the court's view, the combination of mandatory imprisonment and absolute liability was offensive to s. 7. It cannot, however, be ascertained from their judgment whether the violation was triggered by the requirement of minimum imprisonment or solely by the availability of imprisonment as a sentence.

Section 7

12

1. Introduction

13 The issue in this case raises fundamental questions of constitutional theory, including the nature and the very legitimacy of constitutional adjudication under the Charter as well as the appropriateness of various techniques of constitutional interpretation. I shall deal first with these questions of a more general and theoretical nature as they underlie and have shaped much of the discussion surrounding s. 7.

2. The nature and legitimacy of constitutional adjudication under the Charter

14 The British Columbia Court of Appeal has written in the present case that the Constitution Act has added a new dimension to the role of the courts in that the courts have now been empowered by s. 52 to consider not only the vires of legislation but also to measure the content of legislation against the constitutional requirements of the Charter.

15 The novel feature of the Constitution Act, 1982, however, is not that it has suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the vires of legislation. The initial process in such adjudication has been characterized as "a distillation of the 'constitutional value' represented by challenged legislation" (Laskin, Canadian Constitutional Law, 3rd ed. revised (1969), p. 85), and as identifying "the true meaning of the challenged law" (Lederman (ed.), The Courts and the Canadian Constitution (1964), p. 186), and "an abstract of the statute's content" (Professor Abel ["The Neglected Logic of 91 and 92"] (1969), 19 Univ. of Toronto L.J. 487, p. 490). This process

has of necessity involved a measurement of the content of legislation against the requirements of [the Constitution](#), albeit within the more limited sphere of values related to the distribution of powers.

16 The truly novel features of the Constitution Act, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers. In short, it is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation.

17 In neither case, be it before or after the Charter, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of [the Constitution](#). The words of Dickson J. (as he then was) in *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576 at 590, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222 [Sask.], continue to govern:

The Courts will not question the wisdom of enactments ... but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

18 In this respect, [s. 7](#) is no different than other Charter provisions. As the Attorney General for Ontario has noted in his factum:

Section 7, like most of the other sections in the *Charter*, limits the bounds of legislative action. It is the function of the Court to determine whether the challenged legislation has honoured those boundaries. This process necessitates judicial review of the content of the legislation.

Yet, in the context of [s. 7](#), and in particular of the interpretation of "principles of fundamental justice", there has prevailed in certain quarters an assumption that all but a narrow construction of [s. 7](#) will inexorably lead the courts to "question the wisdom of enactments", to adjudicate upon the merits of public policy.

19 From this have sprung warnings of the dangers of a judicial "super-legislature" beyond the reach of Parliament, the provincial legislatures and the electorate. The Attorney General for Ontario, in his written argument, stated that:

... the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.

This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or for worse, been settled by the very coming into force of the Constitution Act, 1982. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.

20 The concerns with the bounds of constitutional adjudication explain the characterization of the issue in a narrow and restrictive fashion, i.e., whether the terms "principles of fundamental justice" have a substantive or merely procedural content. In my view, the characterization of the issue in such fashion preempts an open-minded approach to determining the meaning of "principles of fundamental justice".

21 The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the United States Constitution. [That Constitution](#), it must be remembered, has no [s. 52](#) nor has it the internal checks and balances of [ss. 1](#) and [33](#). We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

22 The overriding and legitimate concern that courts ought not to question the wisdom of enactments, and the presumption that the legislator could not have intended same, have to some extent distorted the discussion surrounding the meaning of "principles of fundamental justice": This has led to the spectre of a judicial "super-legislature" without a full consideration of the process of constitutional adjudication and the significance of [ss. 1, 33](#) and [52](#) of the Constitution Act, 1982. This in turn has also led to a narrow characterization of the issue and to the assumption that only a procedural content to "principles of fundamental justice" can prevent the courts from adjudicating upon the merits or wisdom of enactments. If this assumption is accepted, the inevitable corollary, with which I would have to then agree, is that the legislator intended that the words "principles of fundamental justice" refer to procedure only.

23 But I do not share that assumption. Since way back in time and even recently the courts have developed the common law beyond procedural safeguards without interfering with the "merits or wisdom" of enactments: e.g., *Kienapple v. R.*, [\[1975\] 1 S.C.R. 729](#), [26 C.R.N.S. 1](#), [15 C.C.C.](#)

(2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 [Ont.], entrapment, non-retrospectivity of offences, presumptions against relaxing the burden of proof and persuasion, to give a few examples.

24 The task of the court is not to choose between substantive or procedural content per se but to secure for persons "the full benefit of the Charter's protection" (Dickson C.J.C. in *R v. Big M Drug Mart Ltd.*[1985] 1 S.C.R. 295 at 344[1985] 3 W.W.R. 48137 Alta. L.R. (2d) 9718 C.C.C. (3d) 38518 D.L.R. (4th) 32113 C.R.R. 6485 C.L.L.C. 14,02360 A.R. 16158 N.R. 81), under s. 7, while avoiding adjudication of the merits of public policy. This can only be accomplished by a purposive analysis and the articulation (to use the words in *Curr v. R.*[1972] S.C.R. 889 at 89918 C.R.N.S. 2817 C.C.C. (2d) 18126 D.L.R. (3d) 603 [Ont.]) of "objective and manageable standards" for the operation of the section within such a framework.

25 I propose therefore to approach the interpretation of s. 7 in the manner set forth by Dickson C.J.C. in *Hunter; Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*[1984] 2 S.C.R. 145*Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*[1984] 6 W.W.R. 57741 C.R. (3d) 9733 Alta. L.R. (2d) 19327 B.L.R. 297*Hunter v. Southam Inc.*14 C.C.C. (3d) 972 C.P.R. (3d) 19 C.R.R. 35584 D.T.C. 646711 D.L.R. (4th) 64155 A.R. 29155 N.R. 241, and *R. v. Big M Drug Mart Ltd.*, supra, and by Le Dain J. in *R. v. Therens*[1985] 1 S.C.R. 613[1985] 4 W.W.R. 28538 Alta. L.R. (2d) 9945 C.R. (3d) 9732 M.V.R. 15313 C.R.R. 19318 C.C.C. (3d) 48118 D.L.R. (4th) 65540 Sask. R. 12259 N.R. 122. In *Big M Drug Mart Ltd.*, Dickson C.J.C. wrote at p. 344:

26 In *Hunter v. Southam Inc.*[1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

27 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.

3. The principles of fundamental justice

28 I would first note that I shared the views of Wilson J. in her statement in *Singh v. Min. of Employment & Immigration*, [1985] 1 S.C.R. 177 at 205, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1, that "it is incumbent upon the Court to give meaning to each of the

elements, life, liberty and security of the person, which make up the 'right' contained in s. 7". Each of these, in my view, is a distinct though related concept to be construed as such by the courts. It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. Furthermore, because of the fact that only deprivation of liberty was considered in these proceedings and no one took issue with the fact that imprisonment is a deprivation of liberty, my analysis of s. 7 will be limited, as was the course taken by all, below and in this court, to determining the scope of the words "principles of fundamental justice"; I will not attempt to give any further content to "liberty" nor address that of the words "life" or "security of the person".

29 In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, *supra*), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

30 Given that, as the Attorney General for Ontario has acknowledged, "when one reads the phrase 'principles of fundamental justice', a single incontrovertible meaning is not apparent", its meaning must, in my view, be determined by reference to the interests which those words of the section are designed to protect and the particular role of the phrase within the section. As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which "has the most severe consequences upon an individual": *R. v. Cadeddu*; *R. v. Nunery* (1982), 40 O.R. (2d) 128 at 139, 32 C.R. (3d) 355, (sub nom. *Re Cadeddu and R.*) 4 C.C.C. (3d) 97, 3 C.R.R. 312, 146 D.L.R. (3d) 629(H.C.).

31 For these reasons, I am of the view that it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice as the Attorney General of British Columbia and others have suggested.

32 To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this court toward the interpretation of Charter rights in *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 9 D.L.R. (4th) 161, 3 O.A.C. 321, 53 N.R. 169, per Estey J., and *Hunter v. Southam Inc.*, supra.

33 It would mean that the right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), that the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8). Such an interpretation would give the specific expressions of the "right to life, liberty and security of the person" which are set forth in ss. 8-14, greater content than the general concept from which they originate.

34 Sections 8-14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice and, as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8-14. The alternative, which is to interpret all of ss. 8-14 in a "narrow and technical" manner for the sake of congruity, is out of the question: *L.S.U.C. v. Skapinker*, at p. 366.

35 Sections 8-14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7-14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections, the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".

36 Thus, ss. 8-14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the Canadian Bill of Rights, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the Canadian Charter of Rights and Freedoms).

37 It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general

public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8-14, and the character and larger objects of the Charter itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

38 Thus, it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term "natural justice", a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.

39 Whatever may have been the degree of synonymy between the two expressions in the past (which in any event has not been clearly demonstrated by the parties and intervenants), as of the last few decades this country has given a precise meaning to the words "natural justice" for the purpose of delineating the responsibility of adjudicators (in the wide sense of the word) in the field of administrative law.

40 It is, in my view, that precise and somewhat narrow meaning that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice", the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity.

4. Proceedings and evidence of the special joint committee of the Senate and of the House of Commons on the Constitution of Canada

41 A number of courts have placed emphasis upon the Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on [the Constitution](#) in the interpretation of "principles of fundamental justice", e.g., *Latham v. Solicitor Gen. of Can.* [1984] 2 F.C. 73439 C.R. (3d) 785 Admin. L.R. 7012 C.C.C. (3d) 910 C.R.R. 1209 D.L.R. (4th) 393(T.D.); *Re Mason and R.* (1983), 43 O.R. (2d) 321, (sub nom. *Re Mason; Mason v. R. in Right of Can.*) 35 C.R. (3d) 3935 Admin. L.R. 167 C.C.C. (3d) 4267 C.R.R. 2931 D.L.R. (4th) 712(H.C.); and *R. v. Holman* (1982), 28 C.R. (3d) 378, 16 M.V.R. 225(B.C. Prov. Ct.).

42 In particular, the following passages dealing with the testimony of federal civil servants from the Department of Justice have been relied upon:

43 Mr. Strayer (Assistant Deputy Minister, Public Law):

Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is

called substantive due process, which would impose substantive requirements as to policy of the law in question.

This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness ...

Mr. Strayer: The term "fundamental justice" appears to us to be essentially the same thing as natural justice.

Mr. Tassé (Deputy Minister) also said of the phrase "principles of fundamental justice" in testimony before the committee:

We assume that the Court would look at that much like a Court would look at the requirements of natural justice, and the concept of natural justice is quite familiar to courts and they have given a good deal of specific meaning to the concept of natural justice. We would think that the Court would find in that phraseology principles of fundamental justice a meaning somewhat like natural justice or inherent fairness.

Courts have been developing the concept of administrative fairness in recent years and they have been able to give a good deal of consideration, certainly to these sorts of concepts and we would expect they could do the same with this.

44 The Honourable Jean Chrétien, then federal Minister of Justice, also indicated to the committee that, while he thought "fundamental justice marginally more appropriate than natural justice" in s. 7, either term was acceptable to the government.

a) Admissibility

45 The first issue which arises is whether the Minutes of the Proceedings and Evidence of the Joint Committee may even be considered admissible as extrinsic aids to the interpretation of Charter provisions. Such extrinsic materials were traditionally excluded from consideration in constitutional adjudication: e.g., *Gosselin v. R.* (1903), 33 S.C.R. 255 at 2647 C.C.C. 139 [Que.]; *Ref. re Wartime Leasehold Regulations*, [1950] S.C.R. 124, [1950] 2 D.L.R. 1.

46 In *Ref. re Upper Churchill Water Rights Reversion Act* [1984] 1 S.C.R. 297 at 317, (sub nom. *Churchill Falls (Labrador) Corp. v. A.G. Nfld.*) 8 D.L.R. (4th) 1, 47 Nfld. & P.E.I.R. 125, 139 A.P.R. 125, 53 N.R. 268(Nfld.), however, McIntyre J. stated that:

The general exclusionary rule formerly considered to be applicable in dealing with the admissibility of extrinsic evidence in constitutional cases has been set aside or at least greatly modified and relaxed.

47 Indeed, in *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541, Laskin C.J.C. stated, at p. 389:

... no general principle of admissibility or inadmissibility can or ought to be propounded by this Court, and ... the questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought adduce such evidence.

48 This approach was adopted by Dickson J. (as he then was) in *Ref. re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 [Ont.], and McIntyre J. in *Ref. re Upper Churchill Water Rights Reversion Act*, *supra*, in which he stated at p. 318:

It will therefore be open to the Court in a proper case to receive and consider extrinsic evidence on the operation and effect of the legislation.

49 It is to be noted, however, that McIntyre J.'s remarks are in relation to the interpretation of the challenged statutory enactment rather than the interpretation of *the Constitution* itself. The same is true of the remarks of Laskin C.J.C. and Dickson J. (as he then was).

50 With respect to the interpretation of *the Constitution*, however, such extrinsic materials were considered, in at least two cases, by this court.

51 In the *Re Authority of Parliament in relation to the Upper House* Reference, [1980] 1 S.C.R. 54, (sub nom. *Ref. re Legislative Authority of Parliament to Alter or Replace the Senate*) 102 D.L.R. (3d) 1, 30 N.R. 271 (sub nom. *Re B.N.A. Act and Fed. Senate*), the court stated, at p. 66 [S.C.R.]:

It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing the provisions respecting the Senate. Its important purpose is stated in the following passages in speeches delivered in the debates on Confederation in the parliament of the province of Canada ...

52 The other case is *A.G. Can. v. C.N. Tpt. Ltd.* [1983] 2 S.C.R. 206 [1984] 1 W.W.R. 19328 Alta. L.R. (2d) 9738 C.R. (3d) 977 C.C.C. (3d) 44976 C.P.R. (2d) 13 D.L.R. (4th) 1649 A.R. 3949 N.R. 241. Laskin C.J.C., in that case, referred to the pre-Confederation debates in the course of interpreting ss. 91(27) and 92(14) of the *Constitution Act, 1867* (at p. 225).

53 I would adopt this approach when interpreting the Charter. Consequently, the Minutes of the Proceedings and Evidence of the Special Joint Committee on *the Constitution* should, in my view, be considered.

b) Weight

54 Having said that, however, I nonetheless believe that the logic underlying the reluctance to allow the use of materials such as speeches in Parliament carries considerable force with respect to the Minutes of the Committee as well.

55 In *Ref. re Upper Churchill Water Rights Reversion Act*, *supra*, McIntyre J. wrote at p. 319;

... I would say that the speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence. They represent, no doubt, the considered views of the speakers at the time they were made, but cannot be said to be expressions of the intent of the Legislative Assembly.

56 Professor J. Magnet has written in "The Presumption of Constitutionality" (1980), 18 Osgoode Hall L.J. 87, pp. 99-100:

In an administrative law setting, "The admissibility of ... [factual] evidence [on the issue of legislative intent] ... seems so clear as not to require authority ..."

The transposition of the administrative law principle to a constitutional context is problematic. In the administrative law cases, the issue of intent concerns the intent of a specific person. In the constitutional cases, the issue of intent concerns the legislature, an incorporeal body made up of hundreds of persons. It may be said that such a body, like a corporation, is a legal fiction and has no intention in the relevant sense. It would follow that legislative intent, in the constitutional setting, is a hollow concept.

Largely in consideration of this argument, Canadian courts have developed the rule that, in scrutinizing legislative intent for the purpose of determining constitutional validity, statements by members of the legislature during passage of the challenged *Act* are irrelevant and inadmissible. Several explanations of the rule have been put forward. Strayer has argued that the rule is sound because legislative motive is irrelevant to constitutional validity: "The essential factual issue here is that of effect ..." More convincingly, it has been argued that, considering the way in which the Canadian process of enactment differs from that of the United States, "Hansard gives no convincing proof of what the government intended ..." Moreover, by allowing ambiguities in the statute to be resolved by statements in the legislature, ministers would be given power in effect to legislate indirectly by making such statements. "Cabinets already have powers enough without having this added unto them."

57 If speeches and declarations by prominent figures are inherently unreliable (per McIntyre J. in *Ref. re Upper Churchill Water Rights Reversion Act*, *supra*, at p. 319) and "speeches made in the Legislature at the time of enactment of the measures are inadmissible as having little evidential weight" (per Dickson J. (as he then was) in *Ref. re Residential Tenancies Act, 1979*, *supra*, at

p. 721), the Minutes of the Proceedings of the Special Joint Committee, though admissible and granted somewhat more weight than speeches, should not be given too much weight. The inherent unreliability of such statements and speeches is not altered by the mere fact that they pertain to the Charter of Rights rather than a statute.

58 Moreover, the simple fact remains that the Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?

59 Were this court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, i.e., the intention of the legislative bodies which adopted the Charter. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

60 Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the Charter debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the Charter, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth. As Estey J. wrote in *L.S.U.C. v. Skapinker*, supra, at pp. 366-67:

Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the *Constitution*, remains to be interpreted and applied by the Court.

5. The Canadian Bill of Rights

61 The appellant states that s. 7 "is a blend of s. 1(a) and s. 2(e) of the Canadian Bill of Rights". Considerable emphasis is then placed upon the case of *Duke v. R.* [1972] S.C.R. 91718, C.R.N.S. 302, 7 C.C.C. (2d) 474, 28 D.L.R. (3d) 129 [Ont.], in which this court interpreted the words "principles of fundamental justice" in s. 2(e) of the Bill. Fauteux C.J.C. noted, at p. 923:

Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias, and in a judicial temper, and must give to him the opportunity adequately to state his case.

62 However, as Le Dain J. has written in *R. v. Therens*, supra, with the implicit support of the majority, at p. 638:

63 In my opinion the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts. And after at pp. 638-39:

Although it is clear that in several instances, as in the case of s. 10, the framers of the *Charter* adopted the wording of the *Canadian Bill of Rights*, it is also clear that the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection ...

In considering the relationship of a decision under the *Canadian Bill of Rights* to an issue arising under the *Charter*, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of parliament. The significance of the new constitutional mandate for judicial review provided by the *Charter* was emphasized by this Court in its recent decisions in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, and *Hunter v. Southam, Inc.*, supra.

64 This view was also put forward by Wilson J. in her judgment in *Singh v. Min. of Employment & Immigration*, supra, with which Dickson C.J.C. and Lamer J. concurred, at p. 209:

It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined.

65 In any event, the *Duke* case is of little assistance in the interpretation of s. 7 of the Charter. Section 2(e) of the Canadian Bill of Rights states:

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

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

66 In s. 2(e) of the Bill of Rights, the words "principles of fundamental justice" were placed explicitly in the context of, and qualify, a "right to a fair hearing". Section 7 of the Charter does not create the same context. In s. 7, the words "principles of fundamental justice" are placed in the context of, and qualify, much more fundamental rights, the "right to life, liberty and security of the person". The distinction is important.

Conclusion

67 I have, in this judgment, undertaken a purposive analysis of the term "principles of fundamental justice" in s. 7 of the Charter in accordance with the method established by this court in *Big M Drug Mart Ltd.* [supra](#). Accordingly, the point of departure for the analysis has been a consideration of the general objectives of the Charter in the light of the general principles of Charter interpretation set forth in *Skapinker* and *Southam*, both *supra*. This was followed by a detailed analysis of the language and structure of the section as well as its immediate context within the Charter.

68 The main sources of support for the argument that "fundamental justice" is simply synonymous with natural justice have been the Minutes of the Proceedings and Evidence of the Special Joint Committee on [the Constitution](#) and the Bill of Rights jurisprudence. In my view, neither the Minutes nor the Bill of Rights jurisprudence are persuasive or of any great force. The historical usage of the term "fundamental justice" is, on the other hand, shrouded in ambiguity. Moreover, not any one of these arguments, taken singly or as a whole, manages to overcome in my respectful view the textual and contextual analyses.

69 Consequently, my conclusion may be summarized as follows:

70 The term *principles of fundamental justice* is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

71 [Sections 8-14](#) address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of [s. 7](#). They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law,

the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

72 Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

73 We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and, as Frankfurter J. wrote in *McNabb v. U.S.*^{318 U.S. 332 at 347, 87 L. Ed. 819 (1942)}: "The history of liberty has largely been the history of observance of procedural safeguards". This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor Tremblay has written, "future growth will be based on historical roots": (1984), 18 Univ. of B.C. L. Rev. 201, at p. 254.

74 Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

75 Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

76 I now turn to such an analysis of the principle of mens rea and absolute liability offences in order to determine the question which has been put to the court in the present Reference.

Absolute Liability and Fundamental Justice In Penal Law

77 It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin: *actus non facit reum nisi mens sit rea*.

78 As Glanville Williams said (Glanville Williams, *Criminal Law, The General Part*, 2nd ed. (1961), p. 30):

There is no need here to go into the remote history of *mens rea*; suffice it to say that the requirement of a guilty state of mind (at least for the more serious crimes) had been developed by the time of Coke, which is as far back as the modern lawyer needs to go. "If one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium*."

79 One of the many judicial statements on the subject worth mentioning is of the highest authority, per Goddard C.J. in *Harding v. Price*[1948] 1 K.B. 695 at 700[1948] 1 All E.R. 283(Div. Ct.), where he said:

The general rule applicable to criminal cases is *actus non facit reum nisi mens sit rea*, and I venture to repeat what I said in *Brend v. Wood* [(1946), 62 T.L.R. 462, 463]: "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

80 This view has been adopted by this court in unmistakable terms in many cases, amongst which the better known are *Beaver v. R.*[1957] S.C.R. 53126, C.R. 193, 118 C.C.C. 129 [Ont.], and the most recent and often quoted judgment of Dickson J. (as he then was), writing for the court in *R. v. Sault Ste. Marie*, *supra*.

81 This court's decision in the latter case is predicated upon a certain number of postulates, one of which, given the nature of the rules it elaborates, has to be to the effect that absolute liability in penal law offends the principles of fundamental justice. Those principles are, to use the words of Dickson J. [at p. 1310], to the effect that "there is a generally held revulsion against punishment of the morally innocent." He also stated [at p. 1311] that the argument that absolute liability "violates fundamental principles of penal liability" was the most telling argument against absolute liability and one of greater force than those advanced in support thereof.

82 In my view it is because absolute liability offends the principles of fundamental justice that this court created presumptions against legislatures having intended to enact offences of a regulatory nature falling within that category. This is not to say, however, and to that extent I am in agreement with the Court of Appeal, that, as a result, absolute liability *per se* offends s. 7 of the Charter.

83 A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving of life, liberty, or security of the person.

84 Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.

85 I am therefore of the view that the combination of imprisonment and of absolute liability violates s. 7 of the Charter and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.

86 As no one has addressed imprisonment as an alternative to the non-payment of a fine, I prefer not to express any views in relation to s. 7 as regards that eventuality as a result of a conviction for an absolute liability offence; nor do I need to address here, given the scope of my finding and the nature of this appeal, minimum imprisonment, whether it offends the Charter per se or whether such violation, if any, is dependent upon whether it be for a mens rea or strict liability offence. Those issues were not addressed by the court below and it would be unwise to attempt to address them here. It is sufficient and desirable for this appeal to make the findings I have and no more, that is, that no imprisonment may be imposed for an absolute liability offence and, consequently, given the question put to us, an offence punishable by imprisonment cannot be an absolute liability offence.

87 Before considering s. 94(2) in the light of these findings, I feel we are, however, compelled to go somewhat further for the following reason. I would not want us to be taken by this conclusion as having inferentially decided that absolute liability may not offend s. 7 as long as imprisonment or probation orders are not available as a sentence. The answer to that question is dependent upon the content given to the words "security of the person". That issue was and is a live one. Indeed, though the question as framed focuses on absolute liability (s. 94(2)) in relation to the whole Charter, including the right to security of the person in s. 7, because of the presence of mandatory imprisonment in s. 94(1), only deprivation of liberty was considered. As the effect of imprisonment on the right to liberty is a foregone conclusion, a fortiori minimum imprisonment, everyone directed their arguments, when discussing s. 7, to considering whether absolute liability violated the principles of fundamental justice, and then subsidiarily argued pro or contra the effect of s. 1 of the Charter.

88 Counsel for those opposing the validity of s. 94(2) took the position in this court that absolute liability and severe punishment, always referring to imprisonment, violated s. 7 of the Charter. From the following passage of the judgment in the Court of Appeal [at p. 764] it would appear that counsel for those opposing the validity of the section took the wider position in that court that all absolute liability offences violated s. 7 because of "punishment of the morally innocent":

In seeking to persuade the court to that conclusion counsel opposing the validity of s. 94(2) contended all absolute offences are now of no force and effect because of s. 7 of the Charter and that the provisions of s. 1 of the Charter should not be invoked to sustain them. In support of this submission counsel relied upon the view expressed by Dickson J. in *Sault Ste. Marie* that there was "a generally held revulsion against punishment of the morally innocent". They contended that, had the Charter been in effect when *Sault Ste. Marie* was decided, all absolute liability offences would have been struck down.

We accept without hesitation the statement expressed by the learned justice but do not think it necessarily follows that because of s. 7 of the Charter this category of offence can no longer be legislated. To the contrary, there are, and will remain, certain public welfare offences,

e.g., air and water pollution offences, where the public interest requires that the offences be absolute liability offences.

89 While I agree with the Court of Appeal, as I have already mentioned, that absolute liability does not per se violate s. 7 of the Charter, I am somewhat concerned with leaving without comment the unqualified reference by the Court of Appeal to the requirements of the "public interest".

90 If, by reference to public interest, it was meant that the requirements of public interest for certain types of offences is a factor to be considered in determining whether absolute liability offends the principles of fundamental justice, then I would respectfully disagree; if the public interest is there referred to by the court as a possible justification under s. 1 of a limitation to the rights protected at s. 7, then I do agree.

91 Indeed, as I said, in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the Charter if, as a result, anyone is deprived of their life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s. 1.

92 In this latter regard, something might be added.

93 Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

94 Of course I understand the concern of many as regards corporate offences, specially, as was mentioned by the Court of Appeal, in certain sensitive areas such as the preservation of our vital environment and our natural resources. This concern might well be dispelled were it to be decided, given the proper case, that s. 7 affords protection to human persons only and does not extend to corporations.

95 Even if it be decided that s. 7 does extend to corporations, I think the balancing under s. 1 of the public interest against the financial interests of a corporation would give very different results from that of balancing public interest and the liberty or security of the person of a human being.

96 Indeed, the public interest as regards "air and water pollution offences" requires that the guilty be dealt with firmly, but the seriousness of the offence does not in my respectful view support the proposition that the innocent *human* person be open to conviction, quite the contrary.

Section 94(2)

97 No doubt s. 94(2) enacts in the clearest of terms an absolute liability offence, for the conviction for which a person will be deprived of his or her liberty, and little more, if anything, need be added. However, I should not want to conclude without addressing an argument raised by the appellant in this court and considered by the British Columbia Court of Appeal.

98 The appellant argues that, as a result of the case of *R. v. MacDougall* [1982] 2 S.C.R. 60531 C.R. (3d) 118 M.V.R. 1801 C.C.C. (3d) 65142 D.L.R. (3d) 21654 N.S.R. (2d) 562112 A.P.R. 56244 N.R. 560, s. 94(2) (the absolute liability provision) is of limited effect. Hence, the section raises "a false impression of a potential for wholesale injustice", says the appellant. In my view, this argument is of little relevance to the determination of this appeal. Whether the provision is of broad or of "limited" effect does not change its nature nor lead to a different characterization for the purpose of determining a violation of s. 7. The question is whether the provision offends s. 7 of the Charter at all, rather than whether it does so in "limited" or "wholesale" fashion. At best, this argument may be considered under s. 1.

99 The appellant summarizes the decision in *MacDougall* as establishing that:

... where an accused is charged with driving a motor vehicle while his licence was cancelled (contrary to a provincial statute), ignorance by the accused of the fact that his licence was revoked is ignorance of law and cannot provide the basis for an acquittal.

100 The respondent, however, distinguishes the *MacDougall* case from the case at bar on two grounds. First, the offence under consideration in *MacDougall* was one of strict liability rather than absolute liability. Secondly, while *MacDougall*:

... dealt only with a suspension by operation of law, s. 94(2) encompasses Court imposed suspensions (s. 90(2)), suspensions arising under the "old law" in the absence of the accused, and suspensions imposed by administrative review by the Superintendent of Motor Vehicles requiring delivery of notice ("old" act, Section 82(3)).

Thus, the respondent concludes that there are:

... at least three classes of morally innocent persons who are, by section 94(2) deprived of the opportunity to present a defence of the type outlined by Dickson J. in *R. v. Sault Ste. Marie*, supra, at p. 1326:

The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

101 In the final analysis, it seems that both the appellant and the respondent agree that s. 94 will impact upon the right to liberty of a limited number of morally innocent persons. It creates an absolute liability offence which effects a deprivation of liberty for a limited number of persons. To me, that is sufficient for it to be in violation of s. 7.

Section 1

102 Having found that s. 94(2) offends s. 7 of the Charter, there remains the question as to whether the appellants have demonstrated that the section is salvaged by the operation of s. 1 of the Charter. No evidence was adduced in the Court of Appeal or in this court. The position in that regard and the argument in support of the operability of s. 94(2) is as follows in appellant's factum:

If this Court rules that s. 94(2) of the Motor Vehicle Act is inconsistent with S. 7 (or S. 11(d)) of the Charter, then it is submitted that S. 1 of the Charter is applicable. It is submitted that Laskin J. (as he then was) made it clear in *Curr v. The Queen*, supra, that it is within the scope of judicial notice for this Court to recognize that a statutory provision was enacted as part of a legislative scheme aimed at reducing the human and economic cost of bad driving. S. 94 is but part of the overall scheme laid out in the Motor Vehicle Act by which the Legislature is attempting to get bad drivers off the road. S. 94 imposes severe penalties on those who drive while prohibited from driving and those who drive while their driver's licence is suspended.

It is submitted that if S. 94(2) is inconsistent with one of the above-noted provisions of the Charter, then S. 94(2) contains a "reasonable limit, etc." within the meaning of S. 1 of the Charter.

103 I do not take issue with the fact that it is highly desirable that "bad drivers" be kept off the road. I do not take issue either with the desirability of punishing severely bad drivers who are in contempt of prohibitions against driving. The bottom line of the question to be addressed here is: whether the government of British Columbia has demonstrated as justifiable that the risk of imprisonment of a few innocent is, given the desirability of ridding the roads of British Columbia of bad drivers, a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more than let those few who did nothing wrong remain free.

104 As did the Court of Appeal, I find that this demonstration has not been satisfied, indeed, not in the least.

105 In the result, I would dismiss the appeal and answer the question in the negative, as did the Court of Appeal, albeit for somewhat different reasons, and declare s. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, as amended by the [Motor Vehicle Amendment Act, 1982](#), inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms.

106 Having come to this conclusion, I choose, as did the Court of Appeal, not to address whether the section violates the rights guaranteed under ss. 11(d) and 12 of the Charter.

Wilson J.:

107 I agree with my colleague, Lamer J., that s. 94(2) of the Motor Vehicle Act violates s. 7 of the Charter and is not saved by s. 1 [appeal from case reported at [42 B.C.L.R. 364](#)[1983] [3 W.W.R. 756](#)33 C.R. (3d) 2219 M.V.R. 634 C.C.C. (3d) 2435 C.R.R. 148147 D.L.R. (3d) 539]. I reach that result, however, by a somewhat different route.

108 I start with a consideration of statutory "offences". These are divisible into offences for which mens rea is required and those for which it is not. Statutory offences are subject to a presumption in favour of a mens rea requirement as a matter of interpretation, but the courts have increasingly come to accept the proposition that legislatures may create non mens rea offences provided they make it clear that the actus reus itself is prohibited. This is typically so in the case of the so-called "regulatory" or "public welfare" offences. There is no moral delinquency involved in these offences. They are simply designed to regulate conduct in the public interest.

109 Two questions, therefore, have to be answered on this appeal. The first is: do absolute liability offences created by statute per se offend the Charter? The second is: assuming they do not, can they be attended by mandatory imprisonment or can such a sanction only be attached to true mens rea offences? Certainly, in the absence of the Charter, legislatures are free to create absolute liability offences and to attach to them any sanctions they please. Does s. 7 of the Charter circumscribe their power in this regard?

1. Absolute liability offences

110 [Section 7](#) affirms the right to life, liberty and security of the person while at the same time indicating that a person may be deprived of such a right if the deprivation is effected "in accordance with the principles of fundamental justice". I do not view the latter part of the section as a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Its purpose seems to me to be the very opposite, namely, to protect the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice.

111 Section 7 does not, however, affirm a right to the principles of fundamental justice per se. There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether that impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society. If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the inquiry, in my view, ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the tests in s. 1.

112 Assuming that I am correct in my analysis of s. 7 and its relationship to s. 1, an absolute liability offence cannot violate s. 7 unless it impairs the right to life, liberty or security of the person. It cannot violate s. 7 because it offends the principles of fundamental justice because they are not protected by s. 7 absent an impairment of the s. 7 right. Leaving aside for the moment the mandatory imprisonment sanction, I cannot find an interference with life, liberty or security of the person in s. 94 of the Motor Vehicle Act. It is true that the section prevents citizens from driving their vehicles when their licences are suspended. Citizens are also prevented from driving on the wrong side of the road. Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the Charter to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1. It would be my view, therefore, that absolute liability offences of this type do not per se offend s. 7 of the Charter.

2. Absolute liability plus mandatory imprisonment

113 The real question, as I see it, is whether s. 7 of the Charter is violated by the attachment of a mandatory imprisonment sanction to an absolute liability offence. Clearly a s. 7 right is interfered with here in that a person convicted of such an offence automatically loses his liberty.

114 In what circumstances then may the citizen be deprived of his right to liberty? Clearly not if he was deprived of it through a process which was procedurally unfair. But is s. 7 limited to that?

115 I would assume that one of the reasons for the rider attached to the right to liberty affirmed in s. 7 is to accommodate the criminal justice system. It will be through the criminal justice system that citizens will typically lose their liberty at the hands of government. The system must not, therefore, cause them to lose their liberty in violation of the principles of fundamental justice. The

system must reflect those principles and the validity of the penal provisions must be assessed in relation to them.

116 Since s. 94(2) of the Motor Vehicle Act imposes a limit prescribed by law on the [s. 7](#) right, we must determine whether fundamental justice is offended by attaching mandatory imprisonment to an absolute liability offence. Given that we can have statutory non mens rea offences, what is repugnant to fundamental justice in imprisoning someone for their commission?

117 At common law imprisonment was reserved for the more serious mens rea offences. However, we are dealing here with statutory offences and the legislation must stand unless it violates [s. 7](#). We cannot, in my view, simply state as a bald proposition that absolute liability and imprisonment cannot co-exist in a statutory context. Legislatures can supersede the common law. The legislature may consider it so important to prevent a particular act from being committed that it absolutely forbids it and, if it is committed, may subject the offender to a penalty whether he has any mens rea or not and whether or not he had any intention of breaking the law. Prior to the Charter such legislation would have been unassailable. Now it must meet the test of [s. 7](#). Where the legislature has imposed a penalty in the form of mandatory imprisonment for the commission of an absolute liability offence and has done so in clear and unambiguous language, can the legislation survive an attack under [s. 7](#)? It is suggested that such legislation cannot survive because it offends the principles of fundamental justice and, in particular, the principle that punishment is inappropriate in the absence of moral culpability.

118 The common law distinguished sharply the conduct of the wrongdoer from his state of mind at the time. Hence the famous maxim referred to by my colleague — *actus non facit reum nisi mens sit rea*. The important thing to note, however, is that while the maxim has always been viewed as identifying the essential ingredients of a crime at common law, its meaning has been subject to a process of historical and juridical development, particularly the concept of mens rea. In the earliest beginnings of criminal liability the mental state of the wrongdoer was not considered at all; it was enough that he had done the fell deed: see Holdsworth, *A History of English Law*, 3rd ed. (1923), vol. II, p. 50 et seq. At a later stage the accused's state of mind was considered for two distinct purposes, namely (1) to determine whether his conduct was voluntary or involuntary; and (2) to determine whether he realized what the consequences of his conduct might be. But the first purpose was viewed as the key one. It was considerably later in the development of the law of criminal responsibility that the emphasis changed and an appreciation of the consequences of his act became the central focus. The movement towards the concept of the "guilty mind" was not, however, a sudden or dramatic one. This is understandable. The judges of the day found the new rule hard to apply because it was difficult to look into the state of a man's mind. The ecclesiastical authorities, however, had no such problem and legal historians seem to agree that the ecclesiastical influence was largely responsible for moving the focus to the mental element in common law crime: see Holdsworth, p. 259.

119 The introduction of concepts of morality into criminal responsibility inevitably led to a sharp distinction between crimes which were mala in se and crimes which were merely mala prohibita. Blackstone describes crimes which were mala in se as offences against "those rights which God and nature have established" (Blackstone, Commentaries on the Laws of England, 17th ed. (1830), by E. Christian, p. 53) and crimes which were mala prohibita as breaches of "those laws which enjoin only positive duties, and forbid any such things as are not *mala in se* ... without any intermixture of moral guilt" (Blackstone, p. 57). This distinction is now pretty well discredited: see Archbold's Criminal Pleading, Evidence and Practice, 30th ed. (1938), p. 900; Allen, Legal Duties (1931), p. 239. While it is undoubtedly a fact that certain crimes evoke feelings of revulsion and condemnation in the minds of most people, those feelings are now generally perceived as dependent upon a number of variable factors such as environment, education and religious prejudice and are no longer seen as providing a secure basis for the segregation of crimes into two different categories. Quoting from Kenny's Outlines of Criminal Law (1952), ed. J.W.C. Turner, at pp. 22-23:

Among the members of any community at a given period, certain offences are by general agreement regarded as especially serious and excite deep moral reprobation, whereas other transgressions are regarded as venial and are more or less condoned, especially when they infringe rules of law which are unpopular. It is indeed inevitable that this apportionment of blame should be made. Yet the vague and fluctuating line which in everyday life is drawn between the one group and the other only marks a variation in degree; it is not a boundary which separates things fundamentally alien in kind. Ethical reprobation of homicide, homosexuality, libel, adultery, bigamy and slave trading, to take a few examples, is not the same in all countries, and indeed may vary from section to section of the people in the same country ...

This defective classification of crimes clearly formed an unsound premise from which to draw any jurisprudential conclusion but it has an insidious attraction, and in the form of English phrases such as "in itself unlawful" it has penetrated into one or two modern judgments with vitiating effects upon the logic and clarity of the argument.

120 Accepting that a guilty mind was an essential ingredient of a crime at common law, it does not, of course, follow that the same is true of a "crime" created by statute. I have already referred to the presumption against absolute liability as a matter of statutory interpretation. This undoubtedly reflects the common law approach to the nature of crime. It is, however, only a presumption. Provided it does so in clear and unambiguous terms, the legislature is free to make a person liable for the actus reus with or without mens rea.

121 In Kenny's Outlines of Criminal Law, p. 4, the author highlights the difficulty in identifying any essential characteristics of crimes created by statute. He points out that such crimes originate in the government policy of the day and that, so long as crimes continue to be created by government

policy, the nature of statutory crime will elude definition. Lord Atkin adverted to the same difficulty in *Proprietary Articles Trade Assn. v. A.G. Can.; Re Combines Investigation Act and S. 498 Criminal Code*, [1931] A.C. 310, [1931] 1 W.W.R. 552, 55 C.C.C. 241, [1931] 2 D.L.R. 1(P.C.). He stated at p. 324:

... the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

122 In *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591 [N.S.], Ritchie J., speaking for the majority of this court, said at p. 199:

Generally speaking, there is a presumption at common law that *mens rea* is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety, and the general welfare of the public which are not subject to any such presumption.

123 There seems to be no doubt that in s. 94 of the Motor Vehicle Act the legislature of British Columbia has created such an offence. Subsection (2) expressly precludes the application of any presumption in favour of a mens rea requirement. However, as already indicated, I do not believe that any principle of fundamental justice is offended by the creation of an absolute liability offence absent an impairment of the s. 7 right.

124 Is fundamental justice offended then by the attachment of a mandatory term of imprisonment to the s. 94 offence? Is there something repugnant about imprisoning a person for the commission of an absolute liability offence? Presumably no objection can be taken to attaching penal consequences such as a fine to a validly enacted absolute liability offence, only to penal consequences in the form of imprisonment if this gives rise to a violation of s. 7 of the Charter. If it does, then the court is not only empowered, but obligated by the Constitution, to strike the section down.

125 I have already indicated that in my view a law which interferes with the liberty of the citizen in violation of the principles of fundamental justice cannot be saved by s. 1 as being either reasonable or justified. The concepts are mutually exclusive. This is not, of course, to say that no limits can be put upon the right to life, liberty and security of the person. They clearly can, but only if they are imposed in accordance with the principles of fundamental justice and survive the tests in s. 1 as being reasonable and justified in a free and democratic society. Nor is the government precluded from resort to s. 33 of the Charter in order to dispense with the requirements of fundamental justice when, in a case of emergency, it seeks to impose restrictions on the s. 7 right.

This, however, will be a policy decision for which the government concerned will be politically accountable to the people. As it is, s. 94 cannot, in my view, be saved by s. 1 if it violates s. 7. The sole question is whether it violates s. 7.

126 My colleague, in finding that s. 94 offends the principles of fundamental justice, has relied heavily upon the common law which precluded punishment in the absence of a guilty mind. We are not, however, dealing with a common law crime here. We are dealing with a statutory offence as to which the legislature has stated in no uncertain terms that guilt is established by proof of the act itself.

127 Unlike my colleague, I do not think that ss. 8-14 of the Charter shed much light on the interpretation of the phrase "in accordance with the principles of fundamental justice" as used in s. 7. I find them very helpful as illustrating facets of the right to life, liberty and security of the person. I am not ready at this point, however, to equate unreasonableness or arbitrariness or tardiness as used in some of these sections with a violation of the principles of fundamental justice as used in s. 7. Delay, for example, may be explained away or excused or justified on a number of grounds under s. 1. I prefer, therefore, to treat these sections as self-standing provisions, as indeed they are.

128 I approach the interpretative problem raised by the phrase "the principles of fundamental justice" on the assumption that the legislature was very familiar with the concepts of "natural justice" and "due process" and the way in which those phrases had been judicially construed and applied. Yet they chose neither. Instead they chose the phrase "the principles of fundamental justice". What is "fundamental justice"? We know what "fundamental principles" are. They are the basic, bedrock principles that underpin a system. What would "fundamental principles of justice" mean? And would it mean something different from "principles of fundamental justice"? I am not entirely sure. We have been left by the legislature with a conundrum. I would conclude, however, that if the citizen is to be guaranteed his right to life, liberty and security of the person — surely one of the most basic rights in a free and democratic society — then he certainly should not be deprived of it by means of a violation of a fundamental tenet of our justice system.

129 It has been argued very forcefully that s. 7 is concerned only with procedural injustice but I have difficulty with that proposition. There is absolutely nothing in the section to support such a limited construction. Indeed, it is hard to see why one's life and liberty should be protected against procedural injustice and not against substantive injustice in a Charter that opens with the declaration:

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law: ...

and sets out the guarantee in broad and general terms as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

I cannot think that the guaranteed right in s. 7 which is to be subject only to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system. Certainly the rule of law acknowledged in the preamble as one of the foundations on which our society is built is more than mere procedure. It will be for the courts to determine the principles which fall under the rubric "the principles of fundamental justice". Obviously not all principles of law are covered by the phrase; only those which are basic to our system of justice.

130 I have grave doubts that the dichotomy between substance and procedure which may have served a useful purpose in other areas of the law such as administrative law and private international law should be imported into s. 7 of the Charter. In many instances the line between substance and procedure is a very narrow one. For example, the presumption of innocence protected in s. 11(d) of the Charter may be viewed as a substantive principle of fundamental justice but it clearly has both a substantive and a procedural aspect. Indeed, any rebuttable presumption of fact may be viewed as procedural, as going primarily to the allocation of the burden of proof. Nevertheless, there is also an interest of substance to be protected by the presumption, namely, the right of an accused to be treated as innocent until proved otherwise by the Crown. This right has both a societal and an individual aspect and is clearly fundamental to our justice system. I see no particular virtue in isolating its procedural from its substantive elements or vice versa for purposes of s. 7. A similar analysis may be made of the rule against double jeopardy protected in s. 11(h).

131 How then are we to decide whether attaching a mandatory term of imprisonment to an absolute liability offence created by statute offends a principle of fundamental justice? I believe we must turn to the theory of punishment for the answer.

3. Punishment and fundamental justice

132 It is now generally accepted among penologists that there are five main objectives of a penal system: see Nigel Walker, *Sentencing in a Rational Society* (1969). They are:

- 1) to protect offenders and suspected offenders against unofficial retaliation;
- 2) to reduce the incidence of crime;
- 3) to ensure that offenders atone for their offences;
- 4) to keep punishment to the minimum necessary to achieve the objectives of the system; and
- 5) to express society's abhorrence of crime.

Apart from death, imprisonment is the most severe sentence imposed by the law and is generally viewed as a last resort, i.e., as appropriate only when it can be shown that no other sanction can achieve the objectives of the system.

133 The Law Reform Commission of Canada in its Working Paper 11, "Imprisonment and Release" (Studies on Imprisonment (1976)), states at p. 10:

Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective.

134 Because of the absolute liability nature of the offence created by s. 94(2) of the Motor Vehicle Act, a person can be convicted under the section even although he was unaware at the time he was driving that his licence was suspended and was unable to find this out despite the exercise of due diligence. While the legislature may as a matter of government policy make this an offence, and we cannot question its wisdom in this regard, the question is whether it can make it mandatory for the courts to deprive a person convicted of it of his liberty without violating s. 7. This, in turn, depends on whether attaching a mandatory term of imprisonment to an absolute liability offence such as this violates the principles of fundamental justice. I believe that it does. I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system referred to in para. (4) above.

135 It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system. This is not to say that there is an inherently appropriate relationship between a particular offence and its punishment but rather that there is a scale of offences and punishments into which the particular offence and punishment must fit. Obviously this cannot be done with mathematical precision and many different factors will go into the assessment of the seriousness of a particular offence for purposes of determining the appropriate punishment, but it does provide a workable conventional framework for sentencing. Indeed, judges in the exercise of their sentencing discretion have been employing such a scale for over a hundred years.

136 I believe that a mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane. It is not required to reduce the incidence of the offence. It is beyond anything required to satisfy the need for "atonement". And society, in my opinion, would not be abhorred by an unintentional and unknowing violation of the section. I believe, therefore, that such a sanction offends the principles of fundamental justice embodied in our penal system Section 94(2) is accordingly inconsistent with s. 7 of the Charter and must, to the extent of the inconsistency, be declared of no force and

effect under s. 52. I express no view as to whether a mandatory term of imprisonment for such an offence represents an arbitrary imprisonment within the meaning of s. 9 of the Charter or "cruel and unusual treatment or punishment" within the meaning of s. 12 because it is not necessary to decide those issues in order to answer the constitutional question posed.

137 I would dismiss the appeal and answer the constitutional question in the negative.

Appeal dismissed.

IN THE MATTER OF Section 27(1) of the
Judicature Act, R.S.A. 1980, chapter J-1

AND IN THE MATTER OF a Reference by
the Lieutenant Governor in Council to the
Court of Appeal of Alberta for hearing and
consideration of the questions set out in
Order in Council 461/96 respecting the
Firearms Act, S.C. 1995, chapter 39

The Attorney General for Alberta *Appellant*

v.

The Attorney General of
Canada *Respondent*

and

The Attorney General for Ontario, the
Attorney General of Nova Scotia, the
Attorney General for New Brunswick, the
Attorney General of Manitoba, the Attorney
General for Saskatchewan, the Government
of the Northwest Territories, the Minister of
Justice for the Government of the Yukon
Territory, the Federation of Saskatchewan
Indian Nations, the Coalition of Responsible
Firearm Owners and Sportsmen (CORFOS),
the Law-Abiding Unregistered Firearms
Association (LUFA), the Shooting
Federation of Canada, the Association pour
la santé publique du Québec inc., the
Alberta Council of Women's Shelters,
CAVEAT, the Fondation des victimes du
6 décembre contre la violence, the Canadian
Association for Adolescent Health, the
Canadian Pediatric Society, the Coalition for
Gun Control, the Canadian Association of
Chiefs of Police, the Corporation of the City
of Toronto, the City of Montreal and the
City of Winnipeg *Intervenors*

Please see in particular para. 18

ET DANS L'AFFAIRE DE questions
déférées par le lieutenant gouverneur en
conseil à la Cour d'appel de l'Alberta dans
le décret 461/96 relativement à la *Loi sur les
armes à feu*, L.C. 1995, chapitre 39

Le procureur général de l'Alberta *Appelant*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général de l'Ontario, le
procureur général de la Nouvelle-Écosse, le
procureur général du Nouveau-Brunswick,
le procureur général du Manitoba, le
procureur général de la Saskatchewan, le
gouvernement des Territoires du Nord-
Ouest, le ministre de la Justice du
gouvernement du Territoire du Yukon, la
Federation of Saskatchewan Indian Nations,
la Coalition of Responsible Firearm Owners
and Sportsmen (CORFOS), la Law-Abiding
Unregistered Firearms Association (LUFA),
la Fédération de tir du Canada,
l'Association pour la santé publique du
Québec inc., l'Alberta Council of Women's
Shelters, CAVEAT, la Fondation des
victimes du 6 décembre contre la violence,
l'Association canadienne pour la santé des
adolescents, la Société canadienne de
pédiatrie, la Coalition for Gun Control,
l'Association canadienne des chefs de police,
la Corporation de la cité de Toronto, la
Ville de Montréal et la Ville de
Winnipeg *Intervenants*

INDEXED AS: REFERENCE RE *FIREARMS ACT* (CAN.)

Neutral citation: 2000 SCC 31.

File No.: 26933.

2000: February 21, 22; 2000: June 15.

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

Per curiam

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Criminal law power — Firearms — Licensing and registration of ordinary firearms — Whether licensing and registration provisions of Firearms Act intra vires Parliament — Constitution Act, 1867, s. 91(27) — Firearms Act, S.C. 1995, c. 39.

In 1995, Parliament amended the *Criminal Code* by enacting the *Firearms Act*. The amendments require the holders of all firearms to obtain licences and register their guns. Alberta referred constitutional questions to the Court of Appeal to determine whether the licensing and registration provisions of the *Firearms Act*, as they relate to ordinary firearms, are *intra vires* Parliament. The majority of the Court of Appeal concluded that the Act is a valid exercise of Parliament's criminal law power. Alberta appealed to this Court.

Held: The appeal should be dismissed. The impugned provisions of the *Firearms Act* are constitutional.

The *Firearms Act* constitutes a valid exercise of Parliament's jurisdiction over criminal law. The Act in "pith and substance" is directed to enhancing public safety by controlling access to firearms. Its purpose is to deter the misuse of firearms, control those given access to guns, and control specific types of weapons. It is aimed at a number of "mischiefs", including the illegal trade in guns, both within Canada and across the border with the United States, and the link between guns and violent crime, suicide, and accidental deaths. The purpose of the *Firearms Act* conforms with the historical public safety focus of all gun control laws. The changes introduced by the Act represent a limited expansion of the pre-existing gun control legislation. The effects of the Act also suggest that its essence is the promotion of

RÉPERTORIÉ: RENVOI RELATIF À LA *LOI SUR LES ARMES À FEU* (CAN.)

Référence neutre: 2000 CSC 31.

N° du greffe: 26933.

2000: 21, 22 février; 2000: 15 juin.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des pouvoirs — Compétence en matière de droit criminel — Armes à feu — Permis et enregistrement des armes à feu ordinaires — Les dispositions de la Loi sur les armes à feu relatives aux permis et à l'enregistrement sont-elles de la compétence du Parlement? — Loi constitutionnelle de 1867, art. 91(27) — Loi sur les armes à feu, L.C. 1995, ch. 39.

En 1995, le Parlement a modifié le *Code criminel* en adoptant la *Loi sur les armes à feu*. Les modifications obligent tous les détenteurs d'armes à feu à obtenir un permis et à enregistrer leurs armes. L'Alberta a demandé à la Cour d'appel, par renvoi, de déterminer si les dispositions de la *Loi sur les armes à feu* relatives aux permis et à l'enregistrement à l'égard des armes à feu ordinaires sont de la compétence du Parlement. La Cour d'appel a conclu à la majorité que la Loi était un exercice valide de la compétence du Parlement en matière de droit criminel. L'Alberta fait appel devant notre Cour.

Arrêt: Le pourvoi est rejeté. Les dispositions contestées de la *Loi sur les armes à feu* sont constitutionnelles.

