

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**(TORONTO REGION)
(CRIMINAL DIVISION)**

BETWEEN:

HIS MAJESTY THE KING

RESPONDENT

AND

Kevin Alexander McLean

ACCUSED (APPLICANT)

BOOK OF AUTHORITIES SUBMITTED ON BEHALF OF THE APPLICANT

DATE AND PLACE OF FILING: SCJ 361 University Avenue Courthouse (1st floor): March 23, 2026

Tab	Authority	Citation
1.	<i>R v Araujo</i>	<u>2000 SCC 65</u>
2.	<i>R v Anderson</i>	<u>2014 SCC 41</u>
3.	<i>R v Babos</i>	<u>2014 SCC 16</u>
4.	<i>Baker v Canada</i>	<u>[1999] 2 SCR 817</u>
5.	<i>Blencoe v BC</i>	<u>2000 SCC 44</u>
6.	<i>R v Côté</i>	<u>2011 SCC 46</u>
7.	<i>R v Conway</i>	<u>2010 SCC 22</u>
8.	<i>R v Deschamplain</i>	<u>2004 SCC 76</u>
9.	<i>Doucet-Boudreau</i>	<u>2003 SCC 62</u>
10.	<i>R v Dudley</i>	<u>2009 SCC 58</u>
11.	<i>Dunsmuir v New Brunswick</i>	<u>2008 SCC 9</u>
12.	<i>R v Evans</i>	<u>[1991] 1 SCR 869</u>
13.	<i>R v Feeney</i>	<u>[1997] 2 SCR 13</u>
14.	<i>R v Grant</i>	<u>2009 SCC 32</u>
15.	<i>Henry v BC</i>	<u>2015 SCC 24</u>
16.	<i>Hinse v Canada</i>	<u>2015 SCC 35</u>
17.	<i>R v Jordan</i>	<u>2016 SCC 27</u>

18.	<i>R. v. Krannenburg,</i>	<u>1980 CanLII 179 (SCC), [1980] 1 SCR 1053,</u>
19.	<i>British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23 (CanLII), [2007] 2 SCR 86,</i>	<u>2007 SCC 23</u>
20.	<i>Landreville v Boucherville</i>	<u>[1978] 2 SCR 801</u>
21.	<i>R v MacNeil</i>	<u>2009 SCC 3</u>
22.	<i>Mackin v New Brunswick</i>	<u>2002 SCC 13</u>
23.	<i>McLean v Bradley</i>	<u>1878 CanLII 22</u>
24.	<i>R v Myers</i>	<u>2019 SCC 18</u>
25.	<i>R v Nixon</i>	<u>2011 SCC 34</u>
26.	<i>R v O'Connor</i>	<u>[1995] 4 SCR 411</u>
27.	<i>R v Potvin</i>	<u>[1993] 2 SCR 880</u>
28.	<i>R v Regan</i>	<u>2002 SCC 12</u>
29.	<i>Ref re Residential Tenancies Act</i>	<u>1981 CanLII 24</u>
30.	<i>Roncarelli v Duplessis</i>	<u>1959 CanLII 50</u>
31.	<i>R v S.G.T.</i>	<u>2010 SCC 20</u>
32.	<i>R v Stinchcombe</i>	<u>[1991] 3 SCR 326</u>
33.	<i>R v Storrey</i>	<u>[1990] 1 SCR 241</u>
34.	<i>Canada (Minister of Citizenship and Immigration) v. Tobiass, 1997 CanLII 322 (SCC), [1997] 3 SCR 391</i>	<u>1997 CanLII 322</u>
35.	<i>Canada (Minister of Citizenship and Immigration) v. Vavilov,</i>	<u>2019 SCC 65</u>
36.	<i>Vancouver v Ward</i>	<u>2010 SCC 27</u>
37.	<i>Wewaykum Indian Band v. Canada, 2003 SCC 45 (CanLII), [2003] 2 SCR 259,</i>	<u>2003 SCC 45</u>
38.	<i>Vickery v. Nova Scotia Supreme Court (Prothonotary)</i>	<u>[1991] 1 S.C.R. 671</u>
39.	<i>Andrews v. Grand and Toy Alberta Ltd.</i>	<u>[1978] 2 S.C.R. 229</u>
40.	<i>Hill v. Church of Scientology of Toronto</i>	<u>[1995] 2 S.C.R. 1130</u>

41.	<i>Young v. Bella</i>	2006 SCC 3
42.	<i>Mustapha v. Culligan of Canada Ltd.</i>	2008 SCC 27
43.	<i>Cinar Corporation v. Robinson</i>	2013 SCC 73
44.	<i>Saadati v. Moorhead</i>	2017 SCC 28
45.	<i>Ontario (Criminal Code Review Board) v. Hale</i>	1999 CanLII 3805 (ON CA)
46.	<i>R v Tsekouras</i>	2017 ONCA 290
47.	<i>R v Gauthier</i>	2013 SCC 32
48.	<i>R v Quesnelle</i>	2013 ONCA 180
49.	<i>R v Cole</i>	2012 SCC 53 (CanLII) , [2012] 3 SCR 34 ,
50.	<i>R v N.M.</i>	2007 CanLII 31570 (ON SC)
51.	<i>R v Rajkovic</i>	2021 ONCA 11
52.	<i>R. v. Schertzer</i>	2015 ONCA 259
53.	<i>R. v. Hansen</i>	2018 ONCA 46
54.	<i>Koukounakis v. Stainrod</i>	1995 CanLII 621 (ON CA)
55.	<i>McIntyre v. Grigg</i>	2006 CanLII 37326 (ON CA)
56.	<i>Rizzi v. Mavros</i>	2008 ONCA 172
57.	<i>Nissen v. Durham Regional Police Services Board</i>	2017 ONCA 10
58.	<i>Nissen v. Durham Regional Police Services Board (ONSC)</i>	2015 ONSC 1268
59.	The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11	
60.	The Constitution Act, 1867, 30 & 31 Vict, c 3,	
61.	<i>Courts of Justice Act</i>	RSO 1990, c C.43
62.	<i>Interpretation Act</i>	RSC 1985, c I-21
63.	<i>Evidence Act</i>	RSO 1990, c E.23
64.	<i>Certification of Recordings and Transcripts</i>	O Reg 158/03

65.	<i>Criminal Code</i>	RSC 1985, c C-46
66.	<i>Canada Evidence Act</i>	RSC 1985, c C-5
67.	<i>Judges Act</i>	RSC 1985, c J-1
68.	<i>Canadian Judicial Council Inquiries and Investigations By-laws</i>	SOR/2015-203
69.	<i>Public Service of Ontario Act, 2006</i> , SO 2006, c 35, Sch A	SO 2006, c 35, Sch A
70.	<i>Conflict of Interest Commissioner: Powers, Duties and Functions</i>	O Reg 384/07
71.	<i>Dismissal Without Cause (Part III of the Act)</i>	O Reg 380/07
72.	<i>Ethics Executive: Additional Powers, Duties and Functions</i>	O Reg 383/07
73.	<i>Oaths and Affirmations</i>	O Reg 373/07
74.	<i>Provision of Legal Services Under Section 147 of the Act</i>	O Reg 385/07
75.	<i>Public Bodies and Commission Public Bodies - Definitions</i>	O Reg 146/10
76.	<i>Suspension Pending Investigation (Part III of the Act)</i>	O Reg 379/07
77.	<i>Administration of Justice Act</i>	RSO 1990, c A.6
78.	<i>Superior Court of Justice and Court of Appeal Fees</i>	Reg 293/92
79.	<i>Ontario (Attorney General) (Re)</i>	2008 CanLII 68865 (ON IPC)
80.	<i>Friends of the Oldman River v. Canada</i>	[1992] 1 SCR 3
81.	<i>RWDSU v. Dolphin Delivery Ltd.</i>	1986 CanLII 5
82.	<i>Young v. Young</i>	[1993] 4 SCR 3
83.	<i>Temoin v. Martin</i>	2012 BCCA 250
84.	<i>Slaight Communications v. Davidson (NTD: INCLUDE TAB 84)</i>	[1989] 1 SCR 1038
85.	<i>The Queen v. Beauregard</i>	1986 CanLII 24
86.	<i>McEvoy v. AG for New Brunswick</i>	1983 CanLII 149
87.	<i>MacMillan Bloedel Ltd. v. Simpson</i>	1995 CanLII 57

88.	<i>Crevier v. A.G. (Québec)</i>	1981 CanLII 30
89.	<i>Doré v. Barreau du Québec</i>	2012 SCC 12
90.	<i>Trial Lawyers Assoc v. BC (AG)</i>	2014 SCC 59
91.	<i>Ontario (AG) v. \$25,610 Currency</i>	2017 ONCA 251
92.	<i>Uhrik v Terrigno</i>	2024 ABCA 383
93.	<i>Timm v. Canada</i>	2019 FC 238
94.	<i>Larouche v Court of Queen's Bench (AB)</i>	2015 ABQB 25
95.	<i>Trisura Guarantee Insurance v Duchnij</i>	2021 ABCA 78
96.	<i>Chisan v Fielding</i>	2017 ABQB 233
97.	<i>R. v. Liⁱ</i>	2008 CanLII 92006
98.	<i>Long v. Red Branch Investments</i>	2018 BCCA 115
99.	<i>Smith v. Canada (Attorney General)</i>	2020 FC 629
100.	<i>Faber c. R.,</i>	2015 QCCS 12ⁱⁱ , at para 111
101.	<i>R. v. Q.H.T.</i>	2004 ABQB 526
102.	<i>Gillespie v. Manitoba (Attorney General)ⁱⁱⁱ</i>	2000 CanLII 26952
103.	<i>Reilly v. Wachowich</i>	1999 ABQB 309
104.	<i>Toronto (City) v. Ontario (AG)</i>	2021 SCC 34
105.	<i>Alfano et al v. Piersanti et al</i>	2014 ONSC 60
106.	<i>König v. Hobza</i>	2015 ONCA 885
107.	<i>Smith Bus Lines Ltd. v. BMO</i>	1987 CanLII 4190
108.	<i>Yatar v. TD Insurance Meloche Monnex</i>	2024 SCC 8
109.	<i>Sugar v. Peat Marwick Ltd.</i>	1988 CanLII 4635
110.	<i>Enbridge Gas v. Marinaccio</i>	2012 ONCA 650
111.	<i>Jones v. Tsige</i>	2012 ONCA 32
112.	<i>R. v. Davis</i>	1999 CanLII 638
113.	<i>R. v. Alexander</i>	2005 CanLII 32566
114.	<i>R. v. Barros</i>	2016 ABQB 243
115.	<i>Ontario Realty Corp. v. Gabriele</i>	2000 CanLII 22697

116.	<i>Newfoundland Telephone v. NL (Board)</i>	1992 CanLII 84
117.	<i>Benedict v. Ontario</i>	2000 CanLII 16884
118.	<i>Donovan v. Waterloo (Police Services Board)</i>	2022 ONCA 199
119.	<i>Serra v. Serra</i>	2009 ONCA 105
120.	<i>Toronto Star v. AG Ontario</i>	2018 ONSC 2586
121.	<i>The Queen v. Teskey</i>	2007 SCC 25
122.	<i>Galambos v. Perez</i>	2009 SCC 48
123.	<i>Laiken v. Carey</i>	2011 ONSC 5892
124.	<i>Soleil Hospitality Inc. v. Louie</i>	2010 BCSC 1183
125.	<i>Report re: The Honourable D.E. Spiro</i>	CJC Decision
126.	<i>Decision re: The Hon. Andrew J. Goodman</i>	CJC 24-0799
127.	<i>Decision re: The Hon. Charles C. Chang</i>	CJC 23-0488
128.	<i>Decision re: The Honourable Arthur Doyle</i>	CJC 24-0144
129.	<i>Decision re: The Hon. Marc St-Pierre</i>	CJC 24-0784
130.	<i>Ethical Principles for Judges</i>	2023
131.	<i>Model Definition of Judicial Information</i> by the Canadian Judicial Council	2020
132.	<i>Classification of Court Information</i>	2020
133.	<i>Retention of Court Information</i>	2022
134.	<i>Ruffo v. Conseil de la magistrature (SCC)</i>	1995 CanLII 49
135.	<i>R. v. Baldovi et al</i>	2016 MBQB 90
136.	<i>High-Crest Enterprises v. Canada</i>	2017 FCA 88
137.	<i>The Role of a Chief Justice in Canada</i>	Peter W. Hogg
138.	<i>Regina v. Spezzano (ONCA) as per Martin JA</i> ^{iv} <i>Arnup and Dublin JJA</i>) ^{iv}	1977 CanLII 1371
139.	<i>R. v. Zeck</i>	1980 CanLII 2849
140.	<i>Baxter Student Housing v. College Housing</i>	[1976] 2 SCR 475
141.	<i>Steiner v. Canada</i>	1981 CanLII 4581
142.	<i>Information Commissioner v. Canada (MEI)</i>	1986 CanLII 6836

143.	<i>Halton v. Rezaizadeh</i>	2004 CanLII 6236
144.	<i>Sunrise North Senior Living v. Sheriff</i>	2020 ONSC 469
145.	<i>407 ETR Concession Co. v. Ontario (RMV)</i>	2005 CanLII 49963
146.	<i>Quong v. Pong</i> , 1925 CanLII 11 (ON CA)	1925 CanLII 11
147.	<i>Pong v. Quong</i> , 1926 CanLII 6 (SCC), [1926] SCR 651, Present: Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.	1926 CanLII 6
148.	<i>Pong v. Quong</i> , 1927 CanLII 2 (SCC), [1927] SCR 271	1927 CanLII 2
149.	<i>Turigan v. Alberta</i>	1988 ABCA 333
150.	<i>R v Codrington</i>	2023 ONSC 6352
151.	<i>Evans v. Sproule</i>	2008 CanLII 58428 (ON SC)
152.	<i>C.S. (I) v. J.S. (Shaw v. Staples)</i>	2013 ONSC 3290
153.	<i>Snowball v. Ornge</i>	2017 ONSC 4601
154.	<i>Merrifield v. Canada (Attorney General)</i>	2017 ONSC 1333
155.	<i>Galea v. Wal-Mart</i>	2017 ONSC 245
156.	<i>R.B. v. E.S. (Litigation Guardian of)</i>	2017 ONSC 7866
157.	<i>AA v. BB et al</i>	2018 ONSC 4173
158.	<i>R. v. Barry</i> ,	2021 BCPC 59
159.	<i>R. v. Hampton</i> ,	2020 ABQB 429
160.	<i>R. v. Denny</i> ,	2020 NSPC 14
161.	<i>Prosecutor Handbook from the Federal Government</i>	Her Majesty the Queen in Right of Canada, represented by the Attorney General of Canada, 2014-2020. Catalogue No. J79-2/2014E-PDF ISBN No. 978-1-100-23610-0 PPSC No. 2020-1

162.	<i>Crown Prosecutor Manual</i>	<u>Effective date, November 14, 2017</u>
163.	<i>R v Awad</i> , 2014 NSSC 44 (CanLII), per Edwards J	
164.	<i>R v Ellis</i> , 2009 ONCA 483 (CanLII), 244 CCC (3d) 438, per Gillese JA	
165.	<i>R v Awad</i> , 2015 NSCA 10 (CanLII), 1126 APR 116, per Beveridge JA, at para 49 (see: The swearing of information commences "criminal proceedings" against the accused. ^[4] The commencement of proceedings does not require the issuance of process. ^[5])	
166.	<i>R v McHale</i> , 2010 ONCA 361 (CanLII), 256 CCC (3d) 26, per Watt JA, at para 85 ("Laying or receipt of an information commences criminal proceedings")	
167.		

End of BOA as of March 24, 2026

ⁱ Judicial Pre-Trial Notes Protected by Judicial Immunity

ⁱⁱ No new element or exceptional circumstance justifies the reopening of the investigations or trials, since the accused voluntarily closed their evidence without reserving their rights despite the legal uncertainties raised by the Supreme Court's decision in *St-Onge Lamoureux* (paras. [158-160](#))

ⁱⁱⁱ The majority found that the inherent jurisdiction of a superior court is traditionally invoked as an adjunct to an existing right and is not intended to create new substantive law

^{iv} Per Martin J.A. (Arnup and Dubin J.J.A. concurring):

Scope of s. 127(2): The Court held that s. 127(2) of the Criminal Code is not limited to judicial proceedings that are existing or proposed. The phrase "the course of justice" includes attempts to obstruct investigations that may lead to prosecution, even if no decision to prosecute has been made. The legislative history and case law support this broad interpretation.

False Statement as Obstruction: The accused's false identification to the police was intended to mislead the investigation and avoid prosecution for driving while disqualified. This conduct fell within the scope of s. 127(2) as it obstructed the "course of justice".

Tab 1

R. v. Araujo, 2000 SCC 65 (CanLII), [2000] 2 SCR 992

Source:	Supreme Court of Canada
Date:	2000-12-14
File number:	26898; 26943; 26968; 26904; 26899
Other citations:	193 DLR (4th) 440 — 262 NR 346 — 235 WAC 257 — 149 CCC (3d) 449 — 38 CR (5th) 307 — 143 BCAC 257 — 48 WCB (2d) 65 — 79 CRR (2d) 1 — [2000] CarswellBC 2440 — EYB 2000-21474 — JE 2001-74 — [2000] SCJ No 65 (QL) — [2000] ACS no 65
Citation:	R. v. Araujo, 2000 SCC 65 (CanLII), [2000] 2 SCR 992, < https://canlii.ca/t/5231 >, retrieved on 2026-03-20

R. v. Araujo, [2000] 2 S.C.R. 992

**Angela Araujo, Spencer Leslie,
Neil Grandmaison, Christina Khoury, Victor Camara,
Robert Jenkins, Tiffany Muriel Leslie,
Kevin Lathangue and Jolene Irons**

Appellants

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Araujo

Neutral citation: 2000 SCC 65.

File Nos.: 26898, 26899, 26904, 26943, 26968.

2000: April 11, 12; 2000: December 14.

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

on appeal from the court of appeal for british columbia

Criminal law -- Appeals -- Question of law -- Crown's appeal against acquittals -- Issues on appeal concerning application and interpretation of legal standard of investigative necessity for obtaining wiretap authorization -- Whether Court of Appeal had jurisdiction to hear Crown's appeal -- [Criminal Code, R.S.C., 1985, c. C-46, s. 676\(1\)\(a\)](#).

Criminal law -- Interception of communications -- Investigative necessity requirement -- Nature and interpretation of requirement -- Whether affidavit materials submitted to obtain wiretap authorization established investigative necessity -- [Criminal Code, R.S.C., 1985, c. C-46, s. 186\(1\)\(b\)](#).

Criminal law -- Interception of communications -- Standard of review for wiretap authorization -- Whether trial judge applied proper standard -- Approach to amplification.

Criminal law -- Interception of communications -- Affidavits -- Kind of affidavit to be submitted on application for wiretap authorization.

The accused faced multiple charges related to their cocaine-trafficking ring. Much of the Crown's evidence against them was gleaned from information captured through wiretapping. The Crown had obtained *ex parte* authorizations for its wiretaps from a judge by submitting a 130-page affidavit, prepared and signed by R, a member of the RCMP. The affidavit contained

information from 10 confidential sources denoted “A” through “J”. Information from these sources came to R by way of other officers who were their handlers. On a *voir dire* at trial, R was cross-examined on the affidavit. After confused attempts at explaining inconsistencies in the affidavit, R admitted that in several places the affidavit referred erroneously to source “E”, rather than to source “F”. He later testified that the reference should have been to source “C”. R admitted that he had known about this error several weeks before the trial. He affirmed that he had forgotten about the matter, but suddenly remembered it during the cross-examination. The trial judge indicated that R’s lack of credibility “permeate[d] the issue of reasonable and probable grounds”, one of the preconditions to the authorization, and concluded that the affidavit should fall in its entirety. The Court of Appeal set aside the acquittals of the accused and ordered a new trial.

Held: The appeal should be dismissed.

The Court of Appeal had jurisdiction under [s. 676\(1\)\(a\)](#) of the *Criminal Code* to hear the Crown’s appeal. The Court of Appeal examined the combined interpretation and application of the legal standard of investigative necessity. It also discussed the interpretation and application of the standard of review for a judge reviewing a wiretap authorization. The interpretation or application of a legal standard has been recognized as a question of law.

Under [s. 186\(1\)\(b\)](#) of the *Code*, wiretapping may be accepted as an appropriate investigative tool where “other investigative procedures are unlikely to succeed”. The correct interpretation of [s. 186\(1\)\(b\)](#)’s investigative necessity requirement must be based on the text of the provision read with a simultaneous awareness of two potentially competing considerations: enabling criminal investigations and protecting privacy rights. Wiretapping is highly intrusive and a judge should protect citizens against unwanted fishing expeditions by the state and its law enforcement agencies by granting an authorization only as far as need is demonstrated by the material submitted by the applicant. In order to meet the investigative necessity requirement, the applicant must establish in the affidavit that, practically speaking, there is no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry. Here,

the Court of Appeal applied a standard inconsistent with the words of the *Criminal Code*. In concluding that “in the case at bar, there is no reason to impeach the choice of investigative techniques”, the court applied an “efficiency” rather than a “necessity” standard. This approach is wrong in law and has the potential to subvert the safeguards of privacy interests that are an essential component of the regulation of wiretapping in the *Code*. Using the efficiency standard, wiretapping would always be available to the police and would replace a standard of necessity with one of opportunity at the discretion of law enforcement bodies. However, the application of the proper test supports the conclusion reached by the Court of Appeal that the authorizing judge could properly have issued an authorization based on the facts disclosed in the affidavit. The facts as set out in the affidavit met the investigative necessity standard. The affidavit attested to the failure of police efforts in spite of the use of physical surveillance and search warrants. It also provided evidence as to why the use of informants or undercover agents trying to infiltrate the drug ring would be ineffective and potentially dangerous. There was thus evidence in the affidavit to negate arguments for other investigative techniques and to make the case that wiretapping was, practically speaking, the only reasonable alternative, taking into account the nature and purpose of this particular investigation. The objective of a police investigation -- to bring the higher-ups in a drug ring to justice -- rightly informs the investigative necessity analysis. The police had more need for wiretapping given that they were trying to move up the chain and catch the higher-ups in the operation.

As a practical matter, in seeking permission to use wiretapping, the police should submit an affidavit that sets out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. In addition, an affidavit should be clear and concise. It should never attempt to trick its readers. On this point, the use of boiler-plate language should be avoided. Finally, the affidavits should be gathered from those with the best firsthand knowledge of the facts. This would strengthen the material by making it more reliable.

The trial judge did not correctly apply the standard of review for a wiretap authorization. A reviewing judge does not conduct a rehearing of the application for the wiretap.

The test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued. In considering the evidence, the reviewing judge must exclude erroneous information. Amplification may correct such information where the police had the requisite reasonable and probable grounds and demonstrated investigative necessity but, in good faith, made some minor, technical error in the drafting of their affidavit material. There is no need to seek to amplify the record if sufficient reliable material remains even after excising the erroneous material. In this case, although the trial judge found R to lack credibility on the issue of why he had not disclosed a minor drafting mistake, there is no suggestion that there was ever any untruthfulness in the substance of the information in the affidavit itself. In these circumstances, a global finding against the entire affidavit was unreasonable. Even without the information from sources “C” and “E”, the affidavit would have provided ample evidence to an issuing judge and evidenced the existence of probable grounds and investigative necessity. Moreover, amplification would allow for the reading of the information from the now correctly attributed sources “C” and “E” as well. The Court of Appeal was correct in upholding the issuing judge’s authorization.

Cases Cited

Followed: *R. v. Garofoli*, [1990 CanLII 52 \(SCC\)](#), [1990] 2 S.C.R. 1421; *R. v. Bisson*, [1994 CanLII 46 \(SCC\)](#), [1994] 3 S.C.R. 1097, aff’g [1994 CanLII 5328 \(QC CA\)](#), [1994] R.J.Q. 308, 87 C.C.C. (3d) 440; *R. v. Grant*, [1993 CanLII 68 \(SCC\)](#), [1993] 3 S.C.R. 223; **approved:** *R. v. Hiscock*, [1992 CanLII 2959 \(QC CA\)](#), [1992] R.J.Q. 895, 72 C.C.C. (3d) 303, leave to appeal refused, [1993] 1 S.C.R. vi; *R. v. Monroe* (1997), [1997 CanLII 3034 \(BC CA\)](#), 8 C.R. (5th) 324; *R. v. Morris* (1998), [1998 NSCA 229 \(CanLII\)](#), 134 C.C.C. (3d) 539; **disapproved:** *R. v. Paulson* (1995), [1995 CanLII 2224 \(BC CA\)](#), 97 C.C.C. (3d) 344; *R. v. Cheung* (1997), [1997 CanLII 3763 \(BC CA\)](#), 119 C.C.C. (3d) 507; **referred to:** *R. v. Ewanchuk*, [1999 CanLII 711 \(SCC\)](#), [1999] 1 S.C.R. 330; *R. v. Biniaris*, [2000] 1 S.C.R. 381, [2000 SCC 15](#); *Hunter v. Southam Inc.*, [1984 CanLII 33 \(SCC\)](#), [1984] 2 S.C.R. 145; *R. v. Duarte*, [1990 CanLII 150 \(SCC\)](#), [1990] 1 S.C.R. 30; *R. v. Comisso*, [1983 CanLII 160 \(SCC\)](#), [1983] 2 S.C.R. 121; *R. v. Thompson*, [1990 CanLII 43 \(SCC\)](#), [1990] 2 S.C.R. 1111; *R. v. Lachance*, [1990 CanLII 53 \(SCC\)](#), [1990] 2 S.C.R. 1490; *R. v.*

Finlay (1985), [1985 CanLII 117 \(ON CA\)](#), 23 C.C.C. (3d) 48; *R. v. Playford* (1987), [1987 CanLII 125 \(ON CA\)](#), 40 C.C.C. (3d) 142; *R. v. Smyk* (1993), [1993 CanLII 3370 \(MB CA\)](#), 86 C.C.C. (3d) 63; *R. v. Barbeau* (1996), [1996 CanLII 6391 \(QC CA\)](#), 110 C.C.C. (3d) 69; *R. v. Grant* (1998), [1998 CanLII 17678 \(MB CA\)](#), 130 C.C.C. (3d) 53; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999 CanLII 680 \(SCC\)](#), [1999] 1 S.C.R. 743; *R. v. Madsen*, [1987 CanLII 8603 \(NWT SC\)](#), [1988] N.W.T.R. 82; *R. v. Todoruk* (1992), [1992 CanLII 12773 \(BC SC\)](#), 78 C.C.C. (3d) 139; *R. v. McCreery*, [1996 CanLII 8496 \(BC SC\)](#), [1996] B.C.J. No. 2405 (QL); *R. v. Shalala* (2000), [2000 CanLII 20260 \(NB CA\)](#), 224 N.B.R. (2d) 118; *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. U.S.*, 389 U.S. 347 (1967); *U.S. v. London*, 66 F.3d 1227 (1995); *U.S. v. Torres*, 901 F.2d 205 (1990); *U.S. v. Commito*, 918 F.2d 95 (1990); *U.S. v. Guerra-Marez*, 928 F.2d 665 (1991); *U.S. v. Milton*, 153 F.3d 891 (1998); *U.S. v. Smith*, 31 F.3d 1294 (1994); *U.S. v. Green*, 40 F.3d 1167 (1994); *DalGLISH v. Jarvie* (1850), 2 Mac. & G. 231, 42 E.R. 89; *R. v. Kensington Income Tax Commissioners*, [1917] 1 K.B. 486; *Re Church of Scientology and The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449; *United States of America v. Friedland*, [1996] O.J. No. 4399 (QL); *Mitton v. British Columbia Securities Commission* (1999), [1999 BCCA 186 \(CanLII\)](#), 123 B.C.A.C. 263; *R. v. Allain* (1998), [1998 CanLII 12250 \(NB CA\)](#), 205 N.B.R. (2d) 201; *R. v. Krist* (1998), [1998 CanLII 6105 \(BC CA\)](#), 113 B.C.A.C. 176; *R. v. Plant*, [1993 CanLII 70 \(SCC\)](#), [1993] 3 S.C.R. 281; *R. v. Madrid* (1994), [1994 CanLII 1682 \(BC CA\)](#), 48 B.C.A.C. 271; *R. v. Harris* (1987), [1987 CanLII 181 \(ON CA\)](#), 35 C.C.C. (3d) 1, leave to appeal refused, [1987] 2 S.C.R. vii.

Statutes and Regulations Cited

[Canadian Charter of Rights and Freedoms](#), s. 8.

[Criminal Code](#), R.S.C., 1985, c. C-46, ss. 186 [am. 1993, c. 40, s. 6], 676(1)(a) [am. c. 27 (1st Supp.), s. 139].

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 (1994 & Supp. IV 1998).

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APPEAL from a judgment of the British Columbia Court of Appeal (1998), [1998 CanLII 6287 \(BC CA\)](#), 109 B.C.A.C. 131, 127 C.C.C. (3d) 315, [1998] B.C.J. No. 1558 (QL), allowing the Crown's appeal from the acquittal of the accused on various charges, and ordering a new trial. Appeal dismissed.

Adrian F. Brooks, for the appellant Araujo.

David N. Lyon, for the appellant S. Leslie.

Michael Code and *Jonathan Dawe*, for the appellant Grandmaison.

Robert C. Claus, for the appellant Khoury.

Michael J. B. Munro, for the appellant Camara.

Sidney B. Simons, for the appellants Jenkins, T. M. Leslie and Irons.

D. Mayland McKimm, for the appellant Lathangue.

S. David Frankel, Q.C., and *Peter W. Hogg*, for the respondent.

The judgment of the Court was delivered by

LEBEL J. –

I. Introduction

1 This appeal involves the electronic interception of private communications, popularly known as “wiretapping”. Under what circumstances can the police satisfy the investigative necessity requirement in s. 186(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, and obtain an authorization to intercept private communications by electronic means? On what basis can a trial judge review the decision to issue such an authorization? These questions at the heart of this appeal have given rise to controversy and varying appellate court approaches since our Court last considered them. The reasons that follow will outline what I consider to be the proper approach to these issues.

2 It should be noted that these reasons will not discuss the new s. 186(1.1) and related amendments adopted in 1997 which target criminal organizations. These amendments were not invoked or examined in the case at bar. The interpretation of the investigative necessity requirement in s. 186(1) and the issue of the standard of review on a wiretap authorization are significant enough issues, which will affect many people.

3 The answers of our Court to these questions may have a substantial impact on the privacy rights of a number of Canadians. Although we suggest dismissing the appeal on the facts before our Court and affirm the Court of Appeal’s decision to order a new trial, the language used in the Court of Appeal’s reasons could lead courts to permit undue infringements on privacy in other factual circumstances. These reasons must then discuss the nature and interpretation of the investigative necessity requirement before turning to an examination of the function of the reviewing judge at trial. These reasons will also offer some suggestions as to how the police and other participants in the justice system can avoid some of the problems of the sort that have given rise to this appeal.

II. Factual Background

4 The appellants faced multiple trafficking, possession, conspiracy, and weapons charges related to their cocaine-trafficking ring. Much of the Crown's evidence against the appellants was gleaned, directly or indirectly, from information captured through a wiretap. As is usual, the Crown had obtained *ex parte* authorizations for its wiretaps by submitting affidavit material to an authorizing judge. The main material in support of the application was a long affidavit of some 130 pages, prepared and signed by a member of the RCMP, Constable Rosset. This affidavit was largely based on information gathered by Rosset from the handlers of ten police informers. No affidavits were obtained from these handlers.

5 According to the affidavit material, a number of sources had identified the appellants as running a drug-trafficking operation in Victoria with possible connections to a major, violent cocaine-trafficking gang operating in Vancouver and the Lower Mainland. The appellants, who were the primary targets of the potential wiretap, allegedly trafficked cocaine in quantities up to the kilogram range. The police had conducted previous investigations and executed warrants against some of the appellants. They had also conducted a substantial surveillance operation on the appellants. There was evidence that some of the appellants were engaging at times in counter-surveillance tactics to throw investigators off their tails. There was also reason to believe that standard investigative procedures on their own would not be likely to catch the higher-ups in the drug operation. In seeking an authorization for wiretapping, the police hoped to use wiretaps in conjunction with other investigative techniques in order to pursue the higher-ups in the trafficking ring and to be able to gather evidence on not only trafficking and possession charges but also on laundering and conspiracy offences.

6 At trial, when the Crown brought forth its authorizations under Part VI of the *Criminal Code* for gathering wiretap evidence, counsel for the accused cross-examined Constable Rosset in the *voir dire*, challenging the validity of the wiretap. During cross-examination by defence counsel, it emerged then that there were some serious problems with the affidavit submitted to obtain the first authorization. It became clear that the affidavit contained a number of errors of varying importance. In a number of places, boiler-plate language used in the affidavit might have created a mistaken impression that certain statements had been confirmed in ways that they had not. However, the most important problem with the affidavit concerned references to some of the sources.

7 The affidavit contained information from ten confidential sources denoted “A” through “J”. Information from these sources came to Constable Rosset by way of other officers who were their handlers. There had been no direct contact between Rosset and the informers. In the second day of cross-examination, after repeated denials and confused attempts at explaining inconsistencies in the affidavit and in his own evidence, Constable Rosset had to admit that in several places the affidavit referred erroneously to source “E”, rather than to source “F”. Later, during the same cross-examination, Constable Rosset testified that the reference should have been to source “C”. Rosset admitted then that he had known about this error several weeks before the trial, but had not mentioned it either to his superiors or to the Crown prosecutor. In his testimony, he affirmed that he had forgotten about the matter, but suddenly remembered it during the cross-examination. The trial judge, Filmer Prov. Ct. J., did not believe him. This finding of fact on the credibility of Constable Rosset during the *voir dire* had a catastrophic impact on the Crown’s case and played a major role in the dismissal of the charges against the appellants.

III. Judicial History.

A. *British Columbia Provincial Court*

8 In his factual findings at the *voir dire*, the trial judge found that the mistake of Constable Rosset had been inadvertent but that his failure to reveal it earlier had cast a “pall over Officer Rosset’s credibility”. Filmer Prov. Ct. J. would then go on to extend his finding on Constable Rosset’s credibility to the entire affidavit, although he accepted that the police officer had become aware of the error only well after the submission of the affidavit. He stated, “[c]ross-examination of the deponent here has led to testimony which tends to discredit the existence of one of the preconditions to the authorization: to wit, the existence of reasonable and probable grounds”. Filmer Prov. Ct. J. considered that Constable Rosset’s credibility “permeates the issue of reasonable and probable grounds” and thus concluded that the affidavit should fall in its entirety. In his opinion, the testimony of Constable Rosset tainted the whole affidavit and rendered it unreliable.

9 Although he considered this sufficient reason to invalidate the authorization, Filmer Prov. Ct. J. also discussed two other arguments. First, he criticized the boiler-plate language in the affidavit, calling it potentially confusing but not characterizing it as so confusing as to call for rejecting the authorization if it had been the sole problem. Second, he considered that the authorization had not been necessary because the investigative necessity had not been made out, especially given the possibility that the police might have conducted specifically directed surveillance with a special investigative team of the RCMP, the Special Operations Group. Thus, he decided that the authorization should be rejected.

10 In the end, because he was of the opinion that the police had acted in bad faith and because the courts cannot condone such conduct, Filmer Prov. Ct. J. was prepared to exclude all evidence coming directly or indirectly from the wiretaps. As a result, there was no evidence against the accused, and Filmer Prov. Ct. J. acquitted the accused.

11 The Court of Appeal unanimously set aside the acquittals and ordered a new trial. In a judgment by Braidwood J.A., it rejected Filmer Prov. Ct. J.’s application of the standard of review to the wiretap authorization and of the investigative necessity test.

12 According to Braidwood J.A., the trial judge had erred in applying an inappropriate standard of review to the authorization. In his opinion, the trial judge had failed to consider the nature of the errors, their impact on the affidavit as a whole and whether there remained any further evidence left on the basis of which the authorization could have been granted. As Braidwood J.A. viewed it, the correct standard of review was “whether, on the evidence, there was *any* basis on which the authorization *could* have been granted . . .” (para. 10 (emphasis in original)). In the circumstances, the error in denoting the sources was easily remedied by reading the correct letters on review (para. 22). An inadvertent mechanical error, even in combination with a non-credible explanation of why the error was not corrected, did not take away from the existence of reasonable and probable grounds that existed at the time the police sought the authorization and that continued to exist at the time of the review (para. 23).

13 Braidwood J.A. went on to reject the trial judge’s conclusion that the affidavit had not satisfied the requirements of investigative necessity. Based on previous case law from the British Columbia Court of Appeal, Braidwood J.A. considered that “the key issue was whether or not the authorizing judge *could have* concluded that the most efficacious way of fully investigating all those involved was to permit the police to employ wiretapping along with other investigative techniques” (para. 30 (italics in original; underlining added)). On this standard, there was “no reason to impeach the choice of investigative techniques given the nature and background of the

numerous investigations, the prior experience with a number of the accused, the counter-surveillance employed by some of the accused, and the extent of the investigations in terms of time and resources” (para. 33). He held that the trial judge had erred in applying the correct legal test, that the authorization could have been granted and that it should not have been disturbed.

14 Braidwood J.A. thus was of the view that the trial judge had erred in law by not applying the appropriate test to the facts on the *voir dire* and that the Court of Appeal should allow the appeal, set aside the acquittals, and order a new trial.

IV. Relevant Statutory Provisions

15 *Criminal Code*, R.S.C., 1985, c. C-46

186. (1) An authorization under this section may be given if the judge to whom the application is made is satisfied

(a) that it would be in the best interests of the administration of justice to do so; and

(b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

V. Issues

16 There are several issues on this appeal, which will be considered successively. First, there is one preliminary issue: (A) whether there was a jurisdictional bar to the Crown’s appeal to the Court of Appeal. Second, there are two main issues: (B) whether the factual circumstances revealed in the affidavit met the s. 186(1) requirement of investigative necessity; and (C) whether

the trial judge applied correctly the standard of review for a wiretap authorization, including the correct approach on amplification.

VI. Analysis

A. Was There a Jurisdictional Bar to the Crown's Appeal to the Court of Appeal?

17 Before considering the central issues in this appeal, a preliminary argument must be addressed. The appellants have argued that the Crown's appeal to the British Columbia Court of Appeal did not raise a question of law and that, therefore, the Court of Appeal did not have jurisdiction under s. 676(1)(a) of the *Code* to hear the appeal.

18 It is clear that this argument must fail. The interpretation of a legal standard has always been recognized as a question of law: *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330, at para. 21. Moreover, our Court has recently recognized that if a question is about the application of a legal standard, that is enough to make it a question of law: *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 23. In the case before us, the Court of Appeal examined the combined interpretation and application of the legal standard of investigative necessity. It also discussed the interpretation and application of the standard of review for a judge reviewing a wiretap authorization. There is no question that the Court of Appeal was dealing with questions of law. Thus, there was no jurisdictional bar to the Crown's appeal.

B. Did the Factual Circumstances Revealed in the Affidavit Meet the Section 186(1) Requirement of Investigative Necessity?

The first major issue in the case at bar is whether the factual circumstances revealed in the affidavit even met the s. 186(1) requirement of investigative necessity. This is a facial validity question. On the face of the affidavit material, could the contents of the affidavit support an authorization? In order to answer this question, the meaning of the investigative necessity requirement must be explored in order to determine whether the factual circumstances revealed in the affidavit met this standard.

As will appear below, this case does not raise a question of interpretation of s. 186(1) (a), which requires that the issue of an authorization be in the interest of the administration of justice. Courts have found that this requirement meant that in accordance with s. 8 of the *Canadian Charter of Rights and Freedoms* there had to be reasonable and probable grounds on which to believe that an offence had been committed (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421; and *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30). It is not in dispute that this first basic requirement was satisfied when the wiretap authorization was issued. On the other hand, the investigative necessity standard remains at the heart of the present appeal.

1. The Meaning of the Investigative Necessity Requirement

The meaning of the investigative necessity requirement is of critical importance by reason of the conflict between the privacy interests involved in wiretapping operations and the needs of law enforcement agencies in their difficult fight against some forms of sophisticated and dangerous criminality. Wiretapping is highly intrusive. It may affect human relations in the sphere of very close, if not intimate communications, even in the privacy of the home. La Forest J. was alert to the importance of the societal values involved in wiretapping and the risks to essential privacy interests. Writing for the Court, in *Duarte, supra*, at p. 44, La Forest J. emphasized the potential danger to privacy rights arising from the use of such modern investigative techniques:

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. As Douglas J., dissenting in *United States v. White, supra*, put it, at p. 756: “Electronic surveillance is the greatest leveler of human privacy ever known”. If the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime.

22 An appropriate balance must be found between the need to safeguard privacy interests and the realities and difficulties of law enforcement. The investigative necessity requirement found in s. 186(1)(b) has proved to be a critical but delicate component of the legal framework set up to regulate wiretapping in order to strike this appropriate but often elusive balance between the interests of the State and those of its citizens.

23 This Court has not issued a definitive statement on the meaning of the investigative necessity requirement in s. 186(1). The closest that it has come is in La Forest J.’s reasons in *Duarte, supra*. In considering a problem of surveillance conducted with the consent of one party, La Forest J. referred in passing, at p. 55, to the investigative necessity requirement for wiretapping:

. . . authorizations for electronic surveillance are only to be given on a showing that there is no real practical alternative (s. 178.13(1)); in other words, as put by the Ontario Court of Appeal in *R. v. Playford* (1987), [1987 CanLII 125 \(ON CA\)](#), 40 C.C.C. (3d) 142, at p. 185: “. . . it is treated as a last resort investigative mechanism”, and can only be obtained for investigation of the most serious offences in the *Code* (s. 178.1);

However, this *obiter* comment did not distinguish between a “last resort” test and a “no real practical alternative” test.

24 Our Court has remained divided between these two descriptions of the test: see *R. v. Commisso*, [1983 CanLII 160 \(SCC\)](#), [1983] 2 S.C.R. 121 (in which the dissent of Dickson J. (as he then was) used a “last resort” standard at p. 135); *R. v. Thompson*, [1990 CanLII 43 \(SCC\)](#), [1990] 2 S.C.R. 1111 (in which La Forest J.’s dissent referred to a “last resort” standard at p. 1160); and *R. v. Lachance*, [1990 CanLII 53 \(SCC\)](#), [1990] 2 S.C.R. 1490 (in which an *obiter* reference at p. 1502 of Sopinka J.’s judgment implied that the standard was “the only practical investigative technique available”). Thus, our Court has left open the question of the exact nature of the test of investigative necessity.

25 Over the years, other Canadian courts seem not to have been entirely sure which strand of this case law they should use. Sometimes, they have approved of words such as “last resort” to describe the degree of necessity required to meet the standard: e.g., *R. v. Finlay* (1985), [1985 CanLII 117 \(ON CA\)](#), 23 C.C.C. (3d) 48 (Ont. C.A.), at p. 69; *R. v. Playford* (1987), [1987 CanLII 125 \(ON CA\)](#), 40 C.C.C. (3d) 142 (Ont. C.A.), at p. 185; and *R. v. Smyk* (1993), [1993 CanLII 3370 \(MB CA\)](#), 86 C.C.C. (3d) 63 (Man. C.A.), at p. 81, *per* Twaddle J.A. Other times, they have talked more about reasonable practical alternatives or similar practical tests: e.g., *Smyk*, *supra*, at p. 73, *per* Philp J.A.; *R. v. Barbeau* (1996), [1996 CanLII 6391 \(QC CA\)](#), 110 C.C.C. (3d) 69 (Que. C.A.); *R. v. Grant* (1998), [1998 CanLII 17678 \(MB CA\)](#), 130 C.C.C. (3d) 53 (Man. C.A.).

26 The correct interpretation of s. 186(1)’s investigative necessity requirement must be based on the text of the provision read with a simultaneous awareness of two potentially competing considerations. First, as stated by E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as affirmed by our Court (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27, at para. 21), and as accepted in the analogous context of interpreting the search warrant

provisions of the *Criminal Code* (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 S.C.R. 743, at para. 14), “Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” In other words, we need to give the section a fair and liberal reading as part of our country’s criminal justice legislation. Second, however, we must not forget that the text of s. 186(1) represents a type of constitutional compromise. In particular, the investigative necessity requirement embodied in s. 186(1) is one of the safeguards that made it possible for this Court to uphold these parts of the *Criminal Code* on constitutional grounds (*Duarte, supra*, at p. 45; *Garofoli, supra*, at p. 1444). As a result, s. 186(1) must be read with a simultaneous awareness of the competing values of enabling criminal investigations and protecting privacy rights.

27 With a proper awareness of these values, I must turn to the text of s. 186(1)(b). This provision states that wiretapping may be appropriate as where “other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures” (emphasis added). With the use of the disjunctive “or”, the text of the section makes clear that there are three kinds of circumstances in which wiretapping may be accepted as an appropriate investigative tool (see, e.g., *Smyk, supra*, at pp. 70-71). The third branch of the subsection seems to refer to an emergency situation, and the first branch refers to a true “last resort” situation where other investigative methods “have been tried and have failed”. These branches not having been argued, it is the second branch, which speaks of the likelihood of success of other investigative procedures, that must be considered in the case before us.

The words of the second branch ought not to be read in a vacuum. The disjunctive nature of the three branches does not remove the need to read the subsection together as a whole (see *R. v. Madsen*, [1987 CanLII 8603 \(NWT SC\)](#), [1988] N.W.T.R. 82 (S.C.), at p. 86). Indeed, the nature of the other branches properly emphasizes the gravity of wiretapping and suggests that we should not read the term “unlikely” in the second branch in a weak way. But, ultimately, it is sufficient to satisfy one branch of s. 186(1)(b). Also, the words ought properly to be read in their context in light of the values that were acknowledged at the outset and how any particular investigation meshes with these values.

In the final analysis, the potentially competing values in this area must be acknowledged. The words of the *Code* must be read with some common sense having regard both to the nature and purpose of the particular investigation which the police wish to undertake. A pure last resort test would turn the process of authorization into a formalistic exercise that would take no account of the difficulties of police investigations targeting sophisticated crime. But the authorizing judge must look with attention at the affidavit material, with an awareness that constitutional rights are at stake and carefully consider whether the police have met the standard. All this must be performed within a procedural framework where certain actions are authorized on an *ex parte* basis. Thus, the authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. He or she should not be reluctant to ask questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant. The judge should remember that the citizens of his country must be protected against unwanted fishing expeditions by the state and its law enforcement agencies. Parliament and the courts have indeed recognized that the interception of private communications is a serious matter, to be considered only for the investigation of serious offences, in the presence of probable grounds, and with a serious testing of the need for electronic interception in the context

of the particular investigation and its objects (cf. *Smyk, supra*, at p. 74). There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.

30 This approach is consistent with much of the Canadian jurisprudence analyzing the investigative necessity requirement: e.g., *R. v. Todoruk* (1992), [1992 CanLII 12773 \(BC SC\)](#), 78 C.C.C. (3d) 139 (B.C.S.C.), at p. 145; *Smyk, supra*, at p. 74; *R. v. McCreery*, [1996 CanLII 8496 \(BC SC\)](#), [1996] B.C.J. No. 2405 (QL) (S.C.), at paras. 47-53; *Barbeau, supra*, at pp. 84-85; *R. v. Shalala* (2000), [2000 CanLII 20260 \(NB CA\)](#), 224 N.B.R. (2d) 118 (C.A.), at para. 87.

31 Moreover, although I am wary of applying our southern neighbour's quite different Fourth Amendment jurisprudence in the Canadian context, I note that American courts have approached their almost identical legislation governing the use of wiretapping not on the basis of an absolutist "last resort" theory but in a similarly commonsensical fashion.

32 Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, 18 U.S.C. §§ 2510-2522 (1994 & Supp. IV 1998), implements the standards for the use of electronic surveillance as required by the Fourth Amendment, according to the United States Supreme Court decisions in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. U.S.*, 389 U.S. 347 (1967). This legislation includes a necessity requirement not unlike that found in s. 186(1). A judge may issue a court order authorizing a wiretap only if he or she has determined "on the basis of the facts submitted by the applicant that . . . normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous": 18 U.S.C. § 2518(3) (c).

Recent jurisprudence has confirmed that such language is to be interpreted in a practical commonsense fashion, so that courts may issue wiretap orders even when the government has not pursued all other investigative techniques. Courts have found a variety of grounds for allowing that normal investigative techniques are unlikely to succeed. These include: a showing by the government that those techniques would not reveal key information (*U.S. v. London*, 66 F.3d 1227 (1st Cir. 1995), at p. 1237); when it can be shown that those techniques are ineffective against a large-scale crime organization (*U.S. v. Torres*, 901 F.2d 205 (2d Cir. 1990), at p. 232; *U.S. v. Commito*, 918 F.2d 95 (9th Cir. 1990), at p. 98), a close-knit family (*U.S. v. Guerra-Marez*, 928 F.2d 665 (5th Cir. 1991), at p. 670) or a drug conspiracy (*U.S. v. Milton*, 153 F.3d 891 (8th Cir. 1998), at pp. 897-98); or when counter-surveillance methods employed by the defendants made such methods unlikely to succeed (*U.S. v. Smith*, 31 F.3d 1294 (4th Cir. 1994), at p. 1299; *U.S. v. Green*, 40 F.3d 1167 (11th Cir. 1994), at p. 1172).

Canadian jurisprudence has reflected this approach. Writing for the Quebec Court of Appeal in *R. v. Hiscock*, [1992 CanLII 2959 \(QC CA\)](#), [1992] R.J.Q. 895, 72 C.C.C. (3d) 303, leave to appeal refused, [1993] 1 S.C.R. vi, I asserted the relevance of the actual text of s. 186(1) as follows (at p. 325 C.C.C.):

[TRANSLATION] . . . s. 186 does not require that all alternative investigative techniques have been tried. It is not simply a recourse of last resort. It is a technique which must not be used in the absence of serious, probable grounds, but which can be employed not only when the other methods have failed, but also, when they appear to have little chance of success or when the urgency of the matter would otherwise render the investigation unsuccessful. [Emphasis added.]

But, in so doing, I also recognized the importance of giving meaning to the requirements for a wiretap authorization (at p. 319 C.C.C.):

[TRANSLATION] In his role, and in order to avoid inadmissible intrusions into the private lives of citizens, the authorizing judge must ensure that the application is based on reasonable and probable cause. It must not constitute a mere fishing expedition based on pure suspicion. He must also be convinced that it is necessary to have recourse to this particular investigative technique. [Emphasis added.]

35 This approach is founded on statutory interpretation and supported by a strong strand of case law. Through this combination of text and context, it allows judges to apply in a balanced way the requirement of investigative necessity for wiretapping. In so doing, the judge must keep important values of Canadian society in sight and look seriously at whether there is, practically speaking, no other reasonable alternative method of investigation.

2. Application of the Standard to the Case at Bar

36 How, then, should this approach be applied in the context of the case at bar? There are two aspects of this application to consider. First, we must determine whether the reasoning used by the British Columbia Court of Appeal strays too far from the text of the *Criminal Code* and the important constitutional values that this text protects, thereby endangering privacy interests in other contexts. Second, when applying the correct test, we must consider whether the Court of Appeal nevertheless correctly concluded that the authorizing judge could properly have issued an authorization based on the facts disclosed in the affidavit.

37 The proper test, as I have set out above, concerns whether, practically speaking, there is no other reasonable means of investigation. The judgment from the British Columbia Court of Appeal does not follow this language and, indeed, seems to use a far laxer standard. The approach

taken by the Court of Appeal has the potential to subvert the safeguards of privacy interests that are an essential component of the regulation of wiretapping in the *Criminal Code*.

38 In concluding that “in the case at bar, there is no reason to impeach the choice of investigative techniques” (para. 33 (emphasis added)), Braidwood J.A. reasoned, based on earlier British Columbia Court of Appeal precedents, that the question was whether the authorizing judge “despite the fact that other investigative techniques may have had promise . . . *could have* concluded that the most efficacious way of fully investigating all those involved was to permit the police to employ wiretapping along with other investigative techniques” (para. 30 (italics in original; underlining added); see also para. 32). The British Columbia Court of Appeal’s decisions have gradually moved in this direction, with prior precedents each lowering the bar another notch (see *R. v. Paulson* (1995), 1995 CanLII 2224 (BC CA), 97 C.C.C. (3d) 344; and *R. v. Cheung* (1997), 1997 CanLII 3763 (BC CA), 119 C.C.C. (3d) 507). The question essentially becomes one of whether wiretapping is a more effective, rather than necessary, means of investigation, in the context of the particular criminal investigation.

39 This approach is wrong in law. A standard of “most efficacious” strays far from the text of s. 186(1)(b) and the privacy rights that it protects. Such language does not match with the test enunciated above. Indeed, in the end, one might well argue, using such an efficiency standard, that wiretapping should always be available to the police, since it might often help catch more criminals. Such a result would rightly send a chill down the spine of every freedom-loving Canadian. We would replace a standard of necessity with one of opportunity at the discretion of law enforcement bodies. The British Columbia Court of Appeal’s test must thus be rejected as inconsistent with the very words of the *Criminal Code*.

Nevertheless, this disagreement with the approach of the Court of Appeal does not mean that the appeal must succeed on this point. On the contrary, we must apply the proper test to the circumstances of the case at bar in order to ascertain whether its application would support the conclusion reached by the Court of Appeal. More precisely, the question is whether the factual circumstances revealed in the affidavit could have provided a sufficient basis for the issuance of the authorization.

The facts as set out in the affidavit met this standard. Catching the ringleaders in drug rings and conspiracies is never an easy task. This is particularly so when, as here, they use counter-surveillance measures and behave in a clandestine fashion. The affidavit attested to the failure of the police efforts in spite of the use of physical surveillance and search warrants. It also provided evidence as to why the use of informants or undercover agents trying to infiltrate the drug ring would be ineffective and potentially dangerous. There was, in my view, evidence in the affidavit to negate arguments for other investigative techniques and to make the case that wiretapping was, practically speaking, the only reasonable alternative, taking into account the nature and purpose of this particular investigation.

The appellants made much of arguments that the cross-examination on the affidavit seemed to reveal the availability of another surveillance team, the Special Operations Group, that the police could have used. The availability of another surveillance team was, in reality, of little consequence in the circumstances of the case at bar. The fact is that the police had done extensive surveillance. By doing so, they obtained some information. But their surveillance efforts were occasionally met by counter-surveillance, whose presence can obviously affect the effectiveness of investigative methods, and by the clear reality that surveillance efforts alone would not bring them into contact with higher-ups in the drug organization. Indeed, I am quite uncertain how surveillance alone would ever have given good proof of laundering and conspiracy. By showing that the police were already conducting surveillance and that this was not accomplishing everything required, the affidavit materials established investigative necessity.

43 The objective of the police investigation here was to bring the higher-ups in a drug ring to justice, not simply to remove a few replaceable street dealers. Among their various arguments, the appellants challenged the right of the police to define the objectives of their investigation, alleging that the police could manipulate the objectives in order to get the chance to use a wiretap. However, it is clear that the police here had probable grounds to investigate the serious crimes that they were investigating. This part of the test for wiretapping – probable grounds for believing that serious crimes would likely occur – removes the need for concern about the kinds of suspicions that the appellants raise. If the police have probable grounds to investigate a serious crime, then they may use wiretapping to do so, provided they meet the investigative necessity requirement. There is nothing pernicious about the fact that the objective of their investigation rightly informs the investigative necessity analysis. Here, the police had more need for wiretapping given that they were trying to move up the chain and catch the higher-ups in the operation. This rightly reinforces the investigative necessity made plain by the affidavit materials.

44 The facts set out in the affidavit in the case at bar establish investigative necessity on the required standard. Any argument that an authorization could not have issued based on the facts set out in the affidavits must fail. On its face, the affidavit was sufficient to support an authorization.

45 This being said, it is clear that the affidavit was not perfect, even on its face. Prior to moving on to the subfacial review required by the last issue in the case at bar, it may be useful to discuss some practical suggestions about the form of affidavits on an application for a wiretap authorization in order to reduce needless litigation on similar matters and in better serving the interests of all parties.

Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an *ex parte* authorization is full and frank disclosure of material facts: cf. *Dalglish v. Jarvie* (1850), 2 Mac. & G. 231, 42 E.R. 89; *R. v. Kensington Income Tax Commissioners*, [1917] 1 K.B. 486 (C.A.); *Re Church of Scientology and The Queen (No. 6)* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), at p. 528; *United States of America v. Friedland*, [1996] O.J. No. 4399 (QL) (Gen. Div.), at paras. 26-29, *per* Sharpe J. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.

A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no formal legal requirement to avoid it), I cannot stress enough that judges should deplore it. There is nothing wrong – and much right – with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions.

48 Finally, while there is no legal requirement for it, those gathering affidavit material should give consideration to obtaining affidavits directly from those with the best firsthand knowledge of the facts set out therein, like the police officers carrying on the criminal investigation or handling the informers. This would strengthen the material by making it more reliable. In the present case, it might have prevented this case from turning into the mess it is now, still in appeal, after years of litigation on preliminary matters, without any final judgment on the guilt or innocence of the appellants.

49 This brings me to the adverse credibility finding against the affiant in the case at bar. Practically speaking, these issues and much of the resulting litigation could have been largely avoided if the police had taken the simple step of having each of the handlers sign an affidavit on those matters within his or her particular knowledge. This would almost certainly have ensured a more careful verification of the facts sworn in the affidavit material, potentially avoiding some of the needless errors that the affidavit ended up containing, and would also have made the application for an authorization less tied to the credibility of the one officer who ultimately attested to everything in it.

C. Did the Trial Judge Apply Correctly the Standard of Review for a Wiretap Authorization, Including Amplification?

50 Given that the police did not take such steps that might have prevented these problems from ever arising, I must now focus on the arguments that challenge the affidavit from a subfacial perspective. Subfacial challenges to an affidavit go behind the form of the affidavit to attack the reliability of its content. The issue here is whether the trial judge correctly applied the standard of review for a wiretap authorization in the face of the subfacial challenge that arose through cross-examination on the affidavit.

The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for the wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli, supra*, at p. 1452:

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge. [Emphasis added.]

As I noted as a judge at the Quebec Court of Appeal in *Hiscock, supra*, at p. 326 C.C.C., even a basis that is schematic in nature may suffice. However, as our Court has recognized, it must be a basis founded on reliable information. In *R. v. Bisson*, [1994 CanLII 46 \(SCC\)](#), [1994] 3 S.C.R. 1097, at p. 1098, the requirement was described as “sufficient reliable information to support an authorization” (emphasis added). The Court concluded that this requirement had still been met despite the excision of retracted testimony. In looking for reliable information on which the authorizing judge could have granted the authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.

In oral argument, counsel for the appellant Grandmaison made much of a passage in *R. v. Grant*, [1993 CanLII 68 \(SCC\)](#), [1993] 3 S.C.R. 223, at p. 251, where Sopinka J. explained the test applicable on a review of a search warrant when some of the information supporting the warrant had been obtained in violation of the Constitution. Sopinka J. wrote that “it is necessary for reviewing courts to consider whether the warrant would have been issued had the improperly obtained facts been excised from the information sworn to obtain the warrant: *Garofoli, supra*” (emphasis added). In using the word “would”, Sopinka J. did not set out to alter the test that comes from *Garofoli*, given that he cited this judgment in the same sentence. I take the word in

this context not as setting a different standard of review but simply as suggesting the sincerity of the inquiry that a reviewing judge should undertake. As this Court confirmed in *Bisson*, *supra*, the reviewing judge must carefully consider the existence of sufficient reliable information, that is, information that may reasonably be believed on the basis of which the authorization could have issued.

53 Other appellate court jurisprudence confirms this understanding. In the context of reviewing a search warrant, appellate courts have looked to whether the authorization could have issued: e.g., *Mitton v. British Columbia Securities Commission* (1999), 1999 BCCA 186 (CanLII), 123 B.C.A.C. 263; *R. v. Allain* (1998), 1998 CanLII 12250 (NB CA), 205 N.B.R. (2d) 201 (C.A.), at p. 217; and *R. v. Krist* (1998), 1998 CanLII 6105 (BC CA), 113 B.C.A.C. 176, at p. 179. But they look at this in context. For example, in *R. v. Monroe* (1997), 1997 CanLII 3034 (BC CA), 8 C.R. (5th) 324 (B.C.C.A.), at p. 333, Esson J.A. stated that, after looking for whether there was sufficient grounds on which the judge could have authorized a warrant, “The judge was then required to assess the evidence placed before the justice, in the light of the evidence brought out at trial, in order to determine whether, after expunging any misleading or erroneous information, sufficient reliable information remained to support the warrant” (emphasis added).

54 The authorities stress the importance of a contextual analysis. The Nova Scotia Court of Appeal, while reviewing the cases from our Court cited above, explains this in a judgment dealing with problems arising out of errors committed in good faith by the police in the material submitted to the authorizing justice of the peace:

These cases stress that errors, even fraudulent errors, do not automatically invalidate the warrant.

This does not mean that errors, particularly deliberate ones, are irrelevant in the review process. While not leading to automatic vitiation of the warrant, there remains the need to protect the prior authorization process. The cases just referred to do not foreclose a reviewing judge, in appropriate circumstances, from concluding on the

totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves. [Emphasis added.]

(*R. v. Morris* (1998), 1998 NSCA 229 (CanLII), 134 C.C.C. (3d) 539, at p. 553)

An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge.

55 Of course, this statement of the test does not fully explain the matter of which evidence the reviewing judge should consider in a situation where some of the original information was erroneous and there is an attempt to amplify it on review, a possibility which Sopinka J. in *Garofoli, supra*, at p. 1452, but briefly mentioned. The Nova Scotia Court of Appeal in *Morris, supra*, at pp. 555-69, undertakes a careful examination of these questions based on our Court's analyses in *R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281, and *Bisson, supra*.

56 In *Plant, supra*, our Court considered a situation where the information on a search warrant application compressed two parts of the police investigation by stating that an informant had supplied the police with a particular address when the informant actually supplied a precise description of the house that enabled the police to identify its address. The address itself would be excised from the information on review, but Sopinka J., at pp. 298-99, allowed for the amplification of the information obtained from the informant and concluded that, given that there was no deliberate attempt to mislead, the information concerning the description of the house and the fact that the police had found such a house at the address in question could still contribute to the existence of reasonable and probable grounds. As *Morris, supra*, at p. 556 notes, only erroneous information “needs to be excluded from consideration and that material, provided it is

not part of a deliberate attempt to mislead the Justice of the Peace, may be amplified by evidence on review showing the true facts”.

57 In *Bisson*, *supra*, at p. 1098, our Court gave very short reasons but also affirmed the reasons of Proulx J.A. in the Quebec Court of Appeal, [1994 CanLII 5328 \(QC CA\)](#), [1994] R.J.Q. 308, 87 C.C.C. (3d) 440. In his judgment, Proulx J.A. was clear that a court must look at non-disclosure of any material fact [TRANSLATION] “with respect to the affidavit considered as a whole, or even with respect to the remaining parts of it” (p. 455 C.C.C.). He quoted at p. 457 C.C.C. from the Ontario Court of Appeal in *Church of Scientology*, *supra*, at pp. 528-29: “[T]he function of the reviewing judge is to determine whether there is any evidence remaining, after disregarding the allegations found to be false and taking into consideration the facts found to have been omitted by the informant, upon which the justice could be satisfied that a search warrant should issue” (emphasis added) also affirmed in *Morris*, *supra*, at p. 558. Again, erroneous information is properly excised. In *Bisson*, *supra*, of course, the recanted information obviously had to be excised entirely and the remaining information then assessed in the totality of the circumstances. Where the erroneous information results from a simple error and not from a deliberate attempt to mislead the authorizing judge, amplification may be in order. Nonetheless, there would be no need to seek to amplify the record if sufficient reliable material remains even after excising the erroneous material.

58 Thus, in looking for evidence that might reasonably be believed on the basis of which the authorization could have issued, the reviewing court must exclude erroneous information. However, if it was erroneous despite good faith on the part of the police, then amplification may correct this information.

When using amplification, courts must strike a balance between two fundamental principles of search and seizure law that come into a rather unique tension in these kinds of situations: see *Morris*, *supra*, at pp. 567-68. As a result of this tension, the cases disclose divergent attitudes to incomplete or incorrect affidavits and amplification thereof: see *Morris*, at pp. 560-67; cf. *R. v. Madrid* (1994), [1994 CanLII 1682 \(BC CA\)](#), 48 B.C.A.C. 271, at pp. 285-90, and *R. v. Harris* (1987), [1987 CanLII 181 \(ON CA\)](#), 35 C.C.C. (3d) 1 (Ont. C.A.), at pp. 23 and 27 (leave to appeal refused, [1987] 2 S.C.R. vii). The danger inherent in amplification is that it might become a means of circumventing a prior authorization requirement. Since a prior authorization is fundamental to the protection of everyone's privacy interests (*Hunter v. Southam Inc.*, *supra*, at p. 160), amplification cannot go so far as to remove the requirement that the police make their case to the issuing judge, thereby turning the authorizing procedure into a sham. On the other hand, to refuse amplification entirely would put form above substance in situations where the police had the requisite reasonable and probable grounds and had demonstrated investigative necessity but had, in good faith, made some minor, technical error in the drafting of their affidavit material. Courts must recognize (along with investigative necessity) the two principles of prior authorization and probable grounds, the verification of which may require a close examination of the information available to the police at the time of the application for a wiretap, in considering the jurisprudence on amplification. The approach set out earlier to erroneous information in an affidavit on a wiretap application attempts to reconcile these principles. Courts should take a similar approach to amplification.

In this case, any credibility issue related to the police officer was temporally and logically far removed from the affidavit itself. More than a year after the swearing of the affidavit, Constable Rosset was found to lack credibility on the issue of why he had not disclosed a drafting mistake, perhaps a very minor typographical error. There is no suggestion that there was ever any untruthfulness in the substance of the information in the affidavit itself: see the Court of Appeal judgment at para. 23. In these circumstances, a global finding against the entire affidavit was unreasonable. That there were some errors of a typographical nature in a 130-page affidavit is not

even entirely surprising. The trial judge accepted that these errors were inadvertent. Although it is regrettable that the police did not adopt procedures as outlined above that might have lessened the possibility of these kinds of errors, that they did not do so does not provide grounds for jettisoning all the results of a careful and lengthy investigation.

61 Even without the information from sources “C” and “E”, the affidavit would have provided ample evidence to an issuing judge and evidenced the existence of probable grounds and investigative necessity. Moreover, amplification would allow for the reading of the information from the now correctly attributed sources “C” and “E” as well, which could make only slight differences on the weight given to small pieces of the evidence. There was still ample evidence in the rest of the affidavit to suggest that the appellants were trafficking substantial quantities of cocaine. Thus, given that the affidavit met the requisite investigative necessity requirement, as it was established above, there was no basis on which to overturn the authorization. The Court of Appeal was correct in upholding the issuing judge’s authorization.

VII. Conclusion

62 For these reasons, which differ in part from those of the British Columbia Court of Appeal, I would dismiss the appeal. In the result, the judgment of the Court of Appeal setting aside the acquittals and ordering a new trial would thus be upheld.

Appeal dismissed.

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Solicitor for the appellant S. Leslie: David N. Lyon, Victoria.

Solicitors for the appellant Grandmaison: Sack Goldblatt Mitchell, Toronto.

Solicitors for the appellant Khoury: Green & Claus, Victoria.

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Solicitors for the appellant Lathangue: Mayland McKimm & Associates, Victoria.

Solicitor for the respondent: The Attorney General of Canada, Vancouver.

Tab 2

R. v. Anderson, 2014 SCC 41 (CanLII), [2014] 2 SCR 167

Source: Supreme Court of Canada
Date: 2014-06-06
File number: 35246
Other citations: 350 Nfld & PEIR 289 — 373 DLR (4th) 577 — 458 NR 1 —
1088 APR 289 — [2014] EXP 1824 — 11 CR (7th) 1 —
311 CCC (3d) 1 — 114 WCB (2d) 278 —
[2014] 3 CNLR 267 — 310 CRR (2d) 197 —
[2014] CarswellNfld 166 — EYB 2014-238146 —
JE 2014-1034 — [2014] SCJ No 41 (QL) — 60 MVR (6th) 1
Citation: R. v. Anderson, 2014 SCC 41 (CanLII), [2014] 2 SCR 167,
<<https://canlii.ca/t/g784t>>, retrieved on 2026-03-20



SUPREME COURT OF CANADA

CITATION: R. v. Anderson, 2014 SCC 41, [2014] 2 S.C.R. 167

DATE: 20140606

DOCKET: 35246

BETWEEN:

Her Majesty The Queen

Appellant
and

Frederick Anderson

Respondent
and

**Director of Public Prosecutions of Canada,
Attorney General of Ontario,
Attorney General of New Brunswick,
Attorney General of British Columbia,
David Asper Centre for Constitutional Rights and
Aboriginal Legal Services of Toronto Inc.**
Intervenors

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

REASONS FOR JUDGMENT: Moldaver J. (McLachlin C.J. and LeBel, Abella, Cromwell,
(paras. 1 to 65) Karakatsanis and Wagner JJ. concurring)

R. v. ANDERSON, 2014 SCC 41, [2014] 2 S.C.R. 167

Her Majesty The Queen

Appellant

v.

Frederick Anderson

Respondent

and

**Director of Public Prosecutions of Canada,
Attorney General of Ontario,
Attorney General of New Brunswick,
Attorney General of British Columbia,
David Asper Centre for Constitutional Rights and
Aboriginal Legal Services of Toronto Inc.**

Interveners

Indexed as: R. v. Anderson

2014 SCC 41

File No.: 35246.

2014: March 19; 2014: June 6.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Criminal law — Sentencing — Aboriginal offenders — Mandatory minimum sentence — Accused convicted of impaired driving for fifth time — Crown prosecutor seeking mandatory minimum sentence — Whether s. 7 of the Charter requires the Crown to consider Aboriginal status of accused when seeking minimum sentence for impaired driving — Whether consideration of Aboriginal status is a principle of fundamental justice — Whether decision to seek mandatory minimum sentence is a matter of core prosecutorial discretion — Standard of review for Crown decision making — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 253(1)(b), 255(1)(a)(iii), 727(1).

The accused was convicted of impaired driving. The offence of impaired driving carries with it a minimum sentence of 30 days' imprisonment for a second offence and 120 days' imprisonment for a subsequent offence. These mandatory minimum sentences apply only if the Crown notifies the accused of its intention to seek a greater punishment prior to any plea. Crown counsel served a Notice of intent to seek greater punishment by reason of the accused's four previous impaired driving convictions. The trial judge held that Crown counsel breached s. 7 of the *Canadian Charter of Rights and Freedoms* by tendering the Notice without considering the accused's Aboriginal status. The accused was sentenced to a 90-day intermittent sentence. The Court of Appeal dismissed an appeal from sentence.

Held: The appeal should be allowed and a term of imprisonment of 120 days should be substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused's Aboriginal status when making decisions that limit the sentencing options

available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.

No constitutional obligation

Crown prosecutors are not constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving for two reasons.

First, while it is a principle of fundamental justice that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender, the duty to impose a proportionate sentence rests upon judges, *not* Crown prosecutors. The proportionality principle requires judges to consider systemic and background factors, including Aboriginal status, which may bear on the culpability of the offender. There is no basis in law to support equating the distinct roles of the judge and the prosecutor in the sentencing process.

Second, the principle of fundamental justice that the accused asks this Court to recognize does not meet the test which governs principles of fundamental justice. A principle of fundamental justice must be a legal principle, enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. The principle advanced by the accused does not meet the second requirement as it is contrary to a long-standing and deeply-rooted approach to the division of responsibility between the Crown prosecutor and the courts. It would greatly expand the scope of judicial review of discretionary decisions made by prosecutors and put at risk the adversarial nature of our criminal justice system by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis.

Prosecutorial discretion

Decisions by Crown prosecutors are either exercises of prosecutorial discretion or tactics and conduct before the court. Subsequent to this Court's decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by "prosecutorial discretion" and the law has become cloudy. In particular, the use of the word "core" in *Krieger* has led to a narrow definition of prosecutorial discretion. The present appeal provides an opportunity for clarification.

"Prosecutorial discretion" is an expansive term. It covers all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Prosecutorial discretion is entitled to considerable deference. It must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle based on the doctrine of separation of powers. In contrast, tactics and conduct before the court are governed by the inherent jurisdiction of the court to control its own processes. Deference is not owed to counsel who behave inappropriately in the courtroom, but a high degree of deference is accorded to the tactical decisions of counsel. Abuse of process is not a precondition for judicial intervention in relation to a party's tactics and conduct before the court.

Prosecutorial discretion is reviewable for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision.

Tendering the Notice was a matter of prosecutorial discretion. In the complete absence of any evidence to support it, the accused's abuse of process argument must fail.

Cases Cited

Applied: *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **explained:** *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d)

423; **distinguished:** *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v; **referred to:** *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387; *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601; *R. v. T. (V.)*, 1992 CanLII 88 (SCC), [1992] 1 S.C.R. 749; *R. v. Cook*, 1997 CanLII 392 (SCC), [1997] 1 S.C.R. 1113; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566; *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688; *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83.

Statutes and Regulations Cited

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APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green C.J.N.L. and Welsh and Rowe JJ.A.), [2013 NLCA 2](#), 331 Nfld. & P.E.I.R. 308, 1027 A.P.R. 308, 41 M.V.R. (6th) 194, 275 C.R.R. (2d) 127, 295 C.C.C. (3d) 262, [2013] 4 C.N.L.R. 209, [2013] N.J. No. 13 (QL), 2013 CarswellNfld 11, affirming a sentencing decision of English Prov. Ct. J., 2011 NLPC 1709A00569. Appeal allowed.

Iain R. W. Hollett, for the appellant.

Derek Hogan and Darlene Neville, for the respondent.

David Schermbrucker and Carole Sheppard, for the intervener the Director of Public Prosecutions of Canada.

Philip Perlmutter and Lorna Bolton, for the intervener the Attorney General of Ontario.

Kathryn A. Gregory and Cameron Gunn, Q.C., for the intervener the Attorney General of New Brunswick.

Joyce DeWitt-Van Oosten, Q.C., for the intervener the Attorney General of British Columbia.

Kent Roach and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Jonathan Rudin and Emily Hill, for the intervener the Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

I. Introduction

[1] This appeal raises the following question: Are Crown prosecutors constitutionally required to consider the Aboriginal status of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving? The answer, in my view, must be no. There is no principle of fundamental justice that supports the existence of such a constitutional obligation. Absent such an obligation, the prosecutor’s decision is a matter of prosecutorial discretion which is reviewable by the courts only for abuse of process.

[2] The present appeal involves a scheme of escalating, mandatory minimum sentences for impaired driving convictions. These mandatory minimums are set out in [s. 255](#) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Code*”). [Section 727\(1\)](#) of the *Code* states that the mandatory minimums set out in s. 255 are applicable only if the Crown, in advance of any plea, notifies the accused of its intention to seek a greater punishment by reason of previous convictions (the “Notice”) and tenders proof at the sentencing hearing that the Notice was served. It is the Crown’s discretionary decision to tender the Notice at the sentencing hearing that is the subject of the current debate.

[3] The respondent, Mr. Anderson, submits that the Crown is constitutionally obligated under [s. 7](#) of the *Canadian Charter of Rights and Freedoms* to consider the accused’s Aboriginal status in deciding whether or not to tender the Notice. According to Mr. Anderson, for sentencing purposes, consideration of Aboriginal status is a principle of fundamental justice. It follows that the Crown must consider it when making decisions that limit the sentencing options available to a judge.

[4] The Crown denies the existence of any such obligation. The Crown submits that the decision to tender the Notice is a matter of prosecutorial discretion. As such, it can only be reviewed for abuse of process. The Crown further submits that if mandatory minimum sentences

within a statutory scheme prevent a judge from imposing a fit and just sentence that accords with the fundamental principle of proportionality, it is the scheme that should be challenged, not the exercise of prosecutorial discretion that has triggered it.

[5] For the reasons that follow, I conclude that Crown prosecutors are under no constitutional duty to consider the accused's Aboriginal status when tendering the Notice. As a matter of prosecutorial discretion, the decision is only reviewable for abuse of process.

II. Background

[6] Mr. Anderson was charged with the offence of driving with more than 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(1)(b) of the *Code*. Before pleading guilty, he was served with a Notice. He later learned that the Crown intended to prove the Notice at the sentencing hearing. As this was Mr. Anderson's fifth impaired driving-related conviction, tendering the Notice meant that he would be subject to a mandatory minimum sentence of not less than 120 days' imprisonment under s. 255(1)(a)(iii) of the *Code*.

A. Provincial Court of Newfoundland and Labrador, 2011 NLPC 1709A00569

[7] Prior to the sentencing hearing, Mr. Anderson filed a *Charter* application in which he argued that ss. 255(1) and 727(1) of the *Code* violate s. 7 of the *Charter* because "the combined effect of the [provisions] is to transfer what is a judicial function to the prosecutor, namely, the setting of the floor or minimum sentence in a given case" (motion judgment, at para. 21). He also argued that the statutory scheme violated s. 15(1) of the *Charter* because it deprived an Aboriginal person of the opportunity to argue for a non-custodial sentence in an appropriate case.

[8] The trial judge, English Prov. Ct. J., accepted Mr. Anderson's *Charter* arguments and concluded that the infringements of ss. 7 and 15(1) were not saved by s. 1 of the *Charter*. In order to ensure compliance with s. 7 of the *Charter*, he held that the Crown must in all cases, including those involving non-Aboriginal offenders, provide justification for relying on the Notice. As for the

violation of s. 15(1), he declared the statutory scheme to be of no force and effect as it applied to Aboriginal offenders. Having determined that he was not bound by the minimums set out in s. 255(1), the trial judge sentenced Mr. Anderson to a 90-day intermittent sentence followed by two years' probation. A five-year driving prohibition was also imposed.

B. *Newfoundland and Labrador Court of Appeal*, 2013 NLCA 2, 331 Nfld. & P.E.I.R. 308

[9] The Newfoundland and Labrador Court of Appeal rejected the Crown's appeal. All members of the court held that where the Crown tenders the Notice at the sentencing hearing without considering the accused's Aboriginal status, this renders the sentencing hearing fundamentally unfair, leading to a s. 7 *Charter* breach. According to the court, there would be no breach of s. 7 if the Crown's policy statement^[1] regarding the decision to tender the Notice included a *specific* direction to consider the offender's Aboriginal status. The absence of such a direction, and the lack of explanation on the part of the Crown for its decision to tender the Notice in this case, led the court to conclude that s. 7 of the *Charter* had been breached.

[10] The court split on how the Crown's decision to tender the Notice should be characterized. Welsh J.A. considered it to be a matter of "core" prosecutorial discretion; Green C.J.N.L. and Rowe J.A. maintained that it was "outside a core prosecutorial function": para. 49 (emphasis deleted). In the end, this difference of opinion did not affect the result and the Crown's appeal was dismissed.

III. Relevant Statutory Provisions

[11] Section 253(1) of the *Code* sets out the offence of impaired driving:

253. (1) [Operation while impaired] Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[12] Section 255 of the *Code* sets out the escalating mandatory minimum penalties for impaired driving. For the purposes of this appeal, the relevant portion of s. 255 is the following:

255. (1) [Punishment] Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than \$1,000,

(ii) for a second offence, to imprisonment for not less than 30 days, and

(iii) for each subsequent offence, to imprisonment for not less than 120 days;

[13] Section 727(1) of the *Code* sets out the requirement to give notice to the accused of the Crown's intention to seek the mandatory minimum punishment:

727. (1) [Previous conviction] Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

[14] Section 718.2(e) of the *Code* states:

718.2 [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

...

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[15] Lastly, s. 7 of the *Charter* states:

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

IV. Issues

[16] This appeal raises two issues: (1) whether s. 7 of the *Charter* requires the Crown to consider an accused's Aboriginal status when making decisions that limit the sentencing options available to a judge — here, the decision to seek a mandatory minimum sentence for impaired driving; and (2) whether the decision to tender the Notice is a matter of “core” prosecutorial discretion, and if so, the standard by which it may be reviewed.

[17] Before analyzing these two issues, a brief explanation of how they are connected is warranted. The respondent argues that all state actors (including Crown prosecutors) must consider Aboriginal status where a decision affects the liberty interest of an Aboriginal person. He maintains that this is a principle of fundamental justice. If this argument is accepted, it matters not whether the decision is one of prosecutorial discretion. The principle of fundamental justice — perhaps more aptly described as a constitutional duty — would apply regardless. As will be discussed in greater detail, prosecutorial discretion provides no answer to the breach of a constitutional duty. If, on the other hand, the respondent's argument is rejected, the distinction between prosecutorial discretion and tactics and conduct before the Court becomes important, as the categorization affects the standard of review to be applied to the decision.

V. Analysis

A. *Does Section 7 of the Charter Require the Crown to Consider an Accused's Aboriginal Status When Making Decisions That Limit the Sentencing Options Available to a Judge?*

[18] Mr. Anderson submits that consideration of Aboriginal status in sentencing is a principle of fundamental justice that applies to all state actors, including Crown prosecutors. It

follows that Crown prosecutors are constitutionally required to consider an accused's Aboriginal status when making a discretionary decision that limits the sentencing options available to a judge, including the decision to tender the Notice. In support of this argument, Mr. Anderson relies on s. 718.2(e) of the *Code*, as well as this Court's decisions in *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, and *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.

[19] The Crown submits that Mr. Anderson's argument stretches s. 718.2(e) of the *Code* beyond its intended purpose. According to the Crown, a statutory direction to sentencing judges cannot be transformed into a constitutional obligation on the Crown to take Aboriginal status into account when making a discretionary decision that limits a judge's sentencing options.

[20] In my view, there are two reasons why Mr. Anderson's argument must fail. First, it conflates the role of the prosecutor and the sentencing judge by imposing on prosecutors a duty that applies only to judges — the duty to impose a proportionate sentence. Second, the principle of fundamental justice that Mr. Anderson seeks does not meet the test that governs such principles, set out in *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3.

(1) Imposing a Proportionate Sentence Is the Judge's Responsibility

[21] As LeBel J., for the majority of this Court, stated in *Ipeelee*, “[p]roportionality is the *sine qua non* of a just sanction” and a principle of fundamental justice: paras. 36-37. Proportionality means that the sentence must be “proportionate to both the gravity of the offence and the degree of responsibility of the offender” (*Ipeelee*, at para. 39 (emphasis deleted); see also s. 718.1 of the *Code*). “[S]ystemic and background factors [which include Aboriginal status] may bear on the culpability of the offender, [that is, the degree of responsibility of the offender,] to the extent that they shed light on his or her level of moral blameworthiness”: *Ipeelee*, at para. 73.

[22] The fundamental principle of proportionality has been codified. Section 718.1 of the *Code* states that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 of the *Code* lists numerous factors that sentencing

judges must consider when crafting a fair and just sentence that accords with the fundamental principle of proportionality. Aboriginal status is one of these factors and is found in s. 718.2(e).

[23] In *Gladue*, this Court discussed s. 718.2(e) of the *Code* at length, noting that it was enacted to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons and to encourage a restorative approach to sentencing: para. 93. The Court explained that “sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders” (*Gladue*, at para. 37 (emphasis deleted)). The Court held that, pursuant to s. 718.2(e), a judge must consider: “(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) [t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection”: *Gladue*, at para. 66.

[24] Section 718.2(e) was also central to the discussion in *Ipeelee*. In that case, the Court noted that the *Gladue* principles bear on the ultimate question of what is a fit and proper sentence and assist the judge in crafting a sentence that accords with the fundamental principle of proportionality. The failure of a sentencing judge to consider the unique circumstances of Aboriginal offenders thus breaches both the judge’s statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate: *Ipeelee*, at para. 87.

[25] Importantly, both *Gladue* and *Ipeelee* speak to the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders. They make no mention of prosecutorial discretion and do not support Mr. Anderson’s argument that *prosecutors* must consider Aboriginal status when making a decision that limits the sentencing options available to a judge. Mr. Anderson’s argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process. It is *the judge’s* responsibility to impose sentence; likewise, it is *the judge’s* responsibility, within the applicable

legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.

[26] In so concluding, I have not ignored *United States of America v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, leave to appeal refused, [2013] 1 S.C.R. v, a case upon which Mr. Anderson relies. In *Leonard*, the United States sought the extradition of two Aboriginal Canadians. Sharpe J.A. held that in deciding whether or not to surrender the accused, the Minister of Justice was required to consider their Aboriginal status, noting that

the *Gladue* factors are not limited to criminal sentencing but . . . should be considered by all “decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65) whenever an Aboriginal person’s liberty is at stake in criminal and related proceedings. That category includes extradition. [para. 85]

[27] Mr. Anderson submits that, like the Minister of Justice in *Leonard*, Crown prosecutors should be required to consider Aboriginal status as they are “decision-makers” who “have the power to influence the treatment of aboriginal offenders in the justice system” (*Gladue*, at para. 65). With respect, I cannot agree. The excerpt from *Leonard* upon which Mr. Anderson relies should not be taken out of context. Pursuant to s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18, the Minister of Justice must refuse to surrender an individual if “the surrender would be unjust or oppressive having regard to all the relevant circumstances”. As Sharpe J.A. notes, determining whether the surrender would be unjust or oppressive requires the Minister of Justice to compare the likely sentence that would be imposed in a foreign state *with the likely sentence that would be imposed in Canada* — a task which is impossible to do without reference to the *Gladue* principles. As Sharpe J.A. explained, the proper exercise of the Minister’s discretion in this context

requires an assessment of the likely result if the case were prosecuted domestically and a comparison of that result to the likely outcome in the foreign state if the individual sought were surrender[ed]. In the case of an Aboriginal offender, I fail to see how that assessment and comparison could be accomplished without reference to the *Gladue* principles. [para. 87]

[28] It follows, in my view, that *Leonard* does not support the much broader application of *Gladue* that Mr. Anderson seeks.

(2) The *R. v. D.B.* Test Is Not Satisfied

[29] There is a further reason why Mr. Anderson's s. 7 argument must fail. The principle of fundamental justice that Mr. Anderson asks this Court to recognize — that Crown prosecutors must consider the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options — does not meet the test which governs principles of fundamental justice. As Abella J. observed for the majority in *D.B.*, at para. 46, a principle of fundamental justice must (1) be a legal principle, (2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate, and (3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8.

[30] The principle contended for by Mr. Anderson does not meet the second requirement that it enjoy consensus as a principle that is fundamental to the way in which the legal system ought to fairly operate. In fact, the principle is contrary to a long-standing and deeply rooted approach to the division of responsibility between the Crown prosecutor and the courts.

[31] We must begin by acknowledging that the principle advanced by Mr. Anderson would enormously expand the scope of judicial review of discretionary decisions made by prosecutors. In doing so, it puts at risk the adversarial nature of our criminal justice system by hobbling Crown prosecutors in the performance of their work and by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis. As the Crown has pointed out, the situations where Crown decisions have the potential to limit the sentencing judge's options and therefore the judge's ability to take s. 718.2(e) into account are many: A.F., at para. 145. These decisions include: proceeding with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence (e.g. s. 95 as opposed to s. 92 or s. 94 of the

Code); proceeding by indictment rather than summary conviction when different mandatory minimum sentences are required (e.g. ss. 151, 152 and 271 of the *Code*); and proceeding by indictment rather than by summary conviction when that decision precludes the possibility of a conditional sentence (e.g. s. 267(b) of the *Code*). Moreover, there are several provisions of the *Code* and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, where a mandatory minimum is triggered by the Crown's decision to prove a particular aggravating factor — such as evidence of a firearm used in the commission of the offence (e.g. s. 344 of the *Code*; ss. 5 and 6 of the *Controlled Drugs and Substances Act*). As with the other examples provided, the decision to prove the aggravating factor limits the sentencing judge's options.

[32] Apart from the sheer volume of decisions that would be opened up for review, the Crown's decision to seek the mandatory minimum penalty — as we shall see — is a matter of prosecutorial discretion. There has been a long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of that discretion. As affirmed in *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, at p. 411, the Court “has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice”. And, as L'Heureux-Dubé J., for the majority of this Court, noted in *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, “the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it” (p. 627). The imposition of a sweeping duty that opens up for routine judicial review all of the aforementioned decisions is contrary to our constitutional traditions. It cannot be a principle that is considered fundamental to the way in which our legal system ought fairly to operate.

[33] In sum, the principle of fundamental justice sought by Mr. Anderson must be rejected.

B. *Is the Crown's Decision to Tender the Notice Against an Aboriginal Offender Reviewable?*

[34] Having concluded that the Crown is not under a constitutional obligation to consider the accused's Aboriginal status when making a decision that limits the sentencing options available

to a judge, the next question is whether the Crown's decision to tender the Notice is reviewable in some other way, and if so, under what standard.

Review of Crown Decision Making

[35] There are two distinct avenues for judicial review of Crown decision making. The analysis will differ depending on which of the following is at issue: (1) exercises of prosecutorial discretion; or (2) tactics and conduct before the court.

[36] All Crown decision making is reviewable for abuse of process. However, as I will explain, exercises of prosecutorial discretion are *only* reviewable for abuse of process. In contrast, tactics and conduct before the court are subject to a wider range of review. The court may exercise its inherent jurisdiction to control its own processes even in the absence of abuse of process.

(a) *Prosecutorial Discretion*

[37] This Court has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: *Beare*, at p. 410; *R. v. T. (V.)*, [1992 CanLII 88 \(SCC\)](#), [1992] 1 S.C.R. 749, at pp. 758-62; *R. v. Cook*, [1997 CanLII 392 \(SCC\)](#), [1997] 1 S.C.R. 1113, at para. 19. In *Miazga v. Kvello Estate*, [2009 SCC 51](#), [2009] 3 S.C.R. 339, at para. 47, the fundamental importance of prosecutorial discretion was said to lie, “not in protecting the interests of individual Crown attorneys, but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as ‘ministers of justice’”. More recently, in *Sriskandarajah v. United States of America*, [2012 SCC 70](#), [2012] 3 S.C.R. 609, at para. 27, this Court observed that “[n]ot only does prosecutorial discretion accord with the principles of fundamental justice — it constitutes an indispensable device for the effective enforcement of the criminal law”.

[38] Unfortunately, subsequent to this Court's decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by "prosecutorial discretion" and the law has become cloudy. The present appeal provides an opportunity for clarification.

[39] In *Krieger*, this Court provided the following description of prosecutorial discretion:

"Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence. [para. 43]

[40] The Court went on to provide the following examples of prosecutorial discretion: whether to bring the prosecution of a charge laid by police; whether to enter a stay of proceedings in either a private or public prosecution; whether to accept a guilty plea to a lesser charge; whether to withdraw from criminal proceedings altogether; and whether to take control of a private prosecution (para. 46). The Court continued:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis added; emphasis in original deleted; para. 47.]

[41] Since *Krieger*, courts have struggled with the distinction between prosecutorial discretion, and tactics and conduct. The use of the word "core" in *Krieger* has led to a narrow definition of prosecutorial discretion, notwithstanding the expansive language used in *Krieger* to define the term, namely: ". . . decisions regarding the nature and extent of the prosecution and the

Attorney General's participation in it" (para. 47). Difficulty in defining the term has also led to confusion regarding the standard of review by which particular Crown decisions are to be assessed.

[42] The current appeal presents a good illustration of both problems. As noted earlier, the Newfoundland and Labrador Court of Appeal split on the issue of how to characterize the Crown's decision to tender the Notice. Welsh J.A. held that it was a matter of "core" prosecutorial discretion, whereas Green C.J.N.L. and Rowe J.A. (following *R. v. Gill*, 2012 ONCA 607, 112 O.R. (3d) 423, at paras. 54-56), considered it to be a tactical decision and thus "outside [the] core" (para. 49).

[43] The court also diverged on the applicable standard of review. Welsh J.A. held that the distinction between core decisions and decisions falling outside the core was of no consequence as both types of decisions were reviewable on the same standard — the standard articulated in *Gill*, in which the Ontario Court of Appeal held that the decision to tender the Notice was reviewable if it (1) undermined the integrity of the administration of justice; (2) operated in a manner that rendered the sentencing proceedings fundamentally unfair; (3) was arbitrary; or (4) resulted in a limit on the accused's liberty that was grossly disproportionate to the state interest in pursuing a particular course of action (*Gill*, at para. 59). Green C.J.N.L. and Rowe J.A. disagreed. In their view, tactical decisions (decisions "outside the core") were reviewable according to the *Gill* standard, whereas "core" prosecutorial discretion was reviewable solely for abuse of process. The diverging views present in this case, and in many others, demonstrate the unsatisfactory state of the law.

[44] In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (*Krieger*, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further

examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice.

[45] In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making. That said, care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations. The distinction between prosecutorial discretion and the constitutional obligations of the Crown was made in *Krieger*, where the prosecutor’s duty to disclose relevant evidence to the accused was at issue:

In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of prosecutorial discretion but, rather, is a prosecutorial duty. [Emphasis added; para. 54.]

Manifestly, the Crown possesses no discretion to breach the *Charter* rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence.

(i) The Standard of Review for Prosecutorial Discretion

[46] The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive: see M. *Code*, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009), 34 *Queen’s L.J.* 863, at p. 867. Judicial non-interference with prosecutorial discretion has been referred to as a “matter of principle based on the doctrine of separation of powers as well as a matter of policy

founded on the efficiency of the system of criminal justice” which also recognizes that prosecutorial discretion is “especially ill-suited to judicial review”: *Power*, at p. 623. In *Krieger*, the Court discussed the separation of powers doctrine as a basis for judicial deference to prosecutorial discretion:

In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive [para. 45]

[47] The Court also noted the more practical problems associated with regular review of prosecutorial discretion:

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. [para. 32]

[48] Manifestly, prosecutorial discretion is entitled to considerable deference. It is not, however, immune from all judicial oversight. This Court has repeatedly affirmed that prosecutorial discretion is reviewable for abuse of process: *Krieger*, at para. 32; *Nixon*, at para. 31; *Miazga*, at para. 46.

[49] The jurisprudence pertaining to the review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Krieger*, this Court used the term “flagrant impropriety” (para. 49). In *Nixon*, the Court held that the abuse of process doctrine is available where there is evidence that the Crown’s decision “undermines the integrity of the judicial process” or “results in trial unfairness” (para. 64). The Court also referred to “improper motive[s]” and “bad faith” in its discussion (para. 68).

[50] Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system. Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard.

[51] In sum, prosecutorial discretion is reviewable solely for abuse of process. The *Gill* test applied by the Newfoundland and Labrador Court of Appeal was developed at a time when courts were struggling with the post-*Krieger* “core” versus “outside the core” dichotomy. To the extent the *Gill* test suggests that conduct falling short of abuse of process may form a basis for reviewing prosecutorial discretion, respectfully, it should not be followed.

(ii) The Threshold Evidentiary Burden

[52] The burden of proof for establishing abuse of process lies on the claimant, who must prove it on a balance of probabilities: *Cook*, at para. 62; *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 69, per L’Heureux-Dubé J.; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 19. However, given the unique nature of prosecutorial discretion — specifically, the fact that the Crown will typically (if not always) be the only party who will know *why* a particular decision was made — this Court in *Nixon* recognized that where prosecutorial discretion is challenged, the Crown may be required to provide reasons justifying its decision where the claimant establishes a proper evidentiary foundation: para. 60.

[53] In *Nixon*, this Court noted the following reasons as to why there must be a “proper evidentiary foundation” before the abuse of process claim should proceed:

. . . mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. Similar thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties

when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. [Emphasis added; paras. 61-62.]

[54] *Nixon* involved the Crown’s repudiation of a plea agreement. The Court held that the repudiation of a plea agreement was “a rare and exceptional event” that met the evidentiary threshold and justified an inquiry into the propriety of the Crown’s decision: *Nixon*, at para. 63. Indeed, the evidence in *Nixon* was that only two other plea agreements had been repudiated in Alberta’s history. As a result, the Court held that

to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim. [para. 63]

[55] Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith: *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 95. It also accords with this Court’s statement in *Sriskandarajah*, at para. 27, that “prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives” (emphasis added).

[56] Finally, I note that the content of a Crown policy or guideline may be relevant when a court is considering a challenge to the exercise of prosecutorial discretion. Policy statements or guidelines are capable of informing the debate as to whether a Crown prosecutor’s conduct was appropriate in the particular circumstances. See R. J. Frater, *Prosecutorial Misconduct* (2009), at p.

259. For example, a decision by a Crown prosecutor that appears to contravene a Crown policy or guideline may provide some evidence that assists the claimant in establishing the threshold evidentiary foundation. However, as the intervener the Director of Public Prosecutions of Canada submits, Crown policies and guidelines do not have the force of law, and cannot themselves be subjected to *Charter* scrutiny in the abstract: see *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 45 (discussing police practices manuals).

(b) *Tactics and Conduct Before the Court*

[57] The second category in the framework for review of Crown activity was referred to in *Krieger* as “tactics or conduct before the court”: para. 47. As stated in *Krieger*, “such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum” (para. 47).

[58] Superior courts possess inherent jurisdiction to ensure that the machinery of the court functions in an orderly and effective manner: *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 26. Similarly, in order to function as courts of law, statutory courts have implicit powers that derive from the court’s authority to control its own process: *Cunningham*, at para. 18. This jurisdiction includes the power to penalize counsel for ignoring rulings or orders, or for inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper opening or closing addresses or inappropriate attire. Sanctions may include orders to comply, adjournments, extensions of time, warnings, cost awards, dismissals, and contempt proceedings.

[59] While deference is not owed to counsel who are behaving inappropriately in the courtroom, our adversarial system *does* accord a high degree of deference to the tactical decisions of counsel. In other words, while courts may sanction the conduct of the *litigants*, they should generally refrain from interfering with the conduct of the *litigation* itself. In *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at paras. 36-37, this Court explained why judges should be very cautious before interfering with tactical decisions:

In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel [C]ounsel will generally be in a better position to assess the wisdom, in light of their overall trial strategy, of a particular tactical decision than is the trial judge. By contrast, trial judges are expected to be impartial arbiters of the dispute before them; the more a trial judge second-guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either appearance or reality, cease being a neutral arbiter and instead become an advocate for one party. . . .

The corollary of the preceding is that trial judges should seldom take it upon themselves, let alone be required, to second-guess the tactical decisions of counsel. Of course, trial judges are still required to “make sure that [the trial] remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice”: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 68.

[60] Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused: *Jolivet*, at para. 21. Likewise, as this Court recently held in *R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, a judge may exceptionally override a Crown tactical decision in order to prevent a *Charter* violation.

[61] Finally, as with all Crown decision making, courtroom tactics or conduct may amount to abuse of process, but abuse of process is not a precondition for judicial intervention as it is for matters of prosecutorial discretion.

VI. Conclusion

[62] Parliament has expressly conferred on the Crown the discretion to tender the Notice at the sentencing hearing through the governing provisions of the *Code*. This discretion is consistent with our constitutional traditions. As the Crown points out, tendering the Notice is not simply a decision as to what submissions will be made at a sentencing hearing (A.F., at para. 119). Tendering the Notice fundamentally alters the *extent* of prosecution — specifically, the extent of the jeopardy facing the accused. In this respect, the Crown’s decision to tender the Notice is analogous to the decision to proceed with charges that attract a mandatory minimum sentence when other related offences have no mandatory minimum sentence; the decision to proceed by indictment rather than summary conviction when different mandatory minimum sentences are

involved; and the decision to proceed by indictment rather than by summary conviction when that decision precludes certain sentencing options.

[63] For these reasons, I conclude that tendering the Notice is a matter of prosecutorial discretion. As a result, it is reviewable only for abuse of process. In the complete absence of any evidence to support it, Mr. Anderson's abuse of process argument must fail.

[64] As a final matter, I note that the [s. 15\(1\) Charter](#) challenge to the constitutionality of the statutory scheme was not pursued before this Court. These reasons should not be taken as endorsing the trial judge's analysis or conclusion with respect to that issue.

[65] Accordingly, I would allow the appeal. The order of the Newfoundland and Labrador Court of Appeal is set aside and a term of imprisonment of 120 days is substituted, with service of the remainder of the sentence stayed in accordance with the concession of the Crown.

Appeal allowed.

Solicitor for the appellant: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the respondent: Newfoundland and Labrador Legal Aid Commission, St. John's.

Solicitor for the intervener the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Legal Clinic, Toronto.

[1] Crown policy statements are designed to assist Crown prosecutors in the performance of their functions. In this case, there was a Crown policy statement pertaining to the decision of whether or not to tender the Notice. The policy statement stated that “service of the notice should be considered in all cases, in light of all circumstances of the offence and the background and circumstances of the offender” (Court of Appeal decision, at para. 19 (emphasis deleted)). The policy statement did not specifically reference Aboriginal status.

Tab 3

R. v. Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309

Source:	Supreme Court of Canada
Date:	2014-02-21
File number:	34824
Other citations:	367 DLR (4th) 575 — 454 NR 86 — AZ-51046916 — [2014] EXP 660 — 308 CCC (3d) 445 — 8 CR (7th) 1 — 112 WCB (2d) 68 — 300 CRR (2d) 153 — [2014] CarswellQue 575 — EYB 2014-233436 — JE 2014-343 — [2014] SCJ No 16 (QL)
Citation:	R. v. Babos, 2014 SCC 16 (CanLII), [2014] 1 SCR 309, < https://canlii.ca/t/g36g4 >, retrieved on 2026-03-20
Most recent unfavourable mention	R. v. General , 2024 ONSC 7076 (CanLII) [...] Recall that the main category under Babos is inapplicable in the current circumstances. [...]



SUPREME COURT OF CANADA

CITATION: R. v. Babos, 2014 SCC 16, [2014] 1 S.C.R. 309

DATE: 20140221

DOCKET: 34824

BETWEEN:

Antal Babos
Appellant
and
Her Majesty The Queen
Respondent

AND BETWEEN:

Sergio Piccirilli
Appellant
and

Her Majesty The Queen
Respondent

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

REASONS FOR JUDGMENT: Moldaver J. (McLachlin C.J. and LeBel, Cromwell, Karakatsanis and Wagner JJ. concurring)
(paras. 1 to 74)

DISSENTING REASONS: Abella J.
(paras. 75 to 87)

R. v. Babos, 2014 SCC 16, [2014] 1 S.C.R. 309

Antal Babos

Appellant

v.

Her Majesty The Queen

Respondent

- and -

Sergio Piccirilli

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Babos

2014 SCC 16

File No.: 34824.

2013: October 9; 2014: February 21.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

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

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

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

Per McLachlin C.J. and LeBel, Cromwell, Moldaver, Karakatsanis and Wagner JJ.: A stay of proceedings for an abuse of process will only be warranted in the clearest of cases. Two types of state conduct may warrant a stay. The first is conduct that compromises the fairness of an accused's trial (the "main" category). The second is conduct that does not threaten trial fairness but risks undermining the integrity of the judicial process (the "residual" category). The test for determining whether a stay of proceedings is warranted is the same for both categories and consists

of three requirements: (1) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome, (2) there must be no alternative remedy capable of redressing the prejudice, and (3) where there is still uncertainty over whether a stay is warranted after steps 1 and 2, the court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

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

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

threats. The trial judge also failed to consider that the Crown prosecutor who made the threats was removed from the case months before the trial started. Moreover, the trial judge failed to balance the need for a stay against society's interest in a trial on the merits. When the impugned misconduct is weighed against society's interest in a trial, this is not one of the clearest of cases where the exceptional remedy of a stay of proceedings is warranted.

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

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

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

Cases Cited

By Moldaver J.

Referred to: *R. v. Regan*, [2002 SCC 12](#), [2002] 1 S.C.R. 297; *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391; *R. v. Keyowski*, [1988 CanLII 74 \(SCC\)](#), [1988] 1 S.C.R. 657; *R. v. Waugh* (1985), [1985 CanLII 3557 \(NS CA\)](#), 68 N.S.R. (2d) 247; *R. v. Bellusci*, [2012 SCC 44](#), [2012] 2 S.C.R. 509; *R. v. Zarinchang*, [2010 ONCA 286](#), 99 O.R. (3d) 721; *R. v. Conway*, [1989 CanLII 66 \(SCC\)](#), [1989] 1 S.C.R. 1659; *R. v. Bjelland*, [2009 SCC 38](#), [2009] 2 S.C.R. 651; *Boucher v. The Queen*, [1954 CanLII 3 \(SCC\)](#), [1955] S.C.R. 16; *United States of America v. Cobb*, [2001 SCC 19](#), [2001] 1 S.C.R. 587.

By Abella J. (dissenting)

R. v. O'Connor, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391; *R. v. Conway*, [1989 CanLII 66 \(SCC\)](#), [1989] 1 S.C.R. 1659; *United States of America v. Shulman*, [2001 SCC 21](#), [2001] 1 S.C.R. 616; *R. v. Regan*, [2002 SCC 12](#), [2002] 1 S.C.R. 297; *R. v. Bellusci*, [2012 SCC 44](#), [2012] 2 S.C.R. 509.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, [11\(b\)](#), [24](#).

Criminal Code, R.S.C. 1985, c. C-46, ss. 574(1)(b), [577](#).

APPEALS from a judgment of the Quebec Court of Appeal (Duval Hesler C.J. and Chamberland and Doyon JJ.A.), [2012 QCCA 471](#), [2012] J.Q. n° 2107 (QL), 2012 CarswellQue 1987, SOQUIJ AZ-50839397, setting aside the stay of proceedings entered by Garneau J. and

ordering a new trial, [2008 QCCQ 11373](#), [2008] J.Q. n° 12838 (QL), 2008 CarswellQue 12200, SOQUIJ AZ-50525272. Appeals dismissed, Abella J. dissenting.

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

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

Gilles Villeneuve and François Lacasse, for the respondent.

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

MOLDAVER J. —

I. Introduction

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

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

- (1) Attempts by the original provincial Crown Attorney to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty;

- (2) Collusion on the part of two police officers to mislead the court about the seizure of a firearm from Mr. Babos's car; and
- (3) Improper means used by a federal Crown Attorney in obtaining Mr. Piccirilli's medical records from the detention centre where he was being detained pending trial.

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

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

[5] For the reasons that follow, I would not give effect to the appellants' submissions. In my respectful view, the trial judge committed errors in assessing all three forms of state misconduct. As regards Mr. Piccirilli's medical records, he made a palpable and overriding error in assessing the Crown's conduct. With respect to the police collusion, apart from its limited extent, the trial judge failed to consider that excluding the firearm found in Mr. Babos's trunk would have overcome whatever threat it posed to the integrity of the justice system. As for the threats by the provincial Crown, while they were reprehensible and should not be repeated, the trial judge overstated their seriousness and failed to balance the need for a stay against society's interest in a trial on the merits.

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

II. Background Facts

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

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

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

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

[11] The appellants' trial began in April 2008. Notably, by February 2008, Ms. Tremblay was no longer on the file. She had been removed for health reasons and replaced by a federal prosecutor, Ms. Kovacevich, when the charges against the appellants were joined in a single indictment. It was at this juncture that the appellants were charged with four additional offences relating to organized crime, firearms and drug trafficking. The additional charges stemmed from

evidence led at the appellants' preliminary hearings. By this point, neither the appellants nor their counsel had mentioned the alleged threats made by Ms. Tremblay. Indeed, the threats did not surface until they were brought to the attention of the trial judge some six months into the trial and at least eighteen months after they were made.

[12] At the outset of the trial, Mr. Babos alleged that the police had illegally searched the trunk of his car and he sought to have the firearm they seized excluded from evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. On the s. 24(2) application, a key factual issue was whether Mr. Babos consented to the search and opened the trunk himself. Constables Brière and Sénéchal testified at the hearing. Cst. Brière testified that it was Mr. Babos who opened the trunk of the car. This testimony differed from the version of events he had given at the preliminary inquiry.[2] When defence counsel confronted Cst. Brière with the change, Cst. Brière explained that he had spoken to Cst. Sénéchal while they were waiting to testify, and that Cst. Sénéchal had [TRANSLATION] "convinced" him that the new version of events was the truth.

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

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

[15] On October 3, 2008, with the trial still ongoing, Mr. Babos brought an application to stay the charges for unreasonable delay under s. 11(b) of the *Charter*. That same week, on October 7, 2008, Mr. Piccirilli had a heart attack and the trial was adjourned. Mr. Piccirilli applied for bail,

alleging that the detention centre in which he was being held was unable to adequately care for his health. As part of his application, Mr. Piccirilli undertook to provide the court with his medical report and list of medications.

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

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

[18] Both appellants brought an application to stay the proceedings for abuse of process shortly thereafter. On November 14, 2008, the trial judge granted the application and the charges against the appellants were stayed.

III. Judgments Below

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

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

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

[21] With respect to collusion, the trial judge made a finding that Constables Brière and Sénéchal colluded in order to mislead the court. This finding was based on Cst. Brière's admission that he had spoken to Cst. Sénéchal before testifying, and that Cst. Sénéchal had [TRANSLATION] "convinced" him that Mr. Babos had opened the trunk of the car (para. 12). The trial judge also found that the Crown's later attempt to lead the firearm seized from the trunk against Mr. Piccirilli perpetuated the officers' collusion.

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

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

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

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

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

[26] As for the trial judge's finding that Constables Brière and Sénéchal colluded to mislead the court, Doyon J.A. considered this finding to be a palpable and overriding error. Cst. Brière explained why his testimony had changed. The trial judge's determination that the officers' conduct amounted to collusion lacked an evidentiary foundation.

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

[28] Having reassessed the facts, Doyon J.A. observed that Ms. Tremblay's threats remained the sole cause of concern. In assessing whether those threats warranted a stay, he noted that they were uttered months before trial, by a Crown who was replaced before trial, and about

whom the appellants did not complain until after their trial had been in progress for at least six months. In his view, this did not amount to an extreme case that required a stay of proceedings.

IV. Issues

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

V. Analysis

A. Abuse of Process and Stays of Proceedings

[30] A stay of proceedings is the most drastic remedy a criminal court can order (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53). It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[31] Nonetheless, this Court has recognized that there are rare occasions —the “clearest of cases” — when a stay of proceedings for an abuse of process will be warranted (*R. v. O’Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 68). These cases generally fall into two categories: (1) where state conduct compromises the fairness of an accused’s trial (the “main” category); and (2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the “residual” category) (*O’Connor*, at para. 73). The impugned conduct in this case does not implicate the main category. Rather, it falls squarely within the latter category.

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

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

[33] The test is the same for both categories because concerns regarding trial fairness and the integrity of the justice system are often linked and regularly arise in the same case. Having one test for both categories creates a coherent framework that avoids "schizophrenia" in the law (*O'Connor*, at para. 71). But while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the "main" or "residual" category is invoked.

[34] Commencing with the first stage of the test, when the main category is invoked, the question is whether the accused's right to a fair trial has been prejudiced and whether that prejudice will be carried forward through the conduct of the trial; in other words, the concern is whether there is *ongoing* unfairness to the accused.

[35] By contrast, when the residual category is invoked, the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in

the prosecution of offences. At times, state conduct will be so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society’s sense of fair play and decency. This harms the integrity of the justice system. In these kinds of cases, the first stage of the test is met.

[36] In *Canada (Minister of Citizenship and Immigration) v. Tobias*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391, this Court described the residual category in the following way:

For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society’s sense of justice. Ordinarily, the latter condition will not be met unless the former is as well — society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare. [para. 91]

[37] Two points of interest arise from this description. First, while it is generally true that the residual category will be invoked as a result of state *misconduct*, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct. Repeatedly prosecuting an accused for the same offence after successive juries have been unable to reach a verdict stands as an example (see, e.g., *R. v. Keyowski*, [1988 CanLII 74 \(SCC\)](#), [1988] 1 S.C.R. 657), as does using the criminal courts to collect a civil debt (see, e.g., *R. v. Waugh* (1985), [1985 CanLII 3557 \(NS CA\)](#), 68 N.S.R. (2d) 247 (S.C., App. Div.)).

[38] Second, in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. Different remedies may apply depending on whether the prejudice relates to the accused's right to a fair trial (the main category) or whether it relates to the integrity of the justice system (the residual category). Where the concern is trial fairness, the focus is on restoring an accused's right to a fair trial. Here, procedural remedies, such as ordering a new trial, are more likely to address the prejudice of ongoing unfairness. Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these "clearest of cases", the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the

merits.^[5] Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community's conscience and/or offends its sense of fair play and decency, it becomes less likely that society's interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

[42] This Court's recent decision in *R. v. Bellusci*, [2012 SCC 44](#), [2012] 2 S.C.R. 509, attests to the need for balancing when the conduct in question falls solely within the residual category. In *Bellusci*, the accused was assaulted in the back of a van by a prison guard while he was shackled and handcuffed. The accused was charged with assaulting the guard and intimidating a justice system participant. Fish J., writing for a unanimous Court, upheld the trial judge's decision to issue a stay of proceedings for state misconduct falling in the residual category. In doing so, he noted that the trial judge had

appreciated the need to balance the competing interests at play in contemplating a stay of proceedings. He expressly took into account the difficult position of prison guards, the importance to the justice system of ensuring their protection, the seriousness of the charges against the accused, the integrity of the justice system, and the nature and gravity of the violation of Mr. Bellusci's rights. Only then did he conclude that a stay was warranted. [Emphasis added; para. 29.]

[43] The Ontario Court of Appeal has also recently emphasized the importance of the balancing stage when the residual category is in issue:

In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion. [Emphasis added.]

(*R. v. Zarinchang*, [2010 ONCA 286](#), 99 O.R. (3d) 721, at para. 60)

[44] Undoubtedly, the balancing of societal interests that must take place and the “clearest of cases” threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be “exceptional” and “very rare” (*Tobiass*, at para. 91). But this is as it should be. It is only where the “affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases” that a stay of proceedings will be warranted (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667).

[45] To recapitulate, while the framework is the same for both categories, the test may — and often will — play out differently depending on whether the “main” or “residual” category is invoked.

[46] The following hypothetical may serve as a useful illustration. Take a case where it is discovered, after trial, that the police have tampered with the jury in order to secure the conviction of an accused. Manifestly, the police conduct would impinge on the accused’s right to a fair trial — but it would also impinge on the integrity of the justice system.

[47] Ordering a new trial would probably redress the unfairness of the original trial. But the inquiry would not end there. The court would also have to decide whether ordering a new trial, or some other remedy, would suffice to dissociate it from the prejudice occasioned to the integrity of the justice system by the police misconduct. If no remedy would suffice, the court would have to engage in the balancing process and determine whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits. Given the seriousness of the misconduct — jury tampering strikes at the very heart of the criminal justice system — the residual category might well necessitate a stay of proceedings to redress the threat to the integrity of the justice system, even though the unfairness that marred the first trial could be cured by a second trial.

B. *Whether a Stay of Proceedings Was Warranted in the Instant Case*

[48] The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is “so clearly wrong as to amount to an injustice” (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

[49] In the instant case, the appellants acknowledge that trial fairness is not in issue. They accept that the trial judge viewed the misconduct as coming within the residual category. Approaching the matter from that perspective, I am respectfully of the view that the trial judge erred in assessing all three forms of alleged state misconduct.

(1) The Medical Records

[50] In order for the Crown’s conduct in securing Mr. Piccirilli’s medical records to factor into a decision to stay proceedings, it must pass the first stage of the test. That is, the appellants must show that Ms. Kovacevich’s conduct was prejudicial to the integrity of the justice system. The trial judge appears to have found that this requirement was met when, after considering her conduct, he held that [TRANSLATION] “[t]his conduct will be taken into consideration in reviewing the abuse of process motion” (para. 57).

[51] The trial judge committed a palpable and overriding error in reaching the conclusion that this conduct impinged on the integrity of the justice system. In the first place, he erred in concluding that the Crown’s conduct was marked by a lack of transparency because the Crown had [TRANSLATION] “always refused to disclose the source of the information” (para. 56). In fact, the Crown disclosed the source of the information within a matter of days. In addition, the trial judge failed to consider that Mr. Piccirilli had put his health in issue in his application for interim release and had undertaken to provide the court with his medical records. The trial judge also failed to consider that Ms. Kovacevich had asked the medical staff at the jail to provide an affidavit explaining the medical care Mr. Piccirilli had received since his heart attack. It appears that Mr. Piccirilli’s doctor took it upon himself to forward the appellant’s medical records to the Crown.

[52] In my view, when the Crown's conduct is considered free of the trial judge's errors, it is clear that it occasioned no prejudice to the integrity of the justice system. Mr. Piccirilli had put the state of his health in issue. Ms. Kovacevich sought an affidavit from the jail Mr. Piccirilli was being held in. When she received more than she asked for — Mr. Piccirilli's confidential medical records — she immediately disclosed the information to Mr. Piccirilli's counsel. Within a matter of days, she also disclosed the source of the information.^[6] Accordingly, the appellants' argument fails at the first stage of the test.

(2) The Police Collusion

[53] The Court of Appeal disagreed with the trial judge's finding that Constables Brière and Sénéchal colluded to mislead the court. I too have serious reservations with the trial judge's finding. Indeed, had I been the trial judge, I doubt that I would have reached the same conclusion. However, having seen the witnesses, the trial judge was in a better position to assess the matter. Accordingly, his finding is entitled to deference.

[54] That said, at the first stage of the test, the officers' conduct must be looked at in context. Cst. Brière changed his testimony on a central issue: whether he or Mr. Babos opened the trunk of the car. He did so, however, after having testified at the preliminary inquiry. As an officer, he surely knew that this change would be the subject of questioning by defence counsel. Changes in an officer's testimony are routinely exposed in cross-examination. And when Cst. Brière was predictably questioned about why his story had changed, he immediately explained that he had spoken with Cst. Sénéchal and had been [TRANSLATION] "convinced" of the true version of events. There was no attempt by the officers to cover up their discussions or to hide anything from the court. To the extent this amounts to collusion, it does so in the most technical sense. Whatever threat it poses to the integrity of the justice system must surely be slight.

[55] However, given the trial judge's finding, it is necessary to proceed to the second stage of the test and ask whether there is another remedy, short of a stay, capable of redressing the prejudice to the integrity of the judicial system occasioned by the collusion.

[56] Two concerns to the integrity of the justice system arise out of the trial judge's finding of collusion: (1) the impropriety of police collusion designed to mislead the court, and (2) the Crown's attempt to introduce the firearm against Mr. Piccirilli in the wake of the trial judge's finding of collusion. Manifestly, both are improper. But there was another remedy before the trial judge that would have addressed both, namely: refusing to admit the firearm against Mr. Piccirilli even though he had no standing under s. 8 of the *Charter* to challenge its admissibility. The trial judge erred in failing to consider that alternative.

[57] Excluding the firearm against Mr. Piccirilli would serve to dissociate the court from the officers' collusion and the Crown's misguided attempt, in the face of that finding, to introduce the firearm against Mr. Piccirilli. Both forms of misconduct were intended to achieve the same end — admission of the firearm into evidence. Excluding the firearm against Mr. Piccirilli — even though it was likely admissible against him — purges the problematic evidence from the trial, thereby dissociating the court from the misconduct in question. By doing so, it cannot be said that the misconduct has a lingering effect on the integrity of the justice system. In my view, this remedy fully addresses any prejudice occasioned to the justice system by the impugned conduct. Hence, there is no need to go further in the analysis.

(3) The Crown's Threatening Conduct

[58] In the end, I view this case as turning on the Crown's threatening conduct.

[59] The distinction between the Crown's conduct in this case and legitimate plea bargaining practices should be made clear at the outset. It is perfectly proper for the Crown to indicate that it will drop certain charges, grounded in the evidence, if the accused pleads guilty. It is also proper for a Crown to advise counsel that if evidence arises at the preliminary inquiry that would support additional charges, they may be added to the indictment under s. 574(1)(b) of the *Criminal Code*.^[7] Where discussions of this sort occur with counsel after substantial disclosure has been provided, the accused and his or her lawyer are able to make an informed decision as to how to proceed and nothing improper has occurred.

[60] The Crown's conduct in this case was of a different nature. The impugned comments were made early on in the proceedings, before the appellants and their counsel had sufficient disclosure to make an informed decision as to how they wished to proceed. Moreover, in at least one instance, the comments occurred in the presence of one of the appellants, Mr. Piccirilli. And the Crown's language was nothing short of threatening. Mr. Piccirilli was told, for example, that if he did not settle, he was going to be [TRANSLATION] "hit by a train". Put simply, the Crown's threats were intended to pressure the appellants into foregoing their right to a trial.

[61] Without question, the bullying tactic to which Ms. Tremblay resorted was reprehensible and unworthy of the dignity of her office. It should not be repeated by her or any other Crown. In her capacity as a Crown, Ms. Tremblay's role was that of a quasi-judicial officer. Her function was to be "assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party" (*Boucher v. The Queen*, [1954 CanLII 3 \(SCC\)](#), [1955] S.C.R. 16, at p. 25). In threatening to charge Mr. Piccirilli with more offences if he did not plead guilty, Ms. Tremblay betrayed her role as a Crown. Manifestly it is the type of conduct the court should dissociate itself from.

[62] However, the threats must be considered in their context. With respect, the trial judge did not do so. Here, there were several factors which the trial judge failed to consider. With respect, he erred in this regard.

[63] The threats were made more than a year before the trial began. The 18-month long silence of the appellants and their counsel sheds some light on how seriously they took the threats. Had they been taken seriously, one might have expected counsel to respond immediately. Surely the proper course of action was not to sit back for over a year before applying, mid-trial, for a stay of proceedings. Instead, counsel should have confronted Ms. Tremblay and, failing an adequate response by her, brought the matter immediately to the attention of a senior Crown or a judge. That way, Ms. Tremblay could have been removed from the file during the early stages of the proceedings. Be that as it may, as it turned out, she was removed from the case months before the

trial started — and it was not until six months after the trial was underway that the threats first came to light.

[64] As indicated, context is essential in considering the seriousness of the threatening conduct. By the time the misconduct came to light, Ms. Tremblay had long since been removed from the case and no longer played any part in it. The trial judge acknowledged this fact but did not consider it to be an attenuating factor because the Crown’s office had taken no steps [TRANSLATION] “to remedy or even try to remedy the situation” once the threats were revealed and had instead “remained entrenched in its position” (para. 66). With respect, this observation does not accurately reflect the facts. At the point when the threats first came to light, they were unproven and Ms. Tremblay’s health did not allow her to testify.^[8] The Crown’s office did not condone Ms. Tremblay’s actions, but simply left it to the appellants to prove the threats. Surely the Crown’s office cannot be faulted for taking that approach, especially in the absence of any evidence suggesting that Ms. Tremblay’s conduct was systemic.

[65] Moreover, the trial judge did not consider the passage of time between when the threats were made and when they were first brought to light. He made no mention of this in his reasons. In this regard, while I agree in general with Justice Abella that the passage of time itself cannot “retroactively cure intolerable state conduct” (para. 82), its significance here is that it serves as a yardstick against which to measure just how serious Ms. Tremblay’s conduct was perceived by the defence. The fact that defence counsel took no steps for over a year to raise concerns — and then, almost by accident in the context of a s. 11(b) delay motion — sheds important light on this subject. The trial judge erred in failing to take this into account.

[66] Manifestly, Ms. Tremblay’s misconduct was serious enough to warrant proceeding to the second stage of the test. That said, in my respectful view, when the mitigating factors which the trial judge failed to consider are taken into account, the trial judge’s conclusion that the threats amounted to [TRANSLATION] “an abuse of the worst kind” is simply not borne out (para. 78).

[67] Turning to the second stage of the test, as no argument was made that there was an alternate remedy capable of redressing the particular harm caused to the integrity of the justice system by the threats, I need not finally decide whether such a remedy was available. Instead, I turn to the third stage of the test, namely, whether Ms. Tremblay's conduct was sufficiently egregious to warrant a stay of proceedings.

[68] The answer lies in the balancing process — an exercise which the trial judge did not undertake. The question at this stage is whether the integrity of the justice system is better preserved by staying the proceedings, or proceeding to a trial in the face of the Crown's threatening conduct.

[69] This balancing requires weighing the seriousness of the misconduct against the societal interest in having a trial. At this stage, the very serious nature of the charges facing the appellants — 22 charges concerning firearms, illegal drugs, and organized crime — looms large. Society has a profound interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits. When the impugned misconduct — threats uttered more than a year before trial by a Crown no longer on the case — is weighed against society's interest in a trial, I am satisfied that this is not one of the "clearest of cases" where the exceptional remedy of a stay of proceedings is warranted.

[70] The appellants contend that this case is analogous to *United States of America v. Cobb*, [2001 SCC 19](#), [2001] 1 S.C.R. 587, a case in which this Court upheld a stay of proceedings. In *Cobb*, the accused were facing extradition proceedings from Canada to the United States. They were granted a stay after the American prosecutor on the file hinted to the media that uncooperative fugitives would be subjected to rape in prison, and the judge presiding over their trial in the United States commented that uncooperative defendants would get the maximum jail sentence legally available.

[71] This case is a far cry from *Cobb*. In *Cobb*, the American prosecutor had threatened the accused with sexual violence. Here, the Crown threatened to charge the accused with

additional offences if they did not plead guilty. While that was improper, the threats related to something she could have done legally under s. 574(1)(b) of the *Criminal Code*. Moreover, the decision to stay the proceedings in *Cobb* was motivated in large part by the fact that the prosecutor who made the threats remained in charge of the prosecutions. This Court noted that extraditing the accused would return them to an “ominous climate” in which the American prosecutor and judge would play a “large, if not decisive role” in determining their “ultimate fate” (*Cobb*, at para. 43). Here, Ms. Tremblay was off the case long before trial. In my view, *Cobb* provides little or no assistance to the appellants.

VI. Conclusion

[72] In deciding that a stay of proceedings is unwarranted in this case, I have assessed the three forms of alleged misconduct individually. The Crown’s conduct in securing Mr. Piccirilli’s medical records occasioned no prejudice to the integrity of the justice system. The harm caused by the finding of police collusion was curable through an alternate remedy: excluding the firearm from evidence against both appellants. And the Crown’s threatening conduct, while reprehensible, did not approximate the type of shocking conduct needed to justify a stay.

[73] This case lent itself to an individualistic approach. The three alleged instances of misconduct were separate and distinct, committed at different times by different players. There was no link between them. And in only one instance — the Crown’s threatening behaviour — was it necessary to consider the third stage of the test and balance the Crown’s misconduct against society’s interest in a trial on the merits. That said, I should not be taken as suggesting that an individualistic approach should always be followed. Indeed, a judge who is required to balance several instances of misconduct against the societal interest in a trial will almost certainly wish to consider the conduct cumulatively and in its full context. As well, there may be cases where the nature and number of incidents, though individually unworthy of a stay, will require one when considered together. But this is not such a case.

[74] For these reasons, I would dismiss the appeals.

The following are the reasons delivered by

[75] ABELLA J. (dissenting) — A stay should only be imposed in the clearest of cases, as Justice Moldaver points out, since it has the effect of precluding proceedings which determine the merits of a case, something to which the public — and the parties — are entitled. But the public is also entitled to have confidence in the integrity of the justice system. A Crown who makes threats intended to bully an accused into foregoing his or her right to a trial, takes fatal aim at the heart of the public’s confidence in that integrity.

Analysis

[76] A stay may be justified for an abuse of process under the residual category when the state’s conduct “contravenes fundamental notions of justice and thus undermines the integrity of the judicial process” (*R. v. O’Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411, at para. 73). A stay may be justified, in exceptional circumstances, when the conduct “is so egregious that the mere fact of going forward [with the trial] in the light of it [would] be offensive” (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391, at para. 91).

[77] There are two public interests at play: “the affront to fair play and decency” and “the effective prosecution of criminal cases”. Where the affront is “disproportionate”, the administration of justice is “best served by staying the proceedings” (*R. v. Conway*, [1989 CanLII 66 \(SCC\)](#), [1989] 1 S.C.R. 1659, at p. 1667).

[78] In other words, when the conduct is so profoundly and demonstrably inconsistent with the public perception of what a fair justice system requires, proceeding with a trial means condoning unforgivable conduct.

[79] The Crown who is the focus of this appeal threatened one of the co-accused, Sergio Piccirilli, on three separate occasions. The threats were made twice to Mr. Piccirilli personally and

once to his lawyer. All were to the effect that if Mr. Piccirilli did not plead guilty, he would be charged with additional, serious offences. By the time the trial started several months after the last threat, the Crown was on medical leave and a new Crown was assigned to the case. New charges were in fact brought.

[80] The trial judge concluded that the Crown's conduct was in "bad faith", "unacceptable", "intolerable", "unjustifiable", and was one of the "exceptional and rare cases" that justified a stay.

[81] The Court of Appeal agreed that the threats were "unacceptable" and "outrageous", but found that the trial judge erred in imposing a stay because he did not undertake a sufficient balancing or sufficiently consider the context. That context included the fact that the threats were made more than a year before the trial began, that counsel did not react immediately, and that the Crown was replaced for health reasons months before the trial started. In other words, the impact of the threats was mitigated by the passage of time and the change in personnel.

[82] With great respect, however, the passage of time does not operate to attenuate what was unpardonable conduct. Time is not a legal remedy for a fundamental breach of the Crown's role, and cannot retroactively cure intolerable state conduct. The reason, therefore, that the trial judge did not mention the passage of time in assessing the impact of the threats on the public's confidence in a fair justice system, is that it was not relevant. It was the fact that the threats were made at all that was key, not when they were made (*United States of America v. Shulman*, 2001 SCC 21 (CanLII), [2001] 1 S.C.R. 616).

[83] Moreover, I am not persuaded that a balancing exercise was required here. The trial judge was unequivocal in concluding that the abuse justified a stay. There was none of the uncertainty as to the propriety of a stay that this Court said was a condition precedent to the need for a balancing exercise (*Tobiass*, at para. 92; *R. v. Regan*, 2002 SCC 12 (CanLII), [2002] 1 S.C.R. 297, at para. 57).

[84] But in any event, it is not at all clear to me how one goes about such a balancing. When a trial judge has concluded that conduct is “so egregious that the mere fact of going forward in the light of it will be offensive” (*Tobiass*, at para. 91), against what does one balance that singularly egregious state conduct? When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public’s sense of justice, it seems to me to be conceptually inconsistent to nonetheless ask the court to undermine its own conclusion by reweighing the half of the scale that contains the public’s interest in trials on the merits. It is one thing to require that trial judges look at the “competing interests at play” (*R. v. Bellusci*, 2012 SCC 44 (CanLII), [2012] 2 S.C.R. 509, at para. 29) before concluding that the state conduct could not be condoned, but how, having concluded that it could not be condoned, can such conduct be subjected to yet *another* balancing of factors to determine whether it is nonetheless pardonable?

[85] Of course the public has an interest in trials on the merits, but it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual’s loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public’s interest in the results of a trial must yield to the transcendent interest in protecting the public’s confidence in the integrity of the justice system.

[86] In *Bellusci*, this Court cautioned appellate courts to exercise restraint with respect to the findings of the trial judge, intervening only if the trial judge “misdirects himself or if his decision is so clearly wrong as to amount to an injustice” (para. 17; see also *Regan*, at para. 117; *Tobiass*, at para. 87). There was no such misdirection or injustice here. On the contrary, the trial judge concluded that a stay was justified in order to *prevent* an injustice to the justice system itself. I agree.

[87] I would allow the appeals.

Solicitors for the appellant Antal Babos: Étude Légale Franco Schiro, Montréal.

Solicitors for the appellant Sergio Piccirilli: Pilon & Associés, Montréal.

Solicitor for the respondent: Public Prosecution Service of Canada, Montréal and Ottawa.

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

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

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

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

[5] At this stage, whether the impugned conduct is a systemic and ongoing problem or lies purely in the past may also become relevant. Where the conduct is ongoing and systemic, it may be more difficult for the court to dissociate itself from it with anything less than a stay.

[6] Admittedly, the Crown’s initial refusal to disclose the source of the information was bizarre, but this refusal was short-lived.

[7] Section 574(1)(b) of the *Criminal Code* allows the Crown to lay additional charges, supported by the evidence that has been adduced at the preliminary inquiry.

[8] Fresh evidence was tendered before this Court in which Ms. Tremblay denies ever having made the threats in question. Given the disposition of the appeal, this evidence is irrelevant and there is no need to consider the Crown’s motion to adduce it.

Tab 4

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817

Source:	Supreme Court of Canada
Date:	1999-07-09
File number:	25823
Other citations:	174 DLR (4th) 193 — 243 NR 22 — 89 ACWS (3d) 777 — AZ-99111041 — 14 Admin LR (3d) 173 — 1 Imm LR (3d) 1 — [1999] CarswellNat 1124 — EYB 1999-13279 — JE 99-1412 — [1999] FCJ No 39 (QL) — [1999] SCJ No 39 (QL) — [1999] ACS no 39
Citation:	Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817, < https://canlii.ca/t/1fqjk >, retrieved on 2026-03-20
Most recent unfavourable mention	Saeedy v. Canada (Citizenship and Immigration) , 2025 FC 354 (CanLII) [...] [23] Given that the Applicant was self represented, many of the issues he discussed related to procedural fairness despite not using the term. Baker outlines several factors that are relevant in determining the content of the duty of fairness, including the nature of the decision, the statutory scheme, the importance of the [...]

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

Mavis Baker

Appellant

and

**The Canadian Council of Churches,
the Canadian Foundation for Children, Youth and the Law,
the Defence for Children International-Canada,
the Canadian Council for Refugees,
and the Charter Committee on Poverty Issues**

Interveners

Indexed as: Baker v. Canada (Minister of Citizenship and Immigration)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

on appeal from the federal court of appeal

Immigration -- Humanitarian and compassionate considerations -- Children's interests -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad -- Application denied without hearing or formal reasons -- Whether procedural fairness violated -- Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) -- Immigration Regulations, 1978, SOR/93-44, s. 2.1 -- Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law -- Procedural fairness -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad -- Whether

participatory rights accorded consistent with duty of procedural fairness -- Whether failure to provide reasons violated principles of procedural fairness -- Whether reasonable apprehension of bias.

Courts -- Appellate review -- Judge on judicial review certifying question for consideration of Court of Appeal -- Legal effect of certified question -- Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).

Immigration -- Humanitarian and compassionate considerations -- Standard of review of humanitarian and compassionate decision -- Best interests of claimant's children -- Approach to be taken in reviewing humanitarian and compassionate decision where children affected.

Administrative law -- Review of discretion -- Approach to review of discretionary decision making.

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court -- Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the

best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?” The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer’s decision, was stayed pending the result of this appeal.

Held: The appeal should be allowed.

Per L’Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive,

attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

Per Cory and Iacobucci JJ.: The reasons and disposition of L'Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

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(1986), 159 C.L.R. 656; *Williams v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4972 (FCA), [1997] 2 F.C. 646; **referred to:** *Ramoutar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2972 (FC), [1993] 3 F.C. 370; *Minister of Employment and Immigration v. Jiminez-Perez*, 1984 CanLII 127 (SCC), [1984] 2 S.C.R. 565; *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643; *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 1987 CanLII 9887 (FC), 3 Imm. L.R. (2d) 81; *Said v. Canada (Minister of Employment and Immigration)* (1992), 1992 CanLII 14729 (FC), 6 Admin. L.R. (2d) 23; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879; *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105; *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525; *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 1995 CanLII 19400 (FC), 33 Imm. L.R. (2d) 57; *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 9488 (FCA), [1989] 3 F.C. 16; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 1994 CanLII 18483 (FC), 76 F.T.R. 1; *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310; *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531; *Norton Tool Co. v. Tewson*, 1905 CanLII 109 (NWT SC), [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120; *Orlowski v. British Columbia (Attorney-General)* (1992), 1992 CanLII 878 (BC CA), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 1982 CanLII 3265 (NS CA), 55 N.S.R. (2d) 71; *Taabaa v. Refugee Status Advisory Committee*, 1980 CanLII 4166 (FC), [1980] 2 F.C. 316; *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 1996 CanLII 4829 (NB CA), 179 N.B.R. (2d) 43; *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC),

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By Iacobucci J.

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APPEAL from a judgment of the Federal Court of Appeal, [1996 CanLII 3884 \(FCA\)](#), [1997] 2 F.C. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] F.C.J. No. 1726 (QL), dismissing an appeal from a judgment of Simpson J. (1995), [1995 CanLII 19414 \(FC\)](#), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] F.C.J. No. 1441 (QL), dismissing an application for judicial review. Appeal allowed.

Roger Rowe and Rocco Galati, for the appellant.

Urszula Kaczmarczyk and Cheryl D. Mitchell, for the respondent.

Sheena Scott and *Sharryn Aiken*, for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees.

John Terry and *Craig Scott*, for the intervener the Charter Committee on Poverty Issues.

Barbara Jackman and *Marie Chen*, for the intervener the Canadian Council of Churches.

The judgment of L’Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ. was delivered by

1 L’HEUREUX-DUBÉ J. -- Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children’s interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children

(who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that, although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter dated April 18, 1994 and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN

Says only two children are in her "direct custody". (No info on who has ghe [sic] other two).

There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.

Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -

Letter of Aug. '93 from psychiatrist from Ont. Govm't.

Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.

Lawyer says PS [sic] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

This case is a catastrophe [sic]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence - see charge of "assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation

has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

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82.1 (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court -- Trial Division.

83. (1) A judgment of the Federal Court -- Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court -- Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

114. . . .

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. *Federal Court -- Trial Division* (1995), [1995 CanLII 19414 \(FC\)](#), 101 F.T.R. 110

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that

Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a "serious question of general importance" under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?"

B. *Federal Court of Appeal*, [1996 CanLII 3884 \(FCA\)](#), [1997] 2 F.C. 127

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to

avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision "concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

IV. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

(1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?

(2) Were the principles of procedural fairness violated in this case?

(i) Were the participatory rights accorded consistent with the duty of procedural fairness?

(ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?

(iii) Was there a reasonable apprehension of bias in the making of this decision?

(3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

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I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

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V. Analysis

A. *Stated Questions Under Section 83(1) of the Immigration Act*

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, that the requirement, in s. 83(1), that a “serious question of general importance” be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998 CanLII 778 \(SCC\)](#), [1998] 1 S.C.R. 982, at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

The certification of a “question of general importance” is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment and Immigration)*, [1993 CanLII 2972 \(FC\)](#), [1993] 3 F.C. 370 (T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a “question of general importance” has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. *The Statutory Scheme and the Nature of the Decision*

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13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the Act, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the Regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Minister of Employment and Immigration v. Jiminez-Perez*, 1984 CanLII 127 (SCC),

[1984] 2 S.C.R. 565, at p. 569. In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the Regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first,

whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, has become established, and has become an “illegal de facto resident”, and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if “unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada”. The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person’s home country should also be considered.

C. Procedural Fairness

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18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person’s right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker’s

arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects “the rights, privileges or interests of an individual” is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 1987 CanLII 9887 (FC), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 1992 CanLII 14729 (FC), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 1994 CanLII 19725 (FCA), 170 N.R. 238 (F.C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, at p. 683, it was held that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making”. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface, supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l’Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879, at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”: *Old St. Boniface, supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is

provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980 CanLII 10 \(SCC\)](#), [1980] 1 S.C.R. 1105, at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991 CanLII 74 \(SCC\)](#), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), [1995 CanLII 19400 \(FC\)](#), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989 CanLII 9488 \(FCA\)](#), [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, “Legitimate Expectation and its Application to Canadian Immigration Law” (1992), 8 *J.L. & Social Pol’y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), [1994 CanLII 18483 \(FC\)](#), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the “circumstances” affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans, supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight

must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(2) Legitimate Expectations

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29 I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H & C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H & C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the

duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

(3) Participatory Rights

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30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court -- Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result -- the claimant and his or her close family members -- and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable

flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah, supra*, at p. 239, that the duty of fairness owed in these circumstances is simply “minimal”. Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said, supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children’s Aid Society and from her psychiatrist. These documents were before the

decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah, supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157, at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), [1995 CanLII 19485 \(FC\)](#), 26 Imm. L.R. (2d) 170 (F.C.T.D.), and *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62, it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241, an H & C decision was set aside because the

decision-making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. City of Edmonton*, [1978 CanLII 17 \(SCC\)](#), [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987 CanLII 19 \(SCC\)](#), [1987] 2 S.C.R. 219, at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal. . . .

The importance of reasons was recently reemphasized by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997 CanLII 317 \(SCC\)](#), [1997] 3 S.C.R. 3, at paras. [180-81](#).

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to

see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R. A. Macdonald and D. Lametti, “Reasons for Decision in Administrative Law” (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4972 (FCA), [1997] 2 F.C. 646 (C.A.), at para. 38. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond, supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it “might in some cases induce a lack of candour on the part of the administrative officers concerned”. Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of “archival” reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M. H. Morris, “Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate” (1997), 11 *C.J.A.L.P.* 155, at pp. 164-68; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1

A.C. 531, imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances, a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, 1905 CanLII 109 (NWT SC), [1973] 1 W.L.R. 45 (N.I.R.C.), at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney-General)* (1992), 1992 CanLII 878 (BC CA), 94 D.L.R. (4th) 541 (B.C.C.A.), at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 1982 CanLII 3265 (NS CA), 55 N.S.R. (2d) 71 (C.A.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabaa v. Refugee Status Advisory Committee*, 1980 CanLII 4166 (FC), [1980] 2 F.C. 316 (T.D.), imposed a reasons requirement on a ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 1996 CanLII 4829 (NB CA), 179 N.B.R. (2d) 43 (C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams, supra*.

43

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44

In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46

The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1976 CanLII 2 \(SCC\)](#), [1978] 1 S.C.R. 369, at p. 394:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484, at para. 11, *per* Major J.; at para. 31, *per* L’Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623; *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not

believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the “system” interfered with his duty to consider impartially whether the appellant’s admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. Review of the Exercise of the Minister’s Discretion

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the “serious question of general importance” which was certified by Simpson J. relating to the approach to be taken to children’s interests when reviewing the exercise of the discretion conferred by the Act and the Regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to her show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the Regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that “[t]he Minister is . . . authorized to” grant an exemption or otherwise facilitate the admission to Canada of any person “where the Minister is satisfied that” this should be done “owing to the existence of compassionate or humanitarian considerations”. This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the “pragmatic and functional” approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, [1988 CanLII 30 \(SCC\)](#), [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993 CanLII 164 \(SCC\)](#), [1993] 1 S.C.R. 554, at pp. 601-7, *per* L’Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994 CanLII 103 \(SCC\)](#), [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997 CanLII 385 \(SCC\)](#), [1997] 1 S.C.R. 748; and *Pushpanathan*, *supra*.

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231. A general doctrine of “unreasonableness” has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker’s jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038).

It is, however, inaccurate to speak of a rigid dichotomy of “discretionary” or “non-discretionary” decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves

considerable discretion to clarify, fill in legislative gaps, and make choices among various options.

As stated by Brown and Evans, *supra*, at p. 14-47:

The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim, supra*, at pp. 589-90; *Southam, supra*, at para. 30; *Pushpanathan, supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam, supra*.

Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the “proper purposes” or “relevant considerations” involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

(2) The Standard of Review in This Case

I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan, supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without

leave of the Federal Court -- Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a “serious question of general importance” by the Federal Court -- Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively “open-textured” legal principles, a factor militating in favour of greater deference: *Pushpanathan, supra*, at para. 36. The purpose of the provision in question is also to exempt applicants, in certain circumstances, from the requirements of the Act or its Regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to the determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, were unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary

foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the “serious question of general importance” stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of “H & C factors”, read as follows:

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

65 In my opinion, the approach taken to the children’s interests shows that this decision was unreasonable in the sense contemplated in *Southam, supra*. The officer was completely dismissive of the interests of Ms. Baker’s children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of “deference as respect” as follows:

Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . .

(D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon “compassionate or humanitarian considerations” (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person’s admission should be facilitated owing to the existence of such considerations. They show Parliament’s intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez, supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children’s rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children’s interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) *The Objectives of the Act*

68 The objectives of the Act include, in s. 3(c):

to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(c).

(b) *International Law*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications, supra*; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697.

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that “childhood is entitled to special care and assistance”. A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child “needs special safeguards and care”. The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the “humanitarian” and “compassionate” considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah, supra*, at p. 239, that a s. 114(2) decision is "wholly a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. *Conclusions and Disposition*

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

The reasons of Cory and Iacobucci JJ. were delivered by

78 IACOBUCCI J. - I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can.

T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation

enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

Appeal allowed with costs.

Solicitors for the appellant: Roger Rowe and Rocco Galati, North York.

Solicitor for the respondent: The Deputy Attorney General of Canada, Toronto.

Solicitor for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees: The Canadian Foundation for Children, Youth and the Law, Toronto.

Solicitors for the intervener Charter Committee on Poverty Issues: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the intervener the Canadian Council of Churches: Jackman and Associates, Toronto.

Tab 5

The British Columbia Human Rights Commission, the Commissioner of Investigation and Mediation, the British Columbia Human Rights Tribunal and Andrea Willis *Appellants*

v.

Robin Blencoe *Respondent*

and

Irene Schell *Intervener*

and

The Attorney General for Ontario, the Attorney General of British Columbia, the Saskatchewan Human Rights Commission, the Ontario Human Rights Commission, the Nova Scotia Human Rights Commission, the Manitoba Human Rights Commission, the Canadian Human Rights Commission, the Commission des droits de la personne et des droits de la jeunesse, the British Columbia Human Rights Coalition and the Women's Legal Education and Action Fund *Interveners*

INDEXED AS: BLENCOE v. BRITISH COLUMBIA (HUMAN RIGHTS COMMISSION)

Neutral citation: 2000 SCC 44.

File No.: 26789.

2000: January 24; 2000: October 5.

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

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Constitutional law — Charter of Rights — Application — Human Rights Commission — Commission implementing specific governmental program and exercising statutory authority — Commission independent

La British Columbia Human Rights Commission, le Commissioner of Investigation and Mediation, le British Columbia Human Rights Tribunal et Andrea Willis *Appelants*

c.

Robin Blencoe *Intimé*

et

Irene Schell *Intervenante*

et

Le procureur général de l'Ontario, le procureur général de la Colombie-Britannique, la Saskatchewan Human Rights Commission, la Commission ontarienne des droits de la personne, la Nova Scotia Human Rights Commission, la Commission des droits de la personne du Manitoba, la Commission canadienne des droits de la personne, la Commission des droits de la personne et des droits de la jeunesse, la British Columbia Human Rights Coalition et le Fonds d'action et d'éducation juridiques pour les femmes *Intervenants*

RÉPERTORIÉ: BLENCOE c. COLOMBIE-BRITANNIQUE (HUMAN RIGHTS COMMISSION)

Référence neutre: 2000 CSC 44.

Nº du greffe: 26789.

2000: 24 janvier; 2000: 5 octobre.

Présents: Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Application — Commission des droits de la personne — Commission mettant en œuvre un programme gouvernemental particulier et exerçant un pouvoir conféré par la loi

from government and acting judicially — Whether Canadian Charter of Rights and Freedoms applicable to Commission's actions — Canadian Charter of Rights and Freedoms, s. 32.

Constitutional law — Charter of Rights — Liberty and security of person — Sexual harassment complaints filed against respondent before Human Rights Commission — Lengthy delay in processing complaints — Whether respondent's constitutional rights to liberty and security of person engaged — Canadian Charter of Rights and Freedoms, s. 7.

Administrative law — Abuse of process — Delay — Sexual harassment complaints filed against respondent before Human Rights Commission — Lengthy delay in processing complaints — Whether respondent's ability to have fair hearing compromised — Whether lengthy delay amounted to denial of natural justice or abuse of process.

In March 1995, while serving as a minister in the Government of British Columbia, the respondent was accused by one of his assistants of sexual harassment. A month later, the premier removed the respondent from Cabinet and dismissed him from the NDP caucus. In July and August of 1995, two complaints of discriminatory conduct in the form of sexual harassment were filed with the British Columbia Council of Human Rights (now the British Columbia Human Rights Commission) against the respondent by two other women, W and S. The complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. The respondent was informed of the first complaint in July 1995 and of the second in September 1995. After the Commission's investigation, hearings were scheduled before the British Columbia Human Rights Tribunal in March 1998, over 30 months after the initial complaints were filed.

Following the allegations against the respondent, media attention was intense. He suffered from severe depression. He did not stand for re-election in 1996. Considering himself "unemployable" in British Columbia due to the outstanding human rights complaints against him, the respondent commenced judicial review proceedings in November 1997 to have the complaints stayed. He claimed that the Commission had lost jurisdiction due to unreasonable delay in processing the complaints. The respondent alleged that the unreasona-

— Commission indépendante du gouvernement et agissant de manière judiciaire — La Charte canadienne des droits et libertés s'applique-t-elle aux actes de la Commission? — Charte canadienne des droits et libertés, art. 32.

Droit constitutionnel — Charte des droits — Liberté et sécurité de la personne — Plaintes de harcèlement sexuel déposées contre l'intimé auprès de la Commission des droits de la personne — Long délai écoulé dans le traitement des plaintes — Les droits constitutionnels de l'intimé à la liberté et à la sécurité de sa personne s'appliquent-ils? — Charte canadienne des droits et libertés, art. 7.

Droit administratif — Abus de procédure — Délai — Plaintes de harcèlement sexuel déposées contre l'intimé auprès de la Commission des droits de la personne — Long délai écoulé dans le traitement des plaintes — La capacité de l'intimé d'obtenir une audience équitable a-t-elle été compromise? — Le long délai écoulé constituait-il un déni de justice naturelle ou un abus de procédure?

En mars 1995, alors qu'il était ministre au sein du gouvernement de la Colombie-Britannique, l'intimé a été accusé de harcèlement sexuel par l'une de ses adjointes. Un mois plus tard, le premier ministre l'excluait du Cabinet et du caucus du NPD. En juillet et en août 1995, deux autres femmes, W et S, ont déposé devant le British Columbia Council of Human Rights (maintenant la British Columbia Human Rights Commission) deux plaintes de discrimination sous forme de harcèlement sexuel contre l'intimé. Les plaintes concernaient divers épisodes de harcèlement sexuel qui seraient survenus entre mars 1993 et mars 1995. L'intimé a été informé de la première plainte en juillet 1995 et de la seconde en septembre 1995. À la suite de l'enquête de la Commission, des audiences devant le British Columbia Human Rights Tribunal ont été fixées au mois de mars 1998, soit plus de 30 mois après le dépôt des plaintes initiales.

Les allégations formulées contre l'intimé ont suscité une attention intense de la part des médias. Il a fait une grave dépression. Il n'a pas sollicité un nouveau mandat en 1996. Se disant «inapte au travail» en Colombie-Britannique en raison des plaintes fondées sur les droits de la personne qui pesaient toujours contre lui, l'intimé a présenté, en novembre 1997, une demande de contrôle judiciaire en vue d'obtenir l'arrêt des procédures relatives aux plaintes. Il a fait valoir que la Commission avait perdu compétence en raison d'un délai déraisonna-

ble delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice. His petition was dismissed by the Supreme Court of British Columbia. A majority of the Court of Appeal allowed the respondent's appeal and directed that the human rights proceedings against him be stayed. The majority found that the respondent had been deprived of his right under s. 7 of the *Canadian Charter of Rights and Freedoms* to security of the person in a manner which was not in accordance with the principles of fundamental justice.

Held (Iacobucci, Binnie, Arbour and LeBel JJ. dissenting in part): The appeal should be allowed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ.: The *Charter* applies to the actions of the British Columbia Human Rights Commission. The Commission is created by statute and all of its actions are taken pursuant to statutory authority. Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion. Further, the Commission cannot escape *Charter* scrutiny merely because it exercises judicial functions. The ultimate source of authority is government. The Commission is carrying out the legislative scheme of the *Human Rights Code* and must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally. It is the administration of a governmental program that calls for *Charter* scrutiny.

Section 7 of the *Charter* can extend beyond the sphere of criminal law, at least where there is state action which directly engages the justice system and its administration. If a case arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged.

In order for s. 7 to be triggered, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. The liberty interest protected by s. 7 is no longer restricted to mere freedom from physical restraint. "Liberty" is engaged where state compulsions or prohibitions affect

ble dans le traitement des plaintes. L'intimé a allégué que ce délai déraisonnable avait causé à sa famille et à lui-même un préjudice grave équivalant à un abus de procédure et à un déni de justice naturelle. Sa demande a été rejetée par la Cour suprême de la Colombie-Britannique. La Cour d'appel, à la majorité, a accueilli l'appel de l'intimé et a ordonné l'arrêt des procédures en matière de droits de la personne qui avaient été engagées contre lui. Les juges majoritaires ont conclu que l'intimé avait été privé, d'une manière non conforme aux principes de justice fondamentale, du droit à la sécurité de sa personne que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*.

Arrêt (les juges Iacobucci, Binnie, Arbour et LeBel sont dissidents en partie): Le pourvoi est accueilli.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major et Bastarache: La *Charte* s'applique aux actes de la British Columbia Human Rights Commission. La Commission a été créée par une loi et elle accomplit tous ses actes en vertu du pouvoir que lui confère la loi en cause. L'organisme qui exerce un pouvoir conféré par une loi est assujéti à la *Charte* même s'il peut être indépendant du gouvernement. La Commission dont il est question en l'espèce met en œuvre un programme gouvernemental particulier et exerce des pouvoirs de contrainte émanant de la loi. En outre, la Commission ne peut pas échapper à un examen fondé sur la *Charte* du seul fait qu'elle exerce des fonctions judiciaires. L'origine du pouvoir accordé est en fin de compte le gouvernement. La Commission applique le régime législatif du *Human Rights Code* et doit agir dans les limites de sa loi habilitante. Les fonctions d'une commission des droits de la personne créée par le gouvernement pour promouvoir l'égalité dans la société en général sont clairement de «nature gouvernementale». C'est l'application d'un programme gouvernemental qui commande l'examen fondé sur la *Charte*.

L'article 7 de la *Charte* peut déborder le cadre du droit criminel, au moins dans le cas d'un acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice. Rien ne s'oppose à ce que cet article s'applique à une affaire en matière de droits de la personne qui, sur le plan des faits, respecte les conditions préliminaires de son application.

Pour que l'art. 7 s'applique, il faut d'abord prouver que le droit visé par l'allégation de l'intimé relève de l'art. 7. Le droit à la liberté garanti par l'art. 7 ne s'entend plus uniquement de l'absence de toute contrainte physique. La «liberté» est en cause lorsque des contraintes ou des interdictions de l'État influent sur les

important and fundamental life choices. The s. 7 liberty interest protects an individual's personal autonomy. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. Such personal autonomy, however, is not synonymous with unconstrained freedom. Here, the state has not prevented the respondent from making any "fundamental personal choices". Therefore, the interests sought to be protected in this case do not fall within the "liberty" interest protected by s. 7.

The right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious. In this case, the direct cause of the harm to the respondent was not the state-caused delay in the human rights process. While the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, for s. 7 to be engaged there must be a sufficient causal connection between the state-caused delay and the prejudice suffered. The most prejudicial impact on the respondent was caused not by the actions of the Commission but rather by the events prior to the complaints — the allegations of the respondent's assistant — which caused the respondent to be ousted from Cabinet and caucus as well as the actions by non-governmental actors such as the press. The harm to the respondent resulted from the publicity surrounding the allegations themselves, coupled with the political fallout which ensued. When the respondent began to experience stigma, the human rights proceedings had yet to commence. Further, there is a pending civil suit against the respondent for sexual harassment and W's complaint against the Government on these very same issues. The prolongation of stigma from ongoing publicity was likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name. Lastly, the human rights process did not seriously exacerbate the respondent's prejudice. It is difficult to see how procedural delay could have seriously increased damage already done to the respondent's reputation.

Even accepting that the outstanding complaints may have contributed to the respondent's stigma to some degree, thereby causing some of his suffering, and assuming without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to the respondent, the state interference with the respon-

choix importants et fondamentaux qu'une personne peut faire dans sa vie. Le droit à la liberté garanti par l'art. 7 protège l'autonomie personnelle. Dans notre société libre et démocratique, chacun a le droit de prendre des décisions d'importance fondamentale sans intervention de l'État. Cette autonomie personnelle n'est toutefois pas synonyme de liberté illimitée. Dans la présente affaire, l'État n'a pas empêché l'intimé de faire des «choix personnels fondamentaux». Par conséquent, les droits que l'on cherche à protéger en l'espèce ne font pas partie du droit «à la liberté» garanti par l'art. 7.

Le droit à la sécurité de la personne garanti par l'art. 7 protège l'intégrité psychologique d'une personne. Cependant, pour que ce droit soit en cause, le préjudice psychologique doit résulter d'un acte de l'État et doit être grave. En l'espèce, la cause directe du préjudice subi par l'intimé n'était pas le délai imputable à l'État dans le déroulement du processus en matière de droits de la personne. Bien que les allégations de harcèlement sexuel dont l'intimé a fait l'objet lui aient causé un préjudice grave, il doit y avoir un lien de causalité suffisant entre le délai imputable à l'État et le préjudice subi pour que l'art. 7 s'applique. L'effet le plus préjudiciable sur l'intimé résulte non pas des actes de la Commission, mais plutôt d'événements antérieurs au dépôt des plaintes — les allégations de l'adjointe de l'intimé — qui ont entraîné son expulsion du Cabinet et du caucus, ainsi que du comportement d'acteurs non gouvernementaux comme les journalistes. Le préjudice subi par l'intimé est imputable à la publicité ayant entouré les allégations elles-mêmes et aux retombées politiques qui ont suivi. Les procédures en matière de droits de la personne n'avaient pas encore commencé lorsque l'intimé a commencé à être victime d'une stigmatisation. En outre, l'intimé fait toujours l'objet de poursuites civiles pour harcèlement sexuel et W a déposé une plainte contre le gouvernement pour les mêmes motifs. Il était probable que la stigmatisation résultant de la publicité incessante se poursuivrait peu importe le délai écoulé dans les procédures en matière de droits de la personne. Au mieux, l'intimé a été privé de la possibilité de se disculper rapidement. Enfin, le processus en matière de droits de la personne n'a pas sérieusement aggravé le préjudice subi par l'intimé. On voit mal comment un délai de procédure pourrait avoir sérieusement accru le préjudice déjà causé à la réputation de l'intimé.

Même si on reconnaît que les plaintes dont l'intimé faisait l'objet peuvent avoir contribué jusqu'à un certain point à sa stigmatisation et avoir ainsi causé certaines de ses souffrances, et même si on présume, sans pour autant le décider, qu'il existe un lien suffisant entre le délai imputable à l'État et le préjudice subi par l'intimé,

dent's psychological integrity did not amount to a violation of his right to security of the person. First, the s. 7 rights of "liberty and security of the person" do not include a generalized right to dignity, or more specifically a right to be free from the stigma associated with a human rights complaint. While respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the *Charter*, this does not mean that dignity is elevated to a free-standing constitutional right protected by s. 7. The notion of "dignity" is better understood as an underlying value. Like dignity, reputation is not a free-standing right. Neither is freedom from stigma. Second, the state has not interfered with the ability of the respondent and his family to make essential life choices. In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity. It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. Here, the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent is essentially confined to his personal hardship.

There is no constitutional right outside the criminal context to be "tried" within a reasonable time. The majority of the Court of Appeal erred in transplanting s. 11(b) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal and human rights proceedings, but, more importantly, s. 11(b) of the *Charter* is restricted to a pending criminal case.

There are remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. There must be proof of significant prejudice which results from an unacceptable delay. Here, the respondent's ability to have a fair hearing has

l'atteinte de l'État à l'intégrité psychologique de l'intimé ne constituait pas une atteinte à son droit à la sécurité de sa personne. Premièrement, les droits «à la liberté et à la sécurité de [l]a personne» garantis par l'art. 7 ne comportent pas un droit général à la dignité ou, plus précisément, un droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne. Bien que le respect de la dignité inhérente des gens soit nettement une valeur essentielle de notre société libre et démocratique, qui doit guider les tribunaux dans l'interprétation de la *Charte*, cela ne signifie pas pour autant que l'on fait de la dignité un droit constitutionnel distinct garanti par l'art. 7. Il vaut mieux considérer la notion de «dignité» comme une valeur sous-jacente. À l'instar de la dignité, la réputation n'est pas un droit distinct. La protection contre la stigmatisation ne l'est pas non plus. Deuxièmement, l'État n'a pas porté atteinte à la capacité de l'intimé et des membres de sa famille de faire des choix essentiels dans leur vie. Pour que la sécurité de la personne soit en cause en l'espèce, l'acte reproché à l'État doit avoir eu des répercussions graves et profondes sur l'intégrité psychologique de l'intimé. Ce n'est que dans les cas exceptionnels où l'État s'ingère dans des choix profondément intimes et personnels d'un individu que le délai imputable à l'État, dans des procédures en matière de droits de la personne, pourrait déclencher l'application du droit à la sécurité de la personne garanti par l'art. 7. En l'espèce, le droit allégué à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne ne fait pas partie de cette catégorie restreinte. L'État n'a pas porté atteinte au droit de l'intimé de prendre des décisions touchant son être fondamental. Le préjudice subi par l'intimé se limite essentiellement à ses difficultés personnelles.

Le droit constitutionnel d'être «jugé» dans un délai raisonnable ne s'applique qu'en matière criminelle. La Cour d'appel à la majorité a eu tort de transposer dans des procédures en matière de droits de la personne fondées sur l'art. 7 des principes énoncés relativement à l'al. 11(b) dans le contexte du droit criminel. Non seulement y a-t-il des différences fondamentales entre des procédures criminelles et des procédures en matière de droits de la personne, mais encore l'al. 11(b) de la *Charte* ne s'applique qu'aux affaires criminelles pendantes.

Le droit administratif offre des réparations en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Cependant, le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law. Il faut prouver qu'un délai inacceptable a causé un préjudice important. Dans la présente affaire, la capacité de l'intimé d'obte-

not been compromised. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. Unacceptable delay may also amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. A court must be satisfied that the proceedings are contrary to the interests of justice. There may also be abuse of process where conduct is oppressive. A stay is not the only remedy available for abuse of process in administrative law proceedings and a respondent asking for a stay bears a heavy burden. In this case, the respondent did not demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, the delay in processing the complaints was not inordinate.

The determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay. Here, although the Commission took longer than is desirable to process the complaints, the delay was not so inordinate as to amount to an abuse of process. The case may not have been an extremely complicated one, but the various steps necessary to protect the respondents in the context of the human rights complaints system take time. The trial judge found that only the 24-month period between the filing of the complaints and the end of the investigation process should be considered for the delay, stating that the Human Rights Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates. During that 24-month period, there was no extended period without any activity in the processing of the complaints, except for an inexplicable five months of inaction. The respondent challenged the lateness of the complaints and brought forward allegations of bad faith and, as a result, the process was delayed by eight months. The Commission should not be held responsible for contributing to this part of the delay. When all the relevant factors are taken into account, in particular the ongoing communication between the par-

nir une audience équitable n'a pas été compromise. Il n'a pas été établi que le préjudice subi est assez important pour nuire à l'équité de l'audience. Un délai inacceptable peut également constituer un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Pour constituer un abus de procédure dans les cas où il n'y a aucune atteinte à l'équité de l'audience, le délai doit être manifestement inacceptable et avoir directement causé un préjudice important. Il doit s'agir d'un délai qui, dans les circonstances de l'affaire, déconsidérerait le régime de protection des droits de la personne. La cour doit être convaincue que les procédures sont contraires à l'intérêt de la justice. Il peut également y avoir abus de procédure lorsque la conduite est oppressive. L'arrêt des procédures n'est pas la seule réparation possible dans le cas d'un abus de procédure en matière de droit administratif, et la personne faisant l'objet d'une plainte qui demande l'arrêt des procédures doit s'acquitter d'un lourd fardeau de preuve. En l'espèce, l'intimé n'a pas établi que le délai était inacceptable au point d'être oppressif et de vicier les procédures. Même si le stress et la stigmatisation résultant d'un délai excessif peuvent entraîner un abus de procédure, le délai écoulé dans le traitement des plaintes n'était pas excessif.

La question de savoir si un délai est excessif dépend non pas uniquement de la longueur de ce délai, mais de facteurs contextuels, dont la nature de l'affaire et sa complexité, de l'objet et de la nature des procédures ainsi que de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai. Dans la présente affaire, même si la Commission a pris plus de temps que ce qui est souhaitable pour traiter les plaintes, le délai écoulé n'était pas excessif au point de constituer un abus de procédure. Même s'il se peut que l'affaire n'ait pas été extrêmement compliquée, les diverses étapes nécessaires pour assurer la protection de la personne qui fait l'objet d'une plainte fondée sur les droits de la personne allongent d'autant le processus. Le juge de première instance a conclu que seule la période de 24 mois comprise entre le dépôt des plaintes et la fin de l'enquête pouvait être prise en considération pour calculer le délai, disant qu'on ne pouvait reprocher au Tribunal des droits de la personne de ne pas avoir fixé des dates d'audience plus rapprochées, étant donné que l'intimé ne lui avait pas demandé de le faire. Au cours de ces 24 mois, il n'y a pas eu de période prolongée d'inactivité dans le traitement des plaintes, si ce n'est une période inexplicable de cinq mois d'inactivité. L'intimé a présenté une contestation fondée sur le caractère tardif des plaintes et a allégué la mauvaise foi, de sorte que le processus a été retardé de huit mois. La Commis-

ties, the delay in processing the complaints is not one that would offend the community's sense of decency and fairness. Nevertheless, in light of the lack of diligence displayed by the Commission, the Court's discretion under s. 47 of the *Supreme Court Act* should be exercised to award costs against the Commission in favour of the respondent and the complainants.

Per Iacobucci, Binnie, Arbour and LeBel JJ. (dissenting in part): This matter should be resolved on the basis of administrative law principles. It is therefore unnecessary to express a definite opinion on the application of s. 7 of the *Charter*.

Administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to administrative law principles. Unreasonable delays must be identified within the specific circumstances of every case because not all delay is the same and not all administrative bodies are the same. In order to differentiate reasonable and unreasonable delay, courts must remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. In assessing the reasonableness of an administrative delay, three main factors should be balanced: (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body; (2) the causes of delay beyond the inherent time requirements of the matter; and (3) the impact of the delay. A consideration of these factors imposes a contextual analysis.

Here, inefficiency in the Human Rights Commission's handling of this matter has led to abuse of process. First, although serious, the allegations of sexual discrimination against the respondent did not raise complex issues and were not of a nature that could justify a prolonged investigation. There was little to investigate. Even though the inherent time requirements were minimal, in all it took the Commission approximately two years to determine that the complaints should go to a hearing. The time from the initial filing of the complaints to the scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, nothing in the inherent time requirements of the case came close to requiring the delay that occurred. Second, although the respondent sought to use the

sion ne devrait pas être tenue responsable d'avoir contribué à cette partie du délai. Lorsque tous les facteurs pertinents sont pris en considération, notamment la communication constante entre les parties, le délai écoulé dans le traitement des plaintes n'est pas de ceux qui heurteraient le sens de la justice et de la décence de la société. Néanmoins, vu l'absence de diligence manifestée par la Commission, il y a lieu de lui ordonner de payer les dépens de l'intimé et des plaignantes en vertu du pouvoir discrétionnaire que l'art. 47 de la *Loi sur la Cour suprême* confère à notre Cour.

Les juges Iacobucci, Binnie, Arbour et LeBel (dissidents en partie): La présente affaire devrait être réglée en fonction des principes du droit administratif. Il est donc inutile d'exprimer une opinion précise sur l'application de l'art. 7 de la *Charte*.

Le délai administratif jugé déraisonnable en raison de sa durée, de ses causes et de ses effets est abusif et contraire aux principes du droit administratif. Il faut déterminer si un délai est déraisonnable en fonction des circonstances particulières de chaque cas, car les délais ne sont pas tous les mêmes et les organismes administratifs diffèrent les uns des autres. Pour distinguer un délai raisonnable d'un délai déraisonnable, les tribunaux doivent être conscients non seulement des besoins des régimes administratifs soumis à des contraintes, mais aussi des efforts qu'ils déploient de bonne foi en vue d'offrir des protections procédurales aux présumés contrevenants. Pour évaluer le caractère raisonnable d'un délai administratif, trois facteurs principaux doivent être appréciés: (1) le délai écoulé par rapport au délai inhérent à l'affaire dont est saisi l'organisme administratif en cause, (2) les causes de la prolongation du délai inhérent à l'affaire, et (3) l'incidence du délai. L'examen de ces facteurs commande une analyse contextuelle.

La façon inefficace dont la Commission des droits de la personne a traité la présente affaire a donné lieu à un abus de procédure. Premièrement, quoique graves, les allégations de discrimination sexuelle dont faisait l'objet l'intimé ne soulevaient pas des questions complexes et n'étaient pas de nature à justifier la tenue d'une enquête prolongée. Il y avait peu matière à enquête. Même si le délai inhérent était minime, il a fallu environ deux ans en tout à la Commission pour décider que les plaintes feraient l'objet d'une audience. Environ 32 mois se sont écoulés entre le dépôt initial des plaintes et la date fixée pour leur audition. Même s'il est vrai que la Commission a dû franchir un certain nombre d'étapes pour décider que l'affaire ferait l'objet d'une audience, le délai inhérent à l'affaire était loin de correspondre à celui qui s'est écoulé. Deuxièmement, même si l'intimé a tenté

defences available to him, he did not become responsible for the sheer inefficiency of the Commission in dealing with these matters. There was serious delay on both complaints despite the respondent's efforts to find a way to end it. The Commission admits that it cannot explain what was going on for five months of the time that it was dealing with the allegations against the respondent. This five-month lapse is the high mark of the Commission's ineptitude. Third, although the administrative delay was not the only cause of the prejudice suffered by the respondent, it contributed significantly to its aggravation and the Commission did nothing to minimize the impact of the delay. The Commission's conduct in dealing with this matter was less than acceptable. Further, the inefficient and delay-filled process at the Commission harmed all parties involved in the process, including the complainants. In the end, the specific and unexplained delay entitles the respondent to a remedy.

The choice of the appropriate remedy requires a careful analysis of the circumstances of the case and imposes a balancing exercise between competing interests. In human rights proceedings, the interest of the respondent, that of the complainants, and the public interest of the community itself must be considered. The courts must also consider the stage of the proceedings which has been affected by the delay. A distinction must be drawn between the process leading to the hearing and the hearing itself. A different balance between conflicting interests may have to be found at different stages of the administrative process. A stay of proceedings should not generally appear as the sole or even the preferred form of redress. It should be limited to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to the hearing would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. More limited and narrowly focused remedies will be appropriate when it appears that the hearing will remain fair, in spite of the delay, and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. The first objective of any intervention by a court should be to make things happen, where the administrative process is not working adequately. An order for an expedited hearing would be the most practical and effective means of judicial action.

d'invoquer les moyens de défense dont il disposait, il n'est pas devenu responsable de l'inefficacité pure et simple dont la Commission a fait preuve en traitant ces questions. Les deux plaintes ont fait l'objet d'un délai important malgré les efforts de l'intimé pour y mettre fin. La Commission reconnaît qu'elle ne peut pas expliquer ce qui s'est passé durant les cinq mois au cours desquels elle a traité les allégations formulées contre l'intimé. Cet intervalle de cinq mois est le paroxysme de l'ineptie dont la Commission a fait preuve. Troisièmement, même si le délai administratif n'a pas été la seule cause du préjudice subi par l'intimé, il a beaucoup contribué à son aggravation et la Commission n'a rien fait pour réduire au minimum l'incidence du délai. La conduite adoptée par la Commission en traitant cette affaire était moins qu'acceptable. En outre, l'inefficacité et les multiples délais qui ont caractérisé le processus devant la Commission ont lésé toutes les parties à ce processus, y compris les plaignantes. En définitive, le délai inexpliqué en cause justifie d'accorder une réparation à l'intimé.

Le choix de la réparation appropriée requiert une analyse minutieuse des circonstances de l'affaire et commande une évaluation d'intérêts opposés. Dans les procédures en matière de droits de la personne, il faut tenir compte de l'intérêt de l'intimé, de celui des plaignantes et de celui de la collectivité même. Les tribunaux judiciaires doivent également prendre en considération l'étape des procédures qui est touchée par le délai. Une distinction doit être établie entre les procédures menant à l'audience et l'audience elle-même. Une évaluation des intérêts opposés peut se révéler nécessaire à chacune des étapes des procédures administratives. L'arrêt des procédures ne devrait pas généralement être considéré comme la seule réparation possible ni même comme la forme de réparation préférée. Il devrait être limité aux cas où l'équité même de l'audience est compromise et où le délai dans les procédures menant à l'audience constituerait un abus de procédure grossier ou scandaleux. Dans les deux cas, l'intérêt de l'intimé et la protection de l'intégrité du système judiciaire deviennent les facteurs prépondérants. Des réparations plus limitées et mieux ciblées sont appropriées lorsqu'il appert que le délai ne portera pas atteinte à l'équité de l'audience et qu'il ne constitue pas un abus scandaleux en dépit de sa gravité. Toute intervention d'un tribunal judiciaire devrait, d'abord et avant tout, viser à faire avancer les choses lorsque les procédures administratives ne se déroulent pas adéquatement. L'intervention judiciaire la plus pratique et efficace serait d'ordonner la tenue d'une

An order for costs is a third kind of remedy. It will not address the delay directly, but some of its consequences.

In this case, a stay of proceedings appears both excessive and unfair. First, in spite of the seriousness of the problems faced by the respondent, the delay does not seem to compromise the fairness of the hearing. The delay rather concerns the process leading to the hearing. This delay arises from a variety of causes that do not evince an intent on the part of the Commission to harm the respondent wilfully, but rather demonstrate grave negligence and significant structural problems in the processing of the complaints. Second, a stay of proceedings in a situation that does not compromise the fairness of the hearing or amount to shocking or gross abuse requires the consideration of the interest of the complainants. The Court of Appeal completely omitted any consideration of this interest. Here, an order for an expedited hearing should have been considered as the remedy of choice. The stay should be lifted and the Commission should be ordered to pay costs on a party-to-party basis to the respondent in this Court and in the British Columbia courts. It is fair and appropriate to use the power conferred by s. 47 of the *Supreme Court Act*, as the respondent has established that the process initiated against him was deeply flawed and that its defects justified his search for a remedy, at least in administrative law.

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By Bastarache J.

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audience accélérée. L'adjudication de dépens est la troisième réparation possible. Elle touche non pas le délai directement, mais plutôt certaines de ses conséquences.

En l'espèce, l'arrêt des procédures paraît à la fois excessif et inéquitable. Premièrement, malgré la gravité des difficultés éprouvées par l'intimé, le délai ne semble pas compromettre l'équité de l'audience. Il concerne plutôt les procédures menant à l'audience. Ce délai est dû à une gamme de causes qui traduisent non pas l'intention de la Commission de léser délibérément l'intimé, mais plutôt une négligence grave et l'existence de problèmes structurels importants en matière de traitement des plaintes. Deuxièmement, pour ordonner l'arrêt des procédures dans le cas où l'équité de l'audience n'est pas compromise ou dans celui où il n'y a pas d'abus scandaleux ou grossier, il faut tenir compte de l'intérêt du plaignant. La Cour d'appel a complètement omis de tenir compte de cet intérêt. En l'espèce, l'ordonnance enjoignant de tenir une audience accélérée aurait dû être envisagée à titre de réparation appropriée. Il y a lieu d'annuler l'arrêt des procédures et d'ordonner à la Commission de payer à l'intimé des dépens comme entre parties devant notre Cour et les tribunaux de la Colombie-Britannique. Il est juste et opportun d'exercer le pouvoir conféré par l'art. 47 de la *Loi sur la Cour suprême*, étant donné que l'intimé a établi que les procédures engagées contre lui étaient entachées de vices importants qui le justifiaient de demander une réparation au moins fondée sur le droit administratif.

Jurisprudence

Citée par le juge Bastarache

Arrêts non suivis: *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744; *Lignes aériennes Canadien International Ltée c. Canada (Commission des droits de la personne)*, [1996] 1 C.F. 638; *Saskatchewan Human Rights Commission c. Kodellas* (1989), 60 D.L.R. (4th) 143; **arrêts examinés:** *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122; *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL); *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336; **arrêts mentionnés:** *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Mills c. La Reine*, [1986] 1 R.C.S. 863; *R. c. Rahey*, [1987] 1 R.C.S.

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(*Minister of Citizenship and Immigration*) (1996), 113 F.T.R. 234; *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410; *Dee v. Canada (Minister of Citizenship & Immigration)* (1998), 46 Imm. L.R. (2d) 278; *Kiani v. Canada (Minister of Citizenship & Immigration)* (1999), 50 Imm. L.R. (2d) 81; *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315; *R. v. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] 1 Q.B. 606; *Re Preston*, [1985] A.C. 835; *R. v. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] Q.B. 424; *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477; *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL); *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122; *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336; *R. v. Conway*, [1989] 1 S.C.R. 1659; *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

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APPEAL from a judgment of the British Columbia Court of Appeal (1998), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 7 Admin. L.R. (3d) 220, 31 C.H.R.R. D/175, 53 C.R.R. (2d) 189, [1998] 9 W.W.R. 457, [1998] B.C.J. No. 1092 (QL), allowing an appeal from a decision of the British Columbia Supreme Court (1998), 49 B.C.L.R. (3d) 201, 35 C.C.E.L. (2d) 41, 30 C.H.R.R. D/439, [1999] 1 W.W.R. 139, [1998] B.C.J. No. 320 (QL), dismissing the respondent's petition for judicial review and order that proceedings be terminated due to delay. Appeal allowed, Iacobucci, Binnie, Arbour and LeBel JJ. dissenting in part.

John J. L. Hunter, Q.C., Thomas F. Beasley, K. Michael Stephens and Stephanie L. McHugh, for the appellants the British Columbia Human Rights

Evans, J. M., H. N. Janisch and David J. Mullan. *Administrative Law: Cases, Text, and Materials*, 4th ed. Toronto: Edmond Montgomery, 1995.

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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (1998), 49 B.C.L.R. (3d) 216, 160 D.L.R. (4th) 303, 107 B.C.A.C. 162, 174 W.A.C. 162, 7 Admin. L.R. (3d) 220, 31 C.H.R.R. D/175, 53 C.R.R. (2d) 189, [1998] 9 W.W.R. 457, [1998] B.C.J. No. 1092 (QL), qui a accueilli un appel interjeté contre une décision de la Cour suprême de la Colombie-Britannique (1998), 49 B.C.L.R. (3d) 201, 35 C.C.E.L. (2d) 41, 30 C.H.R.R. D/439, [1999] 1 W.W.R. 139, [1998] B.C.J. No. 320 (QL), qui avait rejeté la demande de contrôle judiciaire et d'ordonnance mettant fin aux procédures pour cause de délai, que l'intimé avait présentée. Pourvoi accueilli, les juges Iacobucci, Binnie, Arbour et LeBel sont dissidents en partie.

John J. L. Hunter, c.r., Thomas F. Beasley, K. Michael Stephens et Stephanie L. McHugh, pour les appelants la British Columbia Human Rights

Commission and the Commissioner of Investigation and Mediation.

Written submissions only by *Susan E. Ross*, for the appellant the British Columbia Human Rights Tribunal.

Robert B. Farvolden, for the appellant *Andrea Willis*.

Joseph J. Arvay, Q.C., for the respondent.

Mark C. Stacey and *Rosy M. Mondin*, for the intervener *Irene Schell*.

Hart Schwartz, for the intervener the Attorney General for Ontario.

Harvey M. Groberman, Q.C., for the intervener the Attorney General of British Columbia.

Milton Woodard, Q.C., for the intervener the Saskatchewan Human Rights Commission.

Cathryn Pike and *Jennifer Scott*, for the intervener the Ontario Human Rights Commission.

Lara J. Morris and *Maureen E. Shebib*, for the intervener the Nova Scotia Human Rights Commission.

Aaron L. Berg and *Denis Guénette*, for the intervener the Manitoba Human Rights Commission.

Fiona Keith, for the intervener the Canadian Human Rights Commission.

Hélène Tessier, for the intervener the Commission des droits de la personne et des droits de la jeunesse.

Frances Kelly and *James Pozer*, for the intervener the British Columbia Human Rights Coalition.

Jennifer L. Conkie and *Dianne Pothier*, for the intervener the Women's Legal Education and Action Fund.

Commission et le Commissioner of Investigation and Mediation.

Argumentation écrite seulement par *Susan E. Ross*, pour l'appelant le British Columbia Human Rights Tribunal.

Robert B. Farvolden, pour l'appelante *Andrea Willis*.

Joseph J. Arvay, c.r., pour l'intimé.

Mark C. Stacey et *Rosy M. Mondin*, pour l'intervenante *Irene Schell*.

Hart Schwartz, pour l'intervenant le procureur général de l'Ontario.

Harvey M. Groberman, c.r., pour l'intervenant le procureur général de la Colombie-Britannique.

Milton Woodard, c.r., pour l'intervenante la Saskatchewan Human Rights Commission.

Cathryn Pike et *Jennifer Scott*, pour l'intervenante la Commission ontarienne des droits de la personne.

Lara J. Morris et *Maureen E. Shebib*, pour l'intervenante la Nova Scotia Human Rights Commission.

Aaron L. Berg et *Denis Guénette*, pour l'intervenante la Commission des droits de la personne du Manitoba.

Fiona Keith, pour l'intervenante la Commission canadienne des droits de la personne.

Hélène Tessier, pour l'intervenante la Commission des droits de la personne et des droits de la jeunesse.

Frances Kelly et *James Pozer*, pour l'intervenante la British Columbia Human Rights Coalition.

Jennifer L. Conkie et *Dianne Pothier*, pour l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. was delivered by

BASTARACHE J. —

I. Introduction

1 This case raises the issue of whether the respondent's rights to "liberty and security of the person" under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated by state-caused delay in the human rights proceedings against him. In the alternative, should this Court find that s. 7 of the *Charter* was not engaged, it must be determined whether the respondent was entitled to a remedy pursuant to principles of administrative law, notwithstanding that he had not been prejudiced in his ability to respond to the complaints against him.

2 I have concluded that the respondent's rights to liberty and security of the person were not implicated in the circumstances of this case. There is therefore no need to determine whether the alleged violation was in accordance with the principles of fundamental justice. While I accept that, under administrative law principles, a denial of natural justice may occur for reasons other than procedural unfairness to the respondent, I find that there has been no denial of natural justice or abuse of process in the circumstances of this case.

II. Factual Background

3 In 1995, the respondent, Robin Blencoe, had been a member of the British Columbia legislature for 12 years. In March of that year the respondent's assistant, Fran Yanor, went public with allegations that the respondent had sexually harassed her. Following this allegation, the respondent stepped down as Minister, but remained in Cabinet pending the results of an inquiry. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the New Democratic Party caucus. Subsequently, in July and August of 1995, two sexual harassment complaints were filed with the British Columbia Coun-

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Major et Bastarache rendu par

LE JUGE BASTARACHE —

I. Introduction

Le présent pourvoi porte sur la question de savoir si le délai imputable à l'État dans les procédures en matière de droits de la personne engagées contre l'intimé a porté atteinte aux droits de ce dernier «à la liberté et à la sécurité de sa personne», que lui garantit l'art. 7 de la *Charte canadienne des droits et libertés*. Subsidiairement, si jamais notre Cour ne conclut pas à l'application de l'art. 7 de la *Charte* en l'espèce, il faudra déterminer si l'intimé a droit à une réparation fondée sur les principes du droit administratif, même s'il n'a pas été porté atteinte à sa capacité de répondre aux plaintes portées contre lui.

J'arrive à la conclusion que les droits de l'intimé à la liberté et à la sécurité de sa personne ne sont pas en cause dans la présente affaire. Il est donc inutile de déterminer si l'atteinte alléguée est conforme aux principes de justice fondamentale. Bien que je convienne que, selon les principes du droit administratif, il peut y avoir déni de justice naturelle pour des raisons autres que l'iniquité procédurale, je juge qu'il n'y a eu ni déni de justice naturelle ni abus de procédure dans les circonstances de la présente affaire.

II. Les faits

En 1995, l'intimé, Robin Blencoe, était député à l'assemblée législative de la Colombie-Britannique depuis 12 ans. En mars de la même année, son adjointe, Fran Yanor, l'a accusé publiquement de harcèlement sexuel. L'intimé a alors abandonné son poste de ministre, mais a continué de faire partie du Cabinet jusqu'à ce que les résultats d'une enquête soient connus. Le 4 avril suivant, le premier ministre Harcourt a exclu l'intimé du Cabinet et du caucus du Nouveau Parti Démocratique. En juillet et en août 1995, l'appelante Andrea Willis et l'intervenante Irene Schell ont déposé devant le British Columbia Council of Human Rights (le

cil of Human Rights (“Council” or “Commission”) against the respondent and the provincial Crown under the *Human Rights Act*, S.B.C. 1984, c. 22 (now the *Human Rights Code*, R.S.B.C. 1996, c. 210, since January 1, 1997) (also referred to as the “Act” or the “Code”) by the appellant Andrea Willis and the intervener, Irene Schell (“Complaints” or “Complaint”).

The Complaints centered around various incidents of sexual harassment alleged to have occurred between March 1993 and March 1995. It is not necessary, for the purposes of this appeal, that I comment on the particulars of the Complaints in any detail. In brief, Ms. Willis worked as a senior clerk in the respondent’s ministerial office and alleged that the respondent discriminated against her because of her sex with respect to terms and conditions of her employment, causing her to resign. The alleged incidents occurred in August 1994 and March 1995. Ms. Schell represented a government-funded sports association with which the respondent had contact in his ministerial capacity. She alleged that the respondent had discriminated against her because of her sex with respect to a service or facility customarily available to the public. The alleged incidents occurred in March 1993 and on several occasions in July 1993 and July 1994.

While the events that followed in the human rights proceedings are lengthy, they nevertheless merit recitation in some detail in order to adequately address the alleged delay in the process. The following are what I consider to be the most relevant facts regarding each of the Complaints.

A. *The Schell Complaint*

The Schell Complaint dealt with conduct which allegedly occurred more than six months before the Complaint was filed. For this reason, a threshold issue of timeliness arose pursuant to s. 13(1)(d) of the Act. By letter dated July 20, 1995, the respondent’s counsel was informed that the Commission was considering whether to proceed with the investigation of the Schell Complaint and that timeliness submissions should be made. Letters were sent by the respondent on July 21 and July

«Conseil» ou la «Commission») deux plaintes de harcèlement sexuel contre l’intimé et Sa Majesté du chef de la province en application de la *Human Rights Act*, S.B.C. 1984, ch. 22 (désormais le *Human Rights Code*, R.S.B.C. 1996, ch. 210, depuis le 1^{er} janvier 1997) (également désigné sous le nom de «Loi» ou de «Code») (les «plaintes» ou la «plainte»).

Les plaintes concernaient divers épisodes de harcèlement sexuel qui seraient survenus entre mars 1993 et mars 1995. Il n’est pas nécessaire, aux fins du présent pourvoi, que je m’attarde aux détails des plaintes. En résumé, M^{me} Willis occupait le poste de commis principal au bureau du ministre Blencoe et elle a allégué que ce dernier avait fait preuve de discrimination sexuelle à son égard relativement à ses conditions de travail, ce qui l’aurait amenée à démissionner. Les épisodes en cause se seraient produits en août 1994 et en mars 1995. Pour sa part, M^{me} Schell représentait une association sportive financée par l’État, avec laquelle l’intimé était en rapport en sa qualité de ministre. Elle a prétendu que l’intimé avait fait preuve de discrimination sexuelle à son égard relativement à des services ou à des installations habituellement accessibles au public. Les épisodes en question se seraient produits en mars 1993 et à maintes reprises en juillet 1993 et en juillet 1994.

Malgré la longueur des procédures en matière de droits de la personne qui ont suivi, il y a lieu néanmoins de les relater de façon assez détaillée pour bien examiner l’allégation de délai. Les faits qui suivent sont, à mon avis, les plus pertinents en ce qui concerne chacune des plaintes.

A. *La plainte de M^{me} Schell*

La plainte de M^{me} Schell porte sur une conduite qui aurait été adoptée plus de six mois avant le dépôt de ladite plainte, ce qui soulève la question préliminaire du respect du délai imparti à l’al. 13(1)d de la Loi. Dans une lettre datée du 20 juillet 1995, la Commission a informé l’avocat de l’intimé qu’elle se demandait si elle devait enquêter sur la plainte de M^{me} Schell, et que des observations devraient être formulées concernant la question du respect du délai imparti. Les 21 et 28

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28, 1995, requesting particulars of the Complaint. Particulars were provided by the Commission by letter dated August 2, 1995.

juillet 1995, l'intimé a envoyé des lettres dans lesquelles il demandait des précisions sur la plainte. La Commission a accédé à sa demande par lettre datée du 2 août 1995.

7 On August 31, 1995, the respondent's counsel notified the Commission that the respondent would not provide a detailed submission on the timeliness issue until Ms. Schell discharged the onus of proving that her Complaint was filed in good faith. The Commission informed the respondent that it was not necessary for Ms. Schell to adduce further material on this matter. The respondent subsequently provided substantive submissions on the timeliness issue on September 22, 1995.

Le 31 août 1995, l'avocat de l'intimé a informé la Commission que son client ne présenterait des observations détaillées sur la question du respect du délai que lorsque M^{me} Schell se serait acquittée de son obligation de prouver que la plainte avait été portée de bonne foi. La Commission a avisé l'intimé que M^{me} Schell n'avait pas à produire d'autres documents à ce propos. Par la suite, le 22 septembre 1995, l'intimé a fourni des observations de fond sur la question du respect du délai imparti.

8 On November 14, 1995, the respondent was informed that the Commission had received Ms. Schell's submissions on October 11, 1995, and that the submissions of both parties were being considered. The respondent had not been forwarded a copy of Ms. Schell's submissions. Following two requests for such by Mr. Blencoe, the Commission provided him with a copy of this document on December 15, 1995, stating that the production of such document was a departure from normal procedures. On February 8, 1996, the respondent provided the Commission with a response to Ms. Schell's timeliness submissions.

Le 14 novembre 1995, l'intimé a appris que la Commission avait reçu les observations de M^{me} Schell le 11 octobre 1995 et que les observations des deux parties étaient examinées. L'intimé n'avait pas obtenu copie des observations de M^{me} Schell. Le 15 décembre 1995, après deux demandes formulées en ce sens par M. Blencoe, la Commission lui a fait parvenir une copie du document demandé en lui précisant qu'il s'agissait d'une entorse à la procédure habituelle. Le 8 février 1996, l'intimé a fait parvenir à la Commission une réponse aux observations de M^{me} Schell concernant le respect du délai imparti.

9 On February 21, 1996, the respondent was informed that the Council had decided to proceed with the investigation and that he had 30 days to provide a full response to the allegations. In letters dated March 1 and March 27, 1996, the respondent requested the initial correspondence between Ms. Schell and the Commission. The respondent maintained that he would not respond to the particulars of allegation until such correspondence was produced. On April 1, 1996, the respondent was informed that such documents would not be disclosed and that the investigation would continue on the basis of existing materials if no response was received by April 10, 1996. A general denial to the allegations was given by the respondent on April 10, 1996. On June 19, 1996, the respondent received a letter from the Commission in response to his request regarding how long he would be required to wait for a hearing date. He was

Le 21 février 1996, l'intimé a appris que le Conseil avait décidé d'enquêter sur la plainte et qu'il disposait de 30 jours pour fournir une réponse complète aux allégations. Dans des lettres datées du 1^{er} et du 27 mars 1996, l'intimé a réclamé la correspondance initiale entre M^{me} Schell et la Commission. L'intimé a maintenu qu'il ne répondrait aux détails des allégations que lorsque cette correspondance aurait été produite. Le 1^{er} avril 1996, l'intimé a été informé que ces documents ne seraient pas communiqués et que l'enquête se poursuivrait en fonction des documents existants si aucune réponse n'était reçue au plus tard le 10 avril 1996. L'intimé a présenté une dénégation générale des allégations le 10 avril 1996. Le 19 juin de la même année, l'intimé a reçu une lettre dans laquelle la Commission répondait à sa demande concernant le temps qu'il lui faudrait attendre avant qu'une date d'audience soit fixée. Il

informed that a hearing could not be scheduled until the Commission determined that a hearing was required.

On September 6, 1996, the respondent was notified that an investigator had been assigned to the Schell Complaint. By letter dated November 8, 1996, the Commission wrote to the respondent, requesting a response to certain information obtained in the course of investigating the Schell Complaint. Such information was provided by the respondent on December 23, 1996. On March 4, 1997, Mr. Blencoe's counsel was provided with a copy of the investigation report and asked for a written response by April 8, 1997. Such response was given on March 27, 1997. On April 15, 1997, the respondent was provided with the submissions received from Ms. Schell in response to the investigation report. Mr. Blencoe was requested to reply by May 15, 1997. Such response was provided on May 14, 1997.

By letter dated July 3, 1997, the respondent was notified that the Schell Complaint would be referred to the British Columbia Human Rights Tribunal ("Tribunal") for a hearing, without specifying the hearing date. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was informed that the hearing was set for March 4, 5 and 6, 1998 and a pre-hearing conference in November of 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

B. *The Willis Complaint*

The respondent was informed of the Willis Complaint by letter dated September 11, 1995. The respondent challenged the timeliness of the Complaint and asked the Council to make a decision pursuant to s. 13(1)(d) of the Act. The respondent was asked to provide submissions on timeliness within 15 days of the letter dated September 21, 1995. Such submissions were provided by Mr. Blencoe on October 11, 1995 with respect to both Complaints. On December 21, 1995, the respondent was sent a copy of Ms. Willis's submissions on timeliness which were dated October

a appris qu'une telle date ne pourrait être fixée que lorsque la Commission aurait conclu à la nécessité de tenir une audience.

Le 6 septembre 1996, l'intimé a été avisé qu'un enquêteur avait été chargé d'examiner la plainte de M^{me} Schell. Le 8 novembre 1996, la Commission a fait parvenir à l'intimé une lettre dans laquelle elle lui demandait de réagir à certains renseignements obtenus pendant l'enquête relative à la plainte de M^{me} Schell. L'intimé a accédé à cette demande le 23 décembre 1996. Le 4 mars 1997, on a remis à l'avocat de M. Blencoe un exemplaire du rapport d'enquête et on lui a demandé d'y répondre par écrit au plus tard le 8 avril 1997, ce qu'il a fait le 27 mars de la même année. Le 15 avril 1997, l'intimé a obtenu copie des observations que M^{me} Schell avait transmises en réponse au rapport d'enquête. On a demandé à M. Blencoe d'y répliquer au plus tard le 15 mai 1997, ce qu'il a fait le 14 mai de la même année.

Dans une lettre datée du 3 juillet 1997, l'intimé a été avisé que la plainte de M^{me} Schell serait renvoyée au British Columbia Human Rights Tribunal (le «Tribunal») pour qu'il tienne une audience, sans que la date de cette audience ne soit toutefois précisée. La Commission était dès lors dessaisie de la plainte. Le 10 septembre 1997, l'intimé a appris que l'audience se déroulerait les 4, 5 et 6 mars 1998 et qu'une conférence préparatoire aurait lieu en novembre 1997. L'audience devait donc débuter environ 32 mois après le dépôt de la plainte initiale.

B. *La plainte de M^{me} Willis*

Dans une lettre datée du 11 septembre 1995, l'intimé a été informé de la plainte de M^{me} Willis. L'intimé a fait valoir que la plainte n'avait pas été déposée dans le délai imparti et a demandé au Conseil de rendre une décision fondée sur l'al. 13(1)(d) de la Loi. Dans une lettre datée du 21 septembre 1995, on lui a demandé de présenter dans les 15 jours suivants des observations sur la question du respect du délai imparti. Monsieur Blencoe a présenté des observations sur les deux plaintes le 11 octobre 1995. Le 21 décembre suivant, l'intimé a obtenu copie des observations de M^{me} Willis sur

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16, 1995. It was standard practice of the Council not to give respondents the complainant's response submissions.

le respect du délai imparti, lesquelles étaient datées du 16 octobre 1995. Le Conseil n'avait pas coutume de communiquer les observations d'un plaignant à la personne qui fait l'objet de la plainte.

13 On January 9, 1996, the respondent wrote to the Council, requesting that it refrain from making a decision regarding timeliness until he could reply to Ms. Willis's submissions. The respondent challenged both the timeliness of the Complaints and whether they were made in good faith. He declined to provide his response until such preliminary issues were addressed, contending that the Complaints should not be addressed at all. The Council concluded that the Complaints were timely, that there was no evidence of bad faith, and that the Complaints should be fully investigated. On January 11, 1996, the respondent was notified that the Commission was proceeding with its investigation of the Willis Complaint. The decision to proceed with this Complaint had been reached by the Council more than three weeks earlier, on December 18, 1995. The delay was said to have resulted from Council not returning the decision on timeliness file to the case management secretary and a temporary backlog in the clerical area.

Le 9 janvier 1996, l'intimé a écrit au Conseil pour lui demander de s'abstenir de rendre une décision concernant le respect du délai imparti jusqu'à ce qu'il puisse répondre aux observations de M^{me} Willis. Il soutenait que les plaintes n'avaient pas été déposées dans le délai imparti et qu'elles n'avaient pas été portées de bonne foi. Il refusait de produire sa réponse tant que ces questions préliminaires n'auraient pas été tranchées et il prétendait qu'il n'y avait absolument pas lieu d'examiner les plaintes. Le Conseil a conclu que les plaintes avaient été déposées à temps, qu'il n'y avait aucune preuve de mauvaise foi et que les plaintes devraient faire l'objet d'une enquête complète. Le 11 janvier 1996, l'intimé a été avisé que la Commission enquêtait sur la plainte de M^{me} Willis. La décision d'enquêter sur la plainte avait été prise par le Conseil plus de trois semaines auparavant, soit le 18 décembre 1995. On a expliqué le délai écoulé par l'omission du Conseil de retourner le dossier de la décision sur le respect du délai imparti au fonctionnaire responsable de la gestion des dossiers et par un retard temporaire dans l'exécution des fonctions administratives.

14 On January 29, 1996, the respondent informed the Council that he was prepared to waive the investigation stage of the process and asked that the Council set the matter for hearing. However, this waiver was not feasible since the respondent was not prepared to concede that there was a sufficient evidentiary basis to warrant a hearing.

Le 29 janvier 1996, l'intimé a informé le Conseil qu'il était disposé à renoncer à l'étape de l'enquête et il lui a demandé d'inscrire l'affaire à son rôle. Cependant, cette renonciation n'était pas possible puisque l'intimé n'était pas prêt à reconnaître qu'il y avait une preuve suffisante pour justifier la tenue d'une audience.

15 In April 1996, Mr. Blencoe's counsel inquired as to when the hearing was expected to occur. In June 1996, he was informed that this could not be determined until the investigation was completed. The respondent was also informed that no investigator had been assigned to the Willis Complaint at that time and that there was a backlog of investigation files. By letter dated September 6, 1996, Mr. Blencoe was informed that an investigator had been assigned to the Willis Complaint. On November 8, 1996, Mr. Blencoe was asked to respond to

En avril 1996, l'avocat de M. Blencoe s'est informé de la date à laquelle l'audience était censée avoir lieu. En juin de la même année, il a appris que cette date ne pourrait être fixée que lorsque l'enquête serait terminée. Il a également appris qu'aucun enquêteur n'avait encore été chargé d'examiner la plainte de M^{me} Willis et que le traitement des dossiers d'enquête accusait un retard. Dans une lettre datée du 6 septembre 1996, on a informé l'intimé qu'un enquêteur avait été chargé d'examiner la plainte de M^{me} Willis.

certain information obtained during the investigation. Such response was given on December 23, 1996. On March 3, 1997, the respondent was provided with a completed investigation report and asked for written responses which were provided by the respondent on March 27, 1997. In April 1997, the respondent was sent the submissions of Ms. Willis. He replied to them on May 14, 1997.

On July 3, 1997, the respondent was informed that the Willis Complaint would be referred to the Tribunal for hearing. That ended the involvement of the Commission in the Complaint. On September 10, 1997, the respondent was notified that the hearing was set for March 18, 19 and 20, 1998 and a pre-hearing conference in November 1997. The hearing was thus scheduled to take place approximately 32 months after the initial Complaint was filed.

Subsequent to the allegations of sex discrimination, the respondent and his family have been hounded by the media. Mr. Blencoe has suffered from severe depression and both he and his wife have sought psychological counselling. The respondent did not stand for re-election when his province went to the polls in 1996. Mr. Blencoe and his wife decided to move their family to Ontario in August 1996, in order to escape the media attention and seek employment. In May 1997, the family returned to Victoria, allegedly because they could not escape the harassment of the media which followed them to Ontario and because the respondent's wife received an excellent job offer in British Columbia. The respondent continues to be clinically depressed and has been prescribed medication. He was prevented from coaching his youngest son's soccer team on the grounds that the soccer association did not want him working with children. The respondent considers himself "unemployable" in British Columbia, due to the outstanding human rights Complaints against him.

On November 27, 1997, the respondent commenced proceedings for judicial review, claiming that the Commission had lost jurisdiction due to unreasonable delay in processing the human rights

Le 8 novembre 1996, on a demandé à M. Blencoe de réagir à certains renseignements obtenus pendant l'enquête, ce qu'il a fait le 23 décembre suivant. Le 3 mars 1997, on a remis à l'intimé une copie du rapport d'enquête et on lui a demandé d'y répondre par écrit, ce qu'il a fait le 27 mars suivant. En avril 1997, l'intimé a obtenu copie des observations de M^{me} Willis, et il y a répondu le 14 mai suivant.

Le 3 juillet 1997, l'intimé a appris que la plainte de M^{me} Willis serait renvoyée au Tribunal pour qu'il tienne une audience. La Commission était dès lors dessaisie de la plainte. Le 10 septembre 1997, l'intimé a été avisé que l'audience se déroulerait les 18, 19 et 20 mars 1998 et qu'une conférence préparatoire aurait lieu en novembre 1997. L'audience devait donc débiter environ 32 mois après le dépôt de la plainte initiale.

À la suite des allégations de discrimination sexuelle, l'intimé et les membres de sa famille ont été traqués par les médias. Monsieur Blencoe a fait une grave dépression, et son épouse et lui ont tous les deux eu recours aux services d'un psychologue. L'intimé n'a pas sollicité un nouveau mandat lors du scrutin provincial de 1996. En août 1996, M. Blencoe et son épouse ont décidé d'aller s'établir en Ontario afin d'échapper à l'attention des médias et de trouver du travail. En mai 1997, la famille est revenue à Victoria, apparemment parce qu'elle ne pouvait pas échapper au harcèlement des médias qui les avaient suivis jusqu'en Ontario et que l'épouse de l'intimé s'était vu offrir un emploi très intéressant en Colombie-Britannique. L'intimé souffre toujours de dépression clinique et consomme des médicaments sur ordonnance. Il n'a pas pu entraîner l'équipe de soccer de son fils cadet parce que l'association responsable ne voulait pas qu'il côtoie des enfants. L'intimé se dit «inapte au travail» en Colombie-Britannique en raison des plaintes fondées sur les droits de la personne qui pèsent toujours contre lui.

Le 27 novembre 1997, l'intimé a présenté une demande de contrôle judiciaire en faisant valoir que la Commission avait perdu compétence en raison d'un délai déraisonnable dans le traitement des

Complaints. The respondent alleged that the unreasonable delay caused serious prejudice to him and his family which amounted to an abuse of process and a denial of natural justice.

III. Judicial History

A. *British Columbia Supreme Court* (1998), 49 B.C.L.R. (3d) 201

19 The respondent's application for judicial review was dismissed by Lowry J. on February 11, 1998. The question before the court was whether, given the time that had elapsed since the Complaints were first made to the Commission, personal hardship attributable to the stigma attached to the allegations justified the supervisory intervention of the court. The respondent also alleged that, because two prospective witnesses had died and the memories of other witnesses had faded, he would be unable to obtain a fair hearing. The respondent did not make an express s. 7 argument before the lower court, but relied instead on principles of natural justice, pursuant to administrative law jurisprudence and common law protections against undue delay. The respondent did however cite s. 7 jurisprudence to support his claim that the prejudice he suffered was analogous to the prejudice that justifies a stay of proceedings in the s. 7 context.

20 Lowry J. recognized that the allegations of sexual harassment had significantly affected the respondent's life and that his political career appeared to be finished. However, he added that it was difficult to determine to what extent such prejudice could be fairly attributed to any delay in the proceedings.

21 Lowry J. rejected the contention that, absent any application of the *Charter*, personal hardship attributable to unacceptable delay in an administrative process could, standing alone, constitute prejudice that entitled a respondent to prerogative relief. He held that delay will only constitute a denial of natural justice if the result of the delay is to directly prejudice the ability of an affected party

plaintes fondées sur les droits de la personne. Il a allégué que ce délai déraisonnable avait causé à sa famille et à lui-même un préjudice grave équivalant à un abus de procédure et à un déni de justice naturelle.

III. Historique des procédures judiciaires

A. *Cour suprême de la Colombie-Britannique* (1998), 49 B.C.L.R. (3d) 201

Le 11 février 1998, le juge Lowry a rejeté la demande de contrôle judiciaire de l'intimé. La cour était appelée à décider si, en raison du délai écoulé depuis le dépôt initial des plaintes à la Commission, les difficultés personnelles imputables à la stigmatisation liée aux allégations justifiaient un contrôle judiciaire. L'intimé prétendait également que, du fait que deux témoins éventuels étaient décédés et que la mémoire d'autres témoins avait décliné, il ne pourrait pas obtenir une audience équitable. Il n'a avancé aucun argument explicitement fondé sur l'art. 7 devant le tribunal inférieur, préférant invoquer les principes de justice naturelle, conformément à la jurisprudence en matière de droit administratif et aux protections que la common law offre contre les délais injustifiés. Il a cependant invoqué la jurisprudence relative à l'art. 7 à l'appui de son allégation que le préjudice qu'il subissait s'apparentait à celui qui justifie un arrêt des procédures dans le contexte de l'art. 7.

Le juge Lowry a reconnu que les allégations de harcèlement sexuel avaient sensiblement perturbé l'existence de l'intimé et semblaient avoir mis un terme à sa carrière politique. Il a toutefois ajouté qu'il était difficile de déterminer dans quelle mesure le préjudice subi pouvait être attribué, à juste titre, à un délai dans le déroulement des procédures.

Le juge Lowry a rejeté la prétention que, en l'absence de toute application de la *Charte*, les difficultés personnelles imputables à un délai inacceptable dans le déroulement d'un processus administratif pouvaient, à elles seules, conférer à l'intimé le droit à un bref de prerogative. Il a conclu qu'un délai ne constitue un déni de justice naturelle pour une partie que s'il porte atteinte

to respond. He concluded that Mr. Blencoe's ability to have a fair hearing had not been prejudiced, since he was able to respond to the Complaints in an evidentiary sense.

Apart from an unexplained five-month period in the human rights process, Lowry J. found that there had been no extended period of inactivity in the processing of the Complaints from receipt to referral. Communication had been ongoing between the Commission, solicitors and complainants, and the respondent had not been ignored. Lowry J. thus concluded that there had been no "unacceptable delay" in the human rights process. He also noted that the respondent had not brought any of his personal hardship to the Commission's attention, nor had he requested a prioritization of the Complaints on that basis.

B. *British Columbia Court of Appeal* (1998), 49 B.C.L.R. (3d) 216

Before the Court of Appeal, Mr. Blencoe expressly argued that his s. 7 rights to liberty and security of the person were violated due to the length of the delay in resolving the Complaints against him. On May 11, 1998, the Court of Appeal (McEachern C.J.B.C. and Prowse J.A. for the majority, in separate concurring reasons) allowed the appeal and directed that the human rights proceedings against the respondent be stayed. Lambert J.A., in dissent, would have upheld the judgment of the British Columbia Supreme Court.

(a) Majority Decision of McEachern C.J.B.C.

McEachern C.J.B.C. concluded that the undue delay and the continued prejudice to privacy and human dignity could not be in accordance with the principles of fundamental justice (para. 104). McEachern C.J.B.C. found that the delay could not be attributed to Mr. Blencoe since he was unable to

directement à sa capacité de se défendre. Il a conclu qu'il n'y avait eu aucune atteinte à la capacité de M. Blencoe d'obtenir une audience équitable étant donné qu'il était en mesure de répondre aux plaintes en produisant des éléments de preuve.

Outre le délai inexpliqué de cinq mois dans le déroulement du processus en matière de droits de la personne, le juge Lowry a estimé qu'il n'y avait eu aucune période d'inactivité prolongée dans le traitement des plaintes entre leur dépôt et leur renvoi pour audience. La communication avait été constante entre la Commission, les avocats et les plaignantes, et l'intimé n'avait pas été tenu à l'écart. Le juge Lowry a donc conclu qu'il n'y avait pas eu de «délai inacceptable» dans le déroulement du processus en cause. Il a également souligné que l'intimé n'avait ni fait part de ses difficultés personnelles à la Commission ni demandé que l'on donne la priorité aux plaintes pour ce motif.