L'adoption de la *Loi sur les armes à feu* est un exercice valide de la compétence du Parlement en matière de droit criminel. De par son «caractère véritable», la Loi vise à améliorer la sécurité publique en régissant l'accès aux armes à feu. Elle a pour objectif la dissuasion de l'usage abusif des armes à feu, le contrôle des personnes ayant accès à des armes à feu et le contrôle de types précis d'armes. Elle vise un certain nombre de «maux», notamment le commerce illégal des armes à feu, à l'intérieur du Canada et à l'extérieur avec les États-Unis, et le lien entre les armes à feu et les crimes de violence, les suicides et les morts accidentelles. L'objet de la *Loi sur les armes à feu* correspond à celui de toutes les lois relatives au contrôle des armes à feu qui sont traditionnellement axées sur la sécurité publique. Les modifications

public safety. The criteria for acquiring a licence are concerned with safety. Criminal record checks and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified.

The *Firearms Act* possesses all three criteria required for a criminal law. Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. The regulation of guns as dangerous products is a valid purpose within the criminal law power. That purpose is connected to prohibitions backed by penalties.

The *Firearms Act* is not essentially regulatory legislation. The Act's complexity does not necessarily detract from its criminal nature. Nor does the law give either the chief firearms officer or the Registrar undue discretion. The offences are clearly defined in the Act. The chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Further, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with a scheme, but independently serve the purpose of public safety. Parliament's intention was not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort. Finally, Parliament may use indirect means to further the end of public safety.

The 1995 gun control scheme is distinguishable from existing provincial property regulation schemes. The Act addresses the aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse. While ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Their control accordingly falls within the criminal law power.

The registration provisions cannot be severed from the rest of the Act. The licensing provisions require everyone who possesses a gun to be licensed; the registra-

introduites par la Loi constituent un accroissement limité de la portée des dispositions antérieures sur le contrôle des armes à feu. Les effets de la Loi indiquent également que son essence même est la promotion de la sécurité publique. Les critères d'obtention d'un permis sont liés à la sécurité. La vérification du casier judiciaire et l'enquête sur les antécédents visent à garder les armes à feu hors de la possession de ceux qui sont incapables de les utiliser avec sûreté. Les cours sur la sécurité permettent de vérifier que les propriétaires d'armes à feu sont qualifiés.

La *Loi sur les armes à feu* possède les trois critères requis pour relever du droit criminel. Le contrôle des armes à feu est traditionnellement considéré comme relevant valablement du droit criminel parce que les armes à feu sont dangereuses et constituent un risque pour la sécurité publique. La réglementation des armes à feu en tant que produits dangereux est un objet valide de droit criminel. Cet objet est lié à des interdictions assorties de sanctions.

La *Loi sur les armes à feu* ne tient pas essentiellement de la réglementation. Sa complexité ne lui enlève pas nécessairement son caractère pénal. La loi ne confère pas un pouvoir discrétionnaire indu au contrôleur des armes à feu ou au directeur. Les infractions sont clairement définies dans la Loi. Le contrôleur des armes à feu et le directeur sont expressément soumis à la surveillance des tribunaux. En outre, les interdictions et les sanctions de la loi ne sont pas de nature réglementaire. Elles ne se limitent pas à assurer le respect du régime, mais servent de façon indépendante les fins de la sécurité publique. Le Parlement ne visait pas à réglementer la propriété, mais à assurer que seuls seront autorisés à posséder une arme à feu ceux qui démontrent qu'ils satisfont aux conditions d'obtention des permis. Enfin, le Parlement peut utiliser des moyens indirects pour atteindre les fins de la sécurité publique.

Le régime de 1995 sur le contrôle des armes à feu se différencie de régimes provinciaux actuels de réglementation des biens. La Loi traite des aspects du contrôle des armes à feu qui ont trait à leur nature dangereuse et à la nécessité d'en réduire l'usage abusif. Les armes à feu ordinaires sont souvent utilisées à des fins licites, mais elles le sont également pour le crime et le suicide, et causent des morts et des blessures accidentelles. Leur contrôle relève donc de la compétence en matière criminelle.

Les dispositions relatives à l'enregistrement ne peuvent être retranchées de la Loi. Les dispositions relatives aux permis obligent quiconque possède une arme à feu à

tion provisions require all guns to be registered. These portions of the *Firearms Act* are both tightly linked to Parliament's goal of promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme.

The *Firearms Act* does not trench on provincial powers such that upholding it as criminal law will upset the balance of federalism. The provinces have not established that the effects of the Act on provincial jurisdiction over property and civil rights are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Third, assuming (without deciding) that the provincial legislatures have the jurisdiction to enact a law in relation to the property aspects of firearms, the double aspect doctrine permits Parliament to address the safety aspects of ordinary firearms. Fourth, the *Firearms Act* does not precipitate the federal government's entry into a new field since gun control has been the subject of federal law since Confederation. There is no colourable intrusion into provincial jurisdiction.

The problems associated with the misuse of firearms are firmly grounded in morality. However, even if gun control did not involve morality, it could still fall under the federal criminal law power. Parliament can use the criminal law to prohibit activities which have little relation to public morality.

The apprehensions of northern, rural and aboriginal Canadians that this law does not address their particular needs do not go to the question of Parliament's jurisdiction to enact the law. The cost of the program and the efficacy of the law, or lack thereof, are equally irrelevant to Parliament's ability to enact it under the division of powers analysis. Within its constitutional sphere,

obtenir un permis; les dispositions relatives à l'enregistrement exigent l'enregistrement de toutes les armes à feu. Ces catégories de dispositions de la *Loi sur les armes à feu* sont étroitement liées au but visé par le Parlement, la promotion de la sécurité par la réduction de l'usage abusif de toutes les armes à feu. Ces deux catégories sont partie intégrante et nécessaire du régime.

La *Loi sur les armes à feu* n'empiète pas tant sur les pouvoirs des provinces que la confirmation qu'elle relève du droit criminel rompra l'équilibre du fédéralisme. Les provinces n'ont pas démontré que les effets de la Loi sur les pouvoirs provinciaux sur la propriété et les droits civils étaient plus que secondaires. Premièrement, le simple fait que les armes à feu sont des biens ne suffit pas pour démontrer que, de par son caractère véritable, une loi sur le contrôle des armes à feu relève d'une matière provinciale. Deuxièmement, la Loi ne nuit pas de façon importante à la capacité des provinces de réglementer la propriété et les droits civils relativement aux armes à feu. Troisièmement, à supposer (sans le décider) que les législatures provinciales aient le pouvoir d'adopter une loi sur les aspects relatifs à la propriété des armes à feu ordinaires, la théorie du double aspect permet au Parlement d'en réglementer les aspects relatifs à la sécurité. Quatrièmement, la *Loi sur les armes à feu* n'entraîne pas le gouvernement fédéral dans un nouveau domaine parce que le contrôle des armes à feu fait l'objet du droit fédéral depuis la Confédération. Il n'y a aucun empiètement déguisé dans les domaines provinciaux.

Les problèmes découlant de l'usage abusif des armes à feu sont étroitement liés à la moralité. Cependant, même si le contrôle des armes à feu ne comportait pas d'aspect moral, il pourrait néanmoins relever de la compétence fédérale en matière criminelle. Le Parlement peut utiliser le droit criminel pour interdire des activités peu liées à la moralité publique.

Les craintes des Canadiens des régions nordiques et rurales et celles des Canadiens autochtones que cette loi ne tienne pas compte de leurs besoins particuliers ne concernent pas la question de la compétence du Parlement pour l'adopter. Le coût du programme et l'efficacité, ou le manque d'efficacité, de la loi sont également sans pertinence pour déterminer si le Parlement a le pouvoir de l'adopter en vertu de l'analyse relative au partage des pouvoirs. Dans le cadre de ses compétences constitutionnelles, c'est au Parlement qu'il appartient de

Parliament is the judge of whether a measure is likely to achieve its intended purpose.

juger s'il est probable qu'une mesure atteindra le but poursuivi.

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APPEAL from a judgment of the Alberta Court of Appeal (1998), 219 A.R. 201, 179 W.A.C. 201, 65 Alta. L.R. (3d) 1, 164 D.L.R. (4th) 513, 19 C.R. (5th) 63, 128 C.C.C. (3d) 225, [1999] 2 W.W.R. 579, [1998] A.J. No. 1028 (QL), upholding the constitutionality of the licensing and registration provisions of the *Firearms Act*. Appeal dismissed.

Roderick A. McLennan, Q.C., Thomas W. R. Ross and Neal A. McLennan, for the appellant.

Graham R. Garton, Q.C., and Sheilah Martin, Q.C., for the respondent.

Robert E. Charney and Edward J. Maksimowski, for the intervener the Attorney General for Ontario.

Louise Walsh Poirier and Reinhold Endres, Q.C., for the intervener the Attorney General of Nova Scotia.

Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

Kenneth J. Tyler, for the intervener the Attorney General of Manitoba.

Graeme G. Mitchell, Q.C., and Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Scott Duke, for the intervener the Government of the Northwest Territories.

William Craik and Lee Kirkpatrick, for the Minister of Justice for the Government of the Yukon Territory.

Delia Opekokew, Darren W. Winegarden, Albert C. Peeling and John D. Parsons, for the intervener the Federation of Saskatchewan Indian Nations.

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1998), 219 A.R. 201, 179 W.A.C. 201, 65 Alta. L.R. (3d) 1, 164 D.L.R. (4th) 513, 19 C.R. (5th) 63, 128 C.C.C. (3d) 225, [1999] 2 W.W.R. 579, [1998] A.J. No. 1028 (QL), confirmant la constitutionnalité des dispositions de la *Loi sur les armes à feu* relatives aux permis et à l'enregistrement. Pourvoi rejeté.

Roderick A. McLennan, c.r., Thomas W. R. Ross et Neal A. McLennan, pour l'appelant.

Graham R. Garton, c.r., et Sheilah Martin, c.r., pour l'intimé.

Robert E. Charney et Edward J. Maksimowski, pour l'intervenant le procureur général de l'Ontario.

Louise Walsh Poirier et Reinhold Endres, c.r., pour l'intervenant le procureur général de la Nouvelle-Écosse.

Gabriel Bourgeois, pour l'intervenant le procureur général du Nouveau-Brunswick.

Kenneth J. Tyler, pour l'intervenant le procureur général du Manitoba.

Graeme G. Mitchell, c.r., et Thomson Irvine, pour l'intervenant le procureur général de la Saskatchewan.

Scott Duke, pour l'intervenant le gouvernement des Territoires du Nord-Ouest.

William Craik et Lee Kirkpatrick, pour l'intervenant le ministre de la Justice du gouvernement du Territoire du Yukon.

Delia Opekokew, Darren W. Winegarden, Albert C. Peeling et John D. Parsons, pour l'intervenante la Federation of Saskatchewan Indian Nations.

Dallas K. Miller, Q.C., for the intervener the Coalition of Responsible Firearm Owners and Sportsmen.

David R. Holman, for the intervener the Law-Abiding Unregistered Firearms Association.

Brian A. Crane, Q.C., and *Paul Shaw*, for the intervener the Shooting Federation of Canada.

Paul Larochelle, Q.C., and *Michèle Thivierge*, for the intervener the Association pour la santé publique du Québec inc.

Alexander D. Pringle, Q.C., and *June Ross*, for the intervener the Alberta Council of Women's Shelters.

Peter A. Downard, Paul F. Monahan and Rochelle S. Fox, for the interveners CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health and the Canadian Pediatric Society.

Jill Copeland, for the interveners the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg.

The following is the judgment delivered by

THE COURT —

I. Introduction

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In 1995, Parliament amended the *Criminal Code*, R.S.C., 1985, c. C-46, by enacting the *Firearms Act*, S.C. 1995, c. 39, commonly referred to as the gun control law, to require the holders of all firearms to obtain licences and register their guns. In 1996, the Province of Alberta challenged Parliament's power to pass the gun control law by a reference to the Alberta Court of Appeal. The Court of Appeal by a 3:2 majority upheld Parliament's power to pass the law. The Province of Alberta now appeals that decision to this Court.

Dallas K. Miller, c.r., pour l'intervenante la Coalition of Responsible Firearm Owners and Sportsmen.

David R. Holman, pour l'intervenante la Law-Abiding Unregistered Firearms Association.

Brian A. Crane, c.r., et *Paul Shaw*, pour l'intervenante la Fédération de tir du Canada.

Paul Larochelle, c.r., et *Michèle Thivierge*, pour l'intervenante l'Association pour la santé publique du Québec inc.

Alexander D. Pringle, c.r., et *June Ross*, pour l'intervenant l'Alberta Council of Women's Shelters.

Peter A. Downard, Paul F. Monahan et Rochelle S. Fox, pour les intervenants CAVEAT, la Fondation des victimes du 6 décembre contre la violence, l'Association canadienne pour la santé des adolescents et la Société canadienne de pédiatrie.

Jill Copeland, pour les intervenantes la Coalition for Gun Control, l'Association canadienne des chefs de police, la Corporation de la cité de Toronto, la Ville de Montréal et la Ville de Winnipeg.

Version française du jugement rendu par

LA COUR —

I. Introduction

En 1995, le Parlement a modifié le *Code criminel*, L.R.C. (1985), ch. C-46, en adoptant la *Loi sur les armes à feu*, L.C. 1995, ch. 39, communément appelée la loi sur le contrôle des armes à feu, pour obliger tous les détenteurs d'armes à feu à obtenir un permis et à enregistrer leurs armes. En 1996, la province de l'Alberta, dans un renvoi à la Cour d'appel de l'Alberta, a contesté le pouvoir du Parlement d'adopter la loi sur le contrôle des armes à feu. Par une majorité de trois à deux, la Cour d'appel a confirmé la compétence du Parlement en la matière. La province de l'Alberta fait appel de cette décision devant notre Cour.

The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will be effective or ineffective in reducing the harm caused by the misuse of firearms. The only issue is whether or not Parliament has the constitutional authority to enact the law.

The answer to this question lies in the Canadian Constitution. The Constitution assigns some matters to Parliament and others to the provincial legislatures: *Constitution Act, 1867*. The federal government asserts that the gun control law falls under its criminal law power, s. 91(27), and under its general power to legislate for the “Peace, Order and good Government” of Canada. Alberta, on the other hand, says the law falls under its power over property and civil rights, s. 92(13). All agree that to resolve this dispute, the Court must first determine what the gun control law is really about — its “pith and substance” — and then ask which head or heads of power it most naturally falls within.

We conclude that the gun control law comes within Parliament’s jurisdiction over criminal law. The law in “pith and substance” is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.

II. Reference Questions

The formal questions put to the Alberta Court of Appeal by the Alberta government in 1996 are attached in Appendix A. Simply put, the issue before us is whether or not the licensing and registration provisions in the *Firearms Act*, as they

On ne demande pas à notre Cour de juger si le contrôle des armes à feu est bon ou mauvais en soi, si la loi est équitable ou inéquitable pour les détenteurs d’armes à feu ou si elle réussira à réduire les maux causés par l’usage abusif des armes à feu. La seule question est de savoir si le Parlement avait le pouvoir constitutionnel d’adopter la loi.

La réponse à cette question réside dans la Constitution canadienne. La Constitution attribue certaines matières au Parlement et d’autres aux législatures des provinces: *Loi constitutionnelle de 1867*. Le gouvernement fédéral affirme que la loi sur les armes à feu relève de sa compétence en matière de droit criminel, par. 91(27), et de sa compétence générale relativement à «la paix, l’ordre et le bon gouvernement» du Canada. Pour sa part, l’Alberta dit que cette loi relève de sa compétence en matière de propriété et de droits civils, par. 92(13). Les parties conviennent que pour trancher le litige, notre Cour doit d’abord déterminer en quoi consiste vraiment la loi sur le contrôle des armes à feu — son «caractère véritable» — et se demander ensuite à quel chef de compétence elle se rapporte le plus naturellement.

Nous concluons que la loi sur le contrôle des armes à feu relève de la compétence du Parlement en matière de droit criminel. De par son «caractère véritable», elle vise à améliorer la sécurité publique en régissant l’accès aux armes à feu, au moyen d’interdictions et de sanctions et, de ce fait, elle relève de la compétence fédérale en matière de droit criminel. Bien que la loi comporte des aspects de réglementation, ceux-ci sont accessoires à son objet premier, qui a trait au droit criminel. L’empiétement de la loi sur la compétence provinciale sur la propriété et les droits civils n’est pas important au point de rompre l’équilibre du fédéralisme.

II. Les questions du renvoi

Les questions déferées à la Cour d’appel de l’Alberta par le gouvernement de l’Alberta en 1996 sont énoncées à l’appendice A. En termes simples, la question est de savoir si le Parlement avait le pouvoir d’édicter à l’égard des armes à feu

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relate to ordinary firearms, were validly enacted by Parliament. The impugned provisions of the Act are attached in Appendix B.

III. Legislation

6 For many years, the *Criminal Code* has restricted access to firearms, mainly automatic weapons and handguns, by classifying some as prohibited and some as restricted. The *Firearms Act* amendments extended this regulation to all firearms, including rifles and shotguns. As a result, s. 84 of the *Criminal Code* now controls three classes of firearms: (1) prohibited firearms (generally automatic weapons); (2) restricted firearms (generally handguns); and (3) all other firearms (generally rifles and shotguns). The third class of guns is variously referred to as “ordinary firearms”, “long guns”, and “unrestricted firearms”. We will refer to this class as “ordinary firearms”.

7 The reference questions focus on the validity of the licensing and registration provisions for ordinary firearms introduced by the *Firearms Act*. The licensing sections of the Act provide that a person must be licensed in order to possess a firearm. Eligibility for a licence reflects safety interests. An applicant with a criminal record involving drug offences or violence, or a history of mental illness, may be denied a licence. An applicant who seeks to acquire a firearm must pass a safety course which requires a basic understanding of firearm safety and the legal responsibilities of firearm ownership. The chief firearms officer, who issues licences, may conduct a background check on the applicant in order to determine eligibility, and may attach conditions to a licence. Once issued, a licence is valid for five years, but it may be revoked for contravention of its conditions or for

ordinaires les dispositions de la *Loi sur les armes à feu* relatives aux permis et à l’enregistrement. Les dispositions contestées sont énoncées à l’appendice B.

III. Les dispositions législatives

Pendant de nombreuses années, le *Code criminel* a limité l’accès aux armes à feu, surtout aux armes automatiques et aux armes de poing, en les plaçant dans les catégories des armes prohibées et des armes à autorisation restreinte. La *Loi sur les armes à feu* a étendu cette réglementation à toutes les armes à feu, y compris les carabines et les fusils de chasse. Par conséquent, l’art. 84 du *Code criminel* régit maintenant trois catégories d’armes à feu: (1) les armes à feu prohibées (principalement les armes automatiques); (2) les armes à feu à autorisation restreinte (principalement les armes de poing); (3) toutes les autres armes à feu (principalement les carabines et les fusils de chasse). La troisième catégorie est appelée diversement «armes à feu ordinaires», «armes d’épaule» et «armes non restreintes». Nous parlerons d’«armes à feu ordinaires».

Les questions du renvoi visent la validité des dispositions relatives aux permis et à l’enregistrement qui ont été introduites par la *Loi sur les armes à feu* à l’égard des armes à feu ordinaires. Les dispositions relatives aux permis obligent quiconque possède une arme à feu à avoir un permis. L’admissibilité à un permis est assujettie à des considérations de sécurité. Le permis peut être refusé à un demandeur ayant un casier judiciaire pour des infractions de drogue ou de violence, ou des antécédents de maladie mentale. Le demandeur qui cherche à acquérir une arme à feu doit réussir un cours de sécurité qui requiert une compréhension de base de la sécurité dans le maniement des armes à feu et des responsabilités légales liées à la propriété d’une arme à feu. Le contrôleur des armes à feu, qui délivre les permis, peut vérifier les antécédents du demandeur pour déterminer son admissibilité, et peut assortir le permis de conditions. Le permis est valide pour une période de cinq ans, mais il peut être révoqué par suite de

certain criminal convictions. A licence refusal or revocation may be appealed to a court.

The registration provisions of the Act are more limited. A firearm cannot be registered unless the applicant is licensed to possess that type of firearm. Registration is generally done by reference to the serial number on the firearm. A registration certificate is valid as long as its holder owns the weapon. If ownership of a registered weapon is transferred, the new owner must register the weapon. In order to give gun owners time to register their weapons, people who owned ordinary firearms as of January 1, 1998 are deemed to hold registration certificates that are valid until January 1, 2003. Possession of an unregistered firearm of any type is an offence. All licences and registration certificates, along with imported, exported, lost and stolen guns, are recorded in the Canadian Firearms Registry, which is operated by a federal appointee.

IV. Reasons of the Alberta Court of Appeal

The Alberta Court of Appeal upheld the 1995 gun control law by a 3:2 majority: (1998), 65 Alta. L.R. (3d) 1. The court wrote four judgments.

A. *Majority*

Fraser C.J.A., in a comprehensive judgment, began by noting that guns may be regulated by both the federal and provincial governments for different purposes, and that the effectiveness of the law is irrelevant to its constitutional characterization. She found that Parliament's purpose in enacting the law was to enhance public safety. While guns preserve lives and serve as useful tools, they also wound and kill. The latter aspect of guns — their inherent dangerousness — is the focus of the impugned provisions of the Act. Parliament's aim

contravention à ses conditions ou de déclaration de culpabilité de certaines accusations criminelles. Le refus et la révocation de permis sont susceptibles d'appel devant une cour de justice.

Les dispositions relatives à l'enregistrement sont plus limitées. Une arme à feu ne peut pas être enregistrée si le demandeur n'a pas de permis de possession pour ce type d'arme à feu. L'enregistrement renvoie généralement au numéro de série de l'arme à feu. Le certificat d'enregistrement est valide tant que son titulaire possède l'arme. En cas de cession de la propriété d'une arme enregistrée, le nouveau propriétaire doit enregistrer l'arme. Pour donner aux propriétaires d'armes à feu le temps d'enregistrer leurs armes, les personnes qui possédaient une arme à feu ordinaire le 1^{er} janvier 1998 sont réputées être titulaires d'un certificat d'enregistrement valide jusqu'au 1^{er} janvier 2003. La possession de toute catégorie d'arme à feu non enregistrée est une infraction. Tous les permis et certificats d'enregistrement, ainsi que les exportations, importations, pertes et vols d'armes à feu, sont inscrits au Registre canadien des armes à feu, qui est tenu par une personne nommée par le gouvernement fédéral.

IV. Les motifs de la Cour d'appel de l'Alberta

La Cour d'appel de l'Alberta, par une majorité de trois à deux, a confirmé la validité de la loi sur le contrôle des armes à feu de 1995: (1998), 65 Alta. L.R. (3d) 1. Quatre juges ont écrit des motifs.

A. *Majorité*

Dans un jugement exhaustif, le juge en chef Fraser note en premier que les armes à feu peuvent être réglementées par les gouvernements fédéral et provinciaux à différentes fins et que l'efficacité de la loi n'est pas pertinente pour sa qualification constitutionnelle. Elle conclut que le Parlement visait l'amélioration de la sécurité publique lorsqu'il a adopté la loi. Même si les armes à feu sauvent des vies et peuvent être des outils utiles, elles blessent et tuent aussi. Cette dernière caractéristique des armes à feu — leur dangerosité

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was to reduce the misuse of guns in crime, including domestic violence, as well as to reduce suicides and accidents caused by the misuse of firearms. The licensing provisions, which require applicants to pass a safety course and undergo a criminal record check and background investigation, support this purpose. The registration system, by seeking to reduce smuggling, theft and illegal sales, also addresses misuse. The licensing and registration provisions are inextricably intertwined. While the provisions entail the regulation of property rights, this regulation is the means of the law, not its end. On this basis, Fraser C.J.A. concluded that the Act is in pith and substance designed to protect public safety from the misuse of firearms.

inhérente — fait l'objet des dispositions contestées de la Loi. Le Parlement avait pour but de réduire l'usage criminel des armes à feu, notamment la violence familiale, de même que les suicides et les accidents causés par le mauvais usage des armes à feu. Les dispositions relatives aux permis, qui obligent les demandeurs à réussir un cours sur la sécurité et à faire l'objet d'une vérification du casier judiciaire et d'une enquête sur leurs antécédents, visent à ce but. En cherchant à réduire la contrebande, le vol et la vente illégale des armes à feu, le système d'enregistrement s'attaque également à leur usage abusif. Les dispositions relatives aux permis et à l'enregistrement sont inextricablement liées. Bien que ces dispositions comportent la réglementation de droits de propriété, cette réglementation est le moyen utilisé par la loi, et non sa fin. Pour ce motif, le juge en chef Fraser conclut que, de par son caractère véritable, la Loi vise à protéger la sécurité publique contre l'usage abusif des armes à feu ordinaires.

11 Fraser C.J.A. went on to the second step in the analysis: considering whether or not that pith and substance could be allocated to one of Parliament's heads of power under the *Constitution Act, 1867*. She held that the legislation falls under the criminal law power, s. 91(27), under either its "prevention" aspect or its "prohibition, penalty, and purpose" aspect. The law does not represent a "colourable" or improper intrusion into provincial jurisdiction.

Le juge en chef Fraser aborde ensuite la deuxième étape de l'analyse, qui consiste à déterminer si ce caractère véritable peut être attribué à l'un des chefs de compétence attribués au Parlement par la *Loi constitutionnelle de 1867*. Elle conclut que la loi relève de la compétence en matière criminelle, selon le par. 91(27), tant dans son aspect préventif que dans l'objet visé, les interdictions et sanctions. La loi n'est pas un empiètement déguisé ou injustifié sur la compétence provinciale.

12 Berger and Hetherington J.J.A. wrote separate opinions agreeing with the Chief Justice. Hetherington J.A. held that any firearm, used improperly, is dangerous to human life and health. As a result, Parliament's purpose, in seeking to prevent crime and promote public safety by discouraging possession, is a valid criminal law purpose. The potential inefficacy of the law, highlighted by Alberta and the other provincial governments, is irrelevant unless it shows that Parliament had a different purpose — a colourable motive. Colourability has not been shown because the law genuinely attempts to improve firearms storage, reduce trafficking, and aid in tracking guns generally. While the law may

Les juges Berger et Hetherington ont rédigé des motifs distincts en accord avec le Juge en chef. Le juge Hetherington conclut que toute arme à feu utilisée à mauvais escient est dangereuse pour la santé et la vie humaines. Par conséquent, en cherchant à prévenir le crime et à favoriser la sécurité publique en en décourageant la possession, le Parlement poursuivait un objectif de droit criminel valide. L'inefficacité potentielle de la loi, soulignée par l'Alberta et par les autres gouvernements provinciaux, n'est pas pertinente à moins qu'elle ne démontre que le Parlement visait un objectif différent — un motif déguisé. L'existence d'un motif déguisé n'a pas été démontrée parce que la

affect property and civil rights, that does not prevent Parliament from enacting it. Hetherington J.A. concluded that the *Firearms Act* contains prohibitions accompanied by penal sanctions, enacted for criminal public purposes, and therefore it is a valid law under the test propounded by La Forest J. of this Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, and *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

Berger J.A. likewise noted that all guns are capable of causing death if misused. He held that Parliament's purpose in enacting the legislation was to ensure that firearms are only possessed by those qualified to use them. The licensing provisions identify those who are qualified. The registration system ensures that only qualified people can acquire firearms. As a prohibition backed by a penalty, for a public purpose, the law is a valid exercise of Parliament's criminal law power. The regulatory aspects of the law are merely the means to an end.

B. Minority

Conrad J.A. dissented, Irving J.A. concurring. Conrad J.A. broadly defined the purpose of the law as regulating all aspects of the possession and use of firearms. While firearms and safety are subjects of both federal and provincial concern, the criminal law power represents a "carve-out" from provincial jurisdiction. The regulation of ownership rather than use and the complexity of the regulations demonstrate that this legislation cannot be classified as valid criminal law. The *Criminal Code* generally prohibits acts, rather than regulating ownership. Possession itself is not dangerous; it is only misuse that is dangerous, and the law goes far beyond prohibiting misuse. This led Conrad J.A. to conclude that the *Firearms Act* represents a colourable intrusion into the provincial jurisdiction over property and civil rights, and is invalid as an exercise of Parliament's jurisdic-

loi vise réellement à améliorer l'entreposage des armes à feu, à en réduire le trafic et, de façon générale, à contribuer à leur repérage. Même si la loi peut toucher la propriété et les droits civils, cela n'empêche pas le Parlement de l'adopter. Le juge Hetherington conclut que la *Loi sur les armes à feu* contient des interdictions assorties de sanctions pénales, adoptées dans l'intérêt public en matière criminelle, et qu'elle est donc une loi valide selon le critère établi par le juge La Forest, de notre Cour, dans les arrêts *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, et *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213.

De même, le juge Berger souligne que toutes les armes à feu peuvent causer la mort si elles sont utilisées à mauvais escient. Il conclut qu'en adoptant la loi, le Parlement visait à ce que seules les personnes qualifiées dans l'usage des armes à feu en possèdent. Le système de permis identifie les personnes qualifiées. Le système d'enregistrement vise à ce que seules les personnes qualifiées puissent acquérir des armes à feu. Comme interdiction assortie d'une sanction, dans l'intérêt public, la loi est un exercice valide de la compétence du Parlement en matière de droit criminel. Les aspects de réglementation de la loi ne sont que les moyens d'arriver à une fin.

B. Minorité

Le juge Conrad, avec l'appui du juge Irving, était dissidente. Elle a donné une définition large de l'objet de la loi comme réglementant tous les aspects de la possession et de l'usage des armes à feu. Bien que les armes à feu et la sécurité soient des sujets d'intérêt fédéral et provincial, la compétence en matière de droit criminel a été «découpee» dans la compétence provinciale. La réglementation de la propriété plutôt que de l'usage, ainsi que la complexité de la réglementation démontrent que cette loi ne peut pas être qualifiée de loi criminelle valide. Généralement, le *Code criminel* interdit des actes plutôt que de réglementer la propriété. La possession n'est pas dangereuse en soi; seul l'usage abusif l'est, et la loi va bien au-delà de l'interdiction de l'usage abusif. De cela, le juge Conrad conclut que la *Loi sur les armes à feu* est un empiétement déguisé sur la compétence

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tion over criminal law or its peace, order and good government power. While she would have struck down the legislation entirely, she held that if the licensing scheme were deemed valid, the registration scheme could be severed from the licensing scheme.

V. Analysis

15 The issue before us is whether the licensing and registration provisions of the *Firearms Act* constitute a valid federal enactment pursuant to Parliament's jurisdiction over criminal law or its peace, order and good government power. In order to answer this question, we must engage in the division of powers analysis used so often by this Court, and most recently summarized in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and *R. v. Morgentaler*, [1993] 3 S.C.R. 463. There are two stages to this analysis. The first step is to determine the "pith and substance" or essential character of the law. The second step is to classify that essential character by reference to the heads of power under the *Constitution Act, 1867* in order to determine whether the law comes within the jurisdiction of the enacting government. If it does, then the law is valid.

A. *Characterization: What Is the Pith and Substance of the Law?*

16 The first task is to determine the "pith and substance" of the legislation. To use the wording of ss. 91 and 92, what is the "matter" of the law? What is its true meaning or essential character, its core? To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law.

17 A law's purpose is often stated in the legislation, but it may also be ascertained by reference to extrinsic material such as Hansard and government

des provinces en matière de propriété et de droits civils et qu'elle est invalide en tant qu'exercice de la compétence du Parlement relativement au droit criminel ou à la paix, l'ordre et le bon gouvernement. Bien que d'avis d'annuler l'ensemble de la loi, elle conclut que si le régime de permis était jugé valide, le régime d'enregistrement pourrait être dissocié du régime de permis.

V. Analyse

Nous devons décider si les dispositions de la *Loi sur les armes à feu* relatives aux permis et à l'enregistrement ont été valablement édictées par le Parlement en vertu de sa compétence en matière de droit criminel ou relativement à la paix, l'ordre et le bon gouvernement. Pour répondre à cette question, nous devons effectuer l'analyse du partage des pouvoirs qui a été utilisée si souvent par notre Cour et qui a été résumée très récemment dans *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21; voir aussi *Whitbread c. Walley*, [1990] 3 R.C.S. 1273, *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, et *R. c. Morgentaler*, [1993] 3 R.C.S. 463. Cette analyse comporte deux étapes. La première consiste à déterminer le «caractère véritable» ou le caractère essentiel de la loi et la seconde à classer ce caractère essentiel en égard aux chefs de compétence établis par la *Loi constitutionnelle de 1867*, afin de déterminer si la loi relève de la compétence du gouvernement qui l'a adoptée. Si c'est le cas, la loi est valide.

A. *Caractérisation: Quel est le caractère véritable de la loi?*

Il faut d'abord déterminer le «caractère véritable» de la loi. Pour reprendre les termes des art. 91 et 92, quelle est la «matière» de la loi? Quelle est sa véritable signification ou son caractère essentiel, sa quintessence? Le caractère véritable de la loi doit être déterminé sous deux aspects: le but visé par le législateur qui l'a adoptée et l'effet juridique de la loi.

L'objet d'une loi est souvent énoncé dans son texte, mais il peut aussi être établi à partir de documents extrinsèques, comme le Hansard et les

publications: see *Morgentaler, supra*, at pp. 483-84. While such extrinsic material was at one time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight: see *Global Securities, supra*, at para. 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35; and *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 14. Purpose may also be ascertained by considering the "mischiefs" of the legislation — the problem which Parliament sought to remedy: see *Morgentaler, supra*, at pp. 483-84.

Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g., criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g., burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler, supra*, at pp. 487-88, and *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. **In some cases, the effects of the law may suggest a purpose other than that which is stated in the law:** see *Morgentaler, supra*, at pp. 482-83; *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) (*Alberta Bank Taxation Reference*); and *Texada Mines Ltd. v. Attorney-General of British Columbia*, [1960] S.C.R. 713; see generally P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at pp. 15-14 to 15-16. **In other words, a law may say**

publications gouvernementales: *Morgentaler*, précité, aux pp. 483 et 484. Même si, à une certaine époque, les documents extrinsèques n'étaient pas admissibles aux fins de déterminer l'objet visé par le législateur, il est maintenant bien établi qu'on peut à bon droit examiner l'historique législatif, les débats parlementaires et autres documents semblables dans la mesure où ils sont pertinents et fiables et qu'on ne leur donne pas plus de poids qu'ils n'en méritent: *Global Securities*, précité, au par. 25; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, au par. 35; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, au par. 14. L'objet peut aussi être établi par l'examen du «mal» visé par la loi — le problème auquel le législateur a voulu remédier: *Morgentaler*, précité, aux pp. 483 et 484.

Les effets juridiques d'une loi sont déterminés par l'examen de son application et de ses effets sur les Canadiens. Le procureur général de l'Alberta dit que la loi ne réussira pas à atteindre son but. Selon lui, pour ce qui a trait à un objet de droit criminel, le régime législatif sera inefficace (p. ex. les criminels n'enregistreront pas leurs armes); là où elle aura un effet, la loi ne contribuera pas à la lutte contre le crime (p. ex. en imposant aux agriculteurs de la paperasserie inutile). Ces préoccupations ont été adressées, comme il se doit, au Parlement qui les a examinées. Dans le cadre de ses compétences constitutionnelles, c'est au Parlement qu'il appartient de juger s'il est probable qu'une mesure atteindra le but poursuivi; l'efficacité n'est pas pertinente dans le cadre de l'analyse du partage des pouvoirs par notre Cour: *Morgentaler*, précité, aux pp. 487 et 488, et *Renvoi: Loi anti-inflation*, [1976] 2 R.C.S. 373. L'examen vise plutôt à déterminer comment la loi cherche à atteindre son but afin de mieux comprendre son [TRADUCTION] «entière portée»: W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), aux pp. 239 et 240. Dans certains cas, les effets de la loi peuvent indiquer un objet autre que celui qu'elle énonce: *Morgentaler*, précité, aux pp. 482 et 483; *Attorney-General for Alberta c. Attorney-General for Canada*, [1939] A.C. 117 (C.P.) (*Alberta Bank Taxation Reference*); et *Texada Mines Ltd. c. Attorney-General of British Columbia*, [1960] R.C.S. 713; et, de façon générale, P.

that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be “colourable”.

W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), aux pp. 15-14 à 15-16. En d’autres termes, une loi peut dire qu’elle vise une chose et, en réalité, faire autre chose. Lorsque les effets de la loi diffèrent de façon importante de l’objet déclaré, on parle parfois de «motif déguisé».

19 Against this background, we turn to the purpose of the *Firearms Act*. Section 4 states that the purpose of the Act is “to provide . . . for the issuance of licences, registration certificates and authorizations under which persons may possess firearms” and “to authorize . . . the manufacture of” and “transfer of” ordinary firearms. This is the language of property regulation. However, this regulatory language is directly tied to a purpose cast in the language of the criminal law. The licensing, registration and authorization provisions delineate the means by which people can own and transfer ordinary firearms “in circumstances that would otherwise constitute [a criminal] offence”. Those who challenge the legislation point to the first part of the section and its regulatory focus. Those who seek to uphold the law point to the second part of the section and its criminal focus.

Sur cette toile de fond, nous abordons l’objet de la *Loi sur les armes à feu*. L’article 4 déclare que son objet est «de prévoir [. . .] la délivrance de permis, de certificats d’enregistrement et d’autorisations permettant la possession d’armes à feu» et «de permettre [. . .] la fabrication» et «la cession» d’armes à feu ordinaires. Ces mots tiennent du langage de la réglementation de la propriété. Ces mots sont toutefois directement liés à un objet formulé dans le langage du droit criminel. Les dispositions relatives aux permis, à l’enregistrement et aux autorisations circonscrivent les moyens par lesquels les personnes peuvent être propriétaires et faire cession d’armes à feu ordinaires «en des circonstances qui ne donnent pas lieu à une infraction» criminelle. Ceux qui contestent la loi invoquent la première partie de l’article et sa nature réglementaire. Ceux qui cherchent à la faire confirmer invoquent la deuxième partie de l’article et sa nature pénale.

20 The statements of the Honourable Allan Rock, Minister of Justice at the time, in his second-reading speech in the House of Commons, reveal that the federal government’s purpose in proposing the law was to promote public safety. He stated: “The government suggests that the object of the regulation of firearms should be the preservation of the safe, civilized and peaceful nature of Canada” (*House of Commons Debates*, vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706 (emphasis added)). Mr. Rock went on to describe the contents of the bill in more detail (at p. 9707):

Les déclarations faites à la Chambre des communes par l’honorable Allan Rock, ministre de la Justice à l’époque, à la deuxième lecture, indiquent que l’objet visé par le gouvernement fédéral dans cette loi était de favoriser la sécurité publique. Il a déclaré: «Le gouvernement estime que la réglementation des armes à feu devrait viser principalement à faire que le Canada demeure un pays sûr, civilisé et paisible» (*Débats de la Chambre des communes*, vol. 133, n° 154, 1^{re} sess., 35^e lég., 16 février 1995, à la p. 9706 (nous soulignons)), puis il a décrit en détail le contenu de la loi (à la p. 9707):

First, tough measures to deal with the criminal misuse of firearms; second, specific penalties to punish those who would smuggle illegal firearms; and third, measures overall to provide a context in which the legiti-

[P]remièrement, des mesures sévères pour contrer l’usage criminel des armes à feu; deuxièmement, des peines précises pour punir ceux qui font la contrebande des armes à feu illégales; troisièmement, des mesures

mate use of firearms can be carried on in a manner consistent with public safety. [Emphasis added.]

(See also the judgment of Fraser C.J.A., at paras. 169-72.)

Later, the Minister referred to the problems of suicide, accidental shootings, and the use of guns in domestic violence, and detailed some of the shooting tragedies that had spurred public calls for gun control. Russell MacLellan, the Parliamentary Secretary of Justice at the time, underscored the government's concerns, noting that the Act pursues "three fundamental policies: the deterrence of the misuse of firearms, general controls on persons given access to firearms, and controls placed on specific types of firearms" ("Canada's firearms proposals" (1995), 37 *Can. J. Crim.* 163, at p. 163).

Another way to determine the purpose of legislation is to look at the problems it is intended to address — the so-called "mischief" approach. The *Firearms Act* is aimed at a number of evils or "mischiefs". One is the illegal trade in guns, both within Canada and across the border with the United States: see *The Government's Action Plan on Firearms Control*, tabled in the House of Commons in 1994. Another is the link between guns and violent crime, suicide, and accidental deaths. In a paper commissioned by the Department of Justice in 1994, *The Impact of the Availability of Firearms on Violent Crime, Suicide, and Accidental Death: A Review of the Literature with Special Reference to the Canadian Situation*, Thomas Gabor found that all three causes of death may increase in jurisdictions where there are the fewest restrictions on guns. Whether or not one accepts Gabor's conclusions, his study indicates the problem which Parliament sought to address by enacting the legislation: the problem of the misuse of firearms and the threat it poses to public safety.

générales pour délimiter ce qui constitue un usage légitime des armes à feu qui ne menace pas la sécurité publique. [Nous soulignons.]

(Voir aussi les motifs du juge en chef Fraser, aux par. 169 à 172.)

Ensuite, le ministre a mentionné les problèmes des suicides, des coups de feu accidentels et de l'usage d'armes à feu dans des cas de violence familiale, et il a évoqué certaines tragédies qui avaient incité le public à demander un contrôle des armes à feu. Russell MacLellan, Secrétaire parlementaire du ministre de la Justice à l'époque, a souligné les préoccupations du gouvernement, précisant que la Loi reposait sur «trois objectifs fondamentaux: décourager la mauvaise utilisation des armes à feu, contrôler de façon générale les personnes qui ont accès à des armes à feu, et contrôler certains types particuliers d'armes à feu» («Le projet canadien sur les armes à feu» (1995), 37 *Rev. can. crim.* 173, à la p. 173).

Une autre façon de déterminer l'objet de la loi est d'examiner les problèmes qu'elle cherche à régler — le «mal visé». La *Loi sur les armes à feu* vise un certain nombre de problèmes ou de «maux». L'un d'eux est le commerce illégal des armes à feu, à l'intérieur du Canada et à l'extérieur avec les États-Unis: *Plan d'action du gouvernement sur le contrôle des armes à feu*, déposé à la Chambre des communes en 1994. Un autre est le lien entre les armes à feu et les crimes de violence, les suicides et les morts accidentelles. Dans un document commandé par le ministère de la Justice en 1994, intitulé *Les conséquences de la disponibilité des armes à feu sur les taux de crime de violence, de suicide et de décès accidentel: Rapport sur la littérature concernant en particulier la situation au Canada*, Thomas Gabor conclut que les morts dues à ces trois causes pouvaient augmenter dans les ressorts où il y avait le moins de restrictions sur les armes à feu. Que l'on accepte ou non les conclusions de Gabor, son étude indique que le problème que le Parlement cherchait à régler en adoptant la loi était le problème de l'usage abusif des armes à feu et de la menace qu'il constitue pour la sécurité publique.

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Finally, there is a strong argument that the purpose of this legislation conforms with the historical public safety focus of all gun control laws. This reference challenges the licensing and registration provisions of the Act only as they relate to ordinary firearms. Alberta does not question the licensing and registration of restricted and prohibited weapons. It freely admits that the restrictions on those categories of weapons are constitutional. Indeed, Alberta would have difficulty alleging otherwise, as numerous courts have upheld the validity of different aspects of the federal gun control legislation that existed prior to the enactment of this Act: see *R. v. Schwartz*, [1988] 2 S.C.R. 443; *McGuigan v. The Queen*, [1982] 1 S.C.R. 284; and *Attorney General of Canada v. Pattison* (1981), 30 A.R. 83 (C.A.).

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More specifically, before the introduction of the *Firearms Act*, the registration of all restricted weapons was upheld by the British Columbia Court of Appeal in *Martinoff v. Dawson* (1990), 57 C.C.C. (3d) 482. Furthermore, the *Criminal Code* required anyone seeking to obtain any kind of firearm to apply for a firearms acquisition certificate. This requirement was upheld in *R. v. Northcott*, [1980] 5 W.W.R. 38 (B.C. Prov. Ct.). These cases upheld the previous gun control legislation on the basis that Parliament's purpose was to promote public safety. The *Firearms Act* extends that legislation in two respects: (1) it requires all guns to be registered, not just restricted and prohibited firearms; and (2) eventually all gun owners will be required to be licensed, not just those who wish to acquire a firearm. These changes represent a continuation of Parliament's focus on safety concerns, and constitute a limited expansion of the pre-existing legislation. Given the general acceptance of the gun control legislation that has existed for the past hundred years, the constitutional validity of which has always been predicated on Parliament's concern for public safety, it is difficult to now impute a different purpose to Parliament. This

Enfin, il y a l'argument solide que l'objet de la loi correspond à l'accent mis traditionnellement sur la sécurité publique dans les lois relatives au contrôle des armes à feu. Le présent renvoi ne vise que les dispositions de la Loi relatives aux permis et à l'enregistrement applicables aux armes à feu ordinaires. L'Alberta ne conteste pas les exigences de permis et d'enregistrement pour les armes à autorisation restreinte et les armes prohibées. Elle admet volontiers que les restrictions applicables à ces catégories d'armes sont constitutionnelles. D'ailleurs, l'Alberta aurait de la difficulté à prétendre le contraire, car de nombreux tribunaux ont confirmé la validité de divers aspects de la législation fédérale sur le contrôle des armes à feu qui existait avant l'entrée en vigueur de la Loi: *R. c. Schwartz*, [1988] 2 R.C.S. 443; *McGuigan c. La Reine*, [1982] 1 R.C.S. 284; et *Attorney General of Canada c. Pattison* (1981), 30 A.R. 83 (C.A.).

Plus particulièrement, avant l'introduction de la *Loi sur les armes à feu*, l'enregistrement de toutes les armes à autorisation restreinte a été jugé valide par la Cour d'appel de la Colombie-Britannique dans *Martinoff c. Dawson* (1990), 57 C.C.C. (3d) 482. En outre, le *Code criminel* obligeait toute personne voulant obtenir tout genre d'arme à feu à demander une autorisation d'acquisition d'armes à feu. Cette exigence a été jugée valide dans *R. c. Northcott*, [1980] 5 W.W.R. 38 (C. prov. C.-B.). Ces décisions ont confirmé la validité des dispositions antérieures en matière de contrôle des armes à feu pour le motif que le but visé par le Parlement était de favoriser la sécurité publique. La *Loi sur les armes à feu* étend la portée de ces dispositions de deux manières: (1) elle exige l'enregistrement de toutes les armes à feu, et non plus seulement des armes à feu prohibées et à autorisation restreinte; (2) à un moment donné, tous les propriétaires d'armes à feu devront détenir un permis, et non plus seulement les personnes qui souhaitent en acquérir. Ces modifications représentent la continuité de l'intérêt que porte le Parlement aux questions de sécurité et constituent un accroissement limité de la portée des dispositions antérieures. Étant donné l'acceptation générale de la législation de contrôle des armes à feu, qui existe depuis cent ans et dont la constitutionnalité a toujours été

supports the view that the law in pith and substance is about public safety.

The effects of the scheme — how it impacts on the legal rights of Canadians — also support the conclusion that the 1995 gun control law is in pith and substance a public safety measure. The criteria for acquiring a licence are concerned with safety rather than the regulation of property. Criminal record checks and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified. What the law does not require also shows that the operation of the scheme is limited to ensuring safety. For instance, the Act does not regulate the legitimate commercial market for guns. It makes no attempt to set labour standards or the price of weapons. There is no attempt to protect or regulate industries or businesses associated with guns (see *Pattison*, *supra*, at para. 22). Unlike provincial property registries, the registry established under the Act is not concerned with prior interests, and unlike some provincial motor vehicle schemes, the Act does not address insurance. In short, the effects of the law suggest that its essence is the promotion of public safety through the reduction of the misuse of firearms, and negate the proposition that Parliament was in fact attempting to achieve a different goal such as the total regulation of firearms production, trade, and ownership. We therefore conclude that, viewed from its purpose and effects, the *Firearms Act* is in “pith and substance” directed to public safety.

B. Classification: Does Parliament Have Jurisdiction to Enact the Law?

Having assessed the pith and substance or matter of the law, the second step is to determine whether that matter comes within the jurisdiction of the enacting legislature. We must examine the

fondée sur l'intérêt que porte le Parlement à la sécurité publique, il est maintenant difficile d'imputer au Parlement une intention différente. Cela appuie l'opinion que le caractère véritable de la loi a trait à la sécurité publique.

Les effets du régime — la façon dont il touche les droits des Canadiens — appuient également la conclusion que la loi de 1995 sur le contrôle des armes à feu, de par son caractère véritable, est une mesure de sécurité publique. Les critères d'obtention d'un permis sont liés à la sécurité, plutôt qu'à la réglementation de la propriété: la vérification du casier judiciaire et l'enquête sur les antécédents visent à garder les armes à feu hors de la possession de ceux qui sont incapables de les utiliser avec sûreté. Les cours sur la sécurité permettent de vérifier que les propriétaires d'armes à feu sont qualifiés. Ce que la loi n'exige pas montre également que le fonctionnement du régime se limite à assurer la sécurité. Par exemple, la Loi ne réglemente pas le marché commercial légitime des armes à feu. Elle ne cherche pas à établir des normes du travail ou le prix des armes. Elle ne tente pas de protéger ni de réglementer les industries ou les entreprises liées aux armes à feu (voir *Pattison*, précité, au par. 22). À la différence des registres de biens provinciaux, le registre créé par la Loi ne porte pas sur des droits antérieurs et, à la différence de certaines lois provinciales sur les véhicules à moteur, la Loi ne traite pas d'assurance. En bref, ses effets indiquent que son essence même est la promotion de la sécurité publique par la réduction de l'usage abusif des armes à feu, et démentent ainsi la proposition que le Parlement tentait en réalité d'atteindre un but différent, telle la réglementation générale de la production, du commerce et de la propriété des armes à feu. Nous concluons donc que, vu son objet et ses effets, la *Loi sur les armes à feu*, de par son «caractère véritable», vise la sécurité publique.

B. Qualification: Le Parlement avait-il compétence pour adopter la loi?

Après l'évaluation du caractère véritable ou de la matière de la loi, la deuxième étape consiste à déterminer si cette matière relève de la compétence du législateur qui l'a adoptée. Nous devons exami-

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heads of power under ss. 91 and 92 of the *Constitution Act, 1867* and determine what the matter is “in relation to”. In this case, the question is whether the law falls under federal jurisdiction over criminal law or its peace, order and good government power; or under provincial jurisdiction over property and civil rights. The presumption of constitutionality means that Alberta, as the party challenging the legislation, is required to show that the Act does not fall within the jurisdiction of Parliament: see *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662.

ner les chefs de compétence attribués par les art. 91 et 92 de la *Loi constitutionnelle de 1867* et déterminer auquel elle se rapporte. En l’espèce, la question est de savoir si la loi relève de la compétence fédérale sur le droit criminel ou la paix, l’ordre et le bon gouvernement, ou si elle relève de la compétence provinciale sur la propriété et les droits civils. La présomption de constitutionnalité signifie que l’Alberta, en tant que partie contestant la Loi, doit démontrer qu’elle ne relève pas de la compétence du Parlement: *Nova Scotia Board of Censors c. McNeil*, [1978] 2 R.C.S. 662.

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The determination of which head of power a particular law falls under is not an exact science. In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree. As Dickson C.J. stated in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669, “overlap of legislation is to be expected and accommodated in a federal state”. Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have “incidental effects” upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other.

La détermination du chef de compétence duquel relève une loi particulière n’est pas une science exacte. Dans un système fédéral, chaque ordre de gouvernement peut s’attendre à ce que sa compétence soit touchée dans une certaine mesure par l’autre. Comme le juge en chef Dickson le dit dans *General Motors of Canada Ltd. c. City National Leasing*, [1989] 1 R.C.S. 641, à la p. 669, «il faut s’attendre à ce qu’il y ait chevauchement de mesures législatives et il faut s’y adapter dans un État fédéral». Les lois se rapportant principalement à la compétence d’un ordre de gouvernement peuvent déborder, ou avoir des «effets secondaires», sur les champs de compétence de l’autre ordre de gouvernement. C’est une question d’équilibre et de fédéralisme: aucun ordre de gouvernement n’est isolé de l’autre, ni ne peut usurper ses fonctions.