B. *Cour d'appel de la Colombie-Britannique* (1998), 49 B.C.L.R. (3d) 216

En Cour d'appel, M. Blencoe a expressément soutenu que les droits à la liberté et à la sécurité de sa personne que lui garantit l'art. 7 ont été violés en raison de la longueur du délai écoulé sans que les plaintes portées contre lui n'aient été réglées. Le 11 mai 1998, la Cour d'appel (le juge en chef McEachern et le juge Prowse s'exprimant, au nom de la majorité, dans des motifs concordants distincts) a accueilli l'appel et ordonné l'arrêt des procédures en matière de droits de la personne qui avaient été engagées contre l'intimé. Le juge Lambert, dissident, aurait confirmé le jugement de la Cour suprême de la Colombie-Britannique.

a) La décision majoritaire du juge en chef McEachern

Le juge en chef McEachern a conclu que le délai injustifié et l'atteinte constante à la vie privée et à la dignité de la personne ne pouvaient pas être conformes aux principes de justice fondamentale (par. 104). Il a jugé que le délai ne pouvait pas être imputé à M. Blencoe étant donné qu'il ne pouvait

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identify any steps taken by the respondent to which he was not entitled in defending himself. McEachern C.J.B.C. opined that the Complaints were not complex, but were rather of the type that are “quickly resolved by courts and tribunals all the time” (para. 37), such that “a week at the outside would have sufficed” to complete the investigation (para. 51). He added (at paras. 47 and 51):

... a delay of over 30 months from the date of the complaints to a hearing on the merits is far too long. If Mr. Blencoe had been charged in the criminal courts with this type of sexual assault, the charge would very likely be dismissed on grounds of delay . . .

As I have already commented, the investigation was necessarily one-dimensional as there were no eyewitnesses, and a week at the outside would have sufficed.

25 Turning to the issue of prejudice, McEachern C.J.B.C. found that but for these proceedings, “it might reasonably be expected that the overwhelming [media] attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives” (para. 53). He considered the contention that the prejudice suffered by the respondent was not caused by the delay, but rather by his dismissal from Cabinet. In this connection McEachern C.J.B.C. held that the Supreme Court of Canada has elevated the “exacerbation” of an existing deprivation to the same level as the creation of the deprivation itself. He held that the excessive delay both created a substantial stigma against the accused and exacerbated an existing state of affairs, thus triggering the s. 7 right to security of the person.

26 McEachern C.J.B.C. noted that the jurisprudence surrounding the application of s. 7 in a non-penal context was “fraught with considerable difficulty” (para. 60). He identified two competing streams of jurisprudence as to the scope of s. 7 in the Supreme Court. First, McEachern C.J.B.C. described what he referred to as the “judicial domain” school, which limits s. 7 protection to criminal proceedings. This approach was then contrasted with a broader approach to s. 7 which pro-

pas dire que ce dernier avait pris des mesures qu’il n’avait pas le droit de prendre pour se défendre. Il s’est dit d’avis que les plaintes n’étaient pas complexes, mais qu’elles étaient plutôt du genre de celles que [TRADUCTION] «les tribunaux judiciaires et les tribunaux administratifs règlent toujours rapidement» (par. 37), de sorte qu’«il aurait suffi tout au plus d’une semaine» pour effectuer l’enquête (par. 51). Il a ajouté ce qui suit (aux par. 47 et 51):

[TRADUCTION] . . . un délai de plus de 30 mois entre le dépôt des plaintes et la tenue d’une audience au fond est beaucoup trop long. Si M. Blencoe avait été accusé au criminel de ce genre d’agression sexuelle, l’accusation serait fort probablement rejetée pour des raisons de délai . . .

Comme je l’ai déjà expliqué, l’enquête était nécessairement unidimensionnelle puisqu’il n’y avait aucun témoin oculaire, et il aurait suffi tout au plus d’une semaine.

Au sujet de la question du préjudice, le juge en chef McEachern a conclu que, n’eût été de ces procédures, [TRADUCTION] «on aurait pu raisonnablement s’attendre à ce que l’attention [médiatique] considérable s’estompe et à ce que [Blencoe] et les membres de sa famille puissent tenter de retrouver une vie normale» (par. 53). Il a examiné la prétention que le préjudice subi par l’intimé résultait non pas du délai, mais plutôt de son exclusion du Cabinet. Le juge en chef McEachern a conclu, à cet égard, que la Cour suprême du Canada a placé sur un pied d’égalité l’«aggravation» d’une atteinte existante et le fait de porter atteinte. Il a estimé que le délai excessif avait à la fois considérablement stigmatisé l’accusé et aggravé une situation déjà existante, de sorte que le droit à la sécurité de la personne garanti par l’art. 7 s’appliquait.

Le juge en chef McEachern a fait remarquer que la jurisprudence entourant l’application de l’art. 7 dans un contexte non pénal [TRADUCTION] «posait de grandes difficultés» (par. 60). Il a relevé, au sujet de la portée de l’art. 7, deux courants opposés dans la jurisprudence de la Cour suprême. Premièrement, le juge en chef McEachern a parlé de ce qu’il a appelé l’école du «domaine judiciaire» qui limite la protection de l’art. 7 aux procédures criminelles. Il a ensuite comparé ce point de vue avec

protects an individual's right to "human dignity" and "privacy" outside the arena of criminal proceedings. McEachern C.J.B.C. adopted the more expansive approach (at para. 101):

... I feel constrained to follow what I regard as the emerging, preferred view in the Supreme Court of Canada that s. 7, under the rubric of liberty and security of the person, operates to protect both the privacy and dignity of citizens against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by [Blencoe] here. Everyone can be made answerable, according to law, for his or her conduct or misconduct, but a process established by law to provide accountability and appropriate remedies cannot be completely open-ended in the sense that human dignity, even for wrongdoers if such is the case, can be compromised for as long as it has occurred in this case.

(b) Concurring Majority Judgment of Prowse J.A.

Prowse J.A. held that the allegations in this case were analogous to allegations of sexual assault and thus engaged s. 7 of the *Charter*. Having regard to the nature of the allegations and the extent of the prejudice suffered by Mr. Blencoe, she agreed with McEachern C.J.B.C. that the delay of over 30 months was unreasonable and breached the respondent's right to security of the person in a manner not in accordance with the principles of fundamental justice.

(c) Dissenting Reasons of Lambert J.A.

In determining whether the delay was unacceptable, for the purposes of an assessment of natural justice, Lambert J.A. held that such decision was an issue of fact which was decided by the lower court. Consequently, he stated that Lowry J.'s decision should only be interfered with if there was a misconception of the evidence or if the decision was palpably wrong, neither of which had occurred in this case. On the legal question of which sorts of

une interprétation plus large de l'art. 7 qui protège le droit de chacun à la «dignité» et à la «vie privée» ailleurs que dans le seul contexte de procédures criminelles. Le juge en chef McEachern s'est dit favorable à l'interprétation plus libérale (au par. 101):

[TRADUCTION] ... je me sens contraint à suivre ce qui me semble être la nouvelle interprétation préconisée par la Cour suprême du Canada, selon laquelle, au chapitre de la liberté et de la sécurité de la personne, l'art. 7 a pour effet de protéger à la fois la vie privée et la dignité des citoyens contre la stigmatisation découlant d'un opprobre prolongé et injustifié comme celui dont [M. Blencoe] a été victime. Suivant la loi, n'importe qui peut être tenu responsable de sa conduite ou de son inconduite, mais le processus établi par la loi pour statuer sur la responsabilité et accorder un redressement approprié ne peut avoir une durée totalement indéterminée au point où la dignité d'une personne, même fautive, peut être compromise aussi longtemps qu'elle l'a été en l'espèce.

(b) Le jugement majoritaire concordant du juge Prowse

Le juge Prowse a conclu que les allégations formulées en l'espèce s'apparentaient à des allégations d'agression sexuelle et faisaient donc intervenir l'art. 7 de la *Charte*. Compte tenu de la nature des allégations et de l'étendue du préjudice subi par M. Blencoe, elle a convenu avec le juge en chef McEachern que le délai de plus de 30 mois était déraisonnable et portait atteinte, d'une manière non conforme aux principes de justice fondamentale, au droit de l'intimé à la sécurité de sa personne.

(c) Les motifs dissidents du juge Lambert

La question de savoir si le délai était inacceptable au regard des principes de justice naturelle était, selon le juge Lambert, une question de fait que le tribunal inférieur avait tranchée. Il a donc affirmé qu'il n'y aurait lieu de modifier la décision du juge Lowry que s'il y avait eu mauvaise interprétation de la preuve ou décision manifestement erronée, ce qui n'était pas le cas en l'espèce. Quant à la question de droit qui est de savoir quels genres

prejudice affect natural justice, Lambert J.A. agreed with Lowry J. that prejudice arising from delay must go to the intrinsic fairness of the hearing process and not merely to extrinsic factors such as stigma, stress or other forms of suffering.

de préjudice sont contraires aux principes de justice naturelle, le juge Lambert a convenu avec le juge Lowry que le préjudice découlant d'un délai doit se rapporter à l'équité intrinsèque de la procédure d'audition et non seulement à un facteur extrinsèque comme la stigmatisation, le stress ou d'autres formes de souffrance.

29 Turning to the *Charter* issue, Lambert J.A. found it unnecessary to decide whether s. 7 of the *Charter* applies to non-criminal proceedings or whether suffering induced by stigmatization, stress and disruption of family life can constitute a deprivation of liberty or security of the person in the human rights context. He found that the stigma suffered by Mr. Blencoe, the stress and anxiety related thereto, the media publicity, and Mr. Blencoe's lack of employment, could not be attributed to the human rights process, nor were they exacerbated by a breach of the principles of fundamental justice. Lambert J.A. emphasized that Mr. Blencoe's rights and expectations had to be balanced against those of the two complainants, in the context of the public interest in upholding an effective human rights process. Concluding that the principles of fundamental justice arising in the human rights process were not breached, Lambert J.A. would have found that the respondent was not entitled to relief under ss. 7 and 24 of the *Charter*.

En ce qui concerne la question relative à la *Charte*, le juge Lambert a décidé qu'il était inutile de déterminer si l'art. 7 de la *Charte* s'applique dans des procédures non criminelles ou si les souffrances dues à la stigmatisation, au stress et à la perturbation de la vie familiale peuvent constituer une atteinte à la liberté ou à la sécurité de la personne dans le contexte des droits de la personne. Il a conclu que la stigmatisation dont M. Blencoe a été victime, le stress et l'angoisse qui en ont résulté, la couverture médiatique et le fait que M. Blencoe n'avait plus d'emploi n'étaient pas attribuables au processus en matière de droits de la personne et n'avaient pas été aggravés par une violation des principes de justice fondamentale. Le juge Lambert a souligné que les droits et les attentes de M. Blencoe devaient être soupesés en fonction de ceux des deux plaignantes et de l'intérêt du public dans le maintien d'un processus efficace en matière de droits de la personne. Après avoir conclu qu'il n'y avait eu aucune violation des principes de justice fondamentale qui s'appliquent en matière de droits de la personne, le juge Lambert aurait conclu que l'intimé n'avait pas droit à une réparation fondée sur les art. 7 et 24 de la *Charte*.

IV. Relevant Constitutional Provisions

IV. Dispositions constitutionnelles pertinentes

30 *Canadian Charter of Rights and Freedoms*

Charte canadienne des droits et libertés

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

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

11. Any person charged with an offence has the right

11. Tout inculpé a le droit:

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(b) to be tried within a reasonable time;

b) d'être jugé dans un délai raisonnable;

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

V. Issues

The following are the central issues to be determined for the disposition of this appeal:

- A. Does the *Charter* apply to the actions of the British Columbia Human Rights Commission?
- B. Have the respondent's s. 7 rights to liberty and security of the person been violated by state-caused delay in the human rights proceedings?
- C. If the respondent's s. 7 rights were not engaged, or if the state's actions were in accordance with the principles of fundamental justice, was the respondent entitled to a remedy pursuant to administrative law principles where the delay did not interfere with the right to a fair hearing?
- D. If the respondent is entitled to a *Charter* or administrative law remedy, was the stay of proceedings an appropriate remedy in the circumstances of this case?

VI. Analysis

- A. *Does the Charter Apply to the Actions of the British Columbia Human Rights Commission?*

The scope of the *Charter's* application is delineated by s. 32(1) of the *Charter* which states:

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

V. Questions en litige

Notre Cour est appelée, aux fins du présent pourvoi, à trancher les questions centrales suivantes:

- A. La *Charte* s'applique-t-elle aux actes de la British Columbia Human Rights Commission?
- B. Le délai imputable à l'État dans les procédures en matière de droits de la personne a-t-il porté atteinte aux droits de l'intimé à la liberté et à la sécurité de sa personne garantis par l'art. 7?
- C. Si les droits garantis à l'intimé par l'art. 7 n'étaient pas en cause ou si les actes de l'État étaient conformes aux principes de justice fondamentale, l'intimé avait-il droit à une réparation fondée sur les principes du droit administratif dans la mesure où le délai écoulé n'a pas porté atteinte à son droit à une audience équitable?
- D. Si l'intimé a droit à une réparation fondée sur la *Charte* ou sur le droit administratif, l'arrêt des procédures était-il la réparation appropriée eu égard aux circonstances de la présente affaire?

VI. Analyse

- A. *La Charte s'applique-t-elle aux actes de la British Columbia Human Rights Commission?*

La portée de la *Charte* est délimitée par son par. 32(1), dont voici le libellé:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

It is clear that both the federal Parliament and provincial legislatures are bound by the *Charter*. However, one threshold issue which has been raised in this case is whether the Commission and the Tribunal are agents of government pursuant to s. 32 of the *Charter*. The following three factors have been put forth to support the argument that these bodies are not bound by the *Charter*: (i) the organizations in question are required to be independent of government; (ii) the challenge in this case is not to any statutory provisions that might be said to be within the legislative sphere; and (iii) the organizations in question must act judicially since their functions are analogous to those exercised by courts of law.

32. (1) La présente charte s'applique:

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Il est clair que le Parlement du Canada et les législatures provinciales sont assujettis à la *Charte*. Cependant, une question préliminaire que soulève la présente affaire est de savoir si la Commission et le Tribunal sont des mandataires du gouvernement aux fins de l'art. 32 de la *Charte*. Les trois facteurs suivants ont été avancés à l'appui de l'argument voulant que ces organismes ne soient pas assujettis à la *Charte*: (i) les organismes en cause doivent être indépendants du gouvernement, (ii) la contestation en l'espèce ne vise pas une disposition dont on pourrait dire qu'elle ressortit au pouvoir législatif et (iii) les organismes en question doivent agir d'une manière judiciaire, étant donné que leurs fonctions sont analogues à celles d'une cour de justice.

33 For the reasons I address below, these claims are misguided with respect to their approach to the application of the *Charter*. Furthermore, for the purposes of this appeal, it is only necessary to address the *Charter's* applicability to the actions of the Commission since the prejudice suffered by the respondent is alleged to have resulted from unreasonable delay in the actions of the Commission.

Pour les raisons exposées ci-après, ces prétentions s'appuient sur une façon erronée d'aborder l'application de la *Charte*. De plus, aux fins du présent pourvoi, il est seulement nécessaire d'examiner l'applicabilité de la *Charte* aux actes de la Commission, étant donné que le préjudice subi par l'intimé serait imputable au fait que la Commission n'a pas agi dans un délai raisonnable.

34 The mere fact that a body is independent of government is not determinative of the *Charter's* application, nor is the fact that a statutory provision is not impugned. Being autonomous or independent from government is not a conclusive basis upon which to hold that the *Charter* does not apply.

Le seul fait qu'un organisme soit indépendant du gouvernement n'est pas décisif en ce qui concerne l'application de la *Charte*, pas plus que ne l'est le fait qu'aucune disposition législative n'est contestée. L'autonomie ou l'indépendance vis-à-vis du gouvernement ne permet pas de conclure à l'inapplication de la *Charte*.

35 Bodies exercising statutory authority are bound by the *Charter* even though they may be independent of government. This was confirmed by

L'organisme qui exerce un pouvoir conféré par une loi est assujetti à la *Charte* même s'il peut être indépendant du gouvernement. Le juge La Forest

La Forest J., speaking for a unanimous Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 21:

There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:

Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

There is no doubt that the Commission is created by statute and that all of its actions are taken pursuant to statutory authority.

One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the Code specifically allows the Commissioner to compel the production of documents. The relevant portions of this section state:

24 (1) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may

l'a confirmé en rendant l'arrêt unanime de notre Cour *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, au par. 21:

Toutefois, il ne fait aucun doute que la *Charte* s'applique aussi aux actes accomplis en vertu de pouvoirs conférés par la loi. La justification de cette règle découle inexorablement de la structure logique de l'art. 32. Comme l'explique le professeur Hogg dans *Constitutional Law of Canada* (3^e éd. 1992 (feuilles mobiles)), vol. 1, aux pp. 34-8.3 et 34-9:

[TRANSDUCTION] Les mesures prises en vertu d'un pouvoir statutaire ne sont valides que si elles se situent à l'intérieur de la portée de ce pouvoir. Puisque ni le Parlement ni une législature ne peuvent eux-mêmes adopter une loi qui contrevient à la Charte, ni l'un ni l'autre ne peuvent autoriser des mesures qui contreviendraient à la Charte. Ainsi, les limites que la Charte impose à un pouvoir statutaire s'étendront à la famille des autres pouvoirs statutaires et s'appliqueront aux règlements, aux statuts, aux ordonnances, aux décisions et à toutes les autres mesures (législatives, administratives ou judiciaires) dont la validité dépend d'un pouvoir statutaire.

Il ne fait aucun doute que la Commission a été créée par une loi et qu'elle accomplit tous ses actes en vertu du pouvoir que lui confère la loi en cause.

L'un des traits distinctifs des actes accomplis en vertu d'un pouvoir conféré par la loi est qu'ils comportent un pouvoir de contrainte que n'ont pas les particuliers (P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 2, à la p. 34-12). Il est clair que les pouvoirs de la Commission sont plus étendus que ceux d'une personne physique. Sa compétence ne découle pas du consentement des parties. Le *Human Rights Code* habilite, de diverses manières, la Commission à enquêter sur des plaintes et à décider de la façon de les traiter. L'article 24 du Code permet expressément au commissaire d'exiger la production de documents. En voici les extraits pertinents:

[TRANSDUCTION]

24 (1) Lorsqu'il l'enquête relative à une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut

(a) require the production of books, documents, correspondence or other records that relate or may relate to the complaint, and

(b) make any inquiry relating to the complaint of any person, in writing or orally.

(2) If a person refuses to

(a) comply with a demand under subsection (1) (a) for the production of books, documents, correspondence or other records, or

(b) respond to an inquiry made under subsection (1) (b),

the commissioner of investigation and mediation or a human rights officer may apply to the Supreme Court for an order requiring the person to comply with the demand or respond to the inquiry.

. . . .

(4) For the purpose of investigating a complaint, the commissioner of investigation and mediation or a human rights officer may, with the consent of the owner or occupier, enter and inspect any premises that in the opinion of that commissioner or the human rights officer may provide information relating to the complaint.

a) exiger la production de livres, documents, lettres ou autres dossiers qui se rapportent ou peuvent se rapporter à la plainte, et

b) poser des questions par écrit ou de vive voix relativement à la plainte.

(2) Si une personne refuse

a) d'obtempérer à une demande de production de livres, documents, lettres ou autres dossiers, fondée sur l'alinéa (1)a), ou

b) de répondre à une question posée en vertu de l'alinéa (1)b),

le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut demander à la Cour suprême d'ordonner à la personne en cause d'obtempérer à la demande ou de répondre à la question.

. . . .

(4) Lorsqu'il enquête sur une plainte, le commissaire aux enquêtes et à la médiation ou un agent des droits de la personne peut, avec le consentement du propriétaire ou de l'occupant, inspecter des locaux si, à son avis, cette inspection peut permettre d'obtenir des renseignements concernant la plainte.

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The Commission in this case cannot therefore escape *Charter* scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by the *Charter* since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program and exercising powers of statutory compulsion.

En l'espèce, la Commission ne peut pas échapper à un examen fondé sur la *Charte* du seul fait qu'elle ne fait pas partie du gouvernement ou qu'elle n'est pas sous son contrôle. Dans l'arrêt *Eldridge*, notre Cour a conclu à l'unanimité qu'un hôpital était assujéti à la *Charte* parce qu'il mettait en œuvre une politique ou un programme gouvernemental particulier. La commission dont il est question en l'espèce met en œuvre un programme gouvernemental particulier et exerce des pouvoirs de contrainte émanant de la loi.

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With respect to the claim that the Commission exercises judicial functions and is thereby not subject to the *Charter*, the decision of this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, is conclusive. Lamer J. (as he then was), in partial dissent but speaking for a unanimous Court on this point, held that the *Charter* applies to the orders of a statutorily appointed labour arbitrator. This determination was not open

L'arrêt de notre Cour *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, est concluant en ce qui concerne la prétention que la Commission exerce des fonctions judiciaires et n'est donc pas assujéti à la *Charte*. Le juge Lamer (plus tard Juge en chef), dissident en partie, mais s'exprimant au nom de toute la Cour sur ce point, a décidé que la *Charte* s'applique aux ordonnances d'un arbitre en matière de relations

to challenge, as expressed by Lamer J., at pp. 1077-78:

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. [Emphasis added.]

The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy (see *Eldridge, supra*, at paras. 37 and 44, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 584). The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory

du travail désigné en application d'une loi. Cette décision était incontestable, comme l'a dit le juge Lamer à la p. 1077:

Le fait que la *Charte* s'applique à l'ordonnance rendue par l'arbitre en l'espèce ne fait, à mon avis, aucun doute. L'arbitre est en effet une créature de la loi; il est nommé en vertu d'une disposition législative et tire tous ses pouvoirs de la loi. [Je souligne.]

Les faits de l'affaire *Slaight* et ceux de la présente affaire ont au moins une caractéristique commune prédominante: l'arbitre en matière de relations du travail (dans *Slaight*) et la Commission (en l'espèce) exercent tous les deux des pouvoirs gouvernementaux conférés par un corps législatif. Dans chaque cas, l'origine du pouvoir accordé est en fin de compte le gouvernement. La Commission tire tous ses pouvoirs de la loi. Elle applique le régime législatif du *Human Rights Code*. Elle met en œuvre un programme gouvernemental ou un régime législatif particulier établi par le gouvernement pour l'application de sa politique (voir *Eldridge*, précité, aux par. 37 et 44, et *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, à la p. 584). La Commission doit agir dans les limites de sa loi habilitante. Les fonctions d'une commission des droits de la personne créée par le gouvernement pour promouvoir l'égalité dans la société en général sont clairement de «nature gouvernementale».

Donc, même si elle peut avoir certaines caractéristiques d'un tribunal, la Commission est une créature de la loi et ses actes sont assujettis au *Human Rights Code*. L'État a créé par voie législative un organisme administratif chargé de mettre en œuvre un programme gouvernemental destiné à remédier à la discrimination. C'est l'application d'un programme gouvernemental qui commande l'examen fondé sur la *Charte*. Une fois la Commission saisie d'une plainte, les procédures administratives qui suivent doivent respecter la *Charte*. L'exercice des fonctions de telles entités peut faire l'objet d'un examen fondé sur la *Charte* tout comme pourrait le faire l'exercice des fonctions d'un gouvernement dans les mêmes circonstances. Conclure le contraire permettrait au pouvoir légis-

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bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission.

B. *Have the Respondent's Section 7 Rights to Liberty and Security of the Person Been Violated by State-caused Delay in Human Rights Proceedings?*

(a) Court of Appeal Decisions on This Issue

41 Four appellate courts have dealt with the issue of whether s. 7 of the *Charter* applies in circumstances similar to the case at bar, including the decision under appeal. The majority of the Court of Appeal in *Blencoe* followed the decision in *Saskatchewan Human Rights Commission v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.), to hold that s. 7 of the *Charter* was violated. However, the Manitoba Court of Appeal in *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, and the Federal Court of Appeal in *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*, [1996] 1 F.C. 638, refused to follow *Kodellas*, holding that s. 7 cannot be applied to the consequences of delays in human rights proceedings.

42 In *Kodellas*, between the date of the first complaint and the date fixed for the hearing, almost four years had elapsed and three years and two months had elapsed with respect to the second complaint. Bayda C.J.S., dissenting in part with respect to the appropriate remedy, held that the delay violated Mr. Kodellas's s. 7 security of the person. In reaching this conclusion, Bayda C.J.S. referred to the dissenting judgment of Lamer J. in *Mills v. The Queen*, [1986] 1 S.C.R. 863 (hereinafter "*Mills* (1986)"), at p. 919, and reiterated in *R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 605, where, in the context of s. 11(b) of the *Charter*, security of the person encompasses protection against

latif de contourner la *Charte* en créant des organismes qui ne peuvent pas faire l'objet d'un tel examen. L'analyse qui précède mène inexorablement à la conclusion que la *Charte* s'applique aux actes de la Commission.

B. *Le retard imputable à l'État dans les procédures en matière de droits de la personne a-t-il porté atteinte aux droits de l'intimé à la liberté et à la sécurité de sa personne garantis par l'art. 7?*

a) La jurisprudence des cours d'appel sur ce point

Quatre cours d'appel ont statué sur la question de savoir si l'art. 7 de la *Charte* s'applique dans des circonstances semblables à celles de la présente affaire, y compris la cour d'appel dans l'arrêt qui fait l'objet du présent pourvoi. Dans l'affaire *Blencoe*, les juges majoritaires de la Cour d'appel ont suivi l'arrêt *Saskatchewan Human Rights Commission c. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.), et ont conclu qu'il y avait violation de l'art. 7 de la *Charte*. Toutefois, la Cour d'appel du Manitoba dans *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, et la Cour d'appel fédérale dans *Lignes aériennes Canadien International Ltée c. Canada (Commission des droits de la personne)*, [1996] 1 C.F. 638, ont refusé de suivre l'arrêt *Kodellas* et ont conclu que l'art. 7 ne peut pas s'appliquer aux conséquences d'un délai dans des procédures en matière de droits de la personne.

Dans l'affaire *Kodellas*, près de quatre années s'étaient écoulées entre le dépôt de la première plainte et la date fixée pour la tenue de l'audience, alors que trois années et deux mois s'étaient écoulées dans le cas de la deuxième plainte. Le juge en chef Bayda, dissident en partie au sujet de la réparation appropriée, a conclu que le délai écoulé portait atteinte au droit de M. Kodellas à la sécurité de sa personne garanti par l'art. 7. En tirant cette conclusion, le juge en chef Bayda a mentionné les motifs dissidents du juge Lamer dans *Mills c. La Reine*, [1986] 1 R.C.S. 863 (ci-après l'«arrêt *Mills* de 1986»), à la p. 919, repris dans *R. c. Rahey*, [1987] 1 R.C.S. 588, à la p. 605, selon lesquels la

“overlong subjection to the vexations and vicissitudes of a pending criminal accusation” (*Kodellas*, at p. 152). The unreasonable delay in *Kodellas* was found to result in two forms of prejudice to Mr. Kodellas. First, it extended his psychological trauma. Second, it reduced Mr. Kodellas’s chances of a fair hearing (*Kodellas*, at p. 161).

sécurité de la personne, dans le contexte de l’al. 11b) de la *Charte*, englobe la protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d’une accusation criminelle pendante» (*Kodellas*, à la p. 152). Il a été jugé, dans *Kodellas*, que le délai déraisonnable avait causé deux formes de préjudice à M. Kodellas: premièrement, il avait prolongé son traumatisme psychologique et, deuxièmement, il avait réduit les chances de M. Kodellas d’obtenir une audience équitable (*Kodellas*, à la p. 161).

In *Nisbett*, the Manitoba Court of Appeal denied relief sought by a medical doctor to prohibit the hearing of his employee’s complaint of sexual harassment that had been outstanding for over three years. This decision was reached despite the stigma attached to the allegations which was described as “anxiety, the strain on family life, the disruption of his professional practice, the quest for evidence of similar conduct from former employees, the damage to his personal dignity and professional standing, the loss of self-esteem, and the continuing uncertainty as to the final outcome of the proceedings” (*Nisbett*, at p. 749) (quoting from the trial judgment (1992), 90 D.L.R. (4th) 672, at p. 679). The Manitoba Court of Appeal refused to follow *Kodellas*, questioning whether the impact of a criminal proceeding for sexual assault can be equated with a human rights proceeding on allegations of sex discrimination for the purposes of s. 7. The Court of Appeal concluded that s. 7 had no application to non-penal proceedings under human rights legislation and that s. 11 of the *Charter* was restricted to criminal cases.

Dans l’arrêt *Nisbett*, la Cour d’appel du Manitoba a refusé d’interdire, à la demande d’un médecin, l’audition de la plainte de harcèlement sexuel que l’employée de ce dernier avait déposée plus de trois ans auparavant. Elle a rendu cette décision malgré les stigmates liés aux allégations, qui avait été décrits comme étant [TRADUCTION] «l’angoisse, la perturbation de la vie familiale et de la vie professionnelle, la recherche d’une preuve de comportement similaire auprès d’anciennes employées, l’atteinte à la dignité personnelle et à la réputation professionnelle, la perte d’estime de soi et l’incertitude continuelle quant à l’issue finale des procédures» (*Nisbett*, à la p. 749 (citation provenant du jugement de première instance (1992), 90 D.L.R. (4th) 672, à la p. 679)). Doutant que l’incidence de procédures criminelles en matière d’agression sexuelle puisse être assimilée, aux fins de l’application de l’art. 7, à celle de procédures en matière de droits de la personne relatives à des allégations de discrimination sexuelle, la Cour d’appel du Manitoba a refusé de suivre l’arrêt *Kodellas*. Elle a statué que l’art. 7 ne s’appliquait pas à des procédures non pénales fondées sur une loi relative aux droits de la personne et que l’art. 11 de la *Charte* ne s’appliquait qu’en matière criminelle.

In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of a tribunal to investigate. The Federal Court of Appeal also refused to follow *Kodellas*, and concluded that s. 7 did not apply to administrative proceedings of a non-criminal nature.

Dans *Lignes aériennes Canadien*, un délai de 50 mois s’était écoulé entre le dépôt de la plainte et la désignation des membres du tribunal chargé de faire enquête. La Cour d’appel fédérale y a également refusé de suivre l’arrêt *Kodellas* et a conclu que l’art. 7 ne s’appliquait pas à des procédures administratives de nature non criminelle.

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(b) Applicability of Section 7 Outside the Criminal Context

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Although there have been some decisions of this Court which may have supported the position that s. 7 of the *Charter* is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context. This was most recently affirmed by this Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, where Lamer C.J. stated that the protection of security of the person extends beyond the criminal law (at para. 58). He later added (at para. 65):

... s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see *B. (R.)*, *supra*, at para. 22.

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Thus, to the extent that the above decisions of *Nisbett* and *Canadian Airlines* stand for the proposition that s. 7 can never apply outside the criminal realm, they are incorrect. Section 7 can extend beyond the sphere of criminal law, at least where there is “state action which directly engages the justice system and its administration” (*G. (J.)*, at para. 66). If a case arises in the human rights context which, on its facts, meets the usual s. 7 threshold requirements, there is no specific bar against such a claim and s. 7 may be engaged. The question to be addressed, however, is not whether delays in human rights proceedings can engage s. 7 of the *Charter* but rather, whether the respondent’s s. 7 rights were actually engaged by delays in the circumstances of this case. Various parties in this case seem to have conflated the delay issue with the threshold s. 7 issue. However, whether the respondent’s s. 7 rights to life, liberty and security of the person are engaged is a separate issue from whether the delay itself was unreasonable. I will now examine whether the s. 7 threshold requirements have been met and whether the

b) Applicabilité de l’art. 7 dans un contexte autre que celui du droit criminel

Même si, dans certains arrêts, notre Cour a pu adhérer au point de vue que l’art. 7 de la *Charte* ne s’applique que dans le domaine du droit criminel, il ne fait plus aucun doute que cette disposition n’est pas limitée au contexte pénal. C’est ce que confirmait tout récemment notre Cour dans *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, où le juge en chef Lamer a affirmé que la protection de la sécurité de la personne déborde le cadre du droit criminel (au par. 58). Plus loin, il a ajouté ce qui suit (au par. 65):

... l’art. 7 n’est pas limité aux affaires purement criminelles ou pénales. Dans le cours de l’administration de la justice, il existe d’autres façons par lesquelles l’État peut priver un individu du droit à la liberté et à la sécurité de la personne garanti à l’art. 7, par exemple l’internement dans un établissement psychiatrique: voir *B. (R.)*, précité, au par. 22.

Ainsi, les arrêts *Nisbett* et *Lignes aériennes Canadien*, précités, sont erronés dans la mesure où ils permettent d’affirmer que l’art. 7 ne s’applique qu’en matière criminelle. L’article 7 peut déborder le cadre du droit criminel, au moins dans le cas d’un «acte gouvernemental intéressant directement le système judiciaire et l’administration de la justice» (*G. (J.)*, au par. 66). Rien ne s’oppose à ce que cet article s’applique à une affaire en matière des droits de la personne qui, sur le plan des faits, respecte les conditions préliminaires de son application. La question qui se pose toutefois est de savoir non pas si des délais dans des procédures en matière de droits de la personne peuvent déclencher l’application de l’art. 7 de la *Charte*, mais plutôt si, dans les circonstances de la présente affaire, des délais ont porté atteinte aux droits garantis à l’intimé par l’art. 7. Différentes parties à la présente affaire semblent avoir confondu la question du délai avec la question préliminaire de l’art. 7. Toutefois, la question de savoir si les droits de l’intimé à la vie, à la liberté et à la sécurité de sa personne s’appliquent est distincte de celle de savoir si le délai lui-même était déraisonnable. Je vais maintenant examiner si les conditions prélimi-

respondent has demonstrated a breach of his s. 7 rights.

(c) Section 7 — General Principles

Section 7 of the *Charter* provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Thus, before it is even possible to address the issue of whether the respondent’s s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7. These two steps in the s. 7 analysis have been set out by La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 401, as follows:

To trigger its operation there must first be a finding that there has been a deprivation of the right to “life, liberty and security of the person” and, secondly, that the deprivation is contrary to the principles of fundamental justice.

Thus, if no interest in the respondent’s life, liberty or security of the person is implicated, the s. 7 analysis stops there. It is at the first stage in the s. 7 analysis that I have the greatest problem with the respondent’s s. 7 arguments.

McEachern C.J.B.C. collapsed the s. 7 interests of “liberty” and “security of the person” into a single right protecting a person’s dignity against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by the respondent. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 204-5, Wilson J. emphasized that “life, liberty and security of the person” are three distinct interests, and that it is incumbent on the Court to give meaning to each of these elements. This statement was endorsed by Lamer J. for a majority of this Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500. In addressing the issue of whether the respondent’s s. 7 rights have been breached in this case, I also prefer to keep the interests protected by s. 7 analytically distinct to the extent possible. For the

naires de l’application de l’art. 7 sont remplies et si l’intimé a démontré qu’il y a eu violation des droits que lui garantit cet article.

c) Article 7 — Principes généraux

L’article 7 de la *Charte* prévoit ceci: «[c]haque personne a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale.» Ainsi, avant même que l’on puisse se demander si les droits garantis à l’intimé par l’art. 7 ont fait l’objet d’une atteinte non conforme aux principes de justice fondamentale, il faut d’abord prouver que le droit visé par l’allégation de l’intimé relève de l’art. 7. Dans l’arrêt *R. c. Beare*, [1988] 2 R.C.S. 387, à la p. 401, le juge La Forest a énoncé ainsi ces deux étapes de l’analyse fondée sur l’art. 7:

Pour que l’article puisse entrer en jeu, il faut constater d’abord qu’il a été porté atteinte au droit «à la vie, à la liberté et à la sécurité [d’une] personne» et, en second lieu, que cette atteinte est contraire aux principes de justice fondamentale.

Par conséquent, si le droit de l’intimé à la vie, à la liberté ou à la sécurité de sa personne n’est pas en cause, l’analyse fondée sur l’art. 7 prend fin. C’est à la première étape de cette analyse que les arguments de l’intimé relatifs à l’art. 7 me posent le plus de difficultés.

Le juge en chef McEachern a fondu le droit «à la liberté» et le droit «à la sécurité de [l]a personne» en un seul droit à la protection de la dignité de la personne contre la stigmatisation découlant d’un opprobre prolongé et injustifié comme celui dont l’intimé a été victime. Dans *Singh c. Ministre de l’Emploi et de l’Immigration*, [1985] 1 R.C.S. 177, aux pp. 204 et 205, le juge Wilson a insisté sur le fait que «la vie, la liberté et la sécurité de la personne» constituent trois droits distincts et qu’il incombe à notre Cour de préciser le sens de chacun de ces droits. Le juge Lamer a souscrit à cet énoncé au nom de notre Cour à la majorité dans le *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, à la p. 500. Pour déterminer si, en l’espèce, il a été porté atteinte aux droits de l’intimé garantis par l’art. 7, je préfère, dans la mesure du

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purposes of this appeal, the outcome is dependent upon the meaning to be given to the interests of “liberty” and “security of the person”.

(d) Liberty Interest

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The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that “liberty” is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L’Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual’s personal autonomy:

... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

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In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J., speaking for herself alone, was of the opinion that s. 251 of the *Criminal Code* violated not only a woman’s right to security of the person but her s. 7 liberty interest as well. She indicated that the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and

possible, cloisonner ces droits aux fins de l’analyse. L’issue du présent pourvoi dépend du sens donné aux droits «à la liberté» et «à la sécurité de [l]a personne».

d) Droit à la liberté

Le droit à la liberté garanti par l’art. 7 de la *Charte* ne s’entend plus uniquement de l’absence de toute contrainte physique. Des juges de notre Cour ont conclu que la «liberté» est en cause lorsque des contraintes ou des interdictions de l’État influent sur les choix importants et fondamentaux qu’une personne peut faire dans sa vie. Une telle situation existe, par exemple, lorsque des personnes doivent se présenter à un endroit et à un moment précis pour faire prendre leurs empreintes digitales (*Beare, précité*), produire des documents ou témoigner (*Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425), et lorsque des personnes doivent s’abstenir de flâner dans certains lieux (*R. c. Heywood*, [1994] 3 R.C.S. 761). Dans notre société libre et démocratique, chacun a le droit de prendre des décisions d’importance fondamentale sans intervention de l’État. Dans *B. (R.) c. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, au par. 80, le juge La Forest, avec l’assentiment des juges L’Heureux-Dubé, Gonthier et McLachlin, souligne que le droit à la liberté garanti par l’art. 7 protège l’autonomie personnelle et qu’il doit être interprété largement et en conformité avec les principes et les valeurs qui sous-tendent la *Charte* dans son ensemble:

... la liberté ne signifie pas simplement l’absence de toute contrainte physique. Dans une société libre et démocratique, l’individu doit avoir suffisamment d’autonomie personnelle pour vivre sa propre vie et prendre des décisions qui sont d’importance fondamentale pour sa personne.

Dans *R. c. Morgentaler*, [1988] 1 R.C.S. 30, le juge Wilson, s’exprimant uniquement en son propre nom, était d’avis que l’art. 251 du *Code criminel* violait non seulement le droit d’une femme à la sécurité de sa personne, mais également son droit à la liberté garanti par l’art. 7. Elle a indiqué que le droit à la liberté prend racine dans les concepts

choice in decisions regarding an individual's fundamental being. She conveyed this as follows, at p. 166:

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

The above passage was endorsed by La Forest J. in *B. (R.)*, *supra*, at para. 80. This Court in *B. (R.)* was asked to decide whether the s. 7 liberty interest protects the rights of parents to choose medical treatment for their children. The above passage from Wilson J. was applied by La Forest J. to individual interests of fundamental importance in our society such as the parental interest in caring for one's children.

In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66, La Forest J., writing for L'Heureux-Dubé J. and McLachlin J. (as she then was), reiterated his position that the right to liberty in s. 7 protects the individual's right to make inherently private choices and that choosing where to establish one's home is one such inherently personal choice:

The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its

fondamentaux de la dignité humaine, de l'autonomie personnelle, de la vie privée et du choix des décisions concernant l'être fondamental de l'individu. Voici ce qu'elle a dit, à la p. 166:

Ainsi, un aspect du respect de la dignité humaine sur lequel la *Charte* est fondée est le droit de prendre des décisions personnelles fondamentales sans intervention de l'État. Ce droit constitue une composante cruciale du droit à la liberté. La liberté, comme nous l'avons dit dans l'arrêt *Singh*, est un terme susceptible d'une acception fort large. À mon avis, ce droit, bien interprété, confère à l'individu une marge d'autonomie dans la prise de décisions d'importance fondamentale pour sa personne.

Le juge La Forest a adopté cet extrait dans l'arrêt *B. (R.)*, précité, au par. 80. Dans cette affaire, notre Cour était appelée à décider si le droit à la liberté garanti par l'art. 7 protège le droit des parents de choisir un traitement médical pour leurs enfants. Le juge La Forest a appliqué l'extrait précité des motifs du juge Wilson aux droits individuels qui revêtent une importance fondamentale dans notre société, comme le droit des parents de prendre soin de leurs enfants.

Dans l'arrêt *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, au par. 66, le juge La Forest, s'exprimant au nom du juge L'Heureux-Dubé et du juge McLachlin (maintenant Juge en chef), a réitéré son point de vue selon lequel le droit à la liberté garanti par l'art. 7 protège le droit de chacun de faire des choix intrinsèquement privés, y compris le choix d'un lieu pour établir sa demeure:

L'analyse qui précède ne fait que répéter mon opinion générale selon laquelle la protection du droit à la liberté garanti par l'art. 7 de la *Charte* s'étend au droit à une sphère irréductible d'autonomie personnelle où les individus peuvent prendre des décisions intrinsèquement privées sans intervention de l'État. Comme les propos que j'ai tenus dans l'arrêt *B. (R.)* l'indiquent, je n'entends pas par là, je le précise, que cette sphère d'autonomie est vaste au point d'englober toute décision qu'un individu peut prendre dans la conduite de ses affaires. Une telle opinion, en effet, irait à l'encontre du principe fondamental que j'ai formulé au début des présents motifs et dans les motifs de l'arrêt *B. (R.)*, selon lequel nul ne peut, dans une société organisée, prétendre à la garantie de la liberté absolue d'agir comme il lui plaît. J'estime même que cette sphère d'autonomie ne protège

scope every matter that might, however vaguely, be described as “private”. Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one’s home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy. [Emphasis added.]

La Forest J. therefore spoke in *Godbout* of a narrow sphere of inherently personal decision-making deserving of the law’s protection. Choosing where to establish one’s home fell within that narrow class according to three members of this Court.

pas tout ce qui peut, même vaguement, être qualifié de «privé». Je suis plutôt d’avis que l’autonomie protégée par le droit à la liberté garanti par l’art. 7 ne comprend que les sujets qui peuvent à juste titre être qualifiés de fondamentalement ou d’essentiellement personnels et qui impliquent, par leur nature même, des choix fondamentaux participant de l’essence même de ce que signifie la jouissance de la dignité et de l’indépendance individuelles. Comme je l’ai déjà mentionné, j’ai exprimé, dans l’arrêt *B.(R.)*, l’opinion voulant que les décisions des parents quant aux soins médicaux administrés à leurs enfants appartiennent à cette catégorie limitée de sujets fondamentalement personnels. À mon avis, le choix d’un lieu pour établir sa demeure est, de la même façon, une décision essentiellement privée qui tient de la nature même de l’autonomie personnelle. [Je souligne.]

Dans l’arrêt *Godbout*, le juge La Forest a donc parlé d’une catégorie limitée de décisions intrinsèquement personnelles qui méritent la protection de la loi. Selon trois juges de notre Cour, le choix d’un lieu pour établir sa demeure faisait partie de cette catégorie limitée.

52 Dissenting at the New Brunswick Court of Appeal in *G. (J.)*, I also favoured a more generous approach to the liberty interest that would protect personal rights that are inherent to the individual and consistent with the essential values of our society (*New Brunswick (Minister of Health and Community Services) v. J.G.* (1997), 187 N.B.R. (2d) 81, at para. 49). In this vein, the parental interest in raising and caring for one’s children would be protected. I however agreed with La Forest J.’s caution that the liberty interest would encompass only those decisions that are of fundamental importance.

Dissident en Cour d’appel du Nouveau Brunswick dans l’affaire *G. (J.)*, j’ai également préconisé une interprétation plus généreuse du droit à la liberté qui protégerait les droits personnels qui sont inhérents à l’individu et conformes aux valeurs essentielles de notre société (*Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. J.G.* (1997), 187 R.N.-B. (2^e) 81, au par. 49). Dans le même ordre d’idées, le droit des parents d’éduquer leurs enfants et d’en prendre soin serait protégé. J’ai cependant souscrit à la mise en garde du juge La Forest selon laquelle le droit à la liberté n’engloberait que les décisions qui revêtent une importance fondamentale.

53 Professor Hogg, *supra*, at p. 44-9, supports a more cautious approach to the interpretation of s. 7 such that s. 7 does not become a residual right which envelopes all of the legal rights in the *Charter*. Professor Hogg also addresses the deliberate omission of “property” from “life, liberty and security of the person” in s. 7, and states, at p. 44-12:

Le professeur Hogg, *op. cit.*, à la p. 44-9, préconise une interprétation plus prudente de l’art. 7 de manière à éviter que cet article confère un droit résiduel englobant toutes les garanties juridiques de la *Charte*. Le professeur Hogg aborde aussi la question de l’omission délibérée de garantir, à l’art. 7, le droit à la «propriété», en sus du droit «à la vie, à la liberté et à la sécurité de [l]a personne», et affirme, à la p. 44-12:

It also requires . . . that those terms [liberty and security of the person] be interpreted as excluding economic lib-

[TRADUCTION] Cela exige en outre [. . .] que ces termes [liberté et sécurité de [l]a personne] soient interprétés

erty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.

Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any “fundamental personal choices”. The interests sought to be protected in this case do not in my opinion fall within the “liberty” interest protected by s. 7.

(e) Security of the Person

In the criminal context, this Court has held that state interference with bodily integrity and serious state-imposed psychological stress constitute a breach of an individual’s security of the person. In this context, security of the person has been held to protect both the physical and psychological integrity of the individual (*Morgentaler*, *supra*, at p. 56, *per* Dickson C.J., and at p. 173, *per* Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 587, *per* Sopinka J.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1177, *per* Lamer J.). These decisions relate to situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person’s ability to control his or her own physical or psychological integrity such as prohibiting assisted suicide and regulating abortion.

The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in *G. (J.)*, *supra*. At issue in *G. (J.)* was whether relieving a parent of the custody of his or her children restricts a parent’s right to security of the person. Lamer C.J. held that the parental interest in raising one’s children is one of fundamental personal importance. State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a “gross intrusion” into the private and intimate sphere of the parent-child

comme excluant la liberté et la sécurité économiques; sinon, refoulée à la porte avant, la propriété entrerait par la porte arrière.

Même si un individu a le droit de faire des choix personnels fondamentaux sans intervention de l’État, cette autonomie personnelle n’est pas synonyme de liberté illimitée. Dans les circonstances de la présente affaire, l’État n’a pas empêché l’intimé de faire des «choix personnels fondamentaux». À mon avis, les droits que l’on cherche à protéger en l’espèce ne font pas partie du droit «à la liberté» garanti par l’art. 7.

e) Sécurité de la personne

Notre Cour a statué, en matière criminelle, que l’atteinte de l’État à l’intégrité corporelle et la tension psychologique grave causée par l’État constituent une atteinte à la sécurité de la personne. Dans ce contexte, il a été jugé que la sécurité de la personne vise à la fois l’intégrité physique et l’intégrité psychologique (*Morgentaler*, précité, à la p. 56, le juge en chef Dickson, et à la p. 173, le juge Wilson; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, à la p. 587, le juge Sopinka; *Renvoi relatif à l’art. 193 et à l’al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, à la p. 1177, le juge Lamer). Ces arrêts concernent des situations où l’État a légiféré au criminel dans le but de s’ingérer dans l’autonomie personnelle et la capacité d’une personne de maîtriser sa propre intégrité physique ou psychologique, en interdisant notamment l’aide au suicide et en réglementant l’avortement.

Récemment, dans l’arrêt *G. (J.)*, précité, notre Cour a réitéré le principe voulant que le droit à la sécurité de la personne vise la tension psychologique grave causée par l’État. La question en litige dans cette affaire était de savoir si le retrait de la garde d’un enfant portait atteinte au droit du parent à la sécurité de sa personne. Le juge en chef Lamer a conclu que le droit des parents d’élever leurs enfants est un droit personnel d’une importance fondamentale. Le retrait de la garde d’un enfant par l’État constitue donc une atteinte directe à l’intégrité psychologique du parent équivalant à une «intrusion flagrante» dans le domaine privé et

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relationship (at para. 61). Lamer C.J. concluded that s. 7 guarantees every parent the right to a fair hearing where the state seeks to obtain custody of their children (at para. 55). However, the former Chief Justice also set boundaries in *G. (J.)* for cases where one's psychological integrity is infringed upon. He referred to the attempt to delineate such boundaries as "an inexact science" (para. 59).

intime du lien parent-enfant (au par. 61). Le juge en chef Lamer a conclu que l'art. 7 garantit aux parents le droit à une audience équitable lorsque l'État demande la garde de leurs enfants (au par. 55). Cependant, il a également établi, dans l'arrêt *G. (J.)*, des limites applicables aux cas où il y a atteinte à l'intégrité psychologique d'une personne. Il a affirmé que la tentative d'établir de telles limites n'est pas une «science exacte» (par. 59).

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Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.

Les atteintes de l'État à l'intégrité psychologique d'une personne ne font pas toutes intervenir l'art. 7. Lorsque l'intégrité physique d'une personne est en cause, la sécurité de la personne se limite à la «tension psychologique grave causée par l'État» (le juge en chef Dickson dans *Morgentaler*, précité, à la p. 56). Je crois que le juge en chef Lamer a eu raison de dire que le juge en chef Dickson tentait d'exprimer en termes qualitatifs le type d'ingérence de l'État susceptible de violer l'art. 7 (*G. (J.)*, au par. 59). Selon l'expression «tension psychologique grave causée par l'État», deux conditions doivent être remplies que la sécurité de la personne soit en cause. Premièrement, le préjudice psychologique doit être causé par l'État, c'est-à-dire qu'il doit résulter d'un acte de l'État. Deuxièmement, le préjudice psychologique doit être grave. Les formes que prend le préjudice psychologique causé par le gouvernement n'entraînent pas toutes automatiquement des violations de l'art. 7. Je vais examiner successivement ces deux conditions.

(i) *Was the Harm to Mr. Blencoe the Result of State-Caused the Human Rights Process?*

(i) *Le préjudice subi par M. Blencoe résulte-t-il d'un délai imputable à l'État dans le déroulement du processus en matière de droits de la personne?*

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In *G. (J.)*, Lamer C.J. found direct state interference with the psychological integrity of the parent, describing the government action in that case as "direct state interference with the parent-child relationship" (para. 61). Later, at para. 66, Lamer C.J. referred to a child custody application as "an example of state action which directly engages the justice system and its administration" (emphasis added). He stressed that not every state action

Dans *G. (J.)*, le juge en chef Lamer a conclu qu'il y avait eu atteinte directe de l'État à l'intégrité psychologique du parent, qualifiant la mesure prise dans cette affaire par le gouvernement d'«ingérence directe de l'État dans le lien parent-enfant» (par. 61). Plus loin, au par. 66, il a dit que les demandes de garde d'enfants sont «un exemple d'acte gouvernemental intéressant directement le système judiciaire et l'administration de la justice»

which interferes with the parent-child relationship would have triggered s. 7.

Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.

While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged *Charter* violation was too “uncertain, speculative and hypothetical to sustain a cause of action”. In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. She stated, at p. 490:

It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face. [Emphasis added.]

(je souligne). Il a souligné que les actes de l'État qui constituent une ingérence dans le lien parent-enfant ne déclenchent pas tous l'application de l'art. 7.

Un procès criminel, une allégation en matière de droits de la personne ou même une action au civil peut être une cause de stress, d'angoisse et de stigmatisation même lorsque le procès ou les procédures se déroulent dans un délai raisonnable. Ce qui nous intéresse en l'espèce n'est pas tout préjudice de cette nature, mais seulement l'atteinte qui, peut-on dire, résulte du délai écoulé dans le déroulement du processus en matière de droits de la personne. Il serait inopportun de tenir le gouvernement responsable du préjudice causé par un tiers qui n'est aucunement un mandataire de l'État.

Bien que les allégations de harcèlement sexuel dont l'intimé a fait l'objet lui aient indéniablement causé un préjudice grave, il doit y avoir un lien de causalité suffisant entre le délai imputable à l'État et le préjudice subi par l'intimé pour que l'art. 7 s'applique. Dans *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, à la p. 447, le juge Dickson (plus tard Juge en chef) a conclu que le lien de causalité entre les actes du gouvernement et la violation alléguée de la *Charte* était «trop incertain, trop conjectural et trop hypothétique pour étayer une cause d'action». Dans des motifs concordants distincts, le juge Wilson a également fait état de la nécessité d'un lien direct quelconque entre les actes de l'État et l'atteinte qui en a résulté. Voici ce qu'elle a dit, à la p. 490:

Il n'est pas nécessaire de souscrire à l'interprétation restrictive avancée par le juge Pratte, qui limiterait l'art. 7 à une protection contre les arrestations ou les détentions arbitraires, pour convenir que l'article a pour objet central l'ingérence directe du gouvernement dans la vie, la liberté et la sécurité personnelle des citoyens. À tout le moins, me semble-t-il, il doit y avoir une forte présomption qu'on n'a jamais voulu qu'une action gouvernementale relative aux relations de l'État avec d'autres États, et qui donc n'est dirigée contre aucun membre de la collectivité politique immédiate, tombe sous le coup de l'art. 7 même si cette action peut avoir l'effet incident d'accroître le risque de mort ou de préjudice auquel les gens doivent faire face en général. [Je souligne.]

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61 The appellants submit that the nexus between the harm to the respondent and the alleged delay in processing the Complaints is remote. They assert that the largest measure of prejudice to Mr. Blencoe resulted not from any delay but from the publicity surrounding the events, especially his dismissal from Cabinet and later from the NDP caucus. They add that the respondent himself fought the allegations against him in the public domain. For the reasons I set out below, I also have doubts whether, on the facts, the psychological harm suffered by the respondent can be seen as the result of state-caused delay in the human rights process.

62 On March 1, 1995, the respondent was informed by Premier Harcourt that his former assistant, Fran Yanor, made sexual harassment allegations against him. This allegation was made public one week later. On March 9, 1995, Mr. Blencoe stepped down as Minister but remained in Cabinet, pending the results of an inquiry. He issued a press release, “vehemently denying the harassment allegations”. On March 10, 1995, the national and provincial press began running stories about the respondent’s resignation and allegations against him by Ms. Yanor and two other women. On April 4, 1995, Premier Harcourt removed the respondent from Cabinet and dismissed him from the NDP caucus.

63 While the respondent was only notified of the Schell and Willis Complaints in July and September of 1995, the record demonstrates that Mr. Blencoe had suffered the following prejudice or “stigmatization” prior to that time: Mr. Blencoe and his family were hounded by the media from the time that the Yanor harassment allegations were made public; the respondent and his wife feared press leaks and stopped speaking to persons outside their close circle of family and friends; Mr. Blencoe’s children were subjected to insults and name-calling at school; and Mr. Blencoe was under the care of a physician and was prescribed

Les appelants soutiennent que le lien entre le préjudice subi par l’intimé et le délai qui se serait écoulé dans le traitement des plaintes est ténu. Selon eux, la majeure partie du préjudice causé à M. Blencoe résultait non pas d’un délai mais de la publicité qui a entouré, plus particulièrement, son exclusion du Cabinet et, par la suite, du caucus du NPD. Ils ajoutent que l’intimé a lui-même réfuté publiquement les allégations dont il faisait l’objet. Pour les motifs indiqués ci-après, je doute également qu’il soit possible, d’après les faits, de considérer que le préjudice psychologique subi par l’intimé a résulté d’un délai imputable à l’État dans le déroulement du processus en matière de droits de la personne.

Le 1^{er} mars 1995, l’intimé a été informé par le premier ministre Harcourt que son ancienne adjointe, Fran Yanor, avait formulé des allégations de harcèlement sexuel contre lui. Ces allégations ont été rendues publiques une semaine plus tard. Le 9 mars 1995, M. Blencoe a démissionné de son poste de ministre, tout en continuant de faire partie du Cabinet, jusqu’à ce que les résultats de l’enquête soient connus. Il a diffusé un communiqué de presse dans lequel il [TRADUCTION] «niait catégoriquement les allégations de harcèlement». Le 10 mars 1995, la presse nationale et la presse provinciale ont commencé à faire état de la démission de l’intimé et des allégations formulées contre lui par M^{me} Yanor et deux autres femmes. Le 4 avril de la même année, le premier ministre Harcourt a exclu l’intimé du Cabinet et, ensuite, du caucus du NPD.

Quoique l’intimé Blencoe n’ait été avisé des plaintes de M^{mes} Schell et Willis qu’en juillet et en septembre 1995, il ressort du dossier qu’il avait déjà été victime d’un préjudice ou d’une «stigmatisation»: M. Blencoe et les membres de sa famille ont été traqués par les médias dès que les allégations de harcèlement de M^{me} Yanor eurent été rendues publiques; craignant les indiscretions de la presse, l’intimé et son épouse n’ont plus parlé qu’à leurs proches; les enfants de M. Blencoe ont fait l’objet d’insultes et de railleries à l’école; M. Blencoe a été suivi par un médecin qui lui a prescrit des antidépresseurs dès avril 1995.

antidepressants by April of 1995. The respondent himself admits that from mid-March 1995 until August 1995, he was “extremely unwell”. From April 11, 1995, to September 7, 1995, the respondent was on medical leave from the legislature. In the Fall of 1995, Mr. Blencoe considered whether to run in the upcoming election. Since he suspected that Premier Harcourt would refuse to sign his nomination papers, he decided not to seek the NDP nomination in his riding and resigned from the party on December 29, 1995. All of these events had occurred prior to any delays in the proceedings.

There is no question that the respondent’s life and that of his family have been terribly affected by the allegations of sexual harassment against him. His political career appears to be finished and, as professed by Lowry J., “[t]he impact on his family of what has seemed at times an unrelenting media coverage has been traumatic” (para. 12). The respondent attributes this prejudice to the delay in the human rights proceedings. McEachern C.J.B.C. agreed, stating (at para. 53) that:

There can be no doubt that [Blencoe] was severely wounded by the publicity surrounding his dismissal from the Cabinet. Such is the price of public life. But for these proceedings, however, it might reasonably be expected that the overwhelming attention would have died away and [Blencoe] and his family could have attempted to reconstruct their lives. [Emphasis added.]

With respect, I cannot agree with McEachern C.J.B.C.’s speculation that the respondent would have been able to reconstruct his life but for the proceedings (or I should say, delay in the proceedings). A higher level of certainty is required than “might reasonably be expected” in order to find that government has caused a deprivation of an individual’s *Charter* rights.

Based on the above facts, the Willis and Schell allegations were clearly not the first events in the sexual harassment claims against the respondent. Lambert J.A. asserted that “[t]he human rights pro-

L’intimé lui-même reconnaît que, à partir de la mi-mars jusqu’au mois d’août 1995, il allait [TRADUCTION] «très mal». Du 11 avril au 7 septembre 1995, il s’est absenté de l’assemblée législative pour cause de maladie. À l’automne de 1995, M. Blencoe s’est demandé s’il solliciterait un nouveau mandat lors du prochain scrutin. Comme il s’attendait à ce que le premier ministre Harcourt refuse de signer sa mise en candidature, il a décidé de ne pas se porter candidat du NPD dans sa circonscription et a démissionné du parti le 29 décembre 1995. Tous ces événements ont précédé quelque délai que ce soit dans les procédures.

Il ne fait aucun doute que les allégations de harcèlement sexuel ont terriblement nui à la vie personnelle de l’intimé et à celle des membres de sa famille. Sa carrière politique semble terminée et, comme l’a affirmé le juge Lowry, [TRADUCTION] «ce qui s’apparentait par moments à un acharnement médiatique a été traumatisant pour les membres de sa famille» (par. 12). L’intimé attribue ce préjudice au délai écoulé dans le déroulement des procédures en matière de droits de la personne. Le juge en chef McEachern lui a donné raison (au par. 53):

[TRADUCTION] On ne saurait douter que [Blencoe] a profondément souffert de la publicité qui a entouré son exclusion du Cabinet. Tels sont les aléas de la vie publique. Or, n’eût été des procédures, on aurait pu raisonnablement s’attendre à ce que l’attention considérable s’estompe et à ce que [Blencoe] et les membres de sa famille puissent tenter de retrouver une vie normale. [Je souligne.]

En toute déférence, je ne puis souscrire à la supposition du juge en chef McEachern que l’intimé aurait pu retrouver une vie normale n’eût été des procédures (ou, devrais-je dire, du délai écoulé dans les procédures). Pour conclure que le gouvernement a porté atteinte aux droits d’une personne garantis par la *Charte*, il faut plus de certitude que ce à quoi [TRADUCTION] «on aurait pu raisonnablement s’attendre».

D’après les faits susmentionnés, les allégations de M^{mes} Willis et Schell ne constituaient manifestement pas les premiers maillons de la chaîne des événements relatifs aux plaintes de harcèlement

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cess started with the complaints in *April, 1995*” (para. 5 (emphasis in original)). Based on the record, however, it is clear that the Willis and Schell Complaints were only filed with the Commission in July and August of that year. The respondent himself asserts that the complaints to the Premier’s office are what resulted in his removal from Cabinet and caucus. He makes this assertion to support his contention that the date from which the delay should be computed should pre-date the official Complaints to the Commission. This argument rather undermines the respondent’s assertion that the state caused his prejudice. The central event leading to the intense media scrutiny was the dismissal of the respondent from Cabinet and caucus in April 1995, following the allegations of Fran Yanor. At that time, there had been no complaints to the Commission. The Yanor allegations are thus more closely tied to the dismissal from Cabinet, and consequently the stigma. I therefore find that the most prejudicial impact on Mr. Blencoe was caused not by the actions of the Commission but rather by the events prior to the Complaints which caused the respondent to be ousted from Cabinet and caucus as well as the result of actions by non-governmental actors such as the press, employers and a soccer association. The harm to the respondent resulted from the publicity surrounding the allegations themselves coupled with the political fall-out which ensued rather than any delay in the human rights proceedings which had yet to commence at the time that the respondent began to experience stigma.

sexuel contre l’intimé. Le juge Lambert a dit que [TRADUCTION] «[l]e processus en matière de droits de la personne a été enclenché par le dépôt des plaintes en *avril 1995*» (par. 5 (en italique dans l’original)). Toutefois, selon le dossier, il est clair que la Commission n’a été saisie des plaintes de M^{mes} Willis et Schell qu’en juillet et en août de la même année. L’intimé lui-même affirme que ce sont les plaintes reçues au bureau du premier ministre qui ont entraîné son exclusion du Cabinet et du caucus. Cette affirmation vise à étayer sa prétention que la date à partir de laquelle le délai devrait être calculé est antérieure au dépôt officiel des plaintes à la Commission. Cet argument mine plutôt sa prétention que l’État est à l’origine du préjudice qu’il a subi. L’événement central à l’origine de la grande couverture médiatique a été l’exclusion de l’intimé du Cabinet et du caucus en avril 1995, à la suite des allégations de Fran Yanor. À l’époque, la Commission n’avait encore été saisie d’aucune plainte. Les allégations de M^{me} Yanor sont donc plus étroitement liées à l’exclusion du Cabinet et, par conséquent, à la stigmatisation. Je conclus donc que l’effet le plus préjudiciable sur M. Blencoe résulte non pas des actes de la Commission, mais plutôt d’événements antérieurs au dépôt des plaintes qui ont entraîné son expulsion du Cabinet et du caucus, ainsi que du comportement d’acteurs non gouvernementaux comme les journalistes, les employeurs et une association de soccer. Le préjudice subi par l’intimé est imputable à la publicité ayant entouré les allégations elles-mêmes et aux retombées politiques qui ont suivi, et non pas à un délai dans les procédures en matière de droit de la personne qui n’avait pas encore commencé à s’écouler lorsque l’intimé a commencé à être victime d’une stigmatisation.

Lambert J.A. rejected the connection between the delay and the prejudice. Although recognizing that the respondent and his family had suffered dreadfully, Lambert J.A. found that “[n]one of that stigma was brought about by the processes under the *Human Rights Act* or the *Human Rights Code*. Nor, in my opinion, was it much exacerbated by those processes” (para. 29). Lambert J.A. was also of the opinion that the stigma would not come to

Le juge Lambert a écarté tout lien entre le délai écoulé et le préjudice subi. Tout en reconnaissant que l’intimé et les membres de sa famille avaient souffert terriblement, il a conclu que [TRADUCTION] «[c]ette stigmatisation n’était aucunement imputable aux procédures fondées sur la *Human Rights Act* ou le *Human Rights Code*. À mon sens, ces procédures ne l’ont pas beaucoup aggravée non plus» (par. 29). Le juge Lambert était aussi d’avis

an end after the Tribunal had made its decision, “no matter the content of that decision” (para. 29).

I am in agreement with Lowry J. and Lambert J.A. on this issue. My understanding is that there remains a civil suit pending against Mr. Blencoe for sexual harassment and that Ms. Willis’s Complaint against the Government on these very same issues has not been stayed. The prolongation of stigma from this ongoing publicity was therefore likely regardless of the delay in the human rights proceedings. At best, the respondent was deprived of a speedy opportunity to clear his name.

While I conclude that the delay in the human rights process was not the direct cause of the respondent’s prejudice, another question which arises is whether it exacerbated his prejudice. According to McEachern C.J.B.C., the excessive delay in the human rights proceedings both created a stigma against Mr. Blencoe and exacerbated an existing prejudice, which, according to the majority of the Court of Appeal, is tantamount to the creation of the prejudice itself. McEachern C.J.B.C. relied on the decision of this Court in *Rodriguez, supra*, to find that the Commission’s exacerbation of the deprivation of security of the person that Mr. Blencoe suffered at the hands of the media, triggered s. 7 (at para. 56). The respondent similarly argues that the delay exacerbated the stigmatization, claiming that additional media stories surfaced each time there was a new development in the processing of the Complaints. He relies on this Court’s decision in *Morgentaler, supra*, to support the position that it is sufficient if the delay is “a contributing cause” of the prejudice.

First, with respect to this “contributing cause” argument, I find it very difficult to equate the situations in *Rodriguez* and *Morgentaler* with that in the case at bar. In *Rodriguez*, the Crown had erroneously characterized Mrs. Rodriguez’s deprivation of security of the person as caused not by government but by her physical disabilities. In rejecting that argument, Sopinka J. held that the *Criminal Code* prohibition at s. 241(b) would con-

que la stigmatisation ne prendrait pas fin dès que le Tribunal aurait rendu sa décision [TRADUCTION] «quelle qu’elle soit» (par. 29).

Je partage l’avis des juges Lowry et Lambert à cet égard. Si je comprends bien, M. Blencoe fait toujours l’objet de poursuites civiles pour harcèlement sexuel, et la plainte que M^{me} Willis a déposée contre le gouvernement pour les mêmes motifs n’a pas été suspendue. Il était donc probable que la stigmatisation résultant de cette publicité incessante se poursuivrait peu importe le délai écoulé dans les procédures en matière de droits de la personne. Au mieux, l’intimé a été privé de la possibilité de se disculper rapidement.

Même si je conclus que le délai écoulé dans le déroulement du processus en matière de droits de la personne n’a pas été la cause directe du préjudice subi par l’intimé, une autre question qui se pose est de savoir s’il a aggravé ce préjudice. Selon le juge en chef McEachern, le délai excessif dans les procédures en matière de droits de la personne a à la fois stigmatisé M. Blencoe et aggravé un préjudice existant, ce qui, selon la Cour d’appel à la majorité, équivaut au fait même de causer le préjudice. Le juge en chef McEachern s’est fondé sur l’arrêt *Rodriguez*, précité, de notre Cour pour conclure que l’aggravation, par la Commission, de l’atteinte que les médias portaient à la sécurité de la personne de M. Blencoe déclenchait l’application de l’art. 7 (au par. 56). De même, l’intimé fait valoir que le délai a aggravé la stigmatisation du fait que l’affaire refaisait surface dans les médias chaque fois qu’il y avait du nouveau dans le traitement des plaintes. Il s’appuie sur l’arrêt *Morgentaler*, précité, de notre Cour pour affirmer qu’il suffit que le délai écoulé soit un «facteur qui a contribué» au préjudice.

Premièrement, en ce qui concerne l’argument du «facteur qui a contribué», il me semble très difficile d’assimiler les situations dans les affaires *Rodriguez* et *Morgentaler* à celle qui existe en l’espèce. Dans l’affaire *Rodriguez*, le ministère public avait imputé à tort l’atteinte à la sécurité de la personne de M^{me} Rodriguez non pas au gouvernement, mais à ses déficiences physiques. En rejetant cet argument, le juge Sopinka a conclu que l’inter-

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tribute to Mrs. Rodriguez's distress if she was prevented from managing her death (at p. 584). A *Criminal Code* prohibition therefore directly deprived Mrs. Rodriguez of the ability to terminate her life. The Court in *Rodriguez* surely did not eliminate the need to establish a relationship between the harm complained of and the state action. In *Rodriguez*, all of the members of the Court agreed that government actions deprived Mrs. Rodriguez of the right to terminate her life at the time of her choosing. In the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights. The same cannot be said of the facts in the case at bar.

diction prévue à l'al. 241b) du *Code criminel* contribuerait à la souffrance de M^{me} Rodriguez si on l'empêchait de gérer sa mort (à la p. 584). Une interdiction du *Code criminel* empêchait donc directement M^{me} Rodriguez de mettre fin à ses jours. Dans l'affaire *Rodriguez*, notre Cour n'a sûrement pas éliminé la nécessité d'établir l'existence d'un lien entre le préjudice reproché et l'acte de l'État. Tous les juges de notre Cour ont reconnu que des actes de l'État portaient atteinte au droit de M^{me} Rodriguez de mettre fin à ses jours au moment qu'elle jugerait opportun. N'eût été le rôle de l'État, il n'y aurait eu aucune atteinte aux droits garantis à M^{me} Rodriguez par l'art. 7. On ne peut en dire autant des circonstances de la présente affaire.

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In the same vein, the *Morgentaler* case dealt with direct state interference with a woman's bodily integrity in that the delays in obtaining therapeutic abortions were caused by the mandatory procedures in s. 251 of the *Criminal Code* and resulted in a higher probability of complications and greater health risks to women. In that case, it could not have been argued that the cause of the deprivation is a woman's pregnancy rather than the *Criminal Code* prohibition. The decisions in *Morgentaler* and *Rodriguez* do not, in my opinion, obviate the need to establish a significant connection between the harm and the impugned state action to invoke the *Charter*.

Dans le même ordre d'idées, l'affaire *Morgentaler* portait sur l'atteinte directe de l'État à l'intégrité corporelle des femmes, étant donné que le délai requis pour obtenir un avortement thérapeutique résultait de la procédure prescrite par l'art. 251 du *Code criminel* et augmentait le risque de complications et le danger pour la santé des femmes. Dans cette affaire, on n'aurait pas pu faire valoir que l'atteinte était imputable à la grossesse plutôt qu'à l'interdiction du *Code criminel*. Les arrêts *Morgentaler* et *Rodriguez* ne permettent pas, à mon avis, d'échapper à l'obligation d'établir l'existence d'un lien important entre le préjudice et l'acte reproché à l'État pour pouvoir invoquer la *Charte*.

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Moreover, even accepting this exacerbation argument, it is difficult to see how the respondent's prejudice was seriously exacerbated by the delays. In the absence of delays in the proceedings, the respondent would nevertheless have faced unproven allegations of sexual harassment and discrimination and suffered stigma as a result. It is thus clear that the respondent's reputation was harmed prior to the filing of the Complaints with the Commission. The delays in the proceedings could only have extended the time that rumours were circulating. As previously mentioned, the continuation of the concurrent complaint and civil action must also be considered. As professed by L'Heureux-Dubé J. in *R. v. O'Connor*, [1995] 4

En outre, même si l'argument de l'aggravation est retenu, il est difficile de voir comment le délai a aggravé sérieusement le préjudice subi par l'intimé. Même en l'absence de tout délai dans les procédures, l'intimé aurait fait face à des allégations non prouvées de harcèlement et de discrimination sexuels et aurait été stigmatisé en conséquence. Il est donc clair qu'il y a eu atteinte à la réputation de l'intimé avant le dépôt des plaintes devant la Commission. Le délai dans les procédures n'a pu contribuer qu'à prolonger la période pendant laquelle des rumeurs ont circulé. Comme je l'ai déjà mentionné, il faut également prendre en considération le fait que la plainte et les poursuites au civil concomitantes avaient toujours cours.

S.C.R. 411, at para. 119, with respect to privacy, “once invaded, it can seldom be regained”. Much the same is true of reputation; it is quickly ruined and difficult to re-establish. It is thus difficult to see how procedural delay could have seriously increased the damage to the respondent’s reputation that had already been done. The true prejudice to the respondent in this case may only be the lost opportunity to clear his name rapidly.

At trial, Lowry J. made the following finding concerning the cause of Mr. Blencoe’s suffering (at para. 13):

The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe.

Perhaps this statement supports the view that the outstanding Complaints did contribute to the stigma to some degree and that it was therefore a cause of the respondent’s suffering. Because I find in the next section that the state has not directly intruded into a private and intimate sphere of the respondent’s life, I assume without deciding that there is a sufficient nexus between the state-caused delay and the prejudice to Mr. Blencoe. I now turn to the question of whether this interference amounts to a violation of the respondent’s security of the person.

(ii) *Quality of the Interference*

McEachern C.J.B.C. concluded that liberty and security of the person under s. 7 protect both the privacy and dignity of individuals against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by Mr. Blencoe (at para. 101). He therefore conflated s. 7 into a general right to dignity and protection against the stigma of undue, prolonged humiliation and public degradation suffered as a result of an administra-

Comme le juge L’Heureux-Dubé l’a affirmé, au sujet de la vie privée, dans *R. c. O’Connor*, [1995] 4 R.C.S. 411, au par. 119, «dès qu’on y a porté atteinte, on peut rarement la regagner dans son intégralité». Il en va généralement de même de la réputation; elle peut être ternie rapidement, mais elle est difficile à rétablir. On voit mal comment un délai de procédure pourrait avoir sérieusement accru le préjudice déjà causé à la réputation de l’intimé. Il se peut que le véritable préjudice qui a été causé à l’intimé en l’espèce ait seulement été la perte de la possibilité de se disculper rapidement.

En première instance, le juge Lowry a conclu ce qui suit au sujet de la cause des souffrances de M. Blencoe (au par. 13):

[TRADUCTION] La stigmatisation liée aux plaintes dont M. Blencoe faisait l’objet a sûrement contribué dans une large mesure aux difficultés très réelles qu’il a éprouvées. Du fait de sa visibilité en tant que ministre du gouvernement, il était davantage exposé à l’attention que les médias lui ont portée à lui-même et à sa famille, ce qui explique la longueur et la gravité des difficultés qui ont résulté.

Cet énoncé confirme peut-être que les plaintes dont M. Blencoe faisait l’objet ont jusqu’à un certain point contribué à la stigmatisation et qu’elles ont donc été l’une des causes de ses souffrances. Étant donné que je conclus ci-après que l’État ne s’est pas directement immiscé dans la vie privée et intime de l’intimé, je présume, sans pour autant le décider, qu’il existe un lien suffisant entre le délai imputable à l’État et le préjudice subi par M. Blencoe. Je vais maintenant passer à la question de savoir si cette immixtion constitue une atteinte à la sécurité de la personne de l’intimé.

(ii) *Qualité de l’immixtion*

Le juge en chef McEachern a conclu que le droit à la liberté et à la sécurité de la personne garanti par l’art. 7 protège à la fois la vie privée et la dignité de l’individu contre la stigmatisation découlant d’un opprobre prolongé et injustifié comme celui dont M. Blencoe a été victime (au par. 101). Il a donc considéré que l’art. 7 confère un droit général à la dignité et à la protection contre l’opprobre prolongé et injustifié qui résulte de

tive proceeding. The question which arises is whether the rights of “liberty and security of the person” protected by s. 7 of the *Charter* include a generalized right to dignity, or more specifically, a right to be free from stigma associated with a human rights complaint? In my opinion, they do not.

procédures administratives. La question qui se pose est de savoir si les droits «à la liberté et à [l]a sécurité de la personne» garantis par l’art. 7 de la *Charte* comportent un droit général à la dignité ou, plus précisément, un droit à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne? Selon moi, ils ne comportent pas un tel droit.

75 The “right to dignity” accepted by McEachern C.J.B.C. essentially rests on several ideas. First, it is based on previous statements by this Court as to the importance and value of dignity. Second, it is based on the recognition in cases such as *Morgentaler* and *O’Connor* that state-induced psychological stress can infringe s. 7. Third, McEachern C.J.B.C. imports the notion of “stigma” as developed under s. 11(b) of the *Charter* in the criminal law context. Each of these bases for a generalized right to dignity under s. 7 will be addressed in turn.

1. Dignity

76 The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter* (*Morgentaler*, *supra*, at pp. 164-66, *per* Wilson J.). As professed by Dickson C.J. in his discussion of s. 1 of the *Charter* in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

Le «droit à la dignité» reconnu par le juge en chef McEachern repose essentiellement sur diverses idées. Premièrement, il s’appuie sur les propos que notre Cour a déjà tenus au sujet de l’importance et de la valeur de la dignité. Deuxièmement, il est fondé sur la reconnaissance, dans des affaires comme *Morgentaler* et *O’Connor*, que la tension psychologique causée par l’État peut violer l’art. 7. Troisièmement, le juge en chef McEachern transpose dans le contexte du droit criminel la notion de «stigmatisation» conçue sous le régime de l’al. 11(b) de la *Charte*. Ces trois fondements d’un droit général à la dignité sous le régime de l’art. 7 seront examinés successivement.

1. Dignité

La *Charte* et les droits qu’elle garantit sont inextricablement liés à la notion de dignité humaine. En fait, cette notion sous-tend presque tous les droits garantis par la *Charte* (*Morgentaler*, précité, aux pp. 164 à 166, le juge Wilson). Comme le juge en chef Dickson l’a dit en analysant l’article premier de la *Charte* dans l’arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, à la p. 136:

Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l’être humain, la promotion de la justice et de l’égalité sociales, l’acceptation d’une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. Les valeurs et les principes sous-jacents d’une société libre et démocratique sont à l’origine des droits et libertés garantis par la *Charte* et constituent la norme fondamentale en fonction de laquelle on doit établir qu’une restriction d’un droit ou d’une liberté constitue, malgré son effet, une limite raisonnable dont la justification peut se démontrer. [Je souligne.]

In *Rodriguez, supra*, Sopinka J. states that it is unquestioned that respect for human dignity is an underlying principle upon which our society is based (at p. 592). In *O'Connor, supra*, at para. 63, L'Heureux-Dubé J. states that, "[t]his Court has repeatedly recognized that human dignity is at the heart of the *Charter*". More recently, this Court has stated in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 51, that the purpose of s. 15(1) of the *Charter*, "is to prevent the violation of essential human dignity and freedom". Respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the *Charter*. This does not mean, however, that dignity is elevated to a free-standing constitutional right protected by s. 7 of the *Charter*. Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion. In cases such as *Morgentaler, Rodriguez* and *B. (R.)*, dignity was linked to personal autonomy over one's body or interference with fundamental personal choices. Indeed, dignity is often involved where the ability to make fundamental choices is at stake.

In my view, the notion of "dignity" in the decisions of this Court is better understood not as an autonomous *Charter* right, but rather, as an underlying value. In *Beare, supra*, at p. 401, La Forest J. cautions that s. 7 must not be interpreted too broadly, stating that:

Like other provisions of the *Charter*, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question. . . .

While this statement may have been *obiter* since the case was decided on the principles of fundamental justice, this caution with respect to the interpretation of "life, liberty and security of the person" is relevant nevertheless. La Forest J. chose

Dans l'arrêt *Rodriguez*, précité, le juge Sopinka affirme qu'on ne conteste pas que le respect de la dignité humaine est un principe fondamental de notre société (à la p. 592). Dans l'arrêt *O'Connor*, précité, au par. 63, le juge L'Heureux-Dubé précise que «[n]otre Cour a reconnu à plusieurs reprises que la dignité humaine est au cœur de la *Charte*». Plus récemment, dans l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, au par. 51, notre Cour a statué que le par. 15(1) de la *Charte* a pour objet «d'empêcher toute atteinte à la dignité et à la liberté humaines essentielles». Le respect de la dignité inhérente des gens est nettement une valeur essentielle de notre société libre et démocratique, qui doit guider les tribunaux dans l'interprétation de la *Charte*. Cela ne signifie pas, cependant, que l'on fait de la dignité un droit constitutionnel distinct garanti par l'art. 7 de la *Charte*. La dignité n'a jamais été reconnue comme un droit indépendant par notre Cour, mais a plutôt été perçue comme s'exprimant dans des droits comme celui à l'égalité, à la vie privée ou à la protection contre la contrainte de l'État. Dans des affaires comme *Morgentaler, Rodriguez* et *B. (R.)*, la dignité était liée à l'autonomie de la personne relativement à la maîtrise de son corps ou à l'ingérence dans des choix personnels fondamentaux. En fait, la dignité est souvent en cause lorsque la capacité de faire des choix fondamentaux est compromise.

À mon sens, il vaut mieux considérer la notion de «dignité» que l'on trouve dans la jurisprudence de notre Cour comme une valeur sous-jacente que comme un droit autonome garanti par la *Charte*. Dans l'arrêt *Beare*, précité, à la p. 401, le juge La Forest prévient que l'art. 7 ne doit pas être interprété de façon trop large:

Comme d'autres dispositions de la *Charte*, l'art. 7 doit être interprété en fonction des intérêts qu'il est censé protéger. Il doit recevoir une interprétation généreuse, mais il est important de ne pas outrepasser le but réel du droit en question . . .

Bien qu'elle ait pu être faite de manière incidente étant donné que l'affaire était tranchée en fonction des principes de justice fondamentale, cette mise en garde concernant l'interprétation du droit «à la vie, à la liberté et à la sécurité de [l]a personne» est

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not to base his finding of a s. 7 deprivation on any principle of “dignity or self-respect”, as did Bayda C.J.S. of the Court of Appeal in that case. La Forest J. chose instead to find a deprivation of liberty and security of the person for the reasons of Cameron J.A. in the court below, based on the statutory requirement that a person surrender himself into the custody of the authorities and submit to bodily intrusions on pain of arrest and prosecution. La Forest J. conveys this, at p. 402:

The Court of Appeal, we saw, found that the impugned provisions constituted an infringement of the right guaranteed by the opening words of s. 7, the majority because fingerprinting offends the “dignity and self-respect” of at least those persons who because of their self-perception or the perception of the community would feel demeaned by being thus treated. In short, the majority thought that being subjected to fingerprinting was to be treated like a criminal. This approach appears to be broad and indefinite and to introduce an undesirable notion of differentiation among those subjected to the procedure. For my part, I prefer the more specific finding of Cameron J.A. that the impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. [Emphasis added.]

néanmoins pertinente. Dans cette affaire, le juge La Forest n’a pas choisi, comme l’avait fait le juge en chef Bayda de la Cour d’appel, de fonder sa conclusion à une violation de l’art. 7 sur un principe quelconque de «dignité ou de respect de soi». Il a plutôt conclu à l’existence d’une atteinte à la liberté et à la sécurité de la personne pour les motifs exprimés par le juge Cameron de la Cour d’appel, compte tenu de l’exigence légale qu’une personne se rende aux autorités, se soumette à la détention et subisse des atteintes physiques sous peine d’emprisonnement et de poursuites. Le juge La Forest dit ceci, à la p. 402:

La Cour d’appel, nous l’avons vu, a jugé que les dispositions attaquées portaient atteinte au droit garanti par la première partie de l’art. 7, la majorité estimant que la prise des empreintes digitales est une atteinte «à la dignité et au respect de soi» dans le cas, à tout le moins, des personnes qui, à cause de leur propre perception ou de la perception de la collectivité se sentent humiliées par un tel traitement. En bref, la majorité pensait qu’être soumis à la prise d’empreintes digitales, c’était être traité comme un criminel. Cette vision des choses est large et indéfinie et introduit un élément regrettable de différenciation entre les diverses personnes qui sont soumises à la procédure. Pour ma part, je préfère la constatation plus précise du juge Cameron, que les dispositions attaquées enfreignent les droits garantis par l’art. 7 parce qu’elles obligent une personne à comparaître à une date et dans un lieu précis, et à subir une procédure d’identification sous peine d’emprisonnement en cas de refus d’obtempérer. [Je souligne.]

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According to the respondent, the human dignity of a person is closely tied to a person’s reputation and privacy interests. Indeed, much of the harm which has been suffered by Mr. Blencoe in this case has been the damage which has been done to his reputation. Essentially, the respondent argues that his reputation has been ruined through the stigma he has suffered as a result of the publicity relating to the human rights proceedings against him. While this Court found in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, that reputation was a concept underlying *Charter* rights, it too is not an independent *Charter* right in and of itself (at para. 120):

Selon l’intimé, la dignité d’une personne est étroitement liée à sa réputation et à son droit à la vie privée. En réalité, l’atteinte à la réputation représente une bonne partie du préjudice subi par M. Blencoe en l’espèce. L’intimé fait essentiellement valoir que la stigmatisation résultant de la publicité qui a entouré les procédures en matière de droit de la personne engagées contre lui a contribué à ruiner sa réputation. Même si notre Cour a conclu, dans *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130, que la réputation est un concept qui sous-tend les droits garantis par la *Charte*, elle n’est pas non plus elle-même un droit indépendant garanti par la *Charte* (au par. 120):

Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. [Emphasis added.]

Respect for a person's reputation, like respect for dignity of the person, is a value that underlies the *Charter*. These two values do not support the respondent's proposition that protection of reputation or freedom from the stigma associated with human rights complaints are independent constitutional s. 7 rights. Moreover, the above passages from *Hill* regarding the protection of reputation were made in the context of a defamation case. Defamation laws are intended to protect reputation. Dignity and reputation are not self-standing rights. Neither is freedom from stigma. I would therefore agree with the following passage from *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, supra*, at p. 1170, wherein Lamer J. cautioned:

If liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the *Charter* of other rights and freedoms such as freedom of religion and conscience or freedom of expression.

2. State Interference with Psychological Integrity

In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity (*G. (J.)*, *supra*, at para. 60). There must be state interference with an individual interest of fundamental importance (at para. 61). Lamer C.J. stated in *G. (J.)*, at para. 59:

It is clear that the right to security of the person does not protect the individual from the ordinary stresses and

Bien qu'elle ne soit pas expressément mentionnée dans la *Charte*, la bonne réputation de l'individu représente et reflète sa dignité inhérente, concept qui sous-tend tous les droits garantis par la *Charte*. La protection de la bonne réputation d'un individu est donc d'importance fondamentale dans notre société démocratique. [Je souligne.]

Le respect de la réputation d'une personne, tout comme le respect de sa dignité, est une valeur qui sous-tend la *Charte*. Ces deux valeurs n'étaient pas l'argument de l'intimé que la protection de la réputation ou la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne constitue un droit constitutionnel indépendant garanti par l'art. 7. En outre, les extraits précités de l'arrêt *Hill* concernant la protection de la réputation ont pour contexte une poursuite en diffamation. Les règles en matière de diffamation visent à protéger la réputation. La dignité et la réputation ne sont pas des droits distincts. La protection contre la stigmatisation ne l'est pas non plus. Je souscrirais donc à l'extrait suivant du *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel*, précité, à la p. 1170, où le juge Lamer a fait la mise en garde suivante:

Si la liberté ou la sécurité de la personne en vertu de l'art. 7 de la *Charte* étaient définies en fonction d'attributs comme la dignité, la valorisation et le bien-être sur le plan émotionnel, il semble que la liberté en vertu de l'art. 7 aurait une portée illimitée. Si tel était le cas, on pourrait sérieusement mettre en doute l'existence indépendante, dans la *Charte*, d'autres droits et libertés comme la liberté de conscience et de religion ou la liberté d'expression.

2. Atteinte de l'État à l'intégrité psychologique

Pour que la sécurité de la personne soit en cause en l'espèce, l'acte reproché à l'État doit avoir eu des répercussions graves et profondes sur l'intégrité psychologique de l'intimé (*G. (J.)*, précité, au par. 60). L'État doit avoir porté atteinte à un droit individuel d'importance fondamentale (au par. 61). Dans l'arrêt *G. (J.)*, précité, au par. 59, le juge en chef Lamer a dit ce qui suit:

Il est manifeste que le droit à la sécurité de la personne ne protège pas l'individu contre les tensions et les

anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.

He went on to state (at paras. 63-64):

Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268.

While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent qua parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged. [Emphasis added.]

82 The quality of the injury must therefore be assessed. In my opinion, all of the cases which have come within the broad interpretation of "security of the person" outside of the penal context differ markedly from the interests that are at issue in this case. Violations of security of the person in this context include only serious psychological incursions resulting from state interference with an individual interest of fundamental importance.

83 It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these funda-

angoisses ordinaires qu'une personne ayant une sensibilité raisonnable éprouverait par suite d'un acte gouvernemental. Si le droit était interprété de manière aussi large, d'innombrables initiatives gouvernementales pourraient être contestées au motif qu'elles violent le droit à la sécurité de la personne, ce qui élargirait considérablement l'étendue du contrôle judiciaire, et partant, banaliserait la protection constitutionnelle des droits.

Il a ajouté ceci (aux par. 63 et 64):

Les actes par lesquels l'État s'ingère dans le lien parent-enfant ne restreignent pas tous le droit d'un parent à la sécurité de sa personne. Par exemple, ce droit n'est pas restreint du seul fait que l'enfant est condamné à la prison ou enrôlé dans l'armée par conscription. Pas plus qu'il ne l'est lorsque l'enfant est abattu par négligence par un agent de police: *Augustus c. Gosset*, [1996] 3 R.C.S. 268.

Bien que l'ingérence de l'État puisse constituer une source de tension et d'angoisse importantes pour le parent, la nature du «préjudice» causé au parent par ces actes peut être distinguée de celle qui est visée dans la présente affaire. Dans les exemples susmentionnés, l'État ne se prononce pas sur l'aptitude du père ou de la mère ni sur sa qualité de parent, il n'usurpe pas non plus sur le rôle parental ni ne cherche à s'ingérer dans l'intimité du lien parent-enfant. En résumé, l'État ne porte pas directement atteinte à l'intégrité psychologique du parent en tant que parent. La répercussion différente sur l'intégrité psychologique des parents dans les exemples susmentionnés m'amène à conclure que les droits constitutionnels des parents n'entrent pas en jeu. [Je souligne.]

Le préjudice doit donc être évalué sur le plan qualitatif. À mon avis, la présente affaire, en raison des droits qui sont en cause, diffère sensiblement de toutes les affaires non pénales que l'on a considérées comme n'étant pas visées par la notion de «sécurité de la personne», à l'issue d'une interprétation large de cette notion. L'atteinte à la sécurité de la personne dans le présent contexte n'englobe que l'atteinte grave à l'intégrité psychologique résultant de l'atteinte de l'État à un droit individuel d'importance fondamentale.

Ce n'est que dans des cas exceptionnels où l'État s'ingère dans des choix profondément intimes et personnels d'un individu que le délai imputable à l'État, dans des procédures en matière de droits de la personne, pourrait déclencher l'ap-

mental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

In *O'Connor*, *supra*, this Court dealt with the disclosure of therapeutic records of a complainant in a sexual assault case. L'Heureux-Dubé J. described the psychological trauma that could be faced by sexual assault victims if forced to disclose their therapeutic records, at para. 112:

These people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.

Such a situation amounts to direct state interference with a complainant's psychological integrity. Moreover, *O'Connor* was reached primarily on the basis of privacy concerns and animated by principles protected by s. 8 of the *Charter*. In *O'Connor*, at para. 110, L'Heureux-Dubé J. listed the cases in which the Court "expressed sympathy" for the idea that s. 7 includes a right to privacy. But she concluded that people have only a "reasonable expectation of privacy" (emphasis deleted) because privacy "must be balanced against legitimate societal needs" (para. 117). However, unlike sexual assault victims who may be said to have a reasonable expectation of privacy in their therapeutic records, the Commission in this case has not invaded any of the respondent's privacy interests. If there was any invasion of the respondent's privacy, it cannot be said to have resulted from state action. Moreover, when one assumes a very prominent public office as the respondent has, it is arguable that a certain amount of public scrutiny is to be expected. The respondent injected himself into the public realm and the public scrutiny that it entailed. An individ-

plication du droit à la sécurité de la personne garanti par l'art. 7. Même si ces choix personnels fondamentaux comprenaient le droit de prendre des décisions concernant son propre corps sans intervention de l'État ou sans risque de perdre la garde d'un enfant, ils pourraient difficilement inclure le genre de stress, d'anxiété et de stigmatisation qui résulte de procédures administratives ou civiles.

Dans l'arrêt *O'Connor*, précité, notre Cour était appelée à se prononcer sur la communication du dossier thérapeutique d'une plaignante dans une affaire d'agression sexuelle. Le juge L'Heureux-Dubé a décrit le traumatisme psychique auquel pouvaient faire face les victimes d'agression sexuelle tenues de communiquer leurs dossiers thérapeutiques (au par. 112):

Elles doivent envisager la menace de divulguer à la personne accusée de les avoir agressées en premier lieu, et très probablement en pleine cour, des dossiers contenant des aspects totalement privés de leur vie, contenant probablement des pensées et des déclarations qui n'ont jamais été partagées avec leurs amis les plus intimes ou leur famille.

Il s'agit là d'une atteinte directe de l'État à l'intégrité psychologique d'une plaignante. De plus, l'arrêt *O'Connor* était fondé principalement sur des préoccupations en matière de vie privée et s'inspirait de principes protégés par l'art. 8 de la *Charte*. Dans cet arrêt, au par. 110, le juge L'Heureux-Dubé a énuméré les affaires dans lesquelles notre Cour «a favorisé» l'idée que l'art. 7 garantit notamment un droit à la vie privée. Elle a cependant conclu que les gens n'ont qu'une «attente raisonnable en matière de protection de la vie privée» (soulignement omis), car la protection de la vie privée «doit être pondérée en tenant compte des besoins légitimes de la société» (par. 117). Toutefois, à la différence des victimes d'agression sexuelle dont on peut dire qu'elles ont, à l'égard de leurs dossiers thérapeutiques, une attente raisonnable en matière de protection de leur vie privée, la Commission en l'espèce n'a pas porté atteinte au droit à la vie privée de l'intimé. S'il y a eu atteinte au droit à la vie privée de l'intimé, on ne saurait dire qu'elle résulte d'un acte de l'État. En outre, on peut soutenir que la personne

ual can have no more than a reasonable expectation of privacy.

qui occupe une charge publique aussi importante que celle de l'intimé peut s'attendre à être exposée, dans une certaine mesure, à l'attention du public. L'intimé s'est lancé lui-même dans le domaine des affaires publiques et s'est exposé lui-même à l'attention qui s'y rattache. Nul ne peut avoir davantage qu'une attente raisonnable en matière de protection de la vie privée.

85 Where the therapeutic relationship between a sexual assault complainant and his or her physician is threatened by the disclosure of private records, this Court has recently held that security of the person is implicated (*R. v. Mills*, [1999] 3 S.C.R. 668 (hereinafter "*Mills* (1999)"), at para. 85). However, this is because the therapeutic relationship between doctor and patient is crucial to the patient's psychological integrity. This relationship must be protected to safeguard the mental integrity of patients and to thereby aid victims in recovering from their trauma. To disclose confidential records would undermine this relationship and jeopardize the victim's psychological integrity.

Notre Cour a récemment statué que la sécurité de la personne est en cause lorsque la relation thérapeutique entre l'auteur d'une plainte d'agression sexuelle et son médecin est compromise par la communication de dossiers privés (*R. c. Mills*, [1999] 3 R.C.S. 668 (ci-après l'«arrêt *Mills* de 1999»), au par. 85). Il en est cependant ainsi parce que la relation thérapeutique entre le médecin et le patient est essentielle à l'intégrité psychologique de ce dernier. Cette relation doit être protégée afin de préserver l'intégrité mentale des patients et d'aider ainsi les victimes à se remettre de leur traumatisme. La communication de dossiers confidentiels minerait la relation et compromettrait l'intégrité psychologique de la victime.

86 Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent in this case, as recognized by Lowry J., at para. 10, is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices. To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security

Peu d'intérêts sont aussi impérieux et essentiels à l'autonomie individuelle que le choix d'une femme d'interrompre sa grossesse, la décision d'une personne de mettre fin à ses jours, le droit d'élever ses enfants et la capacité des victimes d'agression sexuelle de recourir à une thérapie sans craindre que leurs dossiers privés soient communiqués. Ces intérêts sont vraiment essentiels à la dignité individuelle. Toutefois, le droit allégué à la protection contre la stigmatisation liée à une plainte fondée sur les droits de la personne ne fait pas partie de cette catégorie restreinte. L'État n'a pas porté atteinte au droit de l'intimé de prendre des décisions touchant son être fondamental. Comme l'a reconnu le juge Lowry au par. 10, le préjudice subi par l'intimé en l'espèce se limite essentiellement à ses difficultés personnelles. Il est «inapte au travail» de politicien, sa famille et lui ont changé de lieu de résidence deux fois, il a épuisé ses ressources financières et il a souffert tant physiquement que psychologiquement. Cependant, l'État n'a pas porté atteinte à la capacité de l'intimé et des membres de sa famille de faire des

of the person would be to stretch the meaning of this right.

3. Importing the Notion of “Stigma” from the Criminal Law Context

In *Mills* (1986), *supra*, at pp. 919-20, Lamer J., in dissent, found that the combination of loss of privacy, stigma, and disruption of family life engaged an individual’s security of the person in the context of s. 11(b) of the *Charter*, stating that:

... security of the person is not restricted to physical integrity; rather, it encompasses protection against “overlong subjection to the vexations and vicissitudes of a pending criminal accusation”. . . . These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

However, it must be emphasized that this statement was made in the context of s. 11(b) of the *Charter* which provides that a person charged with an offence has the right “to be tried within a reasonable time”. The qualifier to this right is that it applies to individuals who have been “charged with an offence”. The s. 11(b) right therefore has no application in civil or administrative proceedings. This Court has often cautioned against the direct application of criminal justice standards in the administrative law area. We should not blur concepts which under our *Charter* are clearly distinct. The s. 11(b) guarantee of a right to an accused person to be tried within a reasonable time cannot be imported into s. 7. There is no analogous provision to s. 11(b) which applies to administrative proceedings, nor is there a constitutional right outside the criminal context to be “tried” within a reasonable time.

Lamer C.J. later reiterated this statement from *Mills* (1986) in *G. (J.)*, at para. 62. In so doing, however, this Court did not make freedom from stigma a free-standing right. Nor did it establish

choix essentiels dans leur vie. Accepter que le préjudice subi par l’intimé en l’espèce équivaut à une atteinte de l’État au droit qu’il a à la sécurité de sa personne serait forcer le sens de ce droit.

3. Transposition de la notion de «stigmatisation» dans le contexte du droit criminel

Dans l’arrêt *Mills* de 1986, précité, aux pp. 919 et 920, le juge Lamer, dissident, a conclu que, prises ensemble, l’atteinte à la vie privée, la stigmatisation et les perturbations de la vie familiale mettaient en cause la sécurité de la personne dans le contexte de l’al. 11b) de la *Charte*:

... la notion de sécurité de la personne ne se limite pas à l’intégrité physique; elle englobe aussi celle de protection contre [TRADUCTION] «un assujettissement trop long aux vexations et aux vicissitudes d’une accusation criminelle pendante». [. . .] Celles-ci comprennent la stigmatisation de l’accusé, l’atteinte à la vie privée, la tension et l’anxiété résultant d’une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l’incertitude face à l’issue et face à la peine.

Il faut cependant souligner que ces propos ont été tenus dans le contexte de l’al. 11b) de la *Charte*, qui prévoit que tout inculpé a le droit «d’être jugé dans un délai raisonnable». Pour que ce droit s’applique, il faut que la personne en question soit «inculpée». Le droit garanti par l’al. 11b) ne s’applique donc pas dans le cas de procédures civiles ou administratives. Notre Cour a souvent fait des mises en garde contre l’application directe en droit administratif des normes de la justice criminelle. Nous devrions éviter de confondre des notions qui, suivant notre *Charte*, sont clairement distinctes. Le droit d’être jugé dans un délai raisonnable que l’al. 11b) garantit à tout inculpé ne peut être transposé dans l’art. 7. Aucune disposition analogue à l’al. 11b) ne s’applique aux procédures administratives, et le droit constitutionnel d’être «jugé» dans un délai raisonnable ne s’applique qu’en matière criminelle.

Par la suite, le juge en chef Lamer a réitéré, au par. 62 de l’arrêt *G. (J.)*, cet énoncé tiré de l’arrêt *Mills* de 1986. Ce faisant, notre Cour n’a toutefois pas fait de la protection contre la stigmatisation un

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that respondents in sexual harassment proceedings suffer so greatly that s. 11(b) principles should apply to them. As will be demonstrated below, the nature of the harm caused by human rights delay is different.

droit distinct. Elle n'a pas non plus décidé que les personnes visées par des procédures en matière de harcèlement sexuel souffrent à tel point que les principes de l'al. 11b) devraient s'appliquer à elles. Comme nous le verrons plus loin, le préjudice causé par un délai dans des procédures en matière de droits de la personne diffère sur le plan de sa nature.

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In *Kodellas*, *supra*, the Saskatchewan Court of Appeal clearly equated criminal sexual assault charges with human rights sex discrimination complaints. Bayda C.J.S. (dissenting on another issue) conveyed this as follows, at pp. 152-53:

Dans l'arrêt *Kodellas*, précité, la Cour d'appel de la Saskatchewan a clairement assimilé les accusations criminelles d'agression sexuelle à des plaintes de discrimination sexuelle fondées sur les droits de la personne. Le juge en chef Bayda (dissident sur un autre point) s'est exprimé ainsi, aux pp. 152 et 153:

For the purpose of determining the effect upon the "security of the person" I see no logical distinction of substance between the subjection to the vexations and vicissitudes of "a pending criminal accusation" based upon sexual harassment and sexual assault and the subjection to the vexations and vicissitudes of a pending accusation in penal (*i.e.*, *quasi-criminal*) proceedings under s. 35(2) of the Code, of discrimination based upon sexual harassment and sexual assault. It is but a small step from there to find that for the same purpose no distinction of substance can be made between an accusation in a penal proceeding under the Code and an identical accusation in remedial proceedings under ss. 27 to 33 of the Code. Whether they occur in a criminal context, or in the context of a penal proceeding, such as that provided for in the Code, or in the context of remedial proceedings (which, as will be shown later, is the context relevant to this case) the "vexations and vicissitudes" will invariably "include stigmatization of the (alleged discriminator), loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction". This is so because the hurt to the alleged discriminator emanates from the accusation, not from the type of proceedings in which the accusation is made. After all, it matters not a whit to all of the relevant actors — the public, the persons who are the source of the hurt, those who are indirectly affected by the hurt (such as the alleged discriminator's family) and the alleged discriminator, who is directly affected by the hurt and who is the subject and direct object of the hurt — whether the

[TRADUCTION] Pour déterminer l'incidence sur la «sécurité de la personne», je ne vois aucune distinction logique, sur le plan du fond, entre l'assujettissement aux vexations et aux vicissitudes d'une «accusation criminelle pendante» fondée sur le harcèlement sexuel et l'agression sexuelle, et l'assujettissement aux vexations et aux vicissitudes d'une accusation pendante de discrimination fondée sur le harcèlement sexuel et l'agression sexuelle, qui a été portée en matière pénale (c'est-à-dire quasi criminelle) en vertu du par. 35(2) du Code. Par conséquent, il n'y a qu'un pas à faire pour conclure que, à des fins identiques, aucune distinction de fond ne peut être établie entre une accusation portée dans des procédures pénales fondées sur le Code et une accusation identique portée dans des procédures engagées en vertu des art. 27 à 33 du Code dans le but d'obtenir un redressement. Qu'elles soient occasionnées dans le contexte de procédures criminelles ou dans celui de procédures pénales, comme celles que prévoit le Code, ou encore dans celui de procédures visant l'obtention d'un redressement (qui, nous le verrons plus loin, est le contexte pertinent en l'espèce), les «vexations» et les «vicissitudes» comprennent inmanquablement «la stigmatisation de (l'auteur allégué de la discrimination), l'atteinte à la vie privée, la tension et l'anxiété résultant d'une multitude de facteurs, y compris éventuellement les perturbations de la vie familiale, sociale et professionnelle, les frais de justice et l'incertitude face à l'issue et à la peine». Il en est ainsi parce que le mal causé à l'auteur allégué de la discrimination découle de l'accusation, et non du genre de procédures dans lesquelles l'accusation est portée. Après tout, il est parfaitement égal à tous les acteurs pertinents — le public, les personnes qui sont à l'origine du mal causé, celles qui sont indirectement touchées par ce mal (comme les membres de la famille de l'auteur

accusation is made in one procedural forum or another. What matters is the *fact* of the accusation. . . .