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As a general rule, legislation may be classified as criminal law if it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty: *RJR-MacDonald*, *supra*; *Hydro-Québec*, *supra*; and *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the “*Margarine Reference*”). The Attorney General of Canada argues that the 1995 gun control law meets these three requirements, and points to commentary on this legislation which supports its position: D. Gibson, “The *Firearms Reference* in the Alberta Court of Appeal” (1999), 37 *Alta. L. Rev.* 1071; D. M. Beatty, “Gun Control and Judicial Anarchy” (1999), 10 *Constitutional Forum* 45; A. C. Hutchinson and D. Schneiderman, “Smoking Guns: The Federal Government Confronts The Tobacco and Gun Lobbies” (1995), 7 *Constitu-*

En règle générale, une loi peut être considérée comme relevant du droit criminel si elle comporte les trois éléments suivants: un objet valide de droit criminel assorti d’une interdiction et d’une sanction: *RJR-MacDonald*, *Hydro-Québec*, précités; et *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (le «*Renvoi sur la margarine*»). Le procureur général du Canada soutient que la loi de 1995 sur le contrôle des armes à feu respecte ces trois exigences et cite plusieurs auteurs à l’appui de ses arguments: D. Gibson, «The *Firearms Reference* in the Alberta Court of Appeal» (1999), 37 *Alta. L. Rev.* 1071; D. M. Beatty, «Gun Control and Judicial, Anarchy» (1999), 10 *Forum Constitutionnel* 45; A. C. Hutchinson et D. Schneiderman, «Smoking Guns: The Federal Government Confronts The Tobacco and

tional Forum 16; and Peter W. Hogg's testimony before the Standing Senate Committee on Legal and Constitutional Affairs, October 26, 1995.

Before determining whether the three criminal law criteria are met by this legislation, some general observations on the criminal law power may be apposite. Criminal law, as this Court has stated in numerous cases, constitutes a broad area of federal jurisdiction: *RJR-MacDonald*, *supra*; *Hydro-Québec*, *supra*; and *Margarine Reference*, *supra*. The criminal law stands on its own as federal jurisdiction. Although it often overlaps with provincial jurisdiction over property and civil rights, it is not "carved out" from provincial jurisdiction, contrary to the view of Conrad J.A. It also includes the law of criminal procedure, which regulates many aspects of criminal law enforcement, such as arrest, search and seizure of evidence, the regulation of electronic surveillance and the forfeiture of stolen property.

Not only is the criminal law a "stand-alone" jurisdiction, it also finds its expression in a broad range of legislation. The *Criminal Code* is the quintessential federal enactment under its criminal jurisdiction, but it is not the only one. The *Food and Drugs Act*, the *Hazardous Products Act*, the *Lord's Day Act*, and the *Tobacco Products Control Act* have all been held to be valid exercises of the criminal law power: see *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501 (B.C.C.A.); *R. v. Cosman's Furniture (1972) Ltd.* (1976), 73 D.L.R. (3d) 312 (Man. C.A.); *Big M Drug Mart*, *supra* (legislation struck down on other grounds); and *RJR-MacDonald*, *supra* (legislation struck down on other grounds), respectively. Thus the fact that some of the provisions of the *Firearms Act* are not contained within the *Criminal Code* has no significance for the purposes of constitutional classification.

Although the criminal law power is broad, it is not unlimited. Some of the parties before us

Gun Lobbies» (1995), 7 *Forum Constitutionnel* 16; ainsi que le témoignage de Peter W. Hogg devant le Comité sénatorial permanent des affaires juridiques et constitutionnelles, le 26 octobre 1995.

Avant de déterminer si les trois critères de droit criminel sont respectés par cette loi, il y a lieu de faire quelques observations générales sur la compétence en matière de droit criminel. Comme notre Cour l'a indiqué dans de nombreux arrêts, c'est un vaste domaine de compétence fédérale: *RJR-MacDonald*, *Hydro-Québec*, et *Renvoi sur la margarine*, précités. Le droit criminel a une place à part comme chef de compétence fédérale. Malgré des chevauchements multiples avec la compétence provinciale en matière de propriété et de droits civils, il ne résulte pas d'un «découpage» de la compétence provinciale, contrairement à l'opinion du juge Conrad de la Cour d'appel. Il englobe aussi la procédure pénale, qui régit plusieurs aspects de son application, comme l'arrestation, la fouille, la perquisition et la saisie d'éléments de preuve, la réglementation de l'écoute électronique et la confiscation des biens volés.

Non seulement le droit criminel se situe-t-il à part comme chef de compétence, mais il s'exprime aussi dans une vaste gamme de lois. Le *Code criminel* est la quintessence même d'un texte législatif fédéral en matière de droit criminel, mais il n'est pas le seul. La *Loi sur les aliments et drogues*, la *Loi sur les produits dangereux*, la *Loi sur le dimanche* et la *Loi réglementant les produits du tabac* ont toutes été jugées constituer un exercice valide de la compétence en matière criminelle: *Standard Sausage Co. c. Lee*, [1933] 4 D.L.R. 501 (B.C.C.A.); *R. c. Cosman's Furniture (1972) Ltd.* (1976), 73 D.L.R. (3d) 312 (C.A. Man.); *Big M Drug Mart*, précité (dispositions législatives annulées pour d'autres motifs); et *RJR-MacDonald*, précité (dispositions législatives annulées pour d'autres motifs). Par conséquent, le fait que certaines dispositions de la *Loi sur les armes à feu* ne se retrouvent pas dans le *Code criminel* n'est pas pertinent pour les fins de la qualification constitutionnelle.

La compétence en matière de droit criminel est vaste, mais elle n'est pas illimitée. Certaines par-

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expressed the fear that the criminal law power might be illegitimately used to invade the provincial domain and usurp provincial power. A properly restrained understanding of the criminal law power guards against this possibility.

ties ont exprimé devant notre cour la crainte que cette compétence soit utilisée de façon illégitime pour envahir un domaine provincial et usurper des pouvoirs provinciaux. Une perception dûment pondérée de la compétence en matière de droit criminel exclut cette éventualité.

31 Within this context, we return to the three criteria that a law must satisfy in order to be classified as criminal. The first step is to consider whether the law has a valid criminal law purpose. Rand J. listed some examples of valid purposes in the *Margarine Reference* at p. 50: “Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by [criminal] law”. Earlier, we concluded that the gun control law in pith and substance is directed at public safety. This brings it clearly within the criminal law purposes of protecting public peace, order, security and health.

Dans ce contexte, revenons aux trois critères qu’une loi doit respecter pour être considérée comme relevant du droit criminel. La première étape consiste à déterminer si la loi a un objet valide de droit criminel. Le juge Rand a donné certains exemples d’objets valides dans le *Renvoi sur la margarine*, à la p. 50: [TRADUCTION] «La paix publique, l’ordre, la sécurité, la santé, la moralité: ce sont les fins habituelles, mais pas exclusives, du droit [criminel]». Nous avons conclu précédemment que, de par son caractère véritable, la loi sur le contrôle des armes à feu visait la sécurité publique, ce qui la place clairement dans l’objectif de droit criminel que constitue la protection de la paix publique, de l’ordre, de la sécurité et de la santé.

32 In determining whether the purpose of a law constitutes a valid criminal law purpose, courts look at whether laws of this type have traditionally been held to be criminal law: see *Morgentaler*, *supra*, at p. 491, and *RJR-MacDonald*, *supra*, at para. 204; see also *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, *Westendorp v. The Queen*, [1983] 1 S.C.R. 43, and *R. v. Zelensky*, [1978] 2 S.C.R. 940. Courts have repeatedly held that gun control comes within the criminal law sphere. As Fraser C.J.A. demonstrated in her judgment, gun control has been a matter of criminal law since before the enactment of the *Criminal Code* in 1892, and has continued since that date (see also E. M. Davies, “The 1995 Firearms Act: Canada’s Public Relations Response to the Myth of Violence” (2000), 6 *Appeal* 44, and M. L. Friedland, *A Century of Criminal Justice* (1984), at pp. 125 ff.).

Pour déterminer si l’objet d’une loi est un objet de droit criminel valide, les tribunaux examinent si les lois de ce genre sont habituellement jugées relever du droit criminel: *Morgentaler*, précité, à la p. 491, et *RJR-MacDonald*, précité, au par. 204; également *Scowby c. Glendinning*, [1986] 2 R.C.S. 226, *Westendorp c. La Reine*, [1983] 1 R.C.S. 43, et *R. c. Zelensky*, [1978] 2 R.C.S. 940. Les tribunaux ont conclu à maintes reprises que le contrôle des armes à feu relevait de la compétence en matière de droit criminel. Comme le juge en chef Fraser l’a démontré dans ses motifs, le contrôle des armes à feu est une matière de droit criminel depuis avant l’adoption du *Code criminel* en 1892, et cela est toujours le cas (voir aussi E. M. Davies, «The 1995 Firearms Act: Canada’s Public Relations Response to the Myth of Violence» (2000), 6 *Appeal* 44, et M. L. Friedland, *A Century of Criminal Justice* (1984), aux pp. 125 et suiv.).

33 Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. Section 2 of the *Criminal Code* (as amended by s. 138(2) of the *Firearms Act*) defines a “firearm” as “a barrelled weapon from which any shot, bullet or other projectile can

Le contrôle des armes à feu est traditionnellement considéré comme relevant valablement du droit criminel parce que les armes à feu sont dangereuses et constituent un risque pour la sécurité publique. L’article 2 du *Code criminel* (modifié par le par. 138(2) de la *Loi sur les armes à feu*)

be discharged and that is capable of causing serious bodily injury or death to a person” (emphasis added). This demonstrates that Parliament views firearms as dangerous and regulates their possession and use on that ground. The law is limited to restrictions which are directed at safety purposes. As such, the regulation of guns as dangerous products is a valid purpose within the criminal law power: see *R. v. Felawka*, [1993] 4 S.C.R. 199; *RJR-MacDonald*, *supra*; *R. v. Wetmore*, [1983] 2 S.C.R. 284; and *Cosman’s Furniture*, *supra*.

The finding of a valid criminal law purpose does not end the inquiry, however. In order to be classified as a valid criminal law, that purpose must be connected to a prohibition backed by a penalty. The 1995 gun control law satisfies these requirements. Section 112 of the *Firearms Act* prohibits the possession of a firearm without a registration certificate. Section 91 of the *Criminal Code* (as amended by s. 139 of the *Firearms Act*) prohibits the possession of a firearm without a licence and a registration certificate. These prohibitions are backed by penalties: see s. 115 of the *Firearms Act* and s. 91 of the *Code*.

It thus appears that the 1995 gun control law possesses all three criteria required for a criminal law. However, Alberta and the provinces raised a number of objections to this classification which must be considered.

(1) Regulation or Criminal Prohibition?

The first objection is that the *Firearms Act* is essentially regulatory rather than criminal legislation because of the complexity of the law and the discretion it grants to the chief firearms officer. These aspects of the law, the provinces argue, are the hallmarks of regulatory legislation, not the criminal law: see Hogg, *supra*, at pp. 18-25 and 18-26.

Despite its initial appeal, this argument fails to advance Alberta’s case. The fact that the Act is

définit une «arme à feu» comme «[t]oute arme [. . .] susceptible, grâce à un canon qui permet de tirer du plomb, des balles ou tout autre projectile, d’infliger des lésions corporelles graves ou la mort à une personne» (nous soulignons). Cela démontre que le Parlement considère les armes à feu comme dangereuses et qu’il réglemente leur possession et leur usage pour ce motif. La loi se limite à prévoir des restrictions pour des fins de sécurité. En cela, la réglementation des armes à feu en tant que produits dangereux est un objet valide de droit criminel: *R. c. Felawka*, [1993] 4 R.C.S. 199; *RJR-MacDonald*, précité; *R. c. Wetmore*, [1983] 2 R.C.S. 284; et *Cosman’s Furniture*, précité.

La constatation de l’existence d’un objet valide de droit criminel ne conclut toutefois pas l’analyse. Il faut aussi que cet objet soit lié à une interdiction assortie d’une sanction. La loi de 1995 sur le contrôle des armes à feu satisfait à ces exigences. L’article 112 de la *Loi sur les armes à feu* interdit la possession d’une arme à feu sans certificat d’enregistrement. L’article 91 du *Code criminel* (modifié par l’art. 139 de la *Loi sur les armes à feu*) interdit la possession d’une arme à feu sans permis et certificat d’enregistrement. Ces interdictions sont assorties de sanctions: voir l’art. 115 de la *Loi sur les armes à feu* et l’art. 91 du *Code*.

Il ressort donc que la loi de 1995 sur le contrôle des armes à feu possède les trois critères requis pour relever du droit criminel. L’Alberta et les autres provinces ont toutefois soulevé d’autres objections qui nous devons examiner.

(1) Réglementation ou interdiction criminelle?

La première objection est que la *Loi sur les armes à feu* tient essentiellement de la réglementation et non de la législation pénale en raison de sa complexité et du pouvoir discrétionnaire qu’elle confère au contrôleur des armes à feu. Les provinces prétendent que ces aspects de la loi sont caractéristiques des lois de réglementation, et non pas des lois pénales: voir Hogg, *op. cit.*, aux pp. 18-25 et 18-26.

Malgré son attrait initial, cet argument n’aide pas la cause de l’Alberta. Le fait que la Loi soit

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complex does not necessarily detract from its criminal nature. Other legislation, such as the *Food and Drugs Act*, R.S.C., 1985, c. F-27, and the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), are legitimate exercises of the criminal law power, yet highly complex. Nor does the Act give the chief firearms officer or Registrar undue discretion. The offences are not defined by an administrative body, avoiding the difficulty identified in the dissenting judgment in *Hydro-Québec*, *supra*. They are clearly stated in the Act and the *Criminal Code*: no one shall possess a firearm without a proper licence and registration. While the Act provides for discretion to refuse to issue an authorization to carry or transport under s. 68 or a registration certificate under s. 69, that discretion is restricted by the Act. A licence shall be refused if the applicant is not eligible to hold one: s. 68. Eligibility to hold a licence is delineated in the rest of the Act: a person is ineligible to hold a licence if the person has been convicted of certain offences (s. 5(2)) or is subject to a prohibition order (s. 6); s. 7 requires the applicant to complete a safety course. Discretion regarding registration is also bounded by the Act. A refusal by the chief firearms officer or the Registrar must be for “good and sufficient reason”: ss. 68 and 69; the refusal must be in writing with reasons given (s. 72). These provisions demonstrate that the Act does not give the chief firearms officer or the Registrar undue discretion. Furthermore, the chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Refusal or revocation of a licence or a registration certificate may be referred to a provincial court judge: s. 74. The courts will interpret the words “good and sufficient reason” in ss. 68 and 69 in line with the public safety purpose of the Act, ensuring that the exercise of discretion by the chief firearms officer and the Registrar is always wed to that purpose.

complexe ne lui enlève pas nécessairement son caractère pénal. D’autres lois, comme la *Loi sur les aliments et drogues*, L.R.C. (1985), ch. F-27, et la *Loi canadienne sur la protection de l’environnement*, L.R.C. (1985), ch. 16 (4^e suppl.), sont des exercices légitimes de la compétence en matière de droit criminel et sont pourtant extrêmement complexes. La loi ne confère pas non plus un pouvoir discrétionnaire indu au contrôleur des armes à feu ou au directeur. Les infractions ne sont pas définies par un organisme administratif, ce qui évite le problème mentionné dans les motifs de dissidence de l’arrêt *Hydro-Québec*, précité. Elles sont clairement énoncées dans la Loi et dans le *Code criminel*: nul ne doit posséder d’arme à feu sans le permis et le certificat d’enregistrement requis. Si la Loi prévoit le pouvoir discrétionnaire de refuser des autorisations de port ou de transport, à l’art. 68, et un certificat d’enregistrement en vertu de l’art. 69, ce pouvoir discrétionnaire est limité par la Loi. Un permis peut être refusé à un demandeur qui ne répond pas aux critères d’admissibilité: art. 68. L’admissibilité à un permis est délimitée dans d’autres dispositions de la Loi: une personne ne peut pas obtenir de permis si elle a été déclarée coupable de certaines infractions (par. 5(2)) ou si elle fait l’objet d’une ordonnance d’interdiction (art. 6); l’art. 7 oblige le demandeur à réussir un cours sur la sécurité. Le pouvoir discrétionnaire relativement à l’enregistrement est également circonscrit par la Loi. Le contrôleur ou le directeur peut refuser l’enregistrement pour une «raison valable»: art. 68 et 69 et il doit notifier son refus par écrit et fournir ses motifs (art. 72). Ces dispositions démontrent que la Loi ne confère pas un pouvoir discrétionnaire indu au contrôleur ou au directeur. En outre, le contrôleur et le directeur sont expressément soumis à la surveillance des tribunaux. Le refus ou la révocation d’un permis ou d’un certificat d’enregistrement peut être renvoyé à un juge de cour provinciale: art. 74. Les tribunaux interpréteront les mots «raison valable» des art. 68 et 69 en fonction de l’objet de sécurité publique, de sorte que l’exercice du pouvoir discrétionnaire du contrôleur et du directeur sera toujours lié à cet objet.

Furthermore, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with the scheme, as was the case in *Boggs v. The Queen*, [1981] 1 S.C.R. 49, but stand on their own, independently serving the purpose of public safety. Nor are the prohibitions and penalties directed to the object of revenue generation. Parliament's intention was not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort.

Alberta and the supporting interveners argued that the only way Parliament could address gun control would be to prohibit ordinary firearms outright. With respect, this suggestion is not supported by either logic or jurisprudence. First, the jurisprudence establishes that Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, and *RJR-MacDonald*, *supra*. Second, exemptions from a law do not preclude it from being prohibitive and therefore criminal in nature: see *R. v. Furtney*, [1991] 3 S.C.R. 89, *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, and *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497. Third, as noted above, the prohibition in this case is not merely designed to enforce a fee payment or regulatory scheme separate from the essential safety focus of the law: by way of contrast, see *Boggs*, *supra*. Finally, if prohibition is not required to make handgun control constitutional, which no one suggests, why should it be required for ordinary firearms?

In a related argument, some provincial interveners contended that if the purpose of the legislation is to reduce misuse, then the legislation should deal with misuse directly. On this view, Parliament could prohibit the careless or intentional misuse of guns, as it has in ss. 85-87 of the *Criminal Code*,

En outre, les interdictions et les sanctions de la loi ne sont pas de nature réglementaire. Elles ne se limitent pas à assurer le respect du régime, comme c'était le cas dans l'arrêt *Boggs c. La Reine*, [1981] 1 R.C.S. 49, mais forment en elles-mêmes un tout et servent de façon indépendante les fins de la sécurité publique. Les interdictions et les sanctions ne sont pas liées à un objectif de production de revenus. Le Parlement ne visait pas à réglementer la propriété, mais à assurer que seuls seront autorisés à posséder une arme à feu ceux qui démontrent qu'ils satisfont aux conditions d'obtention des permis.

L'Alberta et les intervenants qui l'appuyaient ont soutenu que la seule façon pour le Parlement de contrôler les armes à feu serait d'interdire carrément les armes à feu ordinaires. Avec égards, cette proposition n'est étayée ni par la logique ni par la jurisprudence. Premièrement, la jurisprudence établit que le Parlement peut utiliser des moyens indirects pour atteindre ses fins. Une interdiction directe et totale n'est pas requise: *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, et *RJR-MacDonald*, précité. Deuxièmement, les exemptions n'empêchent pas une loi d'être prohibitive et, par conséquent, de nature pénale: *R. c. Furtney*, [1991] 3 R.C.S. 89, *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, et *Lord's Day Alliance of Canada c. Attorney General of British Columbia*, [1959] R.C.S. 497. Troisièmement, comme on le dit plus haut, l'interdiction en l'espèce ne vise pas simplement à imposer le paiement de frais ou un régime de réglementation n'ayant rien à voir avec la sécurité, qui est l'objet essentiel de la loi: par contraste voir *Boggs*, précité. Enfin, si l'interdiction n'est pas requise pour rendre constitutionnel le contrôle des armes de poing, et personne ne prétend le contraire, pourquoi devrait-elle l'être pour les armes à feu ordinaires?

Invokant un argument connexe, certains intervenants provinciaux ont soutenu que si l'objet de la loi était de réduire l'usage abusif, la loi devrait alors porter directement sur l'usage abusif. Selon cette opinion, le Parlement pourrait interdire l'usage négligent ou l'usage abusif volontaire des

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but could not prohibit people from owning guns if they present risks to public safety or regulate how people store their guns. Again, the answer is that Parliament may use indirect means to further the end of public safety. The risks associated with ordinary firearms are not confined to the intentional or reckless conduct that might be deterred by a prohibition on misuse. The Attorney General of Canada argued, for example, that the suicide rate is increased by the availability of guns. A person contemplating suicide may be more likely to actually commit suicide if a gun is available, it was argued; therefore Parliament has a right to prevent people at risk, for example due to mental illness, from owning a gun. A prohibition on misuse is unlikely to deter a potential suicide; a prohibition on gun ownership may do so. Other examples where a prohibition on misuse falls short are not hard to envisage. A prohibition on misuse is unlikely to prevent the death of a child who plays with a gun; a prohibition on irresponsible ownership or careless storage may do so. Again, reducing availability may have a greater impact on whether a robber uses a gun than a law forbidding him to use it. Whether the 1995 gun law actually achieves these ends is not at issue before us; what is at issue is whether Parliament, in targeting these dangers, strayed outside its criminal law power. In our view, it did not.

(2) Property and Civil Rights or Criminal Law?

41 Alberta's second major objection to classifying the 1995 gun control scheme as criminal law is that it is indistinguishable from existing provincial property regulation schemes such as automobile and land title registries.

42 This argument overlooks the different purposes behind the federal restrictions on firearms and the

armes à feu, comme il l'a fait aux art. 85 à 87 du *Code criminel*, mais il ne pourrait pas interdire à une personne de posséder une arme à feu si cette personne constituait un risque pour la sécurité publique, ni réglementer la manière d'entreposer les armes à feu. Là encore, la réponse réside dans le fait que le Parlement peut utiliser des moyens indirects pour favoriser l'objet de sécurité publique. Les risques liés aux armes à feu ordinaires ne se limitent pas à la conduite volontaire ou négligente qui pourrait être dissuadée par l'interdiction de l'usage abusif. Le procureur général du Canada a prétendu, par exemple, que le taux de suicide augmente avec l'accès aux armes à feu. On a soutenu qu'une personne envisageant le suicide peut être plus susceptible de passer aux actes si une arme à feu est disponible; le Parlement a donc le droit d'empêcher les personnes à risques, en raison d'une maladie mentale par exemple, de posséder une arme à feu. L'interdiction de l'usage abusif ne préviendra vraisemblablement pas un suicide potentiel; l'interdiction de posséder une arme à feu peut le faire. Il n'est pas difficile d'imaginer d'autres exemples où l'interdiction de l'usage abusif est insuffisante. L'interdiction de l'usage abusif n'empêchera vraisemblablement pas la mort d'un enfant qui joue avec une arme à feu; une interdiction visant les propriétaires irresponsables ou l'entreposage négligent peut le faire. Là encore, la limitation de l'accès peut avoir plus d'effets sur l'usage d'armes à feu par des voleurs qu'une loi leur en interdisant l'usage. La question en litige n'est pas de savoir si la loi de 1995 sur le contrôle des armes à feu atteint vraiment ces fins mais si, en ciblant ces dangers, le Parlement a outrepassé sa compétence en matière de droit criminel. Nous sommes d'avis que non.

(2) Propriété et droits civils ou droit criminel?

La deuxième objection principale de l'Alberta à ce que le régime de 1995 sur le contrôle des armes à feu soit classé dans le droit criminel est qu'on ne peut le différencier de régimes provinciaux actuels de réglementation des biens, comme l'enregistrement des automobiles et des droits immobiliers.

Cet argument ne tient pas compte du fait que les restrictions fédérales sur les armes à feu et la régle-

provincial regulation of other forms of property. Guns are restricted because they are dangerous. While cars are also dangerous, provincial legislatures regulate the possession and use of automobiles not as dangerous products but rather as items of property and as an exercise of civil rights, pursuant to the provinces' s. 92(13) jurisdiction: *Canadian Indemnity Co. v. Attorney-General of British Columbia*, [1977] 2 S.C.R. 504; *Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396.

The argument that the federal gun control scheme is no different from the provincial regulation of motor vehicles ignores the fact that there are significant distinctions between the roles of guns and cars in Canadian society. Both firearms and automobiles can be used for socially approved purposes. Likewise, both may cause death and injury. Yet their primary uses are fundamentally different. Cars are used mainly as means of transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns, by contrast, pose a pressing safety risk in many if not all of their functions. Firearms are often used as weapons in violent crime, including domestic violence; cars generally are not. Thus Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms. Parliament did not enact the *Firearms Act* to regulate guns as items of property. The Act does not address insurance or permissible locations of use. Rather, the Act addresses those aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse.

mentation provinciale d'autres types de biens visent des fins différentes. Les armes à feu sont l'objet de restrictions parce qu'elles sont dangereuses. Bien que les automobiles soient également dangereuses, les législatures provinciales réglementent la possession et l'utilisation des automobiles non pas en tant que produits dangereux, mais en tant qu'objets de propriété et en tant qu'exercice de droits civils en vertu de la compétence que leur confère le par. 92(13): *Canadian Indemnity Co. c. Procureur général de la Colombie-Britannique*, [1977] 2 R.C.S. 504; *Validity of Section 92(4) of the Vehicles Act, 1957 (Sask.)*, [1958] R.C.S. 608; *Provincial Secretary of Prince Edward Island c. Egan*, [1941] R.C.S. 396.

L'argument que le régime fédéral de contrôle des armes à feu ne diffère pas de la réglementation provinciale des véhicules automobiles ne tient pas compte du fait qu'il y a des différences importantes entre le rôle des armes à feu et celui des automobiles dans la société canadienne. Tant les armes à feu que les automobiles peuvent être utilisées à des fins socialement acceptables. De même, les unes et les autres peuvent causer des blessures et la mort. Leurs principaux usages sont néanmoins fondamentalement différents. Les automobiles sont principalement des moyens de transport. Les dangers pour le public sont généralement involontaires et accessoires à leur usage. Les armes à feu, par contre, constituent un risque immédiat pour la sécurité dans plusieurs usages, voire tous les usages qui en sont faits. Les armes à feu sont souvent utilisées dans les crimes de violence, et notamment de violence familiale; les automobiles ne le sont pas. Le Parlement considère donc les armes à feu comme particulièrement dangereuses et a cherché à lutter contre ce danger en étendant le régime de permis et d'enregistrement à toutes les catégories d'armes à feu. Le Parlement n'a pas adopté la *Loi sur les armes à feu* pour les réglementer en tant qu'objets de propriété. La Loi ne traite pas d'assurance ou d'endroits où l'usage est permis. Par contre, elle traite des aspects du contrôle des armes à feu qui ont trait à leur nature dangereuse et à la nécessité d'en réduire l'usage abusif.

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In a variation on the theme of property and civil rights, the opponents of the 1995 gun control law argue that ordinary guns, like rifles and shotguns, are common property, not dangerous property. Ordinary firearms are different, they argue, from the automatic weapons and handguns that Parliament has regulated in the past. Ordinary guns are used mainly for lawful purposes in hunting, trapping and ranching. Automatic weapons and handguns, by contrast, have few uses outside crime or war. The fact that Parliament has the right under the criminal law power to control automatic weapons and handguns does not, they argue, mean that Parliament has the right to regulate ordinary guns.

Toujours sur le thème de la propriété et des droits civils, les opposants à la loi de 1995 sur le contrôle des armes à feu prétendent que les armes à feu ordinaires, comme les carabines et les fusils de chasse, sont des biens ordinaires et non pas des biens dangereux. Selon eux, les armes à feu ordinaires sont différentes des armes automatiques et des armes de poing, que le Parlement réglementait déjà. Les armes à feu ordinaires servent principalement aux fins légitimes de la chasse, du piégeage et de l'élevage. Par opposition, les armes automatiques et les armes de poing ont peu d'usages autres que le crime et la guerre. On soutient que le fait que le Parlement ait le droit, en vertu de sa compétence en matière criminelle, de contrôler les armes automatiques et les armes de poing ne signifie pas qu'il a le droit de réglementer les armes à feu ordinaires.

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The difficulty with this argument is that while ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Guns cannot be divided neatly into two categories — those that are dangerous and those that are not dangerous. All guns are capable of being used in crime. All guns are capable of killing and maiming. It follows that all guns pose a threat to public safety. As such, their control falls within the criminal law power.

La faiblesse de cet argument tient à ce que même si les armes à feu ordinaires sont souvent utilisées à des fins licites, elles le sont également pour le crime et le suicide, et elles causent des morts et des blessures accidentelles. On ne peut pas diviser clairement les armes à feu en deux catégories — celles qui sont dangereuses et celles qui ne le sont pas. Toutes les armes à feu sont susceptibles d'utilisation criminelle. Elles sont toutes susceptibles de tuer et de mutiler. Toutes les armes à feu sont donc une menace pour la sécurité publique. À ce titre, leur contrôle relève de la compétence en matière criminelle.

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In a further variation on this argument, the provinces of Ontario and Saskatchewan submitted that even if the licensing provisions of the law were valid criminal legislation, the registration provisions are mainly provincial property legislation and should be severed and struck out. The argument is that the registration portions of the Act simply amount to regulation, with little connection to the public safety purpose advanced by the federal government to justify the Act as a whole. Conrad J.A. agreed with this argument, finding that although the Act “cleverly intertwines” the licensing and registration provisions through “clever packaging”, the registration provisions could be severed from the gun control law. As proof, she

Dans une autre variante de cet argument, les provinces de l'Ontario et de la Saskatchewan ont soutenu que même si les dispositions de la loi relatives aux permis étaient des dispositions valides de droit criminel, les dispositions relatives à l'enregistrement relevaient essentiellement de la compétence provinciale en matière de propriété et devraient être retranchées et annulées. L'argument est que les dispositions de la Loi relatives à l'enregistrement sont une simple réglementation ayant un lien ténu avec les fins de sécurité publique invoquées par le gouvernement fédéral pour justifier l'ensemble de la Loi. Le juge Conrad était d'accord avec cet argument, et a conclu que, même si la Loi [TRADUCTION] «lie habilement» dans un

pointed to the fact that the pre-existing firearms acquisition certificate scheme, governing prohibited and restricted arms, applied to ordinary firearms without being connected to a registration system.

We are not persuaded that the registration provisions can be severed from the rest of the Act, nor that they fail to serve Parliament's purpose in promoting public safety. The licensing provisions require everyone who possesses a gun to be licensed. The registration provisions require all guns to be registered. The combination of the two parts of the scheme is intended to ensure that when a firearm is transferred from one person to another, the recipient is licensed. Absent a registration system, this would be impossible to ascertain. If a gun is found in the possession of an unlicensed person, the registration system permits the government to determine where the gun originated. With a registration scheme in place, licensed owners can be held responsible for the transfer of their weapons. The registration system is also part of the general scheme of the law in reducing misuse. If someone is found guilty of a crime involving violence, or is prohibited from possessing a weapon, the registration scheme is expected to assist the police in determining whether the offender actually owns any guns and in confiscating them. The registration scheme is also intended to reduce smuggling and the illegal trade in guns. These interconnections demonstrate that the registration and licensing portions of the *Firearms Act* are both tightly linked to Parliament's goal in promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme. The government is not prevented from improving the system because the pre-existing firearms acquisition certificate system was not connected to a registration system. Moreover, prior to this Act, the federal government had a registration system for handguns. It now seeks to extend it to all guns. Contrary to the suggestions of

«emballage astucieux» les dispositions relatives aux permis et les dispositions relatives à l'enregistrement, les dispositions relatives à l'enregistrement pouvaient être retranchées de la loi sur le contrôle des armes à feu. La preuve en était, selon elle, que le régime antérieur de certificats d'acquisition, qui régissait les armes prohibées et les armes à autorisation restreinte, s'appliquait aux armes à feu ordinaires sans être lié à un système d'enregistrement.

Nous ne sommes pas convaincus que les dispositions relatives à l'enregistrement peuvent être retranchées de la Loi, ni qu'elles ne servent pas l'objet de sécurité publique poursuivi par le Parlement. Les dispositions relatives aux permis obligent quiconque possède une arme à feu à obtenir un permis. Les dispositions relatives à l'enregistrement exigent l'enregistrement de toutes les armes à feu. La combinaison des deux parties du régime vise à assurer que, lorsqu'une arme à feu change de propriétaire, le nouveau propriétaire ait un permis. Sans système d'enregistrement, cela serait impossible à vérifier. Si une arme à feu est trouvée en la possession d'une personne sans permis, le système d'enregistrement permet au gouvernement d'en déterminer la provenance. Avec un régime d'enregistrement en place, les propriétaires détenant un permis peuvent être tenus responsables de la cession de leurs armes. Le système d'enregistrement vise aussi, comme l'ensemble de la loi, à réduire l'usage abusif. Lorsqu'une personne est déclarée coupable d'un crime de violence ou qu'il lui est interdit de posséder une arme, le régime d'enregistrement est censé aider la police à déterminer si le contrevenant possède en fait une arme à feu et à la confisquer. Le régime d'enregistrement vise également à réduire la contrebande et le commerce illégal des armes à feu. Ces liens multiples démontrent que les dispositions de la *Loi sur les armes à feu* relatives à l'enregistrement et aux permis sont tous deux étroitement liées au but visé par le Parlement, soit la promotion de la sécurité par la réduction de l'usage abusif de toutes les armes à feu. Ces deux catégories de dispositions sont partie intégrante et nécessaire du régime. Le fait que le régime antérieur de certificats d'acquisition n'était pas assorti d'un système d'enregistrement n'em-

Conrad J.A., no improper purpose in including registration in the scheme has been demonstrated.

pêche pas le gouvernement d'améliorer le système. De plus, avant l'adoption de la Loi, le gouvernement fédéral avait un système d'enregistrement pour les armes de poing. Il cherche maintenant à l'étendre à toutes les armes à feu. Contrairement à ce qu'a indiqué le juge Conrad, aucune fin inappropriée n'a été démontrée relativement à l'inclusion de l'enregistrement dans le régime.

(3) Undue Intrusion into Provincial Powers?

(3) Un empiètement indu sur les pouvoirs des provinces?

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In a related argument, Alberta and the provincial interveners submit that this law inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism. In support of its submission, Alberta cites the work of D. M. Beatty, who suggests applying considerations of rationality and proportionality from the *Canadian Charter of Rights and Freedoms* s. 1 cases to questions of legislative competence: *Constitutional Law in Theory and Practice* (1995). It seems far from clear to us that it would be helpful to apply the technique of weighing benefits and detriments used in s. 1 jurisprudence to the quite different exercise of defining the scope of the powers set out in ss. 91 and 92 of the *Constitution Act, 1867*. This said, however, it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government, as this Court affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; see also *General Motors of Canada Ltd. v. City National Leasing*, *supra*. The courts, critically aware of the need to maintain this balance, have not hesitated to strike down legislation that does not conform with the requirements of the criminal law: see *Boggs*, *supra*, and the *Margarine Reference*, *supra*. The question is not whether such a balance is necessary, but whether the 1995 gun control law upsets that balance.

Dans un argument connexe, l'Alberta et les intervenants provinciaux soutiennent que la loi empiète indûment sur les pouvoirs des provinces et que la confirmation qu'elle relève du droit criminel rompra l'équilibre du fédéralisme. À l'appui de son argument, l'Alberta cite l'ouvrage de D. M. Beatty, qui propose d'appliquer aux questions de compétences législatives les considérations de rationalité et de proportionnalité issues des arrêts portant sur l'article premier de la *Charte canadienne des droits et libertés: Constitutional Law in Theory and Practice* (1995). Il est loin d'être évident qu'il serait utile d'appliquer la technique de pondération des avantages et des inconvénients utilisée dans la jurisprudence relative à l'article premier à cet exercice très différent qu'est la définition de la portée des chefs de compétence établis par les art. 91 et 92 de la *Loi constitutionnelle de 1867*. Ceci dit, il est toutefois incontestable que l'équilibre approprié doit être maintenu entre les chefs de compétence fédéraux et provinciaux. L'existence même d'un État fédéral dépend de la présence d'un équilibre juste et fonctionnel entre le gouvernement central et les gouvernements provinciaux, comme notre Cour l'a affirmé dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; voir également *General Motors of Canada Ltd. c. City National Leasing*, précité. Les tribunaux, très conscients de la nécessité de préserver cet équilibre, n'ont pas hésité à annuler des dispositions législatives non conformes aux exigences du droit criminel: *Boggs* et *Renvoi sur la margarine*, précités. La question n'est pas de savoir si cet équilibre est nécessaire, mais si la loi de 1995 sur le contrôle des armes à feurompt l'équilibre.

The argument that the 1995 gun control law upsets the balance of Confederation may be seen as an argument that, viewed in terms of its effects, the law does not in pith and substance relate to public safety under the federal criminal law power but rather to the provincial power over property and civil rights. Put simply, the issue is whether the law is mainly in relation to criminal law. If it is, incidental effects in the provincial sphere are constitutionally irrelevant: see, e.g., *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85. On the other hand, if the effects of the law, considered with its purpose, go so far as to establish that it is mainly a law in relation to property and civil rights, then the law is *ultra vires* the federal government. In summary, the question is whether the “provincial” effects are incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or “in pith and substance”, the regulation of property and civil rights.

In our view, Alberta and the provinces have not established that the effects of the law on provincial matters are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Exercises of the criminal law power often affect property and civil rights to some degree: *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368 (P.C.). Such effects are almost unavoidable, as many aspects of the criminal law deal with property and its ownership. The fact that such effects are common does not lessen the need to examine them. It does suggest, however, that we cannot draw sharp lines between criminal law and property and civil rights. Food, drugs and obscene materials are all items of property and are all legitimate subjects of criminal laws. In order to determine the proper classification of this law, then, we must go beyond the simplistic proposition that

L’argument que la loi de 1995 sur le contrôle des armes à feu rompt l’équilibre de la Confédération peut être considéré comme un argument selon lequel le caractère véritable de la loi, vu ses effets, n’a pas trait à la sécurité publique et donc à la compétence fédérale en matière criminelle, mais relève plutôt de la compétence provinciale sur la propriété et les droits civils. En termes simples, la question est de savoir si la loi est principalement relative au droit criminel. Si elle l’est, ses effets secondaires touchant des domaines de compétence provinciale ne sont pas pertinents sur le plan constitutionnel: voir, p. ex., *Consortium Developments (Clearwater) Ltd. c. Sarnia (Ville)*, [1998] 3 R.C.S. 3, et *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85. En revanche, si les effets de la loi, compte tenu de son objet, sont suffisants pour établir qu’elle vise principalement la propriété et les droits civils, elle excède la compétence du gouvernement fédéral. En résumé, la question est de savoir si les effets «provinciaux» sont secondaires, auquel cas ils ne sont pas pertinents du point de vue constitutionnel, ou s’ils sont tellement importants qu’ils indiquent bien que la loi est principalement, ou de par son «caractère véritable», une réglementation de la propriété et des droits civils.

Nous estimons que l’Alberta et les provinces n’ont pas démontré que les effets de la loi sur les matières provinciales étaient plus que secondaires. Premièrement, le simple fait que les armes à feu sont des biens ne suffit pas pour démontrer que, de par son caractère véritable, une loi sur le contrôle des armes à feu relève d’une matière provinciale. L’exercice de la compétence en matière criminelle touche souvent, et à divers degrés, la propriété et les droits civils: *Attorney-General for British Columbia c. Attorney-General for Canada*, [1937] A.C. 368 (C.P.). De tels effets sont presque inévitables, puisque de nombreux aspects du droit criminel ont trait aux biens et à leur propriété. Le fait que ces effets sont habituels n’atténue pas la nécessité de les examiner. Cela indique toutefois que nous ne pouvons pas tracer une ligne bien définie entre le droit criminel et la propriété et les droits civils. Les aliments, les drogues et le matériel pornographique sont tous des objets de propriété et

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guns are property and thus any federal regulation of firearms is *prima facie* unconstitutional.

sont tous légitimement des objets du droit criminel. Pour déterminer la qualification de la Loi, nous devons donc aller au-delà de la proposition simpliste que les armes à feu sont des biens et que, par conséquent, toute réglementation fédérale des armes à feu est inconstitutionnelle à première vue.

51 Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Most provinces already have regulations dealing with hunting, discharge within municipal boundaries, and other aspects of firearm use, and these are legitimate subjects of provincial regulation: see *R. v. Chiasson* (1982), 66 C.C.C. (2d) 195 (N.B.C.A.), *aff'd* [1984] 1 S.C.R. 266. The Act does not affect these laws.

Deuxièmement, la Loi ne nuit pas de façon importante à la capacité des provinces de réglementer la propriété et les droits civils relativement aux armes à feu. La plupart des provinces réglementent déjà la chasse, le tir dans les municipalités ainsi que d'autres aspects de l'usage des armes à feu, et ces activités sont légitimement l'objet de réglementation provinciale: *R. c. Chiasson* (1982), 66 C.C.C. (2d) 195 (C.A.N.-B.), *conf. par* [1984] 1 R.C.S. 266. La Loi n'a aucun effet sur ces dispositions.

52 Third, the most important jurisdictional effect of this law is its elimination of the ability of the provinces to *not* have any regulations on the ownership of ordinary firearms. The provinces argue that it is in their power to choose whether or not to have such a law. By taking over the field, the federal government has deprived the provinces of that choice. Assuming (without deciding) that the provincial legislatures would have the jurisdiction to enact a law in relation to the property aspects of ordinary firearms, this does not prevent Parliament from addressing the safety aspects of ordinary firearms. The double aspect doctrine permits both levels of government to legislate in one jurisdictional field for two different purposes: *Egan, supra*.

Troisièmement, l'effet le plus important de cette loi, en matière de compétence, est l'élimination de la possibilité pour les provinces de *ne pas* réglementer la propriété des armes à feu ordinaires. Les provinces prétendent qu'elles ont le droit de choisir d'adopter ou non une loi de cette nature. En envahissant ce champ, le gouvernement fédéral a privé les provinces de ce choix. À supposer (sans le décider) que les législatures provinciales aient le pouvoir d'adopter une loi sur les aspects relatifs à la propriété des armes à feu ordinaires, cela n'empêche pas le Parlement d'en réglementer les aspects relatifs à la sécurité. La théorie du double aspect permet aux deux ordres de gouvernement de légiférer dans un même domaine de compétence à des fins différentes: *Egan, précité*.

53 Fourth, as discussed above, this law does not precipitate the federal government's entry into a new field. Gun control has been the subject of federal law since Confederation. This law does not allow the federal government to significantly expand its jurisdictional powers to the detriment of the provinces. There is no colourable intrusion into provincial jurisdiction, either in the sense that Parliament has an improper motive or that it is taking over provincial powers under the guise of the criminal law. While we are sensitive to the concern of the provincial governments that the federal jurisdiction over criminal law not be permitted such an

Quatrièmement, comme nous le disons plus haut, cette loi n'entraîne pas le gouvernement fédéral dans un nouveau domaine. Le contrôle des armes à feu fait l'objet du droit fédéral depuis la Confédération. Cette loi ne permet pas au gouvernement fédéral d'étendre ses pouvoirs de façon importante au détriment des provinces. Il n'y a aucun empiètement déguisé dans les domaines provinciaux, ni dans le sens que le Parlement a agi pour un motif inapproprié ni dans le sens qu'il s'approprie des pouvoirs provinciaux sous le couvert du droit criminel. Nous sommes sensibles à la crainte des gouvernements provinciaux qu'on

unlimited scope that it erodes the constitutional balance of powers, we do not believe that this legislation poses such a threat.

(4) Is Moral Content Required?

Yet another argument is that the ownership of guns is not criminal law because it is not immoral to own an ordinary firearm. There are two difficulties with this argument. The first is that while the ownership of ordinary firearms is not in itself regarded by most Canadians as immoral, the problems associated with the misuse of firearms are firmly grounded in morality. Firearms may be misused to take human life and to assist in other immoral acts, like theft and terrorism. Preventing such misuse can be seen as an attempt to curb immoral acts. Viewed thus, gun control is directed at a moral evil.

The second difficulty with the argument is that the criminal law is not confined to prohibiting immoral acts: see *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (P.C.). While most criminal conduct is also regarded as immoral, Parliament can use the criminal law to prohibit activities which have little relation to public morality. For instance, the criminal law has been used to prohibit certain restrictions on market competition: see *Attorney-General for British Columbia v. Attorney-General for Canada*, *supra*. Therefore, even if gun control did not involve morality, it could still fall under the federal criminal law power.

(5) Other Concerns

We recognize the concerns of northern, rural and aboriginal Canadians who fear that this law does not address their particular needs. They argue that it discriminates against them and violates treaty rights, and express concerns about their ability to access the scheme, which may be adminis-

trée à la compétence fédérale en matière criminelle une portée si grande qu'elle porterait atteinte à l'équilibre constitutionnel des pouvoirs, mais nous ne pensons pas que cette loi comporte ce risque.

(4) Un contenu moral est-il requis?

Un autre argument dit que la propriété des armes à feu ne relève pas du droit criminel parce qu'il n'est pas immoral de posséder une arme à feu ordinaire. Cet argument a deux failles. La première est que, même si la propriété d'une arme à feu ordinaire n'est pas considérée immorale en soi par la plupart des Canadiens, les problèmes découlant de l'usage abusif des armes à feu sont étroitement liés à la moralité. Les armes à feu peuvent servir à tuer et à faciliter la perpétration d'autres actes immoraux, comme le vol et le terrorisme. La prévention d'un tel usage abusif peut être interprétée comme une tentative d'enrayer des actes immoraux. De ce point de vue, le contrôle des armes à feu vise donc un mal moral.

La deuxième faille est que le droit criminel ne se limite pas à interdire les actes immoraux: voir *Proprietary Articles Trade Association c. Attorney-General for Canada*, [1931] A.C. 310 (C.P.). Bien que la plupart des activités criminelles soient également considérées comme immorales, le Parlement peut utiliser le droit criminel pour interdire des activités peu liées à la moralité publique. Par exemple, le droit criminel a été utilisé pour interdire certaines restrictions à la libre concurrence: voir *Attorney-General for British Columbia c. Attorney-General for Canada*, précité. Par conséquent, même si le contrôle des armes à feu ne comportait pas d'aspect moral, il pourrait néanmoins relever de la compétence fédérale en matière de droit criminel.

(5) Autres préoccupations

Nous sommes conscients des préoccupations des Canadiens des régions nordiques et rurales et de celles des Canadiens autochtones qui craignent que cette loi ne tienne pas compte de leurs besoins particuliers. Ils prétendent que cette loi est discriminatoire à leur endroit et qu'elle porte atteinte aux

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tered from a great distance. These apprehensions are genuine, but they do not go to the question before us — Parliament’s jurisdiction to enact this law. Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis applied by this Court. If the law violates a treaty or a provision of the *Charter*, those affected can bring their claims to Parliament or the courts in a separate case. The reference questions, and hence this judgment, are restricted to the issue of the division of powers.

droits issus de traités, et ils s’inquiètent des possibilités d’accès à un régime qui pourrait être administré d’un endroit très lointain. Ces appréhensions sont sincères, mais elles ne concernent pas la question dont nous sommes saisis — la compétence du Parlement pour adopter cette loi. La question de savoir si une loi aurait pu être mieux conçue ou si le gouvernement fédéral aurait dû consulter d’avantage avant de l’adopter n’est pas pertinente dans l’analyse du partage des pouvoirs effectuée par notre Cour. Si la loi contrevient à un traité ou à une disposition de la *Charte*, ceux qui sont touchés peuvent s’adresser au Parlement ou aux tribunaux dans une affaire distincte. Les questions du renvoi et, par conséquent, la présente décision, se limitent à la question du partage des pouvoirs.

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We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court’s decision. The efficacy of a law, or lack thereof, is not relevant to Parliament’s ability to enact it under the division of powers analysis. Furthermore, the federal government points out that it is not only career criminals who are capable of misusing guns. Domestic violence often involves people who have no prior criminal record. Crimes are committed by first-time offenders. Finally, accidents and suicides occur in the homes of law-abiding people, and guns are stolen from their homes. By requiring everyone to register their guns, Parliament seeks to reduce misuse by everyone and curtail the ability of criminals to acquire firearms. Where criminals have acquired guns and used them in the commission of offences, the registration system seeks to make those guns more traceable. The cost of the program, another criti-

Nous sommes également conscients des préoccupations de ceux qui s’opposent à la Loi parce qu’elle peut se révéler inefficace ou trop coûteuse. L’Alberta a fait valoir que les criminels ne feraient pas enregistrer leurs armes. On prétend que le seul effet réel de la loi est d’imposer de la paperasserie à des agriculteurs et des chasseurs respectueux de la loi. Ces préoccupations ont été dûment soumises au Parlement et examinées par lui; elles ne peuvent avoir aucune incidence sur la décision de notre Cour. L’efficacité ou le manque d’efficacité d’une loi n’est pas pertinent pour déterminer si le Parlement a le pouvoir de l’adopter en vertu de l’analyse relative au partage des pouvoirs. En outre, le gouvernement fédéral souligne que les criminels professionnels ne sont pas les seuls à pouvoir faire un usage abusif des armes à feu. La violence familiale est souvent le fait de personnes qui n’ont pas d’antécédents judiciaires. Des crimes sont commis par des personnes qui n’ont jamais commis d’infraction auparavant. Enfin, des accidents, des suicides et des vols d’armes à feu se produisent chez des personnes respectueuses de la loi. En imposant à tous l’enregistrement des armes à feu, le Parlement cherche à réduire leur usage abusif par quiconque de même que la capacité des criminels d’acquérir des armes à feu. Le système d’enregistrement cherche à faciliter la localisation des armes à feu acquises et utilisées par des criminels. Le coût du programme, une autre critique

cism of the law, is equally irrelevant to our constitutional analysis.

VI. Conclusion

We conclude that the impugned sections of the *Firearms Act* contain prohibitions and penalties in support of a valid criminal law purpose. The legislation is in relation to criminal law pursuant to s. 91(27) of the *Constitution Act, 1867* and hence *intra vires* Parliament. It is not regulatory legislation and it does not take the federal government so far into provincial territory that the balance of federalism is threatened or the jurisdictional powers of the provinces are unduly impaired.

Having determined that the legislation constitutes a valid exercise of Parliament's jurisdiction over criminal law, it is unnecessary to consider whether the legislation can also be justified as an exercise of its peace, order and good government power.

We would dismiss the appeal. The licensing and registration provisions in the *Firearms Act* do not constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*. The Act is a valid exercise of Parliament's jurisdiction over criminal law pursuant to s. 91(27).

The answers to the reference questions are as follows:

Question 2:

(1) No.

(2) No.

Question 3:

(1) No.

(2) No.

dirigée contre la loi, est également sans pertinence dans notre analyse constitutionnelle.

VI. Conclusion

Nous concluons que les dispositions contestées de la *Loi sur les armes à feu* prévoient des interdictions et des sanctions à l'appui d'un objet valide de droit criminel. Cette loi se rapporte au droit criminel et, conformément au par. 91(27) de la *Loi constitutionnelle de 1867*, relève de la compétence du Parlement. Cette loi n'est pas de nature réglementaire et elle ne pousse pas le gouvernement fédéral si loin dans le domaine réservé aux provinces que l'équilibre du fédéralisme en est rompu ou qu'il y a empiétement indu sur les domaines de compétence des provinces.

Étant donné que nous avons conclu que la loi constituait un exercice valide de la compétence du Parlement en matière de droit criminel, il est inutile de déterminer si la loi peut également être justifiée en tant qu'exercice de sa compétence relativement à la paix, l'ordre et le bon gouvernement.

Nous sommes d'avis de rejeter le pourvoi. Les dispositions de la *Loi sur les armes à feu* relatives aux permis et à l'enregistrement ne constituent pas une atteinte à la compétence de la législature de l'Alberta en matière de propriété et de droits civils qui est conférée par le par. 92(13) de la *Loi constitutionnelle de 1867*. L'adoption de la Loi est un exercice valide de la compétence du Parlement en matière de droit criminel qui est conférée par le par. 91(27).

Les réponses aux questions du renvoi sont les suivantes:

Question 2:

(1) Non.

(2) Non.

Question 3:

(1) Non.

(2) Non.

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Appendix A — The Reference Questions

The Reference was initiated by Her Majesty the Queen in Right of Alberta on September 26, 1996 by Order in Council 461/96. The Lieutenant Governor in Council referred four specific questions to the Court (under headings 2 and 3):

1. For purposes of these questions,

(a) “*Firearms Act*” means the *Firearms Act*, chapter 39 of the Statutes of Canada, 1995;

(b) “ordinary firearm” means “firearm”, as defined in section 2 of the *Criminal Code* (Canada), as amended by section 138 of the *Firearms Act*, except that it does not include a “prohibited firearm” or a “restricted firearm” as those terms are defined in section 84 of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*;

(c) “licensing provisions” means those portions of the *Firearms Act* relating to the mandatory regime of licensing for those persons who own or possess or wish to own or possess an ordinary firearm, including, without limitation, sections 5 to 10, 54, 55, 56, 58, 61, 64, 67, 68 and 70, and the related enforcement provisions of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*;

(d) “Registration provisions” means those portions of the *Firearms Act* relating to the mandatory regime of registration for an ordinary firearm, including, without limitation, sections 13 to 16, 54, 60, 61, 66, 69, 71, 82 to 94, 112 and 115, and the related enforcement provisions of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*.