In determining whether prejudice occurred in a given situation, it is important to note that it is in the very nature of this form of prejudice (*i.e.*, feelings of mental hurt or “stigmatization”) that it arises automatically upon a formal accusation being made. Lamer J. in *Rahey*, while elucidating this form of prejudice (in the context of s. 11(b) of the Charter), recognized this when he said at p. [609]:

With respect to the security of the person, I do not believe that actual impairment need be proven by the accused to render the section operative. An objective standard is the only realistic means through which the security interest of the accused may be protected under the section. Otherwise, each individual accused would have the burden of demonstrating that he or she has subjectively suffered a form of anxiety, stress or stigmatization as a result of the criminal charge. We are dealing largely with the impairment of mental well-being, a matter which can only be established with considerable difficulty at considerable cost. [Underlining added; italics in original.]

The majority of the Court of Appeal in the case at bar followed the above reasoning in *Kodellas*. The effect of the Appeal Court decision in *Blencoe* was to import a requirement for a hearing within a reasonable time into the processing of human rights complaints. Although the majority of the Court of Appeal disclaimed a direct s. 11(b) right, numerous references were made in its reasons, equating sexual harassment proceedings to criminal proceedings for sexual assault where s. 11(b) would apply. Indeed, the majority speaks of “this type of sexual assault” (para. 47), “stigma against the accused” (para. 56), “prosecution of these complaints” (para. 58), a “straightforward case of sexual assault” (para. 102), “[allegations] which are tantamount to . . . sexual assault” (para. 108), and “unproven charges of sexual harassment” (para. 57). The basis for the majority of the Court of Appeal’s reasons in this case is the treatment of

allégué de la discrimination) et l’auteur allégué de la discrimination, qui est directement touché par le mal et qui en est directement victime — que l’accusation soit portée dans le cadre de l’une ou l’autre instance. Ce qui importe, c’est le *fait* de l’accusation. . .

Pour déterminer si un préjudice a été causé dans une situation donnée, il importe de souligner qu’il est dans la nature même de cette forme de préjudice (c’est-à-dire le sentiment de souffrance morale ou de «stigmatisation») qu’elle prenne naissance dès qu’une accusation officielle est portée. Dans *Rahey*, le juge Lamer l’a reconnu en expliquant cette forme de préjudice (dans le contexte de l’application de l’al. 11b) de la Charte), à la p. [609]:

Au sujet de la sécurité de la personne, je ne crois pas que ce soit à l’inculpé qu’il incombe de prouver qu’il y a effectivement eu atteinte pour que l’article soit applicable. Une norme objective est le seul moyen réaliste de protéger, en vertu de cet article, l’intérêt du prévenu en matière de sécurité. Autrement, chaque prévenu aurait la charge de démontrer qu’il ou elle a subjectivement souffert d’angoisse, de tension ou de stigmates par suite d’une accusation criminelle. Nous avons largement affaire à un préjudice moral, ce qui ne peut être établi qu’au prix de difficultés et de frais considérables. [Je souligne; en italique dans l’original.]

Dans la présente affaire, la Cour d’appel à la majorité a suivi le raisonnement susmentionné de l’arrêt *Kodellas*. L’arrêt *Blencoe* de la Cour d’appel a eu pour effet de transposer dans le traitement d’une plainte en matière de droits de la personne l’exigence qu’une audience ait lieu dans un délai raisonnable. Bien qu’elle ait écarté l’application directe d’un droit garanti par l’al. 11b), la Cour d’appel à la majorité a assimilé, à maintes reprises dans ses motifs, les procédures relatives au harcèlement sexuel à des procédures criminelles en matière d’agression sexuelle où l’al. 11b) s’appliquerait. En fait, les juges majoritaires parlent de [TRADUCTION] «ce genre d’agression sexuelle» (par. 47), de «stigmatisation de l’accusé» (par. 56), de «poursuites relatives à ces plaintes» (par. 58), de «simple cas d’agression sexuelle» (par. 102), d’«[allégations] équivalant à [. . .] une accusation d’agression sexuelle» (par. 108) et d’«accusations non prouvées de harcèlement sexuel» (par. 57). En l’espèce, les motifs majoritaires de la Cour d’appel reposent sur l’assimilation des plaintes de harcèle-

sexual harassment human rights complaints as akin to a pending criminal sexual assault charge.

ment sexuel fondées sur les droits de la personne à une accusation criminelle pendante d'agression sexuelle.

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With respect, the Court of Appeal in *Kodellas* and the majority of the Court of Appeal in the case at bar have erred in transplanting s. 11(b) principles set out in the criminal law context to human rights proceedings under s. 7. Not only are there fundamental differences between criminal proceedings and human rights proceedings that the majority failed to recognize, but, more importantly, s. 11(b) of the *Charter* is restricted to a pending criminal case. The effect of the Court of Appeal's decision was to extract an element of s. 11(b) — the element of stigma, which may be sufficient in the context of criminal proceedings and s. 11(b), to create a deprivation of the security of the person — and apply it to a process that differs with respect to objectives, consequences and procedures. As this Court has recently confirmed in *Mills* (1999), *supra*, at paras. 61 and 64, *Charter* rights must be interpreted and defined in a contextual manner, because they often inform, and are informed by, other similarly deserving rights and values at play in particular circumstances. The Court of Appeal has failed to examine the rights protected by s. 7 in the context of this case.

En toute déférence, la Cour d'appel dans l'arrêt *Kodellas* et la Cour d'appel à la majorité en l'espèce ont eu tort de transposer dans des procédures en matière de droits de la personne fondées sur l'art. 7 des principes énoncés relativement à l'al. 11b) dans le contexte du droit criminel. Non seulement y a-t-il des différences fondamentales entre des procédures criminelles et des procédures en matière de droits de la personne, que les juges majoritaires n'ont pas reconnues, mais encore l'al. 11b) de la *Charte* ne s'applique qu'aux affaires criminelles pendantes. L'arrêt de la Cour d'appel a eu pour effet d'extirper un élément de l'al. 11b) — celui de la stigmatisation qui peut suffire, dans le contexte de procédures criminelles et de l'al. 11b), pour qu'il y ait atteinte à la sécurité de la personne — et de l'appliquer à un processus différent sur le plan des objectifs, des conséquences et de la procédure. Comme notre Cour l'a récemment confirmé dans l'arrêt *Mills* de 1999, précité, aux par. 61 et 64, les droits garantis par la *Charte* doivent être interprétés et définis en fonction du contexte, car ils sous-tendent ou s'inspirent souvent d'autres droits ou valeurs aussi louables qui sont en jeu dans des circonstances particulières. La Cour d'appel n'a pas examiné les droits garantis par l'art. 7 dans le contexte de la présente affaire.

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In the criminal law context, the test to be applied under s. 11(b) is an objective one, and prejudice may be inferred from unreasonable delay. This stands in sharp contrast to the two-tiered approach to s. 7 of the *Charter*, where the mere passage of time in resolving a complaint does not automatically give rise to the kind of prejudice that is presumed to follow from the laying of a charge under s. 11(b) of the *Charter*. In this regard, Lamer J.'s comments in *Mills* (1986), *supra*, are premised on the fact that there has already been an "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" (p. 919). This is a finding that would be made not at the threshold stage of the s. 7 analysis but is rather to be examined at the principles of fundamental justice

Dans le contexte du droit criminel, le critère applicable suivant l'al. 11b) est objectif et il est possible de déduire qu'un délai déraisonnable a causé un préjudice. Cela contraste fortement avec l'interprétation en deux étapes de l'art. 7 de la *Charte*, selon laquelle le seul fait qu'un délai s'écoule entre le dépôt de la plainte et son règlement ne cause pas automatiquement le genre de préjudice qui est présumé résulter du dépôt d'une accusation fondée sur l'al. 11b) de la *Charte*. À cet égard, dans les observations qu'il formule dans l'arrêt *Mills* de 1986, précité, le juge Lamer tient pour acquis qu'il y a déjà eu «assujettissement trop long aux vexations et au vicissitudes d'une accusation criminelle pendante» (p. 919). Il s'agit là d'une conclusion qui serait tirée non pas à l'étape

stage. The Court of Appeal in *Kodellas* and in the case at bar erred in conflating the two stages of the s. 7 analysis. Philip Bryden similarly concluded that the two stages of the s. 7 analysis were merged by the majority of the Court of Appeal in this case (“*Blencoe v. British Columbia (Human Rights Commission): A Case Comment*” (1999), 33 *U.B.C. L. Rev.* 153, at p. 158):

In my view, Chief Justice McEachern’s formulation of when s. 7 applies tends to conflate the threshold question of whether liberty or personal security have been denied with the ultimate question of whether the process in place satisfies the requirements of fundamental justice. The main reason we use threshold tests for the applicability of constitutional protection is to focus our attention on the situations where we believe the special safeguards associated with constitutional protection are needed.

In discussing the nature and purpose of s. 11(b), Lamer J. emphasized in *Mills* (1986), *supra*, that the need for protecting the individual in such cases arises “from the nature of the criminal justice system and of our society” (p. 920). He described the criminal justice process as “adversarial and conflictual” and states that the very nature of the criminal process will heighten the stress and anxiety that results from a criminal charge. In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the Commission “prosecutes” the respondent. The Commission has an investigative and conciliatory role until the time comes to make a recommendation whether to refer the complaint to the Tribunal for hearing. These human rights proceedings are designed to vindicate private rights and address grievances. As stated by Dickson C.J. in *Canada*

préliminaire de l’analyse de l’art. 7, mais plutôt à l’étape de l’examen des principes de justice fondamentale. Dans l’arrêt *Kodellas* et en l’espèce, la Cour d’appel a commis une erreur en confondant les deux étapes de l’analyse de l’art. 7. Philip Bryden a lui aussi conclu que la Cour d’appel à la majorité en l’espèce avait confondu les deux étapes de l’analyse de l’art. 7 («*Blencoe v. British Columbia (Human Rights Commission): A Case Comment*» (1999), 33 *U.B.C. L. Rev.* 153, à la p. 158):

[TRADUCTION] À mon avis, en précisant les cas où l’art. 7 s’applique, le juge en chef McEachern tend à confondre la question préliminaire de savoir s’il y a eu atteinte au droit à la liberté ou à la sécurité de la personne avec la question de savoir, en fin de compte, si la procédure établie satisfait aux exigences de la justice fondamentale. Si nous utilisons des critères préliminaires d’applicabilité de la protection constitutionnelle, c’est principalement pour nous concentrer sur les situations où, croyons-nous, les garanties spéciales liées à la protection constitutionnelle sont requises.

En analysant la nature et l’objet de l’al. 11b) dans l’arrêt *Mills* de 1986, précité, le juge Lamer a souligné que la nécessité de protéger l’individu en pareils cas «tient à la nature même du système de la justice criminelle et de notre société» (p. 920). Il a dit que la justice criminelle procède selon une procédure «contradictoire et conflictuelle» et que la nature même du processus en matière criminelle intensifie le stress et l’angoisse résultant d’une accusation criminelle. Contrairement à ce qui se passe en matière criminelle, le dépôt d’une plainte fondée sur les droits de la personne n’implique aucun soupçon de méfait de la part de l’État. L’enquête menée par la Commission vise uniquement à déterminer ce qui s’est passé et, en fin de compte, à régler l’affaire selon une procédure non contradictoire. L’objectif des procédures en matière de droits de la personne est non pas de punir, mais de mettre fin à la discrimination. Les ordonnances du Tribunal sont de nature compensatoire et non punitive. Lors de l’enquête liée au processus en matière de droits de la personne, la Commission ne «poursuit» pas la personne qui fait l’objet d’une plainte. Elle joue un rôle d’enquêteur et de médiateur jusqu’au moment où il y a lieu de recommander ou non de renvoyer la plainte au Tribunal pour qu’il

(*Human Rights Commission*) v. *Taylor*, [1990] 3 S.C.R. 892, at p. 917:

It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation, and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

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In criminal proceedings, the accusation alone may engage a security interest because of the grave social and personal consequences to the accused — including potential loss of physical liberty, subjection to social stigma and ostracism from the community — which are the unavoidable consequences of an open and adversarial judicial system. However, this Court in *Taylor*, *supra*, at pp. 932-33, has commented directly on the diminished role of stigma in the human rights context:

... the present appeal concerns an infringement of s. 2(b) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim or remedial measures is more upon compensation and protection of the victim. As was stated in *Canadian National Railway Co. v. Canada* (*Canadian Human Rights Commission*), [1987] 1 S.C.R. 1114, at p. 1134, under a human rights regime:

It is the (discriminatory) practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

tienne une audience. Ces procédures en matière de droits de la personne sont conçues pour faire valoir des droits privés et redresser des torts. Comme l'a dit le juge en chef Dickson dans *Canada (Commission des droits de la personne) c. Taylor*, [1990] 3 R.C.S. 892, à la p. 917:

Il est essentiel toutefois de reconnaître qu'en tant qu'outil expressément conçu pour empêcher la propagation des préjugés et pour favoriser la tolérance et l'égalité au sein de la collectivité, la *Loi canadienne sur les droits de la personne* diffère nettement du *Code criminel*. La législation sur les droits de la personne, et en particulier le par. 13(1), n'a pas pour objet de faire exercer contre une personne fautive le plein pouvoir de l'État dans le but de lui infliger un châtiment. Au contraire, les dispositions des lois sur les droits de la personne tendent plutôt, en règle générale, à éviter ce genre d'affrontement en permettant autant que possible un règlement par voie de conciliation et, lorsqu'il y a discrimination, en prévoyant des redressements destinés davantage à indemniser la victime.

Dans des procédures criminelles, l'accusation peut à elle seule faire intervenir un droit à la sécurité en raison de ses graves conséquences sociales et personnelles sur l'accusé — dont le risque d'être privé de liberté, ainsi que la stigmatisation et l'exclusion sociales — qu'entraîne inévitablement un système judiciaire public et contradictoire. Toutefois, dans l'arrêt *Taylor*, précité, aux pp. 932 et 933, notre Cour a commenté directement le rôle moins important de la stigmatisation dans le contexte des droits de la personne:

... le présent pourvoi concerne une atteinte à l'al. 2b) résultant d'une loi sur les droits de la personne. La paralysie de la libre expression dans un tel contexte sera normalement moins grave que s'il s'agissait d'une loi pénale, car toute déclaration de culpabilité, au pénal, s'accompagne de stigmates et de peines importants, alors que l'opprobre attaché à une conclusion de discrimination est beaucoup moins grand et qu'en outre les mesures réparatrices visent plutôt la compensation et la protection de la victime. Comme le dit l'arrêt *Compagnie des chemins de fer nationaux du Canada c. Canada* (*Commission canadienne des droits de la personne*), [1987] 1 R.C.S. 1114, à la p. 1134, sous le régime d'une loi sur les droits de la personne:

C'est l'acte discriminatoire lui-même que l'on veut prévenir. La loi n'a pas pour objet de punir la faute, mais bien de prévenir la discrimination.

The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness.

I do not doubt that parties in human rights sex discrimination proceedings experience some level of stress and disruption of their lives as a consequence of allegations of complainants. Even accepting that the stress and anxiety experienced by the respondent in this case was linked to delays in the proceedings, I cannot conclude that the scope of his security of the person protected by s. 7 of the *Charter* covers such emotional effects nor that they can be equated with the kind of stigma contemplated in *Mills* (1986), *supra*, of an overlong and vexatious pending criminal trial or in *G. (J.)*, *supra*, where the state sought to remove a child from his or her parents. If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma attached to the proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession, or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be “stigmatizing”. The Commission’s investigations are not public, the respondent is asked to provide his version of events, and communication goes back and forth. While the respondent may be vilified by the press, there is no “stigmatizing” state pronouncement as to his “fitness” that would carry with it serious consequences such as those in *G. (J.)*. There is thus no constitutional right or freedom against such stigma protected by the s. 7 rights to “liberty” or “security of the person”.

(f) Conclusion on Liberty and Security of the Person

To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The

Ce dernier point est important et mérite d’être souligné. Rien n’indique que l’objet de la *Loi canadienne sur les droits de la personne* soit d’attribuer une responsabilité morale ou de la punir.

Je ne doute pas que les parties à des procédures relatives à des plaintes de discrimination sexuelle fondées sur les droits de la personne éprouvent un certain stress et voient leur existence perturbée en raison des allégations des plaignants. Même en acceptant que le stress et l’angoisse ressentis par l’intimé en l’espèce étaient liés au délai dans les procédures, je suis incapable de conclure que la sécurité de sa personne garantie par l’art. 7 de la *Charte* englobe une telle incidence sur le plan émotif ou que cette incidence est assimilable au genre de stigmatisation prévu dans l’arrêt *Mills* de 1986, précité, qui résulte d’un procès criminel trop long et vexatoire, ou dans l’arrêt *G. (J.)*, précité, où l’État cherchait à retirer la garde d’un enfant à ses parents. Si les procédures contestées visent à fournir un moyen de faire valoir des droits privés, ou à faire fonction d’arbitre en la matière, le stress et la stigmatisation liés à ces procédures sont acceptables jusqu’à un certain point. Il en va également de même lorsqu’il s’agit de réglementer une activité commerciale, professionnelle ou autre. Les poursuites civiles pour fraude, diffamation ou voies de fait de nature sexuelle sont également «stigmatisantes». Les enquêtes menées par la Commission ne sont pas publiques, la personne qui fait l’objet de la plainte est appelée à donner sa version des faits et l’information circule dans les deux sens. Même si la personne qui fait l’objet de la plainte peut être vilipendée par la presse, l’État ne rend, relativement à son «aptitude», aucune décision «stigmatisante» qui aurait des conséquences graves comme dans l’affaire *G. (J.)*. Le droit à la «liberté» ou à la «sécurité de [l]a personne» garanti par l’art. 7 ne comporte donc aucun droit constitutionnel à la protection contre d’une telle stigmatisation.

(f) Conclusion relative à la liberté et à la sécurité de la personne

En résumé, le stress et l’angoisse que l’intimé a éprouvés et la stigmatisation dont il a été victime n’ont pas porté atteinte à son droit à la liberté ou à

framers of the *Charter* chose to employ the words, “life, liberty and security of the person”, thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

la sécurité de sa personne. Les rédacteurs de la *Charte* ont choisi d'utiliser les termes «vie, [...] liberté et [...] sécurité de [l]a personne», de sorte que l'art. 7 ne garantit que ces trois droits. Même si des notions de dignité et de réputation sous-tendent maints droits garantis par la *Charte*, ce ne sont pas des droits distincts qui déclenchent en soi l'application de l'art. 7. La protection contre le genre d'angoisse et de stress que l'intimé a éprouvés et contre le genre de stigmatisation dont il a été victime en l'espèce ne devrait pas être élevée au rang de droit constitutionnel garanti par l'art. 7.

98 My conclusion that the respondent is unable to cross the first threshold of the s. 7 *Charter* analysis in the circumstances of this case should not be construed as a holding that state-caused delays in human rights proceedings can never trigger an individual's s. 7 rights. It may well be that s. 7 rights can be engaged by a human rights process in a particular case. I leave open the possibility that in other circumstances, delays in the human rights process may violate s. 7 of the *Charter*.

Ma conclusion que l'intimé ne peut pas franchir la première étape préliminaire de l'analyse de l'art. 7 de la *Charte* dans les circonstances de la présente affaire ne doit pas être interprétée comme signifiant que les délais imputables à l'État dans des procédures en matière de droits de la personne ne peuvent jamais faire intervenir les droits que l'art. 7 garantit à une personne. Il peut bien arriver, dans certains cas, qu'un processus en matière de droits de la personne fasse intervenir les droits garantis par l'art. 7. Je n'écarte pas la possibilité que, dans d'autres circonstances, les délais dans le processus en matière de droits de la personne violent l'art. 7 de la *Charte*.

99 Because of my conclusion that there was no deprivation of the respondent's right to liberty or security of the person, I need not proceed to the second stage of the analysis to determine whether the alleged deprivation was in accordance with the principles of fundamental justice. However, for the reasons that immediately follow in the administrative law section, I express the view that the delay, in the circumstances of this case, would not have violated the principles of fundamental justice.

Étant donné que j'ai conclu, dans un premier temps, qu'il n'y a eu aucune atteinte au droit de l'intimé à la liberté ou à la sécurité de sa personne, je n'ai pas à décider, dans un deuxième temps, si l'atteinte alléguée était conforme aux principes de justice fondamentale. Toutefois, pour les motifs exposés immédiatement après la partie relative au droit administratif, j'estime que, dans les circonstances de la présente affaire, le délai écoulé n'aurait pas violé les principes de justice fondamentale.

C. *Was the Respondent Entitled to a Remedy Pursuant to Administrative Law Principles?*

C. *L'intimé avait-il droit à une réparation fondée sur les principes du droit administratif?*

100 While I have concluded that the respondent is not entitled to a remedy under the *Charter*, I must still address the issue of whether the respondent is entitled to a remedy under principles of administrative law. This issue was pleaded before Lowry J. of the British Columbia Supreme Court. Counsel

Bien que j'aie conclu que l'intimé n'a droit à aucune réparation fondée sur la *Charte*, il me reste à déterminer s'il a droit à une réparation fondée sur les principes du droit administratif. La question a été débattue devant le juge Lowry de la Cour suprême de la Colombie-Britannique. À l'au-

were advised by us during the hearing that, notwithstanding that pleadings were not made before this Court on administrative law *per se*, we were nevertheless prepared to deal with this issue. The question to be addressed in this section is whether the delay in this case could amount to a denial of natural justice even where the respondent's ability to have a fair hearing has not been compromised.

(a) Prejudice to the Fairness of the Hearing

In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1100; *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32 (C.A.)). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 9-67; W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at pp. 435-36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, *Administrative Law: Cases, Text, and Materials* (4th ed. 1995), at p. 256; Wade and Forsyth, *supra*, at pp. 435-36; *Nisbett, supra*, at p. 756; *Canadian*

dience, nous avons informé les avocats que, bien que les plaidoiries devant notre Cour n'aient pas porté sur le droit administratif même, nous étions néanmoins disposés à examiner cette question. Il nous faut décider, dans la présente partie, si le délai écoulé en l'espèce peut constituer un déni de justice naturelle même si la capacité de l'intimé d'obtenir une audience équitable n'a pas été compromise.

a) Atteinte à l'équité de l'audience

Selon moi, le droit administratif offre des réparations appropriées en ce qui concerne le délai imputable à l'État dans des procédures en matière de droits de la personne. Cependant, le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law. Mettre fin aux procédures simplement en raison du délai écoulé reviendrait à imposer une prescription d'origine judiciaire (voir: *R. c. L. (W.K.)*, [1991] 1 R.C.S. 1091, à la p. 1100; *Akthar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1991] 3 C.F. 32 (C.A.)). En droit administratif, il faut prouver qu'un délai inacceptable a causé un préjudice important.

Il n'y a aucun doute que les principes de justice naturelle et l'obligation d'agir équitablement s'appliquent à toutes les procédures administratives. Lorsqu'un délai compromet la capacité d'une partie de répondre à la plainte portée contre elle, notamment parce que ses souvenirs se sont estompés, parce que des témoins essentiels sont décédés ou ne sont pas disponibles ou parce que des éléments de preuve ont été perdus, le délai dans les procédures administratives peut être invoqué pour contester la validité de ces procédures et pour justifier réparation (D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), à la p. 9-67; W. Wade et C. Forsyth, *Administrative Law* (7^e éd. 1994), aux pp. 435 et 436). Il est donc reconnu que les principes de justice naturelle et l'obligation d'agir équitablement comprennent le droit à une audience équitable et qu'il est possible de remédier au délai injustifié dans des procédures administratives qui compromettent l'équité de l'audience (voir, par exemple, J. M. Evans, H. N. Janisch et

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Airlines, supra; *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); *Freedman v. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).

D. J. Mullan, *Administrative Law: Cases, Text, and Materials* (4^e éd. 1995), à la p. 256; Wade et Forsyth, *op. cit.*, aux pp. 435 et 436; Nisbett, précité, à la p. 756; *Lignes aériennes Canadien*, précité; *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464 (C. div. Ont.); *Freedman c. College of Physicians & Surgeons (New Brunswick)* (1996), 41 Admin. L.R. (2d) 196 (B.R.N.-B.)).

103 The respondent argued before the British Columbia Supreme Court that the delay in the administrative process caused him prejudice that amounted to a denial of natural justice in that he could no longer receive a fair hearing. He alleged that two witnesses had died and that the memories of many witnesses might be impaired by the passage of time. Lowry J. referred to these claims as “vague assertions that fall far short of establishing an inability to prove facts necessary to respond to the complaints” (para. 10). Lowry J. concluded that the respondent’s opportunity to make full answer and defence had not been compromised and thereby refused to terminate the proceedings.

L’intimé a fait valoir, devant la Cour suprême de la Colombie-Britannique, que le délai écoulé dans le déroulement du processus administratif lui avait causé un préjudice équivalant à un déni de justice naturelle du fait qu’il n’était plus en mesure d’obtenir une audience équitable. Il a allégué que deux témoins étaient décédés et que les souvenirs de bien des témoins avaient pu s’estomper avec le temps. Le juge Lowry a qualifié ces allégations de [TRADUCTION] «vagues assertions n’établissant pas l’incapacité de prouver des faits nécessaires pour répondre aux plaintes» (par. 10). Il a conclu que la possibilité de l’intimé de présenter une défense pleine et entière n’avait pas été compromise et il a donc refusé de mettre fin aux procédures.

104 The respondent also argued before Lowry J. that he was not provided with a copy of Ms. Schell’s timeliness submissions for a two-month period and that he had not received proper disclosure. Lowry J. did not consider the respondent prejudiced in this regard. With respect to the alleged failure to disclose information to the respondent, this is not, in my opinion, a case in which the unfairness is so obvious that there would be a denial of natural justice, or in which there was an abuse of process such that it would be inappropriate to put the respondent through hearings before the Tribunal. I would therefore adopt the finding of Lowry J. that the delay in this case is not such that it would necessarily result in a hearing that lacks the essential elements of fairness. The respondent’s right to a fair hearing has not been jeopardized. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. This is a finding of fact made by the trial judge that has not, in my opinion, been successfully attacked on appeal. The question which must

L’intimé a aussi fait valoir devant le juge Lowry qu’il avait dû attendre deux mois avant d’obtenir copie des observations de M^{me} Schell concernant le respect du délai imparti et que la divulgation qui lui avait été faite n’était pas suffisante. Le juge Lowry n’a pas considéré que l’intimé avait subi un préjudice à cet égard. En ce qui concerne l’omission alléguée de divulguer des renseignements à l’intimé, il ne s’agit pas, à mon sens, d’un cas où l’iniquité est si manifeste qu’il y aurait déni de justice naturelle ni d’un cas où il y a eu abus de procédure tel qu’il serait inapproprié de contraindre l’intimé à se présenter à une audience devant le Tribunal. Je suis donc d’avis de souscrire à la conclusion du juge Lowry que le délai en l’espèce n’est pas nécessairement de nature à entraîner la tenue d’une audience dépourvue des éléments requis pour être équitable. Le droit de l’intimé à une audience équitable n’a pas été compromis. Il n’a pas été établi que le préjudice subi est assez important pour nuire à l’équité de l’audience. Il s’agit là d’une conclusion de fait du juge de pre-

be addressed is therefore whether the delay in this case could amount to a denial of natural justice or an abuse of process even where the respondent has not been prejudiced in an evidentiary sense.

(b) Other Forms of Prejudice

It is trite law that there is a general duty of fairness resting on all public decision-makers (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 628). The human rights processes at issue in this case must have been conducted in a manner that is entirely consistent with the principles of natural justice and procedural fairness. Perhaps the best illustration of the traditional meaning of this duty of fairness in administrative law can be discerned from the following words of Dickson J. in *Martineau*, at p. 631:

In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

Throughout the authorities in this area, terms such as “natural justice”, “procedural fairness”, “abuse of process”, and “abuse of discretion” are employed. In *Martineau*, at p. 629, Dickson J. (writing for three judges, while all nine concurred in the result), stated that “the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework”. With regard to these terms, I would adopt the following words of Sherstobitoff J.A. of the Saskatchewan Court of Appeal in *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, at p. 490:

There are two common denominators in each of the terms. The first is the impossibility of precise definition because of their breadth and the wide array of circum-

mière instance qui n’a pas été contestée avec succès en appel. La question qui doit être examinée est donc de savoir si le délai écoulé en l’espèce pourrait constituer un déni de justice naturelle ou un abus de procédure même si l’intimé n’a subi aucun préjudice sur le plan de la preuve.

b) Autres formes de préjudice

Il est bien établi en droit que les instances décisionnelles publiques ont toutes l’obligation générale d’agir équitablement (*Martineau c. Comité de discipline de l’Institution de Matsqui*, [1980] 1 R.C.S. 602, à la p. 628). Les procédures en matière de droits de la personne, dont il est question en l’espèce, doivent s’être déroulées d’une manière tout à fait conforme aux principes de justice naturelle et d’équité procédurale. Les propos suivants du juge Dickson dans l’arrêt *Martineau*, à la p. 631, illustrent peut-être le mieux le sens traditionnel de l’obligation d’agir équitablement en droit administratif:

En conclusion, la simple question à laquelle il faut répondre est celle-ci: compte tenu des faits de ce cas particulier, le tribunal a-t-il agi équitablement à l’égard de la personne qui se prétend lésée? Il me semble que c’est la question sous-jacente à laquelle les cours ont tenté de répondre dans toutes les affaires concernant la justice naturelle et l’équité.

Dans la jurisprudence qui existe en la matière, on trouve des expressions comme «justice naturelle», «équité procédurale», «abus de procédure» et «abus de pouvoir discrétionnaire». Dans l’arrêt *Martineau*, à la p. 629, le juge Dickson (s’exprimant au nom de trois juges, alors que les neuf juges souscrivaient tous au résultat) a dit que «tracer une distinction entre une obligation d’agir équitablement et celle d’agir selon les règles de justice naturelle conduit à un cadre conceptuel de maniement difficile». En ce qui concerne ces expressions, je suis d’avis de souscrire aux propos suivants du juge Sherstobitoff de la Cour d’appel de la Saskatchewan, dans *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477, à la p. 490:

[TRADUCTION] Il existe deux dénominateurs communs à chacune des expressions. Le premier est l’impossibilité de les définir avec exactitude en raison de leur portée et

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stances which may bring them into play. The other is the concept of “fairness” or “fair play”. They clearly overlap. Unreasonable delay is a possible basis upon which to raise any of them.

de la vaste gamme de circonstances susceptibles de les mettre en jeu. Le deuxième est le chevauchement manifeste des notions d’«équité» et de «franc-jeu». Un délai déraisonnable pourrait justifier d’invoquer l’une ou l’autre.

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The respondent contends that the delay in the human rights proceedings constitutes a breach of procedural fairness amounting to a denial of natural justice and resulting in an abuse of process. The question is whether one can look to the psychological and sociological harm caused by the delay rather than merely to the procedural or legal effect, namely, whether the ability to make full answer and defence has been compromised, to determine whether there has been a denial of natural justice. This issue is a difficult one and there is no clear authority in this area.

L’intimé soutient que le délai dans les procédures en matière de droits de la personne constitue une atteinte à l’équité procédurale qui équivaut à un déni de justice naturelle et qui entraîne un abus de procédure. Il s’agit de savoir si, aux fins de déterminer s’il y a eu déni de justice naturelle, on peut tenir compte du préjudice psychologique et sociologique causé par le délai et non seulement de l’incidence procédurale ou juridique, c’est-à-dire de la question de savoir si la capacité de présenter une défense pleine et entière a été compromise. Cette question est difficile et il n’y a aucune jurisprudence claire en la matière.

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In cases where the *Charter* was held not to apply, most courts and tribunals did not go further to decide whether the stress and stigma resulting from an unacceptable delay were so significant as to amount to an abuse of process. On the other hand, where courts did go further, they most often adopted a narrow approach to the principles of natural justice. For example, in *Nisbett, supra*, the Manitoba Court of Appeal concluded that delay may amount to an abuse of process that the law will remedy only where “on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing” (p. 757). In *Canadian Airlines, supra*, the Federal Court of Appeal followed *Nisbett*, concluding that the prejudice must be such “as to deprive a party of his right to a full and complete defence” (p. 641). In the case at bar, Lowry J. for the British Columbia Supreme Court, found that unless there was prejudice to hearing fairness, the type of personal hardship and psychological prejudice suffered by Mr. Blencoe could not give rise to a breach of natural justice (at para. 31):

Dans les affaires où ils ont jugé que la *Charte* ne s’appliquait pas, la plupart des tribunaux judiciaires et des tribunaux administratifs ne sont pas allés jusqu’à déterminer si le stress et la stigmatisation découlant d’un délai inacceptable étaient importants au point de constituer un abus de procédure. Par contre, les tribunaux judiciaires qui l’ont fait ont le plus souvent interprété de manière restrictive les principes de justice naturelle. Par exemple, dans l’arrêt *Nisbett*, précité, la Cour d’appel du Manitoba a conclu que le délai peut constituer un abus de procédure auquel la loi ne remédie que si, [TRADUCTION] «d’après le dossier, il a été établi que le préjudice subi est assez important pour nuire à l’équité de l’audience» (p. 757). Dans *Lignes aériennes Canadien*, précité, la Cour d’appel fédérale a suivi l’arrêt *Nisbett* et a conclu que le préjudice doit être tel «qu’il prive une partie de son droit à une défense pleine et entière» (p. 641). S’exprimant en l’espèce au nom de la Cour suprême de la Colombie-Britannique, le juge Lowry a conclu que, à moins qu’une atteinte ne soit portée à l’équité de l’audience, les difficultés personnelles que M. Blencoe a éprouvées et le préjudice psychologique qu’il a subi n’étaient pas de nature à donner naissance à un déni de justice naturelle (au par. 31):

...it cannot be said that the personal hardship Mr. Blencoe has suffered, albeit protracted by the time the administrative process has taken, gives rise to any *Charter* considerations. To my mind, it then becomes difficult to see how it can nonetheless be said to be a prejudice giving rise to a denial of natural justice. If it were, there would have been no need for the *Kodellas* court to resort to section 7 of the *Charter*. And, having rejected the applicability of section 7, the *Nisbett* court would have been bound to consider whether the personal hardship in that case constituted a prejudice that supported the prerogative relief sought.

However, courts and tribunals have also referred to other types of prejudice than trial fairness, holding that, where a commission or tribunal has abused its process to the detriment of an individual, a court has the discretion to grant a remedy. For example, in *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C.S.C.), a variety of effects on the petitioner were examined, including a cloud over his professional reputation resulting from a delay of two years and three months between the receipt of the complaint and the inspection, and an additional six- or seven-month delay which followed. However, the delay in that case had also resulted in an inability for the petitioner to have a fair hearing.

We have also been referred to the case of *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), where the British Columbia Supreme Court referred to the petitioner's right to a fair trial having been jeopardized as well as the petitioner suffering harm to his reputation. In *Brown*, it took three years to serve the petitioner with notice of the inquiry after receiving the complaints. The delays were in no part caused by the petitioner.

In *Misra*, *supra*, a college disciplinary board elected to await the completion of criminal proceedings against Misra, while suspending him from the practice of medicine in the interim five-

[TRADUCTION] ... on ne peut pas dire que les difficultés personnelles que M. Blencoe a éprouvées, même si elles se sont prolongées à cause de la longueur du processus administratif, font intervenir des considérations fondées sur la *Charte*. Il est alors difficile, à mon sens, de voir comment on peut néanmoins dire qu'elles constituent un préjudice qui donne naissance à un déni de justice naturelle. Si c'était le cas, la cour, dans l'affaire *Kodellas*, n'aurait pas eu besoin de recourir à l'art. 7 de la *Charte*. Et, après avoir écarté la possibilité d'appliquer l'art. 7, la cour, dans *Nisbett*, aurait été tenue d'examiner si les difficultés personnelles dans cette affaire constituaient un préjudice justifiant la délivrance du bref de prérogative demandé.

Cependant, les tribunaux judiciaires et les tribunaux administratifs ont aussi mentionné d'autres types de préjudice que l'atteinte à l'équité du procès et ont statué que, dans le cas où une commission ou un tribunal administratif abuse de sa procédure au détriment d'une personne, un tribunal judiciaire a le pouvoir discrétionnaire d'accorder un redressement. Par exemple, dans *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (C.S.C.-B.), diverses répercussions sur le requérant ont été examinées, y compris l'atteinte à sa réputation professionnelle qui résultait du délai de deux ans et trois mois écoulé entre le dépôt de la plainte et le début de l'inspection, et du délai supplémentaire de six ou sept mois qui a suivi. Toutefois, le délai écoulé dans cette affaire avait également eu pour effet d'empêcher le requérant d'obtenir une audience équitable.

On nous a aussi mentionné la décision *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL), où la Cour suprême de la Colombie-Britannique a décidé qu'il y avait eu atteinte à la réputation du requérant et à son droit à un procès équitable. Dans cette affaire, trois ans s'étaient écoulés entre le dépôt des plaintes et la signification d'un avis d'enquête au requérant. Le délai écoulé n'était aucunement imputable à ce dernier.

Dans *Misra*, précité, le comité de discipline d'un ordre avait décidé d'attendre la fin des procédures criminelles engagées contre M. Misra et, dans l'intervalle, de lui retirer son permis d'exercer la

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year period. After five years, the criminal proceedings were abandoned and the board council decided to hold a hearing. Sherstobitoff J.A. held for the court that (at p. 490):

The concept of natural justice or procedural fairness as outlined by Dickson J. in *Martineau* is broad enough to encompass principles which, in other contexts, have been termed abuse of discretion or abuse of process because of delay and related matters. A court, in exercising its supervisory function over an administrative tribunal is entitled to prohibit abuse of that tribunal's process in cases of unfairness or oppression caused or contributed to by delay resulting in a denial of natural justice.

médecine. Les procédures criminelles ont été abandonnées au bout de cinq ans et le comité a décidé de tenir une audience. Le juge Sherstobitoff a conclu ce qui suit, au nom de la cour (à la p. 490):

[TRADUCTION] La notion de justice naturelle ou d'équité procédurale dont le juge Dickson fait état dans l'arrêt *Martineau* est assez large pour faire obstacle à ce que l'on a qualifié, dans d'autres contextes, d'abus de pouvoir discrétionnaire ou d'abus de procédure causé par un délai et d'autres éléments connexes. En exerçant son rôle de surveillance d'un tribunal administratif, une cour de justice peut interdire que l'on abuse de la procédure de ce tribunal dans les cas où il y a iniquité ou oppression imputable en totalité ou en partie à un délai qui entraîne un déni de justice naturelle.

112 The Court of Appeal found that Misra's ability to defend himself would likely be impaired and that he had already been punished by virtue of the five-year suspension (at pp. 492-93). It is clear, however, that in *Misra* the court felt that it is only in exceptional cases that delay will amount to unfairness. Moreover, in *Misra*, an essential part of the prejudice suffered was the result of the lengthy suspension. Finally, the court also concluded that there was prejudice to Misra's right to a fair hearing due to the passage of a five-year period.

La Cour d'appel a conclu que la capacité de M. Misra de se défendre serait vraisemblablement compromise et que sa suspension de cinq ans avait déjà eu pour effet de le punir (aux pp. 492 et 493). Cependant, il est clair que, dans l'affaire *Misra*, la Cour d'appel a jugé qu'un délai ne constitue une iniquité que dans des cas exceptionnels. De plus, dans cette affaire, un élément essentiel du préjudice subi découlait de la durée prolongée de la suspension. Enfin, la cour a aussi conclu que le délai de cinq ans avait porté atteinte au droit de M. Misra à la tenue d'une audience équitable.

113 In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336, Hollinrake J.A. for the British Columbia Court of Appeal agreed with the appellant that, "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence" (para. 19). At issue in *Ratzlaff* was a lengthy delay in processing disciplinary charges against a physician that had affected how the physician arranged his finances. In not restricting abuse of process to procedural unfairness, Hollinrake J.A. stated, at paras. 22-23:

Dans l'arrêt *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336, le juge Hollinrake de la Cour d'appel de la Colombie-Britannique a convenu avec l'appellant que [TRADUCTION] «lorsque le délai est énorme au point de constituer un abus de pouvoir ou de pouvoir être qualifié d'oppressif, le fait que l'audience elle-même sera équitable importe peu ou pas du tout» (par. 19). Dans cette affaire, un long délai dans le traitement des accusations d'infraction disciplinaire portées contre un médecin avait eu une incidence sur la planification financière de ce dernier. En s'abstenant de limiter l'abus de procédure à l'iniquité procédurale, le juge Hollinrake a affirmé ceci, aux par. 22 et 23:

Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the

[TRADUCTION] La notion d'abus de pouvoir est large et s'apparente à l'oppression. Elle englobe l'iniquité procédurale, la conduite équivalant à la rupture d'un contrat ou à une fausse déclaration et, à mon avis, le délai injustifié. J'ajouterais que tous les délais ne sont pas injusti-

causes of delay, and to resulting reasonable changes of position.

Where a party in the position of the appellant relies on delay as amounting to an abuse of power it is incumbent on that party to demonstrate a resulting change of position. In my opinion, the very fact that the appellant continued with his practice as he did and throughout the whole period of time in issue is sufficient to establish such a change of position.

Ratzlaff differs from the case at bar in that the physician carried on his practice thinking that his problems were behind him. He had even retired thinking that his billing disputes were over. Moreover, the chambers judge found that the physician had literally requested that action be taken but that it was three years before the Commission even communicated with him (para. 11). In all, it had been seven years before the physician had received a hearing notice.

I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.

fiés; il faut tenir compte des causes du délai ainsi que des changements raisonnables de situation qui en ont résulté.

Lorsqu'une partie qui se trouve dans la situation de l'appellant soutient qu'un délai constitue un abus de pouvoir, il lui incombe de prouver qu'il en a résulté un changement de situation. Selon moi, le fait même que l'appellant a continué d'exercer sa profession pendant toute la période en cause suffit pour établir un tel changement de situation.

L'arrêt *Ratzlaff* diffère de la présente affaire du fait que le médecin avait continué d'exercer sa profession en pensant que ses problèmes étaient réglés. Il avait même pris sa retraite en croyant que ses litiges en matière de facturation étaient terminés. En outre, le juge en chambre a conclu que le médecin avait expressément demandé que des mesures soient prises, mais que trois années s'étaient écoulées avant même que la commission communique avec lui (au par. 11). En tout, sept années s'étaient écoulées avant que le médecin reçoive un avis d'audience.

Je serais disposé à reconnaître qu'un délai inacceptable peut constituer un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Dans le cas où un délai excessif a causé directement un préjudice psychologique important à une personne ou entaché sa réputation au point de déconsidérer le régime de protection des droits de la personne, le préjudice subi peut être suffisant pour constituer un abus de procédure. L'abus de procédure ne s'entend pas que d'un acte qui donne lieu à une audience inéquitable et il peut englober d'autres cas que celui où le délai cause des difficultés sur le plan de la preuve. Il faut toutefois souligner que rares sont les longs délais qui satisfont à ce critère préliminaire. Ainsi, pour constituer un abus de procédure dans les cas où il n'y a aucune atteinte à l'équité de l'audience, le délai doit être manifestement inacceptable et avoir directement causé un préjudice important. Il doit s'agir d'un délai qui, dans les circonstances de l'affaire, déconsidérerait le régime de protection des droits de la personne. La question difficile dont nous sommes saisis est de savoir quel «délai inacceptable» constitue un abus de procédure.

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(c) Abuse of Process — Principles

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The respondent's case is that there has been an unacceptable delay in the administrative process which has caused him to be prejudiced by the stigma attached to the two Complaints to an extent that justifies the process being terminated now. Abuse of process is a common law principle invoked principally to stay proceedings where to allow them to continue would be oppressive. As stated by Brown and Evans, *supra*, at pp. 9-71 and 9-72:

The stringency of the requirements for showing that delay constitutes a breach of fairness would seem to be due, at least in part, to the drastic nature of the only appropriate remedy. Unlike other instances of procedural unfairness where it is open to a court to remit the matter for redetermination in a procedurally fair manner, the remedy for undue delay will usually be to prevent the tribunal from exercising its legislative authority, either by prohibiting it from proceeding with the hearing, or by quashing the resulting decision. [Emphasis added.]

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In the context of a breach of s. 11(b) of the *Charter*, a stay has been found to constitute the only possible remedy (*R. v. Askov*, [1990] 2 S.C.R. 1199). The respondent asked for the same remedy in his administrative law proceedings before Lowry J. There is, however, no support for the notion that a stay is the only remedy available in administrative law proceedings. A stay accords very little importance to the interest of implementing the *Human Rights Code* and giving effect to the complainants' rights to have their cases heard. Other remedies are available for abuse of process. Where a respondent asks for a stay, he or she will have to bear a heavy burden. The discussion that follows often links abuse of process and the remedy of a stay because the stay, as I have said, is the only applicable remedy in the context of a s. 11(b) application. Nevertheless, I wish to underline that my inquiry here is directed only at the determination of the existence of an abuse of process on the facts of this case.

c) Abus de procédure — Principes

L'intimé soutient que, vu qu'il a été tellement lésé par le délai inacceptable dans le processus administratif et par la stigmatisation qui en a découlé par suite des deux plaintes portées contre lui, l'arrêt des procédures est maintenant justifié. L'abus de procédure est une notion de common law qui est invoquée principalement pour mettre fin à des procédures lorsqu'il serait oppressif de permettre leur continuation. Comme l'ont affirmé Brown et Evans, *op. cit.*, aux pp. 9-71 et 9-72:

[TRADUCTION] La rigueur de l'exigence de démontrer que le délai constitue un manquement à l'obligation d'agir équitablement semblerait attribuable, du moins en partie, à la nature radicale du seul redressement approprié. Contrairement à d'autres cas d'iniquité procédurale où la cour peut renvoyer l'affaire pour qu'elle soit tranchée à nouveau d'une manière équitable sur le plan de la procédure, le redressement prévu en cas de délai injustifié consiste généralement à empêcher le tribunal administratif d'exercer le pouvoir qu'il tient de la loi, soit en lui interdisant de tenir l'audience, soit en annulant la décision rendue à l'issue de celle-ci. [Je souligne.]

Dans le contexte d'une violation de l'al. 11b) de la *Charte*, l'arrêt des procédures a été considéré comme étant la seule réparation possible (*R. c. Askov*, [1990] 2 R.C.S. 1199). L'intimé a demandé la même réparation dans le cadre de ses procédures en matière de droit administratif devant le juge Lowry. Cependant, rien ne justifie l'idée que l'arrêt des procédures est la seule réparation possible dans des procédures en matière de droit administratif. Lorsqu'on ordonne un arrêt des procédures, on accorde très peu d'importance à l'intérêt qu'il y a à appliquer le *Human Rights Code* et à faire respecter le droit du plaignant d'être entendu. D'autres réparations peuvent être accordées dans le cas d'un abus de procédure. La personne faisant l'objet d'une plainte qui demande l'arrêt des procédures doit s'acquitter d'un lourd fardeau de preuve. L'analyse qui suit lie souvent abus de procédure et arrêt des procédures parce que ce dernier est, comme je l'ai dit, la seule réparation possible dans le contexte de l'application de l'al. 11b). Je tiens néanmoins à souligner que mon examen ici ne vise qu'à déterminer s'il y a eu abus de procédure d'après les faits de la présente affaire.

In *R. v. Jewitt*, [1985] 2 S.C.R. 128, this Court unanimously affirmed that the doctrine of abuse of process was available in criminal proceedings. In so doing, and as professed by L'Heureux-Dubé J. in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 613, the Court borrowed the comments of Dubin J.A. in *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.), in describing the abuse of process doctrine, stating that a stay of proceedings should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". The Court also adopted the Ontario Court of Appeal's warning in *Young* that this is a power which can be exercised only in the "clearest of cases" (p. 614). This was reiterated on many occasions by this Court (see, for example, *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Scott*, [1990] 3 S.C.R. 979; *Power*, *supra*).

In *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, L'Heureux-Dubé J. explained the underlying purpose of the doctrine of abuse of process as follows:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society" (*Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

Dans l'arrêt *R. c. Jewitt*, [1985] 2 R.C.S. 128, notre Cour a confirmé à l'unanimité la possibilité d'appliquer la règle de l'abus de procédure en matière criminelle. Ce faisant, et comme l'a dit le juge L'Heureux-Dubé dans *R. c. Power*, [1994] 1 R.C.S. 601, aux pp. 613 et 614, notre Cour a repris les observations du juge Dubin dans *R. c. Young* (1984), 40 C.R. (3d) 289 (C.A. Ont.), pour décrire la règle de l'abus de procédure, en affirmant que l'arrêt des procédures devrait être ordonné lorsque «forcer le prévenu à subir son procès violerait les principes de justice fondamentaux qui sous-tendent le sens du franc-jeu et de la décence qu'a la société» ou lorsque la procédure est «oppressive ou vexatoire». La Cour a également fait sienne la mise en garde de la Cour d'appel de l'Ontario dans *Young*, selon laquelle il s'agit d'un pouvoir qui ne peut être exercé que dans les «cas les plus manifestes» (p. 614). Notre Cour a réitéré cela à maintes reprises (voir, par exemple, *R. c. Potvin*, [1993] 2 R.C.S. 880; *R. c. Scott*, [1990] 3 R.C.S. 979; *Power*, précité).

Dans *R. c. Conway*, [1989] 1 R.C.S. 1659, à la p. 1667, le juge L'Heureux-Dubé a expliqué ainsi la fin qui sous-tend la règle ou doctrine de l'abus de procédure:

Suivant la doctrine de l'abus de procédure, le traitement injuste ou oppressif d'un accusé prive le ministère public du droit de continuer les poursuites relatives à l'accusation. Les poursuites sont suspendues, non à la suite d'une décision sur le fond (voir *Jewitt*, précité, à la p. 148), mais parce qu'elles sont à ce point viciées que leur permettre de suivre leur cours compromettrait l'intégrité du tribunal. Cette doctrine est l'une des garanties destinées à assurer «que la répression du crime par la condamnation du coupable se fait d'une façon qui reflète nos valeurs fondamentales en tant que société» (*Rothman c. La Reine*, [1981] 1 R.C.S. 640, à la p. 689, le juge Lamer). C'est là reconnaître que les tribunaux doivent avoir le respect et le soutien de la collectivité pour que l'administration de la justice criminelle puisse adéquatement remplir sa fonction. Par conséquent, lorsque l'atteinte au franc-jeu et à la décence est disproportionnée à l'intérêt de la société d'assurer que les infractions criminelles soient efficacement poursuivies, l'administration de la justice est mieux servie par l'arrêt des procédures. [Je souligne.]

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120 In order to find an abuse of process, the court must be satisfied that, “the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted” (Brown and Evans, *supra*, at p. 9-68). According to L’Heureux-Dubé J. in *Power*, *supra*, at p. 616, “abuse of process” has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L’Heureux-Dubé J., be “unfair to the point that they are contrary to the interests of justice” (p. 616). “Cases of this nature will be extremely rare” (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

(d) Was the Delay Unacceptable?

121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was “inordinate”.

122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the

Pour conclure qu’il y a eu abus de procédure, la cour doit être convaincue que [TRADUCTION] «le préjudice qui serait causé à l’intérêt du public dans l’équité du processus administratif, si les procédures suivaient leur cours, excéderait celui qui serait causé à l’intérêt du public dans l’application de la loi, s’il était mis fin à ces procédures» (Brown et Evans, *op. cit.*, à la p. 9-68). Le juge L’Heureux-Dubé affirme dans *Power*, précité, à la p. 616, que, d’après la jurisprudence, il y a «abus de procédure» lorsque la situation est à ce point viciée qu’elle constitue l’un des cas les plus manifestes. À mon sens, cela s’appliquerait autant à l’abus de procédure en matière administrative. Pour reprendre les termes employés par le juge L’Heureux-Dubé, il y a abus de procédure lorsque les procédures sont «injustes au point qu’elles sont contraires à l’intérêt de la justice» (p. 616). «Les cas de cette nature seront toutefois extrêmement rares» (*Power*, précité, à la p. 616). Dans le contexte administratif, il peut y avoir abus de procédure lorsque la conduite est tout aussi oppressive.

d) Le délai écoulé était-il inacceptable?

Pour qu’il y ait manquement à l’obligation d’agir équitablement, le délai doit être déraisonnable ou excessif (Brown et Evans, *op. cit.*, à la p. 9-68). Le délai ne constitue pas en soi un abus de procédure. La personne visée par des procédures doit établir que le délai était inacceptable au point d’être oppressif et de vicier les procédures en cause. Bien que je sois disposé à reconnaître que le stress et la stigmatisation résultant d’un délai excessif peuvent entraîner un abus de procédure, je ne suis pas convaincu que le délai écoulé en l’espèce était «excessif».

La question de savoir si un délai est devenu excessif dépend de la nature de l’affaire et de sa complexité, des faits et des questions en litige, de l’objet et de la nature des procédures, de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai, et d’autres circonstances de l’affaire. Comme nous l’avons vu, la question de savoir si un délai est excessif et s’il est susceptible de heurter le sens de l’équité de la collectivité dépend non pas uniquement de la longueur de ce délai, mais de facteurs contextuels,

community's sense of fairness would be offended by the delay.

With respect to the actual length of the delay in this case and whether it had been "unacceptable", Lowry J. noted that, unlike the cases to which he had been referred, there was no extended period without any activity in the processing of the Complaints from receipt to referral, except for an inexplicable five-month period of inaction from April 10, 1996, when the respondent provided his substantive response to the Complaints, to September 6, 1996, when human rights officers were assigned to investigate the Complaints. The Commission's counsel provided no explanation or excuses for this five-month gap at the oral hearing. However, according to a letter to the complainant and the respondent dated March 6, 1996, the Council referred to a period of "adjustment" where investigative resources were being transferred from the Employment Standards Branch to the Council and that from then on the Council was to conduct its own investigations. This letter also stated that some investigations would be commenced prior to April 1, 1996, beginning with those complaints that had experienced the longest delays. The Council stated that it appreciated the parties' patience in waiting to be notified as to when the investigation would begin. Lowry J. found that, other than during this five-month period, communication had been ongoing between the Council, solicitors and complainants, and the respondent had not been ignored. There had been a continuous dialogue between the parties (at para. 39).

With respect to calculating the delay, Lowry J. found that the only time that could be considered for the delay was between the filing of the Complaint to the end of the investigation process, in July. He stated that the Tribunal could not be criticized for not setting the hearing dates earlier as the respondent did not press for earlier dates, did not question the fixed dates and cancelled the pre-hearing conference. While the respondent did at one point inquire as to whether one of the Complaints could be set for hearing without investiga-

dont la nature des différents droits en jeu dans les procédures.

En ce qui concerne la longueur du délai en l'espèce et la question de savoir si elle est «inacceptable», le juge Lowry a fait remarquer que, contrairement aux affaires qui lui ont été mentionnées, il n'y avait pas eu de période prolongée d'inactivité dans le traitement des plaintes entre leur dépôt et leur renvoi au Tribunal, à l'exception d'une période inexplicable de cinq mois d'inactivité comprise entre le 10 avril 1996, date à laquelle l'intimé a répondu aux plaintes sur le fond, et le 6 septembre 1996, date à laquelle des agents des droits de la personne ont été chargés d'enquêter sur les plaintes. À l'audience, l'avocat de la Commission n'a fourni aucune explication ni aucune excuse au sujet de cet intervalle de cinq mois. Toutefois, dans une lettre datée du 6 mars 1996 et adressée à la plaignante et à l'intimé, le Conseil a parlé d'une période d'«ajustement» pendant laquelle des enquêteurs de la division des normes d'emploi avaient été mutés chez lui pour qu'il mène dorénavant ses propres enquêtes. La lettre précisait également que certaines enquêtes débuteraient avant le 1^{er} avril 1996 et que la priorité serait accordée aux plaintes dont l'examen avait le plus tardé. Le Conseil remerciait les parties de la patience dont elles feraient preuve en attendant d'être informées de l'ouverture de l'enquête. Le juge Lowry a conclu que, en dehors de cette période de cinq mois, la communication avait été constante entre la Commission, les avocats et les plaignantes, et que l'intimé n'avait pas été tenu à l'écart. Le dialogue s'était poursuivi de façon ininterrompue entre les parties (au par. 39).

Au sujet du calcul du délai, le juge Lowry a conclu que seule la période comprise entre le dépôt de la plainte et la fin de l'enquête, en juillet, pouvait être prise en considération. Il a dit qu'on ne pouvait reprocher au Tribunal de ne pas avoir fixé des dates d'audience plus rapprochées, étant donné que l'intimé ne lui avait pas demandé de le faire, qu'il n'avait pas contesté les dates fixées ni annulé la conférence préparatoire à l'audience. Même si, à un moment donné, l'intimé M. Blencoe s'était enquis de la possibilité de faire inscrire au rôle

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tion, this would have required a concession that there was sufficient evidence to warrant a hearing, a concession which Mr. Blencoe was not prepared to make. Following Lowry J.'s reasoning, the delay would be computed until July 1997, thus reducing the delay from 32 months to 24 months.

l'une des plaintes sans qu'une enquête n'ait lieu, il aurait fallu qu'il reconnaisse que la preuve était suffisante pour justifier la tenue d'une audience, ce qu'il n'était pas disposé à faire. Selon le raisonnement du juge Lowry, le délai serait calculé jusqu'en juillet 1997, de sorte qu'il passerait de 32 mois à 24 mois.

125 During those 24 months, the Commission also had to deal with a challenge by the respondent as to the lateness of the Complaints and his accusation that the Complaints were in bad faith. The respondent refused to respond to the allegations until this determination was made. As a result, the process was delayed for some eight months. The respondent was perfectly entitled to bring forward allegations of bad faith and to question the timeliness of the Complaints. However, the Commission should not be held responsible for contributing to this part of the delay. In this regard, Lowry J. stated (at para. 42):

It is not suggested that Mr. Blencoe was not entitled to challenge the complaints, as he did at the outset, but having done so, and having been unsuccessful, it is not in my view open to him now to claim that the events of the eight months elapsed contributed to an unacceptable delay.

Au cours de ces 24 mois, la Commission a également été saisie d'une contestation de l'intimé fondée sur le caractère tardif des plaintes, et de son argument que ces plaintes avaient été portées de mauvaise foi. Il refusait de répondre aux allégations jusqu'à ce que l'on ait statué sur ces points. Le processus a donc été retardé d'environ huit mois. L'intimé avait parfaitement le droit d'alléguer la mauvaise foi et le non-respect du délai imparti pour porter plainte. Cependant, la Commission ne devrait pas être tenue responsable d'avoir contribué à cette partie du délai. Voici ce que le juge Lowry a dit à ce sujet (au par. 42):

[TRADUCTION] On n'affirme pas que M. Blencoe n'avait pas le droit de contester les plaintes comme il l'a fait au départ, mais j'estime qu'il ne peut pas, après avoir exercé ce droit en vain, prétendre maintenant que les événements qui sont survenus pendant les huit mois qui se sont écoulés ont contribué à l'écoulement d'un délai inacceptable.

Thus, while the respondent was entitled to take the steps he did, the Court of Appeal wrongly considered the delay attributable to the aforementioned challenges in computing the delay caused by the Commission. Clearly much of this delay resulted from the respondent's actions, though there appear to be other delays caused by the Commission. As expressed by Lambert J.A., at para. 29, some of the delay was attributable to the Commission, some to the respondent, but very little of it was attributable to either of the two complainants — Ms. Schell or Ms. Willis.

Donc, même si l'intimé avait le droit de faire les démarches qu'il a faites, la Cour d'appel a eu tort de tenir compte du délai attribuable aux contestations susmentionnées pour calculer le délai imputable à la Commission. Il est clair que ce délai résulte en bonne partie des actes de l'intimé, quoique la Commission semble avoir eu par ailleurs sa part de responsabilité. Comme l'a dit le juge Lambert, au par. 29, le délai était attribuable en partie à la Commission et en partie à l'intimé, mais il l'était très peu à l'une ou l'autre des deux plaignantes, M^{me} Schell ou M^{me} Willis.

126 The arguments advanced by the parties before us rely heavily on criminal judgments where delay was considered in the context of s. 11(b) or s. 7 of the *Charter*. It must be kept in mind, as mentioned in paras. 93-95, that the human rights process of receiving complaints, investigating them, determining whether they are substantial enough to

Les arguments que les parties ont avancés devant nous s'appuient en grande partie sur des jugements en matière criminelle où un délai était examiné à la lumière de l'al. 11b) ou de l'art. 7 de la *Charte*. Comme je l'ai mentionné aux par. 93 à 95, il faut se rappeler que le processus consistant à recevoir des plaintes fondées sur les droits de la

investigate and report and then to refer the matter to the Tribunal for hearing is a very different process from the criminal process. The British Columbia human rights process is designed to protect respondents by ensuring that cases are not adjudicated unless there is some basis for the claims to go forward and unless the issue cannot be disposed of prior to adjudication. Pursuant to s. 27 of the *Human Rights Code*, the Commission may dismiss a complaint if, *inter alia*, it is brought too late, the acts alleged do not contravene the Code, there is no reasonable basis for referring the complaint to a hearing, if it does not appear to be in the interest of the group bringing the complaint, the complaint was filed for improper motives or if the complaint was made in bad faith. The Commission therefore performs a gatekeeping or screening function, preventing those cases that are trivial or insubstantial from proceeding. There is also the goal of settlement through mediation which is lacking in the criminal context. The human rights process thus takes a great deal more time prior to referring a complaint to the Tribunal for hearing.

The principles of natural justice also require that both sides be given an opportunity to participate in reviewing documents at various stages in the process and to review the investigation report. The parties therefore have a chance to make submissions before a referral is made to the Tribunal. These steps in the process take time. Indeed, the Commission was under a statutory obligation to proceed as it did. The process itself was not challenged in this case. True, the Commission took longer than is desirable to process these Complaints. I am not condoning that. Nevertheless, McEachern C.J.B.C. has exaggerated in stating that “a week at the outside would have sufficed” to investigate these Complaints (para. 51). While the case may not have been an extremely complicated one, these stages are necessary for the protection

personne, à enquêter à leur sujet, à déterminer si elles justifient la tenue d’une enquête, à rédiger un rapport et à renvoyer l’affaire au Tribunal pour qu’il l’entende est fort différent du processus en matière criminelle. Le processus en matière de droits de la personne qui a cours en Colombie-Britannique est conçu pour protéger les personnes qui font l’objet d’une plainte en assurant qu’une audience ne sera tenue que si la plainte a un minimum de fondement et que si la question ne peut pas être réglée préalablement. Selon l’art. 27 du *Human Rights Code*, la Commission peut notamment rejeter une plainte si elle est présentée tardivement, si les faits allégués ne contreviennent pas au Code, s’il n’y a aucun motif raisonnable de la renvoyer pour audience, si elle semble contraire aux intérêts du groupe qui porte plainte ou encore si elle a été portée de mauvaise foi ou pour des motifs répréhensibles. La Commission exerce donc une fonction de contrôle ou de tri et empêche ainsi les affaires frivoles ou sans fondement de suivre leur cours. Il y a également l’objectif de règlement par la médiation qui est absent du contexte du droit criminel. Le processus en matière de droits de la personne qui précède le renvoi de la plainte au Tribunal pour qu’il tienne une audience est donc beaucoup plus long.

Les principes de justice naturelle exigent en outre que les deux parties puissent examiner les documents aux différentes étapes du processus et prendre connaissance du rapport d’enquête. Les parties ont donc la possibilité de présenter des observations avant que l’affaire soit renvoyée au Tribunal. Ces étapes allongent d’autant le processus. En réalité, la Commission était tenue par la loi de procéder comme elle l’a fait. Le processus comme tel n’a pas été contesté en l’espèce. Il est vrai que la Commission a pris plus de temps que ce qui est souhaitable pour traiter les plaintes, ce qui n’est pas excusable selon moi. Toutefois, le juge en chef McEachern a exagéré lorsqu’il a dit [TRADUCTION] «qu’il aurait suffi tout au plus d’une semaine» pour enquêter sur ces plaintes (par. 51). Même s’il se peut que l’affaire n’ait pas été extrêmement compliquée, ces étapes sont nécessaires pour assurer la protection de la personne qui fait l’objet d’une plainte fondée sur les droits de la per-

of the respondents in the context of the human rights complaints system.

128 The Commission seems to have handled the Complaints against Mr. Blencoe in the same manner as it handles all of its human rights complaints. The respondent argues that the Commission should have been sensitive to his particular needs and to have consequently expedited his Complaints on a priority basis. However, as professed by Lowry J., there is, “little if anything in the record to suggest that Mr. Blencoe raised with the Commission any of the hardship he has suffered or that he sought to be afforded any priority on that basis” (para. 45).

129 In *Kodellas*, *supra*, the Saskatchewan Court of Appeal held that the determination of whether the delay is unreasonable is, in part, a comparative one whereby one can compare the length of delay in the case at bar with the length of time normally taken for processing in the same jurisdiction and in other jurisdictions in Canada. While this factor has limited weight, I would note that in this regard, on average, it takes the Canadian Human Rights Commission 27 months to resolve a complaint (J. Simpson, “Human Rights Commission Mill Grinds Slowly”, *The Globe & Mail* (October 1, 1998), p. A18, as quoted in R. E. Hawkins, “Reputational Review III: Delay, Disrepute and Human Rights Commissions” (2000), 25 *Queen’s L.J.* 599, at p. 600). In Ontario, the average length of complaints, according to the *Annual Report 1997-1998 of the Ontario Human Rights Commission* (1998), at p. 24, is 19.9 months. The respondent’s counsel at the oral hearing quoted a report of the British Columbia Ministry where the average time to get to a hearing in British Columbia is three years.

130 The delay in the case at bar should be compared to that in analogous cases. In *Nisbett*, the sexual harassment complaint had been outstanding for approximately three years. In *Canadian Airlines*, there was a 50-month delay between the filing of the complaint and the appointment of an investigator. In *Stefani*, there was a delay of two years and

sonne, lorsque vient le temps d’examiner cette plainte.

La Commission semble avoir traité les plaintes portées contre M. Blencoe de la même manière qu’elle le fait pour toutes les autres plaintes fondées sur les droits de la personne dont elle est saisie. L’intimé fait valoir qu’elle aurait dû tenir compte de ses besoins particuliers et, par conséquent, traiter en priorité les plaintes dont il faisait l’objet. Cependant, comme l’a affirmé le juge Lowry, [TRADUCTION] «il n’y a que peu ou pas d’éléments du dossier qui indiquent que M. Blencoe a informé la Commission des difficultés qu’il éprouvait ou qu’il a demandé qu’on lui accorde la priorité pour ce motif» (par. 45).

Dans *Kodellas*, précité, la Cour d’appel de la Saskatchewan a statué que l’exercice consistant à déterminer si un délai est déraisonnable est en partie comparatif, du fait qu’il permet de comparer la durée du délai dans l’affaire en cause au délai qui est normalement nécessaire pour procéder dans le même ressort ou ailleurs au Canada. Bien que ce facteur ait une importance limitée, je tiens à souligner, à cet égard, que la Commission canadienne des droits de la personne met en moyenne 27 mois à régler une plainte (J. Simpson, «Human Rights Commission Mill Grinds Slowly», *The Globe & Mail* (1^{er} octobre 1998), p. A18, cité dans R. E. Hawkins, «Reputational Review III: Delay, Disrepute and Human Rights Commissions» (2000), 25 *Queen’s L.J.* 599, à la p. 600). En Ontario, selon le *Rapport annuel 1997-1998 de la Commission ontarienne des droits de la personne* (1998), à la p. 26, la durée moyenne du traitement d’une plainte est de 19,9 mois. À l’audience, l’avocat de l’intimé a cité un rapport du ministère responsable en Colombie-Britannique selon lequel le délai d’obtention d’une audience dans la province est en moyenne de trois ans.

Le délai écoulé en l’espèce devrait être comparé à celui constaté dans des affaires analogues. Dans l’affaire *Nisbett*, environ trois années s’étaient écoulées depuis le dépôt de la plainte de harcèlement sexuel. Dans l’affaire *Lignes aériennes Canadien*, 50 mois s’étaient écoulés entre le dépôt de la plainte et la désignation d’un enquêteur. Dans

three months between the complaint and the inspection and an additional six- or seven-month delay which followed. In *Brown*, a three-year period had elapsed prior to serving the petitioner with notice of the inquiry. In *Misra*, there was a five-year delay during which time Misra was suspended from the practice of medicine. Finally, in *Ratzlaff*, it had been seven years before the physician received a hearing notice.

A review of the facts in this case demonstrates that, unlike the aforementioned cases where there was complete inactivity for extremely lengthy periods, the communication between the parties in the case at bar was ongoing. While Lowry J. acknowledged the five-month delay of inactivity, on balance, he found no unacceptable delay and considered the time that elapsed to be nothing more “than the time required to process complaints of this kind given the limitations imposed by the resources available” (para. 47). Lowry J. concluded as follows (at para. 49):

In my view, it cannot be said that the Commission or the Tribunal have acted unfairly toward Mr. Blencoe. They have caused neither an unacceptable delay in the process nor a prejudice to him whereby fairness of the hearings scheduled to be conducted next month have been compromised. There has been no denial of natural justice and, accordingly, Mr. Blencoe’s petition for judicial review cannot succeed.

As expressed by Salmon L.J. in *Allen v. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), at p. 561, “it should not be too difficult to recognise inordinate delay when it occurs”. In my opinion, the five-month inexplicable delay or even the 24-month period from the filing of the Complaints to the referral to the Tribunal was not so inordinate or inexcusable as to amount to an abuse of process. Taking into account the ongoing communication between the parties, the delay in this case does not strike me as one that would offend the community’s sense of decency and fairness. While I would not presume to fix a specified period for a reasonable delay, I am satisfied that

l’affaire *Stefani*, deux ans et trois mois s’étaient écoulés entre le dépôt de la plainte et le début de l’inspection, à quoi s’étaient ajoutés six ou sept mois supplémentaires. Dans l’affaire *Brown*, trois années s’étaient écoulées avant qu’un avis d’enquête soit signifié au requérant. Dans l’affaire *Misra*, un délai de cinq ans s’était écoulé, pendant lequel M. Misra s’était vu retirer son permis d’exercer la médecine. Enfin, dans l’affaire *Ratzlaff*, sept ans s’étaient écoulés avant que le médecin reçoive un avis d’audience.

L’examen des faits en l’espèce démontre que, contrairement aux affaires susmentionnées où il y a eu des périodes d’inactivité complète extrêmement longues, la communication entre les parties est demeurée constante. Bien qu’il ait reconnu que le dossier était demeuré inactif pendant cinq mois, le juge Lowry a jugé que ce délai n’était pas inacceptable en fin de compte et qu’il ne représentait rien de plus [TRADUCTION] «que le temps nécessaire pour traiter les plaintes de ce genre compte tenu des limites imposées par les ressources disponibles» (par. 47). Le juge Lowry a tiré la conclusion suivante (au par. 49):

[TRADUCTION] À mon avis, on ne peut dire que la Commission ou le Tribunal ont été inéquitables envers M. Blencoe. Ni l’un ni l’autre n’est à l’origine d’un délai inacceptable ou n’a causé à M. Blencoe un préjudice qui aurait eu pour effet de compromettre l’équité des audiences qui devaient avoir lieu le mois suivant. Il n’y a pas eu de déni de justice naturelle et, en conséquence, la demande de contrôle judiciaire présentée par M. Blencoe ne peut être accueillie.

Comme l’a dit le lord juge Salmon dans *Allen c. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543 (C.A.), à la p. 561, [TRADUCTION] «il ne devrait pas être trop difficile de reconnaître un délai excessif lorsqu’il se produit». Selon moi, le délai inexplicable de cinq mois ou même le délai de 24 mois qui s’est écoulé entre le dépôt des plaintes et le renvoi au Tribunal n’était ni excessif ni inexcusable au point de constituer un abus de procédure. Vu la communication constante entre les parties, le délai en l’espèce ne me paraît pas être de ceux qui heurteraient le sens de la justice et de la décence de la société. Même si je ne saurais préciser la durée d’un délai raisonnable, je suis

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the delay in this case was not so inordinate as to amount to an abuse of process.

133 As noted in the discussion pertaining to the application of s. 7 of the *Charter* (paras. 59 to 72), I am also concerned with the causal connection in this case. There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected. While Mr. Blencoe and his family have suffered obvious prejudice since the various sexual harassment allegations against him were made public, as explained above, I am not convinced that such prejudice can be said to result directly from the delay in the human rights proceedings. As in the *Charter* analysis above, I have simply assumed without deciding, for the purpose of my analysis, that the delay caused by the Commission was a contributory cause of the respondent's prejudice.

VII. Conclusion

134 To summarize, it cannot be said that the respondent's s. 7 rights were violated nor that the conduct of the Commission amounted to an abuse of process. However, I emphasize that nothing in these reasons has any bearing on the merits of the case before the Tribunal.

135 Nevertheless, I am very concerned with the lack of efficiency of the Commission and its lack of commitment to deal more expeditiously with complaints. Lack of resources cannot explain every delay in giving information, appointing inquiry officers, filing reports, etc.; nor can it justify inordinate delay where it is found to exist. The fact that most human rights commissions experience serious delays will not justify breaches of the principles of natural justice in appropriate cases. In *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 795, the Court stated that in the context of s. 11(b) of the *Charter*, the government "has a constitutional obligation to commit sufficient resources to prevent unreasona-

convaincu que le délai en l'espèce n'était pas excessif au point de constituer un abus de procédure.

Comme je l'ai souligné en procédant à l'analyse concernant l'application de l'art. 7 de la *Charte* (par. 59 à 72), je suis également préoccupé par la question du lien causal en l'espèce. Pour qu'il y ait abus de procédure, le délai écoulé doit, outre sa longue durée, avoir causé un préjudice réel d'une telle ampleur qu'il heurte le sens de la justice et de la décence du public. Bien que M. Blencoe et les membres de sa famille aient manifestement subi un préjudice en raison de la publicité qui a entouré les diverses allégations de harcèlement sexuel, comme je l'ai expliqué précédemment, je ne suis pas convaincu qu'on peut dire que ce préjudice résulte directement du délai écoulé dans les procédures en matière de droits de la personne. Comme je l'ai fait dans l'analyse précédente relative à la *Charte*, j'ai simplement tenu pour acquis, sans pour autant le décider, aux fins de mon analyse, que le délai imputable à la Commission avait contribué à causer un préjudice à l'intimé.

VII. Conclusion

En résumé, on ne saurait dire qu'il y a eu atteinte aux droits garantis à l'intimé par l'art. 7 ou que la conduite de la Commission a constitué un abus de procédure. Cependant, je souligne que les présents motifs ne devraient avoir aucune incidence sur le bien-fondé de l'affaire devant le Tribunal.

Je suis néanmoins très préoccupé par l'inefficacité de la Commission et par l'absence d'engagement de sa part à traiter plus rapidement les plaintes dont elle est saisie. Le manque de ressources ne peut pas expliquer tous les délais en matière de communication des renseignements, de désignation d'enquêteurs, de dépôt de rapports, etc.; il ne peut pas justifier non plus un délai jugé excessif. Le fait que la plupart des commissions des droits de la personne connaissent de sérieux délais ne justifie pas la violation des principes de justice naturelle dans des cas appropriés. Dans l'arrêt *R. c. Morin*, [1992] 1 R.C.S. 771, à la p. 795, la Cour a dit, au sujet de l'application de l'al. 11b) de

ble delay". The demands of natural justice are apposite.

I would allow the appeal. The Court of Appeal decision is set aside and the Tribunal should proceed with the hearing of the Complaints on their merits. Considering the lack of diligence displayed by the Commission, I would nevertheless exercise the Court's discretion under s. 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, to award costs against the appellant Commission in favour of Robin Blencoe, Andrea Willis and Irene Schell.

The reasons of Iacobucci, Binnie, Arbour and LeBel JJ. were delivered by

LEBEL J. (dissenting in part) — The reasons of Justice Bastarache fully review the judicial history and the factual background of this case, and I do not intend to summarize them again. I shall refer only to such elements of the evidence and of the history of this case, as may be required, for the purpose of my analysis.

I. The Issues

The parties have fought this case mainly on *Charter* issues. In the end, this approach turned into a constitutional problem, something that it was not. The important and determinative issue should have been the role of judicial review and administrative law principles in the control of undue delay in administrative tribunal proceedings. Given that human rights commissions are administrative law creations, the first place we should look for solutions to problems in their processes is in the realm of administrative law. If the relevant administrative law remedy had been applied, the trial judge should have found that there had been undue delay in the process of the British Columbia Human Rights Commission (formerly the British Columbia Council of Human Rights), that this delay was abusive, and that some

la *Charte*, que le gouvernement «a l'obligation constitutionnelle d'attribuer des ressources suffisantes pour prévenir tout délai déraisonnable». Les exigences de la justice naturelle sont pertinentes.

Je suis d'avis d'accueillir le pourvoi. L'arrêt de la Cour d'appel est annulé et le Tribunal devrait procéder à l'audition des plaintes au fond. Toutefois, vu l'absence de diligence manifestée par la Commission appelante, je suis d'avis de lui ordonner de payer les dépens de Robin Blencoe, Andrea Willis et Irene Schell, en vertu du pouvoir discrétionnaire que l'art. 47 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, confère à notre Cour.

Version française des motifs des juges Iacobucci, Binnie, Arbour et LeBel rendus par

LE JUGE LEBEL (dissident en partie) — Dans ses motifs, le juge Bastarache fait un examen complet des procédures et des faits de la présente affaire, de sorte que je ne compte pas les résumer à nouveau. Je vais mentionner seulement les éléments de preuve et les faits qui seront nécessaires pour les fins de mon analyse.

I. Les questions en litige

L'argumentation des parties a surtout porté sur des questions relatives à la *Charte canadienne des droits et libertés*. En définitive, le problème qui se posait est, de ce fait, devenu à tort un problème constitutionnel. La question importante et déterminante aurait dû être celle du rôle que le contrôle judiciaire et les principes du droit administratif jouent en matière de prévention des délais injustifiés dans des procédures devant un tribunal administratif. Étant donné que les commissions des droits de la personne sont des créatures du droit administratif, c'est dans le domaine du droit administratif qu'il nous faut d'abord chercher des solutions aux problèmes que posent leurs procédures. Si la réparation appropriée en droit administratif avait été appliquée, le juge de première instance aurait dû conclure qu'il y a eu délai injustifié dans les procédures de la British Columbia Human Rights Commission (auparavant British Columbia Council of Human Rights) («Commission des

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form of remedy should have been granted to the respondent Blencoe.

droits de la personne de la Colombie-Britannique» ou «Commission»), que ce délai était excessif et qu'une forme quelconque de réparation devait être accordée à l'intimé Blencoe.

139 Nevertheless, I agree that a stay of proceedings was not warranted in the circumstances of the case and should be lifted, as suggested by Bastarache J. Such a remedy took no consideration of the interest of the complainants Irene Schell and Andrea Willis in the proceedings of the British Columbia Human Rights Commission ("Commission"). Nobody benefits from delay, but the interests of innocent parties must influence our choice of remedy. The Court of Appeal seems to have dealt with this case as if it were a pure conflict between the respondent and the state, without taking into account that the complainants Schell and Willis also had an important interest in an efficient disposition of their allegations against Blencoe and in the correct and timely application of the appropriate administrative law remedies.

II. The Administrative Law Doctrine of Abuse of Process and the Control of Undue Delay

140 Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians. The tools for this task are not to be found only in the *Canadian Charter of Rights and Freedoms*, but also in the principles of a flexible and evolving administrative law system.

141 The legal doctrines that have developed both under the common law and under the *Charter* to respond to delay are certainly not simple. But the facts of this case point to one inescapable conclusion: the respondent, Robin Blencoe, faced unreasonable delay that violated administrative law principles of fairness in the management of the

Je conviens néanmoins qu'un arrêt des procédures n'était pas justifié dans les circonstances de l'affaire et qu'il devrait être annulé, comme le propose le juge Bastarache. Cette réparation ne tenait aucun compte de l'intérêt que les plaignantes Irene Schell et Andrea Willis avaient dans les procédures de la Commission des droits de la personne de la Colombie-Britannique. Un délai n'est avantageux pour personne, mais les intérêts de parties innocentes doivent influencer notre choix d'une réparation. La Cour d'appel semble avoir considéré qu'il s'agissait en l'espèce d'un simple différend entre l'intimé et l'État, sans tenir compte du fait que les plaignantes Schell et Willis avaient elles aussi considérablement intérêt à ce qu'il soit statué efficacement sur leurs allégations contre Blencoe et à ce que les réparations appropriées en droit administratif soient accordées correctement et en temps opportun.

II. La règle de l'abus de procédure en droit administratif et la prévention des délais injustifiés

Ce n'est pas d'hier que les délais inutiles dans les procédures judiciaires et les procédures administratives sont qualifiés de contraires à une société libre et équitable. Il s'agit jusqu'à un certain point d'un fléau qui touche presque tous les tribunaux judiciaires et les tribunaux administratifs. C'est un problème qu'il faut régler pour assurer le maintien d'un système de justice efficace et digne de la confiance des Canadiens et des Canadiennes. La solution à ce problème réside non seulement dans l'application de la *Charte*, mais également dans celle des principes d'un régime de droit administratif souple et en évolution constante.

Les règles juridiques qui ont été établies en vertu de la common law et de la *Charte* afin de remédier au problème des délais ne sont sûrement pas simples. Cependant, les faits de la présente affaire amènent inévitablement à conclure que l'intimé, Robin Blencoe, a été victime d'un délai déraisonnable contraire aux principes, reconnus en

process of an administrative tribunal or body. Those principles concern not only the fairness of the hearing and of the final decision, but the very conduct of the procedures leading to the disposition in the matter. In these reasons, I shall now examine those principles and the nature of the remedy that appears just and appropriate after giving due consideration to the interests of all parties concerned by this long and frustrating judicial debate.

III. The Application for Judicial Review

This case came before the courts when Blencoe brought a petition for judicial review. Lowry J., in the British Columbia Supreme Court, denied any remedy under administrative law principles because, in his opinion, Blencoe had not established any prejudice that related “directly to the ability to respond to the complaint in an evidentiary sense” ((1998), 49 B.C.L.R. (3d) 201, at para. 37). Judicial review would thus be essentially limited to assessing the impact of the delay on the hearing and the decision.

Some case law did support this approach. In *Nisbett v. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, the Manitoba Court of Appeal searched for delay that caused prejudice to an individual’s right to a fair and full hearing. In *Ford Motor Co. of Canada v. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464, at p. 466, the Ontario Divisional Court explicitly followed the *Nisbett* analysis.

However, these decisions seem to have been exceptions in an otherwise steady progression toward a broader vision of administrative law abuse of process doctrine and the remedies that it provides for unreasonable delay. Administrative law abuse of process doctrine is fundamentally about protecting people from unfair treatment by administrative agencies. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 631, Dickson J. (as he then was)

droit administratif, de l’équité en matière de gestion des procédures d’un tribunal ou d’un organisme administratif. Ces principes concernent non seulement l’équité de l’audience et de la décision finale, mais encore le déroulement même des procédures menant au règlement de l’affaire. Dans les présents motifs, je vais maintenant examiner ces principes et la nature de la réparation qui paraît juste et appropriée, compte tenu, comme il se doit, des intérêts de toutes les parties touchées par ce long et frustrant débat judiciaire.

III. La demande de contrôle judiciaire

Les procédures devant les tribunaux ont commencé avec le dépôt par Blencoe d’une demande de contrôle judiciaire. Le juge Lowry de la Cour suprême de la Colombie-Britannique a refusé toute réparation fondée sur les principes du droit administratif parce que, à son avis, Blencoe n’avait pas établi l’existence d’un préjudice lié [TRADUCTION] «directement à sa capacité de répondre à la plainte en produisant des éléments de preuve» ((1998), 49 B.C.L.R. (3d) 201, au par. 37). Ainsi, le contrôle judiciaire consisterait essentiellement à évaluer l’incidence du délai sur l’audience et la décision.

Une partie de la jurisprudence appuyait ce point de vue. Dans l’arrêt *Nisbett c. Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744, la Cour d’appel du Manitoba s’est demandé si un délai avait porté atteinte au droit d’une personne à une audience complète et équitable. Dans *Ford Motor Co. of Canada c. Ontario (Human Rights Commission)* (1995), 24 C.H.R.R. D/464, à la p. 466, la Cour divisionnaire de l’Ontario a explicitement suivi l’analyse effectuée dans l’arrêt *Nisbett*.

Toutefois, ces décisions semblent avoir constitué des accidents de parcours dans une évolution par ailleurs constante vers une conception plus large de la règle de l’abus de procédure en droit administratif et des réparations qu’elle offre en cas de délai déraisonnable. Cette règle de l’abus de procédure en droit administratif vise fondamentalement à protéger les gens contre tout traitement inéquitable de la part d’organismes administratifs. Dans l’arrêt *Martineau c. Comité de discipline de l’Insti-*

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described the administrative law principle of fairness in these classic terms:

In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and fairness.

When we ask whether there has been an administrative law abuse of process, we ask the same fundamental question: has an administrative agency treated people inordinately badly?

IV. Historical Context

145 This question, however, does not exist outside of a legal historical context, through which we must trace the role of courts on these kinds of questions up to the present day. Two fundamental aspects of the common law's history are relevant to the rules in this area: (1) the common law system's abhorrence of delay; and (2) the common law's development as to the power of courts to monitor the processes of administrative bodies.

146 The notion that justice delayed is justice denied reaches back to the mists of time. In *Magna Carta* in 1215, King John promised: "To none will we sell, to none will we deny, or delay, right or justice" (emphasis added). As La Forest J. put it, the right to a speedy trial has been "a right known to the common law . . . for more than 750 years" (*R. v. Rahey*, [1987] 1 S.C.R. 588, at p. 636). In criminal law cases, this Court had no difficulty determining in *R. v. Askov*, [1990] 2 S.C.R. 1199, at p. 1227, that "the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the *Charter*". Outside the criminal law context, legislators have devised limitation periods, and courts have developed equitable doctrines such as that of laches. For centuries, those working with our legal system have recognized

tution de Matsqui, [1980] 1 R.C.S. 602, à la p. 631, le juge Dickson (plus tard Juge en chef) a décrit le principe de l'équité en droit administratif en ces termes classiques:

En conclusion, la simple question à laquelle il faut répondre est celle-ci: compte tenu des faits de ce cas particulier, le tribunal a-t-il agi équitablement à l'égard de la personne qui se prétend lésée? Il me semble que c'est la question sous-jacente à laquelle les cours ont tenté de répondre dans toutes les affaires concernant la justice naturelle et l'équité.

Lorsque nous nous demandons s'il y a eu abus de procédure selon le droit administratif, nous nous posons la même question fondamentale: un organisme administratif a-t-il traité des gens excessivement mal?

IV. Le contexte historique

La question ne se pose cependant pas en dehors d'un contexte juridique historique dans lequel nous devons examiner le rôle que les tribunaux judiciaires ont joué jusqu'à ce jour en la matière. Deux aspects fondamentaux de l'histoire de la common law sont pertinents quant aux règles applicables dans ce domaine: (1) l'aversion de la common law pour les délais, et (2) l'évolution de la common law en ce qui concerne le pouvoir des tribunaux judiciaires de surveiller les procédures d'organismes administratifs.

L'idée que la justice différée est un déni de justice ne date pas d'hier. Dans la *Magna Carta* de 1215, le roi Jean a pris l'engagement suivant: [TRADUCTION] «À aucun nous ne vendrons, à aucun nous ne refuserons ni différerons droit ou justice» (je souligne). Comme l'a dit le juge La Forest, le droit à un procès expéditif «est connu en *common law* depuis plus de 750 ans» (*R. c. Rahey*, [1987] 1 R.C.S. 588, à la p. 636). En matière de droit criminel, notre Cour n'a pas hésité à conclure, dans l'arrêt *R. c. Askov*, [1990] 2 R.C.S. 1199, à la p. 1227, que «le droit d'être jugé dans un délai raisonnable est un aspect de la justice fondamentale garantie en vertu de l'art. 7 de la *Charte*». En dehors du contexte du droit criminel, le législateur a établi des délais de prescription, et les cours de justice, des règles d'*equity* comme celle du manque de dili-

that unnecessary delay strikes against its core values and have done everything within their powers to combat it, albeit not always with complete success.

Under the common law, courts have gradually developed the power to monitor the processes of administrative bodies and their legality. There is today no doubt that “[t]he superior courts have the inherent power to review the legality of administrative actions” (D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (3rd ed. 1999), at p. 6). Unnecessary delay is not excluded from the scope of judicial review.

This supervisory power over administrative processes developed from the very beginnings of the prerogative writ most apropos in the case before us. *Mandamus* is a storied writ. At its origins, it empowered the Court of King’s Bench to order a court or an administrative body to do its duty: Sir W. Holdsworth, *A History of English Law* (7th ed. 1956), vol. I, at p. 229; W. Blackstone, *Commentaries on the Laws of England* (4th ed. 1768), Book III, at p. 110. In the original cases that recognized it, the writ was used largely to prevent the procedurally illegitimate exclusion of citizens who were members of certain disliked groups from municipal offices: see *Bagg’s Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271; and *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143, at p. 1143. But there was always the possibility of something much greater in the writ, and Lord Mansfield would go so far as to announce its prospective use “upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one” (*R. v. Barker* (1762), 3 Burr. 1265, 97 E.R. 823, at pp. 824-25 (emphasis added). Cf. *Bagg’s Case*, *supra*, at pp. 1277-78, referring generally to “misgovernment”.) The writ always promised the possibility of ensuring that governmental officers would not shirk their duty to keep processes operating efficiently. Perhaps significantly, the very words of the original form of the writ referred to

gence. Depuis des siècles, les gens qui œuvrent dans notre système juridique reconnaissent que les délais inutiles vont à l’encontre des valeurs fondamentales qui le sous-tendent et ils font tout ce qu’ils peuvent pour les éliminer, même s’ils ne parviennent pas toujours à le faire complètement.

Sous le régime de la common law, les cours de justice se sont progressivement donné le pouvoir de surveiller les procédures des organismes administratifs et leur légalité. Il ne fait désormais aucun doute que [TRADUCTION] «[l]es cours supérieures ont le pouvoir inhérent d’examiner la légalité de mesures administratives» (D. P. Jones et A. S. de Villars, *Principles of Administrative Law* (3^e éd. 1999), à la p. 6). Les délais inutiles n’échappent pas au contrôle judiciaire.

Ce pouvoir de surveillance des procédures administratives qui remonte aux origines du bref de prérogative est des plus à-propos en l’espèce. Le *mandamus* possède une longue histoire. À l’origine, il habilitait la Cour du Banc du Roi à ordonner à un tribunal judiciaire ou à un organisme administratif de faire son devoir: sir W. Holdsworth, *A History of English Law* (7^e éd. 1956), vol. I, à la p. 229; W. Blackstone, *Commentaries on the Laws of England* (4^e éd. 1768), livre III, à la p. 110. Dans les premières affaires où il a été appliqué, le bref a servi en grande partie à empêcher que des membres de groupes abhorrés soient écartés illégitimement d’une charge municipale: voir *Bagg’s Case* (1615), 11 Co. Rep. 93b, 77 E.R. 1271, et *Andover Case* (1700), Holt. K.B. 441, 90 E.R. 1143, à la p. 1143. Cependant, il était toujours possible que le bref ait une portée plus grande, et lord Mansfield a même dit qu’il pourrait être utilisé [TRADUCTION] «chaque fois que la common law ne prévoit aucune réparation particulière et que la justice et le bon gouvernement exigent qu’il y ait réparation» (*R. c. Barker* (1762), 3 Burr. 1265, 97 E.R. 823, aux pp. 824 et 825 (je souligne). Comparer avec *Bagg’s Case*, précité, aux pp. 1277 et 1278, où il est généralement question de [TRADUCTION] «mauvais gouvernement»). Grâce au bref, il était toujours possible de veiller à ce qu’un fonctionnaire de l’État ne manque pas à son obligation de veiller au déroulement efficace des procédures. Ce qui peut être

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“debitam et festinam justiciam” — due and speedy justice (Holdsworth, *supra*, app. XV, at p. 659).

significatif, le libellé même du bref original parlait de «*debitam et festinam justiciam*» — justice régulière et expéditive (Holdsworth, *op. cit.*, app. XV, à la p. 659).

V. Modern Developments

V. Évolution récente

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Today, there is no doubt that mandamus may be used to control procedural delays. In the middle of the last century, a British Columbia Court of Appeal judgment recognized the principles behind mandamus, stating that “[t]he high prerogative writ of mandamus was brought into being to supply defects in administering justice” (*The King ex rel. Lee v. Workmen’s Compensation Board*, [1942] 2 D.L.R. 665, at p. 678). It went on to note that the granting of mandamus was “to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice” (at p. 678, cited with approval in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561). Members of our Court have on occasion alluded to the use of mandamus specifically to control delay. (See notably: *R. v. Bradley*, [1941] S.C.R. 270, at p. 277, *per* Duff C.J.; *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, at p. 1027, *per* Laskin C.J.; and *Rahey*, *supra*, at pp. 624-25, *per* Wilson J., and p. 631, *per* La Forest J.) And there exists a specific line of case law in the administrative context of immigration law that endorses just such a development, particularly where delay creates hardship: e.g., *Muia v. Canada (Minister of Citizenship and Immigration)* (1996), 113 F.T.R. 234; *Dass v. Canada (Minister of Employment and Immigration)*, [1996] 2 F.C. 410 (C.A.), at para. 24; *Dee v. Canada (Minister of Citizenship & Immigration)* (1998), 46 Imm. L.R. (2d) 278 (F.C.T.D.); and *Kiani v. Canada (Minister of Citizenship & Immigration)* (1999), 50 Imm. L.R. (2d) 81 (F.C.T.D.), at para. 34. In such a context in *Bhatnager v. Minister of Employment and Immigration*, [1985] 2 F.C. 315 (T.D.), at p. 317, Strayer J. offers this widely quoted statement:

De nos jours, il ne fait aucun doute que le mandamus peut servir à limiter les délais procéduraux. Au milieu du siècle dernier, la Cour d’appel de la Colombie-Britannique a reconnu, dans un arrêt, les principes qui sous-tendent le mandamus en disant que [TRADUCTION] «[l]a raison d’être du bref de prérogative qu’est le mandamus est de remédier aux vices de l’administration de la justice» (*The King ex rel. Lee c. Workmen’s Compensation Board*, [1942] 2 D.L.R. 665, à la p. 678). La Cour d’appel a ajouté que la délivrance d’un mandamus devait être [TRADUCTION] «régie par des considérations qui contribuent à une administration de la justice expéditive, peu coûteuse et efficace» (à la p. 678, cité avec approbation dans *Harelkin c. Université de Regina*, [1979] 2 R.C.S. 561). Il est arrivé que des juges de notre Cour fassent allusion à l’utilisation du mandamus dans le but précis de limiter un délai. (Voir notamment les arrêts *R. c. Bradley*, [1941] R.C.S. 270, à la p. 277, le juge en chef Duff; *Rourke c. La Reine*, [1978] 1 R.C.S. 1021, à la p. 1027, le juge en chef Laskin; *Rahey*, précité, aux pp. 624 et 625, le juge Wilson, et à la p. 631, le juge La Forest.) En outre, il existe, dans le contexte administratif du droit de l’immigration, un courant jurisprudentiel particulier qui sanctionne une telle évolution, spécialement lorsque le délai cause des difficultés: par exemple, *Muia c. Canada (Ministre de la Citoyenneté et de l’Immigration)* (1996), 113 F.T.R. 234; *Dass c. Canada (Ministre de l’Emploi et de l’Immigration)*, [1996] 2 C.F. 410 (C.A.), au par. 24; *Dee c. Canada (Ministre de la Citoyenneté et de l’Immigration)* (1998), 46 Imm. L.R. (2d) 278 (C.F. 1^{re} inst.); *Kiani c. Canada (Ministre de la Citoyenneté et de l’Immigration)* (1999), 50 Imm. L.R. (2d) 81 (C.F. 1^{re} inst.), au par. 34. C’est dans ce contexte que, dans *Bhatnager c. Ministre de l’Emploi et de l’Immigration*, [1985] 2 C.F. 315 (1^{re} inst.), à la p. 317, le juge Strayer a tenu les propos suivants qui sont souvent cités:

But *mandamus* can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. [Emphasis added.]

The common law system has always abhorred delay. In our system's development of the courts' supervisory role over administrative processes through *mandamus*, we see a crystallizing potential to compel government officers to do their duty and, in so doing, to avoid delay in administrative processes. The historical context in which our case law is rooted is a soil of well-established principles. This ground's more modern seedlings must now be examined.

VI. Undue Delay and Procedural Fairness

English case law began in the last decades to bring these old streams of the common law together. In *R. v. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] Q.B. 606, the English Court of Appeal was prepared to act against unreasonable delay based on the *Magna Carta* itself, as reinforced by the *European Convention on Human Rights*. In *Re Preston*, [1985] A.C. 835, the House of Lords made clear that there could be judicial review of any delay amounting to an abuse of power or breach of natural justice. In *R. v. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] 1 Q.B. 424, the English Court of Appeal applied this to a lengthy delay in notifying police officers of disciplinary charges against them. In the judgment of May L.J., at pp. 439-40, this was abusive and a breach of fairness because it disregarded the possibility of prejudice accruing to the officers on account of the delay. Unreasonable delay in administrative processes triggers the ancient rights of individuals who suffer prejudice as a result, and it gives the courts good reason to intervene against injustice. The modern English position, stated by W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at p. 649, is clear: "A statutory duty must be per-

Mais un bref de *mandamus* peut être délivré pour exiger qu'une décision soit rendue. Normalement, il en est ainsi lorsqu'il y a eu refus exprès de rendre une décision, mais ce peut être également le cas lorsqu'on tarde beaucoup à rendre une décision sans donner d'explication suffisante. [Je souligne.]

La common law a toujours eu les délais en aversion. Dans notre régime de common law, la reconnaissance du rôle de surveillance par voie de *mandamus* que les cours de justice exercent sur les procédures administratives est perçue comme traduisant la possibilité de contraindre les fonctionnaires de l'État à faire leur devoir et, ce faisant, à éviter les délais dans le déroulement des procédures administratives. Le contexte historique dans lequel s'insère notre jurisprudence est constitué de principes bien établis. Il faut maintenant examiner la jurisprudence plus récente qui en a émané.

VI. Délai injustifié et équité procédurale

Au cours des dernières décennies, les tribunaux britanniques ont commencé à réaliser la synthèse de ces vieux courants de common law. Dans *R. c. Secretary of State for the Home Department, Ex parte Phansopkar*, [1976] 1 Q.B. 606, la Cour d'appel d'Angleterre était disposée à réagir aux délais déraisonnables en se fondant sur la *Magna Carta* elle-même, telle qu'elle est renforcée par la *Convention européenne des droits de l'homme*. Dans *Re Preston*, [1985] A.C. 835, la Chambre des lords a précisé qu'il pouvait y avoir contrôle judiciaire de tout délai équivalant à un abus de pouvoir ou à un déni de justice naturelle. Dans *R. c. Chief Constable of the Merseyside Police, Ex parte Calveley*, [1986] Q.B. 424, la Cour d'appel d'Angleterre a appliqué cela au long délai écoulé avant que des policiers soient avisés des accusations d'infraction disciplinaire portées contre eux. Selon le lord juge May, aux pp. 439 et 440, il y avait eu abus et iniquité du fait qu'on n'avait pas tenu compte du préjudice que le délai pourrait causer aux policiers. Le délai déraisonnable dans des procédures administratives met en jeu les droits de longue date que possèdent les personnes qu'il lèse, et il donne aux tribunaux une bonne raison d'intervenir pour remédier à toute injustice qui peut avoir

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formed without unreasonable delay, and this may be enforced by mandamus” (emphasis added).

été causée. Le point de vue qui a cours actuellement en Angleterre selon W. Wade et C. Forsyth, *Administrative Law* (7^e éd. 1994), à la p. 649, est clair: [TRADUCTION] «Une obligation légale doit être exécutée sans délai déraisonnable, et pareille exécution peut être obtenue par voie de mandamus» (je souligne).

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With the few exceptions I noted at the outset of these reasons, modern Canadian courts have begun building on those historical principles and the developments in the English case law discussed above to develop a framework within which they may assess unreasonable delay. First, courts have linked the idea of procedural fairness with a bar on abuse of process through unreasonable delay: e.g., *Misra v. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.) (leave to appeal to SCC granted, [1989] 1 S.C.R. viii, but appeal later discontinued, [1992] 1 S.C.R. vii). Second, even on a traditional analysis, courts have expressed their preparedness to consider different kinds of adverse effects of delay, such as damage to individuals’ reputations or other aspects of their lives, in conjunction with the traditionally recognized effects on the hearing: see, e.g., *Brown v. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL) (S.C.); and *Stefani v. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (B.C.S.C.).

Sauf les quelques exceptions que j’ai mentionnées au début des présents motifs, les tribunaux canadiens modernes ont commencé à s’appuyer sur ces principes historiques et sur l’évolution de la jurisprudence anglaise mentionnée plus haut pour établir un cadre leur permettant de déterminer si un délai est déraisonnable. Premièrement, ils ont lié la notion d’équité procédurale à l’interdiction de tout abus de procédure découlant d’un délai déraisonnable: par exemple, *Misra c. College of Physicians & Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (C.A. Sask.) (autorisation de pourvoi accordée par la CSC, [1989] 1 R.C.S. viii, mais désistement ultérieur, [1992] 1 R.C.S. vii). Deuxièmement, même dans le cadre d’une analyse traditionnelle, les tribunaux ont affirmé qu’ils étaient disposés à tenir compte de divers types d’effet préjudiciable du délai, comme l’atteinte à la réputation ou d’autres préjudices personnels, conjointement avec ses effets traditionnellement reconnus sur l’audience: voir, par exemple, *Brown c. Assn. of Professional Engineers and Geoscientists of British Columbia*, [1994] B.C.J. No. 2037 (QL) (C.S.), et *Stefani c. College of Dental Surgeons (British Columbia)* (1996), 44 Admin. L.R. (2d) 122 (C.S.C.-B.).

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Third, these two evolutions have become fused along with a realization that other adverse effects can create an abusive situation independently of evidentiary prejudice. In *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.), at para. 22, Hollinrake J.A. set out a theoretical framework within which the courts may consider unreasonable delay, along with some of the relevant factors in assessing it:

Troisièmement, outre ces deux évolutions, on s’est rendu compte que d’autres effets préjudiciables peuvent engendrer une situation abusive indépendamment du préjudice lié à la possibilité de présenter des éléments de preuve. Dans *Ratzlaff c. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (C.A.), au par. 22, le juge Hollinrake a énoncé un cadre théorique à l’intérieur duquel les tribunaux pourraient déterminer si un délai est déraisonnable, ainsi que certains facteurs à prendre en considération à cette fin:

Abuse of power is a broader notion, akin to oppression. It encompasses procedural unfairness, conduct equivalent to breach of contract or of representation, and, in my view, unjust delay. I should add that not all lengthy delays are unjust; regard must be had to the causes of delay, and to resulting reasonable changes of position. [Emphasis added.]

This analytical method, in which unreasonable delay is assimilated to a type of abuse, helped Hollinrake J.A. to recognize that adverse effects other than on hearing fairness can be considered independently. He writes at para. 19, “where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence”.

Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing. The cases that have been part of this evolution have sometimes expressed the point differently, but the key consideration is this: administrative delay that is determined to be unreasonable based on its length, its causes, and its effects is abusive and contrary to the administrative law principles that exist and should be applied in a fair and efficient legal system.

Unreasonable delay is not limited to situations that bring the human rights system into disrepute either by prejudicing the fairness of a hearing or by otherwise rising above a threshold of shocking abuse. Otherwise, there would not be any remedy for an individual suffering from unreasonable delay unless this same individual were unlucky enough to have suffered sufficiently to meet an additional, external test of disrepute resulting to the human rights system. Such a limitation may arise from a fear that the main remedy available would be the blunt instrument of the stay of proceedings. However, as we will see below, a remedy other than a stay may be appropriate in other cases where ongoing delay is abusive. It is true that some of the cases that have most developed the doctrine of abusive delay involved lengthier periods of time that, in conjunction with other factors,

[TRADUCTION] La notion d’abus de pouvoir est large et s’apparente à l’oppression. Elle englobe l’iniquité procédurale, la conduite équivalant à la rupture d’un contrat ou à une fausse déclaration et, à mon avis, le délai injustifié. J’ajouterais que tous les délais ne sont pas injustifiés; il faut tenir compte des causes du délai ainsi que des changements raisonnables de situation qui en ont résulté. [Je souligne.]

Cette méthode analytique, dans laquelle le délai déraisonnable est assimilé à une sorte d’abus, a aidé le juge Hollinrake à reconnaître que des effets préjudiciables autres que celui sur l’équité de l’audience peuvent être pris en considération indépendamment. Il écrit, au par. 19, que [TRADUCTION] «lorsque le délai est énorme au point de constituer un abus de pouvoir ou de pouvoir être qualifié d’oppressif, le fait que l’audience elle-même sera équitable importe peu ou pas du tout».

Le délai administratif abusif est répréhensible, et ce, peu importe qu’il ne ruine que la vie d’une personne sans affecter l’audition à laquelle elle a droit. La jurisprudence associée à cette évolution expose parfois ce point de vue différemment, mais le facteur clé est le suivant: le délai administratif jugé déraisonnable en raison de sa durée, de ses causes et de ses effets est abusif et contraire aux principes du droit administratif qui existent et qui devraient s’appliquer dans un système juridique équitable et efficace.

Un délai n’est pas déraisonnable uniquement dans le cas où le régime de protection des droits de la personne est déconsidéré en raison d’une atteinte à l’équité de l’audience ou du fait que le délai a franchi le seuil d’un abus scandaleux. Si c’était le cas, la personne lésée par un délai injustifié ne disposerait d’aucun recours à moins d’avoir eu la malchance d’être suffisamment lésée pour satisfaire à un autre critère externe, celui de la déconsidération du régime de protection des droits de la personne. Pareille restriction peut découler de la crainte que la principale réparation disponible ne soit l’arrêt pur et simple des procédures. Cependant, comme nous le verrons plus loin, une réparation différente de l’arrêt des procédures peut convenir dans d’autres cas où le délai qui s’écoule est abusif. Il est vrai que, dans certaines des décisions qui ont le plus contribué à l’établissement de la

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warranted stays of proceedings. (see, e.g., the cases cited by Bastarache J. at paras. 117-18). They were cases that passed the highest threshold of abusiveness. Because of this, they did not discuss a lower threshold of unreasonable delay that might warrant some kind of judicial action and different, less radical, remedies than a stay in the administrative proceedings.

VII. Assessing Unreasonable Delay

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The authorities and policy considerations that have been reviewed thus far confirm that modern administrative law is deeply averse to unreasonable delay. But nobody suggests the elimination of all delay *per se* — and with good reason. At the limit, a prohibition on delay *per se* would ban any and all delay. This would be an absurd result that would undermine rather than uphold a fair judicial system. Such an approach would, for example, deny parties on both sides the chance to prepare for the hearing (cf. *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1694). Thus, unreasonable delays must be identified within the specific circumstances of every case.

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In assessing a particular delay in the process of a specific administrative body, we must keep in mind two principles: (1) not all delay is the same; and (2) not all administrative bodies are the same. First, there are different kinds of delay. There are two kinds of delay in an administrative context: general delay and individual delay. Each of these, in turn, may encompass both necessary and unnecessary delay. General delay may include certain kinds of delay due to substantive and procedural complexities inherent in the kind of matter the tribunal deals with, but it may also include delays from systemic problems. Individual delay may relate to the special complexity of a particular decision, but it may also include delays from inattention to a particular file. (See generally: S. N. McMurtrie, “The Waiting Game — The Parliamentary Commissioner’s Response to Delay in

règle du délai abusif, il était question de périodes plus longues qui, en plus d’autres facteurs, justifiaient l’arrêt des procédures (voir, par exemple, la jurisprudence citée par le juge Bastarache, aux par. 117 et 118). Il s’agissait de cas qui satisfaisaient au critère le plus rigoureux du caractère abusif. À cause de cela, on n’y analysait pas le critère moins rigoureux du délai déraisonnable qui pourrait justifier une forme quelconque d’intervention judiciaire et d’autres réparations moins radicales que l’arrêt des procédures administratives.

VII. Détermination du délai déraisonnable

La doctrine, la jurisprudence et les considérations de principe qui ont été examinées jusqu’ici confirment la profonde aversion du droit administratif moderne pour le délai déraisonnable. Cependant, personne ne propose l’élimination de tout délai en soi, et ce, pour une bonne raison. À la limite, l’interdiction du délai en soi aurait pour effet d’interdire tout délai. Ce serait un résultat absurde qui minerait un système judiciaire équitable au lieu de le préserver. Une telle approche priverait notamment les deux parties de la possibilité de se préparer pour l’audience (comparer avec *R. c. Conway*, [1989] 1 R.C.S. 1659, à la p. 1694). Il faut donc déterminer si un délai est déraisonnable en fonction des circonstances particulières de chaque cas.

Pour évaluer un délai dans les procédures d’un organisme administratif donné, il faut conserver deux principes à l’esprit: (1) les délais ne sont pas tous les mêmes, et (2) les organismes administratifs diffèrent les uns des autres. Premièrement, il existe différents types de délai. Dans le contexte administratif, il y en a deux: le délai général et le délai particulier. Chacun d’eux peut englober à son tour le délai nécessaire et le délai inutile. Le délai général peut comprendre certains types de délai dus à des difficultés de fond et de procédure inhérentes au genre d’affaire dont le tribunal est saisi, mais il peut aussi comprendre les délais dus à des problèmes systémiques. Le délai particulier peut être lié à la complexité particulière d’une décision donnée, mais il peut aussi comprendre le délai imputable au manque d’attention accordée à un dossier. (Voir, de manière générale, S. N.

Administrative Procedures”, [1997] *Public Law* 159; and L. S. Skiffington, “Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context” (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.)

McMurtrie, «The Waiting Game — The Parliamentary Commissioner’s Response to Delay in Administrative Procedures», [1997] *Public Law* 159, et L. S. Skiffington, «Federal Administrative Delay: Judicial Remedies and Application in the Natural Resource Context» (1982), 28 *Rocky Mtn. Min. L. Inst.* 671.)

Second, not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate. Thus, inevitably, a court’s assessment of a particular delay in a particular case before a particular administrative body has to depend on a number of contextual analytic factors.

Deuxièmement, les organismes administratifs diffèrent les uns des autres. En fait, c’est le moins qu’on puisse dire. À première vue, un conseil des relations de travail, une commission de police et un office de contrôle laitier peuvent paraître avoir autant de points en commun qu’une ligne d’assemblage, un policier et une vache! Les organismes administratifs ont évidemment certaines caractéristiques en commun, mais en raison de la diversité de leurs attributions, de leur mandat et de leur organisation, il peut être totalement inapproprié d’appliquer les mêmes normes d’un contexte à l’autre. Par conséquent, l’évaluation judiciaire d’un délai dans une affaire particulière dont est saisi un organisme administratif donné doit inévitablement tenir compte d’un certain nombre de facteurs d’analyse contextuels.

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In order to differentiate reasonable and unreasonable delay, a balancing exercise becomes necessary. Courts must, indeed, remain alive not only to the needs of administrative systems under strain, but also to their good faith efforts to provide procedural protections to alleged wrongdoers. One must approach matters with some common sense and ask whether a lengthy delay that profoundly harms an individual’s life is really justified in the circumstances of a given case.

Pour distinguer un délai raisonnable d’un délai déraisonnable, une évaluation s’impose. Les tribunaux doivent en effet être conscients non seulement des besoins des régimes administratifs soumis à des contraintes, mais aussi des efforts qu’ils déploient de bonne foi en vue d’offrir des protections procédurales aux présumés contrevenants. Il faut faire preuve de bon sens et se demander si le long délai qui ruine profondément l’existence d’une personne est véritablement justifié dans les circonstances d’une affaire donnée.

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As indicated above, the central factors toward which the modern administrative law cases as a whole propel us are length, cause, and effects. Approaching these now with a more refined understanding of different kinds and contexts of delay, we see three main factors to be balanced in assessing the reasonableness of an administrative delay:

Comme nous l’avons vu, les principaux facteurs dont l’ensemble de la jurisprudence moderne en droit administratif nous invite à tenir compte sont la longueur, la cause et les effets. Grâce à une meilleure compréhension des différents types de délai et des différents contextes dans lesquels ils se situent, nous considérons que, pour évaluer le caractère raisonnable d’un délai administratif, trois facteurs principaux doivent être appréciés:

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(1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;

(2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

(3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.

(See generally: *Ratzlaff, supra*, at p. 346; *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); *R. v. Morin*, [1992] 1 S.C.R. 771; *McMurtrie, supra*; and *Skiffington, supra*.) Obviously, considering all of these factors imposes a contextual analysis. Thus, our Court should avoid setting specific time limits in such matters. A judge should consider the specific content of the case he or she is hearing and make an assessment that takes into account the three main factors that have been identified above.

(1) le délai écoulé par rapport au délai inhérent à l'affaire dont est saisi l'organisme administratif en cause, ce qui comprendrait la complexité juridique (y compris l'existence de questions systémiques particulièrement complexes) et la complexité factuelle (y compris la nécessité de recueillir de grandes quantités de renseignements ou de données techniques), ainsi que les délais raisonnables pour que les parties ou le public bénéficient de garanties procédurales;

(2) les causes de la prolongation du délai inhérent à l'affaire, ce qui comprendrait notamment l'examen de la question de savoir si la personne touchée a contribué ou renoncé à certaines parties du délai, et celle de savoir si l'organisme administratif a utilisé aussi efficacement que possible les ressources dont il disposait;

(3) l'incidence du délai, considérée comme englobant le préjudice sur le plan de la preuve et les autres atteintes à l'existence des personnes touchées par le délai qui s'écoule. Cela peut également comprendre l'examen des efforts que les différentes parties ont déployés pour réduire au minimum les effets négatifs en fournissant des renseignements ou en apportant des solutions provisoires.

(Voir, de manière générale, *Ratzlaff, précité*, à la p. 346; *Saskatchewan (Human Rights Commission) c. Kodellas* (1989), 60 D.L.R. (4th) 143 (C.A. Sask.); *R. c. Morin*, [1992] 1 R.C.S. 771; *McMurtrie, loc. cit.*; *Skiffington, loc. cit.*) L'examen de ces facteurs commande, de toute évidence, une analyse contextuelle. Notre Cour devrait donc éviter d'imposer des délais précis en la matière. Un juge devrait examiner les faits particuliers de l'affaire dont il est saisi et faire une évaluation qui tienne compte des trois principaux facteurs décrits plus haut.

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A number of parties have raised the objection that the consideration of some of those factors may extend "special treatment" to certain kinds of individuals, whether these be people who commit more stigmatizing wrongs or who are more susceptible to harms like damage to their reputations. Some interveners were afraid that the application of such factors might indeed require preferential

Plusieurs parties ont soulevé l'objection selon laquelle l'examen de certains de ces facteurs peut avoir pour effet d'accorder un «traitement particulier» à certaines personnes, qu'il s'agisse de gens qui commettent des fautes plus stigmatisantes ou de gens qui sont plus exposés à des préjudices comme l'atteinte à la réputation. Certains intervenants craignaient que l'application de tels facteurs

treatment for powerful and influential people. These objections and fears are misplaced. It appears sound administrative practice for decision-making bodies to recognize the relevance of the identified factors while deciding how to process a particular case. For example, task forces analysing delay report that it is simply a good case management practice to send to different tracks cases of differing levels of complexity: see, e.g., Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989), at p. 3. Similarly, it only makes sense for administrative bodies seeking to minimize their negative impacts on real people to consider the ramifications of their failure to act expeditiously. In any event, every case should be processed with due dispatch.

VIII. Delays Before the British Columbia Human Rights Commission in This Case

Unreasonable delay in administrative proceedings is illegal under administrative law. It is a breach of the duty to conduct administrative proceedings fairly. Because of the highly contextual nature of any assessment of delay, I turn now to an analysis of the identified factors in the case at bar. I eventually conclude that inefficiency in the Commission's handling of this matter has led to abuse of process that must be addressed with the appropriate remedies in the circumstances of the case and in consideration of the interests of the complainants.

A. *Length of Delay*

The first factor to be considered is the time taken relative to the inherent time requirements of the matter. In the Court of Appeal, McEachern C.J.B.C. characterized the allegations in the case at bar as "relatively simple complaints" ((1998), 49 B.C.L.R. (3d) 216, at para. 37), stated that "[t]hese kinds of disputes are quickly resolved by courts and tribunals all the time, and there are no complex

n'exige, en fait, que des personnes puissantes et influentes jouissent d'un traitement préférentiel. Ces objections et ces craintes ne sont pas fondées. Le fait qu'un organisme décideur reconnaisse la pertinence des facteurs décrits pour décider de la façon de traiter une affaire donnée semble être une saine pratique administrative. Par exemple, des groupes de travail qui analysent les délais signalent qu'une bonne pratique de gestion des dossiers consiste simplement à traiter différemment des affaires comportant des niveaux de complexité différents: voir, par exemple, Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* (1989), à la p. 3. De même, il est seulement logique qu'un organisme administratif qui cherche à réduire au minimum son incidence négative sur des personnes tienne compte des conséquences de son omission d'agir rapidement. Quoi qu'il en soit, toute affaire devrait être traitée avec célérité.

VIII. Délai écoulé en l'espèce dans les procédures devant la Commission des droits de la personne de la Colombie-Britannique

En droit administratif, le délai déraisonnable dans des procédures administratives est illégal. Il constitue un manquement à l'obligation d'assurer un déroulement équitable des procédures. Vu le caractère hautement contextuel de l'évaluation du délai, je vais maintenant analyser les facteurs décrits dans la présente affaire. Je conclus, en définitive, que la façon inefficace dont la Commission a traité la présente affaire a donné lieu à un abus de procédure auquel il faut remédier en accordant la réparation appropriée dans les circonstances de l'affaire et en tenant compte des intérêts des plaignants.

A. *La longueur du délai*

Le premier facteur à prendre en considération est le délai écoulé par rapport au délai inhérent à l'affaire. Le juge en chef McEachern de la Cour d'appel de la Colombie-Britannique a qualifié les allégations en l'espèce de [TRADUCTION] «plaintes relativement simples» ((1998), 49 B.C.L.R. (3d) 216, au par. 37). Il a affirmé que «[l]es tribunaux judiciaires et les tribunaux administratifs règlent

legal or factual issues” (para. 37), and concluded that “a week at the outside would have sufficed” (para. 51) for the investigation. Although McEachern C.J.B.C. perhaps puts matters a bit optimistically in suggesting that the investigation could have been wrapped up within a week, there is a good measure of truth in what he says.

toujours rapidement ce genre de différend, et qu’aucune question juridique ou factuelle complexe ne se pose» (par. 37) et a conclu qu’«il aurait suffi tout au plus d’une semaine» (par. 51) pour effectuer l’enquête. Bien que le juge en chef McEachern soit quelque peu optimiste lorsqu’il laisse entendre que l’enquête aurait pu être complétée en moins d’une semaine, il y a une grande part de vérité dans ce qu’il dit.

164 At this point, a closer scrutiny of the facts is necessary in order to establish the inherent time requirements of the case. Different kinds of “allegations of sexual discrimination” may be more or less complex. A pay equity case might properly involve complex statistical analysis and innovative legal arguments and take time for those reasons. A case about other forms of well-concealed systemic discrimination might involve numerous witnesses and take time for that reason. But other cases that involve “allegations of sexual harassment” between individuals may have few complex legal or factual elements and thus appropriately should take much less time.

À ce stade, un examen plus minutieux des faits s’impose pour déterminer le délai inhérent à l’affaire. Une «allégation de discrimination sexuelle» peut être plus ou moins complexe selon le cas. Une affaire d’équité salariale pourrait requérir, à juste titre, une analyse statistique complexe et une argumentation juridique novatrice, et durer ainsi un certain temps. Une affaire portant sur d’autres formes de discrimination systémique bien dissimulée pourrait faire intervenir de nombreux témoins et se prolonger pour cette raison. Cependant, il se peut que d’autres affaires où il est question d’«allégations de harcèlement sexuel» entre des personnes comportent peu d’éléments juridiques ou factuels complexes et durent éventuellement moins longtemps.

165 Considering the complexity of the allegations should not be seen to reflect in any way on their merits. This being said, the case at bar falls within a relatively less complex category. The allegations with respect to Willis, an aide to Blencoe, were that Blencoe made sexual overtures to her and inappropriately kissed her when she came to work one evening in August 1994 and that he had subsequently put his arm on her arm in a sexual manner in March 1995. The allegations with respect to Schell were that Blencoe in March 1993 had inappropriately kissed and hugged Schell, who worked for a sports organization deriving funding from Blencoe’s ministry, and that he had subsequently on several occasions between July 1993 and July 1994 given her unwanted attention by inviting her for a drink. There were no other direct witnesses to any of the incidents, although there was some corroborating evidence from a small number of other

La complexité des allégations ne devrait pas être perçue comme ayant une incidence quelconque sur leur bien-fondé. Cela dit, le présent dossier tombe dans la catégorie des affaires relativement moins complexes. Il était allégué, au sujet de Willis, une adjointe de Blencoe, que ce dernier lui avait fait des avances sexuelles et l’avait embrassée inopportunistement lorsqu’elle s’était rendue au bureau pour y travailler un soir du mois d’août 1994, et qu’en mars 1995 il avait appuyé son bras contre le sien dans un dessein apparemment sexuel. Il était allégué, au sujet de Schell, qu’en mars 1993 Blencoe l’avait embrassée et étreinte inopportunistement alors qu’elle travaillait pour une association sportive financée par le ministère de Blencoe, et qu’à maintes reprises, entre juillet 1993 et juillet 1994, il lui avait accordé une attention non souhaitée en l’invitant à prendre un verre. Personne d’autre n’a été directement témoin de ces incidents, bien qu’il y ait eu témoignage corroborant de la part d’un petit nombre d’autres personnes. Les allégations

witnesses. Blencoe denied some aspects of the allegations and admitted others.

Recognizing that this case is far less complex than many other sexual discrimination cases does not alleviate the seriousness of the allegations, but it is clear from the record that the allegations were not of a nature that could justify a prolonged investigation. Ultimately, the case was about a “he said/she said” scenario concerning which there should have been an adjudication. In this sense, there was little or nothing to investigate, and there was no reason for the pre-hearing investigation to take a long period of time.

Lowry J. expressed serious misgivings about the delays in this case. He wrote at para. 46:

It may well be that the structure of the Commission should be such that, given the nature of the complaints made by Ms. Schell and Ms. Willis, two years would not be required to determine that they warrant a hearing. [Emphasis added.]

While Lowry J. went on to attribute the delay to a lack of resources, he questioned the effectiveness of the Commission, and his finding that two years was an inappropriately long time confirms my conclusion on this branch of the analysis. The inherent time requirements in this case were minimal.

By contrast, the time taken was anything but minimal. After five to six months spent on determining that it could hear the complaints, and once Blencoe had a chance to respond, the Commission then mysteriously took the five months from April 1996 to September 1996 to appoint the same investigator who had been working on the file all along despite having told Blencoe that it expected to do so within two months (appellants’ record, at p. 229). The investigation took some four months. The trial judge found at para. 44 that this investigation was concluded in January 1997. Given this finding, then after this conclusion of the investigation, it apparently took the investigator another two months to write and forward a 12-page

ont fait l’objet de dénégations de la part de Blencoe à certains égards et d’aveux à d’autres égards.

La reconnaissance que la présente affaire est beaucoup moins complexe que bien d’autres affaires de discrimination sexuelle n’atténue pas la gravité des allégations, mais il ressort clairement du dossier que ces allégations n’étaient pas de nature à justifier la tenue d’une enquête prolongée. En fin de compte, il était question de versions opposées des faits, qui auraient dû donner lieu à une décision. Il y avait donc peu ou pas matière à enquête, de sorte que rien ne justifiait que l’enquête préalable à l’audience se prolonge.

Le juge Lowry a exprimé de sérieuses réserves au sujet du délai écoulé en l’espèce. Il a écrit, au par. 46:

[TRADUCTION] Il se peut fort bien que la Commission doive être organisée de telle sorte que, compte tenu de la nature des plaintes de M^{mes} Schell et Willis, deux années ne soient pas nécessaires pour déterminer si elles justifient la tenue d’une audience. [Je souligne.]

Bien qu’il ait ensuite imputé le délai à un manque de ressources, le juge Lowry a mis en doute l’efficacité de la Commission, et sa conclusion qu’un délai de deux ans était trop long confirme la mienne en ce qui a trait à ce volet de l’analyse. Le délai inhérent à la présente affaire était minime.

Par contre, le délai écoulé était loin d’être minime. Après avoir mis cinq à six mois à décider qu’elle pourrait entendre les plaintes et après que Blencoe eut obtenu la possibilité de répondre, la Commission a mystérieusement mis cinq mois, soit d’avril à septembre 1996, à désigner le même enquêteur qui s’était occupé jusque-là du dossier, même si elle avait auparavant dit à Blencoe qu’elle s’attendait à le faire dans un délai de deux mois (dossier des appelants, à la p. 229). L’enquête a duré environ quatre mois. Le juge de première instance a conclu, au par. 44, que l’enquête avait pris fin en janvier 1997. Compte tenu de cette conclusion, après la fin de l’enquête, l’enquêteur aurait alors mis deux autres mois à rédiger un rapport de

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report in early March 1997, and this only after letters from Blencoe's lawyer asking about the delay (appellants' record, at pp. 322-35). After another four months, in July 1997, the Commission finally told Blencoe that the matter would proceed to a Tribunal hearing. It then took another two months to get a date set for the hearing, which was scheduled to be some six months later in March 1998. In all, the time for the Commission to make the determination that the complaints should go to a hearing was approximately two years. The time from the initial filing of the complaints to the scheduled hearing was approximately 32 months. While it is true that the Commission's decision to send the matter to a hearing involved a number of steps, every one of these steps involved a significant delay.

12 pages qui a été transmis au début du mois de mars 1997, et ce, uniquement après que l'avocat de Blencoe eut envoyé des lettres dans lesquelles il posait des questions au sujet du délai écoulé (dossier des appelants, aux pp. 322 à 335). Quatre autres mois plus tard, en juillet 1997, la Commission a finalement avisé Blencoe que le Tribunal procéderait à l'audition de l'affaire. Deux autres mois se sont ensuite écoulés avant qu'une date d'audience soit fixée au mois de mars 1998, soit quelque six mois plus tard. En tout, il a fallu environ deux ans à la Commission pour décider que les plaintes feraient l'objet d'une audience. Environ 32 mois se sont écoulés entre le dépôt initial des plaintes et la date fixée pour leur audition. Même s'il est vrai que la Commission a dû franchir un certain nombre d'étapes pour décider que l'affaire ferait l'objet d'une audience, chacune de ces étapes a comporté un délai considérable.

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A particularly egregious example of the Commission's unacceptable lack of diligence may be found in the events during the period from October 16, 1995 to December 21, 1995. During that time, the Commission breached procedural fairness by failing to send to Blencoe Willis's October 16 response to his submissions on the timeliness of her complaint. In response to an inquiry, Blencoe received the Commission's letter dated December 21 on December 27. Although the December 21 letter denied that a decision had been made on this issue, a January 22, 1996 letter revealed that the Commission had actually already made the decision on December 18, before it even sent Blencoe the documents to which he had wished to reply and that the Commission had possessed for three months (see pp. 290-300 of the appellants' record). The Commission essentially failed even to keep those affected by its decisions up to date with what was going on.

Les événements qui se sont déroulés entre le 16 octobre et le 21 décembre 1995 sont un exemple particulièrement frappant du manque inacceptable de diligence de la Commission. Au cours de cette période, la Commission a manqué à son obligation d'équité procédurale en ne transmettant pas à Blencoe la réponse du 16 octobre que Willis avait donnée à ses observations concernant le respect du délai imparti pour déposer la plainte. À la suite d'une demande de renseignements, Blencoe a reçu, le 27 décembre, la lettre de la Commission datée du 21 décembre. Même si, dans la lettre du 21 décembre, on niait qu'une décision avait été prise à ce sujet, une lettre datée du 22 janvier 1996 a révélé que la Commission avait déjà pris une décision le 18 décembre 1995, avant même d'envoyer à Blencoe les documents auxquels il voulait répondre et qu'elle avait en sa possession depuis trois mois (voir les pp. 290 à 300 du dossier des appelants). La Commission a essentiellement omis de tenir au courant de la situation les personnes touchées par ses décisions.

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Regardless of any arguments that parts of the time were necessary for procedural safeguards, the facts are that the Commission was slow at every step along the way. This eventually added up to a delay measured in years for a decision that was not

Indépendamment de tout argument que le délai était en partie nécessaire pour offrir des garanties procédurales, il reste que la Commission a été lente à toutes les étapes. Il lui a fallu, en définitive, plusieurs années pour prendre une décision non

inherently complex. Although a few letters back and forth might have been appropriate, nothing in the inherent time requirements of the case came close to requiring the delay that occurred.

B. Cause of the Delay

The second factor that we must consider is the cause of delay beyond the inherent time requirements of the matter. It is true that Blencoe sought to use those defences available to him, including an argument about whether the complaints had been correctly filed within the limitation period provided by the statute. But in so doing, he did not become responsible for the sheer inefficiency of the Commission in dealing with these and other matters.

A measure of Blencoe's determination to seek an end to the delay is that even after matters had been delayed to this point largely on account of the Commission's failures to comply with basic procedural fairness, he offered to forego the investigative stage of the complaints to bring them to a hearing. In so doing, we may infer that he made clear to the Commission that he was seeking a way past the delay and red tape in which his life had become bound. In his request, he was rebuffed, as the Commission would have required him to make major concessions on the existence of a *prima facie* case against him, if he wanted to proceed to the hearing. (Although Blencoe made the offer only on the Willis complaint, this seems to be explained by the fact that he was simultaneously trying to find out whether a decision on the timeliness issue in the Schell complaint had been made without notification as had occurred with the Willis complaint (see the appellants' record at pp. 220 and 301).) On numerous other occasions as well, Blencoe asked about when there would be a decision on the complaints. Indeed, Blencoe's inquiries of this nature comprise a significant number of the letters in the record. There can be no doubt that there was serious delay on both complaints and that Blencoe tried to find a way to end it. After being thus rebuffed, his counsel was under no obligation to beg and cry for an expedited hear-

complexe en soi. Même si un certain échange de correspondance avait pu être approprié, le délai inhérent à l'affaire était loin de correspondre à celui qui s'est écoulé.

B. La cause du délai

Le deuxième facteur que nous devons prendre en considération est la cause de la prolongation du délai inhérent à l'affaire. Il est vrai que Blencoe a tenté d'invoquer les moyens de défense dont il disposait, y compris l'argument de la question de savoir si les plaintes avaient été dûment déposées dans le délai prévu par la loi. Toutefois, ce faisant, il n'est pas devenu responsable de l'inefficacité pure et simple dont la Commission a fait preuve en traitant ces plaintes et d'autres questions.

Blencoe a montré à quel point il était déterminé à mettre fin au délai en offrant de renoncer à l'étape de l'enquête sur les plaintes et de passer directement à une audience, même si les choses avaient jusque-là traîné en longueur surtout à cause du manquement de la Commission à son obligation fondamentale d'équité procédurale. On peut déduire que, ce faisant, il a clairement signifié à la Commission qu'il souhaitait en finir avec les délais et les formalités administratives qui lui empoisonnaient la vie. Il a essuyé une rebuffade à ce sujet étant donné que, pour passer directement à l'audience, la Commission l'aurait obligé à faire des concessions importantes au sujet de l'existence d'une preuve *prima facie* contre lui. (Quoique Blencoe n'ait fait cette offre qu'à l'égard de la plainte de Willis, cela semble s'expliquer par le fait qu'il tentait, en même temps, de découvrir si une décision concernant le respect du délai imparti dans le cas de la plainte de Schell avait été rendue à son insu comme cela s'était produit relativement à la plainte de Willis (voir les pp. 220 et 301 du dossier des appelants).) Comme l'atteste un grand nombre de lettres versées au dossier, Blencoe a aussi maintes fois demandé à quel moment une décision serait rendue sur les plaintes. Il ne fait aucun doute que les deux plaintes ont fait l'objet d'un délai important auquel Blencoe a tenté de mettre fin. Après cette rebuffade, il n'était plus

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ing to demonstrate to the Human Rights Commission the seriousness of his requests.

nécessaire que l'avocat de Blencoe s'efforce de convaincre la Commission du sérieux des demandes de son client en faisant des pieds et des mains pour obtenir rapidement la tenue d'une audience.

173 A further measure of the Commission's behaviour with respect to delay is that even at the Supreme Court of Canada, the Commission admits that it cannot explain what was going on for five months of the time that it was dealing with the allegations against Blencoe. On a matter that ideally should not even have taken five months, a five-month period of unexplained delay remains surprising and troubling. Lowry J. characterized this period as a "five-month hiatus when there appears to have been no activity in relation to the complaints" (para. 47). After the gap, the Commission sent Blencoe a letter dated September 6, 1996 to advise him that it was appointing the same person as investigator as had up to that point been dealing with the pre-investigation report. In other words, in five months, nothing happened. This five-month lapse is just the high mark of the Commission's ineptitude.

C. Impact of Delay on the Respondent

174 The third factor that we must consider is the harm accruing as a result of the delay. Although Lowry J. found "that no clear case of prejudice in terms of an inability to defend has been made out" (para. 10), there is no doubt that Blencoe and his family suffered serious harm in other ways. Lowry J. went so far as to write at para. 50:

There is, however, substance to the contention that the hardship Mr. Blencoe, his wife, and his children have suffered, and continue to suffer, is markedly disproportionate to the value there can now be in an adjudicated resolution. [Emphasis added.]

175 There can be no doubt about the impact of the allegations on the respondent and his family. The respondent's career is finished. He and his family have been chased twice across the country in their

Une autre exemple de la conduite que la Commission adopte en matière de délais est que, même devant la Cour suprême du Canada, elle reconnaît qu'elle ne peut pas expliquer ce qui s'est passé durant les cinq mois au cours desquels elle a traité les allégations formulées contre Blencoe. Dans une affaire qui, idéalement, n'aurait même pas dû se prolonger pendant cinq mois, un délai inexpliqué de cinq mois est à la fois étonnant et troublant. Le juge Lowry a qualifié cette période de [TRADUCTION] «vide de cinq mois pendant lequel rien ne semble s'être passé relativement aux plaintes» (par. 47). Après cette période, la Commission a envoyé à Blencoe une lettre datée du 6 septembre 1996 l'informant qu'elle désignait à titre d'enquêteur la personne qui, jusque-là, s'était occupée du rapport préalable à l'enquête. En d'autres termes, rien ne s'est passé pendant cinq mois. Cet intervalle n'est que le paroxysme de l'ineptie dont la Commission a fait preuve.

C. L'incidence du délai sur l'intimé

Le troisième facteur que nous devons prendre en considération est le préjudice résultant du délai. Même si le juge Lowry a conclu [TRADUCTION] «qu'il n'y a aucune preuve manifeste de préjudice en ce qui concerne la capacité de se défendre» (par. 10), il n'y a pas doute que Blencoe et sa famille ont subi un grave préjudice à d'autres égards. Le juge Lowry va jusqu'à écrire, au par. 50:

[TRADUCTION] Il y a toutefois de quoi prétendre que les difficultés que M. Blencoe, son épouse et ses enfants ont éprouvées et qu'ils continuent d'éprouver sont nettement disproportionnées à l'avantage qu'il peut maintenant y avoir d'obtenir une décision sur l'affaire. [Je souligne.]

Il n'y a aucun doute que les allégations ont une incidence sur l'intimé et sa famille. La carrière de l'intimé est terminée. Sa famille et lui ont été traqués à deux reprises lorsqu'ils ont tenté de

attempts to make a new life. He was under medical care for clinical depression for many months. In the wake of the outstanding complaints before the Commission, even such a normal aspect of life as coaching his youngest son's soccer team has been denied to Blencoe, since he has faced stigmatization in the form of presumed guilt as a sexual harasser. As Lowry J. wrote at para. 13:

The point need not be further stressed. The stigma attached to the outstanding complaints has certainly contributed in large measure to the very real hardship Mr. Blencoe has experienced. His public profile as a Minister of the Crown rendered him particularly vulnerable to the media attention that has been focused on him and his family, and the hardship has, in the result, been protracted and severe. [Emphasis added.]

Although I do not deny that Blencoe might have taken additional steps to make the Commission more fully aware of the impact on him of continued delay, he did try to move matters along. The Commission showed next to no regard for the possible impacts of its delays, often taking long periods of time even to respond to requests for information as to the progress of the file. It certainly did nothing to minimize the impact of the delay on the respondent.

It is true that administrative delay was not the only cause of the prejudice suffered by the respondent. Nevertheless, it contributed significantly to its aggravation. It must be added, though, that this delay also frustrated the complainants in their desire for a quick disposition of their complaints. Finally, the inefficient and delay-filled process at the Commission linked with the specific blunders made in the management of those particular complaints harmed all parties involved in this sorry process. Its flaws were such that it may rightly be termed to have been abusive in respect of the respondent. In this connection, I note that my colleague, Bastarache J., despite coming to the conclusion that the conduct of the Commission did not amount to an abuse of process, nevertheless found it necessary to award costs against the Commission in light of the "lack of diligence [it] displayed"

refaire leur vie ailleurs au pays. Pendant plusieurs mois, il a eu recours à des soins médicaux pour traiter une dépression clinique. À la suite des plaintes déposées devant la Commission, Blencoe a même été empêché d'exercer une activité aussi normale qu'entraîner l'équipe de soccer de son fils cadet en raison de la stigmatisation liée au fait d'être présumé coupable de harcèlement sexuel. Comme l'a écrit le juge Lowry, au par. 13:

[TRADUCTION] Il n'y a pas lieu d'insister davantage sur ce point. La stigmatisation liée aux plaintes dont M. Blencoe faisait l'objet a sûrement contribué dans une large mesure aux difficultés très réelles qu'il a éprouvées. Du fait de sa visibilité en tant que ministre du gouvernement, il était davantage exposé à l'attention que les médias lui ont portée à lui-même et à sa famille, ce qui explique la longueur et la gravité des difficultés qui ont résulté. [Je souligne.]

Bien que je ne nie pas que Blencoe aurait pu prendre d'autres mesures pour que la Commission soit plus consciente de l'incidence que le délai avait sur lui, il reste qu'il a tenté de faire avancer les choses. La Commission s'est montrée presque indifférente aux effets possibles de ses délais, en mettant même souvent beaucoup de temps à répondre suite à des demandes de renseignements sur l'évolution du dossier. Elle n'a sûrement rien fait pour réduire au minimum l'incidence du délai sur l'intimé.

Il est vrai que le délai administratif n'a pas été la seule cause du préjudice subi par l'intimé. Néanmoins, il a beaucoup contribué à son aggravation. Il faut cependant ajouter que ce délai a également déjoué la volonté des plaignantes de voir leurs plaintes réglées rapidement. Enfin, l'inefficacité et les multiples délais qui ont caractérisé le processus devant la Commission et qui sont liés, en particulier, aux gaffes commises dans la gestion de ces plaintes ont lésé toutes les parties à ce processus déplorable. La procédure a été à ce point viciée qu'on peut à juste titre la qualifier d'abusives à l'égard de l'intimé. À cet égard, je constate que, même s'il conclut que la conduite qu'elle a adoptée n'a pas constitué un abus de procédure, mon collègue le juge Bastarache a néanmoins jugé nécessaire de condamner la Commission à payer des dépens en raison de «l'absence de diligence

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(para. 136). In my view, this further demonstrates the tension in this appeal and the fact that the conduct of the Commission in dealing with this matter was less than acceptable.

IX. Administrative Remedy

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In the end, the specific and unexplained delay entitles Blencoe to some kind of remedy. The choice of the appropriate redress requires, though, a careful analysis of the circumstances of the case, in order to identify the causes and nature of the delay and its impact on the process, because the courts always have some discretion on orders of remedies founded on the old prerogative writs. The selection of an appropriate remedy may also impose a delicate balancing exercise between competing interests. In proceedings like those that gave rise to this appeal, we must factor in the interest of the respondent, that of the complainants themselves and finally, the public interest of the community itself which wants basic rights enforced efficiently but fairly. As we have seen above, the courts must also consider the stage of the proceedings which has been affected by the delay. A distinction must be drawn between the process leading to the hearing and the hearing itself. A different balance between conflicting interests may have to be found at different stages of the administrative process.

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Several kinds of remedies are available either to prevent or remedy abusive delay within an administrative process. The main forms of redress that we need address here are a stay of proceedings, orders for an expedited hearing and costs.

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Whoever asks for a stay of proceedings carries a heavy burden. In a human rights proceeding, such an order not only stops the proceedings and negates the public interest in the enforcement of human rights legislation, but it also affects, in a radical way, the interest of the complainants who lose the opportunity to have their complaints heard

[qu'elle a] manifestée» (par. 136). À mon avis, cela est un autre indice de la tension qui existait en l'espèce et du caractère moins qu'acceptable de la conduite adoptée par la Commission en traitant cette affaire.

IX. Réparation issue du droit administratif

En définitive, le délai inexplicé en cause justifie d'accorder une forme de réparation à Blencoe. Toutefois, le choix de la réparation appropriée requiert une analyse minutieuse des circonstances de l'affaire afin de déterminer les causes et la nature du délai ainsi que son incidence sur les procédures, étant donné que les tribunaux judiciaires détiennent toujours un certain pouvoir discrétionnaire en matière de réparations fondées sur les anciens brevets de prérogative. Le choix d'une réparation appropriée peut aussi commander une évaluation délicate d'intérêts opposés. Dans des procédures comme celles à l'origine du présent pourvoi, il nous faut tenir compte de l'intérêt de l'intimé, de celui des plaignantes et, enfin, de celui de la collectivité, laquelle souhaite une application efficace, mais équitable, des droits fondamentaux. Comme nous l'avons vu, les tribunaux judiciaires doivent également prendre en considération l'étape des procédures qui est touchée par le délai. Une distinction doit être établie entre les procédures menant à l'audience et l'audience elle-même. Une évaluation des intérêts opposés peut se révéler nécessaire à chacune des étapes des procédures administratives.

Plusieurs types de réparation permettent de prévenir le délai abusif dans des procédures administratives, ou d'y remédier. Les principales formes de réparation qu'il nous faut examiner en l'espèce sont l'arrêt des procédures, l'ordonnance enjoignant de tenir une audience accélérée et l'adjudication de dépens.

Quiconque demande l'arrêt des procédures assume un lourd fardeau. Dans des procédures en matière de droits de la personne, en plus de mettre fin aux procédures et d'être contraire à l'intérêt du public dans l'application de la législation relatives aux droits de la personne, une telle ordonnance va, en outre, radicalement à l'encontre de l'intérêt du

and dealt with. The stay of proceedings should not generally appear as the sole or even the preferred form of redress: see *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 68. A more prudent approach would limit it to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to it would amount to a gross or shocking abuse of the process. In those two situations, the interest of the respondent and the protection of the integrity of the legal system become the paramount considerations. The interest of the complainants would undoubtedly be grievously affected by a stay, but the prime concern in such cases becomes the safeguarding of the basic rights of the respondent engaged in a human rights proceeding and the preservation of the essential fairness of the process itself: see *Ratzlaff*, *supra*, at para. 19. Whatever its consequences, a stay may thus become the sole appropriate remedy in those circumstances.

I note that my approach on the matter of a stay here is consistent with the approach that our Court has adopted in the slightly different context in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391. There, the Court, following *O'Connor*, *supra*, recognized a stay as appropriate in situations where the fairness of the hearing had been compromised as well as in situations falling within a residual category. For a residual case to give rise to a stay, the Court held in *Tobiass*, at paras. 90-91 that a stay could be granted where it was the only reasonable means of stopping an abuse that would be perpetuated and aggravated through the conduct of a trial. For a stay to be appropriate as a remedy for an abuse that has already occurred, the abuse must rise to a level such that the mere carrying forward of the case will offend society's sense of justice (*Tobiass*, at para. 91): i.e., in my analysis, where there is a gross or shocking abuse, or where the societal interest in proceeding does not outweigh the considerations I have enumerated.

plaignant qui perd la possibilité de voir sa plainte entendue et réglée. L'arrêt des procédures ne devrait pas généralement être considéré comme la seule réparation possible ni même comme la forme de réparation préférée: voir *R. c. O'Connor*, [1995] 4 R.C.S. 411, au par. 68. Il serait plus prudent de limiter l'arrêt des procédures aux cas où l'équité même de l'audience est compromise et où le délai dans les procédures menant à l'audience constituerait un abus de procédure grossier ou scandaleux. Dans les deux cas, l'intérêt de l'intimé et la protection de l'intégrité du système judiciaire deviennent les facteurs prépondérants. L'arrêt des procédures porterait sans doute gravement atteinte à l'intérêt des plaignantes, mais la principale préoccupation, en pareil cas, devient la protection des droits fondamentaux de l'intimé impliqué dans des procédures en matière de droits de la personne et la protection de l'équité essentielle des procédures mêmes: voir *Ratzlaff*, précité, au par. 19. Quelles qu'en soient les conséquences, l'arrêt des procédures peut donc devenir la seule réparation appropriée dans ces circonstances.

Je souligne que mon point de vue concernant la question d'un arrêt des procédures en l'espèce est conforme à celui que notre Cour a adopté dans le contexte légèrement différent de l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391. Dans cet arrêt, la Cour a suivi l'arrêt *O'Connor*, précité, et a reconnu qu'un arrêt des procédures peut être ordonné dans les cas où l'équité de l'audience a été compromise et dans ceux qui relèvent d'une catégorie résiduelle. En ce qui concerne l'arrêt en vertu d'une catégorie résiduelle, la Cour a statué, aux par. 90 et 91 de l'arrêt *Tobiass*, qu'il pourrait être accordé si c'était le seul moyen raisonnable de mettre fin à un abus que le déroulement d'un procès contribuerait à perpétuer ou à aggraver. Pour qu'un arrêt puisse être ordonné afin de remédier à un abus déjà commis, l'abus doit être tel que la seule poursuite de l'affaire choquera le sens de la justice de la société (*Tobiass*, au par. 91): autrement dit, il convient de l'ordonner, selon moi, lorsqu'il y a abus grossier ou scandaleux ou encore lorsque l'intérêt de la société dans la poursuite de l'affaire ne l'emporte pas sur les considérations que j'ai énumérées.

182 The approach of the courts should change when it appears that the hearing will remain fair, in spite of the delay and when the delay has not risen to the level of a shocking abuse, notwithstanding its seriousness. More limited and narrowly focused remedies would then become appropriate. In the context of a judicial review procedure akin to mandamus, the first objective of any intervention by a court should be to make things happen, where the administrative process is not working adequately. An order for an expedited hearing within such time frame and with such conditions as the Court might set would be the most practical and effective means of judicial action. Used at the right moment, such a remedy may safeguard the interest of all parties to the process. A litigant who believes he or she is facing undue delay should probably take that route rather than letting the process decay in the hope of stopping the old process on some future date.

183 An order for costs is a third kind of remedy. It will not address the delay directly, but some of its consequences. If a party must resort to the courts to secure a timely hearing or to speed up the process in which he or she is engaged, some form of compensation for costs should at least be considered by the courts in their discretion. Whenever parties are compelled to seek judicial interventions to safeguard their rights, costs must be considered to compensate at least in part the time, money and efforts expended in obtaining redress. Even if costs cannot indemnify the party for all the losses and prejudice arising from administrative delay, they afford at least a measure of compensation.

184 In the present appeal, the remedy of a pure stay of proceeding appears both excessive and unfair. First, in spite of the seriousness of the problems faced by Blencoe, the delay does not seem to compromise the fairness of the hearing. As the trial judge found at para. 10, the respondent has not established that the delay has deprived him of evi-

L'approche des tribunaux judiciaires devrait changer lorsqu'il appert que le délai ne portera pas atteinte à l'équité de l'audience et qu'il ne constitue pas un abus scandaleux en dépit de sa gravité. Des réparations plus limitées et mieux ciblées seraient alors appropriées. Dans le contexte d'un contrôle judiciaire analogue au mandamus, toute intervention d'un tribunal judiciaire devrait, d'abord et avant tout, viser à faire avancer les choses lorsque les procédures administratives ne se déroulent pas adéquatement. L'intervention judiciaire la plus pratique et efficace serait d'ordonner la tenue d'une audience accélérée dans un délai et aux conditions prescrites par la cour. Si elle est accordée au bon moment, cette réparation peut protéger les intérêts de toutes les parties en cause. La partie qui se croit victime d'un délai injustifié devrait probablement procéder de cette façon plutôt que de laisser la situation se détériorer dans l'espoir de pouvoir mettre fin aux procédures ultérieurement.

L'adjudication de dépens est la troisième réparation possible. Elle touche non pas le délai directement, mais plutôt certaines de ses conséquences. Si une partie doit recourir aux tribunaux pour obtenir la tenue d'une audience en temps opportun ou pour accélérer les procédures dans lesquelles elle est impliquée, les tribunaux devraient au moins pouvoir envisager la possibilité d'accorder une forme quelconque d'indemnisation des dépens. Chaque fois qu'une partie doit faire appel à une cour de justice pour faire respecter ses droits, les dépens doivent être pris en compte pour compenser, du moins en partie, le temps, l'argent et les efforts consacrés à l'obtention d'une réparation. Même si les dépens ne permettent pas d'indemniser la partie de toutes les pertes et de tout le préjudice résultant d'un délai administratif, ils assurent au moins une certaine indemnisation.

En l'espèce, la réparation consistant à ordonner l'arrêt pur et simple des procédures paraît à la fois excessive et inéquitable. Premièrement, malgré la gravité des difficultés éprouvées par Blencoe, le délai ne semble pas compromettre l'équité de l'audience. Comme le juge de première instance l'a conclu, au par. 10, l'intimé n'a pas établi que le

dence or information important to his defence. The delay rather concerns the process leading to the hearing. It arises from a variety of causes that do not evince an intent from the Commission to harm him wilfully, but rather demonstrate grave negligence and important structural problems in the processing of the complaints. Second, a stay of proceedings in a situation that does not compromise the fairness of the hearing and does not amount to shocking or gross abuse requires the consideration of the interest of the complainants in the choice of the proper remedy (*Tobiass, supra*, at para. 92). In the present matter, the judgment of the Court of Appeal completely omitted any consideration of this interest (see para. 39). The lifting of the stay is thus both justified and necessary.

However, rejecting the stay as a proper remedy in the present case does not mean that Blencoe should be deprived of any redress. On the contrary, an order for an expedited hearing should have been considered as the remedy of choice. There will be some irony in granting such a remedy more than five years after the proceedings began. Such an outcome offers the respondent little solace. Nevertheless, in spite of its rather symbolic value, at the present stage of the proceedings, it appears as a critically important remedy that should have been used at an earlier stage to prod the Commission along and to control the inefficiency of its process.

In spite of the partial success of this appeal, as I agree that the stay should be lifted, Blencoe is entitled to some compensation in the form of costs in our Court and in the courts below. Section 47 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, grants our Court broad discretion when awarding costs. In the present case, it would be both fair and appropriate to use this power as the respondent has established that the process initiated against him was deeply flawed and that its defects justified his search for a remedy, at least in administrative law. He had to fight for his rights, and it would be unfair for him to bear the costs personally.

délai l'a privé d'un élément de preuve ou d'un renseignement important pour sa défense. Le délai concerne plutôt les procédures menant à l'audience. Il est dû à une gamme de causes qui traduisent non pas l'intention de la Commission de léser délibérément l'intimé, mais plutôt une négligence grave et l'existence de problèmes structurels importants en matière de traitement des plaintes. Deuxièmement, pour ordonner l'arrêt des procédures dans le cas où l'équité de l'audience n'est pas compromise et où il n'y a pas d'abus scandaleux ou grossier, il faut tenir compte l'intérêt du plaignant dans le choix de la réparation appropriée (*Tobiass*, précité, au par. 92). Dans la présente affaire, la Cour d'appel a complètement omis de tenir compte de cet intérêt (voir le par. 39). L'annulation de l'arrêt des procédures est donc à la fois justifiée et nécessaire.

Cependant, le rejet de l'arrêt des procédures à titre de réparation appropriée en l'espèce ne signifie pas pour autant que Blencoe devrait être privé de toute réparation. Au contraire, l'ordonnance enjoignant de tenir une audience accélérée aurait dû être envisagée à titre de réparation appropriée. Il est quelque peu ironique d'accorder une telle réparation plus de cinq ans après le début des procédures. Un tel résultat offre une mince consolation à l'intimé. Néanmoins, malgré sa valeur plutôt symbolique à l'étape actuelle des procédures, cette réparation apparaît comme une mesure d'une importance cruciale et aurait dû être accordée plus tôt pour inciter la Commission à agir et pour remédier à l'inefficacité de ses procédures.

En dépit de la réussite partielle du présent appel et étant donné que je conviens qu'il y a lieu d'annuler l'arrêt des procédures, Blencoe a droit à une indemnisation sous forme de dépens devant notre Cour et les tribunaux d'instance inférieure. L'article 47 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26, investit notre Cour d'un large pouvoir discrétionnaire en matière d'adjudication de dépens. En l'espèce, il serait à la fois juste et opportun d'exercer ce pouvoir étant donné que l'intimé a établi que les procédures engagées contre lui étaient entachées de vices importants qui le justifiaient de demander une réparation au moins

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Although ultimately unsuccessful in his application for a stay, Blencoe brought to the attention of the courts the grave deficiency of the administrative processes of the Commission. He should at least not be penalized for this mixture of success and failure (e.g., *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 726).

fondée sur le droit administratif. Il a dû lutter pour faire respecter ses droits et il serait injuste qu'il assume personnellement les frais de cette lutte. Même si sa demande d'arrêt des procédures a finalement été rejetée, Blencoe a attiré l'attention des tribunaux sur les graves lacunes des procédures administratives de la Commission. Il n'y a pas lieu, à tout le moins, de le pénaliser en raison de ce mélange de réussite et d'échec (par exemple, *Schachter c. Canada*, [1992] 2 R.C.S. 679, à la p. 726).

X. Section 7 of the *Charter*

X. L'article 7 de la *Charte*

187 The application of the general principles of administrative law would have justified the intervention of the trial court without any need to demonstrate a breach of an interest protected by s. 7 of the *Charter*. As I think that this matter should have been resolved on the basis of administrative law principles, I do not think I have to express a definite opinion on the application of s. 7 of the *Charter* in the present case.

L'application des principes généraux du droit administratif aurait justifié l'intervention du tribunal de première instance sans qu'il ne soit nécessaire de démontrer l'existence d'une atteinte à un droit garanti par l'art. 7 de la *Charte*. Comme j'estime que la présente affaire aurait dû être réglée en fonction des principes du droit administratif, il me paraît inutile d'exprimer une opinion précise sur l'application de l'art. 7 de la *Charte* en l'espèce.

188 We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*. At the same time, the Court should remind litigants that not every case can be reduced to a *Charter* case.

Nous devons toutefois nous rappeler que l'art. 7 énonce certaines valeurs fondamentales de la *Charte*. Il est sûrement vrai qu'il nous faut éviter de ramener la *Charte*, voire le droit canadien, à une disposition souple et complexe comme l'art. 7. Toutefois, son importance est telle pour la définition des garanties de fond et de procédure en droit canadien qu'il serait périlleux de bloquer l'évolution de cette partie du droit. Il restera difficile pendant encore assez longtemps de prévoir et d'évaluer toutes les répercussions de l'art. 7. Notre Cour devrait être consciente de la nécessité de maintenir une certaine souplesse dans l'interprétation de l'art. 7 de la *Charte* et dans l'évolution de son application. En même temps, notre Cour devrait rappeler aux parties que les affaires ne peuvent pas toutes être plaidées sur le fondement de la *Charte*.

189 Assuming that the *Charter* must solve every legal problem would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country. In the present appeal, the absence of a *Charter* remedy does not mean that administrative law

Supposer que tout problème juridique doit se régler en fonction de la *Charte* contribuerait à bloquer et à stériliser l'évolution naturelle et nécessaire de la common law et du droit civil dans notre pays. Comme nous l'avons vu, l'absence en l'espèce d'une réparation fondée sur la *Charte* ne

remedies could not have been identified and applied, as we have seen above.

XI. Disposition

For these reasons, I would allow the appeal in part, lift the stay of proceedings and order an expedited hearing of the complainants Schell and Willis. I would also order the appellant British Columbia Human Rights Commission to pay costs on a party-to-party basis to the respondent Blencoe in this Court and in the British Columbia courts.

Appeal allowed with costs against the appellant Commission, IACOBUCCI, BINNIE, ARBOUR and LEBEL JJ. dissenting in part.

Solicitors for the appellants the British Columbia Human Rights Commission and the Commissioner of Investigation and Mediation: Davis & Company, Vancouver.

Solicitors for the appellant the British Columbia Human Rights Tribunal: Morley & Ross, Victoria.

Solicitor for the appellant Andrea Willis: Robert B. Farvolden, Victoria.

Solicitors for the respondent: Arvay Finlay, Victoria.

Solicitors for the intervener Irene Schell: Allard & Company, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Saskatchewan Human Rights Commission: Milton Woodard, Saskatoon.

signifie pas qu'aucune réparation n'aurait pu être trouvée et accordée en application du droit administratif.

XI. Dispositif

Pour ces motifs, je suis d'avis d'accueillir le pourvoi en partie, d'annuler l'arrêt des procédures et d'ordonner la tenue d'une audition accélérée des plaintes de Schell et Willis. Je suis également d'avis d'ordonner à l'appelante, la Commission des droits de la personne de la Colombie-Britannique, de payer à l'intimé Blencoe des dépens comme entre parties devant notre Cour et les tribunaux de la Colombie-Britannique.

Pourvoi accueilli avec dépens contre la Commission appelante, les juges IACOBUCCI, BINNIE, ARBOUR et LEBEL sont dissidents en partie.

Procureurs des appelants la British Columbia Human Rights Commission et le Commissioner of Investigation and Mediation: Davis & Company, Vancouver.

Procureurs de l'appelant le British Columbia Human Rights Tribunal: Morley & Ross, Victoria.

Procureur de l'appelante Andrea Willis: Robert B. Farvolden, Victoria.

Procureurs de l'intimé: Arvay Finlay, Victoria.

Procureurs de l'intervenante Irene Schell: Allard & Company, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario: Le ministère du Procureur général, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le ministère du Procureur général, Victoria.

Procureur de l'intervenante la Saskatchewan Human Rights Commission: Milton Woodard, Saskatoon.

Solicitors for the intervener the Ontario Human Rights Commission: Cathryn Pike and Jennifer Scott, Toronto.

Solicitor for the intervener the Nova Scotia Human Rights Commission: Lara J. Morris, Halifax.

Solicitor for the intervener the Manitoba Human Rights Commission: Manitoba Justice, Winnipeg.

Solicitor for the intervener the Canadian Human Rights Commission: Fiona Keith, Ottawa.

Solicitor for the intervener the Commission des droits de la personne et des droits de la jeunesse: Hélène Tessier, Montréal.

Solicitor for the intervener the British Columbia Human Rights Coalition: Community Legal Assistance Society, Vancouver.

Solicitors for the intervener the Women's Legal Education and Action Fund: Jennifer L. Conkie and Dianne Pothier, Vancouver.

Procureurs de l'intervenante la Commission ontarienne des droits de la personne: Cathryn Pike et Jennifer Scott, Toronto.

Procureur de l'intervenante la Nova Scotia Human Rights Commission: Lara J. Morris, Halifax.

Procureur de l'intervenante la Commission des droits de la personne du Manitoba: Justice Manitoba, Winnipeg.

Procureur de l'intervenante la Commission canadienne des droits de la personne: Fiona Keith, Ottawa.

Procureur de l'intervenante la Commission des droits de la personne et des droits de la jeunesse: Hélène Tessier, Montréal.

Procureur de l'intervenante la British Columbia Human Rights Coalition: Community Legal Assistance Society, Vancouver.

Procureurs de l'intervenant le Fonds d'action et d'éducation juridiques pour les femmes: Jennifer L. Conkie et Dianne Pothier, Vancouver.

Tab 6

R. v. Côté, 2011 SCC 46 (CanLII), [2011] 3 SCR 215

Source:	Supreme Court of Canada
Date:	2011-10-14
File number:	33645
Other citations:	342 DLR (4th) 77 — 421 NR 112 — AZ-50794015 — [2011] EXP 3108 — 276 CCC (3d) 42 — 87 CR (6th) 1 — 246 CRR (2d) 213 — 97 WCB (2d) 17 — [2011] CarswellQue 10407 — EYB 2011-196883 — JE 2011-1739 — [2011] SCJ No 46 (QL) — [2011] ACS no 46
Citation:	R. v. Côté, 2011 SCC 46 (CanLII), [2011] 3 SCR 215, < https://canlii.ca/t/fndv8 >, retrieved on 2026-03-22
Most recent unfavourable mention	R v Del Corro , 2019 ABCA 156 (CanLII) [...] The trial judge clearly took the view that the fact that the drugs could have been obtained in a constitutionally permissible manner (without a breach of ss 8 or 9) appreciably mitigated the seriousness and the impact of the breaches, despite the observation in R v Côté, 2011 SCC 46 at paras 67-68 , [2011] 3 SCR 215 , that [...]



SUPREME COURT OF CANADA

CITATION: R. v. Côté, 2011 SCC 46, [2011] 3 S.C.R. 215

DATE: 20111014

DOCKET: 33645

BETWEEN:

Armande Côté
Appellant
and
Her Majesty The Queen

Respondent
- and -
Criminal Lawyers' Association (Ontario)
Intervener

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Cromwell J. (McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ. concurring)
(paras. 1 to 90)

DISSENTING REASONS: Deschamps J.
(paras. 91 to 119)

R. v. Côté, 2011 SCC 46, [2011] 3 S.C.R. 215

Armande Côté

Appellant

v.

Her Majesty The Queen

Respondent

and

Criminal Lawyers' Association (Ontario)

Intervener

Indexed as: R. v. Côté

2011 SCC 46

File No.: 33645.

2011: March 15; 2011: October 14.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Enforcement — Exclusion of evidence — Accused charged with second degree murder — Search of accused's home conducted by police without valid warrants — Trial judge finding that police had not acted in good faith and demonstrated blatant disregard for accused's Charter rights throughout investigation — Trial judge concluding that admission of evidence in face of extraordinarily troubling police misconduct, even when decision would lead to acquittal of serious crime, would bring administration of justice into disrepute — Whether Court of Appeal erred in intervening on bases that police had not deliberately acted in abusive manner and that offence was serious — Whether Court of Appeal erred in intervening on basis that evidence could have been obtained legally by warrant without accused's participation — Canadian Charter of Rights and Freedoms, s. 24(2).

Around 9 p.m. on July 22, 2006, C called 9-1-1 to report that her spouse, H, had been injured. The attending physician at the hospital established that H was suffering from head injuries and confirmed the presence of a metal object in H's skull, and communicated this information to the police. The police attended at C's home around midnight. The lights of the house were off and the house was calm. C answered the door in her pyjamas. The police explained that they were there to find out what happened and to make sure the premises were safe, but they did not tell C that they believed that H was suffering from a gunshot wound. The police, accompanied by C, inspected the interior and the exterior of the residence, as well as a gazebo. The police questioned C about the presence of firearms in the house. She confirmed the presence of two firearms but could only locate one, to which she led the police. The police later obtained warrants which were executed at C's residence. A .22 calibre rifle, of the same calibre as the bullet recovered from H's skull, was located by the police.

C was brought to the police station around 3 a.m. but not until 5:23 a.m. was she given a warning as an important witness in the attempted murder of H and advised of her right to counsel. After being warned, C spoke with a lawyer and invoked her right to silence. She then described the events to the police and was placed under arrest for attempted murder. She was cautioned again, advised of her right to counsel, and spoke with a lawyer again. After being placed under arrest, C was interrogated by the police throughout the day. C exhibited extreme anxiety about having the interrogation room closed, seemed to be exhausted and on several occasions told the interrogator that she had had enough, did not want to talk anymore or wanted to go lie down. C's interrogation ended at 8 p.m. on July 23, when she was advised of H's death and charged with second degree murder.

C applied to the trial judge to exclude the evidence against her. The trial judge concluded that the police embarked on a systematic violation of C's rights from the time they first entered onto her property until the end of her interrogation. The trial judge held that the police's entry on C's property, and the search of her house, property and gazebo constituted unreasonable searches and seizures contrary to [s. 8](#) of the *Charter*. He held that the police detained C without telling her why in violation of [s. 10\(a\)](#) of the *Charter*, and that the police violated C's right to obtain the assistance of a lawyer and to be advised of that right, in violation of [s. 10\(b\)](#) of the *Charter*. He also held that the police violated C's right to silence as protected by [s. 7](#) of the *Charter* and obtained a statement that was not voluntary. The trial judge also found that the investigators had misled a judicial officer to obtain warrants. The trial judge excluded all of the evidence pursuant to [s. 24\(2\)](#) of the *Charter*, finding that its admission would bring the administration of justice into disrepute, and C was acquitted of the charge. The Court of Appeal found that the trial judge was right to exclude C's statements to police. However, it concluded that the trial judge had erred by excluding the observations the police made of the exterior of C's home before the warrants were issued as well as the physical evidence obtained at C's home in execution of the warrants. It ordered a new trial.

Held (Deschamps J. dissenting): The appeal should be allowed and the acquittal restored.

Per McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ.: The standard of review of a trial judge's s. 24(2) determination of what would bring the administration of justice into disrepute having regard to all of the circumstances is as follows: where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review.

This Court established a revised approach to the exclusion of evidence under s. 24(2) in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. This Court held that three avenues of inquiry were relevant to an assessment of whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute: (1) an evaluation of the seriousness of the state conduct; (2) the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused; and (3) society's interest in an adjudication on the merits. After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination to determine whether admission of the evidence would bring the administration of justice into disrepute.

The Court of Appeal erred in intervening on the basis that the police had not deliberately acted in an abusive manner. By its re-characterization of the evidence which departed from express findings by the trial judge which were not tainted by any clear and determinative error, the Court of Appeal exceeded its role. The Court of Appeal also erred in reweighing the impact of the seriousness of the offence. This consideration was fully addressed by the trial judge who was aware of the seriousness of the offence and of the consequences of excluding the evidence.

Furthermore, the Court of Appeal erred by placing undue weight on the "discoverability" of the evidence in its s. 24(2) analysis. Its principal basis for appellate intervention was that the physical evidence could have been obtained legally by warrant, without C's participation. Discoverability is a relevant factor under the current s. 24(2) analysis, however, it is not determinative. A finding of discoverability does not necessarily lead to admission of

evidence. In appropriate cases, discoverability may be relevant to the first two branches of the *Grant* analysis.

In the case at bar, with respect to the first branch of the analysis, it is clear that the trial judge considered the officers' misconduct to be very serious. The collection of the evidence pursuant to the warrants was an extension of the earlier, unlawful warrantless searches. The fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found, but did not do so, significantly aggravated the seriousness of their misconduct. The police misconduct in obtaining the warrants further aggravated the seriousness of the *Charter*-infringing state conduct. With respect to the second branch of the analysis, the absence of prior judicial authorization constitutes a significant infringement of privacy. Having regard to all of the circumstances, the impact of the police misconduct on C's right to privacy was serious: the unauthorized search occurred in her home in the middle of the night while she was detained and the search was not brief. The breach implicated her liberty, her dignity as well as her privacy interests. Thus, the absence of prior authorization for the search was a serious affront to her reasonable expectation of privacy.

In this case, the trial judge drew the line where the police had continually shown systemic disregard for the law and the Constitution. The trial judge did not err in concluding that the courts must not tolerate this sort of behaviour by those sworn to uphold the law. He took the only course open to him in order to prevent the administration of justice from falling into further disrepute by condoning this disturbing and aberrant police behaviour.

Per Deschamps J. (dissenting): The application of the three-stage test proposed in *R. v. Grant* leads to the conclusion that the physical evidence should not have been excluded. At the first stage of the analysis — that of the seriousness of the *Charter*-infringing state conduct — the police officers' conduct revealed a serious disregard for C's constitutional rights. Not only did the officers not concern themselves with obtaining either a warrant or C's informed consent before

conducting their initial search, they also attempted to conceal the constitutional violations of C's rights.

At the second stage — that of the impact of the *Charter* breach on the *Charter*-protected interests of the accused — it is clear that the trial judge did not evaluate the actual impact of the breach. The main interest affected by the unlawful police search was C's expectation of privacy. In this regard, it is not enough to find that the search resulted in an invasion of privacy, as it is also necessary to determine the impact of the failure to obtain prior authorization on C's expectation. To do this, the situation here must be compared with the one that would have prevailed had the search been authorized in advance. It is more specifically the difference in seriousness between the two situations that reveals the extent to which the breach actually undermined the protected interests. In this case, a warrant could have been issued at the start of the investigation and the resulting invasion of C's privacy would, in practice, have been identical to the one that resulted from the warrantless search. Moreover, C did not have the highest expectation of privacy. She was the first and only person to whom the police officers could speak to find out what had happened in the moments before her spouse was taken away by ambulance. Therefore, the visit from the police could hardly be said to have been unexpected.

As for the third stage of the analysis — that of determining whether the search for truth would be better served by admitting the evidence or by excluding it — the evidence in question was reliable physical evidence, and its admission was likely to be of crucial importance to the truth-seeking function and to the conduct of the trial, since the exclusion of the statements made to the police by C meant that it was the only remaining evidence.

After completing all three stages of the analysis, it is necessary to balance the factors that weigh in favour of and against excluding the evidence. Here, the police misconduct, considered as a whole, is serious and the courts must dissociate themselves from it. However, it is possible to do so in respect of the constitutional violations in this case without excluding all the evidence. There are cases of impacts on expectations of privacy that are much more serious. Moreover, where reliable and important evidence exists, society's interest in the search for truth

stands out. On the whole, it is the exclusion of the physical evidence that would bring the administration of justice into disrepute.

Cases Cited

By Cromwell J.

Applied: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; **referred to:** *R. v. Godoy*, 1999 CanLII 709 (SCC), [1999] 1 S.C.R. 311; *R. v. Evans*, 1996 CanLII 248 (SCC), [1996] 1 S.C.R. 8; *R. v. Tricker* (1995), 1995 CanLII 1268 (ON CA), 21 O.R. (3d) 575; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Grant*, 1993 CanLII 68 (SCC), [1993] 3 S.C.R. 223; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, rev'g 2008 ONCA 85, 89 O.R. (3d) 161; *R. v. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265; *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607; *R. v. Colarusso*, 1994 CanLII 134 (SCC), [1994] 1 S.C.R. 20; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *R. v. Feeney*, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13; *R. v. Greffe*, 1990 CanLII 143 (SCC), [1990] 1 S.C.R. 755.

By Deschamps J. (dissenting)

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265; *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 8, 10, 24.

Criminal Code, R.S.C. 1985, c. C-46, s. 488.

APPEAL from a judgment of the Quebec Court of Appeal (Dalphond, Duval Hesler and Gagnon JJ.A.), [2010 QCCA 303](#), 74 C.R. (6th) 130, SOQUIJ AZ-50609169, [2010] Q.J. No. 1162 (QL), 2010 CarswellQue 15137, setting aside the acquittal entered by Cournoyer J., [2008 QCCS 3749](#), SOQUIJ AZ-50509743, [2008] J.Q. n° 7951 (QL), 2008 CarswellQue 7931, and ordering a new trial. Appeal allowed, Deschamps J. dissenting.

Carole Gladu, Josée Veilleux and Karine Guay, for the appellant.

Magalie Cimon and Pierre Goulet, for the respondent.

Frank Addario and Kelly Doctor, for the intervener.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

CROMWELL J. —

I. Introduction

[1] Evidence obtained in a manner that violates rights guaranteed by the [Canadian Charter of Rights and Freedoms](#) must be excluded if, having regard to all of the circumstances, its admission would bring the administration of justice into disrepute: s. 24(2). This case raises in stark terms how this requirement applies when the court is faced with serious and systematic disregard for *Charter* rights by the police during the investigation of a serious crime.

[2] On the appellant's trial for second degree murder, the trial judge, after a five-day hearing, concluded that the police investigators over several hours had violated virtually every [Charter](#) right accorded to a suspect in a criminal investigation. These violations, he held, were not the result of isolated errors of judgment on the part of the police investigators, but rather were part of a larger pattern of disregard of the appellant's *Charter* rights. The seriousness of this

misconduct was aggravated by the facts that the investigators had misled a judicial officer in order to obtain search warrants and that, as witnesses at trial, they had refused to admit obvious facts, offered improbable hypotheses and tried to justify their actions on untenable grounds. The trial judge found that to admit the evidence in the face of this extraordinarily troubling police misconduct, even when his decision would lead to an acquittal of a serious crime, would bring the administration of justice into disrepute. He therefore ordered its exclusion. In response to this ruling, the Crown stated that it had no other evidence and the appellant was acquitted of the charge.

[3] The Crown appealed to the Court of Appeal which held that some of the evidence which the trial judge had excluded should have been admitted. The court therefore set aside the trial judge's decision in part and ordered a new trial. On Ms. Côté's further appeal to this Court, the issue is whether the Court of Appeal erred in law in doing so.

[4] In my respectful view, the appeal must succeed and the decision of the trial judge to exclude the evidence restored. The trial judge drew the line where the police had continually shown systematic disregard for the law and the Constitution. The trial judge did not err in concluding that the courts must not tolerate this sort of behaviour by those sworn to uphold the law. He took the only course open to him in order to prevent the administration of justice from falling into further disrepute by condoning this disturbing and aberrant police behaviour.

II. Facts, Proceedings and Issues

A. *Evidence and Decision at Trial*, [2008 QCCS 3749 \(CanLII\)](#)

(1) Overview

[5] The appellant applied to the trial judge to exclude evidence which she claimed had been obtained in a manner that infringed her rights under the [Charter](#). The appellant also sought exclusion of her statements to the police on the basis that they had not been made voluntarily. The

trial judge essentially agreed with the appellant, finding that the police violated the appellant's rights and misconducted themselves in several respects.

[6] The trial judge concluded that the police embarked on a systematic violation of Ms. Côté's rights when they entered onto her property at approximately 12:15 a.m. on July 23, 2006, and these violations extended until 8:00 p.m. that evening when her interrogation ended. First, the police officers' entry on the appellant's property, their authorization to enter her home, the search of her house, the peripheral search of the property and the search of her gazebo constituted unreasonable searches and seizures contrary to s. 8 of the *Charter*. Second, within a few moments of their arrival, the police detained the appellant without telling her why, in violation of s. 10(a) of the *Charter*. Third, at that point, and later on in their dealings with the appellant, the police violated her right to obtain the assistance of a lawyer and to be advised of that right, both in violation of s. 10(b) of the *Charter*. Fourth, the police violated the appellant's right to silence as protected by s. 7 of the *Charter* and fifth, through their improper questioning, obtained a statement that was not voluntary. In addition, the trial judge found that the investigators had misled a judicial officer to obtain search warrants and had been evasive and unbelievable witnesses at trial. After balancing society's interest in discovering the truth against its interest in maintaining the integrity of the administration of justice, the trial judge excluded all of the evidence, finding that its admission would bring the administration of justice into disrepute.

(2) Evidence and Reasons

[7] On July 22, 2006, a little before 9:00 p.m., Ms. Côté called 9-1-1 to report that her spouse, André Hogue, had been injured. Mr. Hogue was transported to the Hôtel-Dieu hospital in Sorel and attended to by Dr. Nicolas Elazhary. Dr. Elazhary established that Mr. Hogue had a wound in the back of his head and concluded that he was suffering from head and possibly throat injuries. An X-ray revealed an intracerebral hematoma and a metal image compatible with a projectile. Dr. Elazhary communicated this information to Sergeant François Monetta of the Sûreté du Québec (Tracy Detachment) at 11:08 p.m. Shortly thereafter, Sergeant Monetta sent Constable Alain Hogue to the hospital to speak with Dr. Elazhary. At 11:28 p.m. Dr. Elazhary confirmed the

presence of a metal object in the victim's skull and Constable Hogue relayed this information to Sergeant Monetta. At 11:38 p.m. Sergeant Monetta contacted Constable Jean-François Fortier in the Nicolet Detachment of the Sûreté du Québec and communicated the information he had about the victim and the incident, including the observations made by Dr. Elazhary. Thus, from at least 11:38 p.m., before officers arrived at Ms. Côté's residence, the police knew that they were in all likelihood dealing with a bullet wound to the back of the head. They were also aware that the victim had been transported to the hospital from the appellant's address earlier that evening.

[8] The appellant contacted Dr. Elazhary around 11:30 p.m. She told him that she had left Mr. Hogue beside the gazebo and that when she returned he was lying on the ground. Dr. Elazhary informed the appellant that Mr. Hogue was suffering from head trauma but did not mention the discovery of the bullet wound.

(a) *Investigation of 9-1-1 Call*

[9] Around 12:15 a.m. patrolling officers Tremblay and Mathieu attended at the appellant's home. All of the lights were off and the house appeared to be calm. Believing the main entrance to be at the rear of the house, the officers went around the back, entered the solarium and rang the doorbell. The appellant answered the door in her pyjamas. The officers explained that they were there to find out what had happened earlier that evening and to make sure the premises were safe. However, the trial judge was of the view that their explanations did not reflect their true intentions. The trial judge held that

[TRANSLATION] [a]s unpleasant as this might be for a judge, the court did not believe Constables Tremblay, Mathieu and Fortier. They unfortunately failed to display the candour and honesty that are to be expected of police officers responsible for law enforcement. [para. 126]

The officers asked to enter the house and, without responding, the appellant stepped aside. She accompanied the officers as they inspected the interior and exterior of the residence. They did not tell the appellant that they believed that her spouse was suffering from a gunshot wound.

[10] The trial judge found that the violation of the appellant's rights began shortly after the police arrived at her home, when they entered onto her property. The police relied on their power to investigate the 9-1-1 call, and, in particular, to locate the caller, determine his or her reasons for making the call, and provide the required assistance, but the trial judge found that the legitimate ambit of that power to investigate had expired earlier that evening and could not justify their investigation as it unfolded at the appellant's residence: see *R. v. Godoy*, [1999 CanLII 709 \(SCC\)](#), [1999] 1 S.C.R. 311, at para. 22. In the trial judge's view, the police went to the appellant's house with the intention of conducting a criminal investigation, so they could not claim that, at 12:15 a.m., they were responding to a 9-1-1 call placed at 8:51 p.m. He found it telling that, while seeking the appellant's consent to look around her home, the police had deliberately chosen not to inform her about the gunshot wound to her spouse's head. The trial judge concluded that the police thought the appellant was a suspect in an attempted murder and were not responding to a call for assistance. The trial judge also found it incredible that the police tried to justify their intervention on the basis of ensuring Ms. Côté's safety. If the police had been genuinely concerned for the appellant's safety, he determined that they would not have had her accompany them as they searched the house.

[11] The trial judge explained that even if the parameters set out in *Godoy* were respected during the initial police intervention, this power does not authorize police to search the premises or otherwise intrude on a resident's privacy or property. He concluded that the power recognized in *Godoy* did not authorize the searches of the appellant's house and property and these searches were thus unlawful.

(b) *Invitation to Knock and Approach*

[12] The Crown also sought to justify the police intervention on the basis of the implied invitation to knock and approach the door for a lawful purpose as set out in *R. v. Evans*, [1996 CanLII 248 \(SCC\)](#), [1996] 1 S.C.R. 8. This refers to the idea that "the occupier of a dwelling gives implied licence to any member of the public, including a police officer, on legitimate business to come on to the property" (*Evans*, at para. 13, per Sopinka J., citing *R. v. Tricker* (1995), [1995](#)

[CanLII 1268 \(ON CA\)](#), 21 O.R. (3d) 575 (C.A.), at p. 579). The trial judge held that in shutting off the lights in her residence, the appellant had retracted the public and police's implicit invitation to knock and approach. Even if shutting off the lights did not retract this implied invitation, the trial judge found that the police had exceeded the permission accorded by the implied invitation to knock and approach for a lawful purpose. This permission was exceeded because the police had expressly contemplated the possibility of recovering evidence against the appellant when they went to her home, illustrated by the fact that the police deliberately withheld from the appellant the fact that Mr. Hogue had been wounded by a bullet. Given this intention, the police exceeded the implied permission to approach and knock. Therefore, the search was not legally justified on this basis.

(c) *Appellant's Consent to Enter Her Residence*

[13] The trial judge also found that the police's failure to provide the appellant with the information they possessed about the nature of her spouse's injuries vitiated her consent to enter her home. It also did not conform to the requirements set out in the jurisprudence for obtaining consent for a warrantless search. The warrantless searches could therefore not be justified on the basis of the appellant's consent.

(d) *Urgency*

[14] Finally, the trial judge found that the evidence did not establish urgency. There was no concern for the police or the public's safety, nor was there a concern that some of the evidence would be destroyed. Accordingly, the police officers' entry onto the appellant's property and the warrantless search of her home could not be justified on the basis of urgency.

(e) *First Search of House and Property*

[15] After Constables Tremblay and Mathieu entered the appellant's home, she accompanied them as they inspected the interior of the residence. Constable Tremblay then checked the exterior of the house and found that the door to the gazebo was broken and that there

appeared to be blood inside the gazebo. Constable Mathieu, accompanied by the appellant, joined Constable Tremblay outside to make sure everything was in order. Constable Mathieu noticed holes in the gazebo's mosquito screen and in the solarium window. The trial judge found that both of these searches were illegal.

[16] At 12:27 a.m. Constable Tremblay went back to the police cruiser and relayed his observations to Constable Fortier. Constable Mathieu went back inside the house with the appellant. At 12:55 a.m. Constable Tremblay joined the appellant and Constable Mathieu inside the residence and questioned the appellant about the presence of firearms in the house. Ms. Côté gave some information about the night's events during this encounter. She confirmed the presence of two firearms but could only locate one. She led the officers to her bedroom closet where she showed them a firearm case that she said contained a firearm. Constable Tremblay did not handle the case but assumed that it contained a firearm.

(f) *Detention*

[17] The trial judge held that the appellant's detention commenced shortly after Constables Tremblay and Mathieu arrived at her residence. He found that she was detained at 12:27 a.m. when the officers observed holes in the solarium's window and in the gazebo's mosquito screen, failed to tell Ms. Côté about the projectile in Mr. Hogue's head and Constable Mathieu began making surveillance notes with respect to the appellant's behaviour and movements.

[18] The trial judge found that the police officers had quickly established that Ms. Côté was the only suspect in the attempted murder of Mr. Hogue, which is why they hid from her the fact that they knew about the gunshot wound. The trial judge held that keeping this information from her was a strategic choice to prevent Ms. Côté from being on her guard. The trial judge found that the questions posed and verifications undertaken clearly demonstrated that the goal of the investigation was not to acquire information, but rather to clarify the appellant's participation in the crime. He had the impression that the police officers did not want to admit certain facts because they were afraid that their admissions would lead the court to conclude that Ms. Côté was detained

within the meaning of s. 10 of the *Charter* and that she should have been appropriately cautioned. Specifically, he found Constable Mathieu's claim — that if Ms. Côté had wanted to leave, he would have had no choice but to let her go — to be unbelievable. Accordingly, the trial judge found that Ms. Côté's right under s. 10(a) of the *Charter* to be informed promptly of the reasons for her detention was violated until she was warned as an [TRANSLATION] "important witness" at 5:23 a.m. (para. 229). He also found that her rights under s. 10(b) to retain and instruct counsel upon detention and to be advised of that right were violated.

[19] At 2:20 a.m. Constable Tremblay spoke to Detective Christian Houle who told him that it would be preferable to bring Ms. Côté to the police station so that she could make a statement given that she was an important person with respect to the incident. At 2:34 a.m. Constables Tremblay and Mathieu took the appellant to the Nicolet police station, giving her the explanation provided by Detective Houle. She remained in the company of Constable Mathieu from her arrival at the police station at 2:54 a.m. until around 4:00 a.m. On a number of occasions, the appellant asked why she was there, why these steps were being taken and why she was not left at home. She was told that she was an important witness, she was more familiar with her spouse than the police were and it was important for the police to figure out what had happened to Mr. Hogue. At 4:10 a.m. the appellant was asked to write down her version of the evening's events. At 5:23 a.m. Detective Sylvain Bellemare gave the appellant her first warning as an important witness in the attempted murder of André Hogue.

[20] To briefly recap, the appellant's detention began at 12:27 a.m. but the police failed to caution her until 5:23 a.m. and at that point, they only cautioned her as an important witness rather than as a suspect. This violated her s. 10(a) and (b) rights. The trial judge was very troubled by the fact that throughout their interactions with the appellant, the police constantly minimized her actual legal situation to her and kept her ignorant of the information essential to the exercise of her constitutional rights. He found that they had deliberately failed to caution her correctly and he found this behaviour to be illustrative of a constant and systematic attitude evident throughout their interactions with Ms. Côté.

[21] After the appellant was questioned, Constable Mathieu stayed inside the house with her while Constable Tremblay established a security perimeter around the property at 1:15 a.m. At 2:05 a.m. Constables Fortier and Kelly Bellerive arrived on the scene and walked around the property with Constable Tremblay. The trial judge found this to be a warrantless search that violated the appellant's s. 8 rights.

(h) *Enlargement of Security Perimeter*

[22] At 3:10 a.m. Detective Sergeant Luc Briand asked Constable Fortier to enlarge the security perimeter established earlier by Constable Tremblay. Between 3:30 and 3:45 a.m. Constable Fortier expanded the perimeter and took advantage of this opportunity to further search the property. During this search, Constable Fortier observed at least one hole in the gazebo's mosquito screen with the fibres pointing inwards towards the gazebo; a small hole in the interior window of the solarium; a large hole in the exterior window of the solarium; powder residue on the interior of the solarium window; two small holes in the solarium's mosquito screen; and shards of glass on the ground underneath the solarium window. The trial judge found that this constituted an unauthorized perimeter search.

(i) *Issuance of Telewarrants*

[23] At 5:15 a.m. Detective Sergeant Briand drafted requests for telewarrants (a telewarrant for the recording of the 9-1-1 call, a general telewarrant and a search and seizure telewarrant) indicating that he had reasonable and probable grounds to believe that a criminal act, specifically attempted murder with a firearm, had occurred on the night of July 22 at the appellant's home. He indicated that he had reasonable and probable grounds to believe that the shot had been fired from inside the residence.

[24] The trial judge noted that Detective Sergeant Briand had failed to fully and frankly disclose all material facts in the Information to Obtain a Search Warrant ("ITO"). For instance, para. 5 of the ITO was misleading because it suggested that some of the observations regarding the

solarium and gazebo had been made inadvertently, thereby concealing the fact that Constable Fortier had already made a number of those observations during an earlier unconstitutional search with Constable Tremblay. The trial judge was also troubled by the fact that Detective Sergeant Briand failed to mention the illegal search conducted by Constables Tremblay and Mathieu earlier that evening and the fact that they had refrained from disclosing the bullet wound to Ms. Côté.

[25] The general telewarrant and the search and seizure telewarrant were executed on July 23, 2006 at 10:35 a.m. at the appellant's house by Detective Sergeant Briand and Constable Alain Gaucher. While searching the house they located a .10 calibre gun in a case in the bedroom closet and a .22 calibre rifle, not in a case in a basement closet. The trial judge noted that the gun found in the basement closet was the same calibre as the bullet recovered from the victim's skull.

[26] The trial judge held that the general telewarrant and the search and seizure telewarrant were invalid. He found that the police must have identified a problem in Constables Tremblay, Mathieu and Fortier's interventions and sought the warrants to remedy the unconstitutional conduct. He concluded that the warrants were invalid because if the unconstitutionally obtained information was excised from the ITO, the remaining information (paras. 1-3 and 8) did not constitute "some evidence that might reasonably be believed on the basis of which the authorization could have issued" (para. 266, citing *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 51). He also held that the warrants were invalid on the basis of non-disclosure of relevant information as well as the inclusion of deliberately misleading information, such as the wording in para. 5 of the ITO that suggested that Constable Fortier had inadvertently made certain observations while extending the security perimeter when in fact he had made most of those observations earlier while unconstitutionally searching the property with Constable Tremblay. Relying on *R. v. Grant*, 1993 CanLII 68 (SCC), [1993] 3 S.C.R. 223, at pp. 254-55 ("*Grant 1993*"), the trial judge concluded that the entire search process was tainted by the warrantless perimeter searches which violated s. 8.

(j) *First Police Warning*

[27] As mentioned above, the appellant was cautioned and advised of her right to counsel at 5:23 a.m. by Detective Bellemare. This was the first time she was so advised even though she had been detained since 12:27 a.m. At that, she was only cautioned as an “important witness” in the attempted murder of André Hogue. Detective Bellemare used a standard police warning form but struck out the words [TRANSLATION] “arrested or detained” and replaced them with “witness” (evidence of Detective Bellemare, A.R., vol. V, at p. 192). It is notable that the police cautioned the appellant as an important witness at 5:23 a.m. when they had sworn an ITO at 5:15 a.m. stating that they had reasonable and probable grounds to believe that attempted murder had been committed. Given the information that the police possessed at 5:23 a.m., the trial judge found it inexplicable that they only warned Ms. Côté as an important witness. After being warned, she spoke with a lawyer and invoked her right to silence. She then described the day’s events to Detective Bellemare and at 5:56 a.m. was placed under arrest for attempted murder. She was cautioned again, advised of her right to counsel and spoke with a lawyer for a second time.

(k) *Interrogation*

[28] After the appellant was placed under arrest for attempted murder at 5:56 a.m., she was transferred to a different police station. After sleeping an hour and eating, she was interrogated first by Detective Bellemare and later by Detective Pierre Samson. At the outset of her interrogation, the appellant exhibited extreme anxiety about having the interrogation room door closed and appeared claustrophobic. She also seemed to be exhausted and on several occasions told the interrogator that she had had enough, she did not want to talk anymore or she wanted to go lie down. She reaffirmed her right to silence over 20 times after consulting various lawyers. At 8:00 p.m. she was advised of Mr. Hogue’s death and placed under arrest for murder. This ended her interrogation.

[29] The trial judge concluded that the appellant’s right to silence had been systematically violated. He noted that she had been wakened in the middle of the night in the absence of any sort of urgency, the police had deliberately put off warning her appropriately and she was exhausted, claustrophobic and had exercised her right to silence on numerous occasions.

[30] He also faulted the police for having denigrated the work of defence counsel, telling the appellant that she had more life experience than her lawyer and that she was the only person who could help herself. The investigator also counselled her on exercising her right to silence. He told her that if she had planned the murder, like a member of an organized gang would have, he would advise her to remain silent because she would be in serious trouble in that kind of situation. However, given that her situation was very different, the investigator suggested that she need not remain silent. The investigator also suggested that if she had committed an armed robbery he would advise her to remain silent, but again, her circumstances were quite different. In light of this specific behaviour, the whole of the police investigation and the general context of a systematic violation of Ms. Côté's constitutional rights, the trial judge was not convinced beyond a reasonable doubt that the videotaped statement was made freely and voluntarily.

(l) *Police Testimony at Trial*

[31] The trial judge made strong, unfavourable findings about the credibility of the police officers' testimony at trial. He did not believe Constables Tremblay, Mathieu and Fortier, characterizing their evidence as lacking in frankness and sincerity. He found that these officers tried to present their intervention at the appellant's house as routine, a simple follow-up to the 9-1-1 call and a verification of the premises, which downplayed their knowledge that Mr. Hogue had likely suffered a bullet wound to the back of the head and that they were conducting a criminal investigation. He also noted that police witnesses refused to admit obvious facts and offered improbable hypotheses to the court. The trial judge had the impression that the officers did this because they did not want him to conclude that Ms. Côté was detained and should have been properly cautioned. As mentioned above, the trial judge found Constable Mathieu's assertion that Ms. Côté was not detained and could have left the police station at any point to be implausible. He found the officers' evidence that the appellant had not been told about the possible gunshot wound because it had not yet been confirmed to be equally unbelievable. Generally, he found that the officers' attitude during their testimony, primarily Constable Tremblay but also Constables Mathieu and Fortier, established that they did not want to admit that one investigative avenue implicated Ms. Côté in the attempted murder of Mr. Hogue.

[32] The trial judge also found that police witnesses tried to downplay the importance of certain evidence. Specifically, they tried to minimize the importance of the information transmitted to them from Dr. Elazhary, illustrated by the fact that Constable Mathieu maintained that the appellant was not detained and was free to leave at any time. The police officers also downplayed the issue of whether the holes in the window of the solarium were bullet holes and claimed that it was important to investigate whether a shot could have come from the river behind the gazebo when this hypothesis was inconsistent with the evidence they had already found. He concluded that the frankness and sincerity that is expected of police officers charged with applying the law was unfortunately lacking in this case.

(m) *Serious and Systematic Violation of Charter Rights*

[33] The trial judge was troubled by the police conduct throughout the investigation; he found that it demonstrated a blatant disregard for the appellant's *Charter* rights. He found that the breaches of the appellant's rights with respect to search and seizure were extremely serious, [TRANSLATION] "flagrant and systematic" (para. 337). They were not, in his view, the product of isolated errors in judgment on the part of the police, but rather were part of a larger pattern of disregard of the rights guaranteed by the *Charter*. He found that the police had not acted in good faith.

(n) *Exclusion of the Evidence*

[34] Balancing the interests of the state in discovering the truth and the integrity of the administration of justice, the trial judge found that no other result than exclusion of the evidence would prevent further discrediting of the administration of justice. He therefore concluded that the admission of the evidence would bring the administration of justice into disrepute and excluded the oral and written statements given by the appellant, the evidence obtained as a result of the warranted searches at the appellant's home and the observations made by police officers with respect to the exterior of the house before the warrants were issued. In making his decision, he emphasized that the crime in question was serious, that there was a strong societal interest in

adjudicating the charge on its merits and recognized that his decision was particularly difficult because it led to the appellant's acquittal.

B. *Court of Appeal, 2010 QCCA 303 (CanLII)*

[35] The Court of Appeal found that the trial judge was right to exclude the appellant's statements to police as the police seriously undermined the advice given by Ms. Côté's lawyers in obtaining those statements and this behaviour could not be sanctioned by a court. The Crown conceded, by and large, that the police had committed a number of violations, and that they were serious. It also conceded that the videotaped statements ought to be excluded. However, the court concluded that the trial judge had erred by excluding the observations police made of the exterior of the appellant's home before the warrants were issued as well as the physical evidence obtained at the appellant's home in execution of the two telewarrants.

[36] The Court of Appeal explained that the only issue before it was the admissibility of reliable derivative evidence. In *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, this Court referred to derivative evidence as "physical evidence discovered as a result of an unlawfully obtained statement" (para. 116). The Court of Appeal seemed to characterize *all* of the physical evidence obtained at the scene as derivative evidence in this sense. The Court of Appeal noted that the trial judge had not had the benefit of this Court's decisions in *Grant* and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, and that these decisions had changed the law in this area. In *Grant*, the Court stated that in determining whether to exclude evidence under s. 24(2) of the *Charter*, a court must assess and weigh the following three factors: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on the merits (para. 71). The Court of Appeal explained that while derivative evidence was often excluded where an accused's constitutional rights were seriously violated, *Grant* now required the judge "to consider whether admission of derivative evidence obtained through a *Charter* breach would bring the administration of justice into disrepute" (para. 33, citing *Grant*, at para. 118). The Court of Appeal examined the three factors relevant to the s. 24(2) determination, as set out in *Grant*.

[37] With respect to the first factor (the seriousness of the *Charter*-infringing state conduct), the Court of Appeal acknowledged the trial judge's finding that the *Charter* violations were serious and that the police had systematically violated Ms. Côté's *Charter* rights. However, it concluded that the police officers had not deliberately acted in an abusive manner.

[38] Regarding the second factor (the effect of the violation on the accused's rights), it found that the accused had been seriously affected by a series of police errors. However, the Court of Appeal highlighted the fact that the evidence could have been discovered lawfully without the appellant's participation because the police could have obtained a search warrant. It held that a warrant would have been issued on the basis of the 9-1-1 call and the finding of a bullet in the deceased's head which had entered from the rear, thus eliminating any possibility of suicide. Relying on *Grant*, at para. 122, the Court of Appeal noted that discoverability "retains a useful role . . . in assessing the actual impact of the breach on the protected interests of the accused" because the possibility of independent discovery of derivative evidence would mitigate the impact of a *Charter* violation on an accused person (para. 43). The discoverability of the evidence was therefore relevant to the analysis of the second factor. The Court of Appeal held that the admission of the physical evidence would not affect the fairness of the trial or bring the administration of justice into disrepute because the evidence and observations could have otherwise been discovered had the police obtained a warrant when they had grounds to do so.

[39] With respect to the third factor (society's interest in the resolution of the charge on its merits), the court explained that the physical evidence which the trial judge had excluded (e.g. the hole in the gazebo's mosquito screen, the holes in the solarium window, the traces of blood and the firearm registered in the victim's name) was essential to the Crown's case as it included all of the evidence from the scene. The Court of Appeal also underlined that the evidence was reliable. The court found that society's interest in having an adjudication on the merits was extremely important given the seriousness of the alleged crime.

[40] The Court of Appeal took the view that the *exclusion* of the physical evidence, rather than its inclusion, would bring the administration of justice into disrepute. In the Court of Appeal's

opinion, all of the physical evidence from the scene would have been discovered without the appellant's assistance, the crime was very serious and the police officers had not deliberately acted in an abusive manner. The court explained that while the police officers' respect for the appellant's constitutional rights had been somewhat fragmented and that the trial judge had not found them to be credible witnesses, they did not intend to act prejudicially (*pas eu d'attitude attentatoire*) (para. 47). Accordingly, the court held that the physical evidence and observations made at the appellant's home should not have been excluded and it allowed the appeal and ordered a new trial.

C. *Issues*

[41] The appellant challenges the Court of Appeal's decision to admit the physical evidence and the evidence concerning the police observations at her home. The Crown concedes, as it must, that the police committed serious breaches of the appellant's constitutional and legal rights. The Crown also does not contest the trial judge's decision to exclude the appellant's statements made to police. However, the Crown supports the Court of Appeal's decision to admit the police observations and the physical evidence obtained at the appellant's home.

[42] The Court of Appeal intervened principally on the basis that the evidence observed or collected at the scene could have been discovered lawfully without the appellant's participation. The Court of Appeal also justified its intervention by suggesting that the police had not deliberately acted in an abusive manner and by emphasizing the seriousness of the offence. It relied on these considerations in re-balancing the relevant lines of inquiry under s. 24(2) and in concluding that the repute of the administration of justice required the admission of some of the evidence. The appeal thus raises two main issues:

1. Did the Court of Appeal err in intervening on the bases that the police had not deliberately acted in an abusive manner and that the offence was serious?
2. Did the Court of Appeal err in intervening on the basis that the evidence was "discoverable"?

III. Analysis

[43] Before discussing the main issues in this case, I will briefly set out the standard of review and the factors relevant to a s. 24(2) determination, as described in *Grant* and its companion cases.

A. *Standard of Review*

[44] The standard of review of a trial judge's s. 24(2) determination of what would bring the administration of justice into disrepute having regard to all of the circumstances is not controversial. It was set out by this Court in *Grant* and recently affirmed in *R. v. Beaulieu*, 2010 SCC 7, [2010] 1 S.C.R. 248. Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review (*Grant*, at para. 86, and *Beaulieu*, at para. 5).

B. *The Grant Analysis*

[45] This Court established a revised approach to the exclusion of evidence under s. 24(2) in *Grant*. It explained that s. 24(2) was generally concerned with “whether the overall reputation of the justice system, viewed in the long term, will be adversely affected by admission of the evidence” (para. 68). As noted earlier, this Court held that three avenues of inquiry were relevant to an assessment of whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute. A court's role when addressing an application to exclude evidence under s. 24(2) is to balance the assessments under each of these lines of inquiry and determine, based on all of the circumstances, whether the admission of the evidence would bring the administration of justice into disrepute.

[46] In setting out this new framework, this Court made it clear that while these lines of inquiry did not precisely track the categories of considerations set out in the earlier jurisprudence, they did capture the factors relevant to the s. 24(2) determination that had been set out in the earlier

cases. In *Beaulieu*, Charron J., writing for the Court, emphasized this point, noting that *Grant* did not change the relevant factors in the s. 24(2) analysis.

[47] The first line of inquiry involves an evaluation of the seriousness of the state conduct. The more serious the state conduct constituting the *Charter* breach, the greater the need for courts to distance themselves from that conduct by excluding evidence linked to the conduct. The second line of inquiry deals with the seriousness of the impact of the *Charter* violation on the *Charter*-protected interests of the accused. The impact may range from that resulting from a minor technical breach to that following a profoundly intrusive violation. The more serious the impact on the accused's constitutional rights, the more the admission of the evidence is likely to bring the administration of justice into disrepute. The third line of inquiry is concerned with society's interest in an adjudication on the merits. It asks whether the truth-seeking function of the criminal process would be better served by the admission or exclusion of the evidence. The reliability of the evidence and its importance to the prosecution's case are key factors. Admitting unreliable evidence will not serve the accused's fair trial interests nor the public's desire to uncover the truth. On the other hand, excluding reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public's perspective. The importance of the evidence to the Crown's case is corollary to the inquiry into reliability. Admitting evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the whole of the prosecution's case, but excluding highly reliable evidence may more negatively affect the truth-seeking function of the criminal law process where the effect is to "gut" the prosecution's case.

[48] After considering these factors, a court must then balance the assessments under each of these avenues of inquiry in making its s. 24(2) determination. There is no "overarching rule" that governs how a court must strike this balance (*Grant*, at para. 86). Rather, "[t]he evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute" (*Harrison*, at para. 36). No one consideration should be permitted to consistently trump other considerations. For instance, as this Court explained in *Harrison*, the seriousness of the offence

and the reliability of the evidence should not be permitted to “overwhelm” the s. 24(2) analysis because this “would deprive those charged with serious crimes of the protection of the individual freedoms afforded to all Canadians under the *Charter* and, in effect, declare that in the administration of the criminal law ‘the ends justify the means’” (para. 40, citing 2008 ONCA 85, 89 O.R. (3d) 161, at para. 150, *per* Cronk J.A., dissenting). In all cases, courts must assess the long-term repute of the administration of justice.

C. *First Issue*

[49] I turn to the first of the two issues raised on appeal: Did the Court of Appeal err in intervening on the bases that the police had not deliberately acted in an abusive manner and that the offence was serious?

[50] As explained above, the Court of Appeal found that the trial judge had erred in excluding the physical evidence located at the scene. It based its conclusion, in part, on the fact that the police did not intend to act prejudicially nor had they deliberately acted in an abusive manner. It also based this conclusion on the fact that the offence in question was serious. In my respectful view, appellate intervention was not warranted on either of these grounds.

(1) Re-characterization of Police Conduct

[51] The Court of Appeal found that the police did not intend to act prejudicially nor had they deliberately acted in an abusive manner. This constituted a re-characterization of the evidence that was not open to the Court of Appeal. The trial judge made numerous findings to the contrary, specifically that the *Charter* violations were extremely serious, the police had not acted in good faith, the police had demonstrated a continuous and systematic disregard for the appellant’s *Charter*-protected rights and had persisted in their misconduct by misleading a judicial officer in obtaining search warrants, by failing to be frank and sincere in their testimony and by trying to justify their actions on untenable grounds. The Court of Appeal, respectfully, exceeded its role by its re-characterization of the evidence which departed from express findings by the trial judge

which are not tainted by any clear and determinative error. The Court of Appeal should not have substituted its own view of the police conduct for that of the trial judge.

[52] The respondent spent a considerable portion of its written argument trying to persuade this Court that the trial judge's findings about the nature of the police conduct were unreasonable. The respondent submits that the trial judge went too far in his criticism of the police. More specifically, the respondent submits that it was unreasonable for the trial judge to conclude that the *Charter* violations committed by the police were flagrant without considering the dynamic and evolving nature of the situation. It also submits that the trial judge erred in failing to conclude that the police were faced with a situation of urgency that required immediate action from the patrolling officers. I would not accede to these attempts to reverse the trial judge's findings of fact. A trial judge's findings of fact on a *voir dire* concerning the admissibility of evidence must be respected unless they are tainted by clear and determinative error. The trial judge made clear findings that from virtually the moment that the police arrived at the appellant's residence, they believed that she was a suspect; he concluded that the police *knew* that the person they were meeting was susceptible to being involved in the death of Mr. Hogue. I also note that the trial judge made a clear finding that the officers were not exercising their investigative powers arising from the 9-1-1 call when they came to Ms. Côté's house. Rather, he found that their purpose was to conduct a criminal investigation by speaking with an obvious suspect. The trial judge made these clear findings of fact based on his first-hand assessment of the officers' credibility by observing their testimony in court. There is no basis disclosed for interfering with the trial judge's numerous conclusions with respect to the police conduct and I thus decline to interfere with his findings.

(2) Seriousness of the Offence

[53] The Court of Appeal also emphasized that the offence in question was serious in grounding its conclusion that the trial judge was wrong to exclude the physical evidence obtained from the appellant's residence. This relates to the third branch of the *Grant* analysis that deals with society's interest in an adjudication on the merits. Under this branch, relevant, reliable evidence

that is crucial to the prosecution's case will often point towards admission, though these considerations will have to be balanced against other relevant factors. The seriousness of the offence, however, has the potential to "cut both ways" and will not always weigh in favour of admission (*Grant*, at para. 84). While society has a greater interest in seeing a serious offence prosecuted, it has an equivalent interest in ensuring that the judicial system is above reproach, particularly when the stakes are high for the accused person.

[54] The Court of Appeal thus erred in reweighing the impact of the seriousness of the offence. This consideration was fully addressed by the trial judge who was painfully aware of the seriousness of the offence and of the consequences of excluding the evidence. At para. 339 of his reasons, the trial judge acknowledged the seriousness of the offence, and at para. 340, he noted that the more serious the offence, the greater the likelihood that the administration of justice would be brought into disrepute by its exclusion, especially where the evidence was essential to a conviction. It is clear that the trial judge took this factor into account in his s. 24(2) determination and the Court of Appeal was therefore unjustified in simply assigning it greater importance.

[55] The respondent submits that the trial judge erred in failing to consider the reliability of the evidence and that this affected his weighing under the third factor of the s. 24(2) analysis. While I acknowledge that the trial judge did not expressly state that the evidence was reliable, he was of course fully aware of the nature of the evidence that was the subject of his order of exclusion. The evidence was reliable in the sense that it was objective and material and this would certainly have been obvious to the trial judge, who described all of the evidence at length in his reasons. The respondent's argument also overlooks the fact that the trial judge's decision predates this Court's judgment in *Grant* and thus may have been couched in different terms. I do not accept the respondent's submission that the trial judge failed to consider the reliability of the evidence and that this affected his s. 24(2) determination.

[56] To conclude, the Court of Appeal erred in interfering with the trial judge's s. 24(2) determination on the basis that the police did not deliberately act abusively; they did, as the trial judge found. It should also not have interfered with the trial judge's s. 24(2) determination by

assigning greater importance to the seriousness of the offence when the trial judge was fully aware of and properly weighed this factor. The Court of Appeal should not have simply substituted its weighing of these factors for that of the trial judge given that he clearly considered them according to correct legal principles.

D. *Second Issue*

[57] I now turn to the second of the two issues raised on appeal: Did the Court of Appeal err in intervening on the basis that the evidence was “discoverable”?