2. (1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

(2) If the answer to the question posed in subsection (1) is “yes”, are the licensing provisions ultra vires the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?

Appendice A — Les questions du renvoi

Le renvoi a été soumis par Sa Majesté la Reine du chef de l’Alberta le 26 septembre 1996 au moyen du décret 461/96. Le lieutenant gouverneur en conseil a déféré quatre questions précises à la Cour (sous les numéros 2 et 3):

[TRADUCTION]

1. Les définitions qui suivent s’appliquent aux présentes questions:

a) «*Loi sur les armes à feu*» s’entend de la *Loi sur les armes à feu*, chapitre 39 des Lois du Canada, 1995;

b) «arme à feu ordinaire» s’entend de l’«arme à feu» définie à l’art. 2 du *Code criminel* du Canada, modifié par l’art. 138 de la *Loi sur les armes à feu*, à l’exclusion de l’«arme à feu prohibée» et de l’«arme à feu à autorisation restreinte», définies à l’art. 84 du *Code criminel* du Canada édicté par l’art. 139 de la *Loi sur les armes à feu*;

c) «dispositions relatives à la délivrance des permis» s’entendent des parties de la *Loi sur les armes à feu* relatives au régime de délivrance des permis obligatoires qui est applicable aux propriétaires ou aux possesseurs d’armes à feu ordinaires ou à ceux qui veulent le devenir, et notamment, des art. 5 à 10, 54, 55, 56, 58, 61, 64, 67, 68 et 70, ainsi que des dispositions d’application connexes du *Code criminel* du Canada édictées par l’art. 139 de la *Loi sur les armes à feu*;

d) «dispositions relatives à l’enregistrement» s’entendent des parties de la *Loi sur les armes à feu* relatives au régime d’enregistrement obligatoire des armes à feu ordinaires, et notamment, des art. 13 à 16, 54, 60, 61, 66, 69, 71, 82 à 94, 112 et 115, ainsi que des dispositions d’application connexes du *Code criminel* du Canada édictées par l’art. 139 de la *Loi sur les armes à feu*.

2. (1) Dans la mesure où elles se rapportent aux armes à feu ordinaires, les dispositions relatives à la délivrance des permis empiètent-elles sur la compétence en matière de propriété et de droits civils que le par. 92(13) de la *Loi constitutionnelle de 1867* confère à la législature de l’Alberta?

(2) Si la réponse donnée à la question posée au paragraphe (1) est affirmative, les dispositions relatives à la délivrance des permis excèdent-elles la compétence du Parlement du Canada dans la mesure où elles réglementent la possession ou la propriété des armes à feu ordinaires?

3. (1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

(2) If the answer to the question posed in subsection (1) is “yes”, are the registration provisions ultra vires the Parliament of Canada insofar as they require registration of an ordinary firearm?

Appendix B — The Legislation

This is the version of the *Firearms Act* as assented to, and as referred to the Alberta Court of appeal by Order in Council 461/96. It does not take into account any amendments to the Act.

5. (1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

(a) has been convicted or discharged under section 736 of the *Criminal Code* of

(i) an offence in the commission of which violence against another person was used, threatened or attempted,

(ii) an offence under this Act or Part III of the *Criminal Code*,

(iii) an offence under section 264 of the *Criminal Code* (criminal harassment), or

(iv) an offence relating to the contravention of subsection 39(1) or (2) or 48(1) or (2) of the *Food and Drugs Act* or subsection 4(1) or (2) or 5(1) of the *Narcotic Control Act*;

(b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

3. (1) Les dispositions relatives à l'enregistrement applicables aux armes à feu ordinaires empiètent-elles sur la compétence en matière de propriété et de droits civils que le par. 92(13) de la *Loi constitutionnelle de 1867* confère à la législature de l'Alberta?

(2) Si la réponse donnée à la question posée au paragraphe (1) est affirmative, les dispositions relatives à l'enregistrement excèdent-elles la compétence du Parlement du Canada dans la mesure où elles exigent l'enregistrement des armes à feu ordinaires?

Appendice B — Les dispositions législatives

Le texte qui suit est la version de la *Loi sur les armes à feu* telle que déferée à la Cour d'appel de l'Alberta par le décret 461/96 et ne contient pas les modifications qui ont pu y être apportées depuis.

5. (1) Le permis ne peut être délivré lorsqu'il est souhaitable, pour sa sécurité ou celle d'autrui, que le demandeur n'ait pas en sa possession une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées.

(2) Pour l'application du paragraphe (1), le contrôleur des armes à feu ou, dans le cas d'un renvoi prévu à l'article 74, le juge de la cour provinciale tient compte, pour les cinq ans précédant la date de la demande, des éléments suivants:

a) le demandeur a été déclaré coupable ou absous en application de l'article 736 du *Code criminel* d'une des infractions suivantes:

(i) une infraction commise avec usage, tentative ou menace de violence contre autrui,

(ii) une infraction à la présente loi ou à la partie III du *Code criminel*,

(iii) une infraction à l'article 264 du *Code criminel* (harcèlement criminel),

(iv) une infraction aux paragraphes 39(1) ou (2) ou 48(1) ou (2) de la *Loi sur les aliments et drogues* ou aux paragraphes 4(1) ou (2) ou 5(1) de la *Loi sur les stupéfiants*;

b) qu'il ait été interné ou non, il a été traité, notamment dans un hôpital, un institut pour malades mentaux ou une clinique psychiatrique, pour une maladie mentale caractérisée par la menace, la tentative ou l'usage de violence contre lui-même ou autrui;

(c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

(3) Notwithstanding subsection (2), in determining whether a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

6. (1) A person is eligible to hold a licence only if the person is not prohibited by a prohibition order from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition.

(2) Subsection (1) is subject to any order made under section 113 of the *Criminal Code* (lifting of prohibition order for sustenance or employment).

7. (1) An individual is eligible to hold a licence only if the individual

(a) successfully completes the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(b) except in the case of an individual who is less than eighteen years old, passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(c) successfully completed, before January 1, 1995, a course that the attorney general of the province in which the course was given had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act; or

(d) passed, before January 1, 1995, a test that the attorney general of the province in which the test was administered had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act.

(2) An individual is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual

c) l'historique de son comportement atteste la menace, la tentative ou l'usage de violence contre lui-même ou autrui.

(3) Par dérogation au paragraphe (2), pour l'application du paragraphe (1) au non-résident âgé d'au moins dix-huit ans ayant déposé — ou fait déposer — une demande de permis de possession, pour une période de soixante jours, d'une arme à feu qui n'est pas une arme à feu prohibée ni une arme à feu à autorisation restreinte, le contrôleur des armes à feu ou, dans le cas d'un renvoi prévu à l'article 74, le juge de la cour provinciale peut tenir compte des critères prévus au paragraphe (2), sans toutefois y être obligé.

6. (1) Le permis ne peut être délivré lorsqu'une ordonnance d'interdiction interdit au demandeur la possession d'une arme à feu, d'une arbalète, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées.

(2) Le paragraphe (1) s'applique compte tenu des ordonnances rendues sous le régime de l'article 113 du *Code criminel* (levée de l'interdiction).

7. (1) La délivrance d'un permis à un particulier est subordonnée à la réussite d'un des cours ou examens suivants:

a) le Cours canadien de sécurité dans le maniement des armes à feu, contrôlé par l'examen y afférent, dont est chargé un instructeur désigné par le contrôleur des armes à feu;

b) sauf dans le cas d'un particulier âgé de moins de dix-huit ans, l'examen de contrôle de ce cours que lui fait passer un instructeur désigné par le contrôleur des armes à feu;

c) avant le 1^{er} janvier 1995, un cours agréé — au cours de la période commençant le 1^{er} janvier 1993 et se terminant le 31 décembre 1994 — par le procureur général de la province où il a eu lieu pour l'application de l'article 106 de la loi antérieure;

d) avant le 1^{er} janvier 1995, un examen agréé — au cours de la période commençant le 1^{er} janvier 1993 et se terminant le 31 décembre 1994 — par le procureur général de la province où il a eu lieu pour l'application de l'article 106 de la loi antérieure.

(2) La délivrance d'un permis de possession d'une arme à feu à autorisation restreinte à un particulier est subordonnée à la réussite:

- (a) successfully completes a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and passes any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course; or
- (b) passes a restricted firearms safety test, as administered by an instructor who is designated by a chief firearms officer, that is approved by the federal Minister.
- (3) An individual against whom a prohibition order was made
- (a) is eligible to hold a licence only if the individual has, after the expiration of the prohibition order,
- (i) successfully completed the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and
- (ii) passed the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course; and
- (b) is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual has, after the expiration of the prohibition order,
- (i) successfully completed a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and
- (ii) passed any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course.
- (4) Subsections (1) and (2) do not apply to an individual who
- (a) in the prescribed circumstances, has been certified by a chief firearms officer as meeting the prescribed criteria relating to the safe handling and use of firearms and the laws relating to firearms;
- (b) is less than eighteen years old and requires a firearm to hunt or trap in order to sustain himself or herself or his or her family;
- (c) on the commencement day, possessed one or more firearms and does not require a licence to acquire other firearms;
- (d) requires a licence merely to acquire cross-bows; or
- a) soit d'un cours sur la sécurité des armes à feu à autorisation restreinte, agréé par le ministre fédéral et contrôlé par un examen, dont est chargé un instructeur désigné par le contrôleur des armes à feu;
- b) soit d'un examen sur la sécurité des armes à feu à autorisation restreinte, agréé par le ministre fédéral, que lui fait passer un instructeur désigné par le contrôleur des armes à feu.
- (3) Le particulier qui est sous le coup d'une ordonnance d'interdiction peut devenir titulaire:
- a) d'un permis, s'il réussit, après l'expiration de celle-ci:
- (i) le Cours canadien de sécurité dans le maniement des armes à feu donné par un instructeur désigné par le contrôleur des armes à feu,
- (ii) les examens de contrôle de ce cours que lui fait passer un instructeur désigné par le contrôleur des armes à feu;
- b) d'un permis de possession d'une arme à feu à autorisation restreinte, s'il réussit, après l'expiration de celle-ci:
- (i) un cours sur la sécurité des armes à feu à autorisation restreinte, agréé par le ministre fédéral, donné par un instructeur désigné par le contrôleur des armes à feu,
- (ii) tout examen de contrôle de ce cours que lui fait passer un instructeur désigné par le contrôleur des armes à feu.
- (4) Les paragraphes (1) et (2) ne s'appliquent pas, selon le cas, au particulier:
- a) dont la compétence en matière de législation sur les armes à feu et de règles de sécurité relatives à leur maniement et à leur usage a été certifiée conforme aux exigences réglementaires par le contrôleur des armes à feu dans les cas prévus par règlement;
- b) qui, âgé de moins de dix-huit ans, a besoin d'une arme à feu pour chasser, notamment à la trappe, afin de subvenir à ses besoins ou à ceux de sa famille;
- c) qui, à la date de référence, possédait une ou plusieurs armes à feu et n'a pas besoin d'un permis pour acquérir d'autres armes à feu;
- d) qui n'a besoin d'un permis que pour acquérir une arbalète;

(e) is a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms.

(5) Subsection (3) does not apply to an individual in respect of whom an order is made under section 113 of the *Criminal Code* (lifting of prohibition order for sustenance or employment) and who is exempted by a chief firearms officer from the application of that subsection.

8. (1) An individual who is less than eighteen years old and who is otherwise eligible to hold a licence is not eligible to hold a licence except as provided in this section.

(2) An individual who is less than eighteen years old and who hunts or traps as a way of life is eligible to hold a licence if the individual needs to hunt or trap in order to sustain himself or herself or his or her family.

(3) An individual who is twelve years old or older but less than eighteen years old is eligible to hold a licence authorizing the individual to possess, in accordance with the conditions attached to the licence, a firearm for the purpose of target practice, hunting or instruction in the use of firearms or for the purpose of taking part in an organized competition.

(4) An individual who is less than eighteen years old is not eligible to hold a licence authorizing the individual to possess prohibited firearms or restricted firearms or to acquire firearms or cross-bows.

(5) An individual who is less than eighteen years old is eligible to hold a licence only if a parent or person who has custody of the individual has consented, in writing or in any other manner that is satisfactory to the chief firearms officer, to the issuance of the licence.

9. (1) A business is eligible to hold a licence authorizing a particular activity only if every person who stands in a prescribed relationship to the business is eligible under sections 5 and 6 to hold a licence authorizing that activity or the acquisition of restricted firearms.

(2) A business other than a carrier is eligible to hold a licence only if

e) qui est un non-résident âgé d'au moins dix-huit ans qui a déposé — ou fait déposer — une demande de permis l'autorisant à posséder, pour une période de soixante jours, une arme à feu qui n'est pas une arme à feu prohibée ni une arme à feu à autorisation restreinte.

(5) Le paragraphe (3) ne s'applique pas au particulier qui est sous le coup d'une ordonnance rendue sous le régime de l'article 113 du *Code criminel* (levée de l'interdiction) et qui est exempté de l'application de ce paragraphe par le contrôleur des armes à feu.

8. (1) Le permis ne peut être délivré au particulier âgé de moins de dix-huit ans qui répond par ailleurs aux critères d'admissibilité que dans les cas prévus au présent article.

(2) Le permis peut lui être délivré, quand la chasse, notamment la trappe, constitue son mode de vie, s'il a besoin de chasser ainsi pour subvenir à ses besoins ou à ceux de sa famille.

(3) Peut lui être également délivré, s'il a au moins douze ans, le permis de possession d'une arme à feu, conformément aux conditions précisées, pour se livrer au tir à la cible ou à la chasse, pour s'entraîner au maniement des armes à feu ou pour participer à une compétition de tir organisée.

(4) Ne peut lui être délivré en aucun cas un permis l'autorisant soit à posséder une arme à feu prohibée ou une arme à feu à autorisation restreinte, soit à acquérir une arbalète ou des armes à feu.

(5) Dans tous les cas, le permis ne peut lui être délivré qu'avec le consentement — exprimé par écrit ou de toute autre manière que le contrôleur des armes à feu juge satisfaisante — de ses père ou mère ou de la personne qui en a la garde.

9. (1) Pour qu'un permis autorisant une activité en particulier puisse être délivré à une entreprise, il faut que toutes les personnes liées à l'entreprise de manière réglementaire répondent aux critères d'admissibilité prévus par les articles 5 et 6 relativement à l'activité ou à l'acquisition d'armes à feu à autorisation restreinte.

(2) Le permis peut être délivré à l'entreprise qui n'est pas un transporteur lorsque le contrôleur des armes à feu décide qu'il n'est pas nécessaire pour les particuliers liés à l'entreprise de manière réglementaire, ou pour ceux de ces particuliers qu'il désigne, de répondre aux exigences prévues à l'article 7.

(a) a chief firearms officer determines that no individual who stands in a prescribed relationship to the business need be eligible to hold a licence under section 7; or

(b) the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 are eligible to hold a licence under that section.

(3) A business other than a carrier is eligible to hold a licence only if every employee of the business who, in the course of duties of employment, handles or would handle firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition is the holder of a licence authorizing the holder to acquire restricted firearms.

(4) In subsection (3), “firearm” does not include a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon

(a) from which any shot, bullet or other projectile can be discharged; and

(b) that is capable of causing serious bodily injury or death to a person.

(5) Subsection (1) does not apply in respect of a person who stands in a prescribed relationship to a business where a chief firearms officer determines that, in all the circumstances, the business should not be ineligible to hold a licence merely because of that person’s ineligibility.

(6) Subsection (3) does not apply in respect of an employee of a museum

(a) who, in the course of duties of employment, handles or would handle only firearms that are designed or intended to exactly resemble, or to resemble with near precision, antique firearms, and who has been trained to handle or use such a firearm; or

(b) who is designated, by name, by a provincial minister.

10. Sections 5, 6 and 9 apply in respect of a carrier whose business includes the transportation of firearms,

(3) Pour qu’un permis autorisant une activité en particulier puisse être délivré à une entreprise — qui n’est pas un transporteur —, il faut que chaque employé de cette entreprise qui manie ou est susceptible de manier des armes à feu, des armes prohibées, des armes à autorisation restreinte, des dispositifs prohibés ou des munitions prohibées dans le cadre de ses fonctions soit titulaire d’un permis l’autorisant à acquérir des armes à feu à autorisation restreinte.

(4) Pour l’application du paragraphe (3), «arme à feu» exclut une arme partiellement fabriquée pourvue d’un canon qui, dans son état incomplet, n’est pas une arme pourvue d’un canon susceptible de tirer du plomb, des balles ou tout autre projectile et n’est pas capable d’infliger des lésions corporelles graves ou la mort à une personne.

(5) Le paragraphe (1) ne s’applique pas aux personnes liées à une entreprise de manière réglementaire lorsque le contrôleur des armes à feu décide qu’en tout état de cause l’entreprise peut être titulaire du permis même si l’une d’entre elles ne peut l’être.

(6) Le paragraphe (3) ne s’applique pas aux employés d’un musée dans chacun des cas suivants:

a) ils manient ou sont susceptibles de manier, dans le cadre de leurs fonctions, seulement des armes à feu conçues de façon à avoir l’apparence exacte d’une arme à feu historique — ou à la reproduire le plus fidèlement possible — ou auxquelles on a voulu donner cette apparence et ont reçu la formation pour le maniement et l’usage de telles armes;

b) ils sont nominalement désignés par le ministre provincial.

10. Les articles 5, 6 et 9 s’appliquent aux transporteurs se livrant à des activités, notamment de transport

prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition from one province to any other province, or beyond the limits of a province, as if each reference in those sections to a chief firearms officer were a reference to the Registrar.

13. A person is not eligible to hold a registration certificate for a firearm unless the person holds a licence authorizing the person to possess that kind of firearm.

14. A registration certificate may be issued only for a firearm

(a) that bears a serial number sufficient to distinguish it from other firearms; or

(b) that is described in the prescribed manner.

15. A registration certificate may not be issued for a firearm that is owned by Her Majesty in right of Canada or a province or by a police force.

16. (1) A registration certificate for a firearm may be issued to only one person.

(2) Subsection (1) does not apply in the case of a firearm for which a registration certificate referred to in section 127 was issued to more than one person.

54. (1) A licence, registration certificate or authorization may be issued only on application made in the prescribed form containing the prescribed information and accompanied by payment of the prescribed fees.

(2) An application for a licence, registration certificate or authorization must be made to

(a) a chief firearms officer, in the case of a licence, an authorization to carry or an authorization to transport; or

(b) the Registrar, in the case of a registration certificate, an authorization to export or an authorization to import.

(3) An individual who, on the commencement day, possesses one or more restricted firearms or one or more handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) must specify, in any application for a licence authorizing the individual to possess restricted firearms or handguns that are so referred to,

(a) except in the case of a firearm described in paragraph (b), for which purpose described in section 28 the individual wishes to continue to possess restricted firearms or handguns that are so referred to; and

d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés ou de munitions prohibées reliant une province et une ou plusieurs autres provinces, ou débordant les limites d'une province, et, à cette fin, la mention du contrôleur des armes à feu vaut mention du directeur.

13. Le certificat d'enregistrement d'une arme à feu ne peut être délivré qu'au titulaire du permis autorisant la possession d'une telle arme à feu.

14. Le certificat d'enregistrement ne peut être délivré que pour une arme à feu qui:

a) soit porte un numéro de série qui permet de la distinguer des autres armes à feu;

b) soit encore est décrite de manière réglementaire.

15. Il n'est pas délivré de certificat d'enregistrement pour les armes à feu qui appartiennent à Sa Majesté du chef du Canada ou d'une province ou aux forces policières.

16. (1) Le certificat d'enregistrement ne peut être délivré qu'à une seule personne.

(2) Le paragraphe (1) ne s'applique pas à l'arme à feu pour laquelle le certificat d'enregistrement visé à l'article 127 a été délivré à plus d'une personne.

54. (1) La délivrance des permis, des autorisations et des certificats d'enregistrement est subordonnée au dépôt d'une demande en la forme et avec les renseignements réglementaires et à l'acquittement des droits réglementaires.

(2) La demande est adressée:

a) au contrôleur des armes à feu, dans le cas des permis et des autorisations de port et de transport;

b) au directeur, dans le cas des certificats d'enregistrement et des autorisations d'exportation et d'importation.

(3) Le particulier qui possède une ou plusieurs armes à feu à autorisation restreinte ou armes de poing visées au paragraphe 12(6) (armes de poing: 14 février 1995) à la date de référence est tenu de préciser dans toute demande de permis correspondante:

a) sauf s'il s'agit d'une arme à feu visée à l'alinéa b), pour laquelle des fins, prévues à l'article 28, il désire continuer cette possession;

(b) for which of those firearms was a registration certificate under the former Act issued because they were relics, were of value as a curiosity or rarity or were valued as a memento, remembrance or souvenir.

55. (1) A chief firearms officer or the Registrar may require an applicant for a licence or authorization to submit such information, in addition to that included in the application, as may reasonably be regarded as relevant for the purpose of determining whether the applicant is eligible to hold the licence or authorization.

(2) Without restricting the scope of the inquiries that may be made with respect to an application for a licence, a chief firearms officer may conduct an investigation of the applicant, which may consist of interviews with neighbours, community workers, social workers, individuals who work or live with the applicant, spouse, former spouse, dependants or whomever in the opinion of the chief firearms officer may provide information pertaining to whether the applicant is eligible under section 5 to hold a licence.

56. (1) A chief firearms officer is responsible for issuing licences.

(2) Only one licence may be issued to any one individual.

(3) A business other than a carrier requires a separate licence for each place where the business is carried on.

58. (1) A chief firearms officer who issues a licence, an authorization to carry or an authorization to transport may attach any reasonable condition to it that the chief firearms officer considers desirable in the particular circumstances and in the interests of the safety of the holder or any other person.

(2) Before attaching a condition to a licence that is to be issued to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer must consult with a parent or person who has custody of the individual.

(3) Before issuing a licence to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer shall have a parent or person who has custody of the individual sign the licence, including any conditions attached to it.

b) pour lesquelles de ces armes à feu a été délivré le certificat d'enregistrement prévu par la loi antérieure parce qu'elles sont des antiquités ou avaient une valeur de curiosité, de rareté, de commémoration ou de simple souvenir.

55. (1) Le contrôleur des armes à feu ou le directeur peut exiger du demandeur d'un permis ou d'une autorisation tout renseignement supplémentaire normalement utile pour lui permettre de déterminer si celui-ci répond aux critères d'admissibilité au permis ou à l'autorisation.

(2) Sans que le présent paragraphe ait pour effet de restreindre le champ des vérifications pouvant être menées sur une demande de permis, le contrôleur des armes à feu peut procéder à une enquête pour déterminer si le demandeur peut être titulaire du permis prévu à l'article 5 et, à cette fin, interroger des voisins de celui-ci, des travailleurs communautaires, des travailleurs sociaux, toute personne qui travaille ou habite avec lui, son conjoint, un ex-conjoint, des membres de sa famille ou toute personne qu'il juge susceptible de lui communiquer des renseignements pertinents.

56. (1) Les permis sont délivrés par le contrôleur des armes à feu.

(2) Il ne peut être délivré qu'un seul permis à un particulier.

(3) Un permis est délivré pour chaque établissement ou l'entreprise — qui n'est pas un transporteur — exerce ses activités.

58. (1) Le contrôleur des armes à feu peut assortir les permis et les autorisations de port et de transport des conditions qu'il estime souhaitables dans les circonstances et en vue de la sécurité de leur titulaire ou d'autrui.

(2) Avant d'y procéder dans le cas d'un particulier âgé de moins de dix-huit ans qui n'est pas admissible au permis prévu au paragraphe 8(2) (chasse de subsistance par les mineurs), il consulte ses père ou mère ou la personne qui en a la garde.

(3) Avant de délivrer un permis au particulier visé au paragraphe (2), le contrôleur des armes à feu veille à ce que le père ou la mère ou la personne qui en a la garde ait connaissance des conditions dont est assorti le permis en exigeant leur signature sur celui-ci.

60. The Registrar is responsible for issuing registration certificates for firearms and assigning firearms identification numbers to them and for issuing authorizations to export and authorizations to import.

61. (1) A licence or registration certificate must be in the prescribed form and include the prescribed information and any conditions attached to it.

(2) An authorization to carry, authorization to transport, authorization to export or authorization to import may be in the prescribed form and include the prescribed information, including any conditions attached to it.

(3) An authorization to carry or authorization to transport may take the form of a condition attached to a licence.

(4) A licence that is issued to a business must specify each particular activity that the licence authorizes in relation to prohibited firearms, restricted firearms, firearms that are neither prohibited firearms nor restricted firearms, cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or prohibited ammunition.

64. (1) A licence that is issued to an individual who is eighteen years old or older expires on the earlier of

(a) five years after the birthday of the holder next following the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

(2) A licence that is issued to an individual who is less than eighteen years old expires on the earlier of

(a) the day on which the holder attains the age of eighteen years, and

(b) the expiration of the period for which it is expressed to be issued.

(3) A licence that is issued to a business other than a museum expires on the earlier of

(a) one year after the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

60. Le certificat d'enregistrement d'une arme à feu et le numéro d'enregistrement qui est attribué à celle-ci, de même que les autorisations d'exportation et d'importation, sont délivrés par le directeur.

61. (1) Les permis et les certificats d'enregistrement énoncent les conditions dont ils sont assortis; ils sont délivrés en la forme et énoncent les autres renseignements réglementaires.

(2) Les autorisations de port, de transport, d'exportation ou d'importation peuvent être délivrées en la forme réglementaire et énoncer les renseignements réglementaires, notamment les conditions dont elles sont assorties.

(3) Les autorisations de port ou de transport peuvent aussi prendre la forme d'une condition d'un permis.

(4) Les permis délivrés aux entreprises précisent toutes les activités particulières autorisées touchant aux armes à feu — notamment aux armes à feu prohibées et aux armes à feu à autorisation restreinte — aux arbalètes, aux armes prohibées, aux armes à autorisation restreinte, aux dispositifs prohibés, aux munitions ou aux munitions prohibées.

64. (1) Les permis délivrés aux particuliers âgés d'au moins dix-huit ans sont valides pour la période mentionnée, qui ne peut dépasser cinq ans après le premier anniversaire de naissance du titulaire suivant la date de délivrance.

(2) Les permis délivrés aux particuliers âgés de moins de dix-huit ans sont valides pour la période mentionnée, qui ne peut dépasser la date où le titulaire atteint l'âge de dix-huit ans.

(3) Les permis délivrés aux entreprises — autres que les musées — sont valides pour la période mentionnée, qui ne peut dépasser un an.

(4) A licence that is issued to a museum expires on the earlier of

- (a) three years after the day on which it is issued, and
- (b) the expiration of the period for which it is expressed to be issued.

66. A registration certificate for a firearm expires where

- (a) the holder of the registration certificate ceases to be the owner of the firearm; or
- (b) the firearm ceases to be a firearm.

67. (1) A chief firearms officer may renew a licence, authorization to carry or authorization to transport in the same manner and in the same circumstances in which a licence, authorization to carry or authorization to transport may be issued.

(2) On renewing a licence authorizing an individual to possess restricted firearms or handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns), a chief firearms officer shall decide whether any of those firearms or handguns that the individual possesses are being used for

- (a) the purpose described in section 28 for which the individual acquired the restricted firearms or handguns; or
- (b) in the case of any of those firearms or handguns that were possessed by the individual on the commencement day, the purpose described in that section that was specified by the individual in the licence application.

(3) A chief firearms officer who decides that any restricted firearms or any handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) that are possessed by an individual are not being used for that purpose shall

- (a) give notice of that decision in the prescribed form to the individual; and
- (b) inform the Registrar of that decision.

(4) Subsections (2) and (3) do not apply to a firearm

(4) Les permis délivrés aux musées sont valides pour la période mentionnée, qui ne peut dépasser trois ans suivant la date de délivrance.

66. Le certificat d'enregistrement d'une arme à feu est valide tant que le titulaire du certificat demeure propriétaire de l'arme à feu ou que celle-ci demeure une arme à feu.

67. (1) Le contrôleur des armes à feu peut proroger les permis et les autorisations de port et de transport selon les modalités et les circonstances de leur délivrance.

(2) En cas de prorogation du permis de possession par un particulier d'une arme à feu à autorisation restreinte ou une arme de poing visée au paragraphe 12(6) (arme de poing: 14 février 1995), il détermine si celle-ci est utilisée conformément aux fins de l'acquisition prévues à l'article 28 ou, si elle était en sa possession à la date de référence, aux fins — conformes à celles prévues à cet article — précisées par le particulier dans la demande de permis.

(3) S'il détermine qu'une arme à feu à autorisation restreinte ou une arme de poing visée au paragraphe 12(6) (arme de poing: 14 février 1995) en la possession d'un particulier n'est pas utilisée aux fins indiquées, il notifie sa décision à celui-ci en la forme réglementaire et en informe le directeur.

(4) Les paragraphes (2) et (3) ne s'appliquent pas à une arme à feu:

(a) that is a relic, is of value as a curiosity or rarity or is valued as a memento, remembrance or souvenir;

(b) that was specified in the licence application as being a firearm for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir;

(c) for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir; and

(d) in respect of which an individual, on the commencement day, held a registration certificate under the former Act.

(5) A notice given under paragraph (3)(a) must include the reasons for the decision and be accompanied by a copy of sections 74 to 81.

68. A chief firearms officer shall refuse to issue a licence if the applicant is not eligible to hold one and may refuse to issue an authorization to carry or authorization to transport for any good and sufficient reason.

69. The Registrar may refuse to issue a registration certificate, authorization to export or authorization to import for any good and sufficient reason including, in the case of an application for a registration certificate, where the applicant is not eligible to hold a registration certificate.

70. (1) A chief firearms officer who issues a licence, authorization to carry or authorization to transport may revoke it for any good and sufficient reason including, without limiting the generality of the foregoing,

(a) where the holder of the licence or authorization

(i) is no longer or never was eligible to hold the licence or authorization,

(ii) contravenes any condition attached to the licence or authorization, or

(iii) has been convicted or discharged under section 736 of the *Criminal Code* of an offence referred to in paragraph 5(2)(a); or

(b) where, in the case of a business, a person who stands in a prescribed relationship to the business has

a) ayant une valeur de curiosité, de rareté, de commémoration ou de simple souvenir;

b) pour laquelle il est précisé dans la demande de permis que le certificat d'enregistrement prévu par la loi antérieure a été délivré parce qu'elle avait une telle valeur;

c) pour laquelle a été délivré le certificat d'enregistrement prévu par la loi antérieure parce qu'elle avait une telle valeur;

d) pour laquelle un particulier était titulaire, à la date de référence, d'un certificat d'enregistrement délivré en application de la loi antérieure.

(5) La notification prévue au paragraphe (3) comporte les motifs de la décision ainsi que le texte des articles 74 à 81.

68. Le contrôleur des armes à feu ne délivre pas de permis au demandeur qui ne répond pas aux critères d'admissibilité et peut refuser la délivrance des autorisations de port ou de transport pour toute raison valable.

69. Le directeur peut refuser la délivrance du certificat d'enregistrement et des autorisations d'exportation ou d'importation pour toute raison valable, notamment, dans le cas du certificat d'enregistrement, lorsque le demandeur n'y est pas admissible.

70. (1) Le contrôleur des armes à feu peut révoquer un permis ou une autorisation de port ou de transport pour toute raison valable, notamment parce que:

a) le titulaire soit ne peut plus ou n'a jamais pu être titulaire du permis ou de l'autorisation, soit enfreint une condition du permis ou de l'autorisation, soit encore a été déclaré coupable ou absous en application de l'article 736 du *Code criminel* d'une infraction visée à l'alinéa 5(2)a);

b) dans le cas d'une entreprise, une personne liée de manière réglementaire à celle-ci a été déclarée coupable;

been convicted or discharged under section 736 of the *Criminal Code* of any such offence.

(2) The Registrar may revoke an authorization to export or authorization to import for any good and sufficient reason.

71. (1) The Registrar

(a) may revoke a registration certificate for any good and sufficient reason; and

(b) shall revoke a registration certificate for a firearm held by an individual where the Registrar is informed by a chief firearms officer under section 67 that the firearm is not being used for

(i) the purpose for which the individual acquired it, or

(ii) in the case of a firearm possessed by the individual on the commencement day, the purpose specified by the individual in the licence application.

(2) A registration certificate for a prohibited firearm referred to in subsection 12(3) (pre-August 1, 1992 converted automatic firearms) is automatically revoked on the change of any alteration in the prohibited firearm that was described in the application for the registration certificate.

82. The Commissioner of the Royal Canadian Mounted Police shall, after consulting with the federal Minister and the Solicitor General of Canada, appoint an individual as the Registrar of Firearms.

83. (1) The Registrar shall establish and maintain a registry, to be known as the Canadian Firearms Registry, in which shall be kept a record of

(a) every licence, registration certificate and authorization that is issued or revoked by the Registrar;

(b) every application for a licence, registration certificate or authorization that is refused by the Registrar;

(c) every transfer of a firearm of which the Registrar is informed under section 26 or 27;

ble ou absoute en application de l'article 736 du *Code criminel* d'une telle infraction.

(2) Le directeur peut révoquer les autorisations d'exportation ou d'importation pour toute raison valable.

71. (1) Le directeur peut révoquer le certificat d'enregistrement pour toute raison valable; il est tenu de le faire à l'égard d'une arme à feu en la possession d'un particulier dans le cas où le contrôleur des armes à feu l'informe, en application de l'article 67, que l'arme à feu n'est pas utilisée conformément aux fins de l'acquisition ou, en cas de possession d'une telle arme à feu à la date de référence, aux fins précisées par le particulier dans la demande de permis.

(2) Tout changement aux modifications décrites sur la demande de certificat d'enregistrement d'une arme à feu prohibée visée au paragraphe 12(3) (armes automatiques modifiées: 1^{er} août 1992) entraîne la révocation de plein droit du certificat.

82. Le directeur de l'enregistrement des armes à feu est nommé par le commissaire de la Gendarmerie royale du Canada, après consultation du ministre fédéral et du solliciteur général du Canada.

83. (1) Le directeur constitue et tient un registre, dénommé le Registre canadien des armes à feu, où sont notés:

a) les permis, certificats d'enregistrement ou autorisations qu'il délivre ou révoque;

b) les demandes de permis, de certificat d'enregistrement ou d'autorisation qu'il refuse;

c) les cessions d'armes à feu qui lui sont notifiées en vertu des articles 26 ou 27;

(d) every exportation from or importation into Canada of a firearm of which the Registrar is informed under section 42 or 50;

(e) every loss, finding, theft or destruction of a firearm of which the Registrar is informed under section 88; and

(f) such other matters as may be prescribed.

(2) The Registrar is responsible for the day-to-day operation of the Canadian Firearms Registry.

84. The Registrar may destroy records kept in the Canadian Firearms Registry at such times and in such circumstances as may be prescribed.

85. (1) The Registrar shall establish and maintain a record of

(a) firearms acquired or possessed by the following persons and used by them in the course of their duties or for the purposes of their employment, namely,

(i) peace officers,

(ii) persons training to become police officers or peace officers under the control and supervision of

(A) a police force, or

(B) a police academy or similar institution designated by the federal Minister or the lieutenant governor in council of a province,

(iii) persons or members of a class of persons employed in the public service of Canada or by the government of a province or municipality who are prescribed by the regulations made by the Governor in Council under Part III of the *Criminal Code* to be public officers, and

(iv) chief firearms officers and firearms officers; and

(b) firearms acquired or possessed by individuals on behalf of, and under the authority of, a police force or a department of the Government of Canada or of a province.

(2) A person referred to in subsection (1) who acquires or transfers a firearm shall have the Registrar informed of the acquisition or transfer.

(3) The Registrar may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

d) les exportations et les importations d'armes à feu qui lui sont notifiées en vertu des articles 42 ou 50;

e) les pertes, vols ou destructions d'armes à feu, de même que les armes à feu trouvées, dont il est informé en application de l'article 88;

f) tout autre renseignement réglementaire.

(2) Le directeur est chargé du fonctionnement du Registre canadien des armes à feu.

84. Le directeur peut détruire les fichiers versés au Registre canadien des armes à feu selon les modalités de temps et dans les situations prévues par règlement.

85. (1) Le directeur établit un registre des armes à feu:

a) acquises ou détenues par les personnes précisées ci-après et utilisées par celles-ci dans le cadre de leurs fonctions:

(i) les agents de la paix,

(ii) les personnes qui reçoivent la formation pour devenir agents de la paix ou officiers de police sous l'autorité et la surveillance:

(A) soit d'une force policière,

(B) soit d'une école de police ou d'une autre institution semblable désignées par le ministre fédéral ou le lieutenant-gouverneur en conseil d'une province,

(iii) les personnes ou catégories de personnes qui sont des employés des administrations publiques fédérales, provinciales ou municipales et qui sont désignées comme fonctionnaires publics par les règlements d'application de la partie III du *Code criminel* pris par le gouverneur en conseil,

(iv) les contrôleurs des armes à feu et les préposés aux armes à feu;

b) acquises ou détenues par des particuliers sous les ordres et pour le compte des forces policières ou d'un ministre fédéral ou provincial;

(2) Toute personne visée au paragraphe (1) notifie au directeur toute acquisition ou tout transfert d'armes à feu qu'elle effectue.

(3) Le directeur peut détruire les fichiers du registre selon les modalités de temps et dans les situations prévues par règlement.

86. The records kept in the registry maintained pursuant to section 114 of the former Act that relate to registration certificates shall be transferred to the Registrar.

87. (1) A chief firearms officer shall keep a record of

- (a) every licence and authorization that is issued or revoked by the chief firearms officer;
- (b) every application for a licence or authorization that is refused by the chief firearms officer;
- (c) every prohibition order of which the chief firearms officer is informed under section 89; and
- (d) such other matters as may be prescribed.

(2) A chief firearms officer may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

88. A chief firearms officer to whom the loss, finding, theft or destruction of a firearm is reported shall have the Registrar informed without delay of the loss, finding, theft or destruction.

89. Every court, judge or justice that makes, varies or revokes a prohibition order shall have a chief firearms officer informed without delay of the prohibition order or its variation or revocation.

90. The Registrar has a right of access to records kept by a chief firearms officer under section 87 and a chief firearms officer has a right of access to records kept by the Registrar under section 83 or 85 and to records kept by other chief firearms officers under section 87.

91. (1) Subject to the regulations, notices and documents that are sent to or issued by the Registrar pursuant to this or any other Act of Parliament may be sent or issued in electronic or other form in any manner specified by the Registrar.

(2) For the purposes of this Act and Part III of the *Criminal Code*, a notice or document that is sent or issued in accordance with subsection (1) is deemed to have been received at the time and date provided by the regulations.

92. (1) Records required by section 83 or 85 to be kept by the Registrar may

86. Les fichiers figurant dans le registre tenu en application de l'article 114 de la loi antérieure en ce qui concerne les certificats d'enregistrement sont transférés au directeur.

87. (1) Le contrôleur des armes à feu tient un registre où sont notés:

- a) les permis et autorisations qu'il délivre ou révoque;
- b) les permis et les autorisations qu'il refuse de délivrer;
- c) les ordonnances d'interdiction dont il est informé aux termes de l'article 89;
- d) tout autre renseignement réglementaire.

(2) Le contrôleur des armes à feu peut détruire les fichiers selon les modalités de temps et dans les situations prévues par règlement.

88. Le contrôleur des armes à feu qui est informé des pertes, vols ou destructions d'armes à feu, de même que des armes à feu trouvées, les fait notifier sans délai au directeur.

89. Tout tribunal, juge ou juge de paix qui rend, modifie ou révoque une ordonnance d'interdiction avise sans délai le contrôleur des armes à feu de ce fait.

90. Le directeur et le contrôleur des armes à feu ont réciproquement accès aux registres qu'ils tiennent respectivement aux termes de l'article 87 et aux termes des articles 83 ou 85; le contrôleur des armes à feu a également accès aux registres tenus par les autres contrôleurs des armes à feu aux termes de l'article 87.

91. (1) Sous réserve des règlements, les avis ou documents que le directeur envoie ou reçoit aux termes de la présente loi ou de toute autre loi fédérale peuvent être transmis sur support électronique ou autre de la manière précisée par lui.

(2) Pour l'application de la présente loi et de la partie III du *Code criminel*, les avis et documents ainsi transmis sont réputés avoir été reçus à la date et à l'heure réglementaires.

92. (1) Les registres tenus par le directeur aux termes des articles 83 ou 85 peuvent être reliés, ou conservés soit sous forme de feuilles mobiles ou de films, soit à l'aide de tout procédé mécanique ou électronique de traitement des données ou de mise en mémoire de l'information capable de restituer en clair, dans un délai raisonnable, les renseignements demandés.

(a) be in bound or loose-leaf form or in photographic film form; or

(b) be entered or recorded by any system of mechanical or electronic data processing or by any other information storage device that is capable of reproducing any required information in intelligible written or printed form within a reasonable time.

(2) Subject to the regulations, a document or information received by the Registrar under this Act in electronic or other form may be entered or recorded by any information storage device, including any system of mechanical or electronic data processing, that is capable of reproducing stored documents or information in intelligible written or printed form within a reasonable time.

(3) Where the Registrar maintains a record of a document otherwise than in written or printed form, an extract from that record that is certified by the Registrar has the same probative value as the document would have had if it had been proved in the ordinary way.

93. (1) The Registrar shall, as soon as possible after the end of each calendar year and at such other times as the Solicitor General of Canada may, in writing, request, submit to the Solicitor General a report, in such form and including such information as the Solicitor General may direct, with regard to the administration of this Act.

(2) The Solicitor General of Canada shall have each report laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

94. A chief firearms officer shall submit the prescribed information with regard to the administration of this Act at the prescribed time and in the prescribed form for the purpose of enabling the Registrar to compile the reports referred to in section 93.

112. (1) Subject to subsections (2) and (3), every person commits an offence who, not having previously committed an offence under this subsection or subsection 91(1) or 92(1) of the *Criminal Code*, possesses a firearm that is neither a prohibited firearm nor a restricted firearm without being the holder of a registration certificate for the firearm.

(2) Subsection (1) does not apply to

(a) a person who possesses a firearm while the person is under the direct and immediate supervision of a

(2) Sous réserve des règlements, les documents ou renseignements reçus par le directeur en application de la présente loi sur support électronique ou autre peuvent être mis en mémoire par tout procédé, notamment mécanographique ou informatique, capable de les restituer en clair dans un délai raisonnable.

(3) En cas de conservation de documents par le directeur sous une forme non écrite, les extraits qui en sont certifiés conformes par celui-ci ont, sauf preuve contraire, la même force probante que des originaux écrits.

93. (1) Le directeur, dès que possible au début de chaque année civile et chaque fois que le solliciteur général du Canada lui en fait la demande par écrit, transmet à celui-ci un rapport sur l'application de la présente loi rédigé en la forme et contenant les renseignements qu'il exige.

(2) Le solliciteur général du Canada fait déposer chacun de ces rapports devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant sa réception.

94. Le contrôleur des armes à feu communique au directeur les renseignements réglementaires sur l'application de la présente loi selon les modalités de temps et de forme réglementaires afin de permettre à celui-ci d'établir les rapports visés à l'article 93.

112. (1) Sous réserve des paragraphes (2) et (3), commet une infraction quiconque, n'ayant pas antérieurement commis une infraction prévue au présent paragraphe ou aux paragraphes 91(1) ou 92(1) du *Code criminel*, possède une arme à feu — qui n'est pas une arme à feu prohibée ni une arme à feu à autorisation restreinte — sans être titulaire d'un certificat d'enregistrement pour cette arme à feu.

(2) Le paragraphe (1) ne s'applique pas:

a) au possesseur d'une arme à feu qui est sous la surveillance directe d'une personne pouvant légalement

person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it;

(b) a person who comes into possession of a firearm by operation of law and who, within a reasonable period after acquiring possession of it, lawfully disposes of it or obtains a registration certificate for it; or

(c) a person who possesses a firearm and who is not the holder of a registration certificate for the firearm if the person

(i) has borrowed the firearm,

(ii) is the holder of a licence under which the person may possess it, and

(iii) is in possession of the firearm to hunt or trap in order to sustain himself or herself or his or her family.

(3) Every person who, at any particular time between the commencement day and the later of January 1, 1998 and such other date as is prescribed, possesses a firearm that, as of that particular time, is neither a prohibited firearm nor a restricted firearm is deemed for the purposes of subsection (1) to be, until January 1, 2003 or such other earlier date as is prescribed, the holder of a registration certificate for the firearm.

(4) Where, in any proceedings for an offence under this section, any question arises as to whether a person is the holder of a registration certificate, the onus is on the defendant to prove that the person is the holder of the registration certificate.

115. Every person who commits an offence under section 112, 113 or 114 is guilty of an offence punishable on summary conviction.

Appeal dismissed.

Solicitors for the appellant: McLennan Ross, Edmonton.

Solicitor for the respondent: The Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

l'avoir en sa possession, et qui s'en sert de la manière dont celle-ci peut légalement s'en servir;

b) à la personne qui entre en possession d'une arme à feu par effet de la loi et qui, dans un délai raisonnable, s'en défait légalement ou obtient le certificat d'enregistrement pour cette arme;

c) au possesseur d'une arme à feu qui, sans être titulaire du certificat d'enregistrement y afférent, à la fois:

(i) l'a empruntée,

(ii) est titulaire d'un permis en autorisant la possession,

(iii) l'a en sa possession pour chasser, notamment à la trappe, afin de subvenir à ses besoins ou à ceux de sa famille.

(3) Quiconque, à tout moment entre la date de référence et le 1^{er} janvier 1998 — ou toute autre date fixée par règlement — possède une arme à feu qui, à ce moment, n'est pas une arme à feu prohibée ni une arme à feu à autorisation restreinte est réputé pour l'application du paragraphe (1) être, jusqu'au 1^{er} janvier 2003 ou jusqu'à toute autre date antérieure fixée par règlement, titulaire du certificat d'enregistrement de cette arme à feu.

(4) Dans toute poursuite intentée dans le cadre du présent article, c'est au défendeur qu'il incombe éventuellement de prouver qu'une personne est titulaire d'un certificat d'enregistrement.

115. Quiconque contrevient aux articles 112, 113 ou 114 est coupable d'une infraction punissable par procédure sommaire.

Pourvoi rejeté.

Procureurs de l'appellant: McLennan Ross, Edmonton.

Procureur de l'intimé: Le sous-procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Solicitor for the intervener the Attorney General of Nova Scotia: The Department of Justice, Halifax.

Solicitor for the intervener the Attorney General for New Brunswick: The Office of the Attorney General, Fredericton.

Solicitors for the intervener the Attorney General of Manitoba: Ladner Downs, Vancouver.

Solicitor for the intervener the Attorney General for Saskatchewan: The Deputy Attorney General, Regina.

Solicitor for the intervener the Government of the Northwest Territories: The Department of Justice, Yellowknife.

Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: The Department of Justice, Whitehorse.

Solicitor for the intervener the Federation of Saskatchewan Indian Nations: The Federation of Saskatchewan Indian Nations, Saskatoon.

Solicitors for the intervener the Coalition of Responsible Firearm Owners and Sportsmen: Dallas K. Miller Law Office, Medicine Hat.

Solicitors for the intervener the Law-Abiding Unregistered Firearms Association: Neufeld Law Office, Red Deer.

Solicitors for the intervener the Shooting Federation of Canada: Shaw McLennan & Ironside, Collingwood, Ontario.

Solicitors for the intervener the Association pour la santé publique du Québec inc.: Brochet Dussault Larochelle, Sainte-Foy.

Solicitors for the intervener the Alberta Council of Women's Shelters: Pringle & Associates, Edmonton.

Solicitors for the interveners CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse: Le ministère de la Justice, Halifax.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick: Le Cabinet du procureur général, Fredericton.

Procureurs de l'intervenant le procureur général du Manitoba: Ladner Downs, Vancouver.

Procureur de l'intervenant le procureur général de la Saskatchewan: Le sous-procureur général, Regina.

Procureur de l'intervenant le gouvernement des Territoires du Nord-Ouest: Le ministère de la Justice, Yellowknife.

Procureur de l'intervenant le ministre de la Justice du gouvernement du Territoire du Yukon: Le ministère de la Justice, Whitehorse.

Procureur de l'intervenante la Federation of Saskatchewan Indian Nations: La Federation of Saskatchewan Indian Nations, Saskatoon.

Procureurs de l'intervenante la Coalition of Responsible Firearm Owners and Sportsmen: Dallas K. Miller Law Office, Medicine Hat.

Procureurs de l'intervenante la Law-Abiding Unregistered Firearms Association: Neufeld Law Office, Red Deer.

Procureurs de l'intervenante la Fédération de tir du Canada: Shaw McLennan & Ironside, Collingwood, Ontario.

Procureurs de l'intervenante l'Association pour la santé publique du Québec inc.: Brochet Dussault Larochelle, Sainte-Foy.

Procureurs de l'intervenant l'Alberta Council of Women's Shelters: Pringle & Associates, Edmonton.

Procureurs des intervenants CAVEAT, la Fondation des victimes du 6 décembre contre la violence, l'Association canadienne pour la santé des adoles-

Health and the Canadian Pediatric Society: Fasken Campbell Godfrey, Toronto.

Solicitors for the interveners the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg: Ruby & Edwardh, Toronto.

cents et la Société canadienne de pédiatrie: Fasken Campbell Godfrey, Toronto.

Procureurs des intervenants la Coalition for Gun Control, l'Association canadienne des chefs de police, la Corporation de la cité de Toronto, la Ville de Montréal et la Ville de Winnipeg: Ruby & Edwardh, Toronto.

A-292-20
2022 FCA 63A-292-20
2022 CAF 63**Lucien Rémillard** (*Appellant*)

v.

Minister of National Revenue (*Respondent*)**INDEXED AS: RÉMILLARD v. CANADA (NATIONAL REVENUE)**

Federal Court of Appeal, de Montigny, Gleason and Locke JJ.A.—By videoconference, December 13, 2021; Ottawa, April 8, 2022.

Practice — Applications — Material in possession of tribunal — Appeal from Federal Court decision concluding certified records becoming accessible to public upon transmission to Federal Court Registry, transmission of such record not constituting seizure within meaning of Canadian Charter of Rights and Freedoms, s. 8 — Appellant retired businessman living in Barbados — Appellant claims to have become non-resident of Canada for purposes of Income Tax Act (Act) — Since 2015, respondent auditing appellant's non-resident status; during audit, Canada Revenue Agency (CRA) made requests for administrative assistance from certain countries — Appellant challenged requests by filing application for judicial review — As part of application for judicial review, appellant relied on Federal Courts Rules, r. 317 to request disclosure of documents, information (Information) concerning appellant obtained or created by CRA — In response to request for disclosure, appellant learned Information accessible to public — Appellant then filed ex parte motion for interim order of confidentiality, publication ban for specific period — Federal Court quickly issued interim order, ordering to treat Information as confidential under r. 151, not to publish contents of Information — In accordance with interim order, appellant filed motion for order of confidentiality, subject of dispute before Court — Whether Federal Court correct in concluding certified records become public when transmitted to Court Registry under r. 318 — Rules 317, 318 governing transmission to Court Registry of record compiled by administrative decision maker — Rules 2, 23, 26 specifying certain procedures for compiling, consulting Court's files — Paragraph 23(2)(c) providing Administrator shall keep annex to each Court file — Certified record from tribunal transmitted to Registry under r. 318 clearly falling into subcategory of annex — Appellant's submission stating annexes (thus certified record) not formally part of Court file erroneous — Definition of "Court file" in r. 2 making no such distinction; therefore, annex must be considered part of Court file — Rules 151,

Please see in particular para. 71

c.

Ministre du revenu national (*intimé*)**RÉPERTOIRE : RÉMILLARD c. CANADA (REVENU NATIONAL)**

Cour d'appel fédérale, juges de Montigny, Gleason et Locke, J.C.A.—Par vidéoconférence, 13 décembre 2021; Ottawa, 8 avril 2022.