(1) The Court of Appeal’s Reliance on Discoverability

[58] As noted, the Court of Appeal was also convinced that the physical evidence (all of which it described as [TRANSLATION] “derivative evidence”) should not have been excluded because it could have been obtained legally by warrant, without the appellant’s participation (para. 33). Indeed, as I read the court’s reasons, this was the principal basis for its appellate intervention. The Court of Appeal’s emphasis on the discoverability of the evidence affected its weighing of the s. 24(2) factors, in particular the second one concerning the impact of the violation on the accused’s rights. The court was of the view that the impact of the violations was attenuated because the evidence could have been lawfully obtained and, accordingly, its admission would not affect trial fairness nor bring the administration of justice into disrepute.

[59] The trial judge was alive to this issue. He commented at para. 347 of his reasons that it was possible, even probable, that the police could have pursued their investigation effectively and in a constitutional manner had they respected simple and elementary principles governing their actions.

[60] Analysis of the Court of Appeal’s treatment of discoverability requires that the following questions be answered:

- (a) Did the development of the law in *Grant* and its companion cases justify appellate intervention?
- (b) What is the principle of discoverability and how does it affect the s. 24(2) analysis under *Grant* and its companion cases?
- (c) Did the Court of Appeal err in its treatment of discoverability in the s. 24(2) analysis in this case?

[61] I will address these questions in turn.

- (a) *Did the Development of the Law in Grant and Its Companion Cases Justify Appellate Intervention?*

[62] The Court of Appeal was of the view that *Grant* and its companion cases, decided after the trial judge's ruling, had changed the law with respect to the admission of reliable derivative evidence. By "derivative evidence", the Court of Appeal meant physical evidence discovered as a result of an unlawfully obtained statement. In its broader sense, evidence is "derivative" when it is discovered as a result of other unconstitutionally obtained evidence. Under the trial fairness rationale in *R. v. Collins*, [1987 CanLII 84 \(SCC\)](#), [1987] 1 S.C.R. 265, derivative evidence obtained as a result of unconstitutional conscription, that is, compelled self-incrimination at the behest of the state of the accused against him or herself, was generally excluded — because of its presumed impact on trial fairness — unless it would have been independently discovered. The Court of Appeal noted that now, as a result of *Grant* and its companion cases, the admissibility of such evidence is to be assessed on the same basis as all other evidence by asking whether its admission would bring the administration of justice into disrepute. The Court of Appeal seemed to suggest that because derivative evidence of a conscriptive nature was more likely to have been excluded under the pre-*Grant* framework, it was necessary to redo the s. 24(2) analysis using the revised *Grant* approach.

[63] The fundamental difficulty with the court's reasoning, in my respectful view, is this: the trial judge did not refer to the fact that this was conscriptive evidence, nor did he suggest that the case for exclusion was stronger because of that. It is therefore difficult for me to see how the trial judge showed any concern that the evidence ought to be excluded because it was conscriptive. Thus, the trial judge did not place any weight on the conscriptive character of the evidence and it did not appear to affect his analysis in any way. In any event, the Court of Appeal erred by characterizing all of the evidence as being derivative of an unlawfully obtained statement when in fact very little of it was. Only the two guns potentially constitute "derivative" evidence in the narrow sense described by the Court of Appeal, as the appellant had informed Constables Tremblay and Mathieu of their presence in the house. Although she only showed police the gun located in the bedroom, she nevertheless told them that a second gun existed. More importantly, I am of the view that the Court of Appeal erred in its analysis of the doctrine of discoverability as it applies in this case.

(b) *What Is the Principle of Discoverability and How Does It Affect the Section 24(2) Analysis Under Grant and Its Companion Cases?*

[64] The principle of discoverability was developed under the *Collins/Stillman* framework of analysis and has traditionally been applied to derivative evidence obtained as a result of the breach of an accused's right against self-incrimination: see *Collins*, and *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607. According to the *Collins* trial fairness rationale, admitting evidence derived from unconstitutional self-incrimination not only further undermined the accused's right not to be conscripted against him or herself, but it also could be seen as undermining the fairness of the accused's trial at which, of course, he or she is presumed innocent and is not a compellable witness. The fact that the evidence could have been discovered without the accused's participation — in other words that it was discoverable — was considered relevant and often determinative to the s. 24(2) analysis because that fact attenuated the impact of the unconstitutional actions on the accused's right against self-incrimination and his or her fair trial rights. The state would have been able to collect the evidence without the accused's participation, and the fact that the evidence would have been discovered without infringing the accused's right

against self-incrimination weakens the causal link between the *Charter* breach and obtaining the evidence.

[65] In *Grant*, this Court established a more flexible, multi-factored approach to the exclusion of evidence under s. 24(2). The earlier *Collins/Stillman* framework had been criticized for being too categorical; exclusion seemed to be virtually automatic if the evidence was found to be conscriptive and not otherwise discoverable. However, *Grant* affirmed that discoverability remains relevant to the s. 24(2) analysis, explaining as follows:

Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry. [para. 122]

[66] The concept of discoverability has been used in relation to derivative evidence to indicate that the police could have obtained the same evidence without unconstitutionally conscripting the accused or that the evidence would have inevitably been discovered without reference to that conscription: *Stillman*, at para. 107; *R. v. Colarusso*, 1994 CanLII 134 (SCC), [1994] 1 S.C.R. 20, at p. 77. However, I will use the term “discoverability” to refer to situations where unconstitutionally obtained evidence of any nature could have been obtained by lawful means had the police chosen to adopt them. Viewed in this fashion, discoverability has, in appropriate circumstances, a useful role to play in the s. 24(2) analysis where the interest at stake is one other than self-incrimination.

[67] In the pre-*Grant* case law, the fact that unconstitutionally obtained evidence, even though not conscriptive, could have been obtained by constitutional means was considered in the s. 24(2) analysis. Discoverability had two main effects on the analysis: first, the fact that the evidence could have been obtained properly in some circumstances tended to make the *Charter* breach more serious, particularly, for example, in cases in which the police simply ignored the

requirement of prior authorization for a search. On the other hand, in some circumstances, the fact that the police actually had reasonable and probable grounds to search, although they did not obtain a warrant, tended to lessen the seriousness of the breach.

[68] *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, is a good example of how discoverability can, in simple language, cut both ways. There, the police searched a locker. One officer said that the idea of getting a warrant did not even cross his mind, while another said he did not consider obtaining a warrant because he thought he lacked sufficient grounds. The Court endorsed the conclusion of the trial judge that the officer who failed even to consider getting a warrant had demonstrated a “casual attitude” towards the appellant’s *Charter* rights and that the other officer’s decision to proceed with the search because he thought he did not have sufficient grounds to obtain a warrant suggested a blatant disregard for the appellant’s rights which was fatal to a claim of good faith: paras. 60-61. On the other hand, this Court acknowledged that the officer probably did in fact have sufficient grounds to obtain a warrant and that the existence in fact of reasonable and probable grounds to conduct the search has on many occasions been considered as lessening the seriousness of the violation. In the end, the Court accepted that the trial judge had reasonably concluded that the breach was serious and that his assessment should not have been interfered with on appeal: see generally paras. 52-56.

[69] Discoverability remains a relevant factor under the current s. 24(2) analysis. *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, is an example. Binnie J., writing for the Court, found that the fact that non-bodily physical evidence obtained in breach of an accused’s s. 8 right would otherwise have been discovered was one of the points favouring the admissibility rather than the exclusion of the evidence.

[70] While discoverability may still play a useful role in the s. 24(2) analysis, it is not determinative. A finding of discoverability should not be seen as necessarily leading to admission of evidence. Nor should courts engage in speculation. As stated in *Grant*, where it cannot be determined with any confidence whether evidence would have been discovered in the absence of the *Charter* breach, discoverability will have no impact on the s. 24(2) inquiry. I will describe how,

in appropriate cases, discoverability may be relevant to the first two branches of the *Grant* analysis.

[71] I turn to the first branch of the *Grant* test which is concerned with the seriousness of the *Charter*-infringing state conduct. If the police officers could have conducted the search legally but failed to turn their minds to obtaining a warrant or proceeded under the view that they could not have demonstrated to a judicial officer that they had reasonable and probable grounds, the seriousness of the state conduct is heightened. As in *Buhay*, a casual attitude towards, or a deliberate flouting of, *Charter* rights will generally aggravate the seriousness of the *Charter*-infringing state conduct. On the other hand, the facts that the police exhibited good faith and/or had a legitimate reason for not seeking prior judicial authorization of the search will likely lessen the seriousness of the *Charter*-infringing state conduct.

[72] We come now to the effect of discoverability on the second branch of the *Grant* test — the impact on the *Charter*-protected interests of the accused. [Section 8](#) of the *Charter* protects an individual's reasonable expectation of privacy. That reasonable expectation of privacy must take account of the fact that searches may occur when a judicial officer is satisfied that there are reasonable and probable grounds and authorizes the search before it is carried out. If the search could not have occurred legally, it is considerably more intrusive of the individual's reasonable expectation of privacy. On the other hand, the fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search will tend to lessen the impact of the illegal search on the accused's privacy and dignity interests protected by the *Charter*.

[73] This is not to say, however, that in such circumstances there is no infringement of an accused's privacy interests. A reasonable expectation of privacy protected under [s. 8](#) of the *Charter* includes not only that proper grounds exist but also the requirement of prior judicial authorization. Thus the absence of a warrant when one was legally required constitutes an infringement of an accused's privacy. The intrusiveness of such an unauthorized search will be assessed according to the level of privacy that could have reasonably been expected in the given set of circumstances.

The greater the expectation of privacy, the more intrusive the unauthorized search will have been. The seriousness of the impact on the accused's *Charter*-protected interests will not always mirror the seriousness of the breach, i.e. the *Charter*-infringing state conduct. For instance, where the police acted in good faith in obtaining a warrant that was found on review not to disclose reasonable and probable grounds to believe that a crime had been committed and that there was evidence to be found at the place of the search, the seriousness of the *Charter*-infringing state conduct is reduced but the impact of the search on the accused's *Charter*-protected interests is greater because the search could not have occurred legally.

[74] The lawful discoverability of evidence may thus be a relevant consideration when a court must determine whether to exclude evidence pursuant to s. 24(2) of the *Charter*. When relevant, courts should assess the effect of the discoverability of the evidence under the first and second *Grant* lines of inquiry in light of all of the circumstances.

(c) *Did the Court of Appeal Err in Its Treatment of Discoverability in the Section 24(2) Analysis in This Case?*

[75] The Court of Appeal found that all of the physical evidence gathered on the premises, such as the observations of the perforations in the mosquito screen and solarium window, the gunpowder residue on the solarium window and the gun registered in the name of the victim, would have been discovered without the appellant's help. Duval Hesler J.A. held that the 9-1-1 call and the gunshot projectiles lodged in the back of the victim's head would have been sufficient to obtain a valid search warrant even before the first of the warrantless peripheral searches. Relying on *Grant*, she stated that if the derivative evidence could have been discovered independently, the effect of the violation on the accused would be lessened and this would affect the second element of the s. 24(2) inquiry. She then relied, in part, on the discoverability of the evidence to ground her conclusion that the exclusion of the evidence in this case would bring the administration of justice into disrepute.

[76] The finding of discoverability in this case rests on the Court of Appeal's conclusion that the police could have obtained a warrant to search the premises very early in the investigation

based on finding Mr. Hogue at the residence with what was likely a bullet in the back of his head and the 9-1-1 call from the residence. While I agree with this conclusion, I part company with the Court of Appeal about the significance of this factor for the s. 24(2) analysis in this case.

[77] Before turning to the issue of discoverability in this case, I should briefly comment on what role, if any, the validity or invalidity of the telewarrants obtained by the police played in the trial judge's s. 24(2) analysis. In my view, whether or not those warrants were valid had little or no impact on the analysis here.

[78] The trial judge found that the warrants which the police ultimately obtained were unlawful. In his view, when the unconstitutionally obtained material was excised from the ITO, what remained was insufficient. The Court of Appeal did not address this conclusion directly, noting simply that the grounds to obtain a warrant existed much earlier, which would have permitted the police to obtain all of the observations and physical evidence legally. In this Court, the Crown argued that the trial judge's ruling about the validity of the warrants was in error. However, even if the warrants were valid, this could have little if any effect on the trial judge's decision to exclude the physical evidence. The trial judge relied on the fact that the totality of the search process was tainted by the unconstitutional searches that preceded the issuance of the warrants.

[79] This finding is consistent with well-established case law. *Grant 1993* provides a good example of how illegal warrantless searches can taint a subsequent search that is otherwise lawful. In that case, the information obtained through the warrantless perimeter search was used to support the police's application for search warrants. This Court held that once the illegally obtained information was excised from the affidavits presented to the issuing justice, the information that remained was sufficient to issue the warrants. While this Court held that the warrants were valid, it found that the illegal searches "were nevertheless an integral component in a series of investigative tactics which led to the unearthing of the evidence in question". It was thus "unrealistic to view the perimeter searches as severable from the total investigatory process which culminated in discovery of the impugned evidence" (p. 255). Similarly, in the case at bar, given the

trial judge's findings of fact that the police misconduct was continual and systematic from the outset of the investigation, the question of exclusion must not be approached in a compartmentalized fashion.

[80] I now turn to the impact of discoverability on the exclusion of evidence in this case.

[81] With respect to the first branch of the analysis, it is clear that the trial judge considered the officers' misconduct to be very serious. Like in *Grant 1993*, the collection of the evidence in this case was simply an extension of the earlier warrantless searches conducted by Constables Tremblay, Mathieu and Fortier; there was clearly a connection between the earlier breaches and the evidence obtained pursuant to the warrants. Moreover, by the time the warrants were obtained in this case, there had been multiple, serious and deliberate breaches of the appellant's rights. As mentioned earlier, the trial judge found it shocking that the police had not sought a search warrant earlier that evening or obtained the appellant's free and informed consent to enter her home. He was also troubled by the fact that the police had constantly minimized, to the appellant, her true legal situation and found this disregard for her *Charter* rights to be part of a systematic attitude evident throughout their dealings with Ms. Côté. He also found that obtaining the evidence pursuant to the warranted searches was part of a larger pattern of disregard for Ms. Côté's *Charter*-protected rights. Given that this evidence was tainted by the earlier *Charter* breaches that involved serious police misconduct, it is obvious that nothing turned on the trial judge's conclusion with respect to the validity of the warrants.

[82] The fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search but did not do so, in the circumstances of this case, significantly aggravated the seriousness of their misconduct. The trial judge found that no police officer seemed preoccupied with the absence of a search warrant (a warrant was not even prepared until over five hours after the initial police intervention) or the inherent limits recognized by courts for proceeding without a warrant. The trial judge was particularly troubled by the fact that the

search occurred during the night, at a very late hour, and in a dwelling house, typically a place where individuals have the greatest expectation of privacy.

[83] The police misconduct in obtaining the warrants further aggravated the seriousness of the *Charter*-infringing state conduct. The trial judge concluded that the warrants were actually sought as an ill-conceived scheme to attempt to remedy the unconstitutionality of the prior searches and that the police had misled the issuing judicial officer by failing to make full and frank disclosure of their earlier, unconstitutional conduct.

[84] The fact that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search is also relevant to the impact of the breach on the *Charter*-protected interests of the accused. If a search warrant could have been validly issued at the time the search was conducted (putting aside issues about whether the search was conducted reasonably), the intrusiveness of the illegal search arises from the fact that it was not authorized in advance by a judicial officer. This, on its own, tends to reduce the impact of this breach on the appellant's *Charter*-protected reasonable expectation of privacy. However, the absence of prior judicial authorization still constitutes a significant infringement of privacy. Indeed, it must not be forgotten that the purpose of the *Charter*'s protection against unreasonable searches is to prevent them before they occur, not to sort them out from reasonable intrusions on an *ex post facto* analysis: *R. v. Feeney*, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13, at para. 45. Thus, prior authorization is directly related to, and forms part of, an individual's reasonable expectation of privacy.

[85] Having regard to all of the circumstances, the impact of the police misconduct on the appellant's right to privacy was serious: the unauthorized search occurred in her home, a place where citizens have a very high expectation of privacy, and the search was not brief (*Grant*, at para. 113). The officers arrived at the appellant's home at 12:13 a.m. and the appellant only departed for the police station at 2:34 a.m. The appellant, dressed in her pyjamas, accompanied the police as they illegally searched the interior and exterior of her house in the middle of the night for not an

insignificant amount of time during which she was detained without interruption. The breach was thus not “transient or trivial in its impact” and implicated her liberty, her dignity as well as her privacy interests (*Harrison*, at para. 28; *Grant*, at para. 113). The appellant certainly had a reasonable expectation of not being subjected to such an intrusive search, without lawful authorization in the middle of the night, and several hours after her spouse had been transported to the hospital. Thus, the absence of prior authorization for a search of this nature was a serious affront to her reasonable expectation of privacy.

[86] In my respectful view, the Court of Appeal was wrong to conclude that the trial judge erred in his appreciation of the seriousness of the impact on the *Charter*-protected interests of the accused. Even though the searches could have been conducted lawfully, this fact would not have changed the conclusion that the second branch of the *Grant* analysis militated in favour of exclusion, in light of the numerous other factors highlighting the serious impact on the appellant’s privacy and dignity interests.

[87] In the result, the Court of Appeal erred in attaching great weight to the fact that the evidence was discoverable because it could have been obtained lawfully. In my view, the trial judge’s assessment was not tainted by any error of law that is relevant to his ultimate conclusion or by any unreasonable finding of fact. There was therefore no basis to interfere on appeal with the trial judge’s weighing of the various factors.

[88] The trial judge analysed the admissibility of Ms. Côté’s statements and the material evidence separately. With respect to both, he found that the violations of the appellant’s rights were systematic and deliberate and that the police were less than candid even under oath in court in order to minimize the extent of their misconduct. While the misleading character of in-court police testimony does not form part of the *Charter* breach itself, it is a relevant factor under the first branch of the s. 24(2) analysis as a court must dissociate itself from such behaviour: *Harrison*, at para. 26. The trial judge was fully aware that proper investigative methods could have produced the same evidence, that the evidence was reliable and that the alleged offence was extremely serious. He also weighed the important societal interest in having the appellant’s guilt or innocence

determined on the merits. He emphasized that the violations of the appellant's rights were the result of "a larger pattern of disregard for the appellant's *Charter* rights" (para. 346, citing *R. v. Greffe*, 1990 CanLII 143 (SCC), [1990] 1 S.C.R. 755, at p. 796) and this sort of disregard by the police for a suspect's rights was carried through to their misleading evidence to obtain the warrants and by their conduct as witnesses before the court.

IV. Conclusion

[89] To sum up, the trial judge's decision to exclude the observations made by police at the appellant's home and the physical evidence collected pursuant to the warrants was owed deference. With respect, the Court of Appeal misconceived of its appellate role when it substituted its view of the police conduct for the trial judge's and when it placed undue emphasis on the seriousness of the offence. The Court of Appeal's holding that the police had not deliberately acted in an abusive manner was contrary to the trial judge's numerous findings of deliberate and systematic police misconduct. Its emphasis on the seriousness of the offence was also misplaced given that the trial judge had acknowledged that the offence was serious and that the seriousness of the offence had been held not to be a determinative factor. The Court of Appeal also erred in placing undue weight on the "discoverability" of the evidence in its s. 24(2) analysis. While I agree with the Court of Appeal that the police could have demonstrated to a judicial officer that they had reasonable and probable grounds to believe that an offence had been committed and that there was evidence to be found at the place of the search, this fact would not have affected the s. 24(2) analysis in all of the circumstances of this case. Both the police misconduct and its impact on the accused's *Charter*-protected interests were very serious, even taking discoverability into account. The trial judge was obviously and justly concerned about the continuous, deliberate and flagrant breaches of the appellant's *Charter* rights and this consideration played an important role in his balancing of the factors under s. 24(2). He also properly took into account the strong societal interest in having a serious criminal charge determined on its merits. His conclusion was not tainted by any error of law relevant to the ultimate conclusion and, accordingly, it should not have been set aside on appeal.

V. Disposition

[90] I would allow the appeal and restore the acquittal entered at trial.

English version of the reasons delivered by

[91] DESCHAMPS J. (dissenting) — I have read Cromwell J.’s reasons. He would restore the Superior Court’s judgment ([2008 QCCS 3749 \(CanLII\)](#)), which in his view contains no error that would justify the Court of Appeal’s decision to intervene. On the basis of the test from *R. v. Grant*, [2009 SCC 32](#), [2009] 2 S.C.R. 353, I agree with the Court of Appeal ([2010 QCCA 303 \(CanLII\)](#)) that the evidence obtained without the appellant’s participation — which I will call “the physical evidence” — should not have been excluded. I would therefore dismiss the appeal.

[92] There is only one point on which my colleague Cromwell J. expressly agrees with the Court of Appeal: the police could have obtained a search warrant very early in their investigation. However, he attaches no significance to this fact because, in his view, the trial judge’s conclusions on the exclusion of the evidence were not based on the invalidity of the warrants. With respect, I believe that there are two separate issues here: first, the consequences of the trial judge’s failure to consider the possibility that a warrant could have been issued at the very beginning of the investigation; and, second, the consequences of the invalidity of the warrants issued later in the investigation. At no point in his analysis did the trial judge consider whether the physical evidence could have been discovered if a warrant had been obtained very early in the investigation. In my opinion, it is this finding by the Court of Appeal that is relevant.

[93] The trial judge rendered judgment before the decision in *Grant*, in which this Court revised the test from *R. v. Collins*, [1987 CanLII 84 \(SCC\)](#), [1987] 1 S.C.R. 265, and *R. v. Stillman*, [1997 CanLII 384 \(SCC\)](#), [1997] 1 S.C.R. 607. Although this fact would not, considered in isolation, justify reviewing a decision to exclude evidence, it is nonetheless appropriate to ask whether the judge considered all the factors on which such a decision must be based. In the case at bar, it is clear that he failed to do so.

I. Relevant Facts With Respect to the Issuance of a Warrant Very Early in the Investigation

[94] At 11:38 p.m. on July 22, 2006, Constable Jean-François Fortier received a telephone call from Sergeant François Monetta, who told him that a man with injuries to the back of his head had been taken to hospital by ambulance and that an X-ray had revealed that there was a bullet in the man's head. Sergeant Monetta gave Constable Fortier the injured man's name and the address of the residence from which he had been taken by ambulance after his spouse had found him injured there.

[95] On receiving that information, Constable Fortier, as the head of the team of four police officers on duty that night for the area in which the residence in question was located, asked Constables Tremblay and Mathieu to go to the scene to investigate.

[96] The officers arrived there at 12:13 a.m. They began by observing the house. It was not lit and there were no signs of activity. They parked at a certain distance from the house and walked up to it. They rang the doorbell and a woman opened the door. It was Ms. Côté. The officers explained that they were from the Sûreté du Québec and that they were there to find out what had happened that evening and to make sure that the premises were safe.

[97] After inspecting the interior of the residence and determining that no one other than Ms. Côté was there, Constable Tremblay went outside. He entered the gazebo, where he saw blood, or what looked like blood. Constable Mathieu and Ms. Côté joined him there. Constable Mathieu then went back inside the residence, where he noticed a hole in the glass of one of the solarium's windows. Constable Tremblay then went to the patrol car and relayed these observations to Constable Fortier. It was 12:27 a.m.

[98] I do not question the trial judge's decision to reject the prosecution's argument that the officers' purpose in searching the house was to make sure the occupants were safe. My review of the facts is based strictly on the trial judge's findings of fact and is intended to highlight the information the officers had before they arrived at Ms. Côté's residence and when they discovered the key pieces of physical evidence.

[99] It seems to me that the Court of Appeal's conclusion that a warrant could have been issued very early in the investigation is inescapable. The police were informed that a person had sustained a serious injury to the back of the head and that the injury had probably been caused by a firearm. It could not have resulted from illness, nor could it have been self-inflicted given the bullet's point of entry into the skull. In addition, the police knew the address of the residence from which the injured person had been taken by ambulance. In light of these facts, they had to discharge their duty to investigate and gather evidence related to the incident. It was therefore possible for the police to have reasonable and probable grounds to believe that evidence of an offence could be found at the place from which the victim had been taken by ambulance. Furthermore, the nature of the injury and the fact that the victim had been found on the ground could have given them reasonable and probable grounds to believe that the warrant had to be executed by night, since residue, prints and fresh tracks could have been eliminated or altered if the start of the investigation had been delayed (*s. 488* of the *Criminal Code*, R.S.C. 1985, c. C-46). The Court of Appeal analysed the situation as follows (at para. 44):

[TRANSLATION] In a case such as this one, all the [physical] evidence gathered on the premises — including the holes in the gazebo window screen, the hole in the solarium window, the gunshot residue on the inside of the solarium window, the firearm registered in the victim's name and found in his home — would have been discovered without any contribution from the accused. To obtain a valid warrant to search the premises where the incident occurred, it would have been sufficient to refer to the 9-1-1 call and the bullet fragments that penetrated the victim's head from the back, eliminating the possibility of suicide and militating in favour of a serious indictable offence. It is difficult to imagine that a justice of the peace would have refused to issue a warrant in light of such assertions, if only for the purpose of obtaining an appropriate expert assessment of the scene and to perform checks that were obviously relevant, regardless of any suspicion against the accused. Consequently, in this case, the flaws detected by the trial judge in the affidavit used to obtain the general search . . . warrant are not decisive factors.

[100] To determine how to deal with the physical evidence, the Court of Appeal could not simply rely on the trial judge's overall assessment. It had no choice but to conduct the review the trial judge had failed to conduct. In my opinion, the Court of Appeal was right to conclude that the physical evidence should not have been excluded, although the way I apply *Grant* differs somewhat from the way the Court of Appeal applied it.

II. Application of the *Grant* Test

[101] In *Grant*, the Court established a three-stage test for determining whether evidence is admissible under s. 24(2) of the *Canadian Charter of Rights and Freedoms*. At the first stage, a court must consider the seriousness of the *Charter*-infringing state conduct and “assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct” (para. 72).

[102] At the second stage, the inquiry “focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed” (para. 76). It is important to determine the extent of the violation’s impact on the interests protected by the infringed right.

[103] At the third stage, having regard to the fact that “[s]ociety generally expects that a criminal allegation will be adjudicated on its merits”, the court must “[ask] whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (para. 79). The reliability of the evidence and its importance to the prosecution’s case are factors to be considered, and all relevant circumstances must be taken into account.

[104] In determining whether the maintenance of confidence in the administration of justice would be better served by admitting the physical evidence or by excluding it, the court must balance the implications that are identified at the different stages.

[105] At the first stage of the analysis, I accept the trial judge’s conclusion that the police officers’ conduct revealed a serious disregard for Ms. Côté’s constitutional rights. The judge noted that the officers did not concern themselves with obtaining either a warrant or Ms. Côté’s informed

consent before conducting their initial search. The judge seems to have believed that Ms. Côté's rights would not have been violated had experienced officers been assigned to the investigation. In some cases, the fact that an agent of the state is inexperienced may be a sign that rights have not been intentionally violated, which means that the infringement resulting from the officers' conduct would be less serious. In the instant case, however, the officers' inexperience cannot serve as an excuse, since, according to the judge, they should have known the applicable rules. Also relevant is the judge's observation that the officers' conduct was aggravated by their attempt to conceal the constitutional violations of Ms. Côté's rights by raising arguments he held to be unfounded. The police conduct in this case was such that the courts must dissociate themselves from it.

[106] At the second stage, it is clear that the trial judge did not evaluate the actual impact of the breach. The main interest affected by the unlawful police search was Ms. Côté's expectation of privacy. What must be determined is the impact on it of the failure to obtain prior authorization. To do this, the situation here must be compared with the one that would have prevailed had the search been authorized in advance. It is therefore not enough to find that the search resulted in an invasion of privacy. While that is of course relevant, it is more specifically the difference in seriousness between the intrusion that actually occurred and the one that would have occurred had a warrant been issued that reveals the "extent to which the breach actually undermined the interests protected" (*Grant*, at para. 76). This is the corollary of the previous findings that a warrant could have been obtained at the very beginning of the investigation and that this would have led the police to discover the physical evidence.

[107] However limited the warrant may have been, it would at the very least have authorized an examination of the gazebo and the area surrounding it. The warrant would therefore have authorized a search of both the outside and part of the inside of the house. As a result, if it is accepted that the warrant could have been issued at the start of the investigation, it must also be accepted that the resulting invasion of Ms. Côté's privacy would, in practice, have been identical to the one that resulted from the warrantless search.

[108] I therefore agree with Cromwell J. that the impact of the infringement of the right to privacy is limited to the fact that the search was not authorized by a judicial officer (para. 84). However, it seems to me that his assessment of that impact contradicts the conceptual approach that follows from this premise. To determine the seriousness of the impact of the breach, my colleague considers facts that would have existed even if the search had been authorized. That does not reveal the extent to which the expectation of privacy was actually undermined by the failure to obtain prior authorization for the search.

[109] All persons are entitled to expect the state to respect their rights, and a court cannot do anything that suggests that their rights have no value. Even where a breach has no practical consequences, the court must play a declaratory role in vindicating constitutional rights. It is this role that must be borne in mind where a duly authorized search would have had the same practical consequences (see, in the analogous context of s. 24(1) of the *Charter*, *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28). In the instant case, the protected right is the legitimate expectation of any person not to be subjected to a warrantless search. The standpoint from which a court assesses the impact of a breach of protected rights is therefore very different where the intrusion would have been identical had the search been authorized by a warrant. The interest that remains to be protected is what the Court in *Ward* referred to as “[v]indication, in the sense of affirming constitutional values” (para. 28).

[110] Protection of a person’s expectation of privacy is a fundamental requirement in the Canadian constitutional system. For this reason — and to reflect the actual scope of this expectation — it is particularly appropriate to take a nuanced approach when assessing it. The higher the expectation of privacy, the more clearly the constitutional right that protects it must be affirmed. Conversely, the lower the expectation of privacy, the lower the need for affirmation.

[111] In the case at bar, Ms. Côté was the person who called 9-1-1 and provided her address. She was the person who contacted the doctor and told him that she had found her spouse in the gazebo. She was the first and only person to whom the police officers could speak to find out what had happened in the moments before her spouse was taken away by ambulance.

Therefore, the visit from the police could hardly be said to have been unexpected. In short, not only would the intrusion have been the same with or without a warrant, but Ms. Côté did not have the highest expectation of privacy. As a result, the relevant factors at the second stage of the analysis do not weigh in favour of excluding the physical evidence.

[112] At the stage of the analysis that involves determining whether the search for truth would be better served by admitting the evidence or by excluding it, I must point out that the evidence in question was reliable physical evidence. It was found shortly after the injured person was taken away by ambulance, and it was gathered near the alleged scene of the crime. Although my colleague acknowledges that the trial judge did not speak to the reliability of the physical evidence, he assumes that the judge attached the necessary weight to this factor (para. 55). With respect, I have difficulty seeing how such a conclusion can be drawn.

[113] It is possible that the trial judge's failure to discuss the reliability of the evidence is due to the fact that he was applying the law as it stood before *Grant*. According to the test from *Collins* and *Stillman*, the discoverability of physical evidence was linked to the protection against self-incrimination and the assessment of trial fairness (*Grant*, at para. 121). Exclusion was almost automatic (*Grant*, at para. 64). In that context, the reliability of the evidence was of little consequence. However, one of the changes effected in *Grant* was in fact to move away from automatic exclusion toward an analysis in which all the circumstances would be considered. On this point, I agree with my colleague Cromwell J. that the discoverability of physical evidence may be relevant to the decision whether to exclude evidence (para. 74). The relevance of discoverability is no longer limited to the protection against self-incrimination, and it is essential to consider the reliability of the evidence.

[114] Because the trial judge did not discuss the reliability of the physical evidence, I cannot find that he considered all the relevant factors in determining whether physical evidence should be excluded. In my view, this was a serious flaw.

[115] As regards the importance of the physical evidence to the conduct of the trial, it is sufficient to note that this evidence was circumstantial. Because the statements made to the police by Ms. Côté had been excluded, it was the only remaining evidence. Its admission was therefore likely to be of crucial importance to the truth-seeking function and to the conduct of the trial.

[116] At the stage of assessing society's interest in the conduct of the trial, having regard to all the relevant facts, I see nothing that would weigh in favour of excluding the physical evidence. Although the evidence as a whole was limited by the exclusion of the statements made to the police by Ms. Côté, some reliable evidence remained that the prosecution could still have considered sufficient to conduct the trial.

[117] After completing all three stages of the analysis, the court must balance the factors that weigh in favour of and against excluding the evidence. This is a qualitative exercise and not a quantitative one (*R. v. Harrison*, [2009 SCC 34](#), [2009] 2 S.C.R. 494, at para. 36).

[118] In the instant case, the police misconduct, considered as a whole, is serious and the courts must dissociate themselves from it. However, it is possible to do so in respect of the constitutional violations in this case without excluding *all* the evidence. There are cases of impacts on expectations of privacy that are much more serious. Moreover, where reliable and important evidence exists, society's interest in the search for truth stands out. On the whole, I can only conclude that, in this case, it is the exclusion of the physical evidence that would bring the administration of justice into disrepute.

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

Appeal allowed, DESCHAMPS J. dissenting.

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Solicitor for the respondent: Directeur des poursuites criminelles et pénales du Québec, Longueuil.

Solicitors for the intervener: Sack Goldblatt Mitchell, Toronto.

TAB 7

R. v. Conway, 2010 SCC 22 (CanLII), [2010] 1 SCR 765

Source: Supreme Court of Canada
Date: 2010-06-11
File number: 32662
Other citations: 103 OR (3d) 320 — 320 DLR (4th) 25 — 402 NR 255 —
263 OAC 61 — [2010] EXP 1926 — 255 CCC (3d) 506 —
75 CR (6th) 201 — 1 Admin LR (5th) 163 —
211 CRR (2d) 326 — 88 WCB (2d) 441 —
EYB 2010-175167 — JE 2010-1051 — [2010] SCJ No 22 (QL)
Citation: R. v. Conway, 2010 SCC 22 (CanLII), [2010] 1 SCR 765,
<<https://canlii.ca/t/2b2ds>>, retrieved on 2026-03-22



SUPREME COURT OF CANADA

CITATION: R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765

DATE: 20100611

DOCKET: 32662

BETWEEN:

Paul Conway

Appellant

and

Her Majesty The Queen and Person in charge of the

Centre for Addiction and Mental Health

Respondents

- and -

Attorney General of Canada, Ontario Review Board,

Mental Health Legal Committee and Mental Health Legal

Advocacy Coalition, British Columbia Review Board,

Criminal Lawyers' Association and David Asper Centre for

Constitutional Rights, and Community Legal Assistance Society

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Abella J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring)
(paras. 1 to 104)

R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765

Paul Conway

Appellant

v.

**Her Majesty The Queen and Person in charge of the
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Constitutional Rights, and Community Legal Assistance Society**

Interveners

Indexed as: R. v. Conway

2010 SCC 22

File No.: 32662.

2009: October 22; 2010: June 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Remedies — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Accused also seeking as remedy order directing mental health facility to provide him with particular treatment — Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter — If so, whether accused entitled to remedies sought — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

Criminal law — Mental disorder — Review Board — Remedial jurisdiction under Canadian Charter of Rights and Freedoms — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board — Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code — Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of Charter — If so, whether accused entitled to remedy sought — Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

Administrative law — Boards and tribunals — Jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(a) of the *Criminal Code*, which provides that an absolute discharge is unavailable to any patient who is a “significant threat to the safety of the public”. The Board therefore ordered that C remain in the mental health centre. The Board further concluded that it had no jurisdiction to consider C’s *Charter* claims. A majority in the Court of Appeal upheld the Board’s conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of Appeal unanimously concluded that it was unreasonable for the Board not to address the treatment impasse plaguing C’s detention. This issue was remitted back to the Board.

Before this Court, the issue is whether the Ontario Review Board has jurisdiction to grant remedies under s. 24(1) of the *Charter*. C has requested, in addition to an absolute discharge, remedies dealing with his conditions of detention: an order directing the mental health centre to provide him with access to psychotherapy and an order prohibiting the centre from housing him near a construction site.

Held: The appeal should be dismissed.

When the *Charter* was proclaimed, its relationship with administrative tribunals was a blank slate. However, various dimensions of the relationship quickly found their way to this

Court. The first wave of relevant cases started in 1986 with *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863. The *Mills* cases established that a court or administrative tribunal was a “court of competent jurisdiction” under s. 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought. The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038. The *Slaight* cases established that any exercise of statutory discretion is subject to the *Charter* and its values. The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22. The cases flowing from this trilogy, which deal with s. 52(1) of the *Constitution Act, 1982*, established that specialized tribunals with both the expertise and the authority to decide questions of law are in the best position to hear and decide the constitutionality of their statutory provisions.

This evolution of the case law over the last 25 years has cemented the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. It confirms that we do not have one *Charter* for the courts and another for administrative tribunals and that, with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions. The evolution also confirms that expert tribunals should play a primary role in determining *Charter* issues that fall within their specialized jurisdiction and that in exercising their statutory functions, administrative tribunals must act consistently with the *Charter* and its values.

Moreover, the jurisprudential evolution affirms the practical advantages and the constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals. Any scheme favouring bifurcation is, in fact, inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including

constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction.

A merger of the three distinct constitutional streams flowing from this Court's administrative law jurisprudence calls for a new approach that consolidates this Court's gradual expansion of the scope of the *Charter* and its relationship with administrative tribunals. When a *Charter* remedy is sought from an administrative tribunal, the initial inquiry should be whether the tribunal can grant *Charter* remedies generally. The answer to this question flows from whether the administrative tribunal has the jurisdiction, explicit or implied, to decide questions of law. If it does, and unless the legislature has clearly demonstrated its intent to withdraw the *Charter* from the tribunal's authority, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate. The tribunal is, in other words, a court of competent jurisdiction under s. 24(1) of the *Charter*. This approach has the benefit of attributing *Charter* jurisdiction to a tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether the tribunal is a court of competent jurisdiction.

Once the initial inquiry has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought given its statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent, namely, whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations include the tribunal's statutory mandate and function.

In this case, C seeks certain *Charter* remedies from the Board. The first inquiry, therefore, is whether the Board is a court of competent jurisdiction under s. 24(1). The answer to this question depends on whether the Board is authorized to decide questions of law. The Board is a quasi-judicial body with significant authority over a vulnerable population. It operates under Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory

jurisdiction over the treatment, assessment, detention and discharge of NCR patients: accused who have been found not criminally responsible by reason of mental disorder. Part XX.1 of the *Criminal Code* provides that any party to a review board hearing may appeal the board's disposition on a question of law, fact or mixed fact and law. The *Code* also authorizes appellate courts to overturn a review board's disposition if it was based on a wrong decision on a question of law. This statutory language is indicative of the Board's authority to decide questions of law. Given this conclusion, and since Parliament has not excluded the *Charter* from the Board's mandate, it follows that the Board is a court of competent jurisdiction for the purpose of granting remedies under [s. 24\(1\)](#) of the *Charter*.

The next question is whether the remedies sought are the kinds of remedies which would fit within the Board's statutory scheme. This requires consideration of the scope and nature of the Board's statutory mandate and functions. The review board regime is intended to reconcile the "twin goals" of protecting the public from dangerous offenders and treating NCR patients fairly and appropriately. Based on the Board's duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, it is clear that Parliament intended that dangerous NCR patients have no access to absolute discharges. C cannot, therefore, obtain an absolute discharge from the Board. The same is true of C's request for a treatment order. Allowing the Board to prescribe or impose treatment is expressly prohibited by [s. 672.55](#) of the *Criminal Code*. Finally, neither the validity of C's complaint about the location of his room nor, obviously, the propriety of his request for an order prohibiting the mental health centre from housing him near a construction site, have been considered by the Board. It may well be that the substance of C's complaint can be fully addressed within the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If so, resort to [s. 24\(1\)](#) of the *Charter* may not add to the Board's capacity to either address the substance of C's complaint or provide appropriate redress.

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Considered: *Mills v. The Queen*, [1986 CanLII 17 \(SCC\)](#), [1986] 1 S.C.R. 863; *Carter v. The Queen*, [1986 CanLII 18 \(SCC\)](#), [1986] 1 S.C.R. 981; *Weber v. Ontario Hydro*, [1995 CanLII 108 \(SCC\)](#), [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, [1996 CanLII 254 \(SCC\)](#), [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, [2001 SCC 81](#), [2001] 3 S.C.R. 575; *Slaight Communications Inc. v. Davidson*, [1989 CanLII 92 \(SCC\)](#), [1989] 1 S.C.R. 1038; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990 CanLII 63 \(SCC\)](#), [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991 CanLII 57 \(SCC\)](#), [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991 CanLII 12 \(SCC\)](#), [1991] 2 S.C.R. 22; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003 SCC 54](#), [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, [2003 SCC 55](#), [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004 SCC 40](#), [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, [2005 SCC 16](#), [2005] 1 S.C.R. 257; *Cooper v. Canada (Human Rights Commission)*, [1996 CanLII 152 \(SCC\)](#), [1996] 3 S.C.R. 854; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000 SCC 14](#), [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004 SCC 39](#), [2004] 2 S.C.R. 185; *Vaughan v. Canada*, [2005 SCC 11](#), [2005] 1 S.C.R. 146; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999 CanLII 694 \(SCC\)](#), [1999] 2 S.C.R. 625; *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006 SCC 7](#), [2006] 1 S.C.R. 326; **referred to:** *Argentina v. Mellino*, [1987 CanLII 49 \(SCC\)](#), [1987] 1 S.C.R. 536; *United States v. Allard*, [1987 CanLII 50 \(SCC\)](#), [1987] 1 S.C.R. 564; *R. v. Rahey*, [1987 CanLII 52 \(SCC\)](#), [1987] 1 S.C.R. 588; *R. v. Gamble*, [1988 CanLII 15 \(SCC\)](#), [1988] 2 S.C.R. 595; *R. v. Smith*, [1989 CanLII 12 \(SCC\)](#), [1989] 2 S.C.R. 1120; *R. v. Hynes*, [2001 SCC 82](#), [2001] 3 S.C.R. 623; *R. v. Menard*, [2008 BCCA 521](#), 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family & Community Service) v. L. (T.)*, [2009 BCPC 293](#), 73 R.F.L. (6th) 455, aff'd [2010 BCSC 105 \(CanLII\)](#); *Dagenais v. Canadian Broadcasting Corp.*, [1994 CanLII 39 \(SCC\)](#), [1994] 3 S.C.R. 835; *Eaton v. Brant County Board of Education*, [1997 CanLII 366 \(SCC\)](#), [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, [1997 CanLII](#)

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APPEAL from a judgment of the Ontario Court of Appeal (Simmons, Armstrong and Lang JJ.A.), [2008 ONCA 326](#), 90 O.R. (3d) 335, 293 D.L.R. (4th) 729, 235 O.A.C. 341, 231 C.C.C. (3d) 429, 169 C.R.R. (2d) 314, [2008] O.J. No. 1588 (QL), 2008 CarswellOnt 2352, allowing in part an appeal from a decision of the Ontario Review Board. Appeal dismissed.

Marlys A. Edwardh, Delmar Doucette, Jessica Orkin and Michael Davies, for the appellant.

Hart M. Schwartz and Amanda Rubaszek, for the respondent Her Majesty the Queen.

Janice E. Blackburn and Ioana Bala, for the respondent the Person in charge of the Centre for Addiction and Mental Health.

Simon Fothergill, for the intervener the Attorney General of Canada.

Stephen J. Moreau and Elichai Shaffir, for the intervener the Ontario Review Board.

Paul Burstein and Anita Szigeti, for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition.

Joseph J. Arvay, Q.C., Mark G. Underhill and Alison Latimer, for the intervener the British Columbia Review Board.

Cheryl Milne, for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights.

David W. Mossop, Q.C., and Diane Nielsen, for the intervener the Community Legal Assistance Society.

The judgment of the Court was delivered by

[1] ABELLA J. — The specific issue in this appeal is the remedial jurisdiction of the Ontario Review Board under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The wider issue is the relationship between the *Charter*, its remedial provisions and administrative tribunals generally.

[2] There are two provisions in the *Charter* dealing with remedies: s. 24(1) and s. 24(2). Section 24(1) states that anyone whose *Charter* rights or freedoms have been infringed or denied may apply to a “court of competent jurisdiction” to obtain a remedy that is “appropriate and just in the circumstances”. Section 24(2) states that in those proceedings, a court can exclude evidence obtained in violation of the *Charter* if its admission would bring the administration of justice into disrepute. A constitutional remedy is also available under s. 52(1) of the *Constitution Act, 1982*, which states that the Constitution is the supreme law of Canada, and that any law inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

[3] When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was a *tabula rasa*. It was not long, however, before various dimensions of the relationship found their way to this Court.

[4] The first relevant wave of cases started in 1986 with *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863. The philosophical legacy of *Mills* was in its conclusion that for the purposes of s. 24(1) of the *Charter*, a “court of competent jurisdiction” was a “court”

with jurisdiction over the person, the subject matter, and the remedy sought. For the next 25 years, this three-part test served as the grid for determining whether a court or administrative tribunal was a “court of competent jurisdiction” under s. 24(1) of the *Charter* (*Carter v. The Queen*, 1986 CanLII 18 (SCC), [1986] 1 S.C.R. 981; *Argentina v. Mellino*, 1987 CanLII 49 (SCC), [1987] 1 S.C.R. 536; *United States v. Allard*, 1987 CanLII 50 (SCC), [1987] 1 S.C.R. 564; *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588; *R. v. Gamble*, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595; *R. v. Smith*, 1989 CanLII 12 (SCC), [1989] 2 S.C.R. 1120; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (“*Dunedin*”); *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *R. v. Menard*, 2008 BCCA 521, 240 C.C.C. (3d) 1; *British Columbia (Director of Child, Family & Community Service) v. L. (T.)*, 2009 BCPC 293, 73 R.F.L. (6th) 455, aff’d 2010 BCSC 105 (CanLII)).

[5] The second wave started in 1989 with *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038. Although *Slaight* did not — and does not — offer any direct guidance on what constitutes a “court of competent jurisdiction”, its legacy was in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values (*Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, at p. 875; *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 53-56; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 38-40; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 22; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383, at paras. 20-24).

[6] The third and final wave started in 1990 with *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, followed in 1991 by *Cuddy Chicks*

Ltd. v. Ontario (Labour Relations Board), 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5, and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22. The legacy of these cases — the *Cuddy Chicks* trilogy — is in their conclusion that specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257).

[7] The impact of these three jurisprudential waves has been to confine constitutional issues for administrative tribunals to three discrete universes. It seems to me that after 25 years of parallel evolution, it is time to consider whether the universes can appropriately be merged.

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Background

[8] Paul Conway is 56 years old. As a child, he was physically and sexually abused by close relatives. During his twenties, Mr. Conway was twice convicted of assault.

[9] In September 1983, at the age of 29, Mr. Conway threatened his aunt at knife point and forced her to have sexual intercourse with him repeatedly over the course of a few hours. On February 27, 1984, Mr. Conway was found not guilty by reason of insanity on a charge of sexual assault with a weapon.

[10] Since the verdict, Mr. Conway has been detained in mental health facilities across Ontario, primarily the Penetanguishene Mental Health Centre's maximum security unit. He has been diagnosed with an unspecified psychotic disorder, a mixed personality disorder with paranoid, borderline and narcissistic features, potential post traumatic stress disorder and potential paraphilia.

[11] In 2005, following Mr. Conway's mandatory annual review hearing before the Ontario Review Board, the Board transferred Mr. Conway from Penetanguishene to Toronto's Centre for Addiction and Mental Health ("CAMH"), a medium security facility. The Board observed that although Mr. Conway was "unconvinced that he suffers from a mental illness" and was "uncured", his treatment required that he have hope of eventually being integrated into the community.

[12] Prior to his annual review hearing in 2006, Mr. Conway sent a Notice of Constitutional Question to the Board, CAMH, and the Attorneys General of Ontario and Canada, alleging breaches of ss. 2(b), 2(d), 7, 8, 9, 12 and 15(1) of the *Charter*. He listed the following grounds as the basis of the claim that his constitutional rights had been violated and that he was therefore entitled to an absolute discharge under s. 24(1):

Mr. Conway states that there is little regard for the living conditions under which he is detained and that these factors have a negative impact on his mental and physical health. These conditions include:

- a. Construction noise, fumes and dust associated with the renovation of the unit directly below him which affect his peace, tranquillity and convalescence;
- b. Failure to respect his rights, individuality, and expressions of same;
- c. Interruptions by staff of his telephone calls and unnecessary and improper implementation of call restrictions including when he is speaking with legal counsel;
- d. Unfair treatment by staff which manifests in differential treatment towards him compared with other NCR accused individuals detained on the unit; and
- e. Failure to provide for his needs and advocacy for his expressed needs;

...

Mr. Conway is currently incarcerated and is subject to infringements on his liberty, safety, dignity and security of his person without due process of the law, including:

- a) environmental pollution;
- b) noise pollution;
- c) arbitrary actions by staff;
- d) threats of attack and attacks by inpatients;
- e) hostility by staff against him;
- f) threats of the use of chemical and mechanical restraints;
- g) failure to provide emotional counselling for the abuse suffered by Mr. Conway as a child (including emotional, physical, sexual and domestic abuse) which is the real source of Mr. Conway's mental health problems and emotional distress;
- h) failure to provide an environment which allows him to feel safe on a daily basis;
- i) failure to provide an environment where the Rule of Law prevails;
- j) failure to provide an environment where Mr. Conway is afforded procedural fairness in respect of any restriction of his liberties;
- k) failure to provide an environment which is free of racism;
- l) failure to provide [an] environment which is cross-culturally sensitive; and
- m) such other and further infringements and violations as counsel may advise and the Board may permit;

These violations on Mr. Conway's rights have affected Mr. Conway such that he no longer can benefit therapeutically from the environment.

[13] After an eight-day hearing, the five-member panel of the Ontario Review Board unanimously concluded that Mr. Conway was "an egocentric, impulsive bully with a poor to absent ability to control his own behaviour", had continued paranoid and delusional ideation, and had a persistent habit of threatening and intimidating others, high actuarial scores for violent recidivism and an untreated clinical condition.

[14] He was consequently found to be a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under the statute, which states that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54). Accordingly, Mr. Conway was ordered to remain at CAMH. The Board suggested,

but did not formally order, that CAMH establish a “renewed treating team” for Mr. Conway, enrol him in anger management and sexual assault prevention programs, and investigate whether he had sustained brain damage in a car accident more than 30 years ago.

[15] As for Mr. Conway’s application for a remedy under s. 24(1) of the *Charter*, the Board concluded that it had no *Charter* jurisdiction in light of its statutory structure and function, its own past rulings, and those of other Canadian review boards denying s. 24(1) jurisdiction. It therefore had no jurisdiction to consider Mr. Conway’s *Charter* claims.

[16] Mr. Conway appealed to the Ontario Court of Appeal, which unanimously found that an absolute discharge was not an available remedy for Mr. Conway under s. 24(1) (2008 ONCA 326, 90 O.R. (3d) 335). Armstrong J.A. for the majority concluded that the Board lacked jurisdiction to grant an absolute discharge as a *Charter* remedy because granting such a remedy to a patient who, like Mr. Conway, was a significant threat to the public, would frustrate Parliamentary intent. The Board was therefore not a court of competent jurisdiction pursuant to the test set out in *Mills* since it lacked jurisdiction over the particular remedy sought. Lang J.A. agreed that an absolute discharge was unavailable to Mr. Conway, but she was of the view that the Board was competent to make other orders that would be appropriate remedies for a breach of a patient’s *Charter* rights.

[17] Notably, the Court of Appeal also unanimously concluded that it was unreasonable for the Board not to make a formal order setting out conditions addressing the treatment impasse plaguing Mr. Conway’s detention. This issue was remitted back to the Board.

[18] This Court, in order to decide whether Mr. Conway is entitled to the *Charter* remedies he is seeking, must first determine whether the Ontario Review Board is a court of competent jurisdiction which can grant *Charter* remedies under s. 24(1). In accordance with the new approach developed in these reasons, I am of the view that it is. On the other hand, I am not persuaded that Mr. Conway is entitled to the particular *Charter* remedies he seeks and would therefore dismiss the appeal.

Analysis

[19] Section 24(1) states:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[20] We do not have one *Charter* for the courts and another for administrative tribunals (*Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, *per* McLachlin J. (in dissent), at para. 70; *Dunedin; Douglas College; Martin*). This truism is reflected in this Court's recognition that the principles governing remedial jurisdiction under the *Charter* apply to both courts *and* administrative tribunals. It is also reflected in the jurisprudence flowing from *Mills* and the *Cuddy Chicks* trilogy according to which, with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions.

[21] The jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter*

issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*.

[22] All of these developments serve to cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals. In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

[23] This approach has the benefit of attributing *Charter* jurisdiction to the tribunal as an institution, rather than requiring litigants to test, remedy by remedy, whether it is a court of competent jurisdiction. It is also an approach which emerges from a review of the three distinct constitutional streams flowing from this Court's jurisprudence. As the following review shows, this Court has gradually expanded the approach to the scope of the *Charter* and its relationship with administrative tribunals. These reasons are an attempt to consolidate the results of that expansion.

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[24] In *Mills*, it was decided that relief is available under s. 24(1) of the *Charter* if the “court” from which relief is sought has jurisdiction over the parties, the subject matter and the remedy sought. Since 1986, the *Mills* test has been consistently applied to determine whether courts and tribunals acting under specific statutory schemes are courts of competent jurisdiction to grant particular remedies under s. 24(1).

[25] The early cases considered the remedial jurisdiction of statutory and superior courts. In *Mills* and *Carter*, this Court held that a provincial court judge sitting as a preliminary inquiry court was not a court of competent jurisdiction for the purpose of ordering a stay of proceedings for an alleged s. 11(b) violation. The following year, this Court concluded that extradition judges had the same institutional features as preliminary inquiry judges, and could therefore not order a stay in the event of a *Charter* breach (*Mellino*; *Allard*). Further, in *Mellino*, the Court observed that since extradition proceedings were reviewable by superior courts by way of *habeas corpus*, those superior courts were the courts of competent jurisdiction to grant a stay under s. 24(1), not the extradition judge.

[26] In 1988, in *Gamble*, the Court held that a superior court in the province where an individual is in custody is a court of competent jurisdiction to hear an application for *habeas corpus*, stating:

Where the courts of Ontario have jurisdiction over the subject matter and the person, it seems to me that they may, under the broad provisions of s. 24(1) of the *Charter*, grant such relief as it is within their jurisdiction to grant and as they consider appropriate and just in the circumstances. [p. 631]

[27] In 1995, in *Weber*, the Court expanded the scope of the *Mills* inquiry to cover administrative tribunals. The issue was whether a labour arbitrator appointed under the *Labour Relations Act*, R.S.O. 1990, c. L.2, was a court of competent jurisdiction for the purpose of granting damages and a declaration under s. 24(1) in relation to disputes which in their essential character arose out of the collective agreement between the parties. Weber had sought relief for what he alleged were breaches of ss. 7 and 8 of the *Charter* committed by his employer, Ontario Hydro, who had gathered surveillance evidence about him during his extended sick leave. The Court had to determine whether Weber was required to raise his *Charter* claims before a labour arbitrator or before the superior court.

[28] For the majority, McLachlin J. rejected an approach that would bifurcate the proceedings between the arbitrator and the courts. In her view, the “essential character” of Weber’s claim was unfair treatment by the employer. The collective agreement expressly stated that the grievance procedure applied to “[a]ny allegation that an employee has been subjected to unfair treatment”. Weber’s *Charter* claims were therefore found to be within the arbitrator’s exclusive jurisdiction:

[W]hile the informal processes of such tribunals might not be entirely suited to dealing with constitutional issues, clear advantages to the practice exist. Citizens are permitted to assert their *Charter* rights in a prompt, inexpensive, informal way. The parties are not required to duplicate submissions on the case in two different fora, for determination of two different legal issues. A specialized tribunal can quickly sift the facts and compile a record for the reviewing court. And the specialized competence of the tribunal may provide assistance to the reviewing court.

...

... it is not the name of the tribunal that determines the matter, but its powers. ...
The practical import of fitting *Charter* remedies into the existing system of tribunals, as McIntyre J. notes [in *Mills*], is that litigants have “direct” access to *Charter* remedies in the tribunal charged with deciding their case. [paras. 60 and 65]

[29] Foreshadowing the debate that is before us in this case, Iacobucci J. in dissent, expressed the view that the arbitrator was neither a “court” nor of “competent jurisdiction” for the purpose of granting *Charter* remedies under s. 24(1). In his view, Weber was entitled to seek labour remedies from the arbitrator, but not those under the *Charter*.

[30] The *Weber* “exclusive jurisdiction model” enunciated by McLachlin J., which directed that an administrative tribunal should decide *all* matters whose essential character falls within the tribunal’s specialized statutory jurisdiction, is now a well-established principle of administrative law (*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Quebec (Human Rights Tribunal)*; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146; *Okwuobi*; Andrew K. Lokan and Christopher M. Dassios, *Constitutional Litigation in Canada* (2006), at p. 4-15).

[31] The next year, this Court decided *Mooring*. The issue was whether the National Parole Board was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Sopinka J., writing for the majority, considered only the third step of the *Mills* test since he found it to be determinative. In his view, it followed from the Parole Board’s structure and function, as well as the language of its enabling statute, that the Board could not exclude evidence under s. 24(2) of the *Charter*. Pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, the Board was not bound by the traditional rules of evidence and was obliged to consider all available, relevant information when rendering its decisions. The ability to exclude evidence would have been, in Sopinka J.’s view, inconsistent with the intent and specific provisions of the Parole Board’s statutory scheme. Since the *Mills* test was ultimately a means of discerning Parliamentary intent, this inconsistency precluded the Board from being a court of competent jurisdiction for the purpose of granting the particular remedy sought. Sopinka J.

concluded instead that the Parole Board's "duty of fairness" obligations offered sufficient protection to those appearing before the Board.

[32] Major J. (McLachlin J. concurring), in a vigorous dissent, criticized the majority's implicit resurrection of the idea, rejected in *Weber*, that only courts could be "courts of competent jurisdiction" for the purpose of s. 24(1). Major J. was of the view that the policy considerations animating the Court's reasoning under s. 52 in the *Cuddy Chicks* trilogy applied equally in cases arising under s. 24(1). He felt that "[o]f primary importance is the ability of the citizen to rely upon and assert *Charter* rights in a direct manner in the normal procedural context in which the issue arises" (para. 61). As he explained:

There is no reason in principle why any of the practical advantages enunciated by La Forest J. in the trilogy should apply with any less force to a tribunal granting a remedy under s. 24 than to a tribunal declining to enforce a constitutionally invalid statutory provision. If anything, tailoring a specific *Charter* remedy for a specific applicant before a tribunal is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise. It has less serious ramifications than determining that a statutory provision will not be applied on *Charter* grounds. [para. 64]

[33] Turning to the *Mills* test, Major J. concluded that the only real question before the Court was whether the Parole Board was a court of competent jurisdiction for the purpose of awarding the specific remedy sought by the applicant, namely the exclusion of evidence. While the Parole Board was not bound by formal rules of evidence, it was nonetheless obliged to exclude information that was irrelevant, unreliable or inaccurate. Accordingly, the Board had the jurisdiction to exclude evidence and it therefore met the third *Mills* criterion. Major J. expressly disagreed with Sopinka J.'s conclusion that the doctrine of procedural fairness provided sufficient protection of constitutional rights in the context of the Board's proceedings.

[34] More recently, the Court has had two further opportunities to consider the *Mills* test. In *Dunedin*, the issue was whether a provincial court judge with jurisdiction under [Ontario's Provincial Offences Act](#), R.S.O. 1990, c. P.33, was a court of competent jurisdiction for the purpose of ordering costs against the Crown for failure to comply with the [Charter](#). McLachlin C.J., writing for a unanimous Court, again confirmed that applying the *Mills* test is, first and foremost, a matter of discerning legislative intent. The question in each case is whether the legislature intended to give the court or tribunal the power to apply the *Charter*:

[W]here a legislature confers on a court or tribunal a function that involves the determination of matters where [Charter](#) rights may be affected, and furnishes it with processes and powers capable of fairly and justly resolving those incidental *Charter* issues, then it must be inferred, in the absence of a contrary intention, that the legislature intended to empower the tribunal to apply the *Charter*. [para. 75]

[35] This approach “promotes direct and early access to [Charter](#) remedies in forums competent to issue such relief” (para. 75). Applying it to the issue before her, McLachlin C.J. concluded that both the structure and function of the provincial offences court supported the view that it could and should apply the *Charter*. Looking first to function, McLachlin C.J. concluded that the provincial offences court’s role as a quasi-criminal court of first instance weighed strongly in favour of expansive remedial jurisdiction under [s. 24](#) of the *Charter*. Such jurisdiction would promote the resolution of *Charter* issues in the forum best situated to resolve them:

Provincial offences courts, like other criminal trial courts, are the preferred forum for issuing [Charter](#) remedies in the cases originating before them, where they will have the “fullest account of the facts available” This role commends a full complement of criminal law remedies at the disposal of provincial offences courts. This broad

remedial jurisdiction is necessary to prevent frequent resort to superior courts to fill gaps in statutory jurisdiction, and to ensure that the remedy that ultimately flows is in fact both appropriate and just. [para. 79]

[36] McLachlin C.J. also sought, as she had in *Weber*, to avoid the unnecessary bifurcation of avenues of relief:

[F]racturing the availability of *Charter* remedies between provincial offences courts and superior courts could, in some circumstances, effectively deny the accused access to a remedy and a court of competent jurisdiction. It may be unrealistic to expect criminal accused, who often rely on legal aid to mount a defence against the state, to bring a separate action in the provincial superior court to recover the costs arising from the breach of their *Charter* rights. This option, while available in theory, may far too often prove illusory in practice. [para. 82]

[37] McLachlin C.J. then considered the structure of the provincial offences court. She concluded that since criminal and quasi-criminal proceedings are structurally indistinguishable, the criminal courts' jurisdiction to grant costs in the event of a *Charter* breach extends to the quasi-criminal courts. The *Provincial Offences Act* disclosed no contrary intention. McLachlin C.J. ultimately concluded that since the legislature gave the provincial offences court functions destined to attract *Charter* issues and *Charter* remedies, the legislature must have intended that it be able to deal with related *Charter* issues.

[38] In the companion case of *Hynes*, the issue was whether a preliminary inquiry court was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*. Again, only the third step of the *Mills* test was considered, and again the tension on

display in *Weber* and *Mooring* was exhibited. McLachlin C.J., for the majority, reiterated the principles set out in *Dunedin* and explained that in all cases the question is

whether Parliament or the legislature intended to empower the court or tribunal to make rulings on *Charter* violations that arise incidentally to their proceedings, and to grant the remedy sought as a remedy for such violations. [para. 26]

She went on to conclude that a preliminary inquiry court was not a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2). A preliminary inquiry's primary function was, in her view, to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. Empowering a preliminary inquiry judge to exclude evidence under the *Charter* would jeopardize the inquiry's expeditious nature. The criminal trial courts were better suited to the task of determining whether to exclude evidence.

[39] Major J., writing in dissent for four judges, agreed that only the third step of the *Mills* test was at issue but disagreed with the majority as to the result. He noted that preliminary inquiry judges were authorized to exclude evidence under the common law confessions rule. It was not, therefore, supportable by "logic or efficiency to permit a preliminary inquiry justice to determine the admissibility of statements for common law purposes, but not for *Charter* purposes, when it is recognized that preliminary inquiry justices are armed with all the facts. Parliament could not have intended such waste" (para. 96). Accordingly, in his view, a preliminary inquiry judge was competent to exclude evidence under s. 24(2).

[40] This review of *Mills*' progeny gives rise to three observations. First, this Court has accepted that the *Mills* test applies to courts as well as to administrative tribunals. Second, although *Mills* set out a three-pronged definition of "court of competent jurisdiction", the first two steps have almost never been relied on. Twenty-five years later, "jurisdiction over the parties" and

“jurisdiction over the subject matter” remain undefined for the purposes of the test. The inquiry has almost always turned on whether the court or tribunal had jurisdiction to award the *particular* remedy sought under s. 24(1). In other words, the inquiry is less into whether the adjudicative body is institutionally a court of competent jurisdiction, and more into whether it is a court of competent jurisdiction *for the purposes of granting a particular remedy*. Third, while there appears to be agreement that s. 24(1) jurisdiction is a function of legislative intent, the authoritative comments of the majorities in *Weber* and *Dunedin*, eschewing bifurcated proceedings and heralding early and accessible adjudication of *Charter* applications, may have been slightly unmoored by the majority in *Mooring*.

The Slaight Cases

[41] The cases flowing from *Slaight*, while of no direct assistance on what constitutes a court of competent jurisdiction, are of interest as they too show how the Court increasingly came to expand the application of the *Charter* in the administrative sphere. In 1989, *Slaight* established that any exercise of statutory discretion must comply with the *Charter* and its values. The issue was whether an adjudicator appointed under the *Canada Labour Code*, R.S.C. 1970, c. L-1, had the authority to order an employer to write a content-restricted reference letter for an employee and to limit the employer’s response to any inquiries about the employee to the comments in the letter. The employer argued that such an order violated s. 2(b) of the *Charter*. This Court agreed that the employer’s s. 2(b) rights were violated, but a majority concluded that the arbitrator’s order was justified under s. 1 of the *Charter*.

[42] Lamer J. explained that it was “not . . . open to question” that the adjudicator’s orders were subject to the *Charter*:

The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. . . . Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. [Emphasis in original; pp. 1077-78.]

[43] *Slaight* was applied in 1994 in *Dagenais*, where Lamer C.J. (for the majority on this issue) said that a judge's discretion to order a publication ban was subject to the *Slaight* principle. He concluded that the judge's discretion could not be open-ended or exercised arbitrarily, and had to be "exercised within the boundaries set by the principles of the *Charter*" (p. 875). Exceeding those boundaries would result in a reversible error of law (see also *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188).

[44] In the 1997 case of *Eaton*, the Ontario Special Education Tribunal, acting pursuant to the *Education Act*, R.S.O. 1990, c. E.2, had ordered that Emily Eaton, a child with cerebral palsy, be placed in a special classroom for students with disabilities. The Eatons alleged discrimination, arguing that their daughter's education should take place in the mainstream schools. Lamer C.J. wrote brief reasons to clarify what he had said in *Slaight*:

[S]tatutory silences should be read down to not authorize breaches of the *Charter*, unless this cannot be done because such an authorization arises by necessary

implication. I developed this principle in the context of administrative tribunals which operate pursuant to broad grants of statutory powers, and which can potentially violate *Charter* rights. Whatever section of the Act or of Regulation 305, R.R.O. 1990, grants the authority to the Tribunal to place students like Emily Eaton . . . *Slaight Communications* would require that any open-ended language in that provision (if there were any) be interpreted so as to not authorize breaches of the *Charter*. [para. 3]

[45] In the 1997 case of *Eldridge*, the Court was asked to assess the constitutionality of certain aspects of British Columbia's health care delivery scheme. The issue was whether the *Charter* applied to the Medical Services Commission's decision not to provide sign language interpreters for the deaf as part of a publicly funded scheme for the provision of medical care. La Forest J., writing for a unanimous Court, said that the basic principle derived from *Slaight* was that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so (para. 35). The provincial government had delegated to the Medical Services Commission the power to decide whether a service was a "benefit" under the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76, and to define what constitutes a "medically required" service for the purpose of the provincial health insurance program. When exercising this discretion, the Commission was acting in a governmental capacity and was therefore subject to the *Charter*.

[46] In 1999, the Court decided *Baker*, a judicial review of the exercise of statutory discretion by an immigration officer pursuant to the *Immigration Act*, R.S.C. 1985, c. I-2. L'Heureux-Dubé J., relying on *Slaight* and *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, among others, concluded that statutory discretion must be exercised in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter* (paras. 53 and 56).

[47] The following year, in *Blencoe*, the Court was asked to determine whether the provincial Human Rights Commission was subject to the *Charter*. Bastarache J., writing for the majority, explained that *Slaight* guaranteed that statutory bodies like the Commission are bound by the *Charter* even if they are independent of the government and/or exercising adjudicatory functions:

The facts in *Slaight* and the case at bar share at least one salient feature: the labour arbitrator (in *Slaight*) and the Commission (in the case at bar) each exercise governmental powers conferred upon them by a legislative body. The ultimate source of authority in each of these cases is government. All of the Commission's powers are derived from the statute. The Commission is carrying out the legislative scheme of the *Human Rights Code*. It is putting into place a government program or a specific statutory scheme established by government to implement government policy The Commission must act within the limits of its enabling statute. There is clearly a "governmental quality" to the functions of a human rights commission which is created by government to promote equality in society generally.

Thus, notwithstanding that the Commission may have adjudicatory characteristics, it is a statutory creature and its actions fall under the authority of the *Human Rights Code*. The state has instituted an administrative structure, through a legislative scheme, to effectuate a governmental program to provide redress against discrimination. It is the administration of a governmental program that calls for *Charter* scrutiny. Once a complaint is brought before the Commission, the subsequent administrative proceedings must comply with the *Charter*. These entities are subject to *Charter* scrutiny in the performance of their functions just as government would be in like circumstances. To hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny. The above analysis leads inexorably to the conclusion that the *Charter* applies to the actions of the Commission. [paras. 39-40]

The majority ultimately concluded that Blencoe's *Charter* rights had not been infringed.

[48] Finally, in 2006, in *Multani*, the Court considered whether a decision of a school board's council of commissioners prohibiting one of its students from wearing a kirpan at school infringed the student's freedom of religion. Charron J., writing for the majority and relying on *Slaight*, explained:

The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker. [para. 22]

The Cuddy Chicks Trilogy

[49] While the courts and tribunals were preoccupied with the proper application of the principles in *Mills* and *Slaight*, another line of authority regarding the constitutional jurisdiction of statutory tribunals was emerging. These cases dealt with whether administrative tribunals could decide the constitutionality of the provisions of their own statutory schemes and decline to apply them because they are “of no force or effect” under s. 52(1) of the *Constitution Act, 1982*. The first case was *Douglas College*, in which two Douglas College employees challenged the mandatory retirement provision in their collective agreement, claiming that it was contrary to s. 15(1) of the *Charter*. The primary issue was whether a labour arbitrator, governed by the *Industrial Relations Act*, R.S.B.C. 1979, c. 212, and appointed under the parties' collective agreement, had the jurisdiction to determine the collective agreement's constitutionality.

[50] La Forest J., writing for the Court on this issue, concluded that the jurisdiction lay with the arbitrator. Under the *Industrial Relations Act*, the arbitrator had express authority to “provide a final and conclusive settlement of a dispute”. To fulfill this mandate, arbitrators acting

under the Act could interpret and apply any statute that regulated employment. This included the *Charter*. La Forest J. noted that arbitrators were bound by the same Constitution as the courts. Accordingly, if a collective agreement was illegal or unconstitutional, an arbitrator must decline to apply it just as a court would.

[51] La Forest J. rejected the College's argument that the informal arbitration process was unsuited to litigating a *Charter* issue, concluding that any disadvantages of allowing administrative tribunals to decide constitutional questions were outweighed by the "clear advantages" of granting them this jurisdiction. In his view, such jurisdiction promotes respect for the Constitution because "[t]he citizen, when appearing before decision-making bodies set up to determine his or her rights and duties, should be entitled to assert the rights and freedoms guaranteed by the Constitution" (p. 604). Constitutional issues should be raised at an early stage in the context in which they arise, without the claimant having to first resort to an application in superior court, which is more expensive and time-consuming than the administrative process. In addition, a "specialized competence can be of invaluable assistance in constitutional interpretation" (p. 605). Specialized arbitrators and agencies can sift through the facts and quickly compile a record for the benefit of a reviewing court. In this way, the parties (and the reviewing courts) benefit from the arbitrators' expertise. This practice also allows for all related aspects of a matter to be dealt with by the most appropriate decision maker. As La Forest J. pointed out, "it would be anomalous if tribunals responsible for interpreting the law on the issue were unable to deal with the issue in its entirety, subject to judicial review" (p. 599).

[52] In 1991, *Cuddy Chicks* established that the Ontario Labour Relations Board could determine the constitutionality of a provision which excluded agricultural workers from the protections of Ontario's *Labour Relations Act*, R.S.O. 1980, c. 228. The issue arose out of an application by the union for the certification of Cuddy Chicks' hatchery employees. The union

challenged the constitutional validity of this exclusion, arguing that it violated ss. 2(d) and 15 of the *Charter*, and sought to have it declared to be of no force and effect pursuant to s. 52(1).

[53] In rejecting the employer's argument that the superior court, not the Labour Board, should deal with the constitutional question, and drawing on his reasons in *Douglas College*, La Forest J.'s "overarching consideration" was that where administrative bodies like the Labour Board have specialized expertise, that expertise makes them the appropriate forum for assessing *Charter* compliance:

It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(b) of the *Labour Relations Act*. [Emphasis added; p. 18.]

[54] After citing a number of cases in which labour boards were found to have the jurisdiction to consider constitutional questions relating to their own jurisdiction, such as *Four B Manufacturing Ltd. v. United Garment Workers of America*, 1979 CanLII 11 (SCC), [1980] 1 S.C.R. 1031, La Forest J. observed:

What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations

have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a natural progression of a well established principle. [Emphasis added; p. 19.]

[55] La Forest J. ultimately concluded that it was within the Board's jurisdiction to consider the constitutionality of its enabling statute since it had the express authority to consider questions of law under the statute.

[56] In *Tétreault-Gadoury*, Ms. Tétreault-Gadoury lost her job shortly after her 65th birthday and applied for unemployment insurance benefits. The Employment and Immigration Commission denied her application because, under s. 31 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, a person over 65 was only entitled to a lump sum retirement benefit. Ms. Tétreault-Gadoury appealed the Commission's decision to a Board of Referees, arguing that s. 31 of the Act offended s. 15(1) of the *Charter*. The Board declined to rule on the constitutional question. Rather than appeal to an umpire as directed by the Act, Ms. Tétreault-Gadoury appealed to the Federal Court of Appeal, which concluded that s. 31 of the *Unemployment Insurance Act, 1971* was contrary to s. 15 of the *Charter*.

[57] On appeal, La Forest J., again writing for the Court on the jurisdictional issue, reiterated the principle that an administrative tribunal with the authority to interpret or apply the law is entitled to determine whether a particular statutory provision is unconstitutional. The *Unemployment Insurance Act, 1971* expressly conferred the jurisdiction to consider questions of law on the umpires, not the Board of Referees. This meant that under the legislative scheme, umpires, not the Referees, were authorized to resolve constitutional issues.

[58] In 1996, the constitutional jurisdiction of another statutory body — the Canadian Human Rights Commission — came under scrutiny in *Cooper*. Two airline pilots filed a human rights complaint with the Commission alleging that the mandatory retirement provision in their collective agreement was discriminatory. [Section 15\(c\)](#) of the [Canadian Human Rights Act](#), R.S.C. 1985, c. H-6, permitted the imposition of mandatory retirement if the age set was the “normal age of retirement for employees . . . in [similar] positions”. The complainants challenged the constitutionality of s. 15(c). The issue before the Court was whether the Commission and, in turn, a tribunal appointed by the Commission to hear a complaint, had the power to assess the constitutionality of a provision of the *Canadian Human Rights Act*.

[59] *Cooper*, decided in the same year as *Mooring*, highlighted the conceptual debate in this Court as to the constitutional jurisdiction of administrative tribunals. La Forest J., writing for the majority, again confirmed that if a tribunal has the power to consider questions of law, then it “must be able to address constitutional issues” (para. 46). The Commission, however, lacked statutory authority to decide questions of law. While it was entitled to interpret and apply its enabling statute, this limited legal jurisdiction was insufficient to establish that the Commission could consider general questions of law.

[60] La Forest J. reached the same conclusion with respect to a human rights tribunal. While a tribunal could consider general legal and constitutional questions, “logic” demanded that it lacked the ability to assess the constitutionality of the [Canadian Human Rights Act](#) (para. 66). The tribunals lacked expertise; any gain in efficiency would be lost through the inevitable judicial review of a tribunal’s constitutional determinations; the tribunals’ loose evidentiary rules were unsuited to constitutional litigation; and constitutional matters would bog down the human rights system, which was intended to provide for efficient and timely adjudication of complaints.

[61] Lamer C.J. concurred with La Forest J., but wrote separate reasons urging the Court to abandon the principles set out in the *Cuddy Chicks* trilogy. In his view, the principles enunciated in those cases were contrary to the separation of powers and Parliamentary democracy, two fundamental principles of the Canadian Constitution.

[62] In dissent, McLachlin J. (L'Heureux-Dubé J. concurring) concluded that both the Canadian Human Rights Commission and a human rights tribunal were empowered to assess the constitutionality of the *Canadian Human Rights Act*. This result, according to McLachlin J., “best achieves the economical and effective resolution of human rights disputes and best serves the values entrenched in the *Canadian Human Rights Act* and the *Charter*” (para. 73). Like La Forest J., McLachlin J. reinforced the view expressed in the trilogy that “administrative tribunals empowered to decide questions of law may consider *Charter* questions” (para. 81), and once again confirmed that in light of the doctrine of constitutional supremacy,

[c]itizens have the same right to expect that [the *Charter*] will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the *Charter*. [para. 78]

In her view, both the Commission and the tribunals could consider whether the *Charter* renders invalid the “‘normal age of retirement’ defence”, since both bodies were empowered to decide questions of law.

[63] In *Martin*, in 2003, the Court sought to resolve the debate over the *Charter* jurisdiction of tribunals. The issue was whether s. 10B of the *Workers' Compensation Act*, S.N.S.

1994-95, c. 10, and the *Functional Restoration (Multi-Faceted Pain Services) Program Regulations*, N.S. Reg. 57/96, which precluded individuals suffering from chronic pain from receiving workers' compensation benefits, were contrary to s. 15(1) of the *Charter*. As a threshold issue, it was necessary to decide whether the Nova Scotia Workers' Compensation Appeals Tribunal had the jurisdiction to consider whether the benefits provisions of its enabling statute were constitutional.

[64] Gonthier J., writing for a unanimous Court, expressly rejected the 1996 *ratio* in *Cooper*, particularly insofar as it distinguished between limited and general questions of law and insofar as it suggested that an adjudicative function was a prerequisite for a tribunal's constitutional jurisdiction. He also expressly rejected Lamer C.J.'s contention that the *Cuddy Chicks* trilogy was inconsistent with the separation of powers and Parliamentary democracy.

[65] Instead, Gonthier J. affirmed and synthesized the main principles emerging from the trilogy. The first was the principle of constitutional supremacy, which provides that any law that is inconsistent with the Constitution is, to the extent of the inconsistency, of no force and effect. No government actor can apply an unconstitutional law, he observed, and, subject to an express contrary intention, a government agency given statutory authority to consider questions of law is presumed to have the jurisdiction to assess related constitutional questions.

[66] As a further corollary, Gonthier J. echoed the views expressed over the years by McLachlin J., Major J., La Forest J., and McIntyre J. confirming that "Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts". Explaining that this "accessibility concern" was "particularly pressing given that many administrative tribunals have exclusive initial jurisdiction over disputes relating to their enabling

legislation”, Gonthier J. concluded that “forcing litigants to refer *Charter* issues to the courts would result in costly and time-consuming bifurcation of proceedings” (para. 29).

[67] In his view, a tribunal’s factual findings and the record it compiles when considering a constitutional question are of invaluable assistance in constitutional determinations. The tribunal provides the reviewing court with the most well-informed, expert view of the issues at stake:

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. . . . The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. [para. 30, citing *Cuddy Chicks*, at pp. 16-17]

[68] Based on these principles, Gonthier J. concluded that the following determines whether it is within an administrative tribunal’s jurisdiction to subject a legislative provision to *Charter* scrutiny:

- Under the tribunal’s enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.
- Does the tribunal’s enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal’s jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

[69] Applying this approach, Gonthier J. noted that the Workers' Compensation Appeals Tribunal was explicitly authorized to "determine all questions of fact and law". Further, the Tribunal's decisions could be appealed "on any question of law". This confirmed that the Tribunal was entitled to decide legal questions which triggered the presumption that the Tribunal was authorized to decide *Charter* questions.

[70] The adjudicative nature of the Tribunal was also relevant. It was independent of the Workers' Compensation Board, could establish its own procedural rules, consider all relevant evidence, record any oral evidence for future reference, exercise powers under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372, and extend time limits for decisions when necessary. In addition, its members had been called to the bar and the Attorney General could intervene in proceedings involving constitutional questions. In his view, therefore, even if the Tribunal had lacked express authority to decide questions of law, an implied grant of authority would have been found. The legislature clearly intended to create a comprehensive scheme for resolving workers' compensation disputes. Nothing in the *Workers' Compensation Act* rebutted the presumption.

[71] Moreover, allowing the Tribunal to apply the *Charter* furthered the policy objectives of allowing courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim". It also permitted workers to "have their *Charter* rights recognized within the relatively fast and inexpensive adjudicative scheme created by the Act" rather than having to pursue separate proceedings in the courts in addition to a compensation claim before the administrative tribunal (para. 56).

[72] Gonthier J. concluded that the Workers' Compensation Board too, like the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had the same authority to decide questions of law.

[73] *Martin* was released with *Paul v. British Columbia (Forest Appeals Commission)*. Paul was charged with a breach of s. 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, which was a general prohibition against cutting Crown timber. Paul conceded that he cut the prohibited timber, but asserted that as an aboriginal person, he had a right to do so under s. 35 of the *Constitution Act, 1982*. The issue on appeal was whether the provincial Forest Appeals Commission had the authority to entertain Paul's constitutional argument.

[74] Bastarache J., writing for the Court, applied the methodology in *Martin* to determine whether the Commission was authorized to consider and apply s. 35 of the *Constitution Act, 1982*. The issue therefore was whether the enabling statute either expressly or by implication granted the Commission the jurisdiction to interpret or decide questions of law.

[75] The *Forest Practices Code* stated that any party to a proceeding before the Commission could make submissions as to fact, law and jurisdiction and could appeal a Commission's decision on a question of law or jurisdiction. These provisions made it impossible to conclude that the Commission's mandate was limited to purely factual matters, and the Court accordingly concluded that the Forest Appeals Commission was empowered to decide questions of law, including whether s. 35 of the *Constitution Act, 1982* applied.

[76] In the case of *Okwuobi*, the issue was the jurisdiction of the Administrative Tribunal of Québec to hear rights claims for minority language education under the *Charter of the French language*, R.S.Q., c. C-11, and the *Canadian Charter*. Based on *Martin* and *Paul*, the Court concluded:

As will become clear, the fact that the ATQ is vested with the ability to decide questions of law is crucial, and is determinative of its jurisdiction to apply the *Canadian Charter* in this appeal. The quasi-judicial structure of the ATQ, discussed briefly above, may be indicative of a legislative intention that constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

[77] These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

[E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiatives of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

[78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly, they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is “competent” to grant a particular remedy within the meaning of s. 24(1).

[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal’s specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

[80] If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals

are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, “[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies” (para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

[81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal’s jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

[82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal’s statutory mandate, structure and function (*Dunedin*).

Application to This Case

[83] The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an order directing CAMH to provide him with access to psychotherapy, and an order prohibiting CAMH from housing him near a construction site.

[84] The first inquiry is whether the Board is a court of competent jurisdiction. In my view, it is. The Board is a quasi-judicial body with significant authority over a vulnerable population. It is unquestionably authorized to decide questions of law. It was established by, and operates under, Part XX.1 of the *Criminal Code* as a specialized statutory tribunal with ongoing supervisory jurisdiction over the treatment, assessment, detention and discharge of those accused who have been found not criminally responsible by reason of mental disorder (“NCR patient”). Section 672.72(1) provides that any party may appeal a board’s disposition on any ground of appeal that raises a question of law, fact or mixed fact and law. Further, s. 672.78(1) authorizes an appellate court to allow an appeal against a review board’s disposition where the court is of the opinion that the board’s disposition was based on a wrong decision on a question of law. I agree with the conclusion of Lang J.A. and the submission of the British Columbia Review Board that, as in *Martin* and *Paul*, this language is indicative of the Board’s power to decide legal questions. And there is nothing in Part XX.1 of the *Criminal Code* — the Board’s statutory scheme — which permits us to conclude that Parliament intended to withdraw *Charter* jurisdiction from the scope of the Board’s mandate. It follows that the Board is entitled to decide constitutional questions, including *Charter* questions, that arise in the course of its proceedings.

[85] The question for the Court to decide therefore is whether the particular remedies sought by Mr. Conway are the kinds of remedies that Parliament appeared to have anticipated

would fit within the statutory scheme governing the Ontario Review Board. This requires us to consider the scope and nature of the Board’s statutory mandate and functions.

[86] Part XX.1 of the *Criminal Code* was enacted after this Court struck down the traditional regime for dealing with mentally ill offenders as contrary to s. 7 of the *Charter* in *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933. The traditional system subjected offenders with mental illness to automatic and indefinite detention at the pleasure of the Lieutenant Governor in Council (*Criminal Code*, s. 614(2) (formerly s. 542(2)) (repealed S.C. 1991, c. 43, s. 3); *Winko v. British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 S.C.R. 625). Part XX.1 was designed to address the concerns raised in *Swain* and was intended to highlight that offenders with a mental illness must be “treated with the utmost dignity and afforded the utmost liberty compatible with [their] situation” (*Winko*, at para. 42; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, at para. 22).

[87] Part XX.1 introduced a new verdict — “not criminally responsible on account of mental disorder” — into the traditional guilt/innocence dichotomy. This verdict is neither an acquittal nor a conviction; rather, it diverts offenders to a special stream that provides individualized assessment and treatment for those found to be a significant danger to the public (*Winko*, at para. 21; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 90; *Penetanguishene*, at para. 21). Those NCR patients who are not a significant danger to the public must be unconditionally released.

[88] The Ontario Board manages and supervises the assessment and treatment of each NCR patient in Ontario by holding annual hearings and making dispositions for each patient (ss. 672.38(1), 672.54, 672.81(1) and 672.83(1); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 29). It is well

established that the review board regime is intended to reconcile the “twin goals” of protecting the public from dangerous offenders, and treating NCR patients fairly and appropriately (*Winko*, at para. 20; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General*, No. 7, 3rd Sess., 34th Parl., October 9, 1991, at p. 6). While public safety is the paramount concern, an NCR patient’s liberty interest has been held to be the Board’s “major preoccupation” within the fence posts staked by public safety (*Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at para. 19). The Board fulfills its “primary purpose” therefore by protecting the public while minimizing incursions on patients’ liberty and treating patients fairly (*Mazzei*, at para. 32; *Winko*, at paras. 64-71; *Penetanguishene*, at para. 51).

[89] Section 672.54 of the *Criminal Code* sets out the remedial jurisdiction of review boards, stating:

Where a court or Review Board makes a disposition under subsection 672.45(2) or section 672.47 or 672.83, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

- (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;
- (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or
- (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate.

Accordingly, at a disposition hearing regarding an NCR patient, the Ontario Review Board is authorized to make one of three dispositions: an absolute discharge, a conditional discharge or a detention order. When making its disposition, the Board must consider the four statutory criteria:

the need to protect the public from dangerous persons, the patient's mental condition, the reintegration of the patient into society and the patient's other needs.

[90] The Board has a “necessarily broad” discretion to consider a large range of evidence in order to fulfill this mandate (*Winko*, at para. 61). The Board's assessment of the evidence must “take place in an environment respectful of the NCR accused's constitutional rights, free from the negative stereotypes that have too often in the past prejudiced the mentally ill who come into contact with the justice system” (*Winko*, at para. 61). Upon considering the evidence, if the Board is not of the opinion that the patient is a significant threat to public safety, it must direct that the patient be discharged absolutely (s. 672.54(a); *Winko*, at para. 62). On the other hand, if the Board finds that the patient is, as in Mr. Conway's case, a significant threat to public safety, an absolute discharge is not statutorily available as a disposition (s. 672.54; *Winko*, at para. 62).

[91] A patient is not a significant threat to public safety unless he or she is a “real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying” (*Winko*, at para. 62). The conduct giving rise to the harm must be criminal in nature (*Winko*, at paras. 57 and 62).

[92] Once a patient is absolutely discharged, he or she is no longer subject to the criminal justice system or to the Board's jurisdiction (*Mazzei*, at para. 34). However, pending an absolute discharge, NCR patients are subject to a detention or conditional discharge order. The Board is entitled to include appropriate conditions in its orders (s. 672.54(b) and (c)). The appropriateness of conditions is tied, at least in part, to the framework for making the least onerous and least restrictive disposition consistent with public safety, the patient's mental condition and other needs, and the patient's reintegration into the community (s. 672.54(b) and (c); *Penetanguishene*, at paras. 51 and 56).

[93] The Board is not entitled to include any conditions that prescribe or impose treatment on an NCR patient (s. 672.55; *Mazzei*) and any conditions must withstand *Charter* scrutiny (*Slaight*). In addition, disposition orders, including any conditions, are subject to appeal. The Court of Appeal is entitled to allow an appeal against a disposition if it is unreasonable, cannot be supported by the evidence, is based on a wrong decision on a question of law, or gives rise to a miscarriage of justice (s. 672.78(1); *Owen*).

[94] Subject to these limits, the content of the conditions included in a disposition is at the Board's discretion. In this way, the Board has the statutory tools to supervise the treatment and detention of dangerous NCR patients in a responsive, *Charter*-compliant fashion and has a broad power to attach flexible, individualized, creative conditions to the discharge and detention orders it devises for dangerous NCR patients.

[95] The Board's task calls for "significant expertise" (*Owen*, at paras. 29-30) and the Board's membership, which sits in five-member panels comprised of the chairperson (a judge or a person qualified for or retired from appointment to the bench), a second legal member, a psychiatrist, a second psychiatrist or psychologist and one public member (ss. 672.39 and 672.4(1)), guarantees that the requisite experts perform the Board's challenging task (*Owen*, at para. 29; s. 672.39). Further, as almost one-quarter of NCR patients and accused found unfit to stand trial spend at least 10 years in the review board system, with some, like Mr. Conway, spending significantly longer (Jeff Latimer and Austin Lawrence, *Research Report — The Review Board Systems in Canada: Overview of Results from the Mentally Disordered Accused Data Collection Study* (Department of Justice Canada, January 2006, at p. v), review boards become intimately familiar with the patients under their supervision. In light of this expertise, the appellate courts are "not [to] be too quick to overturn" a review board's "expert opinion" on how best to manage a patient's risk to the public (*Owen*, at para. 69; *Winko*, at para. 61).

[96] Mr. Conway submits that, pursuant to s. 24(1) of the *Charter*, and notwithstanding the Board's finding that he is a significant threat to public safety, he is entitled to an absolute discharge or, in the absence of a discharge, an order directing CAMH to provide him with alternative treatment and/or an order directing CAMH to ensure that he can access psychotherapy. Mr. Conway admits that these remedies are outside the Board's statutory jurisdiction, but asserts that s. 24(1) of the *Charter* frees the Board from statutory limits on its jurisdiction.

[97] I disagree. Part XX.1 of the *Code* provides the Board with "wide latitude" in the exercise of its powers (*Winko*, at para. 27; *Mazzei*, at para. 43). However, Parliament did not imbue the Board with free remedial rein, and in fact withdrew certain remedies from the Board's statutory arsenal. As noted above, Part XX.1 of the *Code* precludes the Board from granting either an absolute discharge to an NCR patient found to be dangerous or an order directing that a hospital authority provide an NCR patient with particular treatment (ss. 672.54(a) and 672.55; *Winko*; *Mazzei*). Parliament was entitled to withdraw these powers from the Board and, barring a constitutional challenge to the legislation, no judicial fiat can overrule Parliament's clear expression of intent.

[98] Granting the Board the jurisdiction to unconditionally release a dangerous patient without the requisite treatment to resolve the dangerousness would frustrate the Board's mandate to supervise the special needs of those who are found to require the treatment/assessment regime (*Winko*, at paras. 39-42). It would also undermine the balance required by s. 672.54: it not only threatens public safety, it jeopardizes the interests of the NCR patient by failing to adequately prepare him or her for reintegration and, as a result, creating a substantial risk of re-offending and re-entry into the Part XX.1 regime (*Winko*, at paras. 39-41). As McLachlin J. wrote in *Winko*, at paras. 39-41:

Treatment . . . is necessary to stabilize the mental condition of a dangerous NCR accused and reduce the threat to public safety created by that condition. . . .

Part XX.1 protects society. If society is to be protected on a long-term basis, it must address the cause of the offending behaviour — the mental illness. . . .

Part XX.1 also protects the NCR offender. The assessment-treatment model introduced by Part XX.1 of the *Criminal Code* is fairer to the NCR offender than the traditional common law model. The NCR offender is not criminally responsible, but ill. Providing opportunities to receive treatment, not imposing punishment, is the just and appropriate response.

[99] The Board’s duty to protect public safety, its statutory authority to grant absolute discharges only to non-dangerous NCR patients, and its mandate to assess and treat NCR patients with a view to reintegration rather than recidivism, all point to Parliament’s intent not to permit NCR patients who are dangerous to have access to absolute discharges as a remedy. These factors are determinative in this case and lead to the conclusion that it would not be appropriate and just in Mr. Conway’s current circumstances for the Board to grant him an absolute discharge.

[100] The same is true of Mr. Conway’s request for a treatment order. Allowing the Board to prescribe or impose treatment is not only expressly prohibited by the *Criminal Code* (s. 672.55), it is also inconsistent with the constitutional division of powers (*Mazzei*). The authority to make treatment decisions lies exclusively within the mandate of provincial health authorities in charge of the hospital where an NCR patient is detained, pursuant to various provincial laws governing the provision of medical services. “It would be an inappropriate interference with provincial legislative authority (and with hospitals’ treatment plans and practices) for Review Boards to require hospital authorities to administer particular courses of medical treatment for the benefit of an NCR accused” (*Mazzei*, at para. 31).

[101] A finding that the Board is entitled to grant Mr. Conway an absolute discharge despite its conclusion that he is a significant threat to public safety, or to direct CAMH to provide him with a particular treatment, would be a clear contradiction of Parliament's intent. Given the statutory scheme and the constitutional considerations, the Board cannot grant these remedies to Mr. Conway.

[102] Finally, Mr. Conway complains about where his room is located and seeks an order under s. 24(1) prohibiting CAMH from housing him near a construction site. Neither the validity of this complaint, nor, obviously, the propriety of any redress, has yet been determined by the Board.

[103] Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 30). Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 2). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes (*Nasogaluak*; *Dagenais*; *Okwuobi*). In this case, it may well be that the substance of Mr. Conway's complaint about where his room is located can be fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with *Charter* values. If that is what the Board ultimately concludes to be the case, resort to s. 24(1) of the *Charter* may not add either to the Board's capacity to address the substance of the complaint or to provide appropriate redress.

[104] I would dismiss the appeal. In accordance with the request of the parties, there will be no order for costs.

Appeal dismissed.

Solicitors for the appellant: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitor for the respondent Her Majesty the Queen: Attorney General of Ontario, Toronto.

Solicitors for the respondent the Person in charge of the Centre for Addiction and Mental Health: Bersenas Jacobsen Chouest Thomson Blackburn, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the intervener the Ontario Review Board: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitors for the interveners the Mental Health Legal Committee and the Mental Health Legal Advocacy Coalition: Hiltz Szigeti, Toronto.

Solicitors for the intervener the British Columbia Review Board: Arvay Finlay, Vancouver.

Solicitor for the interveners the Criminal Lawyers' Association and the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

*Solicitor for the intervener the Community Legal Assistance Society: Community
Legal Assistance Society, Vancouver.*

TAB 8

R. v. Deschamplain, 2004 SCC 76 (CanLII), [2004] 3 SCR 601

Source:	Supreme Court of Canada
Date:	2004-11-19
File number:	29722
Other citations:	252 DLR (4th) 289 — 347 NR 287 — 211 OAC 323 — 193 CCC (3d) 448 — 196 CCC (3d) 1 — 65 WCB (2d) 132 — [2004] CarswellOnt 4766 — JE 2007-233 — [2004] OJ No 73 (QL) — [2004] SCJ No 73 (QL) — [2004] ACS no 73
Citation:	R. v. Deschamplain, 2004 SCC 76 (CanLII), [2004] 3 SCR 601, < https://canlii.ca/t/1j5fv >, retrieved on 2026-03-22

R. v. Deschamplain, [2004] 3 S.C.R. 601, 2004 SCC 76

Her Majesty The Queen

Appellant

v.

Douglas Deschamplain

Respondent

Indexed as: R. v. Deschamplain

Neutral citation: 2004 SCC 76.

File No.: 29722.

2004: June 16; 2004: November 19.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for ontario

Criminal law — Preliminary inquiry — Jurisdiction — Certiorari — Preliminary inquiry judge discharging accused — Whether preliminary inquiry judge failed to consider “the whole of the evidence” as prescribed by [Criminal Code](#) — If so, whether such failure constitutes jurisdictional error — Scope of review on certiorari of decision of preliminary inquiry judge to discharge accused — [Criminal Code, R.S.C. 1985, c. C-46, s. 548\(1\)\(b\)](#).

The accused, a police officer, went to his son’s school while on duty in response to allegations that his son had shown a knife to other students and made threats. He met a teacher, who gave him the knife so he could conduct a police investigation. Another officer was subsequently assigned to investigate and discovered that the accused had not made notes in his police notebook nor completed a police report about the incident nor secured the knife as an exhibit. The accused did not comply with a request to turn the knife over to the police. He was charged with possession of “a prohibited weapon, to wit a brass knuckle knife” and with obstruction of justice. At the preliminary inquiry, the teacher testified that the handle of the knife was silver in colour with brass-knuckle type four rings. He said that he had not touched the knife and indicated that by using the descriptor “brass-knuckle type” he was not suggesting that the handle was made of metal. Brass knuckles are described under the relevant regulations as consisting of a band of metal with one or more finger holes designed to fit over the fingers of the hand. The preliminary inquiry judge held that the Crown had failed to adduce any evidence that the handle of the knife was made of metal. She discharged the accused on the prohibited weapon charge because an essential element of the offence had not been made out and she held that a discharge on the count of obstruction of justice resulted as a matter of course. The Crown successfully applied for *certiorari* and the reviewing judge set aside the discharge order. The

Court of Appeal restored the order. It was prepared to assume that the preliminary inquiry judge had erred in failing to consider the whole of the evidence but held that such an error amounts to an error in assessing the sufficiency of the evidence, an error that was within the jurisdiction of the preliminary inquiry judge and was thus not reviewable on *certiorari*.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed. The discharge order should be set aside and the matter remitted to the preliminary inquiry judge.

Per McLachlin C.J. and Major, Bastarache and Deschamps JJ.: A preliminary inquiry judge commits a jurisdictional error if he or she fails to consider “the whole of the evidence”, as prescribed by s. 548(1)(b) of the *Criminal Code*, before discharging an accused. The judge must obey mandatory statutory jurisdictional prescriptions, or risks intervention by a reviewing court on *certiorari*. Here, the preliminary inquiry judge failed to fulfill her obligations under s. 548(1)(b). On the count of possession of a prohibited weapon, her finding that there was no evidence that the handle of the knife was made of metal is unsupported by the record. Silence in the reasons alone may not necessarily be sufficient to justify intervention, however, on the main issue of the case, she mentioned only the teacher’s testimony and his description of the knife and did not refer to the considerable body of circumstantial evidence. Her finding that the count of obstruction of justice “fail[ed] as a matter of course” also amounted to a non-assessment of the circumstantial evidence since, in the performance of his duties, the accused was expected to secure any evidence and to document and report the complaint so that another investigator could be assigned. By failing to consider the whole of the evidence before discharging the accused, the preliminary inquiry judge committed a jurisdictional error on both counts. Although a preliminary inquiry judge is not required to give extensive reasons, there must be some indication that the mandatory requirement of s. 548(1)(b) has been complied with, and the failure to give such an indication results in a loss of jurisdiction. A decision as to the sufficiency of evidence is beyond review by *certiorari* only when it was made by a preliminary inquiry judge who was acting within his or her jurisdiction, pursuant to the mandatory provisions of s. 548.

Per Binnie J. (dissenting): The preliminary inquiry judge did not commit a jurisdictional error. There is no reason to believe in this case that she failed to consider “the whole of the evidence”. Although the judge did not mention the circumstantial evidence in her reasons, what is required is that her reasons indicate she understood the nature of the case so that the parties recognize that the case they argued was the one decided. The teacher’s evidence was the focus of the arguments of both the Crown and the defence, and the main issue was whether the knife was made of metal. Inferences from the subsequent conduct of the accused were secondary. A preliminary hearing judge ought not to be reversed simply because the reasons do not advert to all of the secondary or collateral circumstances that the Crown now say had a bearing on the main issue. The Crown did not demonstrate that the preliminary inquiry judge likely overlooked the circumstantial evidence.

Per LeBel J. (dissenting): The preliminary inquiry judge did not commit a jurisdictional error. In the circumstances of this case, the Crown did not establish that she failed to consider the whole of the evidence.

Per Fish J. (dissenting): The preliminary inquiry justice’s omission to mention explicitly in her reasons certain elements of circumstantial evidence or to include a generalized assertion that she had considered all of the evidence does not indicate that she in fact failed to consider all of the evidence before discharging the accused. First, it cannot be assumed from the justice’s silence that she did not consider the circumstantial evidence. It is more plausible to infer that she simply found that the evidence she did not mention had no significant probative value, since it could not support a rational conclusion that the handle of the knife was made of metal — the critical issue in the case. Even if she was mistaken, her error would relate to the sufficiency of the evidence and would not constitute a jurisdictional error giving rise to *certiorari*. Second, there is some indication in her reasons that she did assess the circumstantial evidence. While the preliminary inquiry justice focussed her attention on the teacher’s evidence, she also adverted to the Crown’s submissions regarding reasonable inferences that could be drawn from the record.

Third, since the Crown, in its submissions relating to the composition of the weapon, referred the justice exclusively to the teacher's testimony — its strongest and most significant evidence — it is not surprising that the justice did the same in her reasons. Fourth, the inquiry was neither disjointed nor hurried and the disposition was not reached precipitously or without reflection. In their submissions, both counsel drew the justice's attention to the circumstantial evidence, including the accused's "subsequent conduct". A reviewing court should not assume that the evidence vanished overnight from the justice's realm of contemplation. This is especially so where the justice amply demonstrated that she understood and considered all of the relevant issues. She was also perfectly aware of the limited nature of her task and of the test she was to apply in discharging it. There is no basis to assume that the preliminary inquiry justice did not apply the principles she had so carefully set out.

Cases Cited

By Major J.

Referred to: *R. v. Sazant*, [2004] 3 S.C.R. 635, [2004 SCC 77](#); *Forsythe v. The Queen*, [1980 CanLII 15 \(SCC\)](#), [1980] 2 S.C.R. 268; *Dubois v. The Queen*, [1986 CanLII 60 \(SCC\)](#), [1986] 1 S.C.R. 366; *R. v. Morin*, [1992 CanLII 40 \(SCC\)](#), [1992] 3 S.C.R. 286; *R. v. Arcuri*, [2001] 2 S.C.R. 828, [2001 SCC 54](#); *R. v. Russell*, [2001] 2 S.C.R. 804, [2001 SCC 53](#); *United States of America v. Shephard*, [1976 CanLII 8 \(SCC\)](#), [1977] 2 S.C.R. 1067; *Skogman v. The Queen*, [1984 CanLII 22 \(SCC\)](#), [1984] 2 S.C.R. 93; *Macdonald v. The Queen*, [1976 CanLII 140 \(SCC\)](#), [1977] 2 S.C.R. 665; *R. v. Sheppard*, [2002] 1 S.C.R. 869, [2002 SCC 26](#).

By Binnie J. (dissenting)

R. v. Sazant, [2004] 3 S.C.R. 635, [2004 SCC 77](#); *R. v. Sheppard*, [2002] 1 S.C.R. 869, [2002 SCC 26](#); *R. v. Braich*, [2002] 1 S.C.R. 903, [2002 SCC 27](#).

By LeBel J. (dissenting)

R. v. Sazant, [2004] 3 S.C.R. 635, [2004 SCC 77](#).

By Fish J. (dissenting)

Skogman v. The Queen, [1984 CanLII 22 \(SCC\)](#), [1984] 2 S.C.R. 93; *Forsythe v. The Queen*, [1980 CanLII 15 \(SCC\)](#), [1980] 2 S.C.R. 268; *R. v. Russell*, [2001] 2 S.C.R. 804, [2001 SCC 53](#); *Dubois v. The Queen*, [1986 CanLII 60 \(SCC\)](#), [1986] 1 S.C.R. 366; *Doyle v. The Queen*, [1976 CanLII 11 \(SCC\)](#), [1977] 1 S.C.R. 597; *R. v. Morin*, [1992 CanLII 40 \(SCC\)](#), [1992] 3 S.C.R. 286; *R. v. Sheppard*, [2002] 1 S.C.R. 869, [2002 SCC 26](#); *R. v. B. (C.R.)*, [1990 CanLII 142 \(SCC\)](#), [1990] 1 S.C.R. 717.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 84(1), [91\(2\)](#), [139\(2\)](#), [548\(1\)](#) [rep. & sub. c. 27 (1st Supp.), s. 101(1)], 675, 676, 691, 693.