Pratique — Demandes — Obtention de documents en la possession d'un office fédéral — Appel à l'encontre d'une décision rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d'un tel dossier ne constituait pas une saisie au sens de l'article 8 de la Charte canadienne des droits et libertés — L'appellant est un homme d'affaires retraité vivant à la Barbade — Il dit être ainsi devenu un non-résident du Canada aux fins de la Loi de l'impôt sur le revenu (Loi) — L'intimé vérifie depuis 2015 le statut de non-résident de l'appellant, et dans le cadre de cette vérification, l'Agence du revenu du Canada (l'ARC) a fait des demandes d'assistance administrative auprès de certains pays — L'appellant a contesté ces demandes en déposant une demande de contrôle judiciaire — Dans le cadre de sa demande de contrôle judiciaire, l'appellant s'est prévalu de la règle 317 des Règles des Cours fédérales pour demander la divulgation des documents et informations (les Renseignements) le concernant, obtenus ou créés par l'ARC — Suite à cette demande, il a appris que les Renseignements étaient accessibles au public — Il a par la suite présenté une requête ex parte visant à obtenir une ordonnance provisoire de confidentialité et de non-publication pour une certaine période — La Cour fédérale a rapidement émis l'ordonnance provisoire et ordonné que les Renseignements soient traités comme confidentiels suivant la règle 151 et que leur contenu ne puisse faire l'objet d'une publication — Conformément à cette ordonnance provisoire, l'appellant a déposé la requête en confidentialité qui faisait l'objet du présent litige — Il s'agissait de savoir si la Cour fédérale a eu raison de conclure que les dossiers certifiés deviennent publics suite à leur transmission au greffe de la Cour en application de la règle 318 — Les règles 317 et 318 encadrent la transmission au greffe de la Cour du dossier constitué par le décideur administratif — Les règles 2, 23 et 26 viennent préciser certaines modalités entourant la constitution et la consultation des dossiers de la Cour — L'alinéa 23(2)c) prévoit que l'administrateur doit tenir une

152 setting out procedure for filing of confidential documents — Rule 151 providing party may submit motion to Court for order “that material to be filed ... be treated as confidential” — Rule 151 governing public access to documents filed with Court — Up to judge hearing motion for order of confidentiality to determine whether necessary to withhold certain documents from public in light of arguments raised by applicant — Therefore, under authority of r. 151, appellant could have requested order of confidentiality to withhold from public, press certain documents, information appellant considered confidential — Federal Court correct in concluding certified record became public upon transmission to Court Registry pursuant to r. 318 — Appeal dismissed.

Practice — Applications — Court record — Appeal from Federal Court decision concluding certified records becoming accessible to public upon transmission to Federal Court Registry, transmission of such record not constituting seizure within meaning of Canadian Charter of Rights and Freedoms, s. 8 — Whether Federal Court could, on own initiative, review confidential information transmitted to Registry, not submitted as evidence by either party — Undeniably judge not at liberty to examine documents not in evidentiary record submitted by parties — Same is true when Court exercising supervisory power — Federal Court erred in consulting of own motion certified record transmitted to Registry by respondent before parties had even filed own records — Federal Court’s reasons suggesting judge reviewed documents before concluding documents not meeting all requirements for order of confidentiality — However, this error of no consequence since having no impact on parties’ rights — Consequently, judges on judicial review cannot go beyond evidentiary record submitted to judges by parties in course of judges’ deliberations, must rely on evidentiary record in reaching decision in adversarial system of justice — Possible system surrounding public access to records established by Federal Courts Rules goes beyond requirements of open court principle — Federal Court correct in concluding certified record became public upon transmission to Court Registry pursuant to r. 318.

annexe à chaque dossier de la Cour — C’était sans conteste dans cette sous-catégorie que tombait le dossier certifié de l’office fédéral transmis au greffe en vertu de la règle 318 — L’argument de l’appelant que les annexes (et donc le dossier certifié) ne font pas formellement partie du dossier de la Cour était erronée — La définition à la règle 2 de l’expression « dossier de la Cour » n’opère pas de telle distinction, si bien que l’annexe doit être considérée comme faisant partie du dossier de la Cour — Les règles 151 et 152 prévoient le régime applicable au dépôt de documents confidentiels — La règle 151 prévoit qu’une partie peut demander à la Cour, par voie de requête, d’ordonner « que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels » — Cette règle encadre l’accès du public aux documents qui sont déposés à la Cour — Il appartiendra au juge saisi d’une requête en confidentialité de déterminer s’il est nécessaire de soustraire certains documents à la connaissance du public au vu des arguments soulevés par le requérant — C’est donc sous l’autorité de la règle 151 que l’appelant aurait pu demander une ordonnance de confidentialité pour soustraire au public et à la presse certains documents ou informations qu’il estimait de nature confidentielle — La Cour fédérale a eu raison de conclure que le dossier certifié est devenu public suite à sa transmission au greffe de la Cour en application de la règle 318 — Appel rejeté.

Pratique — Demandes — Dossier de la Cour — Appel à l’encontre d’une décision rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d’un tel dossier ne constituait pas une saisie au sens de l’article 8 de la Charte canadienne des droits et libertés — Il s’agissait de savoir si la Cour fédérale pouvait examiner de son propre chef les renseignements confidentiels transmis au greffe qui n’avaient pas fait l’objet d’un dépôt en preuve par l’une ou l’autre des parties — Il est indéniable qu’un juge n’a pas la liberté d’examiner des documents qui ne se trouvent pas dans le dossier de preuve soumis par les parties — Il en va de même lorsque la Cour agit dans le cadre de son pouvoir de surveillance — La Cour fédérale a erré en consultant de son propre chef le dossier certifié transmis au greffe par l’intimé, avant même que les parties n’aient déposé leur dossier — Les motifs de la Cour fédérale indiquaient que le juge a examiné les documents avant de conclure qu’ils ne remplissaient pas toutes les conditions requises pour une ordonnance de confidentialité — Cependant, cette erreur était sans conséquence dans la mesure où elle n’a eu aucune incidence sur les droits des parties — Donc, le juge siégeant en révision judiciaire ne peut aller au-delà de ce qui lui a été soumis par les parties dans le cadre de son délibéré et doit s’en tenir au dossier de preuve pour parvenir à sa décision, dans un régime de justice contradictoire — Ceci dit, il se peut bien que le régime entourant l’accessibilité d’un dossier par le public mis en place par les Règles des Cours fédérales aille au-delà de ce que requiert le principe de la publicité des débats — Par

Practice — Confidentiality Orders — Appeal from Federal Court decision concluding certified records becoming accessible to public upon transmission to Federal Court Registry, transmission of such record not constituting seizure within meaning of Canadian Charter of Rights and Freedoms, s. 8 — Federal Courts Rules, r. 151 providing party may submit motion to Court for order “that material to be filed ... be treated as confidential” — Appellant argued these rules illusory in situation such as appellant’s since documents made public before applicant could even see them, before a motion even made to keep documents confidential — True r. 151, as worded, appearing prospective in nature — However, Federal Court, Federal Court of Appeal have shown flexibility in applying r. 151 — Up to judge hearing motion for order of confidentiality to determine whether necessary to withhold certain documents from public — Supreme Court of Canada has repeatedly stated power to impose limits on openness, accessibility of court proceedings, freedom of press to report on court proceedings must be exercised with care, restraint given crucial importance of respect for both values to proper functioning of Canada’s democracy — Therefore, under authority of r. 151, appellant could have requested order of confidentiality to withhold from public, press certain documents, information appellant considered confidential — Federal Court correct in concluding certified record became public upon transmission to Court Registry pursuant to r. 318.

Constitutional Law — Charter of Rights — Unreasonable Search or Seizure — Appeal from Federal Court decision concluding certified records becoming accessible to public upon transmission to Federal Court Registry, transmission of such record not constituting seizure within meaning of Canadian Charter of Rights and Freedoms, s. 8 — Whether Federal Court erred in concluding no resulting violation of Charter, s. 8 to extent certified records do become public when transmitted to Registry — Well established that Charter, s. 8 intended to protect reasonable expectations of privacy of individuals — In case before Court, appellant did not show subjective, objectively reasonable expectation of privacy, having regard to all circumstances — Procedure set out in Federal Courts Rules, rr. 317, 318 not having effect of seizure, even when combined with r. 26 — Therefore not necessary to consider whether procedure unreasonable within meaning of Charter, s. 8.

conséquent, la Cour fédérale a eu raison de conclure que le dossier certifié est devenu public suite à sa transmission au greffe de la Cour en application de la règle 318.

Pratique — Ordonnances de confidentialité — Appel à l’encontre d’une décision rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d’un tel dossier ne constituait pas une saisie au sens de l’article 8 de la Charte canadienne des droits et libertés — La règle 151 des Règles des Cours fédérales prévoit qu’une partie peut demander à la Cour, par voie de requête, d’ordonner « que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels » — L’appelant a soutenu que ces règles seraient illusoires dans une situation comme la sienne puisque les documents seraient rendus publics avant même que le demandeur puisse en prendre connaissance et avant même qu’une requête puisse être présentée pour en préserver la confidentialité — Il est vrai que la règle 151, telle que libellée, semble être de nature prospective — La Cour fédérale et la Cour d’appel ont toutefois fait preuve de souplesse dans l’application de cette règle — Il appartiendra au juge saisi d’une requête en confidentialité de déterminer s’il est nécessaire de soustraire certains documents à la connaissance du public — La Cour suprême du Canada a réitéré à plusieurs reprises que le pouvoir d’imposer des limites à la publicité des débats judiciaires et à la liberté de la presse d’en rendre compte devait être utilisé avec circonspection et modération, étant donné l’importance cruciale du respect de ces deux valeurs pour le bon fonctionnement de notre démocratie — C’est donc sous l’autorité de la règle 151 que l’appelant aurait pu demander une ordonnance de confidentialité pour soustraire au public et à la presse certains documents ou informations qu’il estimait de nature confidentielle — La Cour fédérale a eu raison de conclure que le dossier certifié est devenu public suite à sa transmission au greffe de la Cour en application de la règle 318.

Droit constitutionnel — Charte des droits — Fouilles, perquisitions ou saisies abusives — Appel à l’encontre d’une décision rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d’un tel dossier ne constituait pas une saisie au sens de l’article 8 de la Charte canadienne des droits et libertés — Il s’agissait de savoir si la Cour fédérale a erré en concluant qu’il ne résultait aucune atteinte à l’article 8 de la Charte dans la mesure où les dossiers certifiés deviennent publics suite à leur transmission au greffe — Il est bien établi que l’objectif visé par l’article 8 de la Charte est de protéger les attentes raisonnables des individus en matière de vie privée — Dans le cas présent, l’appelant n’a pas démontré l’existence d’une attente subjective et objectivement raisonnable en matière de vie privée, compte tenu de l’ensemble des circonstances —

Income Tax — Administration and Enforcement — Disclosure of information — Appeal from Federal Court decision concluding certified records becoming accessible to public upon transmission to Federal Court Registry, transmission of such record not constituting seizure within meaning of Canadian Charter of Rights and Freedoms, s. 8 — Appellant retired businessman living in Barbados — Appellant claims to have become non-resident of Canada for purposes of Income Tax Act (Act) — Since 2015, respondent auditing appellant's non-resident status; during audit, Canada Revenue Agency (CRA) made requests for administrative assistance from certain countries — Appellant challenged requests by filing application for judicial review — As part of application for judicial review, appellant relied on Federal Courts Rules, r. 317 to request disclosure of documents, information (Information) concerning appellant obtained or created by CRA — In response to request for disclosure, appellant learned Information accessible to public — Appellant then filed ex parte motion for interim order of confidentiality, publication ban for specific period — Federal Court quickly issued interim order, ordering to treat Information as confidential under r. 151, not to publish contents of Information — In accordance with interim order, appellant filed motion for order of confidentiality, subject of dispute before Court — Federal Court correct in concluding certified record became public upon transmission to Court Registry pursuant to r. 318 — Even assuming appellant had subjective expectation of privacy with respect to some of information contained in certified record, expectation not objectively reasonable in present circumstances — Anyone bringing case before courts, whether in family, commercial, administrative, tax or other matters, must expect large parts of private life to become accessible to public — Act, s. 241(3)(b) states confidentiality of information transmitted to Minister does not apply in respect of legal proceedings relating to administration or enforcement of Act.

This was an appeal from a decision of the Federal Court concluding that certified records become accessible to the public upon transmission to the Federal Court Registry and that the transmission of such a record does not constitute a seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms*.

Donc, la procédure établie par les règles 317 et 318 des Règles des Cours fédérales n'a pas pour effet d'opérer une saisie, même lorsque conjuguée avec la règle 26 — Il n'était donc pas nécessaire de se pencher sur la question de savoir si cette procédure était abusive au sens de l'article 8 de la Charte.

Impôt sur le revenu — Application et exécution — Communication de renseignements — Appel à l'encontre d'une décision rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d'un tel dossier ne constituait pas une saisie au sens de l'article 8 de la Charte canadienne des droits et libertés — L'appelant est un homme d'affaires retraité vivant à la Barbade — Il dit être ainsi devenu un non-résident du Canada aux fins de la Loi de l'impôt sur le revenu (Loi) — L'intimé vérifie depuis 2015 le statut de non-résident de l'appelant, et dans le cadre de cette vérification, l'Agence du revenu du Canada (l'ARC) a fait des demandes d'assistance administrative auprès de certains pays — L'appelant a contesté ces demandes en déposant une demande de contrôle judiciaire — Dans le cadre de sa demande de contrôle judiciaire, l'appelant s'est prévalu de la règle 317 des Règles des Cours fédérales pour demander la divulgation des documents et informations (les Renseignements) le concernant, obtenus ou créés par l'ARC — Suite à cette demande, il a appris que les Renseignements étaient accessibles au public — Il a par la suite présenté une requête ex parte visant à obtenir une ordonnance provisoire de confidentialité et de non-publication pour une certaine période — La Cour fédérale a rapidement émis l'ordonnance provisoire et ordonné que les Renseignements soient traités comme confidentiels suivant la règle 151 et que leur contenu ne puisse faire l'objet d'une publication — Conformément à cette ordonnance provisoire, l'appelant a déposé la requête en confidentialité qui faisait l'objet du présent litige — La Cour fédérale a eu raison de conclure que le dossier certifié est devenu public suite à sa transmission au greffe de la Cour en application de la règle 318 — En supposant même que l'appelant ait pu avoir une attente subjective de vie privée eu égard à certaines informations se trouvant dans ces documents, cette attente n'était pas objectivement raisonnable dans les circonstances — Quiconque saisit les tribunaux d'un litige, que ce soit en matière familiale, commerciale, administrative, fiscale ou autre, doit s'attendre à ce que de larges pans de sa vie privée deviennent accessibles au public — En vertu de l'alinéa 241(3)b) de la Loi, la confidentialité des renseignements transmis au ministre ne s'applique pas dans les procédures judiciaires ayant trait à l'application ou à l'exécution de la loi.

Il s'agissait d'un appel à l'encontre d'une décision rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d'un tel dossier ne constituait pas une saisie au sens de l'article 8 de la *Charte canadienne des droits et libertés*.

The appellant is a retired businessman. He claims to have established himself in Barbados in 2013 and thus to have become a non-resident of Canada for the purposes of the *Income Tax Act* (Act). Since 2015, the respondent has been auditing the appellant's non-resident status; during an audit, the Canada Revenue Agency (CRA) made requests for administrative assistance from certain countries. The appellant challenged these requests in July 2019 by filing an application for judicial review on the grounds that the requests for assistance purportedly misrepresented that he is still a resident of Canada.

As part of his application for judicial review, the appellant relied on rule 317 of the *Federal Courts Rules* to request the disclosure of the documents and information (the Information) concerning him obtained or created by the CRA under the powers conferred on it by the Act. In response to this request, and under rule 318, the CRA sent the Registry a certified copy of the Information. The Registry treated the Information as public documents and placed it in the annex to the Court file as provided for in paragraph 23(2)(c) of the *Federal Courts Rules*. The Registry also sent a certified copy of the Information to counsel for the appellant. A journalist contacted the appellant regarding the application for judicial review. This is how the appellant apparently learned that the Information was accessible to the public and that a journalist had accessed it. Counsel for the appellant then immediately filed an *ex parte* motion for an interim order of confidentiality and a publication ban for a period of 10 days. The Federal Court quickly issued the interim order and ordered that the Information be treated as confidential under rule 151 and that its contents not be published. In accordance with that interim order, the appellant filed the motion for order of confidentiality that is the subject of this dispute. The interim order was later extended until the hearing before the Federal Court.

The issues were whether the Federal Court was correct in concluding that certified records become public when they are transmitted to the Court Registry under rule 318; whether the Federal Court could, on its own initiative, review the confidential Information that was transmitted to the Registry and not submitted as evidence by either party; and to the extent that certified records do become public when they are transmitted to the Registry, whether the Federal Court erred in concluding that there was no resulting violation of section 8 of the Charter.

Held, the appeal should be dismissed.

In order to fully understand the details of the debate in this case, it was appropriate to begin by examining rules 317 and 318 of the *Federal Courts Rules*, which govern the transmission to the Court Registry of the record compiled by the

L'appelant est un homme d'affaires retraité. Il a dit s'être établi à la Barbade en 2013, et être ainsi devenu un non-résident du Canada aux fins de la *Loi de l'impôt sur le revenu* (Loi). L'intimé vérifie depuis 2015 le statut de non-résident de l'appelant, et dans le cadre de cette vérification, l'Agence du revenu du Canada (l'ARC) a fait des demandes d'assistance administrative auprès de certains pays. L'appelant a contesté ces demandes en juillet 2019 en déposant une demande de contrôle judiciaire, au motif que les demandes d'assistance représenteraient faussement qu'il est toujours résident canadien.

Dans le cadre de sa demande de contrôle judiciaire, l'appelant s'est prévalu de la règle 317 des *Règles des Cours fédérales* pour demander la divulgation des documents et informations (les Renseignements) le concernant, obtenus ou créés par l'ARC en vertu des pouvoirs qui lui sont conférés par la Loi. Suite à cette demande, et en conformité avec la règle 318, l'ARC a transmis au greffe une copie certifiée des Renseignements. Le greffe a traité les Renseignements comme documents publics et les a placés dans l'annexe du dossier de la Cour, comme prévu à l'alinéa 23(2)c) des *Règles des Cours fédérales*. Le greffe a aussi envoyé une copie certifiée des Renseignements aux avocats de l'appelant. Un journaliste a contacté l'appelant en lien avec la demande de contrôle judiciaire. C'est de cette façon que l'appelant aurait appris que les Renseignements étaient accessibles au public et qu'un journaliste y avait eu accès. Les avocats de l'appelant ont alors présenté sans délai une requête *ex parte* visant à obtenir une ordonnance provisoire de confidentialité et de non-publication pour une période de dix jours. La Cour fédérale a rapidement émis l'ordonnance provisoire et ordonné que les Renseignements soient traités comme confidentiels suivant la règle 151 et que leur contenu ne puisse faire l'objet d'une publication. Conformément à cette ordonnance provisoire, l'appelant a déposé la requête en confidentialité qui faisait l'objet du présent litige. L'ordonnance provisoire a depuis été reconduite jusqu'à l'audition devant la Cour fédérale.

Il s'agissait de savoir si la Cour fédérale a eu raison de conclure que les dossiers certifiés deviennent publics suite à leur transmission au greffe de la Cour en application de la règle 318; si la Cour fédérale pouvait examiner de son propre chef les Renseignements confidentiels transmis au greffe qui n'avaient pas fait l'objet d'un dépôt en preuve par l'une ou l'autre des parties; et dans la mesure où les dossiers certifiés deviennent effectivement publics suite à leur transmission au greffe, si la Cour fédérale a erré en concluant qu'il n'en résultait aucune atteinte à l'article 8 de la Charte.

Arrêt : l'appel doit être rejeté.

Pour bien saisir les tenants et aboutissants du débat en l'espèce, il convenait de se pencher dans un premier temps sur les règles 317 et 318 des *Règles des Cours fédérales*, qui encadrent la transmission au greffe de la Cour du dossier constitué

administrative decision maker, as well as these rules' interaction with rules 2, 23 and 26, which specify certain procedures for compiling and consulting the Court's files. Rule 317 allows a party that does not have in its possession (or is not certain that it has in its possession) all of the documents on which the administrative decision maker relied in making its decision, to request that those documents be transmitted to that party. This mechanism allows the party challenging an administrative decision to ensure that it does indeed have all of the documents relevant to its application, and thus to effectively assert its rights. Rule 317 also ensures that the administrative decision will not be immune from informed judicial review insofar as the reviewing court will have access to the same record and information as the original decision maker. Rule 318 further provides that the administrative decision maker must send to the Registry and to the requesting party a certified copy of the material relevant to the request, subject to any objections that the party may raise and that the Court will decide. In addition to this objective of providing the applicant and the Court with all the documents on which the administrative decision maker based its decision, there is another objective that consists in allowing the authenticity of the transmitted documents to be verified. The appellant argued that this objective was a relic of the past that was no longer justified. It was more important to situate rules 317 and 318 within the broader architecture of the rules governing the Federal Courts to have a good understanding of their meaning and scope. The definitions found in rule 2 include that of "Court file", which is described as "the file maintained pursuant to rule 23 or 24." Rule 23 further provides, in its first paragraph, that the Administrator shall keep a file that is composed of particular documents such as "document[s] filed under these Rules," etc. The second paragraph also provides that the Administrator shall keep an annex to each Court file that is comprised of affidavits, exhibits, and "all other documents and material in the possession of the Court or the Registry that are not required by these Rules to be kept in the Court file" (paragraph 23(2)(c)). The certified record from the tribunal that is transmitted to the Registry under rule 318 clearly fell into this subcategory. The appellant's submission that the annexes (and thus the certified record) are not formally part of the Court file was erroneous. The definition of "Court file" makes no such distinction; therefore, the annex must be considered part of the Court file. Subsection 26(1) further provides that files and annexes "that [are] available to the public" may be inspected by a person if the necessary facilities are available. Rules 23 and 26 are in Part 2 of the *Federal Courts Rules*, which deals with the administration of the Court. It is clear that these rules have nothing to do with substantive law and are intended only to facilitate the proper functioning of the Court. It is rules 151 and 152 that set out the procedure for the filing of confidential documents. Rule 151 provides that a party may submit a motion to the Court for an order "that material to be filed shall be treated as confidential."

par le décideur administratif, ainsi que sur leur interaction avec les règles 2, 23 et 26, qui viennent préciser certaines modalités entourant la constitution et la consultation des dossiers de la Cour. La règle 317 permet à une partie qui n'a pas en sa possession (ou qui n'est pas sûr d'avoir en sa possession) tous les documents sur lesquels s'est fondé le décideur administratif pour prendre sa décision, de demander à ce que lui soient transmis ces documents. Ce mécanisme permet à la partie qui conteste une décision administrative de s'assurer qu'elle a tous les documents pertinents à sa demande, et donc de faire valoir efficacement ses droits. La règle 317 permet également de s'assurer que la décision administrative ne sera pas à l'abri d'un contrôle judiciaire éclairé dans la mesure où la cour de révision aura accès au même dossier et aux mêmes informations que le décideur original. La règle 318 prévoit par ailleurs que l'office fédéral doit transmettre, au greffe et à la partie qui en a fait la demande, une copie certifiée conforme des documents matériels pertinents à la demande, sous réserve des oppositions qu'elle peut faire valoir et que la Cour tranchera. À cet objectif de fournir au demandeur et à la Cour tous les documents sur lesquels s'est fondé le décideur administratif pour prendre sa décision se greffe celui qui consiste à permettre la vérification de l'authenticité des documents transmis. L'appelant a fait valoir que cet objectif était une relique du passé qui ne se justifiait plus. Il était important de situer les règles 317 et 318 dans l'architecture plus large de l'ensemble des règles qui gouvernent les Cours fédérales pour bien comprendre leur sens et leur portée. Au nombre des définitions qui se retrouve à la règle 2 est celle du « dossier de la Cour », que l'on décrit comme le « dossier tenu conformément aux règles 23 ou 24 ». La règle 23 prévoit par ailleurs, à son premier paragraphe, que l'administrateur doit tenir un dossier dans lequel sont classés des documents en particulier tels que « les documents déposés en application des présentes règles », etc. Le deuxième paragraphe prévoit par ailleurs que l'administrateur doit tenir une annexe à chaque dossier de la Cour, dans laquelle seront versés les affidavits, les pièces, et « tous les autres documents et éléments matériels en la possession de la Cour ou du greffe dont les présentes règles n'exigent pas la conservation au dossier de la Cour » (alinéa 23(2)c)). C'était sans conteste dans cette sous-catégorie que tombait le dossier certifié de l'office fédéral transmis au greffe en vertu de la règle 318. L'argument de l'appelant que les annexes (et donc le dossier certifié) ne font pas formellement partie du dossier de la Cour était erroné. La définition de l'expression « dossier de la Cour » n'opère pas de telle distinction, si bien que l'annexe doit être considérée comme faisant partie du dossier de la Cour. Le paragraphe 26(1) prévoit par ailleurs que les dossiers ainsi que les annexes « qui sont disponibles au public » peuvent être examinés par toute personne, lorsque les installations de la Cour le permettent. Les règles 23 et 26 se trouvent dans la Partie 2 des *Règles des Cours fédérales*, qui porte sur l'administration de la Cour. Il est clair que ces règles n'ont aucune portée de droit substantif et ne visent qu'à faciliter le bon fonctionnement de

With respect to the practical impossibility encountered by the appellant with respect to filing a motion to preserve the confidentiality of information that he considered private and that was in the certified record transmitted to the Registry, it is true that rule 151, as it is worded, appears to be prospective in nature. It allows a party to file a motion for an order that documents “to be filed” be treated as confidential. However, the Federal Court and the Federal Court of Appeal have shown flexibility in applying this rule. It is rule 151 that governs public access to documents filed with the Court. It will be up to the judge hearing a motion for order of confidentiality to determine whether it is necessary to withhold certain documents from the public in light of the arguments raised by the applicant, “notwithstanding the public interest in open and accessible court proceedings.” The highest court has repeatedly stated that the power to impose limits on the openness and accessibility of court proceedings and on the freedom of the press to report on them must be exercised with care and restraint given the crucial importance of respect for both values to the proper functioning of our democracy. It is therefore under the authority of rule 151 that the appellant could have requested an order of confidentiality to withhold from the public and the press certain documents or information that he considered confidential. The party seeking such an order will have a heavy burden.

As to whether the Court can rely on the entire record of the Registry to make its decision, and not only on the evidentiary record constituted by the parties, in general, it is undeniable that a judge is not at liberty to examine documents that are not in the evidentiary record submitted by the parties. The same is true when the Court is exercising its supervisory power. There can be no doubt that the Court, when presented with an application for judicial review under section 18.1 of the *Federal Courts Act*, can rely only on the documents in the parties’ records. It is the responsibility of the applicant to reproduce in his or her record, in whole or in part, the record transmitted by the administrative decision maker. This principle creates a certain tension with the very purpose of judicial review. Indeed, reviewing courts are only mandated to rule on the legality or reasonableness of decisions made by administrative decision makers. It goes without saying that, in order to perform this task, the reviewing court must have access to all the evidence that was before the administrative decision maker. Despite the risk of an inadequate evidentiary record for the court charged with assessing the reasonableness of a decision, this risk nevertheless does not allow the Court to usurp the role of the parties

la Cour. Ce sont les règles 151 et 152 qui prévoient le régime applicable au dépôt de documents confidentiels. La règle 151 prévoit qu’une partie peut demander à la Cour, par voie de requête, d’ordonner « que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels ».

En ce qui concerne l’impossibilité pratique dans laquelle se trouvait l’appelant de déposer une requête pour préserver la confidentialité des informations qu’il estimait de caractère privé et qui se trouvaient dans le dossier certifié transmis au greffe, il est vrai que la règle 151, telle que libellée, semble être de nature prospective. Elle permet à une partie de déposer une requête visant à obtenir une ordonnance selon laquelle des documents « qui seront déposés » soient considérés comme confidentiels. La Cour fédérale et la Cour d’appel ont toutes deux fait preuve de souplesse dans l’application de cette règle. C’est la règle 151 qui encadre l’accès du public aux documents qui sont déposés à la Cour. Il appartiendra au juge saisi d’une requête en confidentialité de déterminer s’il est nécessaire de soustraire certains documents à la connaissance du public au vu des arguments soulevés par le requérant, « étant donné l’intérêt du public à la publicité des débats judiciaires ». Le plus haut tribunal a réitéré à plusieurs reprises que le pouvoir d’imposer des limites à la publicité des débats judiciaires et à la liberté de la presse d’en rendre compte devait être utilisé avec circonspection et modération, étant donné l’importance cruciale du respect de ces deux valeurs pour le bon fonctionnement de notre démocratie. C’est donc sous l’autorité de la règle 151 que l’appelant aurait pu demander une ordonnance de confidentialité pour soustraire au public et à la presse certains documents ou informations qu’il estimait de nature confidentielle. La partie qui requiert une telle ordonnance aura un lourd fardeau.

Quant à savoir si la Cour peut s’appuyer sur tout le dossier du greffe pour prendre sa décision, et non pas uniquement sur le dossier de preuve constitué par les parties, de façon générale, il est indéniable qu’un juge n’a pas la liberté d’examiner des documents qui ne se trouvent pas dans le dossier de preuve soumis par les parties. Il en va de même lorsque la Cour agit dans le cadre de son pouvoir de surveillance. Il ne fait aucun doute que la Cour, lorsqu’elle est saisie d’une demande de contrôle judiciaire conformément à l’article 18.1 de la *Loi sur les Cours fédérales* ne peut s’appuyer que sur les documents qui se trouvent dans le dossier des parties. Il appartient au demandeur de reproduire dans son dossier, en tout ou en partie, le dossier transmis par le décideur administratif. Ce principe n’est pas sans créer une certaine tension avec l’objectif même qui sous-tend le contrôle judiciaire. En effet, les cours de révision n’ont pour mandat qu’à se prononcer sur la légalité ou la raisonnablement de décisions prises par les décideurs administratifs. Il va de soi que pour s’acquitter de cette tâche, la cour de révision doit avoir accès à toute la preuve qui était devant le décideur administratif. Malgré le risque pour la cour chargée d’apprécier la raisonnablement d’une décision de l’insuffisance

in presenting the evidence and arguments in support of their positions. The Federal Court erred in consulting of its own motion the certified record transmitted to the Registry by the respondent before the parties had even filed their records. The Federal Court's reasons suggest that the judge reviewed the documents before concluding that they did not meet all the requirements for an order of confidentiality. However, this error was of no consequence as it had no impact on the rights of the parties. Consequently, judges on judicial review, like judges hearing an action, cannot go beyond what was submitted to them by the parties in the course of their deliberations and must rely on the evidentiary record in reaching their decision in an adversarial system of justice such as ours. The adversarial nature of our justice system should not be confused with the open court principle. These two major values, which have different origins and rationales, can and must coexist without being equated. It may well be that the system surrounding public access to a record that has been established by the *Federal Courts Rules* goes beyond what is required by the open court principle. This is far from sufficient to render it invalid. Accordingly, the Federal Court was correct in concluding that the certified record became public upon transmission to the Court Registry pursuant to rule 318.

The appellant argued that if the Court were to conclude that the certified record transmitted to the Registry under rule 318 must be considered accessible to the public, it must be inferred that it authorized an unreasonable seizure that was inconsistent with section 8 of the Charter. It is well established that section 8 of the Charter is intended to protect the reasonable expectations of privacy of individuals. In other words, the person claiming protection under section 8 must be able to show a subjectively held, and objectively reasonable, expectation of privacy. However, the Supreme Court has repeatedly stated that legitimate expectations of privacy are necessarily diminished where an individual is required to produce documents in the course of a regulated activity. In this case, the appellant did not show that there was a subjective and objectively reasonable expectation of privacy, having regard to all the circumstances. First, he could have limited the number of documents sought in his request for transmission under rule 317. Second, he waited nearly four months before filing a motion for order of confidentiality with the Court and only did so after a journalist had seen the certified record. Given rule 26, one would have expected him to bring such a motion much earlier. Even assuming that the appellant had a subjective expectation of privacy with respect to some of the information contained in those documents, this expectation was not objectively reasonable in the circumstances. Anyone who brings a case before the courts, whether in family, commercial, administrative, tax or other matters,

du dossier de preuve, ce risque n'autorise quand même pas la Cour à usurper le rôle des parties dans la présentation de la preuve et des arguments au soutien de leurs positions. La Cour fédérale a erré en consultant de son propre chef le dossier certifié transmis au greffe par l'intimé, avant même que les parties n'aient déposé leur dossier. Les motifs de la Cour fédérale indiquaient que le juge a examiné les documents avant de conclure qu'ils ne remplissaient pas toutes les conditions requises pour une ordonnance de confidentialité. Cependant, cette erreur était sans conséquence dans la mesure où elle n'a eu aucune incidence sur les droits des parties. Donc, le juge siégeant en révision judiciaire, comme le juge saisi d'une action, ne peut aller au-delà de ce qui lui a été soumis par les parties dans le cadre de son délibéré et doit s'en tenir au dossier de preuve pour parvenir à sa décision, dans un régime de justice contradictoire comme le nôtre. Le caractère contradictoire de notre système de justice ne doit pas être confondu avec le principe de la publicité des débats. Ces deux grandes valeurs, dont les origines et la justification diffèrent, peuvent et doivent coexister sans être assimilées. Il se peut bien que le régime entourant l'accessibilité d'un dossier par le public mis en place par les *Règles des Cours fédérales* aille au-delà de ce que requiert le principe de la publicité des débats. Cela ne suffit pas, tant s'en faut, pour en faire un motif d'invalidation. Par conséquent, la Cour fédérale a eu raison de conclure que le dossier certifié est devenu public suite à sa transmission au greffe de la Cour en application de la règle 318.

L'appellant soutenait que dans l'hypothèse où la Cour en viendrait à la conclusion que le dossier certifié transmis au greffe en application de la règle 318 devait être considéré comme étant accessible au public, il fallait nécessairement en déduire qu'elle autorisait une saisie abusive et incompatible avec l'article 8 de la Charte. Il est bien établi que l'objectif visé par l'article 8 de la Charte est de protéger les attentes raisonnables des individus en matière de vie privée. En d'autres termes, la personne qui veut se réclamer de la protection de l'article 8 doit pouvoir démontrer qu'elle pouvait subjectivement, et de façon objectivement raisonnable, s'attendre au respect de sa vie privée. Or, la Cour suprême a répété à plus d'une reprise que les attentes légitimes au respect de la vie privée sont nécessairement moindres lorsqu'une personne doit produire des documents dans le cadre d'une activité réglementée. Dans le cas présent, l'appellant n'a pas démontré l'existence d'une attente subjective et objectivement raisonnable en matière de vie privée, compte tenu de l'ensemble des circonstances. D'une part, il aurait pu limiter l'ampleur des documents requis dans sa demande de transmission en vertu de la règle 317. D'autre part, il a attendu près de quatre mois avant de saisir la Cour d'une demande de confidentialité, et uniquement après qu'un journaliste ait pris connaissance du dossier certifié. Compte tenu de la règle 26, on se serait attendu à ce qu'il fasse une telle demande beaucoup plus tôt. En supposant même que l'appellant ait pu avoir une attente subjective de vie

must expect that large parts of his or her private life will become accessible to the public. This is what is provided for in rule 26, as well as in paragraph 241(3)(b) of the Act, which states that the confidentiality of information transmitted to the Minister does not apply in respect of legal proceedings relating to the administration or enforcement of the Act. Therefore the procedure set out in rules 317 and 318 does not have the effect of a seizure, even when combined with rule 26. It was therefore not necessary to consider whether this procedure was unreasonable within the meaning of section 8 of the Charter.

privée eu égard à certaines informations se trouvant dans ces documents, cette attente n'était pas objectivement raisonnable dans les circonstances. Quiconque saisit les tribunaux d'un litige, que ce soit en matière familiale, commerciale, administrative, fiscale ou autre, doit s'attendre à ce que de larges pans de sa vie privée deviennent accessibles au public. C'est d'ailleurs ce que prévoient la règle 26, ainsi que l'alinéa 241(3)b) de la Loi, en vertu duquel la confidentialité des renseignements transmis au ministre ne s'applique pas dans les procédures judiciaires ayant trait à l'application ou à l'exécution de cette loi. Donc, la procédure établie par les règles 317 et 318 n'a pas pour effet d'opérer une saisie, même lorsque conjuguée avec la règle 26. Il n'était donc pas nécessaire de se pencher sur la question de savoir si cette procédure était abusive au sens de l'article 8 de la Charte.

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DISTINGUISHED:

Gernhart v. Canada, [2000] 2 F.C. 292, 1999 CarswellNat 2136 (F.C.A.); *R. v. Dymont*, [1988] 2 S.C.R. 417, 1988 CanLII 10.

CONSIDERED:

Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild, 2007 SKCA 74, 284 D.L.R.

LOIS ET RÈGLEMENTS CITÉS

Charte canadienne des droits et libertés, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, n° 44], art. 8.
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Access Information Agency Inc. v. Canada (Attorney General), 2007 FCA 224, [2007] F.C.J. No. 814 (QL); *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19, [2015] F.C.J. No. 1397 (QL); *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, [2012] F.C.J. No. 93 (QL); *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)*, [1995] 1 F.C. 459, [1994] F.C.J. No. 1608 (QL); *Cold Lake First Nations v. Noel*, 2018 FCA 72, [2018] CarswellNat 1425; *Canada (Attorney General) v. Lacey*, 2008 FCA 242, [2008] F.C.J. No. 1221 (QL); *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 42, [2007] 2 F.C.R. D-14; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, 1982 CanLII 14; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 1996 CarswellNB 463; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; 1989 CanLII 20; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 1994 CanLII 39; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287; *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, 1984 CanLII 33; *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, 1990 CanLII 135; 143471 *Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, 1994 CanLII 89; *Comité paritaire de l'industrie de la chemise v. Potash*; *Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406, 1994 CanLII 92; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757.

APPEAL from a Federal Court decision (2020 FC 1061) concluding that certified records become accessible to the public upon transmission to the Federal Court Registry and that the transmission of such record does not constitute a seizure within the meaning of section 8 of the *Canadian Charter of Rights and Freedoms*. Appeal dismissed.

268; *Lukács c. Canada (Office des transports)*, 2016 CAF 103, [2016] 3 R.C.F. F-17; *Slansky c. Canada (Procureur général)*, 2013 CAF 199, [2015] 1 R.C.F. 81; *Bah c. Canada (Citoyenneté et Immigration)*, 2014 CF 693, [2014] A.C.F. n° 1068 (QL); *Sherman (Succession) c. Donovan*, 2021 CSC 25, [2021] A.C.S. n° 25 (QL); *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, 1990 CanLII 137.

DÉCISIONS MENTIONNÉES :

Access Information Agency Inc. c. Canada (Procureur général), 2007 CAF 224, [2007] A.C.F. n° 814 (QL); *Canadian Copyright Licensing Agency (Access Copyright) c. Alberta*, 2015 CAF 268, [2016] 3 R.C.F. 19, [2015] A.C.F. n° 1397 (QL); *Association des universités et collèges du Canada c. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 CAF 22, [2012] A.C.F. n° 93 (QL); *Terminaux portuaires du Québec Inc. c. Canada (Conseil des relations du travail)*, [1995] 1 C.F. 459, [1994] A.C.F. n° 1608 (QL); *Premières Nations de Cold Lake c. Noel*, 2018 CAF 72, [2018] CarswellNat 1425; *Canada (Procureur général) c. Lacey*, 2008 CAF 242, [2008] A.C.F. n° 1221 (QL); *Canada (Procureur général) c. Canadian North Inc.*, 2007 CAF 42, [2007] 2 R.C.F. F-18; *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; *A.G. (Nova Scotia) c. MacIntyre*, [1982] 1 R.C.S. 175, 1982 CanLII 14; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, 1996 CarswellNB 463; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, 1989 CanLII 20; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, 1994 CanLII 39; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Pétrolière Impériale c. Jacques*, 2014 CSC 66, [2014] 3 R.C.S. 287; *Hunter et autres c. Southam Inc.*, [1994] 2 R.C.S. 145, 1984 CanLII 33; *R. c. Mills*, 2019 CSC 22, [2019] 2 R.C.S. 320; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, 1990 CanLII 135; 143471 *Canada Inc. c. Québec (Procureur général)*; *Tabah c. Québec (Procureur général)*, [1994] 2 R.C.S. 339, 1994 CanLII 89; *Comité paritaire de l'industrie de la chemise c. Potash*; *Comité paritaire de l'industrie de la chemise c. Sélection Milton*, [1994] 2 R.C.S. 406, 1994 CanLII 92; *R. c. Jarvis*, 2002 CSC 73, [2002] 3 R.C.S. 757.

APPEL à l'encontre d'une décision (2020 CF 1061) rendue par la Cour fédérale ayant conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d'un tel dossier ne constituait pas une saisie au sens de l'article 8 de la *Charte canadienne des droits et libertés*. Appel rejeté.

APPEARANCES

*Guy Du Pont, Ad.E., Léon H. Moubayed and
Élisabeth Robichaud* for appellant.
Louis Sébastien and Jonathan Bachir-Legault for
respondent.

SOLICITORS OF RECORD

Davies Ward Phillips & Vineberg LLP, Montréal,
for appellant.
Deputy Attorney General of Canada for
respondent.

The following is the English version of the reasons for judgment and judgment rendered by

[1] **DE MONTIGNY J.A.:** This appeal raises the interesting question of what the open court principle entails and how it coexists with the confidentiality of an individual's tax file. More specifically, this Court is called upon to determine whether the documents in the certified record transmitted by the Minister to the Court Registry pursuant to rule 318 of the *Federal Courts Rules*, SOR/98-106 (the Rules) lose their confidentiality and become accessible to the public and, if so, whether rule 318 violates section 8 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (the Charter).

[2] At the end of extensive reasons, the Federal Court (*per* Mr. Justice Pamel) concluded that certified records become accessible to the public upon transmission to the Federal Court Registry and that the transmission of such a record does not constitute a seizure within the meaning of section 8 of the Charter: *Rémillard v. Canada (National Revenue)*, 2020 FC 1061, 2020 CarswellNat 6038 [Rémillard]. After reviewing the submissions of both parties and the record before us, I am of the view that the appeal should be dismissed.

ONT COMPARU :

*Guy Du Pont, Ad.E., Léon H. Moubayed et
Élisabeth Robichaud* pour l'appellant.
Louis Sébastien et Jonathan Bachir-Legault pour
l'intimé.

AVOCATS INSCRITS AU DOSSIER

*Davies Ward Phillips & Vineberg S.E.N.C.R.L.,
s.r.l.*, Montréal, pour l'appellant.
Le sous-procureur général du Canada pour
l'intimé.

*Voici les motifs du jugement et le jugement rendus
en français par*

[1] LE JUGE DE MONTIGNY, J.C.A. : Le présent appel soulève la question intéressante de savoir ce qu'implique le principe de la publicité des débats judiciaires, et comment il se conjugue avec la confidentialité qui entoure le dossier fiscal d'un individu. De façon plus particulière, cette Cour est appelée à déterminer si les documents qui se trouvent dans le dossier certifié transmis par le ministre au greffe de la Cour conformément à la règle 318 des *Règles des Cours fédérales*, DORS/98-106 (les Règles) perdent leur caractère confidentiel et deviennent accessibles au public, et si, le cas échéant, la règle 318 contrevient à l'article 8 de la *Charte canadienne des droits et libertés*, qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, no 44] (la Charte).

[2] Au terme de motifs étoffés, la Cour fédérale (sous la plume du juge Pamel) a conclu que les dossiers certifiés devenaient accessibles au public dès leur transmission au greffe de la Cour fédérale, et que la transmission d'un tel dossier ne constituait pas une saisie au sens de l'article 8 de la Charte : *Rémillard c. Canada (Revenu national)*, 2020 CF 1061, 2020 CarswellNat 5028 [Rémillard]. Après avoir pris connaissance des arguments des deux parties ainsi que du dossier qui se trouve devant nous, je suis d'avis que l'appel devrait être rejeté.

I. The facts

[3] The facts are not in dispute and are relatively simple. Mr. Rémillard is a retired businessman. He claims to have established himself in Barbados in 2013 and thus to have become a non-resident of Canada for the purposes of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (the ITA). Since 2015, the Minister has been auditing Mr. Rémillard's non-resident status; during an audit, the Canada Revenue Agency (CRA) made requests for administrative assistance from certain countries. Mr. Rémillard challenged these requests on July 31, 2019, by filing an application for judicial review on the grounds that the requests for assistance purportedly misrepresent that he is still a resident of Canada.

[4] As part of his application for judicial review, Mr. Rémillard relied on rule 317 to request the disclosure of the documents and information (the Information) concerning him obtained or created by the CRA under the powers conferred on it by the ITA. This request is worded as follows:

[TRANSLATION]

UNDER RULE 317 OF THE *FEDERAL COURTS RULES*, THE APPLICANT REQUESTS THAT THE MINISTER FORWARD HIM AND SEND TO THE REGISTRY A CERTIFIED COPY OF THE FOLLOWING DOCUMENTS, WHICH ARE NOT IN HIS POSSESSION BUT ARE IN THE POSSESSION OF THE TRIBUNAL:

- (a) the foreign requests; and
- (b) all documents considered, consulted, or generated by the Minister or by any person or entity acting on behalf of the Minister, including work sheets, written communications and handwritten notes taken during oral communications, that relate to or are relevant to the foreign requests.

(Appeal Book, at page 93.)

[5] In response to this request, and under rule 318, the CRA sent the Registry (in two parts) a certified copy of the Information. The Registry treated the Information as public documents and placed it in the annex to the Court

I. Les faits

[3] Les faits ne sont pas contestés et sont relativement simples. M. Rémillard est un homme d'affaires retraité. Il dit s'être établi à la Barbade en 2013, et être ainsi devenu un non-résident du Canada aux fins de la *Loi de l'impôt sur le revenu*, L.R.C. (1985) (5^e suppl.), ch. 1 (la LIR). Le ministre vérifie depuis 2015 le statut de non-résident de M. Rémillard, et dans le cadre de cette vérification l'Agence du revenu du Canada (l'ARC) a fait des demandes d'assistance administrative auprès de certains pays. M. Rémillard a contesté ces demandes le 31 juillet 2019 en déposant une demande de contrôle judiciaire, au motif que les demandes d'assistance représenteraient faussement qu'il est toujours résident canadien.

[4] Dans le cadre de sa demande de contrôle judiciaire, M. Rémillard s'est prévalu de la règle 317 pour demander la divulgation des documents et informations (les Renseignements) le concernant, obtenus ou créés par l'ARC en vertu des pouvoirs qui lui sont conférés par la LIR. Cette demande est formulée en ces termes :

CONFORMÉMENT À LA RÈGLE 317 DES RÈGLES DES COURS FÉDÉRALES, LE DEMANDEUR DEMANDE AU MINISTRE DE LUI FAIRE PARVENIR ET D'ENVOYER AU GREFFE UNE COPIE CERTIFIÉ[E] DES DOCUMENTS SUIVANTS QUI NE SONT PAS EN SA POSSESSION, MAIS QUI SONT EN POSSESSION DE L'OFFICE FÉDÉRAL :

- (a) les Demandes Étrangères; et
- (b) tous les documents pris en compte, consultés, ou générés par le Ministre, ou par toute personne ou entité agissant pour le compte du Ministre, incluant les feuilles de travail, les communications écrites et les notes manuscrites prises lors de communications verbales, qui se rapportent ou qui sont pertinentes aux Demandes Étrangères.

(Dossier d'appel, à la page 93.)

[5] Suite à cette demande, et en conformité avec la règle 318, l'ARC a transmis au greffe (en deux envois) une copie certifiée des Renseignements. Le greffe a traité les Renseignements comme documents publics et les a

file as provided for in paragraph 23(2)(c). The Registry also sent a certified copy of the Information to counsel for Mr. Rémillard.

[6] On January 14 and 15, 2020, a journalist contacted Mr. Rémillard and one of his sons regarding the application for judicial review. This is how Mr. Rémillard apparently learned that the Information was accessible to the public and that a journalist had accessed it. Counsel for Mr. Rémillard then immediately filed an *ex parte* motion for an interim order of confidentiality and a publication ban for a period of 10 days.

[7] The Federal Court issued the interim order within hours of the filing of the motion and ordered that the Information be treated as confidential under rule 151 and that its contents not be published. In accordance with that interim order, Mr. Rémillard filed the motion for order of confidentiality that is the subject of this dispute. Since that time, the interim order was extended until the hearing before Justice Pamel. A notice of constitutional questions was also served on the Attorney General of Canada and the provincial attorneys general.

II. The Federal Court decision that is the subject of this appeal

[8] First, the Federal Court rejected Mr. Rémillard's claim that it is the responsibility of the Minister or the Registry to take the necessary measures to preserve the confidentiality of documents that are transmitted until they are filed with the Court by one of the parties. After recalling that the procedure provided for in rules 317 and 318 ensures the integrity of the record in case of doubt and allows the parties to obtain the record used by the administrative decision maker, thus meeting a pressing and substantial objective, the Federal Court went on to state that documents submitted under rule 318 are clearly subject to the open court principle and are accessible to the public as soon as they are received at the Registry by virtue of rules 23 and 26.

[9] In that regard, the Federal Court reiterated the fundamental nature of the open court principle and refused to

placés dans l'annexe du dossier de la Cour, comme prévu à l'alinéa 23(2)c). Le greffe a aussi envoyé une copie certifiée des Renseignements aux avocats de M. Rémillard.

[6] Les 14 et 15 janvier 2020, un journaliste a contacté M. Rémillard et un de ses fils en lien avec la demande de contrôle judiciaire. C'est de cette façon que M. Rémillard aurait appris que les Renseignements étaient accessibles au public et qu'un journaliste y avait eu accès. Les avocats de M. Rémillard ont alors présenté sans délai une requête *ex parte* visant à obtenir une ordonnance provisoire de confidentialité et de non-publication pour une période de 10 jours.

[7] La Cour fédérale a émis l'ordonnance provisoire dans les heures qui ont suivi le dépôt de la requête, et ordonné que les Renseignements soient traités comme confidentiels suivant la règle 151 et que leur contenu ne puisse faire l'objet d'une publication. Conformément à cette ordonnance provisoire, M. Rémillard a déposé la requête en confidentialité qui fait l'objet du présent litige. L'ordonnance provisoire a depuis été reconduite jusqu'à l'audition devant le juge Pamel. Un avis de questions constitutionnelles a également été signifié au Procureur général du Canada et à ceux des provinces.

II. La décision de la Cour fédérale faisant l'objet du présent appel

[8] La Cour fédérale a d'abord rejeté les prétentions de M. Rémillard à l'effet qu'il incombait au ministre ou au greffe de prendre les mesures nécessaires pour préserver la confidentialité des documents transmis jusqu'à ce qu'ils soient déposés en Cour par l'une des parties. Après avoir rappelé que la procédure prévue par les règles 317 et 318 assurait l'intégrité du dossier en cas de doute et permettait aux parties d'obtenir le dossier dont s'est servi le décideur administratif et répondait donc à un objectif urgent et réel, la Cour fédérale a poursuivi en affirmant que les documents soumis en vertu de la règle 318 sont clairement visés par le principe de la publicité des débats et sont accessibles au public dès leur réception au greffe par l'effet des règles 23 et 26.

[9] À ce dernier chapitre, la Cour fédérale a rappelé le caractère fondamental du principe de la publicité des

make a distinction between the Court file and its annex, while recognizing that not all documents in the Court file or in the annex will necessarily be made available to the public. Indeed, subsection 152(1) of the Rules allows documents to be marked as confidential where they are required to be treated as such by law or where the Court orders that they be treated confidentially. Although a document transmitted to the Registry pursuant to rule 318 is not necessarily part of the evidentiary record, it is nonetheless part of the Court file and is therefore in the public domain.

[10] Mr. Rémillard also advanced a number of arguments that justified, in his view, that the Information that was transmitted should be kept confidential even if the Rules made it public. In particular, he relied on the principle of an implied undertaking of confidentiality, which states that information collected during discovery cannot be used for purposes other than for preparing for the trial.

[11] The Federal Court rejected this argument on the grounds that the logic and the basis of this principle cannot be transposed to the transmission of documents under rules 317 and 318. While there are some similarities between examinations for discovery and the procedure provided for under rules 317 and 318, the latter is not exploratory in nature, but rather is intended to provide the reviewing court and the parties with access to all of the documents on which the administrative decision maker relied in making its decision. Moreover, examinations for discovery take place outside the Court, and documents exchanged between the parties during this process are not in the possession of the Court or the Registry and remain in the hands of the parties until they are placed in the Court file, whereas documents requested by a party under rule 317 are transmitted to the Registry and placed in the Court files and their annexes.

[12] The Federal Court also rejected Mr. Rémillard's argument that section 241 of the ITA protects the confidentiality of tax information once it is transmitted to the Registry. Unlike other provisions such as paragraph 83(1)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27,

débats, et a refusé d'opérer une distinction entre le dossier de la Cour et son annexe tout en reconnaissant que les documents versés au dossier de la Cour ou à l'annexe ne seront pas tous nécessairement disponibles au public. Le paragraphe 152(1) des Règles permet en effet d'identifier des documents qui doivent être considérés comme confidentiels en vertu d'une règle de droit ou d'une ordonnance de confidentialité de la Cour. Bien qu'un document transmis au greffe en application de la règle 318 ne fasse pas nécessairement partie du dossier de preuve, il n'en fait pas moins partie du dossier de la Cour et entre de ce fait dans le domaine public.

[10] M. Rémillard avait également avancé un certain nombre d'arguments qui justifiaient selon lui que les Renseignements transmis soient confidentiels même si les Règles les rendent publics. Il s'était notamment appuyé sur le principe d'engagement implicite de confidentialité, en vertu duquel les informations recueillies au cours de la procédure d'enquête préalable ne peuvent être utilisées pour d'autres fins que la préparation du procès.

[11] La Cour fédérale a rejeté cet argument, au motif que la logique et le fondement de ce principe ne peuvent être transposés à la transmission des documents en vertu des règles 317 et 318. Malgré certaines ressemblances entre les interrogatoires préalables et la procédure prévue aux règles 317 et 318, cette dernière n'est pas de nature exploratoire mais vise plutôt à donner accès à la Cour de révision et aux parties à tous les documents sur lesquels s'est fondé le décideur administratif pour prendre sa décision. Au surplus, les interrogatoires préalables ont lieu à l'extérieur de la Cour et les documents échangés entre les parties au cours d'un tel interrogatoire ne sont pas en possession de la Cour ou du greffe et demeurent entre les mains des parties tant qu'ils ne sont pas déposés au dossier de la Cour, tandis que les documents réclamés par une partie sous l'autorité de la règle 317 sont transmis au greffe et placés dans les dossiers de la Cour et leurs annexes.

[12] La Cour fédérale a également rejeté la prétention de M. Rémillard à l'effet que l'article 241 de la LIR protégeait la confidentialité des renseignements fiscaux une fois transmis au greffe. Contrairement à d'autres dispositions comme l'alinéa 83(1)d) de la *Loi sur l'immigration*

or subsections 658(1) and 955(1) of the *Bank Act*, S.C. 1991, c. 46, section 241 does not render taxpayers' tax information inherently confidential because of the nature of the documents themselves. The purpose of that provision is only to impose a positive obligation on the Minister to treat such documents confidentially while in the Minister's possession. Once the information has been transmitted to the Registry under rule 318, it is rule 318 that frames the way in which the information must be handled.

[13] Lastly, the Federal Court rejected Mr. Rémillard's argument that the public disclosure of documents transmitted to the Registry under rule 318 would render rule 151 of the same Rules moot because the documents would be made public before he could even review them and apply to the Court to ensure that they be kept confidential. The Court pointed out that rule 151 could be used to protect confidential information even after it has entered the public domain. Also, the Court has shown flexibility in the past, such as by allowing parties to view documents and decide whether to file a motion under rule 151 before making documents public.

[14] In addition, the Federal Court rejected Mr. Rémillard's argument that was based on section 8 of the Charter. The appellant claimed that rule 318, at least insofar as it is interpreted as allowing public access to the record transmitted by the administrative decision maker to the Registry, constitutes an unreasonable search. The Court rejected this argument, holding that "the objectives of the procedure established by [rules] 317 and 318 ... and the open court principle are not interests of the state that section 8 of the Charter seeks to temper" ([*Rémillard*], at paragraph 141).

[15] The Court recognized that Mr. Rémillard had a reasonable expectation of privacy with respect to his tax information and could therefore expect that the information would be known only to the persons to whom it was disclosed and would be used only for the purposes underlying its disclosure. However, the rules relating to

et la protection des réfugiés, L.C. 2001, ch. 27 ou les paragraphes 658(1) et 955(1) de la *Loi sur les banques*, L.C. 1991, ch. 46, l'article 241 ne rend pas les Renseignements fiscaux des contribuables intrinsèquement confidentiels en raison de la nature même des documents. Cette dernière disposition n'a pour objet que d'imposer au ministre l'obligation positive de traiter ces documents de manière confidentielle tant qu'ils sont en sa possession. Une fois les informations transmises au greffe conformément à la règle 318, c'est cette dernière disposition qui encadre la manière dont ces informations doivent être traitées.

[13] Enfin, la Cour fédérale a écarté l'argument de M. Rémillard selon lequel la divulgation publique des documents transmis au Greffe en vertu de la règle 318 rendrait la règle 151 de ces mêmes Règles purement théorique, dans la mesure où les documents seraient rendus publics avant même qu'il puisse en prendre connaissance et s'adresser à la Cour pour en assurer la confidentialité. D'une part, la Cour a souligné que la règle 151 pouvait être utilisé pour protéger des informations confidentielles même après qu'ils soient entrés dans le domaine public. Au surplus, la Cour a fait preuve de souplesse dans le passé en permettant notamment aux parties de consulter des documents et de décider si elles déposeront une demande en vertu de la règle 151 avant de rendre des documents publics.

[14] En outre, la Cour fédérale a rejeté l'argument de M. Rémillard fondé sur l'article 8 de la Charte. L'appelant soutenait que la règle 318, du moins dans la mesure où elle est interprétée comme permettant l'accès du public au dossier transmis par le décideur administratif au greffe, constituait une fouille abusive. La Cour a rejeté cette prétention, se disant d'avis que « les objectifs de la procédure établie par les [règles] 317 et 318 [...] et le principe de publicité des débats ne constituent pas des intérêts de l'État que l'article 8 de la Charte vise à moduler » ([*Rémillard*], au paragraphe 141).

[15] La Cour reconnaît que M. Rémillard avait une attente raisonnable de vie privée à l'égard de ses renseignements fiscaux, et pouvait donc s'attendre à ce que ces renseignements ne soient connus que des personnes auxquelles ils ont été divulgués et ne soient utilisés que pour les fins sous-jacentes à leur divulgation. Or, les Règles

the disclosure of tax information by the Minister have been well established in the event of legal proceedings. Mr. Rémillard could not have been unaware of rule 318 (as well as rules 23 and 26) and could not have maintained a reasonable expectation of privacy from the moment that he filed an application for judicial review of a decision by the Minister and requested the transmission of certain documents under rule 317.

[16] Moreover, the procedure set out in rules 317 and 318 is not a procedure for enforcement or application of a law; far from constituting an unreasonable incursion by the state into an individual's privacy, rule 318 is a procedural mechanism to ensure the efficient conduct of a judicial review procedure.

[17] Lastly, the Court noted that Mr. Rémillard consented to the transmission of his personal information since he himself made a request to that end, as authorized by rule 317. As for the argument that this was not true consent given that he had no choice but to make the request in order to prepare his record, the Court reiterated that Mr. Rémillard controlled the timing of the request, that he had the opportunity to ask the Court to make an order of confidentiality, and that he could also have asked that his application for judicial review be heard as if it were an action.

[18] In light of its decision that the transmission of the Information to the Registry complied with rule 318 and did not constitute a seizure within the meaning of section 8 of the Charter, the Federal Court concluded that it was not necessary to consider the question of the reasonableness of the seizure, including the conciliation of the interests of the taxpayer and the state. Accordingly, the Court also determined that no analysis was required with regard to section 1 of the Charter.

[19] Lastly, the Court refused to issue an order of confidentiality and a publication ban under rule 151 on the grounds that Mr. Rémillard's request was general in nature and that he had not attempted to demonstrate that all of the documents meet the requirements of such a request. However, the Court added that Mr. Rémillard

relatives à la divulgation des renseignements fiscaux par le ministre étaient bien établies en cas de poursuites judiciaires. M. Rémillard ne pouvait ignorer la règle 318 (ainsi que les règles 23 et 26), et ne pouvait conserver une attente raisonnable en matière de respect de la vie privée à partir du moment où il introduisait une demande de contrôle judiciaire contre une décision du ministre et requérait la transmission de certains documents sous l'autorité de la règle 317.

[16] Qui plus est, la procédure établie par les règles 317 et 318 ne constitue pas une procédure d'exécution ou d'application d'une loi; loin de constituer une incursion abusive de l'État dans la vie privée d'une personne, la règle 318 est un mécanisme procédural visant à assurer le déroulement efficace d'une procédure de contrôle judiciaire.

[17] Enfin, la Cour souligne que M. Rémillard a consenti à la transmission de ses renseignements personnels puisqu'il a lui-même fait une demande à cet effet tel que l'autorise la règle 317. Quant à l'argument qu'il ne s'agissait pas véritablement d'un consentement puisqu'il n'avait d'autre choix que de faire cette demande pour préparer son dossier, la Cour a réitéré que M. Rémillard contrôlait le moment où cette demande était présentée, qu'il avait la possibilité de demander à la cour de rendre une ordonnance de confidentialité, et qu'il aurait également pu demander que sa demande de contrôle judiciaire soit instruite comme une action.

[18] Compte tenu de sa décision à l'effet que la transmission des informations au greffe était conforme à la règle 318 et qu'elle ne constituait pas une saisie au sens de l'article 8 de la Charte, la Cour fédérale a conclu qu'il n'était pas nécessaire d'examiner la question du caractère raisonnable de la saisie, incluant la conciliation de l'intérêt du contribuable et de l'État. Par voie de conséquence, la Cour a aussi déterminé qu'aucune analyse n'était requise au regard de l'article premier de la Charte.

[19] Enfin, la Cour a refusé d'émettre une ordonnance de confidentialité et de non-publication en vertu de la règle 151, au motif que la demande de M. Rémillard était d'ordre général et qu'il n'avait pas tenté de démontrer que tous les documents répondent aux exigences d'une telle demande. La Cour a cependant ajouté que M. Rémillard

remained free to file a more focused request at a later date, specifically concerning the documents for which he considers an order of confidentiality and/or a publication ban to be necessary.

III. Issues

[20] This appeal essentially raises two issues, which I would phrase as follows:

- (1) Was the Federal Court correct in concluding that certified records become public when they are transmitted to the Court Registry under rule 318?
- (2) To the extent that certified records do become public when they are transmitted to the Registry, did the Federal Court err in concluding that there was no resulting violation of section 8 of the Charter?

[21] The appellant also raised, as a preliminary objection, the issue of whether the Federal Court could, on its own initiative, review the confidential information that was transmitted to the Registry and not submitted as evidence by either party. I will deal with this issue as part of my analysis of the first issue.

IV. Analysis

[22] Even though the parties did not address this issue in their memorandums or oral submissions, it is appropriate to begin by considering the applicable standard of review. Since the Supreme Court's decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*), it is well established that correctness applies to questions of law raised in an appeal. Indeed, the issues in this appeal are clearly legal in nature, and one of them is even constitutional. In this context, as the Supreme Court has noted, an appellate court is therefore "free to replace the opinion of the trial judge with its own" (*Housen*, at paragraph 8).

était toujours libre de déposer ultérieurement une requête plus ciblée portant spécifiquement sur les documents à propos desquels il estime que la confidentialité et/ou la non-publication s'imposent.

III. Questions en litige

[20] Le présent appel soulève essentiellement deux questions, que je formulerais de la façon suivante :

- 1) La Cour fédérale a-t-elle eu raison de conclure que les dossiers certifiés deviennent publics suite à leur transmission au greffe de la Cour en application de la règle 318?
- 2) Dans la mesure où les dossiers certifiés deviennent effectivement publics suite à leur transmission au greffe, la Cour fédérale a-t-elle erré en concluant qu'il n'en résultait aucune atteinte à l'article 8 de la Charte?

[21] L'appelant a également soulevé, à titre d'objection préliminaire, la question de savoir si la Cour fédérale pouvait examiner de son propre chef les Renseignements confidentiels transmis au greffe qui n'ont pas fait l'objet d'un dépôt en preuve par l'une ou l'autre des parties. Je traiterai de cette question dans le cadre de mon analyse reliée à la première question.

IV. Analyse

[22] Même si les parties n'en ont pas traité dans leurs mémoires ou leurs observations orales, il convient de se pencher dans un premier temps sur la norme de contrôle applicable. Depuis la décision rendue par la Cour suprême dans l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235 (*Housen*), il est bien établi que la norme de la décision correcte s'applique aux questions de droit soulevées dans le cadre d'un appel. Or, les questions en litige dans le cadre du présent appel sont clairement de nature juridique, l'une d'entre elles étant même d'ordre constitutionnel. Dans ce contexte, comme le soulignait la Cour suprême, une cour d'appel a donc « toute latitude pour substituer [son] opinion à celle des juges de première instance » (*Housen*, au paragraphe 8).

A. *Was the Federal Court correct in concluding that certified records become public when they are transmitted to the Court Registry under rule 318?*

[23] The appellant argues that the transmission of relevant material to the Registry by the tribunal that is in possession of it cannot be likened to the filing of evidence and that therefore, the material is not before the Court. In an adversarial system of justice, it is the parties who are in control of the course of their case, including the documents that they wish to introduce into evidence. It would follow, therefore, that the open court principle would not be engaged until the parties have introduced into evidence the documents on which they intend to rely in support of their proceedings. It would also be absurd to conclude that documents transmitted to the Registry must be accessible to the public on the basis of the open court principle, insofar as the procedure set out in rules 317 and 318 is not mandatory and is used only at the discretion of the parties.

[24] The appellant also argues that the primary purpose of the procedure set out in rules 317 and 318 is to allow litigants to challenge an administrative decision that affects them by having access to all the relevant material and that this procedure is intended to be equivalent, in a way, to the examination for discovery procedure that is available to parties in an action. The appellant considers the secondary purpose—the authentication of documents by the Registry—to be an outdated formality and a relic of the past that must instead be left to the parties. He argues that it would be inconceivable for litigants who wish to have access to their records to be forced to share them with the whole world.

[25] Lastly, the appellant claims that the Federal Court erred in invoking the other means and procedures (such as the motion for order of confidentiality provided for in rule 151) that the appellant could have used to keep his information confidential. Not only would these remedies be inapplicable in this case, but they would also only seek to create exceptions to a principle (the open court principle) before the conditions are even met for it to apply.

A. *La Cour fédérale a-t-elle eu raison de conclure que les dossiers certifiés deviennent publics suite à leur transmission au greffe de la Cour en application de la règle 318?*

[23] L'appelant fait valoir que la transmission au greffe des documents ou des éléments matériels pertinents par l'office fédéral qui en a la possession ne peut être assimilée à un dépôt en preuve et que, partant, la Cour n'en est pas saisie. Dans un système de justice contradictoire, ce sont les parties qui sont maîtres de leur dossier, y compris des documents qu'elles désirent mettre en preuve. Il en découlerait, par conséquent, que le principe de la publicité des débats ne serait pas engagé tant et aussi longtemps que les parties n'ont pas introduit en preuve les documents dont elles entendent se servir au soutien de leurs procédures. Il serait par ailleurs absurde de conclure que les documents transmis au greffe doivent être accessibles au public en s'appuyant sur le principe de la publicité des débats, dans la mesure où la procédure prévue aux règles 317 et 318 n'est pas obligatoire et n'est utilisée qu'à la discrétion des parties.

[24] L'appelant soutient également que l'objectif premier de la procédure prévue aux règles 317 et 318 est de permettre aux justiciables de contester une décision administrative qui les affecte en ayant accès à tous les documents ou éléments matériels pertinents, et se veut en quelque sorte l'équivalent de la procédure d'examen et d'interrogatoires préalables dont peuvent se prévaloir les parties dans le cadre d'une action. L'objectif secondaire d'authentification des documents par le greffe serait, aux yeux de l'appelant, une formalité désuète et une relique du passé et doit plutôt relever des parties. Il serait inconcevable, avance-t-on, que les justiciables désireux d'avoir accès à leur dossier soient contraints de le partager avec le monde entier.

[25] Enfin, l'appelant prétend que la Cour fédérale a erré en invoquant les autres moyens et procédures (tel que la requête en confidentialité prévue à la règle 151) dont l'appelant aurait pu se prévaloir pour maintenir la confidentialité de ses informations. Non seulement ces remèdes seraient-ils inapplicables en l'espèce, mais au surplus ils ne visent qu'à créer des exceptions à un principe (la publicité des débats) avant même que les conditions soient réunies pour qu'il trouve application.

[26] These arguments, which were made with confidence and skill by counsel for Mr. Rémillard, are far from being irrelevant. Nevertheless, I have come to the conclusion, after careful consideration and for the following reasons, that they must be rejected.

[27] In order to fully understand the details of the debate before us, it is appropriate to begin by examining rules 317 and 318, which govern the transmission to the Court Registry of the record compiled by the administrative decision maker, as well as these rules' interaction with rules 2, 23 and 26, which specify certain procedures for compiling and consulting the Court's files. I will then discuss the impact of the open court principle on these rules. Lastly, I will conclude this part of my analysis by examining the role of the judge called upon to decide an application for judicial review and the restrictions imposed on the judge by our adversarial justice system.

[28] Rule 317 allows a party that does not have in its possession (or is not certain that it has in its possession) all of the documents on which the administrative decision maker relied in making its decision, to request that those documents be transmitted to that party. This mechanism allows the party challenging an administrative decision to ensure that it does indeed have all of the documents relevant to its application, and thus to effectively assert its rights. Rule 317 also ensures that the administrative decision will not be immune from informed judicial review insofar as the reviewing court will have access to the same record and information as the original decision maker. This dual purpose was well summarized by the Court of Appeal for Saskatchewan in *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268. Speaking in the context of a provision similar to rule 317, the Court wrote (at paragraph 24):

In my opinion, therefore, it is necessary to recognize and give effect to the reality that, in order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the

[26] Ces arguments, qui ont été plaqués avec beaucoup d'aplomb et d'habileté par les avocats de M. Rémillard, sont loin d'être dénués d'intérêt. J'en suis néanmoins arrivé à la conclusion, après mûre réflexion et pour les motifs qui suivent, qu'ils doivent être rejetés.

[27] Pour bien saisir les tenants et aboutissants du débat dont nous sommes saisis, il convient de se pencher dans un premier temps sur les règles 317 et 318, qui encadrent la transmission au greffe de la Cour du dossier constitué par le décideur administratif, ainsi que sur leur interaction avec les règles 2, 23 et 26, qui viennent préciser certaines modalités entourant la constitution et la consultation des dossiers de la Cour. J'aborderai dans un deuxième temps l'impact qu'a sur ces Règles le principe de la publicité des débats. Enfin, je terminerai cette portion de mon analyse en examinant le rôle du juge appelé à trancher une demande de contrôle judiciaire et les restrictions que lui impose notre système de justice contradictoire.

[28] La règle 317 permet à une partie qui n'a pas en sa possession (ou qui n'est pas sûre d'avoir en sa possession) tous les documents sur lesquels s'est fondé le décideur administratif pour prendre sa décision, de demander à ce que lui soient transmis ces documents. Ce mécanisme permet à la partie qui conteste une décision administrative de s'assurer qu'elle a bel et bien tous les documents pertinents à sa demande, et donc de faire valoir efficacement ses droits. La règle 317 permet également de s'assurer que la décision administrative ne sera pas à l'abri d'un contrôle judiciaire éclairé dans la mesure où la cour de révision aura accès au même dossier et aux mêmes informations que le décideur original. Ce double objectif a été bien résumé par la Cour d'appel de la Saskatchewan dans l'arrêt *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268. S'exprimant dans le contexte d'une disposition similaire à la règle 317, la Cour écrit (au paragraphe 24) :

[TRADUCTION] Par conséquent, à mon avis, il est nécessaire de reconnaître, et d'agir en conséquence, la réalité selon laquelle, pour que les parties demanderesse dans les demandes de contrôle judiciaire puissent faire valoir leurs droits de contester des décisions administratives en mettant en doute leur caractère raisonnable, elles doivent

tribunal in question. No other result is fully consistent with the present substance of administrative law.

See also: *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, [2007] F.C.J. No. 814 (QL), at paragraph 7; *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 (CCLA), [2015] F.C.J. No. 1397 (QL), at paragraph 13; *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103, [2016] 3 F.C.R. D-15 (Lukács), at paragraph 6; *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81, 364 D.L.R. (4th) 112 (Slansky), at paragraphs 275–278, 314–315; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, [2012] F.C.J. No. 93 (QL), at paragraphs 18–20.

[29] Rule 318 further provides that the tribunal must send to the Registry and to the requesting party a certified copy of the material relevant to the request, subject to any objections that the party may raise and that the Court will decide.

[30] As noted above, the appellant places great emphasis on the fact that the documents are transmitted to the Registry, and not to the Court, and are therefore not before the Court until they are entered into evidence by either party. This statement is strictly accurate, as confirmed by several decisions of this Court: see, in particular, *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)*, [1995] 1 F.C. 459, [1994] F.C.J. No. 1608 (QL); *Cold Lake First Nations v. Noel*, 2018 FCA 72, [2018] CarswellNat 1425, at paragraph 30. The applicant (or the respondent) may choose to file in his or her record all the documents transmitted by the tribunal or only those that he or she intends to use in support of his or her application, without the need to introduce them by way of an affidavit: see paragraphs 309(2)(e.1) and 310(2)(c.1) of the Rules. See also: CCLA, at paragraph 17; *Canada (Attorney General) v. Lacey*, 2008 FCA 242, [2008] F.C.J. No. 1221 (QL), at paragraphs 6–7.

avoir le droit de voir la cour effectuant le contrôle examiner les éléments de preuve soumis au tribunal en question. Aucune autre issue n'est pleinement compatible avec la teneur actuelle du droit administratif.

Voir aussi : *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 CAF 224, [2007] A.C.F. n° 814 (QL), au paragraphe 7 (*Access Information Agency Inc.*); *Canadian Copyright Licensing Agency (Access Copyright) c. Alberta*, 2015 CAF 268, [2016] 3 R.C.F. 19, [2015] A.C.F. n° 1397 (QL) (CCLA), au paragraphe 13; *Lukács c. Canada (Office des transports)*, 2016 CAF 103, [2016] 3 R.C.F. F-17 (Lukács), au paragraphe 6; *Slansky c. Canada (Procureur général)*, 2013 CAF 199, [2015] 1 R.C.F. 81 (Slansky), aux paragraphes 275–278, 314–315; *Association des universités et collèges du Canada c. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 CAF 22, [2012] A.C.F. n° 93 (QL), aux paragraphes 18–20.

[29] La règle 318 prévoit par ailleurs que l'office fédéral doit transmettre, au greffe et à la partie qui en a fait la demande, une copie certifiée conforme des documents matériels pertinents à la demande, sous réserve des oppositions qu'elle peut faire valoir et que la Cour tranchera.

[30] Tel que mentionné précédemment, l'appelant insiste beaucoup sur le fait que les documents sont transmis au greffe, et non à la Cour, et que cette dernière n'en est donc pas saisie tant qu'ils n'ont pas été déposés en preuve par l'une ou l'autre des parties. Cette affirmation est rigoureusement exacte, tel que l'ont confirmé plusieurs décisions de cette Cour : voir notamment *Terminaux portuaires du Québec Inc. c. Canada (Conseil des relations du travail)*, [1995] 1 C.F. 459, [1994] A.C.F. n° 1608 (QL); *Premières Nations de Cold Lake c. Noel*, 2018 CAF 72, [2018] CarswellNat 1425, au paragraphe 30. Le demandeur (ou le défendeur) pourra choisir de déposer dans son dossier tous les documents transmis par le tribunal ou seulement ceux qu'il entend utiliser au soutien de sa demande, et ce sans qu'il soit nécessaire de les introduire par voie d'affidavit : voir alinéas 309(2)e.1) et 310(2)c.1) des Règles. Voir aussi : CCLA, au paragraphe 17; *Canada (Procureur général) c. Lacey*, 2008 CAF 242, [2008] A.C.F. n° 1221 (QL), aux paragraphes 6–7.

[31] In addition to this objective of providing the applicant and the Court with all the documents on which the administrative decision maker based its decision, there is another objective, maybe secondary but still important, that consists in allowing the authenticity of the transmitted documents to be verified. The appellant argued before us that this objective is a relic of the past that is no longer justified in light of technological advancements, that the onus is on the parties to ensure that the documents are authentic, and that it would be absurd to consider that the transmission to the Registry of the documents provided for under rule 317 can meet a pressing and substantial objective if this mechanism is optional.

[32] With respect, I cannot accept this argument.

[33] The appellant relied primarily on a paragraph from this Court's decision in *Gernhart v. Canada*, [2000] 2 F.C. 292, 1999 CarswellNat 2136 (*Gernhart*) to support his argument. That case dealt solely with the compatibility of subsection 176(1) of the ITA, as it read at the time, with section 8 of the Charter. This tax provision required the Minister of National Revenue to send the Tax Court of Canada (TCC) copies of returns, notices of assessment, notices of objection and other relevant documents upon an appeal of an assessment by a taxpayer. Through the application of rule 16 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, all of these documents became accessible to the public. I will discuss this decision in greater detail in the second part of my analysis, which concerns unreasonable search and seizure.

[34] In his written submissions, the appellant relies on paragraph 36 of that decision to argue that this Court recognized in that case that subsection 176(1) of the ITA “has by reason of developments in the social, technological and legal field become a historical aberration” (at paragraphs 34 and 54 of the appellant's memorandum). I would make the following comments with respect to this statement.

[35] Firstly, it is important to specify that the excerpt quoted by the appellant does not express the Court's position, but rather repeats the comments of counsel for

[31] À cet objectif de fournir au demandeur et à la Cour tous les documents sur lesquels s'est fondé le décideur administratif pour prendre sa décision s'en greffe un autre, peut-être secondaire mais néanmoins important, qui consiste à permettre la vérification de l'authenticité des documents transmis. L'appelant a fait valoir devant nous que cet objectif était une relique du passé qui ne se justifiait plus compte tenu de l'évolution de la technologie, que c'est aux parties qu'il revenait de s'assurer de l'authenticité des documents, et qu'il serait absurde de considérer que la transmission au greffe des documents prévus à la règle 317 puisse répondre à un objectif urgent et réel dans la mesure où ce mécanisme est facultatif.

[32] Avec égards, je ne peux retenir cette prétention.

[33] L'appelant s'est essentiellement appuyé sur un paragraphe de l'arrêt rendu par cette Cour dans l'affaire *Gernhart c. Canada*, [2000] 2 C.F. 292, 1999 CarswellNat 2136 (*Gernhart*) pour appuyer sa prétention. Cette affaire portait uniquement sur la compatibilité du paragraphe 176(1) de la LIR, tel qu'il se lisait à l'époque, avec l'article 8 de la Charte. Cette disposition fiscale prévoyait que le ministre du revenu national devait transmettre à la Cour canadienne de l'impôt (CCI) des copies des déclarations, avis de cotisations, avis d'oppositions et autres documents pertinents dès qu'un contribuable interjetait appel d'une cotisation. Par l'application de la règle 16 des *Règles de la Cour canadienne de l'impôt (procédure générale)*, DORS/90-688a, tous ces documents devenaient accessibles au grand public. Je reviendrai plus longuement sur cette décision dans la deuxième partie de mon analyse portant sur les fouilles, perquisitions et saisies abusives.

[34] Dans ses représentations écrites, l'appelant s'appuie sur le paragraphe 36 de cette décision pour soutenir que cette Cour a reconnu dans cette affaire que le paragraphe 176(1) de la LIR « est devenue anachronique en raison de l'évolution des mœurs, de la technologie et de la pratique du droit » (aux paragraphes 34 et 54 du mémoire de l'appelant). Je formulerais les commentaires suivants eu égard à cette affirmation.

[35] Tout d'abord, il importe de préciser que l'extrait cité par l'appelant n'exprime pas la position de la Cour mais reprend plutôt les propos de l'avocat du ministre

the Minister in his memorandum. Secondly, the Court's conclusion that subsection 176(1) of the ITA no longer serves any valid purpose is part of an analysis of the unreasonable nature of the seizure authorized by that provision. On the basis that one of the purposes of the Charter is to ensure that legislation keeps pace with the times, the Court could only reject the Minister's claims and conclude that the mere historical presence of this provision was not sufficient to establish that it was not unreasonable. However, that is not the issue that I must resolve at this stage of the analysis, which is concerned only with the meaning and scope of rules 317 and 318.

[36] I also note that subsection 176(1) of the ITA, as it read at the time, had no authentication purpose, as counsel for the respondent pointed out. Care must therefore be taken not to speculate as to what the Minister's position and the Court's decision would have been otherwise. Lastly, it is also relevant to note that the appellant has not cited any other decision of this Court or even of the Federal Court to support his argument that rules 317 and 318 no longer serve any purpose. On the contrary, this Court has reiterated, subsequent to *Gernhart*, that the authentication purpose is still relevant: *CCLA*, at paragraph 18; *Canada (Attorney General) v. Canadian North Inc.*, 2007 FCA 42, [2007] 2 F.C.R. D-14 (*Canadian North*), at paragraph 11.

[37] It would certainly be possible to consider other ways of ensuring the authenticity of the documents filed by the parties in their respective records and to rely upon the rules governing adversarial proceedings, as the appellant suggests, to achieve the same objective. I can even conceive that technological advancements may make it less necessary than it was at other points in time to send the decision maker's record to the Registry in order to ensure that the documents that will potentially become part of the applicant's or the respondent's record are indeed documents that were before the administrative decision maker. However, this is not sufficient to conclude that a rule is inapplicable as long as that rule has not been amended or repealed.

[38] In any event, it seems more important to me to situate rules 317 and 318 within the broader architecture

dans son mémoire. D'autre part, la conclusion de la Cour à l'effet que le paragraphe 176(1) de la LIR ne sert plus aucun objectif légitime s'inscrit dans une analyse du caractère abusif de la saisie autorisée par cette disposition. Se fondant sur le fait que l'un des objectifs de la Charte est de garantir que la législation reflète les valeurs de son temps, la Cour ne pouvait que rejeter les prétentions du ministre et conclure que la seule présence de cette disposition au fil des années ne suffisait pas à en établir le caractère non abusif. Telle n'est cependant pas la question qu'il me faut résoudre à ce stade-ci de l'analyse, qui ne porte que sur le sens et la portée des règles 317 et 318.

[36] Je note également que le paragraphe 176(1) de la LIR, tel qu'il était alors rédigé, ne comportait aucun objectif d'authentification, comme l'a souligné le procureur de l'intimé. Il faut donc se garder de spéculer sur la position qu'aurait adoptée le ministre et la décision qu'aurait prise la Cour s'il en avait été autrement. Enfin, il est également pertinent de souligner que l'appelant n'a cité aucune autre décision de cette Cour ou même de la Cour fédérale pour appuyer sa prétention à l'effet que les règles 317 et 318 n'auraient plus leur raison d'être. Au contraire, cette Cour a réitéré, postérieurement à l'arrêt *Gernhart*, que l'objectif d'authentification est toujours pertinent : *CCLA*, au paragraphe 18; *Canada (Procureur général) c. Canadian North Inc.*, 2007 CAF 42, [2007] 2 R.C.F. F-18 (*Canadian North*), au paragraphe 11.

[37] Sans doute pourrait-on envisager d'autres façons de garantir l'authenticité des documents déposés par les parties dans leur dossier respectif et s'en remettre, comme le suggère l'appelant, aux règles du débat contradictoire pour atteindre le même objectif. Je peux même concevoir que l'évolution de la technologie puisse rendre la transmission du dossier du décideur au greffe moins nécessaire qu'à une autre époque pour s'assurer que les documents qui feront éventuellement partie du dossier du demandeur ou du défendeur sont bel et bien des documents qui étaient devant le décideur administratif. Cela n'est cependant pas suffisant pour conclure à l'inapplicabilité d'une règle, tant et aussi longtemps qu'elle n'a pas été modifiée ou abrogée.

[38] Quoi qu'il en soit, il m'apparaît plus important de situer les règles 317 et 318 dans l'architecture plus

of the rules governing the Federal Courts to have a good understanding of their meaning and scope. The definitions found in rule 2 include that of “Court file”, which is described as “the file maintained pursuant to rule 23 or 24.” Rule 23 further provides, in its first paragraph, that the Administrator shall keep a file that is composed of documents such as “document[s] filed under these Rules,” “correspondence between a party and the Registry” and “all orders”. The second paragraph also provides that the Administrator shall keep an annex to each Court file that is comprised of affidavits, exhibits, and “all other documents and material in the possession of the Court or the Registry that are not required by these Rules to be kept in the Court file” (paragraph 23(2)(c)). The certified record from the tribunal that is transmitted to the Registry under rule 318 clearly falls into this subcategory.

[39] While it may be tempting to rely on this rule to conclude, as the appellant invites us to do, that the annexes (and thus the certified record) are not formally part of the Court file, such an approach seems to me to be erroneous. The definition of “Court file” in rule 2 makes no such distinction; therefore, the annex must be considered part of the Court file. If it were to be determined that the “Court file” includes only the Court file referred to in the first paragraph of rule 23, the definition in rule 2 would be unnecessary and redundant since the Court file would be defined as the Court file. Moreover, the interpretation suggested by the appellant would mean that affidavits and exhibits placed in the annex would not be part of the Court file, and this is clearly an untenable position.

[40] Subsection 26(1) further provides that files and annexes “that [are] available to the public” may be inspected by a person if the necessary facilities are available. The appellant would like to take advantage of what he considers to be a condition (“if they are available to the public”, as he reads it) to conclude that subsection 26(1) does not resolve the issue of public accessibility of Court files and their annexes, but merely provides for the ways and means of accessing documents that are also public. To the

large de l’ensemble des règles qui gouvernent les Cours fédérales pour bien comprendre leur sens et leur portée. Au nombre des définitions que l’on retrouve à la règle 2 se trouve celle du « dossier de la Cour », que l’on décrit comme le « dossier tenu conformément aux règles 23 ou 24 ». La règle 23 prévoit par ailleurs, à son premier paragraphe, que l’administrateur doit tenir un dossier dans lequel sont classés les documents tels que « les documents déposés en application des présentes règles », « la correspondance échangée entre une partie et le greffe » ainsi que « toutes les ordonnances ». Le deuxième paragraphe prévoit par ailleurs que l’administrateur doit tenir une annexe à chaque dossier de la Cour, dans laquelle seront versés les affidavits, les pièces, et « tous les autres documents et éléments matériels en la possession de la Cour ou du greffe dont les présentes règles n’exigent pas la conservation au dossier de la Cour » (alinéa 23(2)c)). C’est sans conteste dans cette sous-catégorie que tombe le dossier certifié de l’office fédéral transmis au greffe en vertu de la règle 318.

[39] Bien qu’il puisse être tentant de s’appuyer sur cette règle pour conclure, comme nous y invite l’appelant, que les annexes (et donc le dossier certifié) ne font pas formellement partie du dossier de la Cour, une telle approche me paraît erronée. La définition de l’expression « dossier de la Cour » que l’on retrouve à la règle 2 n’opère pas de telle distinction, si bien que l’annexe doit être considérée comme faisant partie du dossier de la Cour. S’il fallait conclure que le « dossier de la Cour » n’inclut que le dossier de la Cour mentionné au premier paragraphe de la règle 23, la définition contenue à la règle 2 serait inutile et redondante, puisque le dossier de la Cour serait défini comme le dossier de la Cour. Au surplus, l’interprétation suggérée par l’appelant ferait en sorte que les affidavits et les pièces placées à l’annexe ne feraient pas partie du dossier de la Cour, une position manifestement intenable.

[40] Le paragraphe 26(1) prévoit par ailleurs que les dossiers ainsi que les annexes « qui sont disponibles au public » peuvent être examinés par toute personne, lorsque les installations de la Cour le permettent. L’appelant voudrait tirer parti de ce qu’il considère être une condition (« s’ils sont disponibles au public », selon sa lecture) pour conclure que le paragraphe 26(1) ne résout pas la question de l’accessibilité pour le public des dossiers de la Cour et de leurs annexes, et ne ferait que prévoir les modalités

extent that a document has not been filed with the Court by either party in one of their respective records, that document would not be part of the Court file and would therefore not be accessible to the public. This interpretation appears to me to be unfounded.

[41] Rules 23 and 26 are in Part 2 of the Rules, which deals with the administration of the Court. In addition to the provisions relating to Court files (rules 21–26.1), this part of the Rules contains rules relating to officers of the Court (rule 12), the seals of the two courts (rule 13), the Registry (rules 14–18), fees (rules 19–20), unclaimed exhibits (rule 27), hearings (rules 28–40), and the summoning of witnesses (rules 41–46). It is clear that these rules have nothing to do with substantive law and are intended only to facilitate the proper functioning of the Court. The rules governing procedure and evidence, and in particular those governing the confidentiality of documents, must therefore be sought elsewhere.

[42] It is rules 151 and 152 that set out the procedure for the filing of confidential documents. Rule 151 provides that a party may submit a motion to the Court for an order “that material to be filed shall be treated as confidential.” Where such an order is made by the Court, only solicitors of record will have access to the documents marked as confidential, and these solicitors must give a written undertaking to the Court that they will not disclose their contents.

[43] The appellant argued, both before the Federal Court and before us, that these rules are illusory in a situation such as his since the documents would be made public before the applicant could even see them and before a motion could even be made to keep them confidential. He also argued that reliance on these rules was unnecessary and ill-founded because they are intended only to protect the confidentiality of information or documents that are in the record filed with the Court by the parties and that would otherwise be accessible to the public. The appellant argued that because the certified record

applicables à la consultation des documents qui sont par ailleurs publics. Dans la mesure où un document n’aurait pas été déposé à la Cour par l’une ou l’autre des parties dans l’un de leurs dossiers respectifs, ce document ne ferait pas partie du dossier de la Cour et ne serait donc pas accessible au public. Cette interprétation me paraît sans fondement.

[41] Les règles 23 et 26 se trouvent dans la Partie 2 des Règles, qui porte sur l’administration de la Cour. On retrouve notamment dans cette partie des Règles, en sus des dispositions relatives aux dossiers de la Cour (règles 21–26.1), des règles portant sur les fonctionnaires de la Cour (règle 12), sur les sceaux des deux cours (règle 13), sur le greffe (règles 14–18), sur les droits, frais et honoraires (règles 19–20), sur les pièces non réclamées (règle 27), sur les séances de la Cour (règles 28–40), et sur l’assignation des témoins (règles 41–46). Il est clair que ces règles n’ont aucune portée de droit substantif et ne visent qu’à faciliter le bon fonctionnement de la Cour. C’est donc ailleurs qu’il faut chercher les règles régissant la procédure et la preuve, et en particulier celles qui encadrent la confidentialité des documents.

[42] Ce sont les règles 151 et 152 qui prévoient le régime applicable au dépôt de documents confidentiels. La règle 151 prévoit qu’une partie peut demander à la Cour, par voie de requête, d’ordonner « que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels ». Lorsqu’une telle ordonnance est rendue par la Cour, seuls les avocats inscrits au dossier auront accès aux documents identifiés comme confidentiels, et ces derniers doivent s’engager par écrit auprès de la Cour à ne pas divulguer leur contenu.

[43] L’appelant a soutenu, tant devant la Cour fédérale que devant nous, que ces règles seraient illusoire dans une situation comme la sienne puisque les documents seraient rendus publics avant même que le demandeur puisse en prendre connaissance et avant même qu’une requête puisse être présentée pour en préserver la confidentialité. Il a également fait valoir que le recours à ces règles était inutile et mal fondé puisqu’elles ne visent qu’à protéger la confidentialité de documents ou d’informations qui se trouvent dans le dossier que les parties ont déposé à la Cour et qui seraient autrement accessibles au

transmitted to the Registry is not part of the Court file and is not public, there is no need to rely on rules 151 and 152 to preserve its confidentiality.

[44] The trial judge acted correctly in rejecting these arguments. I will not return to the second of these arguments, which seems to me to be circular insofar as it is based on the premise that documents transmitted to the Registry become public only once they become part of the record submitted by the parties to the Court. As a matter of fact, this is precisely the question that must be decided and that is answered on its face by rule 26. However, what about the practical impossibility encountered by the appellant with respect to filing a motion to preserve the confidentiality of information that he considers private and that was in the certified record transmitted to the Registry?

[45] It is true that rule 151, as it is worded, appears to be prospective in nature. It indeed allows a party to file a motion for an order that documents “to be filed” be treated as confidential. However, the Federal Court and this Court have shown flexibility in applying this rule. For example, in *Bah v. Canada (Citizenship and Immigration)*, 2014 FC 693, [2014] F.C.J. No. 1068 (QL), the Federal Court considered that it had the power to impose an order of confidentiality concerning documents that had already been placed in the Court file.

[46] The Court went even further in *Harkat (Re)*, 2009 FC 167, [2009] F.C.J. No. 228 (QL) (*Harkat*) by allowing Mr. Harkat, who was the subject of a security certificate, to view summaries of conversations prepared by counsel for the ministers involved and provided to the Court and the special advocates. Counsel for the ministers argued that these documents could not be kept confidential and should become part of the public file of the Court unless their disclosure would be injurious to national security. The special advocates argued that the documents could contain personal information and wanted Mr. Harkat to be able to see them before they became accessible to the public so that he could decide for himself what to do next.

public; le dossier certifié transmis au greffe ne faisant pas partie du dossier de la Cour et n'étant pas public, il n'y aurait nul besoin de se prévaloir des règles 151 et 152 pour en préserver la confidentialité.

[44] C'est à bon droit, que le juge de première instance a rejeté ces arguments. Je ne reviendrai pas sur le deuxième de ces arguments, qui me paraît circulaire dans la mesure où il s'appuie sur la prémisse que les documents transmis au greffe ne deviennent publics qu'à partir du moment où ils font partie du dossier soumis par les parties à la Cour. Or, c'est précisément la question qui doit être tranchée, et à laquelle répond à sa face même la règle 26. Qu'en est-il cependant de l'impossibilité pratique dans laquelle se trouvait l'appelant de déposer une requête pour préserver la confidentialité des informations qu'il estime de caractère privé et qui se trouvaient dans le dossier certifié transmis au greffe?

[45] Il est vrai que la règle 151, telle que libellée, semble être de nature prospective. Elle permet en effet à une partie de déposer une requête visant à obtenir une ordonnance selon laquelle des documents « qui seront déposés » soient considérés comme confidentiels. La Cour fédérale et cette Cour ont toutefois fait preuve de souplesse dans l'application de cette règle. Ainsi, dans la décision *Bah c. Canada (Citoyenneté et Immigration)*, 2014 CF 693, [2014] A.C.F. n° 1068 (QL), la Cour fédérale a considéré qu'elle avait le pouvoir d'ordonner la confidentialité de documents qui avaient déjà été déposés au dossier de la Cour.

[46] La Cour est allée encore plus loin dans la décision *Harkat (Re)*, 2009 CF 167, [2009] A.C.F. n° 228 (QL) (*Harkat*), en permettant à M. Harkat, qui faisait l'objet d'un certificat de sécurité, de consulter des résumés de conversation préparés par les avocats des ministres impliqués et remis à la Cour et aux avocats spéciaux. Les avocats des ministres faisaient valoir que ces documents ne pouvaient demeurer confidentiels et devaient être versés au dossier public de la Cour, sauf si leur divulgation portait atteinte à la sécurité nationale. Les avocats spéciaux soutenaient quant à eux que ces documents pouvaient contenir des renseignements personnels et souhaitaient que M. Harkat puisse en prendre connaissance avant qu'ils soient accessibles au public, de façon à ce qu'il puisse lui-même décider de la suite des choses.

[47] Recognizing that Mr. Harkat still had the option of seeking a confidentiality order pursuant to rule 151 to block the disclosure of documents that were not otherwise likely to be injurious to national security, the Court granted the special advocates' request. In doing so, it allowed Mr. Harkat to review the conversation summaries that were not yet part of the Court file so that he could make an informed decision about whether to bring a motion for order of confidentiality. I fully endorse the connection made by the Federal Court between that case and Mr. Rémillard's situation in the following paragraph of its reasons:

The situation faced by Mr. Rémillard in these proceedings is similar to that which troubled Mr. Harkat. Indeed, Mr. Rémillard asserts in this case that, without the systematic recognition of the confidentiality of documents transmitted to the Registry under section 318 of the FCR, he would be faced with the chicken-or-the-egg dilemma of being unaware of the very documents for which he wishes to obtain a confidentiality order and would therefore not be able to file a motion under section 151 of the FCR. However, the Court, in *Harkat*, recognized at paragraph 14 that "the possibility that the matters referred to in these documents may give rise to privacy concerns" and that "[g]iven Mr. Harkat's current lack of knowledge about the contents of the conversations, it is reasonable to give him an opportunity to review them before he decides whether a confidentiality order should be sought. To do otherwise would remove that recourse from him".

[*Rémillard*, at paragraph 127.]

[48] The reasoning of the Federal Court in *Harkat* was adopted in *Charkaoui (Re)*, 2009 FC 342, [2010] 3 F.C.R. 67. This case law appears to me to be entirely consistent with rule 55, which allows the Court to vary a rule or dispense with compliance with a rule; rule 3, which sets out the general principle that the Rules shall be interpreted and applied so as to secure a just outcome for every proceeding; and rule 4, which allows the Court to provide for any procedural matter not provided for in the Rules. Furthermore, Mr. Justice Stratas (speaking as a single judge on a motion) recognized, albeit in the somewhat different context of an objection by a tribunal to a request for transmission under subsection 318(2), that this Court can draw upon "its plenary powers in the

[47] Reconnaissant que M. Harkat avait toujours l'option de solliciter une ordonnance de confidentialité en vertu de la règle 151 pour bloquer la divulgation de documents par ailleurs non susceptibles de nuire à la sécurité nationale, la Cour a fait droit à la demande des avocats spéciaux. Ce faisant, elle lui a permis de prendre connaissance des résumés de conversation qui ne faisaient pas encore partie du dossier de la Cour, de façon à ce qu'il puisse prendre une décision éclairée quant à l'opportunité de présenter une requête en confidentialité. J'endors entièrement le lien qu'a fait la Cour fédérale entre cette affaire et la situation de M. Rémillard dans le paragraphe suivant de ses motifs :

La situation à laquelle est confronté M. Rémillard en l'instance est semblable à celle qui troublait M. Harkat. En effet, M. Rémillard affirme en l'espèce que, sans la reconnaissance systématique de la confidentialité des documents transmis au Greffe en vertu de l'article 318 des [Règles], il serait confronté au dilemme de la poule et de l'œuf en ignorant les documents mêmes sur lesquels il souhaite obtenir une ordonnance de confidentialité et ne pourrait donc pas déposer une demande en vertu de l'article 151 des [Règles]. Toutefois, la Cour, dans l'affaire *Harkat*, a reconnu au paragraphe 14 « que ce dont traite ces documents peut soulever des inquiétudes quant à la protection des renseignements personnels » et que « [p]uisque M. Harkat ignore pour l'instant le contenu des conversations, il est raisonnable de lui donner une possibilité d'examiner les résumés avant qu'il ne décide s'il y a lieu de solliciter une ordonnance de confidentialité. Agir autrement lui retirerait un tel recours. »

[*Rémillard*, au paragraphe 127.]

[48] Le raisonnement de la Cour fédérale dans la décision *Harkat* a été repris dans la décision *Charkaoui (Re)*, 2009 CF 342, [2010] 3 R.C.F. 67. Cette jurisprudence me paraît tout à fait conforme à la règle 55, qui permet à la Cour de modifier une règle ou d'en exempter une partie, à la règle 3, qui énonce le principe général selon lequel les Règles doivent être interprétées et appliquées de façon à permettre d'apporter une solution juste au litige, ainsi qu'à la règle 4, qui permet à la Cour de déterminer la procédure applicable en cas de silence des Règles. Le juge Stratas (s'exprimant comme juge seul dans une requête) a d'ailleurs reconnu, bien que dans le contexte quelque peu différent d'une opposition par un office fédéral à une demande de transmission en vertu du paragraphe 318(2)

area of supervision ... to craft procedures to achieve certain legitimate objectives in specific cases” (*Lukács*, at paragraph 14).

[49] It therefore seems to me that it is rule 151 that governs public access to documents filed with the Court. In accordance with the Supreme Court case law regarding open and accessible proceedings, it will be up to the judge hearing a motion for order of confidentiality to determine whether it is necessary to withhold certain documents from the public in light of the arguments raised by the applicant, “notwithstanding the public interest in open and accessible court proceedings.” The highest court has repeatedly stated that the power to impose limits on the openness and accessibility of court proceedings and on the freedom of the press to report on them must be exercised with care and restraint given the crucial importance of respect for both values to the proper functioning of our democracy: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at paragraphs 1 and 36; *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, 1982 CanLII 14, at pages 183, 185–186; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, 1996 CarswellNB 463, at paragraph 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paragraphs 23–26; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20, [1989] 2 S.C.R. 1326, at pages 1326–1339; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 1994 CanLII 39, at page 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paragraphs 32–39; *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] S.C.J. No. 25 (QL) (*Sherman*), at paragraphs 30 and 39.

[50] This Court has had the opportunity to apply these principles on several occasions, including in *Kirikos v. Fowlie*, 2016 FCA 80, [2016] F.C.J. No. 278 (QL), where it stated the following [at paragraph 19]:

What is meant by the “open court principle”? In a nutshell, it signifies that in Canada, unless otherwise stated, all court proceedings, including all material forming part of a court’s records, remain publicly available. As such, confidentiality orders are the exception. Orders such as the one requested in this case are granted only in

[des Règles], que cette Cour peut faire appel « à sa plénitude de compétence » dans l’exercice de son pouvoir de surveillance « pour établir les procédures visant à atteindre certains objectifs légitimes dans des cas précis » (*Lukács*, au paragraphe 14).

[49] Il me semble donc que c’est la règle 151 qui encadre l’accès du public aux documents qui sont déposés à la Cour. En conformité avec la jurisprudence de la Cour suprême sur la publicité des débats, il appartiendra au juge saisi d’une requête en confidentialité de déterminer s’il est nécessaire de soustraire certains documents à la connaissance du public au vu des arguments soulevés par le requérant, « étant donné l’intérêt du public à la publicité des débats judiciaires ». Le plus haut tribunal a réitéré à plusieurs reprises que le pouvoir d’imposer des limites à la publicité des débats judiciaires et à la liberté de la presse d’en rendre compte devait être utilisé avec circonspection et modération, étant donné l’importance cruciale du respect de ces deux valeurs pour le bon fonctionnement de notre démocratie : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522, aux paragraphes 1 et 36; *A.G. (Nova Scotia) c. MacIntyre*, [1982] 1 R.C.S. 175, 1982 CanLII 14, aux pages 183, 185–186; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, 1996 CarswellNB 463, au paragraphe 23; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, aux paragraphes 23–26; *Edmonton Journal c. Alberta (Procureur général)*, 1989 CanLII 20, [1989] 2 R.C.S. 1326, aux pages 1326–1339; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, 1994 CanLII 39, à la page 878; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442, aux paragraphes 32–39; *Sherman (Succession) c. Donovan*, 2021 CSC 25, [2021] A.C.S. n° 25 (QL) (*Sherman*), aux paragraphes 30 et 39.

[50] Cette Cour a eu l’occasion d’appliquer ces principes à plusieurs reprises, notamment dans l’arrêt *Kirikos c. Fowlie*, 2016 CAF 80, [2016] A.C.F. n° 278 (QL), où elle s’est exprimée en ces termes [au paragraphe 19] :

Qu’entend-on par « principe de la publicité des débats judiciaires »? En un mot, cela signifie qu’au Canada, sauf indication contraire, toutes les procédures judiciaires, y compris les documents faisant partie des dossiers d’un tribunal, restent accessibles au public. Cependant, les ordonnances de confidentialité font figure d’exception. Les

exceptional circumstances to avoid deleterious effects on the principle of open courts and freedom of expression [Emphasis added.]

[51] It is therefore under the authority of rule 151 that the appellant could have requested an order of confidentiality to withhold from the public and the press certain documents or information that he considered confidential. The party seeking such an order will have a heavy burden, as the Supreme Court recently recalled in *Sherman*. Speaking for a unanimous Court, Mr. Justice Kasirer wrote the following in that case (at paragraph 35):

.... For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[52] This is precisely what counsel for Mr. Rémillard did from the moment that he was contacted by a journalist. An interim order was immediately made by the Federal Court, and that order is still in effect following this Court's order of January 26, 2021, granting the motion to stay the order issued by the Federal Court on November 17, 2020.

[53] As noted above, the Rules are flexible enough to ensure that confidentiality is maintained when the circumstances require it. The appellant could therefore have requested to see the documents transmitted to the Court Registry before they were placed in the annex of the Court file, which would have made it possible to bring a motion for order of confidentiality before the documents became accessible to the public. Given the large number of documents sought by the appellant in his request for transmission under rule 317, it was foreseeable that some of those documents might contain information that he considered confidential. In any event, Mr. Rémillard obtained the requested documents from the CRA at the same time as

ordonnances telles que celle demandée en l'instance ne sont rendues que dans des circonstances exceptionnelles pour éviter des effets néfastes qu'elles pourraient avoir sur le principe de la publicité des débats judiciaires et de la liberté d'expression [...] [Je souligne.]