Police Services Act, R.S.O. 1990, c. P.15, s. 42.

Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted, SOR/98-462, s. 4, Part 3, s. 15.

APPEAL from a judgment of the Ontario Court of Appeal (2003), [2003 CanLII 52134 \(ON CA\)](#), 173 C.C.C. (3d) 130, 168 O.A.C. 389, [2003] O.J. No. 570 (QL), reversing a decision of the Superior Court of Justice setting aside a preliminary inquiry judge's order discharging an accused. Appeal allowed, Binnie, LeBel and Fish JJ. dissenting.

Jennifer Woollcombe, for the appellant.

Michael W. Lacy, for the respondent.

The judgment of McLachlin C.J. and Major, Bastarache and Deschamps JJ. was delivered by

MAJOR J. —

I. Introduction

1 This appeal, like its companion case, *R. v. Sazant*, [2004] 3 S.C.R. 635, 2004 SCC 77, concerns the scope of review on *certiorari* of the decision of a preliminary inquiry judge to discharge an accused. The issue raised in this appeal is whether the failure of a preliminary inquiry judge to consider “the whole of the evidence” as prescribed by s. 548(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, before discharging an accused, constitutes a jurisdictional error. The Ontario Court of Appeal held that such an error falls within the jurisdiction of the preliminary inquiry judge and is therefore immune from review. With respect, I do not agree. A preliminary inquiry judge who fails to meet the statutory obligations imposed by Parliament acts in excess of his or her jurisdiction and risks the intervention of a reviewing court. For the reasons that follow, I would allow the appeal.

II. Facts

2 On May 24, 2000, the respondent, a member of the Ontario Provincial Police, attended an elementary school with another police officer, Constable Renauld. Both officers were in uniform and on duty. The respondent’s wife had arrived earlier to search for a knife that she believed was in their son’s possession. Her actions were prompted by the alarming notes she found at home written by him. She called the respondent from the school. There were allegations

that their son had shown a knife to other students and made threats. The knife was found in a box in another student's desk and given to Guy Campeau, a teacher, who decided that the police should be contacted.

3 The respondent met with his wife, their son and Mr. Campeau, in the principal's office. Constable Renauld remained in the outer office with the secretary. The respondent told Mr. Campeau that the knife had been recently bought at a flea market for whittling wood and that he had warned his son not to take it to school. Mr. Campeau suggested that the respondent's son be sent home and that the principal, David Parks, who was away that day, would decide the length of the suspension.

4 Given the seriousness of the situation, Mr. Campeau asked the respondent about the procedure for laying criminal charges. The respondent told him that it was the responsibility of the police. He also asked the respondent whether he was there as a father or police officer, and the respondent replied that he was there as a concerned father and as a police officer. Mr. Campeau decided that as a police officer, the respondent should have the knife in order to conduct the investigation, and gave it to him. The respondent, accompanied by Constable Renauld, then drove his wife and son home.

5 On May 25, 2000, Mr. Parks, the principal, dissatisfied with how the matter had been handled the previous day, contacted the police and requested that another officer investigate the incident. Detective Sergeant Lalonde was assigned to the case and when he spoke to the respondent that night, he asked him what sort of knife was involved. The respondent replied that it was a small jackknife. Mr. Campeau had looked at the knife in the box after removing the lid but never touched it. He testified at the preliminary inquiry that the handle and the grip area of the knife were silver in colour with "brass-knuckle type four rings that you would put your fingers

through to hold on to the handle”. Mr. Campeau did not say in direct examination that the handle was made of metal and in cross-examination clarified that by using the descriptor “brass-knuckle type”, he was not suggesting that the handle was made of brass.

6 Detective Sergeant Lalonde discovered that the respondent had not made any notes in his police notebook, completed a police report about the incident or secured the knife as an exhibit. The respondent never complied with a subsequent request to turn the knife over to the police.

7 On June 22, 2000, the respondent was charged with two *Criminal Code* offences: possession of a prohibited weapon contrary to s. 91(2) and obstruction of justice contrary to s. 139(2).

III. Judicial History

A. *Ontario Court of Justice*

8 A preliminary inquiry was commenced before Serré J. of the Ontario Court of Justice on April 17, 2001. Three witnesses testified for the Crown: Guy Campeau, Detective Sergeant Lalonde, and Constable Renault. The matter was adjourned to May 30, 2001, when counsel made their submissions on committal. Serré J. rendered her decision the following day, and discharged the respondent on both counts. As a prohibited weapon, “brass knuckles” are described in the *Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*, SOR/98-462, Part 3, s. 15, as “consisting of a band of metal with one or more finger holes

designed to fit over the fingers of the hand”. In the view of Serré J., on the strength of Mr. Campeau’s testimony alone, the Crown had failed to adduce any evidence that the handle of the knife was made of metal, and therefore an essential element of the prohibited weapon charge was not met. She concluded that a discharge under the second count, obstruction of justice, resulted as a matter of course. Serré J. made no reference to the circumstantial evidence including the evidence presented by the other witnesses.

B. *Superior Court of Justice*

9 The Crown brought an application in the Ontario Superior Court seeking an order in lieu of *certiorari* quashing the discharge order. The reviewing judge, Gauthier J., concluded that Serré J. had exceeded her jurisdiction by failing to commit on the first count despite direct evidence and by failing to consider the sufficiency of the circumstantial evidence with respect to both counts. She set aside the discharge order and remitted the matter back to Serré J. to commit the respondent on the first count and to consider the whole of the evidence with respect to the second.

C. *Ontario Court of Appeal* (2003), [2003 CanLII 52134 \(ON CA\)](#), 173 C.C.C. (3d) 130

10 The Ontario Court of Appeal reversed the reviewing judge’s decision and restored the discharge order. Laskin J.A. (Morden and Feldman JJ.A. concurring) noted that the Crown had rightly conceded that there was no direct evidence adduced at the preliminary inquiry that any part of the knife handle attaching to the four finger rings was made of metal. In fact, the evidence proffered on this element was entirely circumstantial. Laskin J.A. was prepared to assume that on the whole of the evidence, a reasonable and properly instructed jury could conclude that the knife was a prohibited weapon. However, he held that a failure to consider all of the evidence constitutes an error in assessing the sufficiency of the evidence, and since such an error falls within the jurisdiction of the preliminary inquiry judge, it is not reviewable.

IV. Relevant Statutory Provisions

11 *Criminal Code*, R.S.C. 1985, c. C-46

548. (1) When all the evidence has been taken by the justice, he shall

(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

Regulations Prescribing Certain Firearms and other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted,
SOR/98-462

4. The weapons listed in Part 3 of the schedule are prohibited weapons for the purposes of paragraph (b) of the definition “prohibited weapon” in subsection 84(1) of the *Criminal Code*.

...

PART 3

...

15. The device known as “Brass Knuckles” and any similar device consisting of a band of metal with one or more finger holes designed to fit over the fingers of the hand.

V. Analysis

A. *Jurisdiction*

12 There is no dispute that the jurisdiction of a preliminary inquiry judge is statutory and not inherent. In *Forsythe v. The Queen*, 1980 CanLII 15 (SCC), [1980] 2 S.C.R. 268, Laskin C.J. acknowledged that there are few situations in which a preliminary inquiry judge can lose jurisdiction, but noted, at pp. 271-72, that “jurisdiction will be lost by a magistrate who fails to observe a mandatory provision of the *Criminal Code*”. He went on to say that the judge presiding at a preliminary inquiry “has the obligation to obey the jurisdictional prescriptions of s. 475 [now s. 548] of the *Criminal Code*”.

13 In *Dubois v. The Queen*, 1986 CanLII 60 (SCC), [1986] 1 S.C.R. 366, Estey J. affirmed, at p. 377:

Jurisdictional error is committed where “mandatory provisions” of the *Criminal Code* are not followed, and in the context of s. 475 [now s. 548], this means at least that there must be some basis in the evidence proffered for the justice’s decision to commit.

14 In the decision under review, Laskin J.A. held that it is not a jurisdictional requirement of s. 548(1)(b) that the preliminary inquiry judge consider “the whole of the evidence”. He stated, at para. 37, that he reached this conclusion because

to accept that a failure to consider “the whole of the evidence” is a jurisdictional error risks turning virtually every error of law into a jurisdictional error. This would be contrary to numerous authorities, including *Dubois*, which have held that many errors of law are not jurisdictional. Indeed, the mere failure to consider relevant evidence has been held by the Supreme Court of Canada not even to amount to an error of law: see *R. v. Morin* (1992)

15 With respect, Laskin J.A. appears to have taken the reasoning of this Court in *Morin* out of context. *R. v. Morin*, 1992 CanLII 40 (SCC), [1992] 3 S.C.R. 286, was not a preliminary inquiry, but a trial. At p. 297, Sopinka J., for the Court, held that there was no basis for concluding that the trial judge had failed to consider the totality of the evidence in reaching the verdict. While it is open to the trial judge to assess the quality, credibility and reliability of evidence, a preliminary inquiry judge is prohibited from making such findings: see *R. v. Arcuri*, [2001] 2 S.C.R. 828, 2001 SCC 54, at para. 30. As the preliminary inquiry judge correctly stated in this appeal: “Assessing the quality and reliability of the evidence, or weighing the evidence for competing inferences in determining whether there is sufficient evidence for committal is not permitted at this stage of the proceedings.”

16 In *Forsythe, supra*, at p. 272, Laskin C.J. emphasized that the “[m]ere disallowance of a question or questions on cross-examination or other rulings on proffered evidence [in a preliminary inquiry] would not, in [his] view, amount to a jurisdictional error.”

17 The respondent questions why the failure of a preliminary hearing judge to consider evidence tendered by the Crown amounts to jurisdictional error, but the erroneous exclusion of evidence at the preliminary hearing does not. The answer is not elusive. The preliminary inquiry judge has jurisdiction to conduct the inquiry according to the rules of evidence. Any error with respect to the application of those rules that does not rise to the level of a denial of natural justice (which also goes to jurisdiction: see *Dubois, supra*, at p. 377; *Forsythe, supra*, at p. 272) constitutes an error of law, not a jurisdictional error. Errors of law are not reviewable by way of *certiorari*.

18 Section 548(1)(b) requires the preliminary inquiry judge to consider “the whole of the evidence” that “has been taken” during the preliminary inquiry. The primary purpose of a preliminary inquiry is to “ascertain whether there is sufficient evidence to warrant committing the accused to trial”: *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 20. It follows that Parliament never intended to allow decisions on the discharge of an accused to be made without full regard to all of the evidence. In my view, it is a jurisdictional error for a preliminary inquiry judge to fail to consider the “whole of the evidence” as required under s. 548(1)(b), and the Ontario Court of Appeal erred in concluding otherwise.

19 As *Forsythe* and *Dubois* make plain, the failure of a preliminary inquiry judge to comply with a mandatory statutory provision goes to jurisdiction and allows a reviewing court to intervene.

B. *The Reasons of the Preliminary Inquiry Judge*

20 As it is a jurisdictional error for a preliminary inquiry judge to discharge an accused under s. 548(1)(b) without considering “the whole of the evidence”, for the purposes of this appeal, the question that remains is whether or not Serré J. fulfilled this obligation.

21 While an exhaustive examination of all the evidence is not expected, her finding that the Crown failed to adduce any evidence that the handle of the knife was made of metal is unsupported by the record which reveals a considerable body of circumstantial evidence going to both counts. The absence of any reference to this circumstantial evidence in the reasons leads me to conclude that she failed to consider the whole of the evidence as required by s. 548(1)(b). As a result, she committed a jurisdictional error and her decision is subject to review on *certiorari*.

Serré J. began her reasons, which were delivered orally, by correctly stating the proper legal tests and outlining the role of the preliminary inquiry judge. She noted that

the test for sufficiency is whether there is any admissible evidence, whether direct or circumstantial, upon which a reasonable jury properly instructed could convict the accused. [See *United States of America v. Shephard*, 1976 CanLII 8 (SCC), [1977] 2 S.C.R. 1067, at p. 1080; *Arcuri*, *supra*, at para. 21.]

The jurisprudence of this Court leaves no doubt that a preliminary inquiry judge commits a jurisdictional error by committing an accused for trial under s. 548(1)(a) when an essential element of the offence is not made out: see *Skogman v. The Queen*, 1984 CanLII 22 (SCC), [1984] 2 S.C.R. 93, at p. 104; *Dubois*, *supra*, at p. 376; *Russell*, *supra*, at para. 21. Conversely, it is not a jurisdictional error for the preliminary inquiry judge, after considering the whole of the evidence and where there is an absence of direct evidence on each essential element of the offence, to erroneously conclude that the totality of the evidence (direct and circumstantial) is insufficient to meet the test for committal and to consequently discharge the accused under s. 548(1)(b): see *Arcuri*, *supra*, at paras. 21-23; *Russell*, *supra*, at para. 26. In that situation, it would be improper for a reviewing court to intervene merely because the preliminary inquiry judge's conclusion on sufficiency differs from that which the reviewing court would have reached: see *Russell*, *supra*, at para. 19. It is a jurisdictional error, however, for a preliminary inquiry judge to act arbitrarily: *Dubois*, *supra*, at p. 377.

Silence in the reasons alone may not necessarily be sufficient to justify the intervention of a reviewing court. As this Court has previously held, there must be some rational basis in the record to justify such intervention: see *Macdonald v. The Queen*, 1976 CanLII 140 (SCC), [1977] 2 S.C.R. 665, at p. 673 (involving reasons from a court martial); and *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at paras. 29-30 (involving reasons from a trial verdict).

25 After canvassing the case law, stating the legal rules to be followed and reciting the charges against the respondent, Serré J. said:

A critical examination of Mr. Campeau's evidence is warranted to determine whether it registers on the scales as any evidence at all to meet the [*Shephard*] test.

She then referred to excerpts from the direct and cross-examination of Mr. Campeau that confirmed his description of the knife ("silver with brass-knuckle type four rings that you would put your fingers through to hold on to the handle"), the fact that he never touched the knife or saw the blade, and that by referring to the handle as a "brass-knuckle type", he was not suggesting that it was made of brass.

26 Serré J. went on to explain what she found to be her task before stating her conclusion:

Can a Justice draw a reasonable inference from Mr. Campeau's knowledge of brass knuckles that the device was made of metal? Mr. Campeau simply identified the shape of the device; the grip of the knife bore four rings; it was silver in colour and could be used in a manner consistent with brass knuckles.

To apply, as suggested by the Crown, every-day meaning to the language on the exchange reproduced above, [i.e., excerpts from Mr. Campeau's direct and cross-examination] does not lead to the inference that the device was made of metal. The question on a preliminary inquiry always relates to the ability of the evidence to support a verdict of guilt in the eyes of the dispassionate jury, properly instructed on the law. The absence of evidence on an essential element will result in a discharge.

There is a distinction to be made between a situation where there is no evidence on an essential element of the charge and one where the evidence proffered suffers from frailties.

This is a clear situation where there was no evidence that the device was made of metal nor was there any evidence upon which a reasonably instructed jury could infer that

the device was a prohibited weapon as defined in the regulations. [First emphasis in the certified transcription; second and third emphasis added.]

Clearly, Serré J. referred only to the testimony of Mr. Campeau and only to his description of the knife.

27 Laskin J.A. summarized, at paras. 23-24, some of the circumstantial evidence that appears to have not been considered by the preliminary inquiry judge: (1) the respondent did not make any notes of the incident in his police notebook; (2) the respondent did not make a police report about taking the knife; (3) the respondent did not turn over the knife though asked to do so by the investigating officer; (4) the respondent described the knife as a “jack-knife”; (5) the respondent’s wife arrived at the school upset and became even more upset “as the situation progressed”; (6) Mr. Campeau thought that the knife was “no ordinary knife” and that its presence in the school was as serious as if a gun had been found; (7) Mr. Campeau insisted that the police be called and later acknowledged that it was “not in every situation that the police would necessarily become involved”; (8) Mr. Campeau gave the knife to the respondent because he was a police officer, not because he was a concerned parent; (9) the respondent’s description of the knife was inconsistent with that given by Mr. Campeau.

28 As a result of her findings on the first count, Serré J. held that “[t]he second count of obstruct justice fails as a matter of course.” In the Court of Appeal, Laskin J.A., at para. 27, found merit in the argument that

[i]f the knife was not a prohibited weapon the appellant was not required to refer to the incident in his notebook, make out a police report, or even return the knife. Therefore, the preliminary inquiry judge had no need to consider this circumstantial evidence

once she had concluded the evidence was insufficient to show that the knife could be a prohibited weapon.

29 The second count alleges that the respondent

on or about the 24th day of May 2000 at the Town of Monetville in the said region did wilfully attempt to defeat the course of justice in a judicial proceeding by, while acting in his capacity as a peace officer, failing to report a criminal offence and removing evidence of that offence, contrary to [Section 139\(2\)](#) of the [Criminal Code of Canada](#).

30 Mr. Campeau insisted that the police attend the school because of the presence of the knife and the allegations of threats made by the respondent's son. The respondent was bound by Ontario Provincial Police duty requirements to complete General Occurrence Reports or other law enforcement forms and to maintain "a daily journal which thoroughly and chronologically details experienced, investigated or reported events and occurrences during each duty period". In addition, [s. 42](#) of the [Ontario Police Services Act](#), R.S.O. 1990, c. P.15, also imposes an obligation on police officers to perform those assigned duties. It is noteworthy that Constable Renauld documented her attendance at the school even though she was under the impression that the respondent was attending to a personal family matter and not a complaint requiring a police investigation. Considering that the suspect of the complaint was his son, the respondent, understandably, would not have been expected to conduct the ensuing investigation, but he was expected, in the performance of his duties, to secure any evidence, document and report the complaint so that another investigator could be assigned.

31 I agree with the reviewing judge, Gauthier J., that the preliminary inquiry judge's finding that the second count "failed as a matter of course" amounted "to a non-assessment of the

circumstantial evidence which was before the court”.

32 The respondent contends that since the testimony of the three Crown witnesses was heard over the course of one day and the preliminary inquiry judge had the benefit of submissions from counsel, not to mention a transcript of the evidence, the fact that she chose to focus on a specific portion of the evidence in her reasons does not suggest that she did so to the exclusion of the other evidence. This argument, though, cuts both ways. The evidence was heard on April 17, 2001, written submissions were made later, and oral submissions were presented on May 30. The decision was rendered on May 31. Given the time frame and the preponderance of circumstantial evidence, it is equally reasonable to expect that if Serré J. had considered the strength of the inferences that could be drawn from the circumstantial evidence, she would have made some reference to her assessment in the reasons.

33 Section 548(1)(b) is a mandatory provision. In addition to Mr. Campeau’s description of the knife there was, as already noted, a mountain of additional circumstantial evidence. It is evident from the record that the preliminary inquiry judge was aware of this material and had, at times, some of it in her possession. However, there is nothing in the record or in the reasons of the preliminary inquiry judge that indicates that she considered the whole of the evidence. There is no requirement for fulsome reasons why evidence at a preliminary inquiry has been rejected, but there must be some indication that the mandatory requirement of the *Criminal Code* has been complied with. The failure to do so results in a loss of jurisdiction.

34 It is now plain from Canadian jurisprudence that a trial judge is not required to give extensive reasons for a decision, but is bound to indicate what he or she understands the nature of the case to be so that the parties are aware that the case they argued was the one decided: see *Sheppard, supra*. Similarly, a preliminary inquiry judge is not required to render extensive reasons

but must demonstrate that he or she met the statutory and mandatory duty to consider the whole of the evidence. It hardly needs saying that had the proceedings been a trial and not a preliminary inquiry, an acquittal of the respondent for the reasons given by Serré J. not to commit would likely be sustained. However, the mandatory duty imposed on the judge at a preliminary inquiry to consider the whole of the evidence requires some clear indication that this obligation was met. In my view, the reasons at issue here do not satisfy this requirement.

35 I find that the preliminary inquiry judge committed a jurisdictional error on both counts by failing to consider the whole of the evidence before discharging the respondent.

36 Fish J. concludes at para. 82 that if the preliminary inquiry judge erred at all, “her error concerned the sufficiency of the evidence and was not subject to review on *certiorari*”. He postulates at para. 62:

And it is well established that an error as to the sufficiency of the evidence cannot properly be characterized as “jurisdictional”, except where it results in a committal to trial in the absence of some evidence capable of supporting a conviction. . . .

He then quotes McLachlin C.J. at paras. 28-29 of *Russell, supra*. In that passage, McLachlin C.J. clarified that the principles that govern jurisdictional errors are the same, regardless of whether such an error is raised by the Crown or by the accused. However, the reasons went on to state that practically speaking, the Crown and the accused would face disparate effects of errors as to the essential elements of a crime. She wrote (at para. 29):

While it is true that the effect of this principle is that errors as to the essential elements of the crime will, as a general rule, be reviewable when challenged by the accused but

not when challenged by the Crown, this disparity reflects the balance of harms

[Emphasis in original.]

37 As discussed at para. 23 above, when it is the accused who raises a jurisdictional error, he or she will succeed if it can be shown that there was no evidence as to some essential element of the crime. In referring to disparate effects faced by the Crown and the accused, I read McLachlin C.J. to be referring to the fact that, on the other hand, the Crown cannot demonstrate a jurisdictional error merely by showing that there was some evidence on each essential element of the crime. This is because it would be improper for the reviewing court to intervene merely because it would have reached a different conclusion from the preliminary inquiry judge as to the sufficiency of the evidence. However, a decision as to the sufficiency of evidence is beyond review by *certiorari* only when it was made by a preliminary inquiry judge who was acting within his or her jurisdiction, pursuant to the mandatory provisions of s. 548.

38 Fish J. would dismiss the appeal on the basis that the preliminary inquiry judge made a determination as to the sufficiency of the evidence that was within her jurisdiction. However, under s. 548(1)(b), a preliminary inquiry judge must consider “the whole of the evidence” in order to determine whether “no sufficient case is made out to put the accused on trial”. In this case, the preliminary inquiry judge did not consider “the whole of the evidence” as mandated by s. 548(1)(b), and such an error is jurisdictional.

VI. Disposition

39 I would therefore allow the appeal, set aside the discharge order and remit the matter to the preliminary inquiry judge to consider the whole of the evidence.

The following are the reasons delivered by

40 BINNIE J. (dissenting) — I agree with Major J., as a matter of law, that the failure of a preliminary inquiry judge to consider “the whole of the evidence” as prescribed by [s. 548\(1\)\(b\)](#) of the *Criminal Code*, R.S.C. 1985, c. C-46, before discharging an accused, would, if established, constitute a jurisdictional error. Of course, it is the duty of *any* court or tribunal to consider “the whole of the evidence”. Nevertheless Parliament has chosen to turn this general duty into a specific statutory condition precedent to the exercise of the power of discharge. As such, it is mandatory, and failure to comply would result in loss of jurisdiction.

41 My disagreement with Major J. is on the facts. As a practical matter, appellate courts should not be too quick to conclude that a preliminary inquiry judge has *not* considered “the whole of the evidence”. In the companion case of *R. v. Sazant*, [2004] 3 S.C.R. 635, [2004 SCC 77](#), the fatal flaws in the preliminary inquiry judge’s decision appear from what is said in his reasons. This case is different. The Crown relies entirely on what *is not* said. It is true that the preliminary inquiry judge made no specific mention of the circumstantial evidence. Nevertheless, as Major J. acknowledges at para. 34, what is required is that the reasons “indicate what he or she understands the nature of the case to be so that the parties are aware that the case they argued was the one decided”. Here both the Crown and the defence demonstrated in their respective submissions to the hearing judge that they regarded Mr. Campeau’s evidence as the focus of the contending arguments. Inferences from the subsequent conduct of the accused were secondary. In *R. v. Sheppard*, [2002] 1 S.C.R. 869, [2002 SCC 26](#), we confirmed the duty on trial judges to give reasons adequate for the function they perform, including appellate review, but we also held in *R. v. Braich*, [2002] 1 S.C.R. 903, [2002 SCC 27 \(released at the same time\)](#), at para. 25, that in the case of a conviction:

Enough was said in the trial judge’s reasons to show that he came to grips with the issues thus defined by the defence. His decision ought not to be reversed simply

because he did not advert to all of the secondary or collateral circumstances that the respondents say had a bearing on the main issue.

42 The “main issue” here was whether the alleged prohibited weapon was made of metal, as charged in the information. The Crown cannot, in fairness, demand a higher and more meticulous standard of reasons in dealing with this issue where the accused has been discharged (or acquitted) than where the accused has been committed (or convicted). It has not been demonstrated by the Crown that the preliminary inquiry judge likely overlooked the circumstantial evidence now relied upon. We have no reason to believe she did not consider “the whole of the evidence”. I would therefore dismiss the appeal.

The following are the reasons delivered by

43 LEBEL J. (dissenting) — Although I concur with Major J. in the companion case *R. v. Sazant*, [2004] 3 S.C.R. 635, [2004 SCC 77](#), I agree with Fish J. in the present appeal that the preliminary inquiry judge did not commit any jurisdictional error. In my opinion, in the circumstances of this case, the appellant did not establish that Serré J. had actually failed to consider the “whole of the evidence”. Such a failure would have been a jurisdictional error, whether it resulted in an improper discharge or an unwarranted committal. For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

FISH J. (dissenting) —

I. Overview

44 Douglas Deschamplain, the respondent, was discharged at the conclusion of his preliminary inquiry on both counts of an information laid against him under the *Criminal Code*, R.S.C. 1985, c. C-46. The first count was for possession of “a prohibited weapon, to wit a brass knuckle knife”; the second, for obstructing justice by “failing to report a criminal offence and removing evidence of that offence”.

45 It is common ground that Mr. Deschamplain could not properly be committed to trial on the first count in the absence of some evidence upon which a jury could reasonably conclude that the handle of the “brass knuckle knife” (or band to which the “knuckle holes” were attached) was made of metal. As Laskin J.A. explained in the court below:

Not every knife is a prohibited weapon. Section 84(1) of the *Code* defines a “prohibited weapon” as “(b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon”. Those weapons prescribed to be prohibited are listed in Regulation [SOR/98-462](#). In this case the relevant provision of the Regulation is part 3, section 15, which prescribes as prohibited “[t]he device known as ‘Brass Knuckles’ and any similar device consisting of a *band of metal* with one or more finger holes designed to fit over the fingers of the hand”. [Emphasis in original.]

((2003), [2003 CanLII 52134 \(ON CA\)](#), 173 C.C.C. (3d) 130, at para. 16)

46 It is common ground as well that Mr. Deschamplain could not be committed on the second count unless he was also committed on the first: if the evidence was insufficient to establish possession of a prohibited weapon, Mr. Deschamplain could hardly be sent to trial for failing to report that offence or for removing evidence of its commission.

47 In this case, the respondent, Mr. Deschamplain, had admitted possession of the knife. His committal to trial on both counts therefore depended on whether the evidence, in the opinion of the justice, was sufficient to support a reasonable inference that the handle of the knife was “made of metal”, in the sense mentioned above. After studying the transcript, considering the

submissions of counsel, and reserving the matter overnight for deliberation and decision, Serré J. answered that question in the negative and discharged Mr. Deschamplain.

48 Section 548(1) of the *Criminal Code* provides:

548. (1) When all the evidence has been taken by the justice, he shall

(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

49 The governing principles are well established. The decision of the justice to commit or to discharge is not appealable. It is, however, reviewable on *certiorari*, but only for excess of jurisdiction. An error as to the sufficiency of the evidence is not reviewable on *certiorari* except where it results in a committal to trial in the absence of any evidence capable of supporting a conviction. Nor is the failure of a justice to explicitly advert to relevant and admissible evidence, whether wrongly excluded or properly admitted. In some instances, errors of this sort may be appealed as errors of law: see, for example, ss. 675, 676, 691 and 693 of the *Criminal Code*. At the preliminary inquiry, however, they are neither appealable nor reviewable on *certiorari*.

50 Looking beyond the form to the substance of the matter, the Crown's attack on Serré J.'s decision amounts, in my respectful view, to an appeal that does not lie, dressed up as a prerogative remedy that cannot fly. The Superior Court of Justice nonetheless found that Serré J. had exceeded her jurisdiction and therefore granted *certiorari*. In the opinion of the reviewing

judge, there was direct evidence that the knife in question here was a prohibited weapon. The Crown acknowledged in the Court of Appeal that the reviewing judge, on this point, was wrong.

51 The decision of the Superior Court was in turn set aside by the Court of Appeal for Ontario. Speaking for a unanimous court, Laskin J.A. held that Serré J. did not exceed her jurisdiction in discharging the respondent. Major J. would allow the Crown's present appeal against that judgment.

52 I agree with Major J. (at para. 22) that Serré J. "correctly stat[ed] the proper legal tests and outlin[ed] the role of the preliminary inquiry judge". With respect, however, I do not share his conclusion (at para. 35) that Serré J. exceeded her jurisdiction "by failing to consider the whole of the evidence before discharging the respondent".

53 This conclusion rests, ultimately, on the omission of Serré J. to mention explicitly in her reasons certain elements of circumstantial evidence. On this issue, able and experienced Crown counsel stated on the hearing of the appeal that she could not even make this argument if Serré J. "[had] said anywhere in her reasons: I've considered all of the other evidence—.

54 The failure of Serré J. to include this sort of generalized assertion in her reasons, delivered orally, does not persuade me that she failed to consider all of the evidence before deciding to discharge the respondent; on the contrary, the Crown's reliance on this purportedly fatal "omission" simply exposes the frail foundation of the Crown's appeal.

55 I shall later explain in some detail why I am not persuaded that Serré J. failed to consider all of the evidence. It appears to me, rather, that she did not explicitly set out the circumstantial evidence mentioned by Major J. because she did not consider it probative on the only decisive issue before her: whether the knife that the respondent had in his possession at the relevant time was a “prohibited weapon” within the meaning of the *Criminal Code* (s. 84(1)). That depended on the composition of its handle. Serré J. evidently agreed with defence counsel that the circumstantial evidence set out in my colleague’s reasons could not support a rational conclusion that the handle of the knife was made of metal, as required by the relevant regulation (SOR/98-462, Part 3, s. 15).

56 But even if Serré J. was mistaken in this regard, her error related to the sufficiency of the evidence. And, as I have already mentioned, it is well established that an error as to the sufficiency of the evidence is not reviewable on *certiorari*.

57 For these reasons and the reasons that follow, I would dismiss the appeal.

II. Review for “Jurisdictional Error”

58 An erroneous committal or discharge, I again emphasize, is not appealable and is only reviewable on *certiorari* for want or excess of jurisdiction. Estey J., speaking for the majority in *Skogman v. The Queen*, 1984 CanLII 22 (SCC), [1984] 2 S.C.R. 93, thus explained (at p. 100):

It is clear . . . that *certiorari* remains available to the courts for the review of the functioning of the preliminary hearing tribunal only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of

jurisdiction It need only be added by way of emphasis that such *certiorari* review does not authorize a superior court to reach inside the functioning of the statutory tribunal for the purpose of challenging a decision reached by that tribunal within its assigned jurisdiction on the ground that the tribunal committed an error of law in reaching that decision, or reached a conclusion different from that which the reviewing tribunal might have reached.

See also *Forsythe v. The Queen*, 1980 CanLII 15 (SCC), [1980] 2 S.C.R. 268; *R. v. Russell*, [2001] 2 S.C.R. 804, 2001 SCC 53; *Dubois v. The Queen*, 1986 CanLII 60 (SCC), [1986] 1 S.C.R. 366.

59 Major J. finds that the justice in this case committed a “jurisdictional error” in failing to take into account some of the evidence adduced before her. In my colleague’s view, this omission violated a “mandatory provision of the *Criminal Code*”, within the meaning of *Doyle v. The Queen*, 1976 CanLII 11 (SCC), [1977] 1 S.C.R. 597; *Dubois, supra*; and *Forsythe, supra*, in that s. 548(1)(b) of the *Code* requires a preliminary inquiry justice to “discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged . . .” (emphasis added).

60 In this regard, Laskin J.A. stated (at para. 36):

I acknowledge that in . . . *Dubois* [at p. 377], Estey J. wrote that “[j]urisdictional error is committed where ‘mandatory provisions’ of the *Criminal Code* are not followed” and that the requirement in s. 548(1)(b) to consider “the whole of the evidence” before discharging the accused could be characterized as “mandatory”. It seems to me, however, that for several reasons, failing to comply with this kind of provision cannot amount to jurisdictional error. [Emphasis added.]

61

Laskin J.A. then proceeded to explain why the omission of a justice to take into account some of the relevant evidence, even when viewed as a failure to comply with s. 548(1)(b), will not for that reason amount to a jurisdictional error subject to review on *certiorari*.

62

As we shall soon see, I am not persuaded at all that the justice in this case failed to consider the circumstantial evidence mentioned by Major J. In my view, the error imputed by the Crown to Serré J. in this regard amounts, at its highest, to an error as to the sufficiency of the evidence taken as a whole. And it is well established that an error as to the sufficiency of the evidence cannot properly be characterized as “jurisdictional”, except where it results in a committal to trial in the absence of some evidence capable of supporting a conviction. As McLachlin C.J., speaking for a unanimous Court, explained in *Russell, supra*, at paras. 28-29:

The Crown’s argument here is that under the “parity” principle of *Dubois*, if a preliminary judge’s error as to the elements of a crime is unreviewable when challenged by the Crown (as the Crown contends is the law under *Tremblay*), that kind of error must also be unreviewable when challenged by the accused. The Crown argues that “the availability of *certiorari* does not turn on the identity of the party seeking that relief, but rather on the nature of the alleged error”. I find nothing objectionable in that assertion, but I cannot see how it warrants the conclusion that the alleged error in this case is unreviewable on *certiorari*. The fault lies in the Crown’s characterization of the error as “an alleged misinterpretation of the elements of the offence”. When characterized this way, it is indeed difficult to see how it can be that the accused can challenge such an error though the Crown cannot. The logic becomes clear, however, once the rule is framed, as it should be, in terms of the jurisdiction of the preliminary inquiry judge: whether the error is challenged by the Crown or by the accused, an error is reviewable on *certiorari* only if it is jurisdictional. If it is not jurisdictional, no recourse to *certiorari* may be had. It is not the fact that it is the accused seeking *certiorari* here that makes the error reviewable. It is the fact that the error is jurisdictional.

The discrepancy that troubles the Crown is not, in my view, disturbing. As I note above, the governing principle is the same whether an error is challenged by the Crown or by the accused. While it is true that the effect of this principle is that errors as to the essential elements of the crime will, as a general rule, be reviewable when challenged by the accused but not when challenged by the Crown, this disparity reflects the balance of harms: a wrongful discharge does not raise the possibility of a

violation of s. 7 of the *Canadian Charter of Rights and Freedoms*; by contrast, I think it clear that committing an individual to stand trial on a charge for which there is no evidence on one of the essential elements would violate the principles of fundamental justice. I note, moreover, that in circumstances such as were at issue in *Tremblay*, the Crown is free, subject to the requirements of s. 577 of the *Criminal Code*, to lay a new information or prefer an indictment. There is no analogous remedy available to the accused. [Emphasis in original.]

63 I take care not to be understood to have decided here that a failure to consider relevant evidence will never amount to reviewable error. With respect, however, I do not subscribe to a jurisdictional distinction in this regard between preliminary inquiries and summary trials, for example — which are almost everywhere in Canada generally conducted by the very same judges — or between common law courts and courts created by statute. A superior court is, of course, vested with discretionary prerogatives not shared by statutory courts and tribunals. In my view, however, it enjoys no exclusive or inherent powers regarding an omission to consider relevant evidence.

64 As Laskin J.A. noted, this Court, in *R. v. Morin*, 1992 CanLII 40 (SCC), [1992] 3 S.C.R. 286, has held that the failure of a trial judge to consider relevant evidence will not necessarily amount to an error of law. Delivering the judgment of the Court in *Morin*, Sopinka J. put the matter this way: “[f]ailure to appreciate [all of] the evidence cannot amount to an error of law unless the failure is based on a misapprehension of some legal principle” (p. 295). This rule, it appears, would apply even where “the trial judge [has] failed to appreciate important evidence”: see *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 47 (emphasis added).

65 The error imputed in this case to Serré J. was not “based on a misapprehension of some legal principle”. Assuming, in this context only, that Serré J. did indeed fail to appreciate some of the relevant evidence, as alleged by the appellant, I find it unnecessary to decide whether this constituted an error in law within the meaning of *Morin, supra*. I think it sufficient to say that she did not thereby commit a jurisdictional error giving rise to *certiorari*.

III. Serré J.’s Consideration of Evidence

66 The appellant, I repeat once more, has failed to persuade me that Serr— J. discharged the respondent without considering the whole of the evidence.

67 It is undisputed that Serré J., before concluding that the evidence was insufficient to warrant a committal for trial, instructed herself correctly as to the role of a justice at a preliminary inquiry. Moreover, she instructed herself impeccably as to the test for sufficiency as it related specifically to the offences charged in both counts.

68 The Crown contends that Serré J. examined some but not all of the evidence capable of supporting a committal and thereby exceeded her jurisdiction in discharging the respondent. Specifically, the appellant relies on Serr— J.’s question, “Can a Justice draw a reasonable inference from Mr. Campeau’s knowledge of brass knuckles that the device was made of metal?” (emphasis in original), to support the conclusion that Serré J. considered only the evidence of Guy Campeau, while ignoring other circumstantial evidence that could support a finding that the object was a prohibited weapon. Major J. has reviewed that other circumstantial evidence, much of which relates to the respondent’s “subsequent conduct”, in considerable detail and there is thus no need for me to do so again here.

70 First, we are not entitled to assume from the justice's silence regarding a particular piece of evidence that she has not considered that evidence as she is required by s. 548(1)(b) to do. I think it more plausible to infer that Serré J. simply found that the evidence not explicitly mentioned by her had no significant probative value and, therefore, no impact on the sufficiency of the evidence taken as a whole.

71 A reviewing court must take care not to fill with presumptively adverse assumptions the gaps it sees in the reasons given by a justice at the conclusion of a preliminary inquiry. Here, there is no basis for supposing, because Serré J. mentioned the strongest evidence relied on by the prosecution, that she overlooked or “failed to consider” other evidence that may be thought by some to have a bearing on that issue. On my reading of the record, it is more likely by far that these other items of evidence, individually or collectively considered, could not in her opinion reasonably support an inculpatory finding on the one critical issue in the case as it had unfolded before her: whether the “brass knuckle knife” Mr. Deschamplain admittedly had in his possession was a prohibited weapon within the meaning of the *Criminal Code*.

72 Second, there is some indication in Serr— J.'s reasons, delivered orally, that she did in fact assess the circumstantial evidence adduced by the Crown, and found it to be insufficient to warrant a committal. The question relied upon by the appellant must be taken in the context of Serr— J.'s reasons read as a whole. Serré J. dealt with the Crown's evidence on the composition of the “brass knuckle knife” as follows:

Counsel for the prosecution invites the Court to safely act on the evidence of Guy Campeau and commit the accused to trial.

Crown Counsel submits that the Court can draw from the record and from the application of the common usage of the language given to the phrase ‘brass knuckle’, a reasonable inference to commit.

Counsel for the defence argues that the Crown is engaging in conjecture, and that it is insufficient for a committal that the inferences which Crown counsel asks the Court to draw leads to speculative rather than logical and precise inferences of guilt objectively grounded in evidence. . . .

Can a Justice draw a reasonable inference from Mr. Campeau’s knowledge of brass knuckles that the device was made of metal? Mr. Campeau simply identified the shape of the device; the grip of the knife bore four rings; it was silver in colour and could be used in a manner consistent with brass knuckles. [First, second and third emphasis added; fourth emphasis in certified transcript.]

73 In this regard, I find it helpful to reproduce here a relevant extract from the reasons of Laskin J.A. in the Court of Appeal (at paras. 7-8):

The box with the knife in it was turned over to one of the teachers at the school, Guy Campeau. Mr. Campeau took the box back to his office, opened the lid, and looked at the knife. At the preliminary hearing he testified that the knife was “silver with brass knuckle type four rings that you would put your finger through to hold onto the handle”. On cross-examination he acknowledged that he never took the knife out of the box or even touched it. He also acknowledged that although he described the knife as a “brass knuckle type knife” he was not suggesting that it was made of brass. . . .

Mr. Campeau was not asked, either on direct examination or on cross-examination, whether either the four rings or the handle to which they were attached was made of metal.

74 While Serré J. did focus her attention on the evidence of Mr. Campeau, she also adverted to the Crown’s submissions regarding reasonable inferences that could be drawn from the record. Serr— J.’s assessment of the sufficiency of this body of evidence was within her jurisdiction: she was entitled — indeed, required — to determine what inferences it could

reasonably support, and she was entitled to conclude, as she did, that those inferences were speculative in nature.

75 Third, it is not at all surprising that the justice, in giving her reasons, focussed on the evidence of Mr. Campeau. Crown counsel, in his submissions relating to the composition of the weapon, referred Serr— J. exclusively to the teacher’s testimony:

Mr. Campeau in his evidence, and perhaps the better way of doing this is taking it to the defendant’s written submissions. This would be found at page 7. He describes it was silver, brass knuckle type, 4 rings that you could put your finger through to hold on to the handle and then at the bottom of page 7 he says “I’ve never seen brass knuckles before but from what I know of them you slide your 4 fingers into a grip and you hold on to it this way.” Then I got him to describe the fact that he held it up with his fist closed and in my respectful submission that is sufficient evidence for these purposes.

Counsel went on to discuss the importance of the other circumstantial evidence, particularly the respondent’s “subsequent conduct”, in relation to the respondent’s state of mind and with respect to the obstruction of justice charge. As I have mentioned, however, it is conceded that a committal for obstruction could not stand in the absence of a committal on the count for possession of a prohibited weapon.

76 Crown counsel was most familiar with the theory of his case, the relative importance of the various pieces of evidence, and the viability of the inferences to be drawn from them. The claim of the defence to a discharge rested on an assertion that there was no evidence upon which a trier of fact could reasonably find that the knife in question was a prohibited weapon.

Understandably, Crown counsel, in responding to that submission, relied on the testimony of Mr. Campeau concerning the appearance of the knife, rather than on the more speculative and tenuous evidence of “subsequent conduct”. It is hardly surprising that Serr— J. likewise thought it unnecessary to do so. Instead, she dealt in detail with what the Crown itself evidently (and correctly) considered to be its strongest and most significant evidence in relation to the nature of the weapon. In my view, Serré J. committed no jurisdictional error in doing so.

77 Finally, as I mentioned earlier, the preliminary inquiry in this case was not conducted in a disjointed or hurried manner, and the disposition was not reached precipitously or without reflection. Serr— J. heard all the Crown’s evidence together and on the same day. She then adjourned for six weeks before hearing submissions with the benefit of a full transcript of the evidence.

78 In their submissions, both counsel drew Serr— J.’s attention to the circumstantial evidence adduced by the Crown, including the respondent’s “subsequent conduct”. Understandably, they offered differing assessments of the import of that evidence. Moreover, they related it essentially to the respondent’s state of mind rather than to the composition of the “prohibited weapon”. Serr— J. then adjourned until the next morning, with the transcript of the evidence in hand, in order to “review the submissions of counsel, together with the case law that has been provided”.

79 As a general rule, the reasons set out in a judge’s decision provide the safest measure of what was in the judge’s mind when that decision was rendered. Earlier comments, particularly if they are remote in time or expressed in evidently tentative terms, are of little value in determining the soundness of the judgment. This, however, does not entitle a reviewing court to assume that evidence canvassed by opposing counsel in their extensive and detailed submissions vanished overnight from the judge’s realm of contemplation. And I would not do so here.

80 As McLachlin J. has stated in another context, “[t]he fact that a trial judge misstates himself at one point should not vitiate his ruling if the preponderance of what was said shows that the proper test was applied and if the decision can be justified on the evidence”: *R. v. B. (C.R.)*, 1990 CanLII 142 (SCC), [1990] 1 S.C.R. 717, at p. 737. This Court should show no less deference in reviewing the decision of a justice to discharge at the conclusion of a preliminary inquiry.

81 This is especially so where, as here, the preponderance of what transpired before the justice, and what she expressly stated, amply demonstrate that she understood and considered all of the relevant issues. More particularly, it is clear from the record that Serré J. was perfectly aware of the limited nature of her task, of the test she was to apply in discharging it, of the essential elements of the offences charged and of the evidence relied on by the prosecution to establish those elements.

82 If Serr— J. erred at all, it was, of course, not in “misstating” herself, but rather in failing to refer explicitly to some of the circumstantial evidence which may be thought by others to have warranted a committal to trial. Here, I repeat, Serré J. heard all the relevant evidence, received and examined a transcript of that evidence, considered it in the light of counsels’ submissions, adjourned to consider the evidence and to review the governing principles, and set out flawlessly the law governing her role in determining whether to commit for trial. I think it both right and fair to assume that she proceeded to apply the principles she had so carefully set out. I see no basis for assuming the opposite. If she nonetheless erred in the result, her error concerned the sufficiency of the evidence and was not subject to review on *certiorari*.

IV. Conclusion

For all of the foregoing reasons and with respect for the contrary conclusion of Major J., I would therefore, as stated at the outset, dismiss the appeal.

Appeal allowed, BINNIE, LEBEL and FISH JJ. dissenting.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Kelly Jennings & Lacy, Toronto.

TAB 9

Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3

Source:	Supreme Court of Canada
Date:	2003-11-06
File number:	28807
Other citations:	232 DLR (4th) 577 — 312 NR 1 — 218 NSR (2d) 311 — 687 APR 311 — 112 CRR (2d) 202 — 45 CPC (5th) 1 — [2003] CarswellNS 375 — JE 2003-2076 — [2003] SCJ No 63 (QL) — [2003] ACS no 63
Citation:	Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3, < https://canlii.ca/t/4nx4 >, retrieved on 2026-03-22
Most recent unfavourable mention	R. v. Warren , 2024 ONSC 2785 (CanLII) [...] Mr. Warren’s case is distinguishable from Doucet-Boudreau v. Nova Scotia (Minister of Education) , 2003 SCC 62 (CanLII) , [2003] 3 S.C.R. 3, as s. 12 of the Charter does not contain the same “affirmative promise” as the provision of minority language education in s. 23. [...]

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62

Glenda Doucet-Boudreau, Alice Boudreau, Jocelyn Bourbeau, Bernadette Cormier-Marchand, Yolande Levert and Cyrille Leblanc, in their name and in the name of all Nova Scotia parents who are entitled to the right, under [Section 23](#) of the [Canadian Charter of Rights and Freedoms](#), to have their children educated in the language of the minority, namely the French language, in publicly funded French-language school facilities, and Fédération des parents acadiens de la Nouvelle-Écosse Inc.

Appellants

Attorney General of Nova Scotia

Respondent

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Newfoundland and Labrador, Commissioner of Official Languages for Canada, Fédération nationale des conseillères et conseillers scolaires francophones, Fédération des associations de juristes d'expression française de Common Law Inc. (FAJEFCL) and Conseil scolaire acadien provincial (CSAP)

Interveners

Indexed as: Doucet-Boudreau v. Nova Scotia (Minister of Education)

Neutral citation: 2003 SCC 62.

File No.: 28807.

2002: October 4; 2003: November 6.

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

on appeal from the court of appeal for nova scotia

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

Rights and Freedoms — Whether reporting order was “appropriate and just in the circumstances” — Canadian Charter of Rights and Freedoms, ss. 23, 24(1).

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

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

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

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

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

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

The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. While it would be unwise at this point to attempt to define the expression “appropriate and just”, there are some

broad considerations that judges should bear in mind in evaluating the appropriateness and justice of a potential remedy. An appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants and employs means that are legitimate within the framework of our constitutional democracy. It is a judicial one which vindicates the right while invoking the function and powers of a court. An appropriate and just remedy is also fair to the party against whom the order is made. Since s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*, the judicial approach to remedies must remain flexible and responsive to the needs of a given case. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may thus in some cases require the introduction of novel remedies. Lastly, the remedial power in s. 24(1) cannot be strictly limited by statutes or rules of the common law. However, insofar as the statutory provisions or common law rules express principles that are relevant to determining what is “appropriate and just in the circumstances”, they may be helpful to a court choosing a remedy under s. 24(1).

Here, the remedy ordered by the trial judge was appropriate and just in the circumstances. He exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education. The order is a creative blending of remedies and processes already known to the courts in order to give life to the rights in s. 23. Given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. The remedy took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. The remedy vindicated the rights of the parents while leaving the detailed choices of means largely to the executive. The reporting order was judicial in the sense that it called on the functions and powers known to courts. The range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts. Further, although the common law doctrine of *functus officio* cannot strictly pre-empt the remedial discretion in s. 24(1),

an examination of the *functus* question indicates that the trial judge issued an order that is appropriately judicial. The retention of jurisdiction did not include any power to alter the disposition of the case and did nothing to undermine the provision of a stable basis for launching an appeal. Finally, in the context, the reporting order was not unfair to the government. While, in retrospect, it would certainly have been advisable for the trial judge to provide more guidance to the parties as to what they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. It was not vaguely worded so as to render it invalid.

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

Here, the drafting of the reporting order was anything but clear. The order gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. The uncertainty engendered by the order amounted to a breach of procedural fairness. For this reason alone, the order can be found to be inappropriate under s. 24(1) and therefore void. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized. As a general rule, courts should avoid interfering in the management of public administration. Once they have rendered judgment, they should resist the temptation to directly oversee or supervise the

administration of their orders and operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. In this case, the trial judge assumed jurisdiction over a sphere traditionally outside the province of the judiciary, and also acted beyond the jurisdiction with which he was legitimately charged as a trial judge, thereby breaching the constitutional principle of separation of powers and the *functus officio* doctrine. His remedy undermined the proper role of the judiciary within our constitutional order and unnecessarily upset the balance between the three branches of government. Since no part of the Constitution can conflict with another, the trial judge's order for reporting hearings cannot be interpreted as appropriate and just under s. 24(1).

The proper development of the law of constitutional remedies requires that courts reconcile their duty to act within proper jurisdictional limits with the need to give full effect to the rights of a claimant. The intrusiveness of the trial judge's order was in no way necessary to secure the appellants' s. 23 *Charter* interests. In the present case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized *Charter* remedy and, more importantly, to that which they are guaranteed by s. 23 — namely, the timely provision of minority language instruction facilities. If, as suggested by the appellants, the reporting hearings were an incentive for the government to comply with the best efforts order, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. Moreover, at the level of constitutional principles, because this incentive is legal in nature, it would not have led to the improper politicization of the relationship between the judiciary and the executive. While a trial judge's decisions with respect to remedies are owed deference, this must be tempered when, as here, fundamental legal principles are threatened. Proper consideration of the principles of procedural fairness and the separation of powers is required to establish the requisite legitimacy and certainty essential to an appropriate and just remedy under s. 24(1) of the *Charter*.

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By Iacobucci and Arbour JJ.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (2001), 203 D.L.R. (4th) 128, 194 N.S.R. (2d) 323, 85 C.R.R. (2d) 189, [2001] N.S.J. No. 240 (QL), [2001 NSCA 104](#), setting aside a decision of the Nova Scotia Supreme Court (2000), [2000 CanLII 50591 \(NS SC\)](#), 185 N.S.R. (2d) 246, 575 A.P.R. 246, [2000] N.S.J. No. 191 (QL). Appeal allowed, Major, Binnie, LeBel and Deschamps JJ. dissenting.

Joel E. Fichaud, Q.C., and *Melanie S. Comstock*, for the appellants.

Alexander M. Cameron, for the respondent.

Bernard Laprade and *Christopher Rupar*, for the intervener the Attorney General of Canada.

Janet E. Minor and *Vanessa Yolles*, for the intervener the Attorney General of Ontario.

Gabriel Bourgeois, Q.C., for the intervener the Attorney General of New Brunswick.

Written submissions only by *Deborah Paquette*, for the intervener the Attorney General of Newfoundland and Labrador.

Laura C. Snowball and *Subrata Bhattacharjee*, for the intervener the Commissioner of Official Languages for Canada.

Michel Doucet and *Christian E. Michaud*, for the intervener Fédération nationale des conseillères et conseillers scolaires francophones.

Roger J. F. Lepage and *Peter T. Bergbusch*, for the intervener Fédération des associations de juristes d’expression française de Common Law Inc.

Noella Martin and *Janet M. Stevenson*, for the intervener Conseil scolaire acadien provincial.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Bastarache and Arbour JJ. was delivered by

1 IACOBUCCI AND ARBOUR JJ. — This appeal involves the nature of remedies available under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for the realization of the minority language education rights protected by s. 23 of the *Charter*. The specific issue is whether a trial judge may, after ordering that a provincial government use its best efforts to build French-language school facilities by given dates, retain jurisdiction to hear reports on the progress of those efforts. The issue of broader and ongoing judicial involvement in the administration of public institutions is not before the Court in this case.

I. Background and Judicial History.

2 The appellants are Francophone parents living in five school districts in Nova Scotia (Kingston/Greenwood, Chéticamp, Île Madame-Archat (Petit-de-Grat), Argyle, and Clare) and Fédération des parents acadiens de la Nouvelle-Écosse Inc., a non-profit organization that monitors the advancement of educational rights of the Acadian and Francophone minority in Nova Scotia.

The Attorney General of Nova Scotia is the respondent, acting on behalf of the Department of Education of Nova Scotia.

3 Apart from the specific facts of the case, it is most important to note the historical context on which this dispute is centred. As we will discuss below, French-language education in Nova Scotia has not had an enviable record of success. While the situation improved over the rather dismal record of the previous centuries, the twentieth century left much to be achieved. [Section 23](#) of the *Charter* has been the hope of the French-speaking minority of Nova Scotia to redress the linguistic failings and inequality of history.

4 It is conceded in this appeal that [s. 23](#) of the *Charter* entitles the appellant parents to publicly funded French-language educational facilities for their children. For some time, Francophone parents in these five school districts of Nova Scotia had been urging their provincial government to provide homogeneous French-language schools at the secondary level in addition to the existing primary level facilities. The government of Nova Scotia, for its part, agreed: it did not dispute that the number of students warranted the facilities demanded. The government amended the *Education Act*, S.N.S. 1995-96, c. 1, ss. 11-16, in 1996 to create the Conseil scolaire acadien provincial (the “Conseil”), a province-wide French-language school board, with a view to realizing the *Charter*’s minority language education rights. However, while s. 11(1) empowered the Conseil to deliver and administer all French-language programs, only the Minister, with the approval of the Governor in Council, could construct, furnish and equip schools (see s. 88(1)). Although the government eventually announced the construction of the new French-language school facilities, construction of the promised schools never began. So in 1998, 16 years after the right was entrenched in the Constitution, the appellant parents applied to the Supreme Court of Nova Scotia for an order directing the Province and the Conseil to provide, out of public funds, homogeneous French-language facilities and programs at the secondary school level.

5 The application was heard before LeBlanc J. in October 1999. LeBlanc J. declared that the applicants were entitled parents under s. 23 of the *Charter* and that the number of students warranted the provision of French homogeneous secondary school facilities in Chéticamp, Île Madame-Archat (Petit-de-Grat), Argyle, and Clare: (2000), 2000 CanLII 50591 (NS SC), 185 N.S.R. (2d) 246. He noted, however, that the real issue was not the existence and content of the applicants' s. 23 rights, but the date on which the programs and facilities would finally be made available.

6 LeBlanc J. found that the respondents had not given sufficient attention to the serious rate of assimilation among Acadians and Francophones in Nova Scotia. The Province treated s. 23 rights as if they were but one more demand for educational programs and facilities, and failed to accord them due priority as constitutional rights. Meanwhile, assimilation continued. LeBlanc J. stated that “[i]t is beyond any doubt that it is time that homogeneous programs and facilities be provided to s. 23 students” (para. 206).

7 LeBlanc J. considered the state of school programs and facilities, including the progress that had already been made toward complying with s. 23 of the *Charter*, in each of the five school districts at issue. He directed the Province, which, through the Department of Education, is responsible for providing school facilities, and the Conseil, which is responsible for program provision, to build schools and provide programs by more and less specific deadlines. LeBlanc J. required that the respondents use their “best efforts” to comply with his order. Finally, he retained jurisdiction to hear reports from the respondents on their compliance. The precise wording of the order was as follows:

1. In Kingston/Greenwood, the entitled parents under Section 23 have a right to a homogeneous French program from grades Primary to 12 and the entitled parents

have a right to a homogeneous French facility for grades Primary to 12 by September 2000.

2. In Cheticamp, the entitled parents under Section 23 have a right to a homogeneous French secondary program in a homogeneous French facility by September 2000.
3. In Île Madame-Archat (Petit-de-Grat), the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades 9 through 12 by September 2000 and the Respondent Department of Education shall use its best efforts (a) to provide a homogeneous French facility (on an interim basis) for grades 9 through 12 by September 2000 and (b) to provide a permanent homogeneous French facility by January 2001.
4. In Argyle, the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall provide a homogeneous French facility for grades Primary through 12 by September 2001.
5. In Clare, the Respondent CSAP shall provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall take immediate steps to provide homogeneous French facilities for grades Primary through 12 by September 2001.
6. The Respondents shall use their best efforts to comply with this Order.
7. The Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondents' compliance with this Order. The Respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

8 The reference to "the Court" in the final paragraph was interpreted by LeBlanc J., and the parties, as a reference to himself sitting as a judge of the provincial supreme court, rather than to the Supreme Court of Nova Scotia generally, which, as a court of first instance, would be competent to hear applications relating to any failure by the respondents to comply with LeBlanc J.'s order and would require no express retention of jurisdiction. LeBlanc J. presided over several of these "reporting hearings" between July 27, 2000, and March 23, 2001. Prior to each reporting session the trial judge directed the Province to file an affidavit from the appropriate official at the Department of Education, setting out the Department's progress in complying with the trial judge's decision. The trial judge permitted the respondent and Conseil to adduce evidence, including rebuttal evidence on various matters relating to compliance with the best efforts order. The

Attorney General of Nova Scotia, on behalf of the Department of Education, appealed the part of the order in which LeBlanc J. retained his jurisdiction to hear reports.

9 The majority at the Nova Scotia Court of Appeal allowed the appeal before the final scheduled reporting hearing took place ((2001), 194 N.S.R. (2d) 323, [2001 NSCA 104](#)). Flinn J.A., writing for the majority, emphasized that the declaration of the parents' rights and the order to provide programs and facilities were not in issue in the appeal (para. 6). Only the trial judge's retention of jurisdiction to hear reports was challenged. Flinn J.A. held that the trial judge, having decided the issue between the parties, had no further jurisdiction to remain seized of the case. This opinion was based on the common law principle of *functus officio* and Flinn J.A.'s view that the [Judicature Act](#), R.S.N.S. 1989, c. 240, not only fails explicitly to authorize the retention of jurisdiction by a trial court after it has decided the issues before it and provided a remedy, but also precludes a trial judge from retaining jurisdiction to determine whether there is compliance with the order. He cited this Court's decision in *Mills v. The Queen*, [1986 CanLII 17 \(SCC\)](#), [1986] 1 S.C.R. 863, at pp. 952-53, for the principle that it is for Parliament, and not judges, to fix the jurisdiction of courts and that the [Charter](#) was intended to fit in, rather than to alter, the existing scheme of Canadian legal procedure. After reviewing the language rights jurisprudence, Flinn J.A. concluded that there was no authority or precedent supporting the trial judge's decision to order and conduct the reporting sessions. He concluded that, while it is true that courts have broad ranging powers under s. 24(1) to fashion remedies, and are encouraged to be creative in so doing, the *Charter* does not extend a court's jurisdiction to permit it to enforce its remedies. Finally, Flinn J.A. expressed a reluctance to open the door to American jurisprudence on the enforcement of mandatory injunctions and a fear that post-trial intervention by trial judges in the enforcement of remedies would undermine the tradition of co-operation between the judiciary and the other branches of government.

10 Freeman J.A. dissented. In his view, LeBlanc J.’s order was not final and the judge was not *functus officio* until the continuing supervision was completed; the trial judge was able to keep his decision from being final simply by declaring that he was doing so. Freeman J.A. referred to the order as a “creative blending of declaratory and injunctive relief with a means of mediation” and found it to be “of the very essence of the kind of remedy courts are encouraged to seek pursuant to s. 24(1) to give life to *Charter* rights” (para. 70). He noted that requiring fresh applications by the parties each time the Province or the Conseil appeared not to be using its best efforts could have dragged matters out interminably, and would have left the matter to a judge with less familiarity with the issues and legal principles involved. Freeman J.A. concluded that the order, meant to “head off the potential for an enforcement nightmare”, “got the job done, virtually on time, with a minimum of inconvenience or unnecessary cost” (para. 84).

II. Issues

11 A preliminary issue raised by the respondent is whether the Court should decline to hear this appeal because it is moot.

12 The main issue in the appeal is simply this: having found a violation of s. 23 of the *Charter* and having ordered that the Province make its best efforts to provide homogeneous French-language facilities and programs by particular dates, did the Nova Scotia Supreme Court have the authority to retain jurisdiction to hear reports from the Province on the status of those efforts as part of its remedy under s. 24(1) of the *Charter*?

13 Strictly speaking, only the retention of jurisdiction to hear reports, and not the “best efforts” order itself, is at issue in the present appeal. Nonetheless, the best efforts order and the retention of jurisdiction were conceived by the trial judge as two complementary parts of a whole. A full appreciation of the balance and moderation of the trial judge’s approach to crafting this

remedy requires that the reports respecting the respondents' compliance with the order be viewed and evaluated in the context of the remedy as a whole.

III. Charter Provisions

14 LeBlanc J.'s order was designed to remedy a breach of s. 23 of the *Charter* which provides:

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

15 LeBlanc J. ordered the remedy challenged in this case pursuant to s. 24(1) of the *Charter* which provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this [Charter](#), have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

IV. Analysis

A. *Mootness*

16 Before considering the main issue in this case, it is necessary to consider the respondent's argument that this appeal should not be heard because it is moot.

17 The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard (see *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#), [1989] 1 S.C.R. 342, at p. 353). In our view, the instant appeal is moot. The parties attended several reporting hearings, presented evidence and allowed the deponents of affidavits to be cross-examined. The desired effect has been achieved: the schools at issue have been built. Restoring the validity of the trial judge's order would have no practical effect for the litigants in this case and no further reporting sessions are necessary.

18 Although this appeal is moot, the considerations in *Borowski*, *supra*, suggest that it should be heard. Writing for the Court, Sopinka J. outlined the following criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63):

(1) the presence of an adversarial context;

(2) the concern for judicial economy; and

(3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

19 In this case, the appropriate adversarial context persists. The litigants have continued to argue their respective sides vigorously.

20 As to the concern for conserving scarce judicial resources, this Court has many times noted that such an expenditure is warranted in cases that raise important issues but are evasive of review (*Borowski, supra*, at p. 360; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967 CanLII 116 \(SCC\)](#), [1967] S.C.R. 628; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999 CanLII 653 \(SCC\)](#), [1999] 3 S.C.R. 46). The present appeal raises an important question about the jurisdiction of superior courts to order what may be an effective remedy in some classes of cases. To the extent that the reporting order is effective, it will tend to evade review since parties may rapidly comply with orders before an appeal is heard.

21 Moreover, in deciding whether to hear a moot case, courts must weigh the expenditure of scarce judicial resources against “the social cost of continued uncertainty in the law” (*Borowski, supra*, at p. 361). The social cost of uncertainty as to the available *Charter* remedies is high. The *Charter* is designed to protect those who are most vulnerable to the dangers of majority rule; this aspect of the *Charter*’s purpose is evident in the provisions protecting official minority language education rights. If the Court leaves this matter undecided and courts are left under a misapprehension as to the tools available to ensure that government behaviour conforms with the *Charter*, the obvious danger is less than full protection of *Charter* rights. Thus, the expenditure of judicial resources is warranted in the present case despite the fact that the appeal may be moot.

The decision of this Court will provide guidance on the important question of the nature and extent of remedies under [s. 24](#) of the *Charter* in similar cases.

22 Finally, the Court is neither departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere by deciding to hear this case (*Borowski, supra*, at p. 362). The question of what remedies are available under the *Charter* falls squarely within the expertise of the Court and is not susceptible to legislative or executive pronouncement. Furthermore, unlike in *Borowski, supra*, at p. 365, the appellants are not seeking an answer to an abstract question on the interpretation of the *Charter*; they are not “turn[ing] this appeal into a private reference”. The Attorney General of Nova Scotia appealed successfully against an order made against it by a superior court. Although the immediate grievances of the appellants have now been addressed, deciding in this case will assist the parties to this action, and others in similar circumstances, in their ongoing relationships.

B. *The Retention of Jurisdiction*

(1) The Importance of Context: [Sections 23](#) and [24](#) of the *Charter*

23 It is well accepted that the *Charter* should be given a generous and expansive interpretation and not a narrow, technical, or legalistic one (*Hunter v. Southam Inc.*, [1984 CanLII 33 \(SCC\)](#), [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985 CanLII 69 \(SCC\)](#), [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, [1985 CanLII 81 \(SCC\)](#), [1985] 2 S.C.R. 486; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991 CanLII 61 \(SCC\)](#), [1991] 2 S.C.R. 158; *Vriend v. Alberta*, [1998 CanLII 816 \(SCC\)](#), [1998] 1 S.C.R. 493). The need for a generous interpretation flows from the principle that the *Charter* ought to be interpreted purposively. While courts must be careful not to overshoot the actual purposes of the *Charter*’s guarantees, they must avoid a narrow, technical approach to *Charter* interpretation which could subvert the goal of ensuring that right holders

enjoy the full benefit and protection of the *Charter*. In our view, the approach taken by our colleagues LeBel and Deschamps JJ. which appears to contemplate that special remedies might be available in some circumstances, but not in this case, severely undervalues the importance and the urgency of the language rights in the context facing LeBlanc J.

24 The requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights (*R. v. Gamble*, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595; *R. v. Sarson*, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 (“*Dunedin*”). In *Dunedin*, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:

[Section] 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures the attainment of its objects Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a “large and liberal” interpretation Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights. In *Mills*, McIntyre J. observed at p. 965 that “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”. This broad remedial mandate for s. 24(1) should not be frustrated by a “(n)arrow and technical” reading of the provision [Reference omitted.]

25 Purposive interpretation means that remedies provisions must be interpreted in a way that provides “a full, effective and meaningful remedy for *Charter* violations” since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach” (*Dunedin, supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives

modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

26 The purpose of s. 23 of the *Charter* is “to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population” (*Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at p. 362). Minority language education rights are the means by which the goals of linguistic and cultural preservation are achieved (see *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at p. 849-50 (“*Schools Reference*”)). This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:

. . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

27 A further aspect of s. 23 of the *Charter* is its remedial nature (see, for example, *Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1, at para. 26). The section is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing (*Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850). Section 23 must therefore be construed “in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection of minority language rights” (*Schools Reference*, at p. 850; see also *Arsenault-Cameron*, *supra*, at para. 27). This Court

has made it clear that the fact that language rights arose from political compromise does not alter their nature and importance; consequently, s. 23 must be given the same large and liberal interpretation as all *Charter* rights (*R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25; *Arsenault-Cameron*, *supra*, at para. 27).

28 The minority language education rights protected under s. 23 of the *Charter* are unique. They are distinctively Canadian, representing “a linchpin in this nation’s commitment to the values of bilingualism and biculturalism” (*Mahe*, *supra*, at p. 350). Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures (*Mahe*, at p. 389). While the rights are granted to individuals (*Schools Reference*, at p. 865), they apply only if the “numbers warrant”, and the specific programs or facilities that the government is required to provide varies depending on the number of students who can potentially be expected to participate (*Mahe*, *supra*, at p. 366; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron*, *supra*, at para. 38). This requirement gives the exercise of minority language education rights a unique collective aspect even though the rights are granted to individuals.

29 Another distinctive feature of the right in s. 23 is that the “numbers warrant” requirement leaves minority language education rights particularly vulnerable to government delay or inaction. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to “warrant”. Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order

affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected (see, for example, *Marchand v. Simcoe County Board of Education* (1986), [1986 CanLII 2671 \(ON SC\)](#), 29 D.L.R. (4th) 596 (Ont. H.C.); *Marchand v. Simcoe County Board of Education* (No. 2) (1987), [1987 CanLII 4129 \(ON SC\)](#), 44 D.L.R. (4th) 171 (Ont. H.C.); *Lavoie v. Nova Scotia (Attorney-General)* (1988), [1988 CanLII 5684 \(NS SC\)](#), 47 D.L.R. (4th) 586 (N.S.S.C.T.D.); *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation)* (1996), [1996 CanLII 12465 \(ON SCDC\)](#), 136 D.L.R. (4th) 704 (Ont. Ct. (Gen. Div.)), *aff'd* (1996), [1996 CanLII 11789 \(ON SC\)](#), 30 O.R. (3d) 681 (C.A.); *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan*, [1998 CanLII 13468 \(SK QB\)](#), [1999] 3 W.W.R. 743 (Sask. Q.B.), *aff'd* [1998 CanLII 12371 \(SK CA\)](#), [1999] 12 W.W.R. 742 (Sask. C.A.); *Assoc. Française des Conseils Scolaires de l'Ontario v. Ontario* (1988), [1988 CanLII 4759 \(ON CA\)](#), 66 O.R. (2d) 599 (C.A.); *Assn. des parents francophones de la Colombie-Britannique v. British Columbia* (1998), [1998 CanLII 3969 \(BC SC\)](#), 167 D.L.R. (4th) 534 (B.C.S.C.)).

30 To put the matter of judicial remedies in greater context, it is useful to reflect briefly on the role of courts in the enforcement of our laws.

31 Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement. In this respect, courts play an essential role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions. But courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.

Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches. While our Constitution does not expressly provide for the separation of powers (see *Re Residential Tenancies Act, 1979*, [1981 CanLII 24 \(SCC\)](#), [1981] 1 S.C.R. 714, at p. 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990 CanLII 63 \(SCC\)](#), [1990] 3 S.C.R. 570, at p. 601; *Reference re Secession of Quebec*, [1998 CanLII 793 \(SCC\)](#), [1998] 2 S.C.R. 217, at para. 15), the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. (See, for example, *Fraser v. Public Service Staff Relations Board*, [1985 CanLII 14 \(SCC\)](#), [1985] 2 S.C.R. 455, at pp. 469-70.) In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993 CanLII 153 \(SCC\)](#), [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

34 In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

35 In addition, it is unsurprising, given how the *Charter* changed the nature of our constitutional structure by requiring that all laws and government action conform to the *Charter*, that concerns about the limits of the judicial role have animated much of the *Charter* jurisprudence and commentary surrounding it (see, for example, K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001); C. P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1993); F. L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (2000); A. Petter, “The Politics of the Charter” (1986), 8 *Supreme Court L.R.* 473). Thus, in *Vriend, supra*, this Court stated, at para. 136:

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts.

36 Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 136:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.

Determining the boundaries of the courts' proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.

37 Returning to this appeal, we believe that LeBlanc J. was duly guided by historical and contextual factors in crafting a remedy that would meaningfully protect, indeed implement, the applicants' rights to minority official language education for their children while maintaining appropriate respect for the proper roles of the executive and legislative branches.

38 As indicated earlier, the history of French-language education in Nova Scotia has been disappointing, resulting in high rates of assimilation that have continued well into the period when this litigation began. While the situation is not what it was in the eighteenth and nineteenth centuries when French-language education in Acadia was for the most part either expressly prohibited or unavailable, the promise of s. 23 had yet to be fulfilled in the five school districts at issue in this appeal when the appellants brought their application demanding homogeneous French-language facilities before the Supreme Court of Nova Scotia in 1998. Through the mid-1990s, s. 23 parents had pressured the government to provide homogeneous French-language facilities in presentations to Legislative Committees and in written and oral submissions to Ministers of Education. They had submitted petitions, letters, and expert analyses on assimilation to the Province. In 1996, amendments to the *Education Act* provided for a French-language school board, the Conseil scolaire acadien provincial, geared toward the fulfilment of the Province's s. 23 obligations. The school board then decided to provide the facilities at issue in this appeal. From

1997 to 1999, the provincial government announced the construction of homogeneous French-language schools in Petit-de-Grat, Clare, and Argyle. The schools were never built, and the construction projects were officially put on hold in September 1999.

39 The reason for the delay, broadly speaking, was the government's failure to give due priority to s. 23 rights in educational policy setting. Indeed, LeBlanc J. observed that the real issue between the parties by the time of trial was the date on which the programs ought to be implemented, rather than any question as to whether they were required in the first place. The government cited a lack of consensus in the community, a consequent fear that enrollment would drop, and lack of funds as reasons for its decision to place the previously announced school construction projects on hold pending cost-benefit reviews. LeBlanc J. rightly concluded that none of these reasons justified the government's failure to fulfill its obligations under s. 23. He found that the government had been treating the provision of s. 23 schools no differently from programs or facilities generally, without attention to purposes of s. 23 of the *Charter* and the role that homogeneous schools play in French linguistic and cultural preservation and flourishing (para. 205). Meanwhile, assimilation continued (para. 210) and enrollment in the Conseil's schools was dropping. Programs were in jeopardy (paras. 229-30).

40 It is in this urgent context of ongoing cultural erosion that LeBlanc J. crafted his remedy. He was sensitive to the need for timely execution, the limits of the judicial role, and the desirability of allowing the government flexibility in the manner of fulfilling its constitutional obligations when he ordered the government to make best efforts to provide facilities by particular dates and retained jurisdiction to hear progress reports. However, the urgency of the context does not by itself create jurisdiction in a superior court to issue a remedy of unlimited scope under s. 24(1) of the *Charter*. We now turn to the question of whether LeBlanc J.'s order was within the jurisdiction of a superior court.

(2) The Jurisdiction of a Superior Court to Issue a Remedy Under Section 24(1) of the [Charter](#)

41 Section 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of [Charter](#) rights and freedoms. The respondent makes various arguments suggesting that LeBlanc J. exceeded his jurisdiction by violating constitutional norms, statutory provisions, and common law rules. We will first deal with the extent of the remedial jurisdiction in s. 24(1) and the constitutional limits to that jurisdiction proposed by the respondent. Later we will discuss how statutes and common law rules might be relevant to the choice of remedy under s. 24(1).

42 Clearly, if there is some constitutional limit to the remedial power either in s. 24(1) or in some other part of the Constitution, the judge ordering a remedy must respect this boundary. As a basic rule, no part of the Constitution can abrogate or diminish another part of the Constitution (*New Brunswick Broadcasting, supra*, at p. 373, McLachlin J. citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987 CanLII 65 \(SCC\)](#), [1987] 1 S.C.R. 1148). For example, a court could not compel a provincial government to do something pursuant to s. 24(1) which would exceed the jurisdiction of the province under s. 92 of the [Constitution Act, 1867](#).

43 A remedy under s. 24(1) is available where there is some government action, beyond the enactment of an unconstitutional statute or provision, that infringes a person's [Charter](#) rights (see *Schachter v. Canada*, [1992 CanLII 74 \(SCC\)](#), [1992] 2 S.C.R. 679, at pp. 719-20). In the present appeal, the difficulty does not lie with the legislation: no provision or omission in the [Education Act](#) prevented the government from providing minority language education as required by the *Constitution Act, 1982*. On the contrary, the *Education Act*, as amended in 1996, establishes a French-language school board to provide homogeneous French-language education to children of s. 23 entitled parents. Neither is the problem rooted in any particular government action; rather,

the problem was inaction on the part of the provincial government, particularly its failure to mobilize resources to provide school facilities in a timely fashion, as required by s. 23 of the *Charter*. Section 24(1) is available to remedy this failure.

44 To repeat its text, s. 24(1) of the *Charter* provides:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

45 The purposive reading of s. 24(1) and also the ordinary meaning of the drafter's language make it clear that s. 24(1) guarantees that there must always be a court of competent jurisdiction to hear anyone whose rights or freedoms have been infringed or denied (see *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, at p. 196, and *Mills*, *supra*, at p. 881). The default court of competent jurisdiction is a superior court established under s. 96 of the *Constitution Act, 1867*. It is also plainly contemplated in s. 24(1) that a court of competent jurisdiction will have the authority to grant a remedy that it considers appropriate and just in the circumstances.

46 The respondent Attorney General of Nova Scotia suggested that *Re Residential Tenancies Act, 1979*, *supra*, and other cases which describe the functions of courts in the context of s. 96 should be read as setting limits on superior courts' remedial power. With respect, that submission must fail. It is true that in *Re Residential Tenancies Act, 1979*, at pp. 734-35, Dickson J. (as he then was) discussed the nature of the "judicial function" of s. 96 courts. But this discussion occurred in the context of a s. 96 challenge to the validity of a statute conferring jurisdiction on an administrative tribunal. Section 96 protects a "core" of superior courts'

jurisdiction from being transferred exclusively to provincial inferior courts or administrative tribunals (*MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at para. 15, *per* Lamer C.J.). These cases safeguarding a core do not trace the limits of superior courts' jurisdiction. There is nothing in s. 96 to limit the inherent jurisdiction of the superior courts or the jurisdiction that can be conferred on them by statute (*Reference re Young Offenders Act (P.E.I.)*, 1991 CanLII 11713 (SCC), [1991] 1 S.C.R. 252, at p. 274) and, *a fortiori*, nothing to limit the jurisdiction of a superior court under s. 24(1) of the *Charter*.

47 In a similar vein, the respondent Attorney General suggests that this Court's decisions in *Mills* and *Dunedin*, both *supra*, which set out a framework for determining when a court or tribunal is competent to grant remedies under s. 24(1) of the *Charter*, deny the availability of the remedy ordered in this case. In our opinion, this submission rests on a mistaken view of the source of superior courts' power to grant *Charter* remedies.

48 In *Mills*, the Court considered whether a preliminary hearing magistrate given jurisdiction by particular provisions of the *Criminal Code* was a court of competent jurisdiction for the purposes of entering a stay of proceedings under s. 24(1) of the *Charter*. The unanimous conclusion of the Court was that a magistrate sitting at preliminary hearing was not competent to provide that remedy. McIntyre J., speaking for the majority on this point, emphasized the limited function of a court sitting in preliminary inquiry, which is to commit the accused to trial where there is sufficient evidence, or discharge the accused where there is not. The role does not include entering acquittals or convictions, imposing penalties, or giving remedies. As such, remedies under s. 24(1) could not be granted by that tribunal. Subsequent cases applying *Mills*, including *Dunedin*, *supra*, *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, considered whether administrative tribunals or judges acting under statutory authority had the power to issue particular *Charter* remedies under s. 24(1). In each case, the analysis was directed at discerning

what kinds of powers the legislator intended the tribunal to exercise in light of the purposes of the *Charter* as well as the tribunal's function and the practical limits imposed by its structure. This analysis has no application to s. 96 courts which are, of course, not creatures of statute but courts of general inherent jurisdiction.

49 Thus, when McIntyre J. wrote in *Mills, supra*, at p. 953, that “the *Charter* was not intended to turn the Canadian legal system upside down”, he meant that s. 24(1) did not confer new jurisdiction on statutory and inferior tribunals beyond that which was intended by the legislator as reflected in the tribunal's function and the practical limits imposed by its structure. The test set out in *Mills* does not apply to superior courts since, as McIntyre J. pointed out, a superior court will always be a court of competent jurisdiction under s. 24(1) of the *Charter* (*Mills, supra*, at p. 956). Superior courts retain “constant, complete and concurrent jurisdiction” to issue remedies under s. 24(1) (see *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, at pp. 603-4, citing *Mills, supra*, at p. 892, and *R. v. Smith*, 1989 CanLII 12 (SCC), [1989] 2 S.C.R. 1120, at pp. 1129-30).

50 The foregoing analysis does not preclude review on appeal of a superior court's choice of remedy under s. 24(1). Rather, it simply forecloses the argument that a given remedy under s. 24 is unavailable in a superior court because of the constitutional limitations on its jurisdiction as proposed by the respondent. The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. As McIntyre J. wrote in *Mills, supra*, at p. 965:

What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers “appropriate and just in the circumstances”. It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

McLachlin C.J. recently endorsed this passage in *Dunedin, supra*, at para. 18. Consequently, a party seeking to challenge a *Charter* remedy ordered by a s. 96 court must show that the order is not “appropriate and just in the circumstances”.

51 The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is “appropriate and just in the circumstances”.

(3) The Meaning of “Appropriate and Just in the Circumstances”

52 What, then, is meant in s. 24(1) by the words “appropriate and just in the circumstances”? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just. Deciding on an appropriate and just remedy in particular circumstances calls on the judge to exercise a discretion based on his or her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. Once again, we emphasize McIntyre J.’s words in *Mills, supra*, at p. 965:

It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

53 With respect, the approach to s. 24 reflected in the reasons of LeBel and Deschamps JJ. would tend to pre-empt and reduce this wide discretion. Their approach would also, in this case, pre-empt and devalue the constitutional promise respecting language rights in s. 23. In our view, judicial restraint and metaphors such as “dialogue” must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated. The same may be said of common law procedural principles such as *functus officio* which may to some extent be incorporated in statutes. Rather, as LeBel and Deschamps JJ. appear to recognize at paras. 135 and following, there are situations in which our Constitution requires special remedies to secure the very order it envisages.

54 While it would be unwise at this point to attempt to define, in detail, the words “appropriate and just” or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).

55 First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was “smothered in procedural delays and difficulties”, is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin, supra*, at para. 20, McLachlin C.J. citing *Mills, supra*, at p. 882, *per* Lamer J. (as he then was)).

56 Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

57 Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

59 Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just

remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

(4) Application to this Case: the Remedy Ordered by the Trial Judge Was Appropriate and Just in the Circumstances

(a) *The Reporting Order Effectively Vindicated the Rights of the Parents*

60 LeBlanc J. exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education in Kingston (Greenwood, Chéticamp, Île Madame-Archat (Petit-de-Grat), Argyle, and Clare). The facts as found by LeBlanc J. disclosed that continued delay could imperil the already vulnerable s. 23 rights, their exercise depending as it does on the numbers of potential students. As Freeman J.A. noted in dissent in the Court of Appeal, the reporting hearings were aimed at identifying difficulties with the timely implementation of the trial judge's order as they arose, instead of requiring fresh applications by the appellants every time it appeared that a party was not using its best efforts to comply with the judge's order.

61 In the absence of reporting hearings, the appellant parents would have been forced to respond to any new delay by amassing a factual record by traditional means disclosing whether the parties were nonetheless using their best efforts. A new proceeding would be required and this might be heard by another judge less familiar with the case than LeBlanc J. All of this would have taken significant time and resources from parents who had already waited too long and dedicated much energy to the cause of realizing their s. 23 rights. The order of reporting hearings was, as Freeman J.A. wrote "a pragmatic approach to getting the job done expeditiously" (para. 74).

LeBlanc J.'s order is a creative blending of remedies and processes already known to the courts in order to give life to the right in s. 23.

62 In assessing the extent to which LeBlanc J.'s remedy was appropriate and just in the circumstances, it is useful to examine the options before the trial judge. In doing so we are not intending to usurp the role and discretion of the trial judge but only to gain a fuller understanding of the situation he faced. LeBlanc J. could have limited the remedy to a declaration of the rights of the parties, as the Court considered prudent in *Mahe, supra*, at pp. 392-93. In *Mahe*, however, the primary issues before the Court concerned the scope and content of s. 23 of the *Charter*, including the degree of management of control of schools to be accorded to s. 23 parents, and the determination of when the numbers are sufficient to warrant given programs and facilities. After clarifying the content and scope of the s. 23 rights at issue, the Court chose the remedy of ordering a declaration of those rights. It did so to allow the government the greatest flexibility to fashion a response suited to the circumstances (p. 393). The assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully.

63 After *Mahe*, litigation to vindicate minority language education rights has entered a new phase. The general content of s. 23 in many cases is now largely settled (*Mahe, Schools Reference, Arsenault-Cameron*, all *supra*). In the present case, for example, it was clear to and accepted by the parties from the start that the government was required to provide the homogeneous French-language facilities at issue. The entitled parents sought the assistance of the court in enforcing the full and prompt vindication of their rights after a lengthy history of government inaction.

64 Our colleagues LeBel and Deschamps JJ. state at para. 140 of their reasons that the trial judge was not faced with a government which had understood its obligations but refused to

comply with them. Our colleagues suggest that there was some issue as to what s. 23 demanded in the situation. With respect, this portrayal is directly at odds with the findings of fact made by the trial judge. At para. 198 of his reasons, the trial judge wrote:

It is apparent that the real issue between the parties is the date on which these programs and facilities are to be implemented. The Department, in its submissions, does not challenge the applicants' right and entitlement to these programs and facilities but point [*sic*] to a number of factors which ought to satisfy the applicants. The Conseil opposes the applicants' claim for an earlier implementation of the transition plan but supports the applicants in its [*sic*] demand for declaration that the Department ought to be directed to provide homogeneous facilities.

65 LeBlanc J. further noted that the Department of Education did not provide either statistical or financial evidence with respect to the “numbers warrant” test and that, in any case, the number of children of s. 23 parents were greater than the number in the case of *Mahe, supra*, decided by this Court (paras. 200-201). Instead, the government argued at trial that it should be allowed to delay its obligations because of a lack of consensus in the Acadian and Francophone communities (para. 202) and because the political compromise in s. 23 required a “go-slowly approach” (para. 214). According to the trial judge, the government did not deny the existence or content of the s. 23 rights of the parents but rather failed to prioritize those rights and delayed fulfilling its obligations. The government “did not give sufficient priority to the serious rate of assimilation occurring among Acadians and Francophones in Nova Scotia and the fact that rights established in s. 23 are individual rights” (para. 204) despite clear reports showing that assimilation was “reaching critical levels” (para. 215). These are the findings of fact which can only be made by a judge who has heard all the evidence at trial. These findings are not on appeal and it is not open for appellate judges to reverse these findings without proper justification. LeBlanc J. properly took account of the factual circumstances within which he exercised his discretion to select a remedy which was appropriate and just.

LeBlanc J. obviously considered that, given the Province's failure to give due priority to the s. 23 rights of its minority Francophone populations in the five districts despite being well aware of them, there was a significant risk that such a declaration would be an ineffective remedy. Parents such as the appellants should not be forced continually to seek declarations that are essentially restatements of the declaration in *Mahe*. Where governments have failed to comply with their well-understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for declarations may be undermined. In *Mahe*, *supra*, at p. 393, Dickson C.J. recognized this possibility:

As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. [Emphasis added.]

This Court's judgment in *Mahe* speaks to all provincial and territorial governments. LeBlanc J. was entitled to conclude that he was not limited to declaring the appellant parents' rights and could take into consideration that the case before him was different from those in which declarations had been considered appropriate and just.

Our colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases. The threat of contempt proceedings is not, in our view, inherently more respectful of the executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards the fulfilment of their s. 23 rights. More importantly, given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. Viewed

in this light, LeBlanc J. selected a remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay.

(b) *The Reporting Order Respected the Framework of our Constitutional Democracy*

68 The remedy granted by LeBlanc J. took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. LeBlanc J. considered the government’s progress toward providing the required schools and services (see, e.g., paras. 233-34). Some flexibility was built into the “best efforts” order to allow for unforeseen difficulties. It was appropriate for LeBlanc J. to preserve and reinforce the Department of Education’s role in providing school facilities as mandated by s. 88 of the *Education Act*, as this could be done without compromising the entitled parents’ rights to the prompt provision of school facilities.

69 To some extent, the legitimate role of the court *vis-à-vis* various institutions of government will depend on the circumstances. In these circumstances, it was appropriate for LeBlanc J. to craft the remedy so that it vindicated the rights of the parents while leaving the detailed choices of means largely to the executive.

70 Our colleagues LeBel and Deschamps JJ. appear to consider that the issuance of an injunction against the government under s. 24(1) is constitutionally suspect and represents a departure from a consensus about *Charter* remedies (see para. 134 of the dissent). With respect, it is clear that a court may issue an injunction under s. 24(1) of the *Charter*. The power of courts to issue injunctions against the executive is central to s. 24(1) of the *Charter* which envisions more than declarations of rights. Courts do take actions to ensure that rights are enforced, and not merely declared. Contempt proceedings in the face of defiance of court orders, as well as coercive

measures such as garnishments, writs of seizure and sale and the like are all known to courts. In this case, it was open to the trial judge in all the circumstances to choose the injunctive remedy on the terms and conditions that he prescribed.

(c) *The Reporting Order Called on the Function and Powers of a Court*

71 Although it may not be common in the context of *Charter* remedies, the reporting order issued by LeBlanc J. was judicial in the sense that it called on the functions and powers known to courts. In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties (see R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at paras. 1.260-1.490). Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have “assumed active and even managerial roles in the exercise of their traditional equitable powers” (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes. For example, prejudgment remedies developed in such cases as *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd’s Rep. 509 (C.A.), and *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), involve the court in the preservation of evidence and the management of parties’ assets prior to trial. In bankruptcy and receivership matters, courts may be called on to supervise fairly complex and ongoing commercial transactions relating to debtors’ assets. Court-appointed receivers may report to and seek guidance from the courts and in some cases must seek the permission of the courts before disposing of property (see *Bennett on Receiverships* (2nd ed. 1999), at pp. 21-37, 443-45). Similarly, the courts’ jurisdiction in respect of trusts and estates may sometimes entail detailed and continuing supervision and support of their administration (see D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 904-9; *Oosterhoff on Wills and Succession* (5th ed. 2001), at pp. 27-28). Courts may also retain an ongoing jurisdiction in family law cases to order alterations in maintenance payments or parenting arrangements as circumstances change. Finally, this Court has in the past remained

seized of a matter so as to facilitate the implementation of constitutional language rights: see *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *Re Manitoba Language Rights Order*, 1985 CanLII 9 (SCC), [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, 1990 CanLII 35 (SCC), [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, 1992 CanLII 115 (SCC), [1992] 1 S.C.R. 212. Lower courts have also retained jurisdiction in s. 23 cases: *British Columbia (Association des parents francophones) v. British Columbia* (1996), 1996 CanLII 1455 (BC SC), 139 D.L.R. (4th) 356 (B.C.S.C.), at p. 380; *Lavoie, supra*, at pp. 593-95; *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 1983 CanLII 3785 (NB KB), 48 N.B.R. (2d) 361 (Q.B.), at para. 109.

72 The difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be awarded. Nonetheless, courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies (see Sharpe, *supra*, at paras. 1.260-1.380; *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48 (C.A.), aff'd [1912] A.C. 788 (H.L.); *Kennard v. Cory Brothers and Co.*, [1922] 1 Ch. 265, aff'd [1922] 2 Ch. 1 (C.A.)).

73 As academic commentators have pointed out, the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts (see W. A. Bogart, “‘Appropriate and Just’: Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy” (1986), 10 *Dalhousie L.J.* 81, at pp. 92-94; N. Gillespie, “Charter Remedies: The Structural Injunction” (1989-90), 11 *Advocates’ Q.* 190, at pp. 217-18; Roach, *Constitutional Remedies in Canada*, *supra*, at paras. 13.50-13.80; Sharpe, *supra*, at paras. 1.260-1.490). The change announced by s. 24 of the *Charter* is that the flexibility inherent in an

equitable remedial jurisdiction may be applied to orders addressed to government to vindicate constitutionally entrenched rights.

74 The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.

75 The respondent argues that the reporting order issued by LeBlanc J. violated the common law doctrine of *functus officio*. As we have said, statutes or common law rules cannot strictly pre-empt the remedial discretion in s. 24(1). Nonetheless, the doctrine of *functus officio* properly speaks to the functions and powers of courts. Therefore, an examination of the *functus* question is useful in deciding whether LeBlanc J. issued an order that is appropriately judicial.

76 Flinn J.A. for the majority in the Court of Appeal decided that the trial judge, having issued the best efforts order, had no further jurisdiction with respect to the parties and was therefore precluded from retaining jurisdiction to hear reports on its implementation (para. 21). This view is based on a mis-characterization of the reporting portion of the order as somehow separate from and additional to the best efforts injunctions. On the contrary, in our view, the reporting sessions formed an integral part of the remedy fashioned by LeBlanc J. Moreover, the *functus* doctrine has no application where the trial judge does not purport to alter a final judgment. There was no indication that the retention of jurisdiction included any power to alter the disposition of the case.

77 A closer examination of the doctrine is helpful. The *Oxford Companion to Law* (1980), at p. 508, provides the following definition:

Functus officio (having performed his function). Used of an agent who has performed his task and exhausted his authority and of an arbitrator or judge to whom further resort is incompetent, his function being exhausted.

78 But how can we know when a judge's function is exhausted? Sopinka J., writing for the majority in *Chandler v. Alberta Association of Architects*, [1989 CanLII 41 \(SCC\)](#), [1989] 2 S.C.R. 848, at p. 860, described the purpose and origin of the doctrine in the following words:

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division.

79 It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey*, [1990 CanLII 158 \(SCC\)](#), [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal. Applying that aspect of the *functus* doctrine to s. 23(1), we face the question of whether the ordering of progress reports denied the respondents a stable basis from which to appeal.

80 In our view, LeBlanc J.'s retention of jurisdiction to hear reports did nothing to undermine the provision of a stable basis for launching an appeal. He did not purport to retain a power to change the decision as to the scope of the s. 23 rights in question, to alter the finding as to

their violation, or to modify the original injunctions. The decision, including the best efforts order and the order to appear at reporting sessions, was final and appealable.

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

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

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

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

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

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

(5) Conclusion

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

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

V. Disposition

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

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

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

LEBEL AND DESCHAMPS JJ. (dissenting) —

I. Introduction

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

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

II. The Nature of the Issues

This appeal raises the sole question of the validity of the reporting order made by LeBlanc J. ((2000), [2000 CanLII 50591 \(NS SC\)](#), 185 N.S.R. (2d) 246). In this context, we do not intend to engage in a full review of the factual background and of the judicial history of this case. For the purposes of our reasons, we are content to rely on their extensive review in the reasons of our colleagues. We will only add such details about the reporting order and its implementation as might be of assistance to our analysis of the legal questions at stake in this appeal.

At the outset, we wish to emphasize that we fully agree with our colleagues in their analysis of the nature and fundamental importance of language rights in the Canadian Constitution, as well as on the need for efficacy and imagination in the development of constitutional remedies. Indeed, we dissent because we believe that constitutional remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime, a key

principle of which remains the separation of powers. This principle protects the independence of courts. It also flexibly delineates the domain of court action, particularly in the relationship of courts not only with legislatures but also with the executive branch of government or public administration.

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

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

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

97 The drafting of applications asking for injunctive relief, or of orders granting such remedies, can be a serious challenge for counsel and judges. The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment (R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-

leaf)), at p. 6-7). Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided (*Sonoco Ltd. v. Local 433* (1970), [1970 CanLII 763 \(BC CA\)](#), 13 D.L.R. (3d) 617 (B.C.C.A.), at p. 621; *Sporting Club du Sanctuaire Inc. v. 2320-4365 Québec Inc.*, [1989 CanLII 1210 \(QC CA\)](#), [1989] R.D.J. 596 (Que. C.A.)).

98 Unfortunately, the drafting of the present reporting order was anything but clear. Its brevity and apparent simplicity belie its actual complexity and the state of confusion and uncertainty in which it left not only all of the parties, but the trial judge himself at times. This order was final, not interim, and it was tied to the “best efforts order”, which was not couched in terms liable to shed much light on the nature of the obligations of the respondents. Given that this part of the order was not challenged on appeal, we will not discuss it at length, but instead, will focus exclusively on the reporting order which is the object of this appeal.

99 At first, when judgment was rendered, the reporting order read, at para. 245:

The applicants have requested that I should maintain jurisdiction. I agree to do so. I am scheduling a further appearance for Thursday, July 27, 2000 at 1:30 p.m., and at that time the respondents will report on the status of their efforts. I am requesting the respondents to utilize their best efforts to comply with this decision.

This drafting was slightly modified in the final order, dated December 14, 2000:

The Court shall retain jurisdiction to hear reports from the respondents respecting the respondents' compliance with this Order. The respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

100 As Flinn J.A. observed in his reasons in the Court of Appeal ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104), nobody knew the exact nature of these reports. Their form and content were undefined. There was no indication as to whether they should be delivered orally or in writing or both nor as to how detailed they should be and what kind of supporting documents, if any, would be needed. The order also provided for hearings, but again, it left the parties in the dark as to the procedure, purpose or nature of these sessions of the court. The parties learned only shortly before these hearings that affidavits needed to be filed and deponents made available for cross-examination. Further, there seemed to be little direction, if any at all, as to what sort of evidence was required to be included for the purpose of the hearings. The nature of these hearings, as the process developed, appeared to become a cross between a mini-trial, an informal meeting with the judge and some kind of mediation session, for the purpose of monitoring the execution of the school-building program for Francophone students.

101 The trial judge himself seemed unsure about the nature of the hearings he had ordered and of the process he had initiated. At first, he appeared to lean towards the view that those hearings were regular sessions of the court, that he had not issued a final order and that additional relief could be requested. For example, in the July 27, 2000 hearing, the trial judge stated that in the hearings, he “would have the opportunity to determine if the Respondents were indeed making every or best efforts to comply” (appellants’ record, at p. 762). This was a reiteration of a claim made earlier in that hearing (appellants’ record, at p. 720). Similarly, in the August 9, 2000 hearing, the trial judge stated: “the amount of room I have with respect to a decision or direction or comment is very limited” (appellants’ record, at pp. 997-98); this statement implies that the trial judge had the power, albeit limited, to make orders. However, after the setting down of his formal order, at the last hearing in March 2001, he commented that he could not grant further relief, that he had fully disposed of the matter in his order and accompanying reasons, which were released the previous summer. He added that the sessions had a solely informational purpose.

102 In the meantime, schools were built or renovated and made available to Francophone students. It is difficult to determine whether those sessions accomplished anything in this respect. What these sessions certainly did was sow confusion, doubt and uncertainty about the obligations of the respondents and about the nature of a process that went on over several months. The trial judge appeared to view this process as open ended and indeterminate, with more sessions being scheduled as he wished. Nobody really knew when it all would come to an end.

103 The uncertainty engendered by the reporting order was not merely inconvenient for the parties. In our view it amounted to a breach of the parties' interest in procedural fairness. One essential feature of a fair procedural rule is that its contents are clearly defined, and known in advance by the parties subject to it (*Supermarchés Jean Labrecque Inc. v. Flamand*, [1987 CanLII 19 \(SCC\)](#), [1987] 2 S.C.R. 219, at pp. 233-36; see also: D. J. Mullan, *Administrative Law* (2001), at p. 233; R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1990), vol. 4, at pp. 279-82; S. A. de Smith, H. Woolf and J. L. Jowell, *Judicial Review of Administrative Action* (5th ed. 1995 & Cum. Supp. 1998), at pp. 432-36).

104 Moreover, as we noted above, the trial judge in his initial characterization of the order seemed to believe, and certainly gave the impression, that he had the power to make further orders based on what was presented to him at the reporting sessions. In other words, he purported to have available the coercive power of the state to compel the parties to act, and suggested that he could do so based on conclusions that he would draw from the evidence placed before him. In the result, the parties found themselves before a trial judge who purported to exercise judicial functions and powers, and who provided almost nothing by way of procedural guidelines. The parties were denied notice which, as L'Heureux-Dubé J. has noted, is a rule "so fundamental in our legal system that I do not think there is any necessity to discuss it at length" (*Supermarchés Jean Labrecque*,

supra, at p. 233). For this reason alone, the trial judge's order can be found to be inappropriate under s. 24(1) of the *Canadian Charter of Rights and Freedoms* and therefore void. Nonetheless, we turn now to a discussion of the principles of separation of powers and *functus officio*. Consideration of these principles will aid in assessing the appropriateness of the remedy, in light of the judiciary's proper role within our constitutional order.

IV. The Appropriate Role of the Judiciary

105 While superior courts' powers to craft *Charter* remedies may not be constrained by statutory or common law limits, they are nonetheless bound by rules of fundamental justice, as we have shown above, and by constitutional boundaries, as we shall see below. In the context of constitutional remedies, courts fulfill their proper function by issuing orders precise enough for the parties to know what is expected of them, and by permitting the parties to execute those orders. Such orders are final. A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels. First, by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle. Second, by acting after exhausting its jurisdiction, it will breach the *functus officio* doctrine. We will look at each of these breaches in turn.

1. *The Separation of Powers*

106 Courts are called upon to play a fundamental role in the Canadian constitutional regime. When needed, they must be assertive in enforcing constitutional rights. At times, they have to grant such relief as will be required to safeguard basic constitutional rights and the rule of law, despite the sensitivity of certain issues or circumstances and the reverberations of their decisions in their societal environment. Despite — or, perhaps, because of — the critical importance of their functions, courts should be wary of going beyond the proper scope of the role

assigned to them in the public law of Canada. In essence, this role is to declare what the law is, contribute to its development and to give claimants such relief in the form of declarations, interpretation and orders as will be needed to remedy infringements of constitutional and legal rights by public authorities. Beyond these functions, an attitude of restraint remains all the more justified, given that, as the majority reasons acknowledge, Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders.

107 Given the nature of the Canadian parliamentary system, the existence of a true doctrine of separation of powers in Canada was sometimes put in doubt (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at p. 7-24; *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at para. 52). It is true that Canadians have never adopted a watertight system of separation of judicial, legislative and executive functions. In the discharge of their functions, courts have had to strike down laws, regulations or administrative decisions. They have imposed liability on the Crown or public bodies and have awarded damages against them. Forms of administrative justice or adjudication have grown out of the development of executive functions (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52; *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, 2003 SCC 36). Such developments may be said to have blurred theoretical distinctions between government functions. Nevertheless, in a broad sense, a separation of powers is now entrenched as a cornerstone of our constitutional regime.

108 More particularly, the distinction clearly stands out in respect of the relationship of courts on one side and of the legislatures and executive or public administration on the other (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at pp. 756-57). Our Court has acknowledged the fundamental nature of the separation of powers, although some of its

pronouncements emphasize its functional nature (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319). Indeed, our Court has recently characterized this principle as a defining feature of the Canadian Constitution (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 (“*Provincial Court Judges Reference*”); see also *Fraser v. Public Service Staff Relations Board*, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at pp. 469-70).

109 Our Court has strongly emphasized and vigorously applied the principle of separation of powers in order to uphold the independence of the judiciary (see for example: *Provincial Court Judges Reference*, *supra*; see also *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13). In that context, the principle was viewed as a shield designed to protect the judiciary in order to allow it to discharge its duties under the Constitution with complete independence and impartiality. Nothing less was required to maintain the normative ordering of the Canadian legal system.

110 However, the principle of separation of powers has an obverse side as well, which equally reflects the appropriate position of the judiciary within the Canadian legal system. Aside from their duties to supervise administrative tribunals created by the executive and to act as vigilant guardians of constitutional rights and the rule of law, courts should, as a general rule, avoid interfering in the management of public administration.

111 More specifically, once they have rendered judgment, courts should resist the temptation to directly oversee or supervise the administration of their orders. They should generally operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. Once they have declared what the law is, issued their orders and granted such relief as they think is warranted by circumstances and relevant legal rules, courts should take

care not to unnecessarily invade the province of public administration. To do otherwise could upset the balance that has been struck between our three branches of government.

112 This is what occurred in the present case. When the trial judge attempted to oversee the implementation of his order, he not only assumed jurisdiction over a sphere traditionally outside the province of the judiciary, but also acted beyond the jurisdiction with which he was legitimately charged as a trial judge. In other words, he was *functus officio* and breached an important principle which reflects the nature and function of the judiciary in the Canadian constitutional order, as we shall see now.

2. *Functus Officio*

113 Canadian doctrinal and judicial writing on *functus officio* is sparse, even though the rule itself derives from an old case of the English Court of Appeal (*In re St. Nazaire Co.* (1879), 12 Ch. D. 88). Essentially, the rule is that the court has no jurisdiction to reopen or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been error in expressing the manifest intention of the court (see *In re Swire* (1885), 30 Ch. D. 239 (C.A.); *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934 CanLII 1 \(SCC\)](#), [1934] S.C.R. 186). More recently, this Court affirmed that this rule need not always be rigidly applied to tribunals in the administrative law context when the policy reasons for it are not present (*Chandler v. Alberta Association of Architects*, [1989 CanLII 41 \(SCC\)](#), [1989] 2 S.C.R. 848).