[51] C'est donc sous l'autorité de la règle 151 que l'appellant aurait pu demander une ordonnance de confidentialité pour soustraire au public et à la presse certains documents ou informations qu'il estimait de nature confidentielle. La partie qui requiert une telle ordonnance aura un lourd fardeau, comme l'a récemment rappelé la Cour suprême dans l'arrêt *Sherman*. S'exprimant au nom d'une Cour unanime, le juge Kasirer a écrit dans cette affaire (au paragraphe 35) :

[...] Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

[52] C'est précisément ce que les avocats de M. Rémillard ont fait dès le moment où ce dernier a été contacté par un journaliste. Une ordonnance provisoire a immédiatement été rendue par la Cour fédérale, laquelle est toujours en vigueur suite à l'ordonnance de cette Cour émise le 26 janvier 2021 accueillant la requête en sursis d'exécution de l'ordonnance rendue par la Cour fédérale le 17 novembre 2020.

[53] Tel que mentionné précédemment, les Règles sont assez souples pour assurer le maintien de la confidentialité lorsque les circonstances l'exigent. L'appellant aurait donc pu demander à voir les documents transmis au greffe de la Cour avant qu'ils soient déposés à l'annexe du dossier de la Cour, de façon à pouvoir introduire une requête en confidentialité avant que les documents soient accessibles au public. Compte tenu de l'ampleur des documents requis par l'appellant dans sa demande de transmission en vertu de la règle 317, il était prévisible que certains de ces documents puissent contenir de l'information qu'il estime confidentielle. En tout état de cause, M. Rémillard a obtenu les documents demandés à l'ARC au même moment

the Court Registry, namely, on August 30 and October 4, 2019, and thus could have brought his motion for order of confidentiality well before January 15, 2020. In these circumstances, I find it difficult to see how Mr. Rémillard can claim that he was surprised that a journalist had had access to the file.

[54] To this, the appellant counters, as noted above, that the open court principle applies only to the record as constituted by the parties and that is before the Court and that he could not therefore expect the public and the media to have access to the record sent by the CRA to the Court Registry under rule 317. I have already explained, in the preceding paragraphs, why this distinction between the Court file and the record of the Registry cannot hold water under the Rules of the Court. Does this mean that the Court can rely on the entire record of the Registry to make its decision, and not only on the evidentiary record constituted by the parties? Would this not go against the very foundations of our adversarial system of justice, where the presentation of the facts is the responsibility of the parties and their counsel?

[55] In general, it is undeniable that a judge is not at liberty to examine documents that are not in the evidentiary record submitted by the parties. The decision of the Ontario Court of Appeal in *Phillips et al. v. Ford Motor Co. of Canada Ltd. et al.*, [1971] 2 O.R. 637, (1971), 18 D.L.R. (3d) 641 (at page 657 [of O.R.]), cited by this Court in *Gernhart*, illustrates this principle well:

Our mode of trial procedure is based upon the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice

que le greffe de la Cour, soit les 30 août et 4 octobre 2019, et il aurait donc pu présenter sa requête en confidentialité bien avant le 15 janvier 2020. Je vois mal, dans ces circonstances, comment M. Rémillard peut prétendre avoir été pris par surprise lorsqu'il a réalisé qu'un journaliste avait eu accès au dossier.

[54] À ceci, l'appelant rétorque, tel que mentionné plus haut, que le principe de la publicité des débats ne s'applique qu'au dossier tel que constitué par les parties et dont la Cour est saisie, et qu'il ne pouvait par conséquent s'attendre à ce que le public et les médias aient accès au dossier transmis par l'ARC au greffe de la Cour sous l'autorité de la règle 317. J'ai déjà expliqué, dans les paragraphes qui précèdent, pourquoi cette distinction entre le dossier de la Cour et le dossier du greffe ne pouvait tenir la route, au vu des Règles de la Cour. Est-ce à dire pour autant que la Cour peut s'appuyer sur tout le dossier du greffe pour prendre sa décision, et non pas uniquement sur le dossier de preuve constitué par les parties? Cela n'irait-il pas à l'encontre des fondements mêmes de notre système de justice contradictoire, dans le cadre duquel la présentation des faits relève des parties et de leurs avocats?

[55] De façon générale, il est indéniable qu'un juge n'a pas la liberté d'examiner des documents qui ne se trouvent pas dans le dossier de preuve soumis par les parties. La décision rendue par la Cour d'appel de l'Ontario dans *Phillips et al. v. Ford Motor Co. of Canada Ltd. et al.*, [1971] 2 O.R. 637, (1971), 18 D.L.R. (3d) 641 (à la page 657 [des O.R.]), citée par cette Cour dans l'arrêt *Gernhart*, illustre bien ce principe :

[TRADUCTION] Nos procédures judiciaires découlent d'un système fondé sur la confrontation, dans lequel les parties tentent d'établir, au moyen d'éléments de preuve pertinents soumis à un juge des faits impartial, les incidents ou les circonstances qui constituent le fondement de leurs allégations. Il est présumé dans cette procédure que les parties, assistées de leurs avocats, auront la chance de présenter pleinement et efficacement tous les faits importants ayant une valeur probante à l'appui de leurs thèses respectives et que le juge du procès prendra en considération, de manière posée et impartiale, les faits en litige afin de cerner la vérité des questions à trancher. Le procès n'est pas une expérience scientifique où le juge assumerait le rôle de directeur de recherche; il s'agit plutôt de la

for the litigants. Undoubtedly a Court must be concerned with truth, in the sense that it accepts as true certain sworn evidence and rejects other testimony as unworthy of belief, but it cannot embark upon a quest for the “scientific” or “technological” truth when such an adventure does violence to the primary function of the Court, which has always been to do justice, according to law...

[56] The same is true when the Court is exercising its supervisory power. There can be no doubt that the Court, when presented with an application for judicial review under section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (the Act), can rely only on the documents in the parties’ records. It is the responsibility of the applicant to reproduce in his or her record, in whole or in part, the record transmitted by the administrative decision maker; if the respondent believes that one or more documents in the certified record that were not filed by the applicant are relevant, the respondent will add them to his or her own record. Only those documents will form part of the evidentiary record and may be considered by the Court: see, in particular, *Canadian North*, at paragraphs 9 and 12; *CCLA*, at paragraph 18.

[57] Of course, this principle creates a certain tension with the very purpose of judicial review. Indeed, reviewing courts are not mandated to make their own findings of fact or to rule on the merits of the submissions made by the parties, but only to rule on the legality or reasonableness of decisions made by administrative decision makers. In keeping with the principle of the rule of law and the role conferred on the judiciary to ensure that the executive branch is acting within the powers delegated to it by Parliament, it is not the role of the reviewing court to substitute itself for the regulatory or administrative authority and to weigh the evidence itself in order to draw its own conclusions; rather, its role is to ensure that the decision is reasonable or, in some rare cases, correct in light of the applicable law.

[58] However, it goes without saying that, in order to perform this task, the reviewing court must have access to

tribune établie pour permettre aux parties d’obtenir justice. Manifestement, la Cour doit se préoccuper de la vérité, en ce sens qu’elle reconnaît comme étant vrais certains témoignages sous serment alors qu’elle en rejette d’autres parce qu’ils ne sont pas dignes de foi, mais elle ne peut pas s’engager dans une quête de vérité « scientifique » ou « technologique » lorsque cette quête malmène la fonction principale de la Cour, qui a toujours été de rendre justice en appliquant le droit [...]

[56] Il en va de même lorsque la Cour agit dans le cadre de son pouvoir de surveillance. Il ne fait aucun doute que la Cour, lorsqu’elle est saisie d’une demande de contrôle judiciaire conformément à l’article 18.1 de la *Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7 (la Loi), ne peut s’appuyer que sur les documents qui se trouvent dans le dossier des parties. Il appartient au demandeur de reproduire dans son dossier, en tout ou en partie, le dossier transmis par le décideur administratif; dans l’hypothèse où la partie défenderesse estime qu’un ou plusieurs documents du dossier certifié qui n’ont pas été déposés par la partie demanderesse sont pertinents, elle les ajoutera dans son propre dossier. Seuls ces documents feront partie du dossier de preuve et pourront être considérés par la Cour : voir notamment *Canadian North*, aux paragraphes 9 et 12; *CCLA*, au paragraphe 18.

[57] Bien entendu, ce principe n’est pas sans créer une certaine tension avec l’objectif même qui sous-tend le contrôle judiciaire. En effet, les cours de révision n’ont pas pour mandat de tirer leurs propres conclusions de fait et de se prononcer sur le bien-fondé des prétentions mises de l’avant par les parties, mais uniquement à se prononcer sur la légalité ou la raisonnablement de décisions prises par les décideurs administratifs. Conformément au principe de la primauté du droit et du rôle dévolu au pouvoir judiciaire de s’assurer que l’exécutif agit dans le cadre des pouvoirs que lui délègue le législateur, il ne revient pas à la cour de révision de se substituer à l’autorité réglementaire ou administrative et d’évaluer elle-même la preuve pour en tirer ses propres conclusions, mais plutôt de s’assurer que la décision prise est raisonnable ou, dans certains cas plus rares, correcte au regard du droit applicable.

[58] Or, il va de soi que pour s’acquitter de cette tâche, la cour de révision doit avoir accès à toute la preuve qui

all the evidence that was before the administrative decision maker. Indeed, how can a court charged with assessing the reasonableness of a decision and the defensibility of the justification given in light of the evidence do so if it does not have access to the entire record that was before the administrative authority? Is there not a risk, as my colleague Justice Stratas pointed out (dissenting, but not on this point) in *Slansky*, at paragraph 276, that an inadequate evidentiary record may in some circumstances immunize the decision made by a decision maker or an administrative tribunal? For example, how would it be possible to assess whether the evidence in the record supports a conclusion that was reached if all the evidence that was before the administrative body is not on the record of the parties?

[59] In my view, these risks are real, but they nevertheless do not allow the Court to usurp the role of the parties in presenting the evidence and arguments in support of their positions. Even in the context of an application for judicial review, the fundamental principles of our adversarial system of justice continue to apply, and judges must be careful not to act as lawyers and supplement a record that they consider incomplete by consulting, of their own motion, the tribunal record transmitted to the Registry.

[60] In light of the foregoing, I am of the view that the Federal Court erred in consulting of its own motion the certified record transmitted to the Registry by the Minister before the parties had even filed their records. Indeed, it appears, on the basis of paragraph 193 of the Federal Court's reasons, that the judge reviewed the documents before concluding that they did not meet all the requirements for an order of confidentiality. However, I find that this error is of no consequence as it had no impact on the rights of the parties. It must be remembered that the burden is on the party requesting that material be kept confidential to identify it specifically and to state the legal principle under which it must be removed from the record accessible to the public. In this case, the judge did not definitively dismiss the appellant's motion, but merely indicated that it was too general and therefore did not meet the requirements of rule 151. However, the judge did expressly preserve Mr. Rémillard's right to file a new motion specifically identifying the documents for which he

était devant le décideur administratif. Comment, en effet, la cour chargée d'apprécier la raisonnable d'une décision et le caractère défendable de la justification donnée au regard de la preuve si elle n'a pas accès à tout le dossier qui était devant l'autorité administrative? N'y a-t-il pas un risque, comme le soulignait mon collègue le juge Stratas (dissident mais pas sur ce point) dans l'arrêt *Slansky*, au paragraphe 276, que l'insuffisance du dossier de preuve puisse dans certaines circonstances immuniser la décision prise par un décideur ou un tribunal administratif? Comment pourra-t-on par exemple évaluer si la preuve au dossier donnait ouverture à une conclusion qui a été tirée si toute la preuve qui était devant l'organe administratif ne se retrouve pas dans le dossier des parties?

[59] À mon avis, ces risques sont réels mais n'autorisent quand même pas la Cour à usurper le rôle des parties dans la présentation de la preuve et des arguments au soutien de leurs positions. Même dans le contexte d'une demande de contrôle judiciaire, les principes fondamentaux de notre système de justice accusatoire continuent de s'appliquer et le juge doit se garder de se muer en avocat et de suppléer à un dossier qu'il estime incomplet en consultant, de son propre chef, le dossier du tribunal transmis au greffe.

[60] Compte tenu de ce qui précède, je suis d'avis que la Cour fédérale a erré en consultant de son propre chef le dossier certifié transmis au greffe par le ministre, avant même que les parties n'aient déposé leur dossier. Il apparaît en effet du paragraphe 193 des motifs de la Cour fédérale que le juge a examiné les documents avant de conclure qu'ils ne remplissaient pas toutes les conditions requises pour une ordonnance de confidentialité. J'estime cependant que cette erreur est sans conséquence, dans la mesure où elle n'a eu aucune incidence sur les droits des parties. Il faut rappeler que le fardeau repose sur la partie qui demande la confidentialité d'un document ou d'un élément matériel de l'identifier précisément et préciser la règle de droit en vertu de laquelle il doit être soustrait du dossier accessible au public. Dans le cas présent, le juge n'a pas rejeté définitivement la demande de l'appellant, mais s'est contenté d'indiquer qu'elle était trop générale et ne remplissait pas de ce fait les exigences de la règle 151. Il a cependant expressément préservé le

considers confidentiality to be necessary. I therefore see no breach of procedural fairness in this approach.

[61] In summary, I agree with the appellant that judges on judicial review, like judges hearing an action, cannot go beyond what was submitted to them by the parties in the course of their deliberations and must rely on the evidentiary record in reaching their decision in an adversarial system of justice such as ours. The only exception permitted by the Rules is in rule 313, under which the Court may order that other material be filed where it considers that the application records of the parties are incomplete. Indeed, there may be situations where the Court considers that it is not in a position to adequately conduct a judicial review of a decision on the basis of the record submitted by the parties. This is a power that must be exercised with caution as parties should be in control of their own record: *Imperial Oil v. Jacques*, 2014 SCC 66, [2014] 3 S.C.R. 287, at paragraph 25. Moreover, this rule does not authorize judges themselves to consult the certified record; at most, a judge may ask the parties themselves to present documents or evidence that the judge deems necessary to carry out the role that has been conferred on him or her.

[62] However, I do not draw the same conclusion from this finding as the appellant. The adversarial nature of our justice system should not be confused with the open court principle (although they are not unrelated). These two major values, which have different origins and rationales, can and must coexist without being equated. As noted above, open and accessible courts are essential to the transparency of the judicial process and have been enshrined in the Constitution as a matter of freedom of expression. It does not follow that everything that must be made accessible to the public must necessarily end up before the judge. Indeed, there is no reason why the public should not have access to documents and information that judges cannot consider in the exercise of their judicial duties. In fact, this situation occurs regularly, in both civil and criminal matters, without causing any problems whatsoever. In short, there is nothing to prevent the record that was filed with the Court Registry and that is accessible to the

droit de M. Rémillard de présenter une nouvelle requête identifiant spécifiquement les documents pour lesquels la confidentialité lui semblait s'imposer. Je ne vois donc aucun bris d'équité procédurale dans cette démarche.

[61] En résumé, je suis d'accord avec l'appelant pour dire que le juge siégeant en révision judiciaire, comme le juge saisi d'une action, ne peut aller au-delà de ce qui lui a été soumis par les parties dans le cadre de son délibéré et doit s'en tenir au dossier de preuve pour parvenir à sa décision, dans un régime de justice contradictoire comme le nôtre. La seule exception qu'autorisent les Règles se trouve à la règle 313, en vertu de laquelle la Cour peut demander le dépôt de documents ou d'éléments matériels supplémentaires si elle est d'avis que les dossiers des parties sont incomplets. Il peut en effet arriver que la Cour estime ne pas être en mesure de procéder adéquatement au contrôle judiciaire d'une décision au vu du dossier que lui ont soumis les parties. Il s'agit là d'un pouvoir qui doit être utilisé avec circonspection étant donné que les parties sont normalement maîtres de leur dossier : *Pétrolière Impériale c. Jacques*, 2014 CSC 66, [2014] 3 R.C.S. 287, au paragraphe 25. Qui plus est, cette Règle n'autorise pas le juge lui-même à consulter le dossier certifié; tout au plus peut-il demander aux parties elles-mêmes de lui présenter des documents ou des preuves qui lui paraissent nécessaires pour mener à bien le rôle qui lui est dévolu.

[62] Je ne tire cependant pas de ce constat la même conclusion que l'appelant. Le caractère contradictoire de notre système de justice ne doit pas être confondu (même s'ils ne sont pas sans liens) avec le principe de la publicité des débats. Ces deux grandes valeurs, dont les origines et la justification diffèrent, peuvent et doivent coexister sans être assimilées. Tel que mentionné plus haut, la publicité des débats devant les tribunaux est essentielle à la transparence du processus judiciaire et a été constitutionnalisée au titre de la liberté d'expression. Il n'en découle pas que tout ce qui doit être accessible au public doit nécessairement se retrouver devant le juge. En fait, rien ne s'oppose à ce que le public puisse consulter des documents et des informations dont le juge ne pourra tenir compte dans l'exercice de ses fonctions judiciaires. En fait, cette situation se produit régulièrement, tant en matière civile que criminelle, sans que cela pose le moindre problème que ce soit. Bref, rien ne s'oppose à ce que le dossier déposé

public from being different from the record entered into evidence by the parties, which alone can be considered by the judge.

[63] It may well be that the system surrounding public access to a record that has been established by the Rules goes beyond what is required by the open court principle as interpreted by the Supreme Court. This is far from sufficient to render it invalid, especially since rule 151 and the case law relating to it adequately protect the confidentiality of documents and information whose dissemination might violate a legal principle.

[64] I therefore find that the first question raised by this case must be answered in the affirmative. The Federal Court was correct in concluding that the certified record became public upon transmission to the Court Registry pursuant to rule 318.

B. *To the extent that certified records do become public when they are transmitted to the Registry, did the Federal Court err in concluding that there was no resulting violation of section 8 of the Charter?*

[65] The appellant argues that if the Court were to conclude that the certified record transmitted to the Registry under rule 318 must be considered accessible to the public, it must be inferred that it authorizes an unreasonable seizure that is inconsistent with section 8 of the Charter. Should that happen, he asks that the Court of Appeal read down rule 318 so that the transmission of the certified record to the Court Registry does not result in it becoming accessible to the public, or alternatively, that the words “to the Registry” in paragraph 318(1)(a), paragraph 318(1)(b) and subsection 318(4) of rule 318 be declared inoperative.

[66] As he did at trial, Mr. Rémillard relies primarily on the decision of this Court in *Gernhart* to support his argument. In that case, which I have already discussed in paragraph 34 of these reasons, the impugned provision required the Minister to transmit to the TCC all documents in his possession that were relevant to the appeal.

au greffe et accessible au public diffère du dossier déposé en preuve par les parties et qui seul peut être considéré par le juge.

[63] Il se peut bien que le régime entourant l’accessibilité d’un dossier par le public mis en place par les Règles aille au-delà de ce que requiert le principe de la publicité des débats tel qu’interprété par la Cour suprême. Cela ne suffit pas, tant s’en faut, pour en faire un motif d’invalidation, d’autant plus que la règle 151 et la jurisprudence qui l’entoure protègent adéquatement la confidentialité des documents et des informations dont la diffusion pourrait contrevenir à une règle de droit.

[64] J’en arrive donc à la conclusion qu’il faut répondre par l’affirmative à la première question soulevée par le présent litige. La Cour fédérale a eu raison de conclure que le dossier certifié est devenu public suite à sa transmission au greffe de la Cour en application de la règle 318.

B. *Dans la mesure où les dossiers certifiés deviennent effectivement publics suite à leur transmission au greffe, la Cour fédérale a-t-elle erré en concluant qu’il n’en résultait aucune atteinte à l’article 8 de la Charte?*

[65] L’appelant soutient que dans l’hypothèse où la Cour en viendrait à la conclusion que le dossier certifié transmis au greffe en application de la règle 318 doit être considéré comme étant accessible au public, il faudrait nécessairement en déduire qu’elle autorise une saisie abusive et incompatible avec l’article 8 de la Charte. Dans une telle éventualité, il invite la Cour d’appel à donner une interprétation atténuée à la règle 318, de façon à ce que la transmission du dossier certifié au greffe de la Cour n’entraîne pas son accessibilité au public, ou alternativement, que les mots « au greffe » de l’alinéa 318(1)a), l’alinéa 318(1)b) et le paragraphe 318(4) de la règle 318 soient déclarés inopérants.

[66] Comme en première instance, M. Rémillard s’appuie essentiellement sur la décision rendue par cette Cour dans l’arrêt *Gernhart* pour étayer son argument. Dans cette affaire, dont j’ai déjà traité au paragraphe 34 des présents motifs, la disposition contestée faisait obligation au ministre de transmettre à la CCI tous les documents pertinents

Speaking for a unanimous Court, Mr. Justice Sexton relied on *R. v. Dymont*, [1988] 2 S.C.R. 417, 1988 CanLII 10 (*Dymont*) to conclude that a seizure can occur even where no investigation is taking place and that the transmission of a taxpayer's tax return to the TCC amounted to a seizure so long as the taxpayer had a reasonable expectation of privacy in filing the return and had not consented to its subsequent transmission to the Court. Justice Sexton stated the following on this issue [at paragraph 24]:

Indeed, it is natural that most seizures occur during investigations, since investigations permit state actors to narrowly focus the target of a seizure. That salutary idea should not be turned on its ear to then prevent the application of section 8 of the Charter in circumstances where state actors do not engage in investigations. In my view, that conclusion would permit state actors to actively obtain private information for non-investigatory purposes and to indiscriminately broadcast that information, despite the fact that people nevertheless have a reasonable expectation of privacy in that information.

[67] Mr. Rémillard argued before us, as he did before the Federal Court, that his situation is no different from that of Ms. Gernhart since rule 317 permits all of a litigant's documents and personal information that are collected by any tribunal to be made public, whether or not they are introduced into evidence. In my view, this argument must be rejected, essentially for the reasons given by the Federal Court. Despite the able argument of counsel for Mr. Rémillard, there is no symmetry between the certified record transmission system established by the Rules and subsection 176(1) of the ITA.

[68] It is well established that section 8 of the Charter is intended to protect the reasonable expectations of privacy of individuals: *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at page 159, 1984 CanLII 33; *Dymont*, at paragraph 15. In other words, the person claiming protection under section 8 must be able to show a subjectively held, and objectively reasonable, expectation of privacy: *R. v.*

à l'appel qui étaient en sa possession. S'exprimant au nom d'une Cour unanime, le juge Sexton s'est appuyé sur l'arrêt *R. c. Dymont*, [1988] 2 R.C.S. 417, 1988 CanLII 10 (*Dymont*) pour conclure qu'une saisie peut être effectuée en dehors du contexte d'une enquête, et que la transmission de la déclaration de revenus d'un contribuable à la CCI équivalait à une saisie dans la mesure où le contribuable avait une attente raisonnable de vie privée en produisant sa déclaration et n'avait pas consenti à ce qu'elle soit subseqüemment transmise à la Cour. Voici comment le juge Sexton s'exprime à ce propos [au paragraphe 24] :

En effet, il est normal que la plupart des saisies soient effectuées dans le cadre d'enquêtes, puisque les enquêtes permettent aux représentants de l'État de circonscrire l'objectif de la saisie. Cette situation est profitable et ne devrait pas être dénaturée par une interprétation qui vise à soustraire à l'application de l'article 8 de la Charte les circonstances où les représentants de l'État n'effectuent pas d'enquêtes. À mon avis, cette conclusion permettrait aux représentants de l'État de travailler activement à l'obtention d'information confidentielle, à des fins autres que celles d'une enquête, et de diffuser cette information inconsiderément, malgré le fait que les gens aient pourtant une attente raisonnable en matière de vie privée à l'égard de cette information.

[67] L'appelant a soutenu devant nous, comme il l'avait fait en Cour fédérale, que la situation de M. Rémillard n'est pas différente de celle dans laquelle se trouvait Mme Gernhart, puisque la règle 317 permet de rendre publics tous les documents et renseignements personnels d'un justiciable colligés par tout office fédéral, peu importe que ceux-ci soient présentés en preuve ou non. À mon avis, cet argument doit être rejeté, essentiellement pour les raisons données par la Cour fédérale. Malgré l'argumentation habile des avocats de M. Rémillard, il n'y a pas de symétrie entre le régime de transmission du dossier certifié mis en place par les Règles et le paragraphe 176(1) de la LIR.

[68] Il est bien établi que l'objectif visé par l'article 8 de la Charte est de protéger les attentes raisonnables des individus en matière de vie privée : *Hunter et autres c. Southam Inc.*, [1984] 2 R.C.S. 145, à la page 159, 1984 CanLII 33; *Dymont*, au paragraphe 15. En d'autres termes, la personne qui veut se réclamer de la protection de l'article 8 doit pouvoir démontrer qu'elle pouvait subjectivement, et de façon

Mills, 2019 SCC 22, [2019] 2 S.C.R. 320, at paragraph 12. However, the Supreme Court has repeatedly stated that legitimate expectations of privacy are necessarily diminished where an individual is required to produce documents in the course of a regulated activity (see, for example, *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at page 507, 1990 CanLII 135; *143471 Canada Inc. v. Quebec (Attorney General)*; *Tabah v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, at page 378, 1994 CanLII 89; *Comité paritaire de l'industrie de la chemise v. Potash*; *Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406, at pages 420–421, 1994 CanLII 92) or in tax matters (see *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pages 649–650, 1990 CanLII 137 (*McKinlay*); *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at paragraph 72).

[69] In this case, I find that Mr. Rémillard has not shown that there is a subjective and objectively reasonable expectation of privacy, having regard to all the circumstances. First, he could have limited the number of documents sought in his request for transmission under rule 317. Rather than only including the documents considered by the Minister in making his decision, Mr. Rémillard expanded the scope of his request to include all documents [TRANSLATION] “consulted or generated by the Minister or by any person or entity acting on behalf of the Minister” and thus proportionally increased the number of documents transmitted and the risk of confidential information being included in those documents. Second, he waited nearly four months before filing a motion for order of confidentiality with the Court and only did so after a journalist had seen the certified record. Given the perfectly clear wording of rule 26, one would have expected him to bring such a motion much earlier, if only as a preventative measure and an additional precaution, if he had any real concerns about his privacy.

[70] Even assuming that Mr. Rémillard may have had a subjective expectation of privacy with respect to some of the information contained in those documents, this expectation does not appear to me to be objectively

objectivement raisonnable, s’attendre au respect de sa vie privée : *R. c. Mills*, 2019 CSC 22, [2019] 2 R.C.S. 320, au paragraphe 12. Or, la Cour suprême a répété à plus d’une reprise que les attentes légitimes au respect de la vie privée sont nécessairement moindres lorsqu’une personne doit produire des documents dans le cadre d’une activité réglementée (voir par exemple : *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, à la page 507, 1990 CanLII 135; *143471 Canada Inc. c. Québec (Procureur général)*; *Tabah c. Québec (Procureur général)*, [1994] 2 R.C.S. 339, à la page 378, 1994 CanLII 89; *Comité paritaire de l’industrie de la chemise c. Potash*; *Comité paritaire de l’industrie de la chemise c. Sélection Milton*, [1994] 2 R.C.S. 406, aux pages 420–421, 1994 CanLII 92), ou en matière fiscale (voir *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, aux pages 649–650, 1990 CanLII 137 (*McKinlay*); *R. c. Jarvis*, 2002 CSC 73, [2002] 3 R.C.S. 757, au paragraphe 72).

[69] Dans le cas présent, j’estime que M. Rémillard n’a pas démontré l’existence d’une attente subjective et objectivement raisonnable en matière de vie privée, compte tenu de l’ensemble des circonstances. D’une part, il aurait pu limiter l’ampleur des documents requis dans sa demande de transmission en vertu de la règle 317. Plutôt que de se contenter des seuls documents considérés par le ministre dans sa prise de décision, il a élargi la portée de sa demande à tous les documents « consultés ou générés par le [M]inistre ou par toute personne ou entité agissant pour le compte du [M]inistre », multipliant d’autant le nombre de documents transmis et le risque que des informations confidentielles s’y retrouvent. Qui plus est, il a attendu près de quatre mois avant de saisir la Cour d’une demande de confidentialité, et uniquement après qu’un journaliste ait pris connaissance du dossier certifié. Compte tenu de la règle 26, dont le libellé est on ne peut plus clair, on se serait attendu à ce qu’il fasse une telle demande beaucoup plus tôt, ne serait-ce que de façon préventive et par surcroît de précaution, s’il craignait réellement pour la protection de sa vie privée.

[70] En supposant même que M. Rémillard ait pu avoir une attente subjective de vie privée eu égard à certaines informations se trouvant dans ces documents, cette attente ne me paraît pas objectivement raisonnable dans les

reasonable in the circumstances. Anyone who brings a case before the courts, whether in family, commercial, administrative, tax or other matters, must expect that large parts of his or her private life will become accessible to the public. This is what is provided for in rule 26, as well as in paragraph 241(3)(b) of the ITA, which states that the confidentiality of information transmitted to the Minister does not apply in respect of legal proceedings relating to the administration or enforcement of the ITA.

[71] I would add that the concept of seizure involves the taking of a thing from a person by a public authority without that person's consent (*Dymnt*, at paragraph 26). In *McKinlay* (at page 642), this concept was extended to all situations where a person is required to produce information under compulsion of the state. This is not the situation in which Mr. Rémillard found himself. He asked the Minister of his own initiative to provide him (and the Registry) with the documents that concerned him. He controlled not only the scope of the documents transmitted, but also the timing of his request. He was also informed of the documents that had been provided to the Registry since he also obtained a copy of them.

[72] This situation therefore has nothing to do with the situation in which Ms. Gernhart found herself. The documents were not transmitted by the Minister automatically, but at the request of Mr. Rémillard, and the information was not broadcast "indiscriminately" (the French version of *Gernhart* uses the word "*inconsidérément*"), but only according to the criteria determined by Mr. Rémillard himself. This situation is therefore far from one in which the state is interfering in the private affairs of the appellant, as was the case in *Gernhart* and *Dymnt*. Far from transmitting confidential information without his consent and without informing him, it was rather at Mr. Rémillard's own request that the Minister transmitted the relevant documents to the Court Registry.

[73] In his memorandum and at the hearing, Mr. Rémillard argued that he had no real choice in proceeding as he did and that he had to use the procedure set out in rules 317 and 318 in order to make a valid application for judicial review. The Federal Court was correct in rejecting this argument.

circonstances. Quiconque saisit les tribunaux d'un litige, que ce soit en matière familiale, commerciale, administrative, fiscale ou autre, doit s'attendre à ce que de larges pans de sa vie privée deviennent accessibles au public. C'est d'ailleurs ce que prévoient la règle 26, ainsi que l'alinéa 241(3)b de la LIR, en vertu duquel la confidentialité des renseignements transmis au ministre ne s'applique pas dans les procédures judiciaires ayant trait à l'application ou à l'exécution de cette loi.

[71] J'ajouterais que le concept de saisie suppose que les autorités prennent quelque chose appartenant à une personne sans son consentement (*Dymnt*, au paragraphe 26). Dans l'arrêt *McKinlay* (à la page 642), on a étendu ce concept à toutes les situations où une personne est tenue de produire de l'information sous la contrainte de l'État. Telle n'est pas la situation dans laquelle se trouvait M. Rémillard. C'est de son propre chef qu'il a demandé au ministre de lui transmettre (ainsi qu'au greffe) les documents qui le concernaient. Non seulement contrôlait-il l'étendue des documents transmis, mais également le moment où il a fait cette demande. Et il était également informé des documents qui ont été communiqués au greffe puisqu'il en a aussi obtenu copie.

[72] Cette situation n'a donc rien à voir avec celle dans laquelle se trouvait Mme Gernhart. Les documents n'ont pas été transmis par le ministre de façon automatique mais à la requête de M. Rémillard, et l'information n'a pas été diffusé « inconsidérément » (« indiscriminately » dans la version anglaise de *Gernhart*), mais uniquement en fonction des critères déterminés par M. Rémillard lui-même. On est donc loin d'une ingérence de l'État dans les affaires privées de l'appellant, comme c'était le cas dans les affaires *Gernhart* et *Dymnt*. Loin de transmettre des informations confidentielles sans son consentement et sans l'en informer, c'est plutôt à la demande même de M. Rémillard que le ministre a transmis les documents pertinents au greffe de la Cour.

[73] Dans son mémoire et lors de l'audition, M. Rémillard a fait valoir qu'il n'avait pas vraiment le choix de procéder comme il l'a fait, et qu'il devait se servir de la procédure prévue par les règles 317 et 318 pour pouvoir exercer valablement sa demande de contrôle judiciaire. C'est à bon droit que la Cour fédérale a rejeté cette prétention.

[74] As noted above, the procedure set out in rules 317 and 318 is optional and is carried out on the applicant's initiative. It is up to applicants to determine whether they have all the relevant documents to complete their application for judicial review. If there is any doubt, or if applicants wish to supplement their record to ensure that they have exactly the same information as the administrative decision maker had in making its decision, applicants may avail themselves of this mechanism provided for in the Rules; it is up to applicants to determine the number of documents sought. In this case, it appears that the request for the transmission of documents made by counsel for Mr. Rémillard was written in very general terms, and there is no evidence that all the documents requested were relevant to establish the merits of his application.

[75] Furthermore, Mr. Rémillard could have availed himself of the mechanism provided under rule 151 and asked the Court to make an order to protect the confidentiality of certain information contained in the transmitted documents. The power conferred by this rule has been interpreted in a flexible manner, and counsel for Mr. Rémillard could even have asked to see the transmitted documents before they were made available to the public.

[76] Lastly, Mr. Rémillard could have sought to have his application for judicial review be heard as if it were an action, as authorized by subsection 18.4(2) of the Act. As the Federal Court noted at paragraph 182 [*Rémillard*] "[t]his provision constitutes Parliament's response to concerns that an application for judicial review would not offer appropriate procedural safeguards when declaratory relief is exercised." If Mr. Rémillard truly believed that the procedural safeguards surrounding an application for judicial review were not sufficient to protect the confidentiality of his personal information, he could have availed himself of this option.

[77] For all of these reasons, therefore, I am of the view that the procedure set out in rules 317 and 318 does not have the effect of a seizure, even when combined with rule 26. It is therefore not necessary for me to consider whether this procedure is unreasonable within the meaning of section 8 of the Charter.

[74] Tel que mentionné plus haut, la procédure mise en place par les règles 317 et 318 est facultative et relève de l'initiative du demandeur. C'est à ce dernier qu'il revient de déterminer s'il a tous les documents pertinents pour mener à bien sa demande de contrôle judiciaire. En cas de doute, ou s'il désire compléter son dossier pour s'assurer qu'il a exactement les mêmes informations qu'avait le décideur administratif en prenant sa décision, le demandeur peut se prévaloir de ce mécanisme prévu par les Règles et il lui appartient de déterminer l'ampleur des documents sollicités. Dans le cas présent, il appert que la demande de transmission de documents formulée par les procureurs de M. Rémillard était formulée en termes très généraux, et rien ne permet d'établir que tous les documents demandés étaient pertinents pour établir le bien-fondé de sa demande.

[75] D'autre part, M. Rémillard aurait pu se prévaloir du mécanisme prévu par la règle 151 et demander à la Cour de rendre une ordonnance visant à protéger la confidentialité de certaines informations se trouvant dans les documents transmis. Le pouvoir conféré par cette Règle a été interprété de façon souple, et les procureurs de M. Rémillard auraient même pu demander à voir les documents transmis avant qu'ils soient mis à la disposition du public.

[76] Enfin, M. Rémillard aurait pu demander que sa demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action, comme l'autorise le paragraphe 18.4(2) de la Loi. Comme le note la Cour fédérale au paragraphe 182 [de *Rémillard*] « [c]ette disposition constitue la réponse du législateur aux préoccupations selon lesquelles une demande de contrôle judiciaire n'offrirait pas les garanties procédurales appropriées lorsqu'un recours déclaratoire est exercé ». Si M. Rémillard croyait vraiment que les garanties procédurales entourant une demande de contrôle judiciaire n'étaient pas suffisantes pour protéger la confidentialité de ses informations personnelles, il aurait pu se prévaloir de cette option.

[77] Pour tous ces motifs, je suis donc d'avis que la procédure établie par les règles 317 et 318 n'a pas pour effet d'opérer une saisie, même lorsque conjuguée avec la règle 26. Il ne m'est donc pas nécessaire de me pencher sur la question de savoir si cette procédure est abusive au sens de l'article 8 de la Charte.

V. Conclusion

[78] I would therefore dismiss the appeal, with costs. The documents that were transmitted to the Federal Court Registry on August 30 and October 4, 2019, and that are currently the subject of an order of confidentiality shall remain confidential and shall not be published for a period of 60 days from the date of this judgment.

GLEASON J.A.: I agree.

LOCKE J.A.: I agree.

V. Conclusion

[78] Je rejetterais donc l'appel, avec dépens. Les documents qui ont été transmis au greffe de la Cour fédérale les 30 août et 4 octobre 2019 et qui font présentement l'objet d'une ordonnance de confidentialité, demeureront confidentiels et ne pourront faire l'objet d'une publication pour une durée de soixante jours à compter du présent jugement.

LA JUGE GLEASON, J.C.A. : Je suis d'accord.

LE JUGE LOCKE, J.C.A. : Je suis d'accord.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Round v. MacDonald, Dettwiler and Associates Ltd.*,
2012 BCCA 456

Please see in particular para. 41

Date: 20121102
Docket: CA039489

Between:

Lesley Round

Appellant
(Petitioner)

And

MacDonald, Dettwiler and Associates Ltd., Daniel Friedmann, Magued Iskander, Peter Louis, Robert Phillips, Terrance W. Piche, Marshall Prentice, Gordon D. Thiessen, Martin Willard, and Anil Wirasekara

Respondents
(Respondents)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Groberman
The Honourable Madam Justice A. MacKenzie

On appeal from Supreme Court of British Columbia, October 21, 2011
(*Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416,
Victoria Registry 10-4687)

Oral Reasons for Judgment

Counsel for the Appellant:

E.F.A. Merchant, Q.C.
A.A. Tibbs

Counsel for the Respondent:

R.S. Anderson, Q.C.
T.M. Tomchak
N.T. Hooge

Place and Date of Hearing:

Vancouver, British Columbia
November 2, 2012

Place and Date of Judgment:

Vancouver, British Columbia
November 2, 2012

[1] **A. MACKENZIE J.A.:** This is an appeal from an order of a Supreme Court chambers judge dismissing the appellant, Lesley Round's, application pursuant to Part 16.1 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "*Act*") for leave to commence an action for damages for misrepresentation of material facts and failure to disclose material changes.

[2] As the chambers judge noted, these new statutory causes of action came into force in British Columbia on July 4, 2008, and were created in favour of "a person who acquires or disposes" of shares during the period between the breach and its correction. The statutory causes of action form part of the secondary market liability provisions of the *Act*. The secondary market is the market in a company's shares after the shares have been issued or distributed by the company and are trading publicly.

[3] The legislation requires that an intended plaintiff obtain leave of the court before a secondary market liability claim can be commenced. She must establish the claim is brought in good faith and there is a "reasonable possibility" that if leave is granted, the claim will be resolved in her favour at trial (section 140.8(2) of the *Act*).

[4] The chambers judge dismissed the application on two essential grounds. Specifically, he found there was no possibility Ms. Round could succeed at trial because 1) the material facts upon which Ms. Round relied all occurred before the statutory cause of action in Part 16.1 of the *Act* existed and the legislation does not apply retrospectively; and 2) Ms. Round has no cause of action because she did not acquire or dispose of her shares on the secondary market, but instead acquired the shares from MDA's treasury through her voluntary participation in an Employee Share Purchase Plan.

[5] For the reasons that follow, I find the chambers judge was correct on both grounds: Part 16.1 does not apply retrospectively, and Ms. Round did not meet the statutorily required condition of having acquired or disposed of her shares on the secondary market. Therefore, I find the judge properly exercised his discretion to

refuse leave to commence the proposed action. Accordingly, I would dismiss this appeal.

[6] Furthermore, I would not interfere with the exercise of the judge's discretion in awarding costs to the Respondents.

Background Facts

[7] Between October 2002 and December 2008, Ms. Round worked for the respondent company, MacDonald, Dettwiler and Associates Ltd. ("MDA"). During this time, she received an entitlement to a total of 195 common shares of MDA under a voluntary Employee Share Purchase Plan. Under this plan, automatic payroll deductions were made on a monthly basis, the funds accumulated in the employee's account, and the administrator of the plan periodically bought shares from MDA's treasury. The shares were held by the administrator until the employee withdrew them.

[8] During three periods in 2008 – January 1 to January 8, April 8 to April 10, and May 8 to May 12 – no shares were allotted to Ms. Round's employee account. In December 2008, Ms. Round filed an election to withdraw shares from her employee account. These shares were delivered to her and there is no evidence she disposed of them.

[9] On November 17, 2010, Ms. Round sought leave by petition in the Supreme Court to begin a secondary market liability claim under Part 16.1 of the *Act* against MDA and certain directors, officers, and employees of MDA (collectively, the "Respondents"). Ms. Round alleged that MDA had failed to disclose and misrepresented facts about a proposed sale of one of its divisions to Alliant Techsystems Inc. ("ATK"). Specifically, Ms. Round alleged that MDA wrongfully failed to disclose the fact that it was in negotiation before the sale to sell a division, and the fact that the sale was subject to approval by the Minister under the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).

[10] Ms. Round also alleged that MDA misrepresented the status of the agreement. Ultimately, on May 9, 2008, the Minister responsible for administering the *Investment Canada Act* refused to approve the sale. Ms. Round further alleged that MDA failed to make timely disclosure of the Minister's decisions, as MDA did not disclose the conditional refusal dated April 8, 2008, until April 10, 2008, and did not disclose the final rejection of the sale by the Minister on May 9, 2008, until May 12, 2008.

[11] Ms. Round intended to bring a class action if she were granted leave under Part 16.1 of the *Act*.

Chambers Judgment

[12] The chambers judge refused Ms. Round's application for leave to commence the proposed action under Part 16.1 of the *Act* for several reasons.

[13] First, the judge found that Part 16.1 of the *Act* came into force after the alleged misrepresentations and failures to disclose and it does not have retroactive application. The judge noted that Part 16.1 of the *Act* came into force on July 4, 2008, and all the events material to the existence of a cause of action and their legal consequences were complete by no later than May 23, 2008, when the price of MDA shares traded higher than immediately before the Minister announced his final decision to reject the sale transaction.

[14] The judge further held statutes are presumed to apply prospectively and there is nothing in the *Act* to indicate the Legislature intended the statutory causes of action to operate retroactively.

[15] Ms. Round argued that MDA's non-disclosure and misrepresentations were not completed by July 4, 2008. She submitted that MDA had failed to make a filing with SEDAR by July 4, 2008, and the events were therefore ongoing after the date the *Act* came into force. In rejecting this argument, the judge held MDA's news release, issued on May 9, 2008, was sufficient disclosure to the public to comply with MDA's substantive disclosure obligations. Furthermore, the critical fact that the

Minister had rejected the proposed sale was filed with SEDAR before July 4, 2008. The judge also held that even if MDA was technically in breach of an obligation to file a Material Change Report on SEDAR, that breach had no effect on the market price of MDA's shares.

[16] The judge also rejected Ms. Round's argument that she was entitled to rely on parallel secondary market liability provisions in Ontario legislation that was in force at the relevant times, as Ontario law was not pleaded.

[17] Second, the judge held Ms. Round did not have a right to bring an action under Part 16.1 of the *Act*, as the secondary market liability provisions do not confer a cause of action on a person who acquired shares from a treasury and did not acquire or dispose of the shares on the secondary market.

[18] The judge also rejected Ms. Round's argument that she need not have a personal cause of action in order to be able to advance the claim on behalf of others who do. The judge found that s. 140.3 of the *Act* clearly states that the cause of action resides with "a person who acquires or disposes" of shares during the periods of breach and s. 140.8 of the *Act* stipulates that the Court may only grant leave where it is satisfied that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (emphasis added). The judge held these provisions clearly indicate an action can only be brought by a person who has a personal cause of action.

[19] The judge concluded that these two grounds were sufficient to dispose of the application, as Ms. Round had not demonstrated she would have any prospect of succeeding at trial.

[20] However, the judge went on to address other arguments made by the parties. In response to Ms. Round's argument that the test to be applied on applications for leave under Part 16.1 of the *Act* should be a low threshold, favouring the party seeking leave, the judge made the following comments:

[72] Much of this argument neglects the plain wording of the statute. It will be recalled, first, that the test for leave involves the court being satisfied that there is "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": s. 140.8(2)(b). Additionally, section 140.8(3) states:

Upon an application under this section, the plaintiff and each defendant must serve and file with the court one or more affidavits setting forth the material facts upon which each intends to rely.

[73] Taken together, several propositions emerge from these sections. First, the leave application involves a review of evidence. Each side is required to provide evidence of material facts upon which each intends to rely. Secondly, the analysis must involve a weighing and balancing of the evidence of each side. It is not sufficient for the court simply to rely on material filed by the plaintiff. Thirdly, the test involves an assessment of the merits of the proposed action on the evidence. The court must analyze the evidence to decide whether it is satisfied that the "reasonable possibility" test is satisfied. ...

[21] The judge rejected Ms. Round's argument that the bar for granting leave should be set lower than the test on certification for a class action. The judge held that the test for granting leave is distinct from the test involved in the certification of class actions; unlike the test for leave, the test for certifying class actions is not a merits test and the court does not analyze or weigh the likelihood of success at trial in deciding whether to certify the action.

[22] The judge also dismissed Ms. Round's argument that s. 140.8(3) of the *Act* requires each respondent to swear, file, and serve a personal affidavit and if the respondents fail to do so, leave should be automatically granted. The judge held that s. 140.8(3) only requires each party to file evidence, in affidavit form, of material facts on which it intends to rely. It does not require each defendant to swear his or her own affidavit.

[23] Finally, the judge held, apart from the issues of the applicability of Part 16.1 of the *Act* and Ms. Round's right to bring this action, the evidence did not demonstrate that Ms. Round had any prospect of succeeding at trial.

[24] The judge awarded costs to the Respondents on Scale B.

Issues on Appeal

[25] Ms. Round alleges the chambers judge erred by:

1. concluding Ms. Round should not automatically have been granted leave to proceed against the nine defendants who failed to file evidence, as required by s. 140.8(3) of the Act;
2. concluding Ms. Round does not have a reasonable possibility of succeeding at trial; and
3. awarding costs to the respondents.

Discussion

[26] I will first address Ms. Round's application to adduce fresh evidence, and then address Ms. Round's second ground of appeal.

Application to adduce fresh evidence

[27] Ms. Round seeks an order, pursuant to Rule 31(1) of the *Court of Appeal Rules*, for leave to adduce further evidence. Specifically, she seeks to adduce the Affidavit of Dawn Hunter ("Hunter Affidavit"), sworn October 11, 2011, and the Affidavit of Lesley Round ("Round Affidavit"), sworn February 3, 2012.

[28] The test for the admissibility of fresh evidence is set out in *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775-76:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- (3) The evidence must be credible in the sense that it is reasonably capable of belief;
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[29] Ms. Round says the fresh evidence consists of information which has always been known to the Respondents. She submits that the information contained in the Hunter Affidavit was not known to her until days before Mr. Justice Harris released

his decision and she did not recognize the significance of the information contained in the Round Affidavit until after the release of Harris J.'s decision.

[30] Ms. Round urges the Court to consider that nine of the ten Respondents failed to file affidavits, therefore hampering Ms. Round's ability to present the true facts of the case. Ms Round says this factor weighs in favour of granting the application for leave to introduce further evidence.

[31] Ms. Round also submits the fresh evidence is very relevant and credible. She says the Hunter Affidavit shows MDA learned that the Minister disallowed the sale transaction a full month before publicly disclosing this material fact. She further says the Round Affidavit demonstrates Ms. Round did in fact "acquire" shares of MDA when she was employed by MDA, contrary to the findings of Harris J.

[32] In my view, Ms. Round has failed to meet the test in *Palmer*. First, the evidence was available at the time Ms. Round made the application before the chambers judge and she has not demonstrated that the proposed evidence could not have been adduced at trial with reasonable due diligence.

[33] Secondly, in my view, the fresh evidence is not relevant to either of the issues upon which, as will be explained, I would dispose of this appeal. The alleged fact that MDA may have learned of the Minister's rejection of the sale transaction earlier is irrelevant if Part 16.1 of the *Act* did not apply at that time. In addition, evidence showing Ms. Round allegedly "acquired" shares during the relevant time period is irrelevant, as a cause of action only arises under Part 16.1 of the *Act* if the shares were acquired on the secondary market.

[34] Accordingly, I would dismiss the application to adduce fresh evidence.

Reasonable Possibility of Succeeding at Trial

[35] The chambers judge held there was no reasonable possibility of Ms. Round succeeding at trial because 1) the relevant events occurred before the statutory cause of action in Part 16.1 of the *Act* existed and the legislation does not apply

retrospectively, and 2) Ms. Round has no cause of action, as she did not acquire or dispose of her shares on the secondary market.

Issue 1: Retroactivity of Part 16.1 of the Act

[36] In finding that Part 16.1 of the *Act* does not apply to Ms. Round's intended action, the judge stated:

[34] In my view, the evidence on the record and allegations contained in the intended action demonstrate that all of the events material to the existence of a cause of action had occurred and their legal consequences were complete before the cause of action existed. Certainly, they were completed by no later than May 23, 2008, when the price of MDA shares traded higher than immediately before the Minister announced his final decision to reject the sale transaction. By that date, any alleged misrepresentation or failure to disclose had been corrected and any effect on market price had evaporated and, with it, any continuing claim by any holder of the shares to a loss or damage as a result of the alleged breaches.

[35] I agree with MDA's argument that to apply the civil liability provisions of Part 16.1 to the facts here, all of which predate the creation of the causes of action, would be to give the statute a retroactive or retrospective application. At the time of the events in issue these statutory causes of action did not exist, even if it could be anticipated that they would be brought into force sometime in the future. The proposition that statutes creating a cause of action cannot apply to events before their enactment without having a retroactive effect is sound: *Côté, supra* at 183.

...

[39] In this case, there is nothing in the legislative scheme that indicates that the Legislature has turned its mind to the effects and benefits of retroactivity and determined that they outweighed the potential for disruption or unfairness.

[40] I conclude, therefore, that the statutory causes of action operate prospectively and not either retroactively or retrospectively.

[37] Ms. Round advances three arguments as to why the judge erred in finding Part 16.1 of the *Act* does not apply to her proposed action.

[38] First, Ms. Round submits Part 16.1 is procedural and therefore applies retrospectively. She points to Part 23.1 of the *Ontario Security Act*, R.S.O. 1990 c. S.5 ("OAS"), and contends it is substantially identical to Part 16.1 of the *Act*. Ms. Round says she could have sought relief under Part 23.1 of the OSA and argues

that the OSA creates substantive rights, while Part 16.1 of the *Act* simply provides a procedural scheme to facilitate the enforcement of those rights in British Columbia.

[39] Second, Ms. Round submits Part 16.1 of the *Act* was enacted to protect the public and therefore the presumption against the retroactive application of the statute does not apply. Ms. Round relies on *Brosseau v. The Alberta Securities Commission*, [1989] 1 S.C.R. 301, for this proposition.

[40] Third, Ms. Round submits her right of action arose after Part 16.1 of the *Act* came into force, as MDA still has not disclosed the Minister's final decision in the manner and at the time required under the *Act*. Ms. Round acknowledges MDA issued a news release on May 9, 2008, but says the news release was not filed, was not authorized by an executive officer, and does not disclose the nature and substance of the material change. She further says MDA contravened the *Act* by failing to file a Material Change Report on SEDAR.

[41] I would not accede to any of Ms. Round's arguments on this issue. The conclusion of the chambers judge on the applicability of the presumption against retroactive application of legislation is supported by the authority he cited that "retroactive operation of a statute is highly exceptional, whereas prospective operation is the rule": Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough: Carswell, 2000) at 169. See also *Angus v. Sun Alliance Insurance Co.*, [1998] 2 S.C.R. 256 at 262, which both the majority and the dissent endorsed in the recent decision in *R. v. Dineley*, 2012 SCC 58 at paras. 10 and 45. Ms. Round has not identified any error which would form a basis for interfering with the judge's conclusion.

[42] In *Dineley*, Deschamp J., for the majority, at para. 15, also approved the following statement of La Forest J. from *Angus* at 265-266:

Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. ...
Alteration of a "mode" of procedure in the conduct of a defence is a very

different thing from the removal of the defence entirely. [Emphasis in original.]

In the present case, the legislation creates a new obligation. It is therefore substantive and does not apply retroactively. *Dineley* makes it clear the real question on retroactivity is whether the legislation creates new consequences for completed acts or imposes new substantive obligations.

[43] The judge also correctly refused to rely on the OSA, as Ontario law was not pleaded in the petition; clearly, the Court could not give leave under the BC legislation to bring an action under Ontario legislation.

[44] Ms. Round also appears to raise the Ontario legislation to say the BC legislation does not attach new consequences to completed acts, because the legislation of another jurisdiction already attaches those consequences. This argument has no merit. The question of whether the *Act* is intended to be retroactive cannot depend on the existence of legislation in another jurisdiction. Therefore, even had Ms. Round pleaded the Ontario legislation, it would not have improved her prospects.

[45] Furthermore, I agree with the Respondents that *Brosseau* does not apply in the circumstances. As the Respondents point out, this Court has restricted the scope of *Brosseau*. In *B.C. Hydro & Power Authority v. British Columbia (Environmental Appeal Board)*, 2003 BCCA 436, 17 B.C.L.R. (4th) 210 at paras. 70-71 (overturned on a different point: 2005 SCC 1, [2005] 1 S.C.R. 3), Newbury J.A., stated:

[70] L'Heureux-Dubé, J. summarized this passage of *Brosseau* by saying the presumption applies "only to prejudicial statutes" (p. 318), and that since the statutory amendment under consideration in *Brosseau* was "designed to protect the public, the presumption . . . [was] effectively rebutted" (p. 321). As noted by Professor Sullivan (*supra*, 4th ed., at 561), the latter comment of L'Heureux-Dubé J. was, with respect, perhaps misleading: the presumption is not rebutted simply by showing that the purpose of a provision is to protect the public. The emphasis is not on the intention or motivation of the Legislature, but on the consequences attached by the legislation to the past acts or conduct. Moreover, as Mr. Singleton argued, virtually every statute is designed to protect the public or the public interest in some way. Obviously, the *Waste Management Act* is intended to do so. But Part 4 clearly does not attach "benevolent

consequences" to prior events. It attaches new liabilities to conduct (even conduct expressly authorized under permits issued by the Crown) that previously did not attract liability; and that consequence is "prejudicial" to those affected, though perhaps not "punitive" or "penal".

[Emphasis added.]

[46] As in *B.C. Hydro*, the legislation in this case attaches new liabilities to conduct that previously did not attract liability and therefore imposes prejudicial consequences. The above principle in *BC Hydro* is therefore apt and I would endorse it.

[47] The chambers judge also correctly found MDA fulfilled all its disclosure obligations by May 12, 2008, after it had disclosed the Minister's rejection of the proposed sale in a news release issued on May 9, 2008, and it had disclosed the Minister's rejection in documents that were filed with SEDAR on May 12, 2008. The judge correctly concluded that the news release was sufficient disclosure to the public under the secondary market liability provisions in the *Act*. As the Respondents note, s. 140.3(4) is only available with respect to securities that have been acquired or disposed of before the "subsequent disclosure of the material change"; it does not require subsequent disclosure of the material change in the manner required by the *Act* and therefore "subsequent disclosure" does not require filing a Material Change Report with SEDAR.

[48] Finally, the chambers judge correctly found Ms. Round's cause of action is not ongoing, as no damages were incurred after May 23, 2008, at the latest. The judge found that after May 23, 2008, the market price of MDA shares had rebounded and was higher than before the Minister announced his final decision.

Issue 2: Acquired or Disposed of on the Secondary Market

[49] It was not disputed before the chambers judge that Ms. Round acquired her shares through her participation in the Employee Share Purchase Plan and that those shares were distributed from MDA's treasury. Neither she nor the plan administrator acquired them from the secondary market. In considering whether the

secondary market liability provisions in the *Act* applied to Ms. Round's shares, the judge said:

[58] The question is, therefore, whether the secondary market liability provisions can confer a cause of action on a person who acquired shares from treasury and did not acquire or dispose of them on the secondary market.

[59] MDA argued that a distribution of shares from a company's treasury to an employee is exempt from Part 16.1 (the secondary market liability provisions) if the distribution is voluntary. It is not in dispute that Ms. Round received her entitlement to shares through her voluntary participation in the Employee Share Purchase Plan.

[60] The basis of this argument is that Part 16.1 does not apply to the acquisition of an issuer's security pursuant to a distribution that is exempt from s. 61, unless the acquisition is within a class of prescribed acquisitions: see s. 140.2(b). In other words, the distribution must meet two conditions. It must be exempt from s. 61. If it is exempt, it must also not fall within a class of prescribed acquisitions.

[61] The first question, therefore, is whether this distribution is exempt from s. 61. Section 61 provides that an issuer must not distribute a security unless a prospectus has been filed, unless an exemption applies. A distribution includes: "(a) a trade in a security of an issuer that has not been previously issued": see s. 1(1) definition of "distribution". It is not in dispute that Ms. Round's shares were a distribution within the meaning of this definition.

[62] The next aspect of this question is whether this distribution is exempt from the requirement that a prospectus be filed. Section 2.24 of National Instrument 45-106 Prospectus and Registration Exemptions, B.C. Reg. 269/2005 (now replaced by B.C. Reg. 227/2009) exempts from the prospectus requirement a distribution "by an issuer of its own issue... with an employee... if participation in the distribution is voluntary". This provision applies to Ms. Round's acquisition of her shares. It follows that the distribution of shares to Ms. Round is exempt from s. 61.

[63] The second question is whether, nonetheless, the "acquisition is within a class of prescribed acquisitions". If it were, Part 16.1 would apply. It is clear however that the distribution here does not fall within a class of prescribed acquisitions. The class of "prescribed acquisitions" referred to in s. 140.2 is set out in s. 185.3 of the Securities Rules, B.C. Reg. 194/97. These Rules relate to the resale of securities and takeover bids. The distribution of shares to Ms. Round does not fall within the class of "prescribed acquisitions".

[64] In the result, the secondary market liability provisions do not apply to confer a cause of action on Ms. Round in respect of the shares she acquired through the Plan.

The judge concluded:

[67] Having acquired her shares as an employee through a voluntary plan from the company's treasury and neither having acquired them from the second market nor having disposed of them there, Ms. Round does not have a cause of action against the intended defendants. She is not a person who in her capacity as a plaintiff can demonstrate a reasonable possibility that the action will be resolved at trial in her favour.

[50] Ms. Round argues the judge erred in finding Ms. Round's shares were a "distribution" within the meaning of s. 140.2(b) of the *Act*. She says her shares do not fall within the definition of "distribution" in s. 1.1 of the *Act*, as there was no evidence the shares had not been "previously issued". Ms. Round also relies on the definition of "treasury shares" in the UK *Companies Act*, 2006, c. 46, to argue treasury shares are issued shares.

[51] I observe that Ms. Round has changed her position from the position she took at the hearing below. As noted by the chambers judge, at para. 61, it was not in dispute that Ms. Round's shares were a distribution within the meaning of the *Act*.

[52] Ms. Round further argues the judge erred in holding this "distribution" was exempt from s. 61 of the *Act*. She says the phrase "Unless exempted under this *Act*" in s. 61 means that any exemptions must be found in the *Act*, without reference to regulations or other sources. As the *Act* itself does not contain any exemptions, Ms. Round submits her shares are not exempt from s. 61, and therefore Part 16.1 applies to her intended action.

[53] Ms. Round's submissions fail to persuade me that the chambers judge made any error in his reasoning as to whether the secondary market liability provisions in the *Act* applied to Ms. Round's shares. In my view, the judge correctly held Ms. Round's shares were a "distribution" within the meaning of the *Act*. As the Respondents point out, the treasury shares were issued by MDA expressly for the voluntary Employee Share Purchase Plan. There is nothing in the evidence to refute the finding that they were issued expressly for this purpose.

[54] Nor would I accede to Ms. Round's argument that any exemptions from s. 61 of the *Act* must be found in the *Act* itself, not in any regulations. As the Respondents point out, s. 33(6) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that "If an enactment refers to a matter 'under' a named or unnamed Act, an Act in that reference includes regulations enacted under the authority of that Act." Thus, the phrase "Unless exempted in this *Act*" in s. 61 of the *Act* refers to exemptions in the *Act* itself and in any regulations enacted under the authority of the *Act*, including National Instrument 45-106.

[55] Finally, Ms. Round argues the judge erred in holding an action under Part 16.1 of the *Act* can only be brought by a person who is properly a plaintiff. Ms. Round relies on s. 140.9 of the *Act*, which addresses the notice requirements when leave is granted and refers to "A person that has been granted leave to commence an action under s. 140.3" (emphasis added). Ms. Round says the word "person" is broader than the word "plaintiff". The chambers judge correctly disposed of this argument as follows:

[57] I cannot accede to this latter argument. Section 140.3 of the *Act* is explicit that the cause of action resides with "a person who acquires or disposes" of shares of an issuer during periods of breach. The leave requirement, under s. 140.8, stipulates that the court may only grant leave where it is satisfied that, "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" (emphasis added). Jointly these provisions make it apparent that an action can only be brought by a person who has a cause of action and is, thereby, properly a plaintiff. If Ms. Round does not personally have a cause of action, leave cannot be granted to start the action.

[56] In summary, it is my view that the chambers judge was correct in finding there was no reasonable possibility of Ms. Round succeeding at trial because the legislation does not apply retroactively to the relevant events and Ms. Round has no cause of action.

[57] This conclusion is sufficient to dispose of the appeal. It is therefore unnecessary to address the arguments that her intended action has a reasonable prospect of success on the merits. I would add, however, that there is no merit to

Ms. Round's argument that s. 140.8(3) of the *Act* requires each defendant to swear, file, and serve a personal affidavit and since the respondents failed to do so, leave should automatically have been granted. As the judge said, s. 140.8(3) only requires each party to file evidence, in affidavit form, of material facts on which it intends to rely. It does not require each defendant to swear his or her own affidavit.

Costs

[58] Ms. Round submits the chambers judge erred in awarding costs to the Respondents, as the no-costs regime in s. 37 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"), governs the award of costs in this case. Ms. Round argues the large cost award defeats the purpose of class proceedings legislation and has a chilling effect upon the willingness of wronged investors to bring meritorious claims, as the risk is far greater than the possible benefit.

[59] The Respondents submit this cost award is not governed by the *CPA* as the no-costs regime in the *CPA* is not engaged before the hearing of the class action certification application. The Respondents also point to Rule 1-2(a) of the *Supreme Court Civil Rules*, which provides that the *Rules* govern every proceeding in the Supreme Court, unless an enactment otherwise provides. As the *Act* is silent on the issue of costs, the regular principles under the *Rules* apply and costs are awarded to the successful party.

[60] The Respondents also say there is no evidence to support the suggestion Ms. Round's counsel has not indemnified Ms. Round. They note that representative plaintiffs in class action proceedings often enter into retainer agreements with class counsel that provide indemnification from adverse costs awards.

[61] I agree with the Respondents' submissions that the no-costs regime in the *CPA* does not apply to these proceedings.

[62] In *Seidel v. TELUS Communications Inc.*, 2009 BCCA 383, 96 B.C.L.R. (4th) 24, the Court said:

[2] We are of the view that the costs of the appeal should follow the normal course set out in s. 23 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, and be awarded to the appellant, which was successful on the appeal. The action was not certified prior to the stay, and s. 37 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, which provides for a “no costs” regime in respect of certified class actions, had not yet been engaged. The respondent is seeking financial gain on behalf of herself and others in the proposed class, and the issue in the action is not one of consequence to the community as a whole. The action is not properly characterized as public interest litigation: see *Smith v. Canada (Attorney General)*, 2006 BCCA 407, 56 B.C.L.R. (4th) 333.

[63] It follows that the judge properly exercised his discretion by awarding costs to the Respondents. I would not interfere with the award of costs.

Conclusion

[64] I would dismiss this appeal.

[65] **LOW J.A.:** I agree.

[66] **GROBERMAN J.A.:** I agree.

[67] **LOW J.A.:** The application to adduce fresh evidence is dismissed. The appeal is dismissed.

“The Honourable Madam Justice A. MacKenzie”

1992 CarswellNat 1006

Supreme Court of Canada

Schachter v. Canada

**Please see in particular paras.
29-31**

1992 CarswellNat 1006, 1992 CarswellNat 658, [1992] 2 S.C.R. 679, [1992]
S.C.J. No. 68, 10 C.R.R. (2d) 1, 139 N.R. 1, 34 A.C.W.S. (3d) 1090, 53 F.T.R.
240 (note), 92 C.L.L.C. 14,036, 93 D.L.R. (4th) 1, J.E. 92-1054, EYB 1992-67220

**Her Majesty The Queen and Canada Employment and Immigration Commission,
Appellants v. Shalom Schachter, Respondent and Women's Legal Education and Action
Fund, Respondent and The Attorney General for Ontario, the Attorney General of
Quebec, the Attorney General for New Brunswick, the Attorney General of British
Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta, the
Attorney General of Newfoundland and Minority Advocacy Rights Council, Interveners**

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

Judgment: December 12, 1991

Judgment: July 9, 1992

Docket: 21889

Proceedings: On Appeal from the Federal Court of Appeal

Counsel: *David Sgayias, Q.C.*, and *Roslyn J. Levine*, for the appellants.
Brian G. Morgan and *Lawrence E. Ritchie*, for the respondent Shalom Schachter.
Mary A. Eberts and *Jenifer Aitken*, for the respondent Women's Legal Education and Action Fund.
Elizabeth Goldberg and *Lori Sterling*, for the intervener the Attorney General for Ontario.
Jean-Yves Bernard and *Madeleine Aubé*, for the intervener the Attorney General of Quebec.
Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.
George H. Copley, for the intervener the Attorney General of British Columbia.
Ross Macnab, for the intervener the Attorney General for Saskatchewan.
Stanley H. Rutwind, for the intervener the Attorney General for Alberta.
B. Gale Welsh, for the intervener the Attorney General of Newfoundland.
Emilio S. Binavince, for the intervener Minority Advocacy and Rights Council.

Subject: Constitutional; Insurance; Public; Employment; Human Rights

Headnote**Public law --- Social programs — Employment insurance — Constitutional issues — Charter of Rights and Freedoms**

Section favouring adopting parents violating equality rights — Court erring by reading excluded group into section — [Canadian Charter of Rights and Freedoms, s. 15\(1\)](#) — Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30, 32 [Constitution Act, 1982, s 15\(1\)](#).

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General principles

Section excluding natural parents violating equality rights — Court erring by reading excluded group into section — [Canadian Charter of Rights and Freedoms, s. 15\(1\)](#) — Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30, 32 [Constitution Act, 1982, s 15\(1\)](#); [Constitution Act, 1982, s 24\(1\)](#); [Constitution Act, 1982, s 52](#).

Human rights --- What constitutes discrimination — Sex — Employment — Pregnancy, maternity and parental leave — Miscellaneous

Section favouring adopting parents violating equality rights — Court erring by reading excluded group into section — [Canadian Charter of Rights and Freedoms, s. 15\(1\)](#) — Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30, 32 [Constitution Act, 1982, s 15\(1\)](#).

S. 30 of the Act provided for benefits for a claimant who proved her pregnancy. The section clearly excluded the payment of benefits to natural fathers. S. 32 provided for the payment of benefits to a claimant of either sex upon the placing with that claimant of an adopted child. On a challenge to the constitutionality of s. 32, the Court of Appeal upheld the decision of the Trial Division that s. 32 was to be extended by judicial amendment to include natural parents. Minister appealed. Held, the appeal was allowed. Although s. 32 did violate [s. 15\(1\) of the Charter](#), there was no need to declare s. 32 invalid given that it had been repealed in 1990 and replaced, with the result that Parliament equalized the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. Without a mandate based on a clear legislative objective, it was not prudent for the Court to read the excluded group, namely, natural parents, into s. 32. A consideration of the budgetary considerations of such an action underlined that conclusion.

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APPEAL by appellants.

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ. was delivered by Lamer C.J.:

Facts

1 The respondent, Shalom Schachter, and his wife, Marcia Gilbert, were expecting their second child in the summer of 1985. The respondent intended to stay home with the newborn as soon after the birth as his wife was able to return to work. Ultimately, he took three weeks off work without pay.

2 Marcia Gilbert received fifteen weeks of maternity benefits under s. 30 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, as am. by S.C. 1980-81-82-83, c. 150, s. 4. The respondent first applied for benefits under s. 30 in respect of the time he had to take off work, but ultimately modified an application under s. 32, as am. by S.C. 1980-81-82-83, c. 150, s. 5, for "paternity benefits". This is a section which provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

3 The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues.

4 The matter proceeded before Strayer J. in the Federal Court, Trial Division. In written reasons, [1988] 3 F.C. 515, Strayer J. found a violation of s. 15 of the *Canadian Charter of Rights and Freedoms* in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s. 32.

5 The appellants appealed to the Federal Court of Appeal. In written reasons dated February 16, 1990, [1990] 2 F.C. 129, the Court upheld the Trial Division's decision, Mahoney J.A. dissenting. The appeal was dismissed.

6 On November 15, 1990, the appellants were granted leave to appeal to this Court.

7 It should be noted that the impugned provision has since been amended by Parliament to extend parental benefits to natural parents on the same footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

Relevant Statutory and Constitutional Provisions

8 The relevant provision of the *Unemployment Insurance Act, 1971*, reads as follows:

32.(1) Notwithstanding [section 25](#) but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

9 The relevant provisions of the *Canadian Charter of Rights and Freedoms* read as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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

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.

10 The relevant provision of the *Constitution Act, 1982* reads as follows:

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.

Judgments Below

Federal Court, Trial Division (Strayer J.)

11 Strayer J. held that [s. 32](#) denied equal benefit of the law with discrimination on the basis of parental status, thereby infringing the [s. 15](#) rights of the respondent. No [s. 1](#) analysis was undertaken. Having decided that there was an infringement, Strayer J. went on to consider the appropriate remedy. In his view, at p. 543, two options were available:

I could either declare [section 32](#) to be invalid in its present form, thus denying benefits to those already within it, or I could simply declare the entitlement of natural parents to benefits equal to those now provided to adoptive parents under [section 32](#). Counsel for the plaintiff

[respondent] and for the intervenor [LEAF] argued for the latter approach, while counsel for the defendants [appellants] argued that I must, if I concluded there was unequal benefit of the law, strike down the existing benefits in [section 32](#).

12 Given that Strayer J. found [s. 32](#) to be defective, not because it provided prohibited benefits but because it was "underinclusive", he did not consider it appropriate to deprive those persons already qualified under [s. 32](#) of their benefits. Rather, he decided to make a declaration that other persons in similar circumstances were entitled to the same benefits, until such time as Parliament amended the legislation in a way which met the requirements of [s. 15](#). Further, he ordered that the respondent's application for benefits be reconsidered on the basis that if, apart from his status as a natural parent, he met the requirements of the section, he was entitled to benefits. Pursuant to Rule 341A (*Federal Court Rules*, C.R.C., c. 663, ad. SOR/79-57, s. 8), Strayer J. suspended the operation of his judgment pending appeal.

Court of Appeal (Heald J.A. for the majority)

13 Since the parties conceded at the outset that [s. 15\(1\) of the Charter](#) had been violated, the Court of Appeal dealt only with the jurisdiction of the trial judge to accord the remedy sought by the respondent.

14 Heald J.A. noted at the outset that the appellants had conceded that, had the Trial Division had the jurisdiction to grant the remedy it did, the order was "just and appropriate in the circumstances". Heald J.A. determined that the trial judge did have the jurisdiction to grant a remedy under [s. 24\(1\) of the Charter](#). He did not accept the appellants' argument that the only option which was open to the trial judge in the circumstances was to strike down the impugned provision pursuant to [s. 52 of the Constitution Act, 1982](#). He found, at p. 137, the distinction made by the trial judge between legislation which "is unconstitutional because of what it provides and legislation which is unconstitutional because of what it omits" to be an apt one. He held that here it was permissible to have recourse to s. 24 because the impugned provision was unconstitutional solely because it was not sufficiently broad in scope. "It is the omission in this case that is unconstitutional, not the legislation itself." Therefore, in his opinion, s. 52 was not engaged.

15 Heald J.A. further considered the "interface" between ss. 24 and 52 when a violation of [s. 15](#) has been found. He held, at p. 142, that:

A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to [subsection 15\(1\)](#). That positive right can only be guaranteed by the fashioning of a positive remedy. That is precisely what the learned Trial Judge attempted to do in the decision *a quo*.

16 Heald J.A. was of the view that, as the consequences of a declaration that the legislation was inoperative would be to deprive adoptive parents of the benefits granted to them by [s. 32 of the](#)

Unemployment Insurance Act, 1971, this would be as much an amendment of legislation as the remedy granted by the trial judge. Heald J.A. concluded that where legislation is "underinclusive", positive relief is both warranted and constitutionally permitted through the vehicle of s. 24.

17 Heald J.A. was not persuaded that the jurisprudence supported the appellants' contention that the order was an appropriation of public funds for a purpose not authorized by Parliament.

18 Heald J.A. dismissed the appeal, upholding the judgment of the trial judge. He suspended the operation of that judgment pending appeal.

Mahoney J.A. (dissenting)

19 Mahoney J.A. held that the remedy granted by the trial judge was outside his jurisdiction because he had in effect amended the legislation where, by virtue of the Constitution, the sole power to legislate is reserved to Parliament.

20 With regard to the issue of the appropriation of funds, Mahoney J.A. was of the view that the remedy fashioned by the trial judge amounted to an appropriation of money by a court which is not permitted by the provisions of the preamble to the *Constitution Act, 1867*. He concluded, at p. 164:

Even if the power of a court to legislate by way of a [subsection 24\(1\)](#) remedy were found to exist in circumstances which do not entail the appropriation of public monies, no such power can be found to exist where the remedy appropriates monies from the Consolidated Revenue Fund for a purpose not authorized by Parliament. A purposive approach to remedies under [subsection 24\(1\)](#) cannot take a court that far.

In my opinion, the appellants are correct: the Constitution of Canada does not permit the remedy crafted by the learned Trial Judge. Having found that [section 32 of the Unemployment Insurance Act, 1971](#) was inconsistent with a provision of the Constitution of Canada, the learned Trial Judge was bound to find it to be of no force and effect. Had that finding been made, the absence of any conflict between [subsections 24\(1\)](#) and [52\(1\)](#) would be apparent. There is no offending legislation and, therefore, no [subsection 24\(1\)](#) remedy called for.

In my opinion, [subsection 52\(1\)](#) does not provide a "remedy" in any real sense of that word. It states a constitutional fact which no court can ignore when it is invoked in a proceeding and found to apply.

21 Mahoney J.A. would have allowed the appeal and issued a declaration pursuant to [s. 52\(1\)](#) that [s. 32 of the Unemployment Insurance Act, 1971](#), was of no force or effect by reason of its inconsistency with [the Charter](#). He could see no compelling reason to order a stay of execution of that judgment to permit remedial legislative action.

Issues

22 By order dated March 14, 1991 the following constitutional questions were stated by the Chief Justice:

1. Is the Federal Court Trial Division, having found that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act, R.S.C., 1985, c. U-1*) creates unequal benefit contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the *Constitution Act, 1982* to declare that s. 32 is of no force and effect?
2. Does s. 24(1) of the *Charter* confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

Analysis

23 I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.

24 All of the above essentially leaves the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context.

1. Reading in as a Remedial Option under Section 52

25 A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the *Constitution*, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52

or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

A. The Doctrine of Severance

26 The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using of the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

27 Far from being an unusual technique, severance is an ordinary and everyday part of constitutional adjudication. For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify.

28 Furthermore, as Rogerson has pointed out (in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., *Charter Litigation* (1987) at pp. 250-52), it is logical to expect that severance would be a more prominent technique under the Charter than it has been in division of powers cases. In division of powers cases the question of constitutional validity often turns on an overall examination of the pith and substance of the legislation rather than on an examination of the effects of particular portions of the legislation on individual rights. Where a statute violates the division of powers, it tends to do so as a whole. This is not so of violations of the Charter where the offending portion tends to be more limited.

29 Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada* [1947] A.C. 503, at p. 518:

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

30 This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

31 Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

B. Reading In as Akin to Severance

32 This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly *excludes* rather than what it wrongly *includes*. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.

33 A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate. Rowles J. made this point in *Knodel v. British Columbia (Medical Services Commission)* 1991 58 B.C.L.R. (2d) 356(B.C.S.C.), at p. 388:

As stated previously, once a person has demonstrated that a particular law infringes his or her *Charter* rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy. To hold otherwise would result in a statutory provision dictating the interpretation of the Constitution. Further, where B's *Charter* right to a[n equal] benefit is demonstrated, it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B.

The first example would require the court to "read in" the words "and B," while the second example would require the court to "strike out" the words "except B." In each case, the result would be identical.

Accordingly, whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.

34 There is nothing in *s. 52 of the Constitution Act, 1982* to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and *the Constitution*. Section 52 does not say that the *words* expressing a law are of no force or effect to the extent that they are inconsistent with *the Constitution*. It says that a *law* is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

35 This Court implicitly recognized that the extent of the inconsistency can be defined in substantive, rather than merely verbal, terms in *Andrews v. Law Society of British Columbia, supra*. In *Andrews* the statute (*Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42*) dictated that only Canadian citizens could become lawyers in the following words:

42. The benchers may call to the Bar of the Province and admit as solicitor of the Supreme Court

(a) a Canadian citizen with respect to whom they are satisfied that he

36 The Court found that the exclusion of non-citizens violated the right to equality. Instead of striking down the entire section so that everyone would be equally prevented from becoming a lawyer, only the requirement of Canadian citizenship was declared inoperative. However, the section does not make any sense if the words "a Canadian citizen" are deleted and there is, in fact, no way of simply deleting words that would make the section conform to the requirements of *the Charter*. Instead of focusing on these verbal formulae, the Court nullified the substantive citizenship requirement which could be said to amount to extending the statute to cover non-Canadians. Thus, *Andrews* is already an example of a case in which the extent of the inconsistency was defined conceptually without being limited to the manner in which the statute was drafted.

C. The Purposes of Reading In and Severance

37

(i) Respect for the Role of the Legislature

38 The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of [the Constitution](#) to the scheme enacted by the Legislature. Rogerson makes this observation at p. 288:

Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.

39 Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

(ii) Respect for the Purposes of [the Charter](#)

40 Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of [the Charter](#). The absolute unavailability of reading in would mean that the standards developed under [the Charter](#) would have to be applied in certain cases in ways which would derogate from the deeper social purposes of [the Charter](#). This point has been made well by Duclos' and Roach's article "Constitutional Remedies as 'Constitutional Hints': A Comment on *R. v. Schachter*" (1991), 36 *McGill L.J.* 1, and by Caminker's article "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 *Yale L.J.* 1185. Their argument is that even in situations where the standards of [the Charter](#) allow for more than one remedial response, the purposes of [the Charter](#) may encourage one kind of response more strongly than another.

41 This is best illustrated by the case of *Attorney-General of Nova Scotia v. Phillips* 1986 34 D.L.R. (4th) 633 (N.S.C.A.). In that case, a form of welfare benefit was available to single mothers but not single fathers. This was held to violate s. 15 of [the Charter](#) since benefits should be available to single mothers and single fathers equally. However, the court held that s. 15 merely required equal benefit, so that [the Charter](#) would be equally satisfied whether the benefit was available to both mothers and fathers or to neither. Given this and the court's conclusion that it could not extend benefits, the only available course was to nullify the benefits to single mothers. The irony of this result is obvious.

42 Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put (see Caminker, at p. 1186). Yet the nullification of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter* and for s. 15 to have such a result clearly amounts to "equality with a vengeance," as LEAF, one of the interveners in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the *Charter*.

43 Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*.

II. Choice of Remedial Options under Section 52

A. Defining the Extent of the Inconsistency

44 The first step in choosing a remedial course under s. 52 is defining the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1 will be critical to this determination. In this case, as noted earlier, this Court is hampered by the lack of an opportunity to assess the nature of the violation and the absence of s. 1 evidence.

45 It is useful at this point to set out the two stage s. 1 test developed by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103:

(1) Is the legislative objective which the measures limiting an individual's rights or freedoms are designed to serve sufficiently pressing and substantial to justify the limitation of those rights or freedoms?

(2) Are the measures chosen to serve that objective proportional to it, that is:

(a) Are the measures rationally connected to the objective?

(b) Do the measures impair as little as possible the right and freedom in question? and,

(c) Are the effects of the measures proportional to the objective identified above?

(i) The Purpose Test

46 In some circumstances, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative

provision does not meet the first part of the *Oakes* test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a *Charter* right. Although it predates *Oakes*, *supra*, *R. v. Big M Drug Mart Ltd.*[1985] 1 S.C.R. 295, provides a clear example. There Dickson C.J. found that the purpose of the *Lord's Day Act*, R.S.C. 1970, c. L-13, was itself inimical to the values of a free and democratic society. The case stands as authority for the proposition that, where the purpose of the legislation is itself unconstitutional, the legislation should be struck down in its entirety. Indeed, it is difficult to imagine anything less being appropriate where the purpose of the legislation is deemed unconstitutional; however, I do not wish to foreclose that possibility prematurely.

(ii) The Rational Connection Test

47 Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test.

48 This Court's decision in *Andrews*, *supra*, can be taken to support this position. Again, this Court held there that the citizenship requirement for admission to the British Columbia bar violated the equality guarantee enshrined in s. 15 of the *Charter*. While the citizenship requirement was held to have a valid purpose (the objectives argued were that lawyers be familiar with Canadian institutions and customs and that they display a commitment to them), the Court determined that the requirement did not meet the proportionality test. The majority on this issue concluded that the means were probably not rationally connected to the objectives put forward, in that citizenship does not ensure familiarity with or commitment to Canadian society and, conversely, non-citizenship does not necessarily point to a lack of familiarity or commitment. The requirement was struck down.

49 It is logical that in most such cases the appropriate remedial choice will be to strike down the entire portion of the legislation that fails on this element of the proportionality test. It matters not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective are not rationally connected to it, then the objective will not be furthered by somehow upholding the legislation as it stands.

(iii) The Minimal Impairment/Effects Test

50 Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. For instance, if the legislative provision fails because it is not carefully tailored to be a minimal intrusion, or because it has effects disproportionate to its purpose, the inconsistency could be defined as being the provisions left out of the legislation which would carefully tailor it, or would avoid a disproportionate effect.

According to the logic outlined above, such an inconsistency could be declared inoperative with the result that the statute was extended by way of reading in.

51 Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met. The choice of remedy will be guided by the following considerations.

B. Deciding whether Severance or Reading In is Appropriate

52 Having determined what the extent of the inconsistency is, the next question is whether that inconsistency may be dealt with by way of severance, or in some cases reading in, or whether an impugned provision must be struck down in its entirety.

(i) Remedial Precision

53 While reading in is the logical counterpart of severance, and serves the same purposes, there is one important distinction between the two practices which must be kept in mind. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of [the Constitution](#). This will not always be so in the case of reading in. In some cases, the question of how the statute ought to be extended in order to comply with [the Constitution](#) cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's. This point is made most clearly in [Hunter v. Southam Inc.](#)[1984] 2 S.C.R. 145, at p. 169:

While the courts are guardians of [the Constitution](#) and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with [the Constitution](#)'s requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

54 In *Hunter*, the Court decided that the scheme for authorizing searches under the relevant legislation did not withstand [Charter](#) scrutiny. In such a circumstance, it would theoretically be possible to characterize the "extent of the inconsistency" as the *absence* of certain safeguards. Thus, in the abstract, the absence of appropriate safeguards could have been declared of no force or effect, which would have led to the establishment of the appropriate safeguards. However, this approach would have been inappropriate because this would have required establishing a new scheme, the details of which would have been up to the Court to determine.

55 *Hunter* has been applied recently by Justice McLachlin in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. The issue in that case was the prohibition of advertising by the members of a professional association, with certain exceptions. McLachlin J. found that the regulation of advertising violated [the Charter](#) and extended too far to be justified under s. 1. However, some prohibition of advertising would be justifiable if additional exceptions were added.

The question then arose whether the Court ought to supply those additional exemptions itself, or simply strike down the prohibition.

56 McLachlin J. noted, at p. 253, that the drafting of rules which would allow only legitimate advertising would be a difficult and complex endeavour that did not flow with precision from the requirements of *the Charter*:

I am conscious of the difficulties involved in drafting prohibitions on advertising which will catch misleading, deceptive and unprofessional advertising while permitting legitimate advertising.

Since the exemptions could not be defined with sufficient precision, the section itself had to be struck down (at p. 252):

Because the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators.

57 These cases stand for the proposition that the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of *the Constitution*. In such cases, to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of *the Constitution*. This is the task of the legislature, not the courts.

(ii) Interference with the Legislative Objective

58 The primary importance of legislative objective quickly emerges from decisions of this Court wherein the possibility of reading down or in has been considered and determined inappropriate.

59 In *Osborne v. Canada (Treasury Board)*[1991] 2 S.C.R. 69, at p. 104, Justice Sopinka emphasized that it is necessary in fashioning a remedy for a *Charter* violation to both "apply the measures which will best vindicate the values expressed in *the Charter*" and "refrain from intruding into the legislative sphere beyond what is necessary". He determined that reading down was not appropriate in that case but concluded, at p. 104: "Reading down may in some cases be the remedy that achieves the objectives to which I have alluded while at the same time constituting the lesser intrusion into the role of the legislature."

60 The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. This objective may, as suggested above, be obvious from the very text of the provision. In other cases, it may only be illuminated through the evidence put forward under the s. 1 analysis, the fail

ure of which would precede this inquiry. A second level of legislative intention may be manifest in the means chosen to pursue that objective.

61 In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, this Court struck down s. 276, the rape shield provision, of the *Criminal Code*, R.S.C., 1985, c. C-46. The majority of the Court held that it violated the accused's *Charter* right to a fair trial. The provision failed the *Oakes* test because of its overbreadth. It could not meet the minimal impairment element of the proportionality test. In considering the question of remedy, McLachlin J. canvassed the possibility of declaring the legislation valid in part through techniques such as reading down and constitutional exemption, but concluded that neither technique was appropriate in the case before her. McLachlin J. arrived at this conclusion because to take either approach would necessitate importing an element into the provision — judicial discretion — that the legislature specifically chose to exclude. She stated, at p. 628: "Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption". Without question, the same is true of extension by way of reading in.

62 This Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, is instructive as to the second level of legislative intention referred to above. There, it was held that s. 542(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, which provides for the automatic detention at the pleasure of the Lieutenant Governor of an insanity acquittee, was in violation of s. 7 of the *Charter* in that it deprived the appellant of his right to liberty without meeting the requirements of procedural fairness that attach to the principles of fundamental justice. In my judgment, I rejected the argument that the requirements of procedural fairness could just be read into the legislation as it stood because it was clear that, to achieve its objectives, Parliament had deliberately chosen the means which ultimately failed the minimal impairment element of the proportionality test under s. 1. Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

63 Even where extension by way of reading in can be used to further the legislative objective through the very means the legislature has chosen, to do so may, in some cases, involve an intrusion into budgetary decisions which cannot be supported. This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.

64 Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money. The respondent in this case pointed out that this Court's decision in *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, wherein an exclusion under the *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48, based on age was found

to contravene [the Charter](#), necessarily led to an expenditure of government funds in that persons previously not entitled to benefits were thereafter free to apply for them. It has also been pointed out that a wide variety of court orders have had the effect of causing expenditures (see Lajoie, "De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux" (1991), 36 *McGill L.J.* 1338, at pp. 1344-45). In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.

(iii) The Change in Significance of the Remaining Portion

65 Another way of asking whether to read in or sever would be an illegitimate intrusion into the legislative sphere is to ask whether the significance of the part which would remain is substantially changed when the offending part is excised. For instance, in *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, this Court found that certain statutory requirements respecting the use of the French language were unconstitutional because they were more stringent than necessary. By way of exception, the statute provided for less stringent requirements in certain circumstances. These less stringent requirements were not in themselves unconstitutional, and it would therefore have been possible to sever them and in that way to implement as much of the legislative intent as possible. However, the Court noted that to do so would really turn the legislative scheme on its head. The exceptions were meant to allow more lenient treatment of persons in certain situations, but if they were upheld while the main provisions were struck down, they would have precisely the opposite effect of dealing more stringently with those persons. This led to the conclusion, at p. 816, that the exceptions were "necessarily connected" to the offending provision, so that even though the exceptions were not themselves impermissible, they must be struck down as well:

A single scheme is being dealt with, and once the parent section which institutes that scheme has been found unconstitutional, the Court must proceed to strike down those exceptions which are necessarily connected to the general rule. In that way, distortions and inconsistencies of legislative intention do not result from finding the major component of a comprehensive legislative regime contrary to [the Constitution](#).

66 This built on the comments of Dickson C.J. in *R. v. Morgentaler* [1988] 1 S.C.R. 30, at p. 80, where he observed that the prohibition of abortions must fall with the procedural exceptions which violated [the Charter](#), since merely to eliminate the exceptions would be to re-draft a comprehensive code:

Having found that this "comprehensive code" infringes [the Charter](#), it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section.

67 In both these cases, the significance of the non-offending provision was so markedly changed in the absence of the offending provision that the assumption that the legislature would have passed it was unsafe. The problem with striking down only the inconsistent portion is that the significance of the remaining portion changes so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

68 In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. For instance, in *Knodel, supra*, Rowles J. extended the provision of benefits to spouses to include same-sex spouses. She considered this course to be far less intrusive to the intention of the legislature than striking down the benefits to heterosexual spouses since the group to be added was much smaller than the group already benefitted (at p. 391):

In the present case, it would clearly be far more intrusive to strike the legislation and deny the benefits to the individuals receiving them than it would be to extend the benefits to the small minority who demonstrated their entitlement to them.

69 In *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, *supra*, this Court decided that persons over 65 should be able to receive benefits that had been explicitly restricted to persons under 65. This is also a case in which the group to be added was much smaller than the group already benefitted.

70 Where the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefitted, this could indicate that the assumption is not safe. This is not because of the numbers *per se*. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion. In some contexts, the fact that the group to be added is much larger than the original group will not lead to these conclusions. *R. v. Hebb* 1989 69 C.R. (3d) 1 (N.S.T.D.), is an example of this.

(iv) The Significance of the Remaining Portion

71 Other cases have focused on the significance or long-standing nature of the remaining portion. This sort of analysis is most apparent in *Russow v. B.C. (A.G.)* 1989 35 B.C.L.R. (2d) 29 (S.C.). The court examined the various versions of the relevant provision which had been in force in the province from the time of Confederation to the present, and noted that the permissible portion had been invariably present. This helped the court to come to the conclusion that it was safe to assume that the legislature would have enacted the permissible portion without the impermissible portion (at pp. 33-35).

72 This consideration was also highlighted by Harlan J. in *Welsh v. United States* 398 U.S. 333 (1970), at p. 366:

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.

73 It is sensible to consider the significance of the remaining portion when asking whether the assumption that the legislature would have enacted the remaining portion is a safe one. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion.

74 The significance of the remaining portion may be enhanced where the Constitution specifically encourages that sort of provision. Earlier I referred to the articles by Duclos and Roach, and Caminker, which point out that the Constitution may encourage particular kinds of remedies even if it does not directly mandate them. This aspect of remedial choice was specifically relied on in *R. v. Hebb*, *supra*. In that case the court considered a provision which required the court to consider the means of accused to pay a fine before incarceration upon default. This provision only applied to persons aged 18 to 22. The court found that this constituted discrimination on the basis of age. The question then was whether the limitation to ages 18 to 22 could be severed from the rest of the provision.

75 The court observed that either course, severance or nullification, would interfere with the intention of Parliament to some extent. That is, severance would expand the protection of the provision to a group Parliament had not intended to benefit by it, and nullification would remove protection from the group Parliament had intended to have it. The court, at p. 21, then found it important that the protection in question was "constitutionally encouraged," and thought that this was a good reason to favour expansion of the provision rather than nullification:

To sever the age-related phrase provides protection to persons of all ages who are charged with a crime, in that they cannot be incarcerated for failure to pay a fine until a judicial review of their situation is held. On the other hand, by severing the complete s. 646(10), this protection is removed for all persons, including the age group which Parliament determined were worthy of that special protection.

It is important that the courts not unjustifiably invade the domain which is properly that of the legislature. In following either of the alternatives above, the court will be interfering to some extent with the efforts of the legislators of the enactment. Where the result is the removing of a protection that is constitutionally encouraged — that is, judicial consideration before incarceration — as opposed to the enlarging of such a protection, it is submitted that the court

should favour a result that would expand the group of persons protected rather than remove that protection completely.

76 This reasoning is sensible given our knowledge of how legislatures act generally. The fact that the permissible part of a provision is encouraged by the purposes of [the Constitution](#), even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

77 This factor may have been important in a case which dealt specifically with human rights statutes. In *Re Blainey and Ontario Hockey Association* 1986 54 O.R. (2d) 513 (C.A.), the statute (*Human Rights Code, 1981*, S.O. 1981, c. 53) provided, in s. 1, a right to equal treatment without discrimination on the basis of, *inter alia*, sex. [Section 19](#), however, provided that s. 1 was not violated when athletic activities were restricted on the basis of sex. The court found that s. 19 violated the guarantee of equality under [the Charter](#). It was argued by the Hockey Association that s. 19 was not severable from s. 1, since it could not be assumed that the legislature would have passed s. 1 without s. 19. It was said that this meant that s. 19 should not be struck down, even though it violated [the Charter](#). In fact, if it were true that s. 19 was inextricably linked to s. 1, then the result would be not that s. 19 was saved, but rather that s. 1 would be lost, even though there was nothing impermissible about it, considered in isolation. However, it is clear that it is safe to assume that the legislature would have passed the general prohibition on discrimination even if it could not limit its application in the area of athletics.

(v) Conclusion

78 It should be apparent from this analysis that there is no easy formula by which a court may decide whether severance or reading in is appropriate in a given case. While respect for the role of the legislature and the purposes of [the Charter](#) are the twin guiding principles, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.

C. Whether to Temporarily Suspend the Declaration of Invalidity

79 Having identified the extent of the inconsistency, and having determined whether that inconsistency should be dealt with by way of striking down, severance or reading in, the court has identified what portion must be struck down. The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended.

80 A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain, supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721*). It may also be appropriate in cases of underinclusiveness

as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

81 I would emphasize that the question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under [s. 52 of the Constitution Act, 1982](#). While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s. 52.

82 A delayed declaration is a serious matter from the point of view of the enforcement of [the Charter](#). A delayed declaration allows a state of affairs which has been found to violate standards embodied in [the Charter](#) to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of [the Charter](#).

83 Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

84 The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.

D. Summary

85 It is valuable to summarize the above propositions with respect to the operation of [s. 52 of the Constitution Act, 1982](#) before turning to the question of the independent availability of remedies pursuant to [s. 24\(1\) of the Charter](#). Section 52 is engaged when a law is itself held to be

unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The factors to be considered can be summarized as follows:

(i) The Extent of the Inconsistency

86 The extent of the inconsistency should be defined:

A. broadly where the legislation in question fails the first branch of the *Oakes* test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a *Charter* right or, indeed, if the purpose is itself held to be unconstitutional — perhaps the legislation in its entirety;

B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the *Oakes* test in that the means used to achieve that purpose are held not to be rationally connected to it — generally limited to the particular portion which fails the rational connection test; or,

C. flexibly where the legislation fails the second or third element of the proportionality branch of the *Oakes* test.

(ii) Severance/Reading In

87 Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:

A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

(iii) Temporarily Suspending the Declaration of Invalidity

88 Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision

into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

89 I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.

III. Section 24(1)

A. Section 24(1) Alone

90 Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

91 This course of action has been described as "reading down as an interpretive technique", but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1).

B. Section 24(1) in Conjunction with Section 52

92 An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared

unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

IV. Remedial Options Appropriate to this Case

A. The Nature of the Right Involved

93 The right which was determined to be violated here is a positive right: the right to equal *benefit* of the law. Positive rights by their very nature tend to carry with them special considerations in the remedial context. It will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose. Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down and suspending the operation of the declaration of invalidity than to mandate an immediate striking down. Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory. For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd. Certainly the intrusion into the legislative sphere of extending a constitutionally guaranteed benefit is warranted when the benefit was itself guaranteed by the legislature through constitutional amendment.

94 Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s. 7 as a positive right in some circumstances. Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.

95 The benefit with which we are concerned here is a monetary benefit for parents under the *Unemployment Insurance Act, 1971*, not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Parliament is obliged to do, by virtue of the conceded s. 15 violation, is equalize the provision of that benefit. The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provision into line with constitutional requirements. All of the intervening provincial Attorneys General agreed with this proposition, although, for the most part, they intervened on behalf of

the appellants. The question which remains is whether this is a case in which it is appropriate to go further and read the excluded group into the legislation. This question must be answered with reference to the specific legislation under consideration.

B. The Context of the Unemployment Insurance Act. 1971

96 It is not difficult to discern the legislative objective of this scheme as a whole. The following overall objective emerges from Justice La Forest's judgment concerning the same legislative scheme in *Tétreault-Gadoury, supra*, at p. 41:

... to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market.

97 It is, however, not as simple to discern the objective of the particular provision. It is not clear on the text of the provision alone that the purpose of it is to extend benefits to parents of newborns caring for them at home, a purpose which reading in the excluded group would further. Indeed, on the express language of the provision, one could quickly conclude that the benefits were only intended to be conferred on adoptive parents and that natural parents were deliberately excluded. One could postulate that the provision was specifically aimed at responding to circumstances peculiar to adoptive parents. Certainly this possibility cannot be ruled out on the basis of the text of the provision alone, and we have not been provided with the further assistance of a s. 1 argument here or in the courts below.

98 Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation. A consideration of the budgetary implications of such a course of action further underlines this conclusion. This is not a situation comparable to that in *Tétreault-Gadoury, supra*. There, the budgetary implications of severing the provision in question were not extensive. The group of people not previously entitled to benefit by the scheme who would become eligible was a small, discrete group. Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.

99 Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these. Clearly, the appropriate action for the Court to take is to declare the provision invalid but to suspend that declaration to allow the

legislative body in question to weigh all the relevant factors in amending the legislation to meet constitutional requirements.

100 I think it significant and worthy of mention that in this case Parliament did amend the impugned provision following the launching of this action, and that that amendment was not the one that reading in would have imposed. Parliament equalized the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. The two groups now receive equal benefits for ten weeks rather than the original fifteen. This situation provides a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear. In this case, reading in would not necessarily further the legislative objective and it would definitely interfere with budgetary decisions in that it would mandate the expenditure of a greater sum of money than Parliament is willing or able to allocate to the program in question.

The Constitutional Questions

101 Following from the above analysis, I would answer the constitutional questions as follows:

1. Is the Federal Court Trial Division, having found that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act, R.S.C., 1985, c. U-1*) creates unequal benefit contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the *Constitution Act, 1982* to declare that s. 32 is of no force and effect?

102 The answer to question one is, in the present circumstances, yes, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. This is not to say that s. 52 does not provide the flexibility to stop short of striking out an unconstitutional provision in its entirety. Given the appropriate circumstances, a court may choose the options of severance or reading in by which to bring the provision in line with the *Charter*. These options should be exercised only in the clearest of cases, keeping in mind the principles articulated above relating to the nature of the right and the specific context of the legislation.

2. Does s. 24(1) of the *Charter* confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

103 The answer to question two is no. Section 24(1) provides an individual remedy for actions taken under a law which violate an individual's *Charter* rights. Again, however, a limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the *Constitution Act, 1982*.

Disposition

104 In the result, the appeal is allowed and the judgment of the trial judge set aside. Normally, I would order that [s. 32 of the *Unemployment Insurance Act, 1971*](#) (subsequently [s. 20 of the *Unemployment Insurance Act, 1985*](#)) be struck down pursuant to [s. 52](#) and be declared to be of no force or effect, and I would further suspend the operation of this declaration to allow Parliament to amend the legislation to bring it into line with its constitutional obligations. There is, however, no need for a declaration of invalidity or a suspension thereof at this stage of this matter given the November 1990 repeal and replacement of the impugned provision.

105 Further, this is not a case in which extending a remedy, for example damages, under [s. 24\(1\)](#) to the respondent would be appropriate. The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have been in had there been no wrong. The plaintiff could have received the benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under [s. 24](#) thus rests on an assumption about which position the plaintiff would have been in. However, I have already determined which assumption should be made in the analysis under [s. 52](#), and have determined that it cannot be assumed that the legislature would have enacted the benefit to include the plaintiff. Therefore, the plaintiff is in no worse position now than had there been no wrong.

106 Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the [s. 15](#) issue at trial and the subsequent litigation has, upon the concession of the appellants, centred only on choice of remedy. According to this concession, the respondent by his claim brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-client costs.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by La Forest J.:

107 I have had the benefit of reading the reasons of the Chief Justice and I agree with his proposed disposition and answers to the constitutional questions. I take this approach on the simple basis that the legislation concerned concededly violates the [Canadian Charter of Rights and Freedoms](#) and that it does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being obviously intended by the legislature in any event. As the Chief Justice points out, there is a long tradition of reading down legislation, and I see no reason, where it substantially amounts to the same thing, why reading in should not also be done. I note that the Chief Justice states, and I agree, that these devices should only be employed in the clearest of cases. The courts are not in the business of rewriting legislation. I also

agree that there is little point in light of Parliament's subsequent action to declare the impugned legislation invalid and then suspend that declaration.

108 That is sufficient to dispose of the case, and I find it unnecessary to elaborate further. In limiting my reasons in this way, however, I would not wish it to be thought that I fundamentally disagree with what the Chief Justice has to say regarding the means for assessing when the techniques of reading down or reading in should be adopted. Indeed, I find his reasons very helpful in this regard. Rather I take this narrow approach because the unsatisfactory manner in which this case has been presented to us makes it necessary to respond to the issues in the abstract, which leads to the risk of misleading or insufficiently qualified pronouncements.

109 To begin with, I am by no means sure there was a violation of *the Charter* in this case. At first sight (and the Chief Justice alludes to this) it does not seem wholly unreasonable that Parliament might have good reason to encourage adoptive parents as a group, and the effect of the judicial intervention has been to divert from that group some of the monies intended to meet the problem Parliament may have had in contemplation. This Court has repeatedly stated that Parliament may constitutionally attack one problem, or part of a problem, at a time. But the manner in which the case was presented requires us to assume constitutional invalidity in the absence of any evidence as to context, which I would have thought was essential to a consideration of the extent of inconsistency with *the Charter*.

110 Ordinarily, a case is dealt with in light of facts that define the scope of the Court's pronouncement. Here we are forced to deal with the tests for reading down or reading in in a manner that may give the impression that they are of universal application. But it must be underlined that the case is one involving a scheme of social assistance which may dictate a quite different approach from that which one would follow in other areas. Thus this Court has repeatedly stated in cases like *R. v. Wong*, [1990] 3 S.C.R. 36, for example, that it was not the business of the courts to invent schemes that had the effect of increasing police powers (at pp. 56-57). The rationale for this was not so much the complexity of possible schemes (as the Chief Justice appears to suggest at one stage), but rather that this could distract the courts from their fundamental duty under *the Charter* to protect the rights guaranteed to the individual.

111 The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention, in cases like *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, for example, where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing

with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective.

112 I have added these comments to underline that there are further dimensions (and I have mentioned only a few) to the issue of reading in and reading down that will require qualifications to the propositions set down by the Chief Justice. I note that he has wisely indicated that these propositions are intended as guidelines to assist the courts and not as hard and fast rules to be applied regardless of factual context.

113 Where I am most doubtful about the Chief Justice's reasons is in closely tying the process of reading down or reading in with the checklist set forth in *R. v. Oakes*, [1986] 1 S.C.R. 103. Though this may be useful at times, it may, I fear, encourage a mechanistic approach to the process, rather than encourage examination of more fundamental issues, such as those to which I have referred above, issues that go well beyond the factual context.

Appeal allowed, with costs to the respondent. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

Solicitors of record:

Solicitor for the appellants: *John C. Tait*, Ottawa.

Solicitors for the respondent Shalom Schachter: *Osler, Hoskin & Harcourt*, Toronto.

Solicitors for the respondent Women's Legal Education and Action Fund: *Tory, Tory, DesLauriers & Binnington*, Toronto.

Solicitor for the intervener the Attorney General for Ontario: *The Attorney General for Ontario*, Toronto.

Solicitor for the intervener the Attorney General of Quebec: *The Attorney General of Quebec*, Ste-Foy.

Solicitor for the intervener the Attorney General for New Brunswick: *The Attorney General for New Brunswick*, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: *The Attorney General of British Columbia*, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: *Brian Barrington-Foote*, Regina.

Solicitor for the intervener the Attorney General for Alberta: *The Attorney General for Alberta*, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: *The Attorney General of Newfoundland*, St. John's.

Solicitors for the intervener Minority Advocacy Rights Council: *Cogan & Cogan*, Ottawa.

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