114 The existence and scope of a right of appeal has often been made the focus of analytical attention in applying the *functus* doctrine. Such was the case when the power of the

Court of Chancery to rehear cases was extinguished by the *Judicature Acts* in 1873 by fusing common law and equity jurisdictions into one court and providing for a single appeal to a newly created Court of Appeal (*In re St. Nazaire, supra*). Originally, this was also the focus of the *functus* analysis for administrative tribunals that had rights of appeal tightly constrained by statute (see *Grillas v. Minister of Manpower and Immigration*, 1971 CanLII 3 (SCC), [1972] S.C.R. 577). However, the underlying rationale for the doctrine is clearly more fundamental: that for the due and proper administration of justice, there must be finality to a proceeding to ensure procedural fairness and the integrity of the judicial system. The point is plainly made by Sopinka J. in *Chandler, supra*, at pp. 861-62:

As a general rule, once . . . a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. . . .

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal.

115 If a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding, or, as G. Pépin and Y. Ouellette have perceptively termed it, the providing of [TRANSLATION] “legal security” for the parties (*Principes de contentieux administratif* (2nd ed. 1982), at p. 221). This concern for finality is evident in the definition of *functus officio*:

[TRANSLATION] Qualifies a court or tribunal, a public body or an official that is no longer seized of a matter because it or he or she has discharged the office. E.g. A judge who has pronounced a final judgment is *functus officio*.

(H. Reid, *Dictionnaire de droit québécois et canadien* (2001), at p. 253)

The principle ensures that subject to an appeal, parties are secure in their reliance on the finality of superior court decisions.

116 This common law rule is further reflected in modern rules of civil procedure (see, e.g., Nova Scotia *Civil Procedure Rules*, Rule 15.07) and the interpretation of criminal appeal provisions (see *R. v. H. (E.F.)* (1997), 1997 CanLII 418 (ON CA), 115 C.C.C. (3d) 89 (Ont. C.A.), considering s. 675 of the *Criminal Code*). Whether in its common law or statutory form, the doctrine of *functus officio* provides that only in strictly limited circumstances can a court revisit an order or judgment (see Nova Scotia *Civil Procedure Rules*, Rule 15.08). If it were otherwise, there would be, to paraphrase Charron J.A. in *H. (E.F.)*, *supra*, at p. 101, the recurring danger of the trial process becoming or appearing to become a “never closing revolving door” through which litigants could come and go as they pleased.

117 In addition to this concern with finality, the question of whether a court is clothed with the requisite authority to act raises concerns related to the separation of powers, a principle that transcends procedural and common law rules. In our view, if a court intervenes, as here, in matters of administration properly entrusted to the executive, it exceeds its proper sphere and thereby breaches the separation of powers. By crossing the boundary between judicial acts and administrative oversight, it acts illegitimately and without jurisdiction. Such a crossing of the boundary cannot be characterized as relief that is “appropriate and just in the circumstances” within the meaning of s. 24(1) of the *Charter*.

V. Application of the Relevant Principles to the Present Case

118 When the above principles are applied to the present facts, it is evident that McIntyre J.’s admonition in *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, that s. 24(1)

“was not intended to turn the Canadian legal system upside down” is apropos (p. 953). In our view, the trial judge’s remedy undermined the proper role of the judiciary within our constitutional order, and unnecessarily upset the balance between the three branches of government. As a result, the trial judge in the present circumstances acted inappropriately, and contrary to s. 24(1).

119 As we noted above, the trial judge equivocated on the question of whether his purported retention of jurisdiction empowered him to make further orders. Regardless of which position is taken, the separation of powers was still breached. On the one hand, if he did purport to be able to make further orders, based on the evidence presented at the reporting hearings, he was *functus officio*. We find it difficult to imagine how any subsequent order would not have resulted in a change to the original final order. This necessarily falls outside the narrow exceptions provided by *functus officio*, and breaches that rule.

120 Such a breach would also have resulted in a violation of the separation of powers principle. By purporting to be able to make subsequent orders, the trial judge would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive. These functions are beyond the capacities of courts. The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor the resources to undertake public administration. In *Eldridge v. British Columbia (Attorney General)*, [1997 CanLII 327 \(SCC\)](#), [1997] 3 S.C.R. 624, at para. 96, it was held that in light of the “myriad options” available to the government to rectify the unconstitutionality of the impugned system, it was “not this Court’s role to dictate how this is to be accomplished”.

121 In addition, if he purported to adopt a managerial role, the trial judge undermined the norm of co-operation and mutual respect that not only describes the relationship between the

various actors in the constitutional order, but defines its particularly Canadian nature, and invests each branch with legitimacy. In *Vriend v. Alberta*, [1998 CanLII 816 \(SCC\)](#), [1998] 1 S.C.R. 493, Iacobucci J. noted that “respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts” (para. 136). He discussed the wording of provisions of the *Charter* that expressed this norm of mutual respect (para. 137), and remarked that this norm has “the effect of enhancing the democratic process” (para. 139).

122 Similarly, McLachlin J. (as she then was) in the 1990 Weir Memorial Lecture reviewed the elements of our legal culture — including our political climate, our tradition of judicial restraint, and the system of references — that have contributed to a spirit of co-operation, rather than confrontation among the branches of government (B. M. McLachlin, “The Charter: A New Role for the Judiciary?” (1991), 29 *Alta. L. Rev.* 540, at pp. 554-56). Moreover, referring to her reasons in *Dixon v. British Columbia (Attorney-General)* (1989), [1989 CanLII 248 \(BC SC\)](#), 59 D.L.R. (4th) 247 (B.C.S.C.), she spoke to the importance of considerations of institutional legitimacy for a court crafting a remedy (at p. 557):

It was not for me, I felt, to dictate to the Legislature what sort of law they should enact; that was the responsibility of the elected representatives. But, again following a time-honoured judicial tradition, I offered advice on what limits on the principle of one person-one vote, might be acceptable.

123 McLachlin J. expressed this concern for the principle of democratic legitimacy in respect of the relationship between the judiciary and the legislature, but the principle extends to that between the judiciary and the executive. This Court has recognized that in the Canadian parliamentary system, the executive is inextricably tied to the legislative branch. The Court in *Attorney General of Quebec v. Blaikie*, [1981 CanLII 14 \(SCC\)](#), [1981] 1 S.C.R. 312, at p. 320,

observed that “[t]here is thus a considerable degree of integration between the Legislature and the Government”. In *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199, at para. 53, the Court held: “On a practical level, it is recognized that the same individuals control both the executive and legislative branches of government.”

124 Therefore, just as the legislature should, after a judicial finding of a *Charter* breach retain independence in writing its legislative response, the executive should after a judicial finding of a breach, retain autonomy in administering government policy that conforms with the *Charter*. In our constitutional order, the legislature and the executive are intimately interrelated and are the principal *loci* of democratic will. Judicial respect for that will should extend to both branches.

125 Thus, if the trial judge’s initial suggestion that he could continue to make orders, and thereby effectively engage in administrative supervision and decision making accurately characterizes the nature of the reporting sessions, the order for reporting sessions breached the constitutional principle of separation of powers. Since no part of the Constitution can be interpreted to conflict with another, that order cannot be considered appropriate and just in the circumstances, under s. 24(1). The trial judge’s order for reporting sessions should also be considered inappropriate because it put into question the Canadian tradition of mutual respect between the judiciary and the institutions that are the repository of democratic will.

126 If, however, the trial judge’s statement in the last session that he could not make further orders correctly characterized his remedial order, then he breached the separation of powers in another way. When considered in light of this constitutional principle and applied to the present facts, McLachlin C.J.’s proposition that “s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise” (*R. v. 974649 Ontario Inc.*,

[2001] 3 S.C.R. 575, 2001 SCC 81 (“*Dunedin*”), at para. 22) leads to the conclusion that the trial judge’s remedy was not appropriate and just in the circumstances.

127 The appellants argued that the trial judge retained jurisdiction only to hear reports, and that these hearings had purely “suasive” value. They also argued that the hearings were designed to hold “the Province’s feet to the fire” (SCC hearing transcripts). They further suggested that the threat of having to report to the trial judge functioned as an incentive for the government to comply with the best efforts order. In the words of the appellants:

Is it a coincidence that, after a nine month delay (October 1999 to July 2000) the Province called for tenders eight days before the reporting hearing and “fast tracked” the school? The Province knew that it would have to report on July 27. The Province ensured that a call for tenders and a construction schedule were in place for July 27.

128 If this characterization of the trial judge’s activity is accurate, then the order for reporting sessions did not result in the exercise of adjudicative, or any other, functions that traditionally define the ambit of a court’s proper sphere. Moreover, it resulted in activity that can be characterized as political. According to the appellants’ characterization, a primary purpose of the hearings was to put public pressure on the government to act. This kind of pressure is paradigmatically associated with political actors. Indeed, the practice of publicly questioning a government on its performance, without having any legal power to compel it to alter its behaviour, is precisely that undertaken by an opposition party in the legislature during question period.

129 In the above, we reasoned that the trial judge, by breaching the separation of powers, would have put in question the norm of co-operation that defines the relationship between the branches of government in Canada. We will presently demonstrate how the trial judge, by

improperly altering the relationship between the judiciary and the executive, would have breached the separation of powers.

130 In *Provincial Court Judges Reference*, *supra*, Lamer C.J. described the separation of powers as providing that “the relationships between the different branches of government should have a particular character” (para. 139 (emphasis in original)). In particular, according to him, the separation of powers doctrine requires that these relationships be depoliticized (para. 140 (emphasis in original)).

131 In that case, Lamer C.J. remarked that the legislature and the executive cannot exert, and cannot appear to exert political pressure on the judiciary (para. 140). The reciprocal proposition applies to the immediate case. With the reporting hearings, the trial judge may have sought to exert political or public pressure on the executive, and at least appeared to do so. In our view, such action would tend to politicize the relationship between the executive and the judiciary.

132 If the reporting hearings were intended to hold “the Province’s feet to the fire”, the character of the relationship between the judiciary and the executive was improperly altered and, as per the *Provincial Court Judges Reference*, the constitutional principle of separation of powers was breached. Once again, since no part of the Constitution can conflict with another, the trial judge’s order for reporting hearings cannot be interpreted as appropriate and just under s. 24(1).

133 We would reiterate, at this point, the importance of clarity and certainty in the provisions of a court order. If the trial judge had precisely defined the terms of the remedy, in advance, then the ensuing confusion surrounding his role may not have occurred. Moreover, by

complying with this essential element of fair procedure, he may have been able to avoid the constitutional breach of the separation of powers that followed.

VI. Neither a Breach of Procedural Fairness nor of the Separation of Powers Was Appropriate

134 We noted above that this Court in *Eldridge* recognized the appropriateness of judicial restraint in issuing a remedy under s. 24(1), given the variety of choices open to the executive in administering policy. Implicit in the declaratory remedy ordered in that case was the presumption that the government will act in good faith in rectifying *Charter* wrongs and the recognition that legislatures and executives, not the courts, are in the best position to decide exactly how this should be done. Turning to the present case then, the trial judge's decision to provide injunctive relief already represented a departure from the cooperative norm that defines and shapes the relationships among the branches of the Canadian constitutional order. We do not deny that in the appropriate factual circumstances, injunctive relief may become necessary. However, the trial judge's order for reporting sessions then purported to go even further, and breached both a fundamental principle of procedural fairness and the constitutional principle of separation of powers.

135 One might argue that such a breach is appropriate where it is the only way that a claimant's rights can be vindicated. Alternatively, one might suggest that if a government has ignored previous, less intrusive judicial measures, and thereby put into question their efficacy, a court might be justified in abandoning the presumption of governmental good will that we referred to above. In our view, the present case gave rise to neither of these arguments.

136 Turning to the first argument, if the hearings were aimed at ensuring the vindication of the claimants' rights by providing them with the opportunity to enforce or alter the remedy, there

were alternatives available. If the claimants felt that the government was not complying with any part of the order, then they could have brought an application for contempt. The majority seems to suggest that contempt proceedings would have been less effective in this case in ensuring timely performance of the order, without being any more respectful of the separation of powers. However, we would note that expedited applications are possible in Nova Scotia and other jurisdictions to deal with cases quickly and efficiently. In addition, the reporting order at issue in this case precluded applying to any other judge for relief and was, in this way, even more limiting than a contempt proceeding. Most importantly, contempt proceedings are more consistent with our adversarial system, which is based on the common law norm of giving the parties primary control over the proceedings (see J. I. H. Jacob, *The Fabric of English Civil Justice* (1987), at p. 13). In contrast, the present order for reporting sessions placed the trial judge in an inappropriate, ongoing supervisory and investigative role despite the availability of the equally effective, well-established, and minimally intrusive alternative of contempt relief.

137 Consequently, it is clear that the order for reporting hearings was not the only means of vindicating the claimants' rights, and that recourse to a readily available alternative would have been consistent with a defining feature of our legal system. Recourse to this alternative would not have resulted in an interpretation of the court's remedial powers that was so broad as to purport to endow the court with powers that it was "never intended to exercise" (*Dunedin, supra*, at para. 22). It is important to stress that in the present case, it is not clear that actual recourse to a contempt application would have been necessary. The point is simply that if judicial enforcement of the deadlines in question were necessary, recourse to this alternative would not have overextended the court's powers.

138 On a last note, we find it difficult to imagine circumstances where a breach of one party's fundamental right to notice would aid in the vindication of another's *Charter* rights. In any event, the present facts do not present such a case. The intrusiveness of the trial judge's order was in no way necessary to secure the claimants' s. 23 interests. Given the absence of any causal

connection between the breach of the parties' right to notice and the effectiveness of the purported remedy, we would conclude that the breach cannot be considered appropriate for the purposes of s. 24(1).

139 The second argument is simply not applicable in this case. The facts here do not require us to decide whether previous government non-compliance can ever justify remedial orders that breach principles of procedural fairness and the separation of powers. The Government of Nova Scotia did not refuse to comply with either a prior remedial order or a declaration with respect to its particular obligations in the fact-situation at hand. No such order was made and it is impossible to determine whether the government would have responded in the present case to either a declaration of rights, or the injunction to meet the deadline as these measures were combined with the order purporting to retain jurisdiction to oversee the reporting sessions. Therefore, it cannot be asserted that the trial judge's order has succeeded where less intrusive remedial measures failed.

140 Moreover, what was required by the Government of Nova Scotia to comply with its obligations pursuant to s. 23 was not self-evident at trial. The trial judge was not faced with a government which was cognizant of how it should fulfill its obligations, but refused to do so. Indeed, at issue before the trial judge was precisely the question of what compliance with s. 23 involved. The present order, therefore, did not overcome governmental recalcitrance in the face of a clear understanding of what s. 23 required in the circumstances of the case. Remedies must be chosen in light of the nature and structure of the Canadian constitutional order, an important feature of which is the presumption of co-operation between the branches of government. Therefore, unless it is established that this constitutional balance has been upset by the executive's clear defiance of a directly applicable judicial order, increased judicial intervention in public administration will rarely be appropriate.

141 In choosing and reviewing s. 24(1) remedies, it is important to remember that the inquiry into the appropriateness of a remedy should be undertaken from an *ex ante* perspective. The simple fact that a desired result occurs after a remedial order is issued is not relevant to determining the question of the order's appropriateness. In our view, an adequate *ex ante* assessment must consider the risks that attend a given remedy. In the present case, as Freeman J.A. noted in dissent, if the trial judge "misread the degree of co-operation he could expect from the players, there was a risk of failure" (para. 84). That the present remedy's susceptibility to failure was tied to the capacities of a particular judge should in itself give pause. In our view, whether a remedy is appropriate should be assessed with reference to the remedy itself and not the particular capacities of a given judge to manage that remedy. More importantly, where a thorough *ex ante* assessment of a remedy reveals that it will certainly be inconsistent with basic legal principles and constitutional doctrines, such a remedy should not be considered appropriate. Available remedies that do not result in such breaches should, *a contrario*, be considered to be more appropriate.

142 The question of the relevant time frame for the inquiry into a remedy's appropriateness is tied to the more general question of remedial effectiveness. It is important to remember the context in which this Court considered the issue of effectiveness in *Dunedin, supra*. The issue was whether a justice of the peace acting as a trial justice under the [Ontario Provincial Offences Act](#), R.S.O. 1990, c. P.33, was a court of competent jurisdiction to direct an order for costs against the Crown for a [Charter](#) breach. The Court held that if provincial offences courts were deprived of this remedy, an accused may be denied access to a recognized means of remedying a *Charter* breach (para. 82).

In the present case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized *Charter* remedy, as such an order is entirely idiosyncratic. More importantly, refusing superior courts this power would not deprive claimants of access to that which they are guaranteed by s. 23, namely, the timely provision of minority language instruction facilities. Indeed, if the appellants' characterization of the reporting hearings' purpose is correct, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. In our view, the availability of this legal sanction for non-compliance with the order to meet the construction deadline would have provided at least as much incentive for the government to remedy the s. 23 breach as would have reporting hearings, in which the presiding judge was without the power to make further orders. Moreover, at the level of constitutional principle, because this incentive is legal in nature, it would not have led to the improper politicization of the relationship between the judiciary and the executive.

Also, it should be noted that the trial judge's order was not consistent with this Court's retention of jurisdiction in the *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721. Far from purporting to supervise compliance with a remedy, the Court in that case retained jurisdiction to ask for the government's assistance in fashioning it. The Court did not thereby exceed its constitutional role by purporting to oversee administrative action. The Court was ultimately respectful of the executive's capacity to make the policy choices necessary to comply with constitutional requirements.

VII. Conclusion

In the result, the trial judge breached both a principle of procedural fairness and the constitutional principle of separation of powers, and it is not clear that alternative, less-intrusive remedial measures, would not have achieved the ends sought. While a trial judge's decisions with

respect to remedies are owed deference, we believe that this must be tempered when fundamental legal principles are threatened. In light of these principles, and in the presence of untested alternative remedies, we would find that the present trial judge's retention of jurisdiction was not appropriate and just under s. 24(1). The Court of Appeal was correct in declaring that the order to retain jurisdiction for the purposes of reporting sessions was of no force and effect.

146 In closing, we recur to the underlying purpose of s. 24(1), by referring to a passage in *Mills, supra*, at pp. 952-53, in which McIntyre J. wrote:

To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislatures of the various provinces and by the Parliament of Canada. It is not for the judge to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. . . .

. . . The absence of jurisdictional provisions and directions in the *Charter* confirms the view that the *Charter* was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure.

147 The proper development of the law of constitutional remedies requires that courts reconcile their duty to act within proper jurisdictional limits with the need to give full effect to the rights of a claimant. To read into s. 24(1) a judicial *carte blanche* would not only “turn the Canadian legal system upside down”, but would also be an injustice to the parties who come before the court to have their disputes resolved in accordance with basic legal principles. In our view, proper consideration of the principles of procedural fairness and the separation of powers is required to establish the requisite legitimacy and certainty essential to an appropriate and just remedy under s. 24(1) of the *Charter*.

*Appeal allowed with costs, MAJOR, BINNIE, LEBEL and DESCHAMPS JJ.
dissenting.*

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TAB 10

R. v. Dudley, 2009 SCC 58 (CanLII), [2009] 3 SCR 570

Source:	Supreme Court of Canada
Date:	2009-12-17
File number:	32603
Other citations:	313 DLR (4th) 257 — 396 NR 299 — [2010] 3 WWR 191 — 470 WAC 198 — 17 Alta LR (5th) 1 — [2010] EXP 53 — 469 AR 198 — 249 CCC (3d) 421 — 71 CR (6th) 1 — 86 WCB (2d) 156 — EYB 2009-167385 — JE 2010-26 — [2009] SCJ No 58 (QL) — [2009] ACS no 58
Citation:	R. v. Dudley, 2009 SCC 58 (CanLII), [2009] 3 SCR 570, < https://canlii.ca/t/272k3 >, retrieved on 2026-03-22
Most recent unfavourable mention	R. v. Lapointe , 2021 QCCA 360 (CanLII) [...] [38] Contrary to her conclusion, the trial judge was not bound by Dudley according to stare decisis since, in that case, the Supreme Court of Canada had specifically excluded the application of the Identification of Criminals Act from the analysis. [...]



SUPREME COURT OF CANADA

CITATION: R. v. Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570

DATE: 20091217
DOCKET: 32603

BETWEEN:

Kristy Leanne Dudley
Appellant
and
Her Majesty The Queen
Respondent
- and -

Director of Public Prosecutions of Canada

Intervener

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Fish J. (McLachlin C.J. and Binnie, LeBel, Abella and Cromwell JJ. concurring)
(paras. 1 to 56)

CONCURRING REASONS: Charron J. (Deschamps and Rothstein JJ. concurring)
(paras. 57 to 90)

R. v. Dudley, 2009 SCC 58, [2009] 3 S.C.R. 570

Kristy Leanne Dudley

Appellant

v.

Her Majesty The Queen

Respondent

and

Director of Public Prosecutions of Canada

Intervener

Indexed as: R. v. Dudley

Neutral citation: 2009 SCC 58.

File No.: 32603.

2009: March 18; 2009: December 17.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Criminal law — Procedure — Hybrid offences — Summary convictions — Limitation period — Information sworn more than six months after offences were alleged to have been committed — Plea not yet entered — Trial judge declaring information to be a nullity — Whether Crown can continue prosecution as indictable offence — Whether limitation period in s. 786(2) of Criminal Code applies to hybrid offences.

D was charged with one count of fraud not exceeding \$5,000 under s. 380(1)(b) of the *Criminal Code*, and one count of uttering a forged document under s. 368(1)(b), both hybrid offences which allow the Crown to proceed either by indictment or by summary conviction. The Crown elected to proceed summarily. When the matter came before the trial court for an expected guilty plea, defence counsel moved to dismiss the charges as a nullity because the summary conviction proceeding was statute-barred under s. 786(2) of the *Code* as the information had been

sworn more than six months after the alleged unlawful conduct. The Crown immediately sought leave to “re-elect” and proceed by indictment or, alternatively, to withdraw the charge. The trial judge denied these motions and concluded that the charge was a nullity. The Court of Appeal allowed the Crown’s appeal, holding that the original information remained valid and that the Crown could “re-elect” to proceed by indictment.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, Fish, Abella and Cromwell JJ.: Where the Crown elects to proceed by way of summary conviction, the hybrid offence is treated in all respects as a summary conviction offence and the proceedings must be instituted within six months unless the parties otherwise agree. Where the trial has proceeded before a summary conviction court without an express election by the Crown, it will be presumed that the Crown has elected to proceed summarily. Where it is discovered before adjudication on the merits that the proceedings were instituted more than six months after the offence is alleged to have been committed, a mistrial should be declared unless the parties agree to waive the limitation period. After the verdict has been rendered, the appropriate remedy is an appeal on any permissible ground to the summary conviction appeal court. Where an appeal by the accused is allowed on the sole ground that the proceedings were statute-barred and conducted without consent, a conviction at trial should be set aside. When a mistrial is declared or a conviction is set aside, the Crown may proceed afresh by indictment except where the court is satisfied that this would amount to an abuse of process. An appeal by the Crown against an acquittal on the ground that the proceedings were statute-barred will not lie, since it is the Crown’s responsibility to ensure that the proceedings are properly instituted. [2-6]

When the defendant declines to consent to the continuation of the summary conviction proceedings, and the offence is punishable only on summary conviction, the court should simply dismiss the information. Hybrid offences, however, in virtue of [s. 34](#) of the *Interpretation Act*, are deemed indictable unless and until the Crown has elected to proceed summarily. Where the Crown elects to proceed summarily, proceedings are governed by the provisions of the *Code* set out in Part XXVII, including [s. 786\(2\)](#). The accused’s failure to consent to the prosecution of a hybrid offence by way of summary conviction beyond the limitation period is fatal to the validity of the Crown’s election to proceed summarily and to the ensuing proceedings. The initial election and all subsequent proceedings are a nullity and have therefore no effect on the Crown’s ability to proceed by indictment. [37-39] [42-43]

Per Deschamps, Charron and Rothstein JJ.: The limitation period in [s. 786\(2\)](#) of the *Criminal Code* does not apply to dual procedure offences. The matter should therefore be remitted to the trial court to proceed by summary conviction in accordance with the Crown’s election. [62] [90]

Section 786(2) only operates as a general bar to the institution of proceedings more than six months after the alleged offence in respect of summary conviction offences. While the definition of “proceedings” in [s. 785](#) of Part XXVII of the *Code* entitled “Summary Convictions” is wide enough to include dual procedure offences, that Part only applies “[e]xcept where otherwise provided by law”. Since dual procedure offences are deemed indictable offences by operation of [s. 34](#) of the *Interpretation Act*, the proceedings are commenced pursuant to [s. 504](#) or [505](#) of the *Code*, not [s. 788\(1\)](#). As a result, the proceedings for dual procedure offences are never “instituted” under Part XXVII within the meaning of [s. 788\(1\)](#) and the limitation period in [s. 786\(2\)](#) does not apply to these offences. Proceedings in respect of dual procedure offences may therefore be instituted beyond the six-month period. Any subsequent Crown election to proceed summarily does not retroactively invalidate the institution of the proceeding. Even though the

Crown's election to proceed summarily results in the dual procedure offence's acquiring the same characteristics as a pure summary offence in important aspects, its choice of procedural route does not change the original characterization of the offence as an indictable offence. Further, since s. 786(2) speaks to the institution of the proceeding, not the Crown election, nothing in the provision bars the Crown from electing to proceed either by indictment or by summary conviction in respect of such offences. Parliament considers dual procedure offences as more serious than pure summary conviction offences and, had it wished to impose a limitation period on dual procedure offences, it could have expressly adverted to the offences in s. 786(2) or declined to deem them to be indictable offences in the *Interpretation Act*. [61] [68] [71-72] [77-78]

Interpreting s. 786(2) to exclude dual procedure offences is consistent with the purpose of the limitation provision and does not interfere with the fair and efficient administration of the criminal justice system. Such an interpretation also respects prosecutorial discretion and protects the accused from unfair treatment since the Crown is not forced to proceed by way of indictment when it would otherwise pursue a summary conviction absent an accused's consent to summary proceedings. In addition, this interpretation causes no conflict with other legislation and nothing in the jurisprudence militates against it as no court has ruled on the specific issue of the application of s. 786(2) to dual procedure offences. [75] [79] [80] [82-83] [87]

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By Fish J.

Referred to: *R. v. Richards*, 1933 CanLII 483 (BC CA), [1934] 2 W.W.R. 390; *Smythe v. The Queen*, 1971 CanLII 831 (SCC), [1971] S.C.R. 680; *R. v. Mitchell* (1997), 1997 CanLII 6321 (ON CA), 121 C.C.C. (3d) 139; *R. v. Paul-Marr*, 2005 NSCA 73, 199 C.C.C. (3d) 424; *R. v. C. (D.J.)* (1985), 1985 CanLII 3611 (PE SCAD), 21 C.C.C. (3d) 246; *Canada (Attorney General) v. Trueman, P.C.J.* (1996), 1996 CanLII 3132 (BC CA), 83 B.C.A.C. 227; *Trinidad and Tobago v. Davis*, 2008 ABCA 275, 233 C.C.C. (3d) 435; *R. v. Huff* (1979), 1979 ABCA 234 (CanLII), 50 C.C.C. (2d) 324; *R. v. Gougeon* (1980), 1980 CanLII 2842 (ON CA), 55 C.C.C. (2d) 218; *R. v. Tontarelli*, 2009 NBCA 52, 348 N.B.R. (2d) 41; *R. v. D. (S.)* (1997), 1997 CanLII 14627 (NL CA), 119 C.C.C. (3d) 65; *R. v. O'Leary* (1991), 1991 CanLII 6852 (NL CA), 64 C.C.C. (3d) 573; *R. v. Shiplack* (1993), 1993 CanLII 9139 (SK CA), 109 Sask. R. 311; *Ahmed v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 672, 81 Imm. L.R. (3d) 116; *R. v. Connors* (1998), 1998 CanLII 12468 (BC CA), 121 C.C.C. (3d) 358; *Re Abarca and The Queen* (1980), 1980 CanLII 2958 (ON CA), 57 C.C.C. (2d) 410; *R. v. Karpinski*, 1957 CanLII 9 (SCC), [1957] S.C.R. 343; *R. v. Kelly* (1998), 1998 CanLII 7145 (ON CA), 128 C.C.C. (3d) 206; *Giroux v. The King* (1917), 1917 CanLII 81 (SCC), 56 S.C.R. 63; *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41; *R. v. Jans* (1990), 1990 ABCA 271 (CanLII), 59 C.C.C. (3d) 398; *R. v. Burke* (1992), 1992 CanLII 7121 (NL CA), 78 C.C.C. (3d) 163; *R. v. Kalkhorany* (1994), 1994 CanLII 687 (ON CA), 89 C.C.C. (3d) 184; *R. v. Boutilier* (1995), 1995 NSCA 227 (CanLII), 104 C.C.C. (3d) 327; *R. v. Belair* (1988), 1988 CanLII 7110 (ON CA), 41 C.C.C. (3d) 329; *R. v. Phelps* (1993), 1993 CanLII 14657 (ON CA), 79 C.C.C. (3d) 550; *R. v. Edwards* (1898), 1898 CanLII 105 (ON CA), 2 C.C.C. 96; *R. v. Machacek*, 1961 CanLII 55 (SCC), [1961] S.C.R. 163; *Petersen v. The Queen*, 1982 CanLII 200 (SCC), [1982] 2 S.C.R. 493.

By Charron J.

Considered: *R. v. Karpinski*, 1957 CanLII 9 (SCC), [1957] S.C.R. 343; **referred to:** *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Smythe v. The Queen*, 1971 CanLII 831 (SCC), [1971] S.C.R. 680; *R. v. Court of Sessions of the Peace, ex parte Lafleur*, 1966 CanLII 560 (QC CA), [1967] 3 C.C.C. 244; *R. v. Connors* (1998), 1998 CanLII 12468 (BC CA), 121 C.C.C. (3d) 358; *R. v. Boutilier* (1995), 1995 NSCA 227 (CanLII), 104 C.C.C. (3d) 327.

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Interpretation Act, R.S.C. 1985, c. I-21, s. 34.

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APPEAL from a judgment of the Alberta Court of Appeal (Ritter and Slatter JJ.A. and Bielby J. (*ad hoc*)), 2008 ABCA 73, 425 A.R. 280, 418 W.A.C. 280, 89 Alta. L.R. (4th) 71, 231

C.C.C. (3d) 80, [2008] 7 W.W.R. 645, [2008] A.J. No. 209 (QL), 2008 CarswellAlta 261, setting aside a decision of Wenden Prov. Ct. J., 2006 CarswellAlta 2115. Appeal dismissed.

Akram Attia and Daryl J. Royer, for the appellant.

James A. Bowron, for the respondent.

François Lacasse and Gilles Villeneuve, for the intervener.

The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella and Cromwell JJ. was delivered by

FISH J. —

I

[1] “Hybrid” offences are crimes that can be prosecuted by indictment or on summary conviction. The choice in Canada is the Crown’s, though this has not always been the case and is not the case in other jurisdictions.

[2] Where the Crown elects to proceed by way of summary conviction, or “summarily”, the hybrid (or “dual procedure”) offence is treated in all respects as a summary conviction offence. Of particular importance here, the proceedings must be instituted within six months unless the parties otherwise agree.

[3] Where the trial has proceeded before a summary conviction court without an express election by the Crown, it will be presumed that the Crown has elected to proceed

summarily. Where it is discovered before adjudication on the merits that the proceedings were instituted more than six months after the offence is alleged to have been committed, a mistrial should be declared unless the parties agree to waive the limitation period (or “prescription”).

[4] After the verdict has been rendered, the appropriate remedy is an appeal on any permissible ground to the summary conviction appeal court.

[5] Where an appeal by the accused^[1] is allowed on the sole ground that the proceedings were statute-barred and conducted without consent, a conviction at trial should be set aside. In either instance, the Crown may proceed afresh by indictment except where the court is satisfied that this would amount to an abuse of process. That is because neither a mistrial nor a conviction set aside on appeal gives rise to a plea of *autrefois*.

[6] An appeal by the Crown against an acquittal on the ground that the proceedings were statute-barred will not lie, since it was the Crown’s responsibility to ensure that the proceedings were properly instituted. Having elected to proceed by way of summary conviction before the right court, the Crown should not be heard to complain *after an adverse adjudication on the merits* that it neglected to obtain the consent of the accused before the accused was acquitted!

[7] In my view, these are the governing principles where a hybrid offence is prosecuted by way of summary conviction beyond the six-month limitation period.

[8] The rest is background, detail and commentary.

II

[9] The appellant, Kristy Leanne Dudley, was charged with one count of fraud not exceeding \$5,000 under s. 380(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, and one count of uttering a forged document under s. 368(1)(b) of the *Code*. The fraud was alleged to have occurred between June 23, 2002 and May 31, 2004; the uttering, on November 12, 2002. Both are hybrid offences and the Crown elected to proceed summarily.

[10] When the matter came before Wenden Prov. Ct. J. for an expected guilty plea, counsel for Ms. Dudley noticed that the information had been sworn on January 30, 2006 — more than six months after the alleged unlawful conduct was said to have occurred — and was therefore statute-barred as a summary conviction proceeding.

[11] Counsel for Ms. Dudley moved to dismiss the charges as a “nullity”. The prosecutor immediately sought leave to “re-elect” and proceed by indictment or, in the alternative, to withdraw the charges. Wenden Prov. Ct. J. denied the Crown’s motions and disposed of the matter by concluding that “the charge is a nullity because . . . it is sworn out of time” (2006 CarswellAlta 2115, at para. 3).

[12] The Alberta Court of Appeal allowed the Crown’s appeal and held that the original information charging Ms. Dudley with fraud and uttering remained valid (2008 ABCA 73, 231 C.C.C. (3d) 80). It also held that the Crown’s statute-barred election to proceed summarily did not afford Ms. Dudley a defence to the charges. Rather, the court concluded that the Crown could “re-elect” to proceed by indictment on the original information since the Crown’s initial election and the subsequent proceedings in the summary conviction court were nullities.

III

[13] This case requires us to consider the peculiar nature of hybrid offences, which exist nowhere — and everywhere — on the landscape of Canadian criminal procedure.

[14] They exist nowhere in the sense that the *Criminal Code* classifies offences as *either* indictable *or* punishable upon summary conviction, and nowhere recognizes a third, discrete category of hybrid offences. Yet hybrid offences are everywhere to be found in the *Criminal Code* — and in dozens, if not hundreds, of other federal statutes.

[15] Hybrid offences, though initially rare, are not of recent conception: Some can be found in the very first *Criminal Code*, enacted by Parliament in 1892. And in recent decades Parliament has transformed many crimes formerly triable *either* by indictment *or* summarily into offences that may now be prosecuted *either way*.

[16] Moreover, hybrid offences are by no means a uniquely Canadian phenomenon. Elsewhere, however, the decision whether to proceed summarily or on indictment is not generally a matter of prosecutorial discretion. In England and Wales, for example, it is the presiding magistrate who decides: *Magistrates' Courts Act 1980* (U.K.), 1980, c. 43, s. 19. And in certain Australian states, including New South Wales, the accused may apply to be tried summarily, subject to the consent of the Crown: *Crimes Act 1900* (N.S.W.), ss. 475A and 475B.

[17] Even in Canada, it was at one time explicitly provided that certain offences were punishable on indictment or on summary conviction *at the option of the accused*: see, for

example, s. 501 of the *Criminal Code*, R.S.C. 1927, c. 36; *R. v. Richards*, 1933 CanLII 483 (BC CA), [1934] 2 W.W.R. 390 (B.C.C.A.). But all such provisions have long since been repealed and, as mentioned earlier, the choice is now the Crown's: *Smythe v. The Queen*, 1971 CanLII 831 (SCC), [1971] S.C.R. 680, at pp. 685-87, *per* Fauteux C.J.

[18] Pursuant to s. 34(1)(a) of the *Interpretation Act*, R.S.C. 1985, c. I-21, an offence is presumed indictable “if the enactment provides that the offender may be prosecuted for the offence by indictment”. Hybrid offences are therefore treated as indictable — unless the Crown elects, or is deemed to have elected, to try them summarily:

In these cases, it is the prosecution that first decides how to proceed. If it chooses to proceed by indictment, the offence is treated in all respects as an indictable offence and the accused has the normal rights of election; if it chooses otherwise, the case proceeds in all respects as a summary conviction offence.

(*Manning, Mewett & Sankoff: Criminal Law* (4th ed. 2009), at p. 44)

[19] To avoid uncertainty and the misunderstanding of which much unnecessary litigation is born, I think it best for the Crown to declare explicitly whether it is proceeding on a hybrid offence summarily or by indictment *before the accused is asked to plead*. And where the Crown elects to proceed summarily beyond the six-month limitation period, the prosecutor and the defendant should both be required to declare expressly — again, before plea — that they agree to proceed summarily.

[20] In the absence of an express election, it will in any event be presumed that the Crown has elected to proceed summarily where a hybrid offence “is proceeded with through trial to a verdict in a court having jurisdiction to hear a summary conviction proceeding”: *R. v. Mitchell* (1997), 1997 CanLII 6321 (ON CA), 121 C.C.C. (3d) 139 (Ont. C.A.), at para. 4. Similarly, the

Crown will be deemed to have elected to proceed by indictment where the accused has been put to the election as to mode of trial required, for example by [s. 536](#) of the *Criminal Code*, so long as the proceedings take place in a court having jurisdiction over the alleged offence.

IV

[21] As mentioned earlier, hybrid offences are deemed to be indictable unless and until the Crown elects to proceed summarily. Thus, speaking for the Nova Scotia Court of Appeal in *R. v. Paul-Marr*, [2005 NSCA 73](#), 199 C.C.C. (3d) 424, at para. [20](#), Cromwell J.A. (as he then was) explained that “where an offence may be prosecuted by either indictment or on summary conviction at the election of the Crown, the offence is deemed to be indictable until the Crown elects to proceed by way of summary conviction”. Likewise, in *R. v. C. (D.J.)* (1985), [1985 CanLII 3611 \(PE SCAD\)](#), 21 C.C.C. (3d) 246, at p. 252, MacDonald J., speaking for the Prince Edward Island Supreme Court, Appeal Division, stated that “in the case of a hybrid offence once the Crown elects to proceed by way of summary conviction the offence is no longer deemed to be an indictable offence”. And in *Canada (Attorney General) v. Trueman, P.C.J.* (1996), [1996 CanLII 3132 \(BC CA\)](#), 83 B.C.A.C. 227, at para. [13](#), once more for a unanimous court, McEachern C.J.B.C. held that hybrid offences “are deemed by [s. 34](#) of the *Interpretation Act* . . . to be indictable [and] remain indictable unless the Crown elects to proceed by summary conviction”. (Emphasis added throughout.)

[22] Other appellate courts across the country have reached the same conclusion: *Trinidad and Tobago v. Davis*, [2008 ABCA 275](#), 233 C.C.C. (3d) 435, at para. [14](#); *R. v. Huff* (1979), [1979 ABCA 234 \(CanLII\)](#), 50 C.C.C. (2d) 324 (Alta. C.A.), at p. 328; *Mitchell*, at para. [4](#); *R. v. Gougeon* (1980), [1980 CanLII 2842 \(ON CA\)](#), 55 C.C.C. (2d) 218 (Ont. C.A.), at p. 234; *R. v. Tontarelli*, [2009 NBCA 52](#), 348 N.B.R. (2d) 41, at para. [55](#); *R. v. D. (S.)* (1997), [1997 CanLII 14627 \(NL CA\)](#), 119 C.C.C. (3d) 65 (Nfld. C.A.), at para. [34](#); *R. v. O’Leary* (1991), [1991 CanLII](#)

6852 (NL CA), 64 C.C.C. (3d) 573 (Nfld. C.A.), at p. 575; *R. v. Shiplack* (1993), 1993 CanLII 9139 (SK CA), 109 Sask. R. 311 (C.A.), at para. 9. See also *Ahmed v. Canada (Minister of Citizenship & Immigration)*, 2009 FC 672, 81 Imm. L.R. (3d) 116, at para. 40.

[23] Justice Charron cites *R. v. Connors* (1998), 1998 CanLII 12468 (BC CA), 121 C.C.C. (3d) 358 (B.C.C.A.), for the proposition that “dual procedure offences retain their character as indictable offences in the context of the *Identification of Criminals Act*” (para. 73). As my colleague points out, the *Identification of Criminals Act* is not before us on this appeal. For present purposes, it will therefore suffice to emphasize that *Connors* stands alone in this regard. Other courts have reached the opposite conclusion. See, for example, *Re Abarca and The Queen* (1980), 1980 CanLII 2958 (ON CA), 57 C.C.C. (2d) 410 (Ont. C.A.), at p. 413.

V

[24] Against this background, I turn now to ss. 786(2) and 788(1) of the *Criminal Code*, which both appear in Part XXVII of the *Code*, entitled “Summary Convictions”:

786. . . .

(2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.

788. (1) Proceedings under this Part shall be commenced by laying an information in Form 2.

[25] The time limit for instituting summary conviction proceedings that is now codified in s. 786(2) has existed in one form or another since at least 1892: *Criminal Code, 1892*, S.C. 1892, c. 29, s. 841. Only in 1997, however, was it made subject to waiver — that is, to extension

by consent of the parties (S.C. 1997, c. 18, s. 110). Until then, summary conviction offences could not be prosecuted at all unless proceedings were timely brought: *R. v. Karpinski*, [1957 CanLII 9 \(SCC\)](#), [1957] S.C.R. 343, at p. 350, *per* Fauteux J.

[26] It was in light of this that this Court in *Karpinski* unanimously held that the Crown could not try a hybrid offence as a summary conviction offence after the six-month limitation period had expired. But the Court divided as to the validity of the proceedings that had taken place in the summary conviction court prior to the discovery of the limitation problem.

[27] Fauteux J. (Abbott J. concurring) held that the proceedings were null *ab initio* because “there [was] no right for the Crown to elect to proceed by way of summary conviction and no jurisdiction for the magistrate to accept and act upon the election by receiving a plea” (p. 351). This line of reasoning has come to be known as the “no jurisdiction” view, and has been embraced by the Ontario Court of Appeal in a number of cases similar to the one at bar. See, for example, *R. v. Kelly* (1998), [1998 CanLII 7145 \(ON CA\)](#), 128 C.C.C. (3d) 206.

[28] Again in *Karpinski*, Cartwright J. (dissenting) concluded that the summary conviction court retained at least a limited jurisdiction over the proceedings. In his view, the Crown’s “withdrawal of the charge before the learned magistrate was tantamount to an acquittal” and thus gave rise to the special plea of *autrefois acquit* if the Crown attempted to prosecute the same offence by indictment: *Karpinski*, p. 350. Justice Cartwright’s reasoning has come to be known as the “defence view” of *Karpinski*, and it has been embraced by the Newfoundland Court of Appeal, in *obiter*, in *D. (S.)*.

[29] This division between the “no jurisdiction” and the “defence” views of acquired prescription retains its historical interest but not its former procedural significance. On either view, a summary conviction court has jurisdiction, with the consent of the parties, over statute-barred summary conviction proceedings. Absent consent, it does not.

[30] Except in one respect, I see no reason to distinguish in this regard between hybrid offences and offences punishable only on summary conviction. For hybrid offences, the Crown may proceed by indictment where its offer to proceed summarily is spurned by the accused. If the offence is a “pure” summary conviction offence — as opposed to a hybrid offence — the accused may nonetheless agree to proceed beyond the limitation period to avoid prosecution by indictment for a related offence that covers the same conduct. In either instance, if the prosecutor and defendant agree, a summary conviction court may exercise in respect of a statute-barred prosecution the jurisdiction it would otherwise have had.

[31] The sole relevant difference, it seems to me, is this. Absent consent, expiry of the limitation period bars entirely proceedings in respect of an offence that may be prosecuted only by way of summary conviction. A hybrid offence that can no longer be prosecuted summarily without the defendant’s consent may nonetheless, absent abuse of process, be prosecuted by indictment, whether or not the Crown initially elected to proceed summarily — except of course, where the accused was acquitted by a summary conviction court pursuant to the Crown’s initial election.

[32] In its reasons below, the Alberta Court of Appeal held that the Crown may “seek the consent of the accused to continue with a summary procedure” under s. 786(2) when it discovers “it has mistakenly elected to proceed summarily on an information sworn more than six months after the date of an alleged hybrid offence” (para. 42). On this view, which I share, the proceedings in the summary conviction court cannot be treated as a nullity *ab initio*.

[33] Whatever the situation may have been prior to the amendment of s. 786(2) in 1997, the summary conviction court now retains jurisdiction — subject to the consent of the parties — when it is discovered that the proceedings before it were statute-barred when the information was sworn. On a purposive interpretation of the amendment, the curative consent that is its object may be given at any time before verdict without requiring the parties to start the trial afresh. As I mentioned earlier, however, uncertainty and misunderstanding can easily be avoided by inviting and recording on the record — before the defendant is asked to plead — an agreement by the parties to proceed summarily.

[34] It is true, as a matter of principle, that jurisdiction cannot be conferred by consent. But this principle is subject to statutory attenuation, and Parliament has since 1997 expressly provided in s. 786(2) that the prosecutor and the defendant, by mutual consent, can renounce the six-month limitation period for summary convictions. From the defendant's point of view, this amounts to what may properly be characterized as a waiver of the benefit of prescription.

[35] And it is not without interest that the Court, nearly a century ago, recognized in *Giroux v. The King* (1917), [1917 CanLII 81 \(SCC\)](#), 56 S.C.R. 63, that “[c]onsent cannot confer jurisdiction but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject matter” (p. 67). In the context that concerns us here, the benefit of an expired limitation period may be regarded, at least since 1997, as a privilege that can be waived by the accused.

[36] The consent of the parties, I repeat, can be given at any time during the proceedings before the verdict. The prosecutor will always be deemed to have consented by virtue of his or her election to try the hybrid offence summarily. The defendant must consent to the

proceedings in a manner consistent with the reasons of the Court in *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41. That is to say, the consent of the defendant to continue with the proceedings must be “informed, clear and unequivocal”: *Korponay*, at p. 58.

VI

[37] The only question remaining on this appeal is what should become of the proceedings when the defendant declines to consent to their continuation.

[38] Where the offence is punishable only on summary conviction, the court should simply dismiss the information.

[39] In virtue of s. 34 of the *Interpretation Act*, hybrid offences are deemed indictable unless and until the Crown has elected to proceed summarily. Where the Crown elects to proceed summarily beyond the limitation period without the defendant’s consent, the Crown’s invalid election does not retrospectively invalidate an information.

[40] There is a large and divided body of case law considering the Crown’s right to “re-elect” on the original information to proceed by indictment after first electing to proceed summarily. See, for example, *Re Abarca and The Queen*; *R. v. Jans* (1990), 1990 ABCA 271 (CanLII), 59 C.C.C. (3d) 398 (Alta. C.A.); *R. v. Burke* (1992), 1992 CanLII 7121 (NL CA), 78 C.C.C. (3d) 163 (Nfld. C.A.); *R. v. Kalkhorany* (1994), 1994 CanLII 687 (ON CA), 89 C.C.C. (3d) 184 (Ont. C.A.); *R. v. Boutilier* (1995), 1995 NSCA 227 (CanLII), 104 C.C.C. (3d) 327 (N.S.C.A.).

[41] In my respectful view, these cases do not ask the right question.

[42] As mentioned earlier, the failure of the accused to consent to the prosecution of a hybrid offence by way of summary conviction beyond the limitation period is fatal to the validity of the Crown's election and to the proceedings that ensue.

[43] It is for precisely this reason that the Crown is free to proceed by indictment on the original information, if valid on its face, where the accused refuses to consent. Although the information remains valid, the initial election and all subsequent proceedings are a nullity. They can therefore have no effect on the Crown's ability to proceed by indictment.

[44] I agree with the Court of Appeal that it is not unfair to the accused to permit the Crown to proceed by indictment unless "the evidence discloses an abuse of process arising from improper Crown motive, or resulting prejudice to the accused sufficient to violate the community's sense of fair play and decency" (para. 1). On the record as we have it, nothing of the sort may be said to have occurred here.

[45] As Martin J.A. observed in *R. v. Belair* (1988), [1988 CanLII 7110 \(ON CA\)](#), 41 C.C.C. (3d) 329 (Ont. C.A.):

The [hybrid] offence charged was at all times triable by indictment, and indeed the information charged an indictable offence until the Crown elected to treat the offence as one punishable on summary conviction: see *Re Abarca and The Queen* (1980), [1980 CanLII 2958 \(ON CA\)](#), 57 C.C.C. (2d) 410 at pp. 413-4 (Ont. C.A.). The respondent in this case was in no way prejudiced by the error of Crown counsel. If Crown counsel

had noticed, prior to electing to proceed by way of summary conviction, that summary conviction proceedings were precluded by s. 721(2), he would, no doubt, have proceeded by indictment, as he ultimately did. The respondent in this case suffered no prejudice as a result of Crown counsel failing to notice prior to election that summary conviction proceedings were barred by s. 721(2). [p. 339]

[46] In *R. v. Phelps* (1993), [1993 CanLII 14657 \(ON CA\)](#), 79 C.C.C. (3d) 550, the Ontario Court of Appeal aptly noted that “in view of the lengthy proceedings that have taken place through no fault of the appellant, [the Crown should] consider whether the interests of justice would be served by proceeding further with this charge, the seriousness of which it obviously deemed to be of a summary conviction nature” (p. 552). That decision, I agree, is best left to prosecutorial and not judicial discretion.

VII

[47] Finally, four observations regarding the reasons of Justice Charron.

[48] The first concerns the conceptual underpinning of my colleague’s entire analytical framework. Justice Charron finds that the Crown’s election to prosecute a hybrid offence by way of summary conviction, “while defining the process by which the charge will be dealt once laid, does not change the underlying character of the offence as indictable” (para. 74).

[49] With respect, I am unable to understand in what sense the “underlying character” of a hybrid offence remains indictable once the Crown has elected to proceed summarily. The trial is before a *different court* and follows a *different procedure*. The offender is subject, upon conviction, to a *different punishment*. An appeal against the decision at trial goes to a *different*

court of appeal. Under various federal and provincial statutes, conviction for a hybrid offence prosecuted summarily carries with it, not only in respect of sentence but in other respects as well, *different consequences* than a conviction on indictment: See, for example, the *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4; the *Citizenship Act*, R.S.C. 1985, c. C-29, s. 22; and the *Ontario Juries Act*, R.S.O. 1990, c. J.3, s. 4. Finally, Parliament has expressly provided, in s. 34(1)(c) of the *Interpretation Act*, that “no person [prosecuted summarily for a hybrid offence] shall be considered to have been convicted of an indictable offence”.

[50] In what sense, then, does a hybrid offence retain its “underlying character” as an indictable offence once the Crown has elected to proceed by way of summary conviction? I am unable to identify any. On the contrary, the hybrid offence takes on the “underlying character” of a summary conviction offence and is in every respect governed by the provisions of Part XXVII of the *Criminal Code*. In my view, there is no principled reason for making of s. 786(2) an exception to this rule.

[51] Second, Justice Charron finds that “s. 786(2) speaks to the institution of the proceeding, not the Crown election” (para. 61). That, of course, is so. But hybrid offences prosecuted summarily are instituted by the laying of an information and *not* by the Crown’s election. In virtue of s. 788, they commence with the laying of that information; and in virtue of s. 786(2) they cannot be commenced more than six months after the offence is alleged to have occurred. Accordingly, it is *because* s. 786(2) “speaks to the institution of proceedings, not the Crown election” that the Crown may elect to proceed summarily at any time, *provided that the information was sworn no more than six months after the date of the alleged offence* — and otherwise only with the consent of the accused.

[52] Third, Justice Charron states (at para. 60) that “[t]here is a conflicting body of jurisprudence, all stemming from this Court’s decision in . . . *Karpinski* . . . on the effect of a ‘mistaken’ Crown election to proceed summarily in respect of a dual procedure offence on an information laid more than six months after the offence was allegedly committed.” My colleague’s statement should not be misunderstood: *Not a single Canadian decision drawn to our attention has held that the limitation period for summary conviction offences is inapplicable to hybrid offences prosecuted summarily.* On this issue, there is no jurisprudential conflict whatever.

[53] Thus, in *Karpinski*, all members of the Court agreed that the limitation period applied. This understanding of the law has prevailed in Canada for well over 100 years: *R. v. Edwards* (1898), [1898 CanLII 105 \(ON CA\)](#), 2 C.C.C. 96 (Ont. H.C.J.). And it has since *Karpinski* been twice re-affirmed by this Court, first in *R. v. Machacek*, [1961 CanLII 55 \(SCC\)](#), [1961] S.C.R. 163, and again in *Petersen v. The Queen*, [1982 CanLII 200 \(SCC\)](#), [1982] 2 S.C.R. 493. Any “conflict” in the jurisprudence relates to entirely different questions that *confirm* the applicability of the limitation period to hybrid offences prosecuted summarily, differing only as to whether a statute-barred prosecution goes to jurisdiction or is a matter of defence. I have dealt with this branch of the matter above, at paras. 21 and following.

[54] Finally, Justice Charron states, at para. 74, that “in those jurisdictions where cases are screened before charges are laid, a dual procedure offence is still instituted as an indictable offence under s. 504 or 505”. On the contrary, and with the greatest of respect, I believe the opposite is true. In screening proposed prosecutions, Crown counsel are expected to determine whether charges are justified and, in the case of hybrid offences, whether they should be prosecuted summarily or by indictment. Where Crown counsel determines that the case should be prosecuted summarily, it would at the very least be incongruous to then proceed as if by indictment — and nothing in the materials before us suggests that this is done. It is more plausible to assume

that where the Crown authorizes summary proceedings, they are instituted under s. 788 of the *Code* — in accordance with the Crown’s decision to prosecute summarily.

[55] In short, my colleague’s position — which was not raised by the parties or by the intervener — is incompatible with the text of the relevant provisions of the *Code*, inconsistent with more than a century of judicial decisions (including *Karpinski*), and contrary to how the law has always and universally been understood by lawyers and commentators alike. It is contrary as well to the position taken by the Director of Public Prosecutions of Canada in this Court when invited to do so,^[2] in instructions to federal prosecutors across the country,^[3] and by the Federal Department of Justice in Parliament when s. 786(2) was amended.^[4]

VIII

[56] In the result, I would dismiss the appeal, set aside the decision of the trial judge and let justice take its course in accordance with the governing principles set out in these reasons.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

CHARRON J. —

1. Overview

[57] The appellant, Kristy Leanne Dudley, was charged with one count of fraud not exceeding \$5,000 under s. 380(1)(b), and one count of uttering a forged document under s. 368(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, both dual procedure offences which allow the

Crown to proceed either by indictment or by summary conviction. The Crown elected to proceed summarily. When the matter came before the trial court for an expected guilty plea, counsel for Ms. Dudley noticed that the information had been sworn more than six months after the offences were alleged to have been committed. Counsel therefore argued that the information was a nullity on the basis that it was statute-barred under [s. 786\(2\)](#) of the *Criminal Code*. The Crown sought leave to re-elect to proceed by indictment, or in the alternative to withdraw the information. Counsel for Ms. Dudley objected, arguing that a judicial stay would probably be appropriate as his client had “no resolution other than a guilty plea” and the extent of her jeopardy increased if this matter proceeded by indictment. The trial judge denied both Crown requests, on the ground that the information was “out of time” and “a nullity” (2006 CarswellAlta 2115, at para. 3).

[58] The Crown appealed to the Alberta Court of Appeal. The Court of Appeal set aside the trial court’s decision, holding that an information is not invalidated by the Crown’s mistaken election to proceed summarily, nor is the Crown precluded from re-electing to proceed by indictment once the error is discovered, “unless the evidence discloses an abuse of process arising from improper Crown motive, or resulting prejudice to the accused sufficient to violate the community’s sense of fair play and decency” (2008 ABCA 73, 231 C.C.C. (3d) 80, at para. 1). The matter was therefore remitted to the trial court, for the Crown to apply to re-elect to proceed by indictment on the information, or alternatively to withdraw the information and proceed by indictment on a new information.

[59] Ms. Dudley appeals to this Court, arguing that the trial judge’s decision was, in effect, an implicit determination that a stay of the charges was appropriate and, as such, an exercise of judicial discretion which ought not to have been interfered with by the Court of Appeal. She therefore asks that the trial court’s decision be reinstated, disallowing the Crown to re-elect or to proceed with the matter by indictment.

[60] There is a conflicting body of jurisprudence, all stemming from this Court's decision in *R. v. Karpinski*, 1957 CanLII 9 (SCC), [1957] S.C.R. 343, on the effect of a "mistaken" Crown election to proceed summarily in respect of a dual procedure offence on an information laid more than six months after the offence was allegedly committed. In all cases, much as in the case at bar, it was simply assumed that s. 786(2) of the *Criminal Code* operated to bar a proceeding by summary conviction in respect of a dual procedure offence, without asking whether the six-month prescription applies at all to such offences. In this appeal, this precise issue was canvassed at the hearing before this Court, following which the parties and the Director of Public Prosecutions, as intervener, filed supplementary submissions. Ms. Dudley argues that dual procedure offences are subject to the general limitation period under s. 786(2). The intervener supports her position. The Crown, on the other hand, takes the position that the general limitation period under s. 786(2) cannot govern the institution of proceedings in respect of dual procedure offences, as these offences are deemed indictable at law.

[61] Having considered those submissions, I have come to the conclusion that s. 786(2) only operates as a general bar to the institution of proceedings more than six months after the alleged offence in respect of summary conviction offences. Dual procedure offences are deemed indictable offences by operation of s. 34 of the *Interpretation Act*, R.S.C. 1985, c. I-21, and, as such, not subject to any general limitation period under the *Criminal Code*. Proceedings in respect of dual procedure offences may therefore be instituted beyond the six-month period. Further, s. 786(2) speaks to the institution of the proceeding, not the Crown election. Therefore, nothing in the provision bars the Crown from electing to proceed either by indictment or by summary conviction in respect of such offences.

[62] Consequently, I would confirm the Court of Appeal's judgment setting aside the trial court's decision, but would remit the matter to the trial court to proceed by *summary conviction* in accordance with the Crown's election.

2. Analysis

[63] The first question in this case is whether the limitation period in s. 786(2) applies to dual procedure offences. In light of my conclusion that it does not, this is the only question that need be answered. Resolving this issue is a matter of statutory interpretation, which requires ascertaining Parliament's intent. Before interpreting the provision in question, I will briefly discuss the nature and purpose of dual procedure offences.

2.1 *Dual Procedure Offences*

[64] The *Criminal Code* creates two categories of offences: summary conviction offences and indictable offences. Since indictable offences are more serious, a prosecution by indictment triggers additional procedural safeguards and a conviction attracts more severe penalties. Some offences may be prosecuted either summarily or by indictment, at the Crown's discretion. These offences are commonly known as "hybrid offences", but this term is misleading if it suggests that there exists a third category of offences. As discussed below, these offences are deemed at law to be indictable offences; they do not occupy a third category. I will therefore refer to these hybrid offences as "dual procedure offences".

[65] Parliament's enactment of dual procedure offences recognizes that certain crimes can be more or less serious depending on the circumstances and provides the Crown with discretion to choose the most appropriate procedure and range of potential penalties. For example, the offence of fraud under \$5,000 — one of the charges in this case — can embrace criminal activity ranging from a young first offender switching price tickets on an item in a department store, to a repeat offender wrongfully appropriating the savings account of a vulnerable person

under his or her care. The Crown prosecutor chooses the procedure that best fits the particular offence and offender. As this Court has recognized, discretion, including prosecutorial discretion, is an “essential feature of the criminal justice system” which will not be lightly interfered with: *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, at p. 410; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372.

[66] With few exceptions, the decision to proceed summarily or by way of indictment in Canada has always been the Crown prosecutor’s. This Court made this explicit in *Smythe v. The Queen*, 1971 CanLII 831 (SCC), [1971] S.C.R. 680, at p. 686, when it adopted the following statement from the Quebec Court of Appeal: “If an authority such as the Attorney-General can have the right to decide whether or not a person shall be prosecuted, surely he may, if authorized by statute, have the right to decide what form the prosecution shall take”: *R. v. Court of Sessions of the Peace, ex parte Lafleur*, 1966 CanLII 560 (QC CA), [1967] 3 C.C.C. 244, at p. 248. Justice Fish, at para. 17, points to s. 501 of the 1927 version of the *Criminal Code* which, exceptionally, left the choice to the accused. The operative part of s. 501 read as follows: “Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months’ imprisonment with or without hard labour . . .”. Since the potential range of penalties on conviction of this offence was the same whichever procedural route was chosen, in effect, s. 501 gave the accused the choice of trial forum, a choice that is commonly left with the accused. In any event, the wording of s. 501 appears to be an anomaly as it is not replicated in any other provision in that version of the *Criminal Code*.

2.2 *The Words of the Statute*

[67] I now turn to the question of statutory interpretation. The starting point in interpreting statutes is the wording of the provision. The provision in question is found at the

commencement of Part XXVII of the *Criminal Code*, entitled “Summary Convictions”. A number of definitions are set out in s. 785, then s. 786 provides the following:

786. (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.

(2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree.

The relevant part of the definition of “proceedings” under s. 785 reads as follows:

“proceedings” means

(a) proceedings in respect of offences that are declared by an Act of Parliament or an enactment made thereunder to be punishable on summary conviction

[68] Ms. Dudley claims that since dual procedure offences are “punishable on summary conviction”, s. 786(2) applies to them. As she points out, nothing in para. (a) of the definition of “proceedings” in s. 785 suggests that an offence must be punishable *exclusively* on summary conviction to fall within the definition. True enough, but this argument only brings us so far. While the definition of “proceedings” is wide enough to include dual procedure offences, Part XXVII only applies “[e]xcept where otherwise provided by law”. For example, it is obvious that many of the provisions contained in Part XXVII do not apply to dual procedure offences when the Crown elects to proceed by indictment. Other provisions of the *Criminal Code* govern instead. Therefore, the definition of “proceedings” does not answer the question whether the limitation provision under s. 786(2) applies to dual procedure offences. The fact that the provision deals with the *institution* of the proceedings, in my view, provides more fruitful ground to ascertain its meaning.

[69] Section 786(2) states that proceedings shall not be “instituted” outside of the six-month limitation period. Proceedings relating to summary conviction offences are instituted pursuant to s. 788(1) of the *Code*; proceedings relating to indictable offences are instituted pursuant to s. 504 or 505 of the *Code*. In either case, instituting the procedure requires laying an information in Form 2. Thus, the *Criminal Code* provides two routes to the same result. There is no third route in respect of dual procedure offences — this reflects the fact that, as stated earlier, there is no third category of “hybrid” offences.

[70] The question therefore becomes whether dual procedure offences are instituted pursuant to s. 788(1) or pursuant to s. 504 or 505. Section 34(1) of the *Interpretation Act* makes it clear that it is the latter, as s. 34(1)(a) deems a dual procedure offence to be an indictable offence. The provision reads as follows:

34. (1) Where an enactment creates an offence,

(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;

(b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and

(c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.

[71] The import of s. 34(1) of the *Interpretation Act* is that dual procedure offences are deemed to be indictable offences, so the proceedings are commenced pursuant to s. 504 or 505, not s. 788(1). As a result, the proceedings are never “instituted” under Part XXVII within the meaning of s. 788(1), and the limitation period does not apply to

these offences. Any subsequent Crown election to proceed summarily does not retroactively invalidate the institution of the proceeding.

[72] Further, as the wording of s. 34(1) of the *Interpretation Act* indicates, the characterization of a dual procedure offence as an indictable offence endures. Paragraph (a) provides no suggestion that the dual procedure offence ever ceases being deemed indictable. In addition, the safeguarding provision under para. (c) would not be necessary if a summary election or plea negated the deeming provision in para. (a). Therefore, subsequent events — notably the Crown’s election to proceed by way of summary conviction or the accused’s decision to plead guilty to a summary conviction offence pursuant to s. 606(4) — do not affect the original characterization. They do affect the procedure that is followed, the penalty that may be imposed, and the effect of a conviction — as Fish J. notes in his reasons, where the Crown elects to proceed summarily, the dual procedure offence acquires the same characteristics as a pure summary offence in all those important respects and indeed, as he points out, the offence has been described by many courts as having *ceased* to be indictable at that point. (See paras. 21-22.) While this view may accurately reflect the practical *effects* of the Crown election from a procedural standpoint, there is no support in the wording of s. 34 to say that the offence, from a substantive standpoint, is no longer indictable. If it were otherwise and the offence ceased to be characterized as an indictable offence upon the Crown electing to proceed summarily, there would be no basis in law for the Crown to “re-elect” and continue the proceedings by indictment. In my respectful view, the Crown’s choice of procedural route does not change the original characterization of the offence as an indictable offence.

[73] The extent to which the original characterization of the offence carries the day in any particular context has been the subject of debate in other contexts. For example, the British Columbia Court of Appeal in *R. v. Connors* (1998), 1998 CanLII 12468 (BC CA), 121 C.C.C. (3d) 358, came to the conclusion that dual procedure offences retained their character as indictable offences in the context of the *Identification of Criminals Act*, R.S.C. 1985, c. I-1, which allows for

the fingerprinting of any person who is in lawful custody, charged or convicted of an indictable offence:

At least for the purposes of the *Identification of Criminals Act* the term “indictable offence” includes offences which may be prosecuted summarily, but they retain their character as indictable offences no matter how the Crown elects. The Crown election has an impact procedurally on how and in what court the charge proceeds and, as well, on the maximum penalty that may be imposed, but does not change the character of the offence. It remains an indictable offence.

(*Per* Cumming J.A. writing for a unanimous bench on this point, at para. 69.)

[74] The interpretation of the *Identification of Criminals Act* is not before us. Therefore suffice it for our purposes to conclude that the underlying characterization of the dual procedure offence as indictable certainly governs the institution of the process. The Crown’s election to proceed summarily, while defining the process by which the charge will be dealt once laid, does not change the underlying character of the offence as indictable. Therefore, it is of no moment when the Crown makes the decision. As noted by the intervener, in some jurisdictions the Crown’s election is sometimes expressly set out on the form or in the wording of the count before the information is laid. In my view, this causes no difficulties. Regardless of the timing of the Crown election, the offence is still deemed to be an indictable offence pursuant to the *Interpretation Act*. Another way of looking at it is the following. An election is not made in the abstract. It must relate to a proceeding. As matter of logic, the institution of the proceeding therefore must precede the election. Accordingly, in those jurisdictions where cases are screened before charges are laid, a dual procedure offence is still instituted as an indictable offence under s. 504 or 505, following which the election becomes immediately effective to govern the ensuing process accordingly.

2.3 *The Purpose of the Limitation Period*

[75] An examination of the purpose of the limitation provision supports the conclusion that Parliament did not intend to time-limit prosecutions of dual procedure offences.

[76] As one academic has noted, it is primarily the interests of the defendant that animate limitation periods in criminal law: P. G. Barton, “Why Limitation Periods in the [Criminal Code](#)?” (1998), 40 *Crim. L.Q.* 188. A central purpose is to allow those who commit minor offences to rest easy after a period: “. . . if the matter is of a level of seriousness of a summary conviction offence, it is not so significant that, after a time, a person should have to fear prosecution. He or she should be able to get on with life without the threat of a criminal proceeding hanging over his or her head. The seriousness of indictable matters overweighs this factor” (p. 190).

[77] In respect of dual procedure offences, as discussed above, Parliament has recognized that certain crimes may be more or less serious depending on the circumstances and has provided the Crown with broad discretion to choose the most appropriate procedure. It follows that Parliament considers dual procedure offences as more serious than pure summary conviction offences.

[78] It is of course open to Parliament to create limitation periods for all offences, some offences, or no offences. While Parliament has imposed a limitation period on summary conviction offences, the least serious crimes, it has not made the same choice regarding indictable offences. It has determined that the public interest in prosecuting these more serious offences outweighs the defendant’s interest in resting easy. It has also chosen that dual procedure offences are deemed to be indictable offences. In my view, imposing a limitation period on dual procedure offences would frustrate Parliament’s purpose. Had Parliament wished to impose a limitation

period on dual procedure offences, it could have expressly adverted to these offences in s. 786(2) or declined to deem them to be indictable offences in the *Interpretation Act*.

2.4 *The Consequences of the Interpretation*

[79] In my view, interpreting s. 786(2) to include dual procedure offences would have undesirable consequences: it would interfere with the fair and efficient administration of the criminal justice system.

[80] As many cases exemplify, including the case at bar, the consequence of imposing a limitation period on dual procedure offences is to force the Crown to proceed by way of indictment when it would otherwise pursue a summary conviction (unless the accused consented to summary proceedings). This interpretation would restrain the Crown's exercise of discretion, the importance of which was alluded to above. It might also be unfair to the accused. As Ms. Dudley argued, proceedings by way of indictment may cause more prejudice to the accused: they place the accused in greater jeopardy, can involve increased cost and delay, and may carry greater stigma. See *R. v. Boutilier* (1995), 1995 NSCA 227 (CanLII), 104 C.C.C. (3d) 327 (N.S.C.A), at pp. 335-36.

[81] An interpretation excluding dual procedure offences from s. 786(2) avoids these adverse consequences. For dual procedure offences, Crown prosecutors would continue to exercise their full discretion, even after the expiry of six months. For pure summary offences instituted beyond the six months, defendants would still have the option, granted in s. 786(2), to agree to proceed by way of summary conviction. I do not accept the argument that this option would be absurd if the limitation applied only to pure summary conviction offences on the basis

that an accused's only possible motivation for waiving the limitation period would be to avoid proceedings by indictment in respect of a dual procedure offence. This premise is incorrect: defendants might well exercise that option where their conduct can be captured by several different offences, some indictable and others not. Agreeing to summary conviction proceedings, in return for the Crown's decision not to proceed with the indictable offence(s), would decrease their jeopardy.

[82] In my view, the interpretation that respects prosecutorial discretion and protects the accused from unfair treatment should be favoured in this case.

[83] Interpreting s. 786(2) to exclude dual procedure offences also does not cause conflicts with other legislation. No inconsistency results.

[84] I would dismiss three concerns raised by the intervener about incoherence with other statutes. First, this intervener has identified a number of federal statutes which contain only dual procedure offences and for which a specific limitation period applicable when the proceedings are instituted by way of summary conviction is prescribed. The intervener argues that these limitation periods must remain. I agree. At issue in this case is the limitation period in s. 786(2) of the *Code* only; Parliament of course may institute any other statutory limitation periods it wishes.

[85] Second, this intervener has identified a number of other federal statutes providing for summary conviction offences which are not subject to a specific limitation period. It worries that an interpretation of s. 786(2) excluding dual procedure offences would lead to the result that the dual procedure offences set out in these statutes would elude prescription, while the dual procedure offences in the statutes described in the preceding paragraph would not. I do not

think there is any cause for concern. Again, Parliament is free to impose, or not to impose, limitation periods. No conflict arises.

[86] Third, this intervener points specifically to the *Animal Pedigree Act*, R.S.C. 1985, c. 8 (4th Supp.). This Act contains only one offence which is a dual procedure offence, but s. 67 of the act states, “[t]he provisions of the *Criminal Code* prescribing a time limit for making a complaint or laying an information in respect of offences punishable on summary conviction do not apply to proceedings in respect of an offence under this Act.” According to the intervener, this indicates that Parliament considered that s. 786(2) applies to dual procedure offences. I disagree. I take comfort in the fact that the parties and the intervener could locate only one such example and, in my view, this provision was added for greater certainty. No incoherence results: this provision in fact aligns with the proposed interpretation of s. 786(2).

[87] Finally, nothing in the jurisprudence militates against the proposed interpretation as no court has ruled on this issue.

[88] This Court did not hold in *Karpinski* that the Crown could not try a dual procedure offence as a summary conviction offence after the expiry of the limitation period; this question was not before the Court. In *Karpinski*, an information was sworn, the Crown elected to proceed summarily, and the defendant entered a plea of not guilty. Defence counsel then moved to dismiss on the ground that the information had been laid out of time. The magistrate permitted Crown counsel to withdraw the information and lay a new information to proceed by way of indictment. This Court confronted only the narrow question of whether the withdrawal of the first information amounted to an acquittal thereby allowing the accused to plead *autrefois acquit*. It did not address the aborted trial, or the propriety of withdrawing the information.

[89] While other courts have also assumed that s. 786(2) applies to dual procedure offences, none has ruled on this issue. Therefore, no case law stands against the conclusion that s. 786(2) does not apply to dual procedure offences.

3. Disposition

[90] I have reached the conclusion that, properly interpreted, s. 786(2) does not bar the institution of proceedings more than six months after the alleged offence in respect of dual procedure offences. I would dismiss the appeal, confirm the Court of Appeal's order setting aside the trial court's decision, and amend that order so as to remit the matter to the trial court to proceed by *summary conviction* in accordance with the Crown's election.

Appeal dismissed.

Solicitors for the appellant: Attia Reeves Tensfeldt Snow, Edmonton.

Solicitor for the respondent: Department of Justice, Edmonton.

Solicitor for the intervener: Director of Public Prosecutions of Canada, Ottawa.

[1] I am aware, of course, that the *Criminal Code* uses the term “accused” for indictable offences and “defendant” for offences punishable on summary conviction. For the sake of simplicity without unnecessary terminological nuance, I shall, dealing here with hybrid offences, use “accused” for both and “defendant” only for summary conviction proceedings. I shall also use “verdict” to signify a decision on the merits (“guilty” or “not guilty”) both for indictable and for summary conviction matters, “acquittal” to signify a not guilty verdict in either instance, and “summarily” to signify proceedings by way of summary conviction.

[2] Supplementary Factum, Intervener Director of Public Prosecutions.

[3] *The Federal Prosecution Service Deskbook*, Section 19.2.1 (updated 2002).

^[4] Senior Counsel, Department of Justice Criminal Law Policy Section, before the Standing Committee on Justice and Human Rights, at 0930 (October 20, 1998).

TAB 11

Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 SCR 190

Source:	Supreme Court of Canada
Date:	2008-03-07
File number:	31459
Other citations:	329 NBR (2d) 1 — 291 DLR (4th) 577 — 372 NR 1 — 164 ACWS (3d) 727 — 844 APR 1 — AZ-50478101 — 170 LAC (4th) 1 — 64 CCEL (3d) 1 — 69 Admin LR (4th) 1 — 69 Imm LR (3d) 1 — 95 LCR 65 — DTE 2008T-223 — [2008] CarswellNB 124 — EYB 2008-130674 — JE 2008-547 — [2008] SCJ No 9 (QL) — [2008] ACS no 9
Citation:	Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 SCR 190, < https://canlii.ca/t/1vxsm >, retrieved on 2026-03-22
Most recent unfavourable mention	Dr Ignacio Tan III v Alberta Veterinary Medical Association , 2025 ABCA 119 (CanLII) [...] Despite Dunsmuir , "patent unreasonableness" will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative [...]



SUPREME COURT OF CANADA

CITATION: Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9

DATE: 20080307
DOCKET: 31459

BETWEEN:

David Dunsmuir

Appellant

v.

**Her Majesty the Queen in Right of the Province of New Brunswick
as represented by Board of Management**

Respondent

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

JOINT REASONS FOR JUDGMENT: Bastarache and LeBel JJ. (McLachlin C.J. and Fish and Abella JJ. concurring)

(paras. 1 to 118)

Binnie J.

CONCURRING REASONS:

(paras. 119 to 157)

Deschamps J. (Charron and Rothstein JJ. concurring)

CONCURRING REASONS:

(paras. 158 to 173)

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9

David Dunsmuir

Appellant

v.

**Her Majesty the Queen in Right of the Province of
New Brunswick as represented by Board of Management**

Respondent

Indexed as: Dunsmuir v. New Brunswick

Neutral citation: 2008 SCC 9.

File No.: 31459.

2007: May 15; 2008: March 7.

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

on appeal from the court of appeal for new brunswick

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decision makers — Whether judicial review should include only two standards: correctness and reasonableness.

Administrative law — Judicial review — Standard of review — Employee holding office “at pleasure” in provincial civil service dismissed without alleged cause with four months’ pay in lieu of notice — Adjudicator interpreting enabling statute as conferring jurisdiction to determine whether discharge was in fact for cause — Adjudicator holding employer breached duty of procedural fairness and ordering reinstatement — Whether standard of reasonableness applicable to adjudicator’s decision on statutory interpretation issue — [Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, ss. 97\(2.1\), 100.1\(5\)](#) — [Civil Service Act, S.N.B. 1984, c. C-5.1, s. 20](#).

Administrative law — Natural justice — Procedural fairness — Dismissal of public office holders — Employee holding office “at pleasure” in provincial civil service dismissed without alleged cause with four months’ pay in lieu of notice — Employee not informed of reasons for termination or provided with opportunity to respond — Whether employee entitled to procedural fairness — Proper approach to dismissal of public employees.

D was employed by the Department of Justice for the Province of New Brunswick. He held a position under the [Civil Service Act](#) and was an office holder “at pleasure”. His probationary period was extended twice and the employer reprimanded him on three separate occasions during the course of his employment. On the third occasion, a formal letter of

reprimand was sent to D warning him that his failure to improve his performance would result in further disciplinary action up to and including dismissal. While preparing for a meeting to discuss D's performance review the employer concluded that D was not right for the job. A formal letter of termination was delivered to D's lawyer the next day. Cause for the termination was explicitly not alleged and D was given four months' pay in lieu of notice.

D commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act* ("PSLRA"), alleging that the reasons for the employer's dissatisfaction were not made known, that he did not receive a reasonable opportunity to respond to the concerns, that the employer's actions in terminating him were without notice, due process or procedural fairness, and that the length of the notice period was inadequate. The grievance was denied and then referred to adjudication. A preliminary issue of statutory interpretation arose as to whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator held that the referential incorporation of s. 97(2.1) of the *PSLRA* into s. 100.1(5) of that Act meant that he could determine whether D had been discharged or otherwise disciplined for cause. Ultimately, the adjudicator made no finding as to whether the discharge was or was not for cause. In his decision on the merits, he found that the termination letter effected termination with pay in lieu of notice and that the termination was not disciplinary. As D's employment was hybrid in character, the adjudicator held that D was entitled to and did not receive procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered D reinstated as of the date of dismissal, adding that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

On judicial review, the Court of Queen's Bench applied the correctness standard and quashed the adjudicator's preliminary decision, concluding that the adjudicator did not have jurisdiction to inquire into the reasons for the termination, and that his authority was limited to determining whether the notice period was reasonable. On the merits, the court found that D had received procedural fairness by virtue of the grievance hearing before the adjudicator. Concluding

that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the court quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice. The Court of Appeal held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was unreasonable. It found that where the employer elects to dismiss with notice or pay in lieu of notice, s. 97(2.1) of the *PSLRA* does not apply and the employee may only grieve the length of the notice period. It agreed with the reviewing judge that D's right to procedural fairness had not been breached.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ.: Despite its clear, stable constitutional foundations, the system of judicial review in Canada has proven to be difficult to implement. It is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. Notwithstanding the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, any actual difference between them in terms of their operation appears to be illusory. There ought to be only two standards of review: correctness and reasonableness. [32] [34] [41]

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative

choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system. [47-50]

An exhaustive analysis is not required in every case to determine the proper standard of review. Courts must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker with regard to a particular category of question. If the inquiry proves unfruitful, courts must analyze the factors making it possible to identify the proper standard of review. The existence of a privative clause is a strong indication of review pursuant to the reasonableness standard, since it is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. It is not, however, determinative. Where the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, deference will usually apply automatically. Deference will usually result where a decision maker is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. While deference may also be warranted where an administrative decision maker has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, a question of law that is of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker will always attract a correctness standard. So will a true question of *vires*, a question regarding the jurisdictional lines between two or more competing specialized tribunals, and a constitutional question regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*. [52-62]

The standard of reasonableness applied on the issue of statutory interpretation. While the question of whether the combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in

lieu of notice is a question of law, it is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator, who was in fact interpreting his enabling statute. Furthermore, s. 101(1) of the *PSLRA* includes a full privative clause, and the nature of the regime favours the standard of reasonableness. Here, the adjudicator's interpretation of the law was unreasonable and his decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. The employment relationship between the parties in this case was governed by private law. The combined effect of ss. 97(2.1) and 100.1 of the *PSLRA* cannot, on any reasonable interpretation, remove the employer's right, under the ordinary rules of contract, to discharge an employee with reasonable notice or pay in lieu thereof without asserting cause. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. [66-75]

On the merits, D was not entitled to procedural fairness. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. Where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness. The principles expressed in *Knight v. Indian Head School Division No. 19* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that *Knight* ignored the important effect of a contract of employment, it should not be followed. In the case at bar, D was a contractual employee in addition to being a public office holder. [Section 20](#) of the *Civil Service Act* provided that as a civil servant he could only be dismissed in accordance with the ordinary rules of contract. To consider a public law duty of fairness issue where such a duty exists falls squarely within the adjudicator's task to resolve a grievance. Where, as here, the relationship is contractual, it was unnecessary to consider any public law duty of procedural fairness. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of D,

the adjudicator erred and his decision was therefore correctly struck down. [76-78] [81] [84] [106] [114] [117]

Per Binnie J.: The majority reasons for setting aside the adjudicator ruling were generally agreed with, however the call of the majority to re-evaluate the pragmatic and functional test and to re-assess “the structure and characteristics of the system of judicial review as a whole” and to develop a principled framework that is “more coherent and workable” invites a broader reappraisal. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. Litigants find the court’s attention focussed not on their complaints, or the government’s response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. The Court should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [119-122] [133] [145]

The distinction between “patent unreasonableness” and reasonableness *simpliciter* is now to be abandoned. The repeated attempts to explain the difference between the two, was in hindsight, unproductive and distracting. However, a broad reappraisal of the system of judicial review should explicitly address not only administrative tribunals but issues related to other types of administrative bodies and statutory decision makers including mid-level bureaucrats and, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. [121-123] [134-135] [140]

It should be presumed that the standard of review of an administrative outcome on grounds of substance is reasonableness. In accordance with the ordinary rules of litigation, it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. An applicant urging the non-deferential “correctness” standard should be required to demonstrate that the decision rests on an error in the determination of a legal issue not confided (or which constitutionally could not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. The logic of the constitutional limitation is

obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. Questions of law outside the administrative decision maker's home statute and closely related rules or statutes which require his or her expertise should also be reviewable on a "correctness" standard whether or not it meets the majority's additional requirement that it be "of central importance to the legal system as a whole". The standard of correctness should also apply to the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. [127-129] [146-147]

On the other hand when the application for judicial review challenges the substantive outcome of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended. [130]

Abandonment of the distinction between reasonableness *simpliciter* and patent unreasonableness has important implications. The two different standards addressed not merely "the magnitude or the immediacy of the defect" in the administrative decision but recognized that different administrative decisions command different degrees of deference, depending on who is deciding what. [135]

"Contextualizing" a single standard of "reasonableness" review will shift the courtroom debate from choosing between two standards of reasonableness that each represented a

different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference. [139]

Thus a single “reasonableness” standard will now necessarily incorporate both the degree of deference owed to the decision maker formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances. The judge’s role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. [141] [149]

A single “reasonableness” standard is a big tent that will have to accommodate a lot of variables that inform and limit a court’s review of the outcome of administrative decision making. “Contextualizing” the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred. In some cases the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case careful consideration will have to be given to the reasons given for the decision. This list of “contextual” considerations is non-exhaustive. A reviewing court ought to recognize throughout the exercise that fundamentally the “reasonableness” of the administrative outcome is an issue given to another forum to decide. [144] [151-155]

Per Deschamps, Charron and Rothstein JJ.: Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. In the adjudicative context, decisions on questions of fact, whether undergoing appellate review or

administrative law review, always attract deference. When there is a privative clause, deference is owed to the administrative body that interprets the legal rules it was created to interpret and apply. If the body oversteps its delegated powers, if it is asked to interpret laws in respect of which it does not have expertise or if Parliament or a legislature has provided for a statutory right of review, deference is not owed to the decision maker. Finally, when considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court. [158-164]

Here, the employer's common law right to dismiss without cause was the starting point of the analysis. Since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court can proceed to its own interpretation of the applicable rules and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is essential if [s. 97\(2.1\)](#) of the *PSLRA* is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by [s. 100.1\(5\)](#) of the *PSLRA*. The adjudicator's failure to inform himself of this crucial difference led him to look for a cause for the dismissal, which was not relevant. Even if deference had been owed to the adjudicator, his interpretation could not have stood. Employment security is so fundamental to an employment relationship that it could not have been granted by the legislature by providing only that the *PSLRA* was to apply *mutatis mutandis* to non-unionized employees. [168-171]

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APPEAL from a judgment of the New Brunswick Court of Appeal (Turnbull, Daigle and Robertson JJ.A.) (2006), [2006 NBCA 27 \(CanLII\)](#), 297 N.B.R. (2d) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 2006 CLLC ¶220-030, [2006] N.B.J. No. 118 (QL), 2006 CarswellNB 155, 2006 NBCA 27, affirming a judgment of Rideout J. (2005), 293 N.B.R. (2d) 5, 43 C.C.E.L. (3d) 205, [2005] N.B.J. No. 327 (QL), 2005 CarswellNB 444, [2005 NBQB 270](#), quashing a preliminary ruling and quashing in part an award made by an adjudicator. Appeal dismissed.

J. Gordon Petrie, Q.C., and *Clarence L. Bennett*, for the appellant.

C. Clyde Spinney, Q.C., and Keith P. Mullin, for the respondent.

The judgment of McLachlin C.J. and Bastarache, LeBel, Fish and Abella JJ. was delivered by

BASTARACHE AND LEBEL JJ. —

I. Introduction

[1] This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. *Facts*

[2] The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

[3] The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

[4] The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

[5] A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding

the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal."

[6] Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

[7] A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to [section 20](#) of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.

To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.

. . .

In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession

[8] On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

[9] The appellant commenced the grievance process under [s. 100.1](#) of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 (“*PSLRA*”; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a “discharge, suspension or a financial penalty” (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer’s dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer’s concerns; that the employer’s actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

[10] The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. *Decisions of the Adjudicator*

(1) Preliminary Ruling (January 10, 2005)

[11] The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Chalmers (Dr. Everett) Hospital v. Mills* (1989), 1989 CanLII 7923 (NB CA), 102 N.B.R. (2d) 1.

[12] Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an

employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005).

[13] In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

[14] The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

[15] The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural

fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

[16] The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. *Judicial History*

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270

[17] The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

[18] The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

[19] Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed “at pleasure” and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words “and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined” from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed “at pleasure”. In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

[20] With respect to the adjudicator’s award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator’s reasons do not stand up to a “somewhat probing examination” (para. 76). The reviewing judge held that the adjudicator’s award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator’s decision did not stand up to review

on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, [2006 NBCA 27](#)

[21] The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, [2004 SCC 28](#). However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

[22] Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however,

s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

[23] On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

[24] At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

[25] The second issue involves examining whether the appellant who held an office “at pleasure” in the civil service of New Brunswick, had the right to procedural fairness in the employer’s decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

[26] The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator’s Statutory Interpretation Determination

A. Judicial Review

[27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public

authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[30] In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, “the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal’s authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law” (“Appellate Review: Policy and Pragmatism”, in 2006 Isaac Pitblado Lectures, *Appellate Courts: Policy, Law and Practice*, V-1, at p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

[31] The legislative branch of government cannot remove the judiciary’s power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, 1972 CanLII 139 (SCC), [1973] S.C.R. 120, at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867: Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090, “[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection”. In short, judicial review is constitutionally guaranteed in Canada,

particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*:

Where . . . questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act* and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review. [pp. 237-38]

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

[32] Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

[33] Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada*

(*Minister of Citizenship and Immigration*), [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, [2002 SCC 1](#), *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, [2001 SCC 41](#), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003 SCC 29](#), it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, [2002 SCC 86](#), at paras. [190 and 195](#), questioning the applicability of the “pragmatic and functional approach” to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. *Reconsidering the Standards of Judicial Review*

[34] The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

[35] The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979 CanLII 23 \(SCC\)](#), [1979] 2 S.C.R. 227 (“*CUPE*”), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within

its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review” (p. 237). Prior to *CUPE*, judicial review followed the “preliminary question doctrine”, which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as “jurisdictional”, courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.’s warning that courts “should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so” (p. 233). Dickson J.’s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

[36] *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, “the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and . . . such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator” (p. 1086). *Bibeault* introduced the concept of a “pragmatic and functional analysis” to determine the jurisdiction of a tribunal, abandoning the “preliminary question” theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put “renewed emphasis on the superintending and reforming function of the superior courts” (p. 1090). The “pragmatic and functional analysis”, as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

[37] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997 CanLII 385 \(SCC\)](#), [1997] 1 S.C.R. 748, a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

[38] The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998 CanLII 778 \(SCC\)](#), [1998] 1 S.C.R. 982.

[39] The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

[40] The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 78, per LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

[A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as “clearly irrational” or “evidently not in accordance with reason” A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after “significant searching or testing” (*Southam, supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

[41] As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E.*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15, at paras. 101-3). Indeed, even this Court divided when attempting to determine whether a particular decision was “patently unreasonable”, although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of*

Labour)). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

[T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

[42] Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E.*, at para. 108:

In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, [2004 SCC 23](#), at paras. 40-41, *per* LeBel J.

C. *Two Standards of Review*

[43] The Court has moved from a highly formalistic, artificial “jurisdiction” test that could easily be manipulated, to a highly contextual “functional” test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonableness and Correctness

[44] As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, “The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law” (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

[45] We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of “reasonableness” review. The result is a system of judicial review

comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does

not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference “is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers” (*Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at p. 596, *per* L’Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of “deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”: “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L’Heureux-Dubé J.; *Ryan*, at para. 49).

[49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”: D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just

decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

[51] Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

[52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, 1995 CanLII 148 (SCC), [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, 1997 CanLII 378 (SCC), [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan*, 1974 CanLII 12 (SCC), [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

— The nature of the question of law. A question of law that is of “central importance to the legal system . . . and outside the . . . specialized area of expertise” of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[56] If these factors, considered together, point to a standard of reasonableness, the decision maker’s decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator’s decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[57] An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, [2004 SCC 26](#)). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

[58] For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998 CanLII 813 \(SCC\)](#), [1998] 1 S.C.R. 322. Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution:

Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504, [2003 SCC 54](#); Mullan, *Administrative Law*, at p. 60.

[59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. “Jurisdiction” is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, [2004 SCC 19](#). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[60] As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in

Toronto (City) v. C.U.P.E., which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, [2000 SCC 14](#); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, [2004 SCC 39](#).

[62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[63] The existing approach to determining the appropriate standard of review has commonly been referred to as “pragmatic and functional”. That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase “pragmatic and functional approach” may have misguided courts in the past, we prefer to refer simply to the “standard of review analysis” in the future.

[64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative

clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. *Application*

[65] Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

[66] The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

[67] The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of . . . an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered,

and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain . . . an adjudicator in any of its or his proceedings.” The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

[68] The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. RWDSU, Local 454*, 1998 CanLII 780 (SCC), [1998] 1 S.C.R. 1079, at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *Alberta Union of Provincial Employees v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

[69] The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator’s powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.

[70] Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

[71] Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

[72] While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

[73] The adjudicator considered the New Brunswick Court of Appeal decision in *Chalmers (Dr. Everett) Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve “with respect to . . . disciplinary action resulting in discharge, suspension or a financial penalty” (s. 92(1)). The amended legislation grants the right to grieve “with respect to discharge, suspension or a financial penalty” (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) “necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause” (p. 5). He further stated that an employer “cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), by simply

stating that cause is not alleged” (*ibid.* (emphasis added)). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

[74] The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

[75] The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of

grievances brought by non-unionized employees. The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

[76] The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

[77] Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were

not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

[78] The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. Duty of Fairness

[79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 74-75).

[80] This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder

of an office “at pleasure” was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

[81] We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

[82] This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

[83] In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see,

its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

[84] Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

[85] In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for

dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

[86] The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, 1978 CanLII 24 (SCC), [1979] 1 S.C.R. 311. *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

[87] Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution Disciplinary Board*, 1979 CanLII 184 (SCC), [1980] 1 S.C.R. 602; *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105; *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735). In *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual [p. 653]

(See also *Baker*, at para. 20.)

[88] In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Director of Kent Institution* that the existence of a general duty to act fairly will depend on “(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual’s rights” (*Knight*, at p. 669).

[89] The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months’ notice pursuant to his contract of employment. The main issue was whether the director’s employment relationship with the school board was one that attracted a public law duty of fairness. L’Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director’s position had a “strong ‘statutory flavour’” and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid’s holding in *Ridge v. Baldwin*, holders of an office “at pleasure”, were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director’s written contract of employment specifically provided that he could be dismissed with three months’ notice was held not to be enough to displace a public law duty to act fairly (p. 681).

[90] From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, “[t]he observance of fair procedures is central to the notion of the ‘just’ exercise of power” (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

[91] *Ridge v. Baldwin* and *Nicholson* established that a public employee’s right to procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee’s legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, [2004 BCSC 790](#); *Gismondi v. Toronto (City)* (2003), [2003 CanLII 52143 \(ON CA\)](#), 64 O.R. (3d) 688 (C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, [2001 MBCA 151](#); *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, [2001 SKCA 83](#); *Hanis v. Teevan* (1998), [1998 CanLII 7126 \(ON CA\)](#), 111 O.A.C. 91; *Gerrard v. Sackville (Town)* (1992), [1992 CanLII 2435 \(NB CA\)](#), 124 N.B.R. (2d) 70 (C.A.)).

[92] In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

Although the law makes such a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes “office” has long been defined as a “subsisting, permanent substantive position which has an existence independent of the person who fills it”, but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.

(Wade and Forsyth, at pp. 532-33)

[93] Lord Wilberforce noted that attempting to separate office holders from contractual employees

involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.

(*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (H.L.), at p. 1294)

[94] There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee’s position had a “strong ‘statutory flavour’” (p. 672), but as Brown and Evans observe, “there is no simple test for determining whether there is a sufficiently strong ‘statutory flavour’ to a job for it to be classified as an ‘office’” (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a “middle manager” in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 1990 CanLII 6545 (NB QB), 111 N.B.R. (2d) 184 (Q.B.), aff’d (1991), 1991 CanLII 4226 (NB CA), 118 N.B.R. (2d) 306 (C.A.)). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia and Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40).

[95] Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally “servants of the Crown” and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199.

[96] *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells’ position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and “others who fulfill constitutionally defined state roles”, do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

[97] The effect of *Wells*, as Professors Hogg and Monahan note, is that

[t]he government’s common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.

(P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

[98] If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

[99] First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

[100] A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

[101] A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the

public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office “at pleasure” were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black’s Law Dictionary* (8th ed. 2004), at p. 1192 “pleasure appointment”). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

[102] In our view, the existence of a contract of employment, not the public employee’s status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

[103] Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director’s position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months’ notice. Similarly, the appellant in this case was dismissed pursuant to [s. 20](#) of the [New Brunswick Civil Service Act](#), but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months’ pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment. [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

[104] Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *School District No. 5 (Southeast Kootenay) and B.C.T.F. (Yellowaga) (Re)* (2000), 2000 CanLII 50084 (BC LA), 94 L.A.C. (4th) 56). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

[105] In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's

right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701, at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

[106] Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

[107] Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

[108] It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

[109] In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

[110] In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

[111] It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

[112] In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

[113] The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment

should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

[114] The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

[115] The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who “fulfill constitutionally defined state roles” (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office “at pleasure” (see e.g. New Brunswick *Interpretation Act*, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

[116] A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks’ notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for

the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. *Conclusion*

[117] In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. [Section 20](#) of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

[118] We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

The following are the reasons delivered by

[119] BINNIE J. — I agree with my colleagues that the appellant’s former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

[120] However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole.

...

... The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

[121] The need for such a re-examination is widely recognized, but in the end my colleagues’ reasons for judgment do not deal with the “system as a whole”. They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two (“correctness” and “reasonableness”), but retain the pragmatic and functional analysis, although now it is to be called the “standard of review analysis” (para. 63). A broader reappraisal

is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

What's in a name? that which we call a rose
By any other name would smell as sweet;

(*Romeo and Juliet*, Act II, Scene ii)

[122] I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g. *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227.

[123] Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected

council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

[124] On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the “correctness” standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator’s enabling statute (the “home statute”) or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 14:2210.

[125] Thus the law (or, more grandly, the “rule of law”) sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion “has the right to be wrong”. This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. Limits on the Allocation of Decision Making

[126] It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

[127] Firstly, the Constitution restricts the legislator’s ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government

could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

[128] Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers . This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

[129] Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of “procedural fairness”, which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. Hansard is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the “justice of the common law will supply the omission of the legislature” (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180, 143 E.R. 414 (C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, [2001 SCC 52](#).

B. Reasonableness of Outcome

[130] At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge’s view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a “correctness” standard is intended.

[131] In *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, Beetz J. adopted the view that “[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation” (p. 1087 (emphasis deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.) (“you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority” (p. 683)) to *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (“was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation . . . ?” (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 (para. 53), and *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. *The Need to Reappraise the Approach to Judicial Review*

[132] The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making. The objection is that our present “pragmatic and functional” approach is more complicated than is required by the subject matter.

[133] People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge

through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. Standards of Review

[134] My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review” (para. 44), and “any actual difference between them in terms of their operation appears to be illusory” (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between “patent unreasonableness” and “reasonableness *simpliciter*” has been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. *Degrees of Deference*

[135] The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to “the magnitude or the immediacy of the defect” in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

[136] A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be “at the extreme legislative end of the *continuum* of administrative decision-making” (*Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the “reasonableness *simpliciter*” standard was applied). The difference does not lie only in the judge’s view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that “[i]f the

people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove” (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985 CanLII 74 \(SCC\)](#), [1985] 1 S.C.R. 441, or policy decisions arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980 CanLII 21 \(SCC\)](#), [1980] 2 S.C.R. 735, at p. 753, where the Court said: “The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council.”

[137] Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on “public convenience and necessity” (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998 CanLII 813 \(SCC\)](#), [1998] 1 S.C.R. 322) or simply to take a decision in the “public interest” is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member’s misconduct (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003 SCC 20](#)).

[138] In our recent jurisprudence, the “nature of the question” before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

[139] The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. “Contextualizing” a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today’s decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

[140] That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and “patent” unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

[141] Historically, our law recognized “patent” unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective “patent” initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end “patent” unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most “deferential” standard as “reasonableness” is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator’s decision as if it were the judge’s view of “reasonableness” that counts. At this

point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. *Multiple Aspects of Administrative Decisions*

[142] Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11). In the jargon of the judicial review bar, this is known as "segmentation".

G. *The Existence of a Privative Clause*

[143] The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must

be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying “what’s wrong with these people [the judges], can’t they read?” A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another “factor” in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. *A Broader Reappraisal*

[144] “Reasonableness” is a big tent that will have to accommodate a lot of variables that inform and limit a court’s review of the outcome of administrative decision making.

[145] The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among “reasonableness” standards of review proved to be undefinable and their application unpredictable. The present incarnation of the “standard of review” analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the “real” nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn’t be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

[146] The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness (“contextually” applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single “correct” outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

[147] An applicant urging the non-deferential “correctness” standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

[148] When, then, should a decision be deemed “unreasonable”? My colleagues suggest a test of *irrationality* (para. 46), but the editors of de Smith point out that “many decisions which fall foul of [unreasonableness] have been coldly rational” (*de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003 SCC 29](#), where the Minister’s appointment of retired judges with little experience in labour matters to chair “interest” arbitrations (as opposed to “grievance” arbitrations) between hospitals and hospital workers was “coldly rational” in terms of the Minister’s own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

[149] Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single “reasonableness” standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the “reasonableness” standard.

I. *Judging “Reasonableness”*

[150] I agree with my colleagues that “reasonableness” depends on the context. It must be calibrated to fit the circumstances. A driving speed that is “reasonable” when motoring along a four-lane interprovincial highway is not “reasonable” when driving along an inner city street. The standard (“reasonableness”) stays the same, but the reasonableness assessment will vary with the relevant circumstances.

[151] This, of course, is the nub of the difficulty. My colleagues write:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising “function” of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. “[T]here is always a perspective”, observed Rand J., “within which a statute is intended [by the legislature] to operate”: *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 140. How is that “perspective” to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many “contextual” considerations as the court considers relevant and material.

[152] Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Law Society of New Brunswick v. Ryan*, for example, the Court *rejected* the argument that “it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the

circumstances” (para. 43). It seems to me that collapsing everything beyond “correctness” into a single “reasonableness” standard will require a reviewing court to do exactly that.

[153] The Court’s adoption in this case of a single “reasonableness” standard that covers both the degree of deference assessment and the reviewing court’s evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

[154] It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the “pragmatic and functional” test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant’s complaint on its merits.

[155] That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the “reasonableness” of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single “reasonableness” standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

[156] Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his “home statute” plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his “home turf”, and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant’s grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator’s interpretation of his “home turf” statutory framework.

[157] Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

The reasons of Deschamps, Charron and Rothstein JJ. were delivered by

[158] DESCHAMPS J. — The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any

review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

[159] By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

[160] The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on “the nature of the question”, to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

[161] Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — “palpable and overriding error” versus “unreasonable decision” — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge’s findings of fact: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

[162] Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature’s intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

[163] However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body’s core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly

and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

[164] The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

[165] In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

[166] In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

[167] I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, [2003 SCC 63](#), LeBel J. explained why a distinction between the standards of patent unreasonableness and

unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word “deference” to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word “reasonableness” concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

[168] In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. [Section 20](#) of the [Civil Service Act](#), S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the [Public Service Labour Relations Act](#), R.S.N.B. 1973, c. P-25 (“*PSLRA*”), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator’s enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee’s contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

[169] It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said:

An employee to whom [section 20](#) of the *Civil Service Act* and section 100.1 of the *PSLR Act* apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons. [p. 5]

[170] The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

[171] This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

[172] In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

[173] On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1

20 Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25

92(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(b) disciplinary action resulting in discharge, suspension or a financial penalty,

and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

...

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

...

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

...

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Appeal dismissed.

Solicitors for the appellant: Stewart McKelvey, Fredericton.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

TAB 12

R. v. Evans, 1991 CanLII 98 (SCC), [1991] 1 SCR 869

Source:	Supreme Court of Canada
Date:	1991-04-18
File number:	21375
Other citations:	124 NR 278 — 4 CR (4th) 144 — 63 CCC (3d) 289 — 12 WCB (2d) 579 — 3 CRR (2d) 315 — [1991] CarswellBC 417 — JE 91-689 — [1991] SCJ No 31 (QL)
Citation:	R. v. Evans, 1991 CanLII 98 (SCC), [1991] 1 SCR 869, < https://canlii.ca/t/1fsml >, retrieved on 2026-03-22
Most recent unfavourable mention	R v. Bilyea , 2013 ONSC 1454 (CanLII) [...] The subject case is distinguishable from the Evans , Borden and Sawatsky trilogy because the Applicant was not at risk of self-incrimination in relation to the other offence, that is, the Peace Garden incident. [...]

R. v. Evans, [1991] 1 S.C.R. 869

Wesley Gareth Evans *Appellant*

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Evans

File No.: 21375.

1991: January 21; 1991: April 18.

Present: Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- [Charter of Rights](#) -- Right to be advised of reason for detention -- Right to counsel -- Accused not understanding right -- Police initially investigating drug offence -- Investigation changing to murder investigation -- Accused initially waived right to counsel -- Accused not formally informed of change of nature of investigation -- Accused not informed of right to counsel when nature of investigation changed -- Incriminating statements made during investigation -- Whether or not infringement of accused's right to be informed of reason for detention -- Whether or not infringement of accused's right to counsel -- Whether or not statements should be excluded for bringing administration of justice into disrepute -- [Canadian Charter of Rights and Freedoms](#), ss. 10(a), (b), 24(2).

Evidence -- Admissibility -- [Charter of Rights](#) -- Right to be advised of reason for detention -- Right to counsel -- Accused not understanding right -- Police initially investigating drug offence -- Investigation changing to murder investigation -- Accused initially waived right to counsel -- Accused not formally informed of change of nature of investigation -- Accused not informed of right to counsel when nature of investigation changed -- Incriminating statements made during investigation -- Whether or not infringement of accused's right to be informed of reason for detention -- Whether or not infringement of accused's right to counsel -- Whether or not statements should be excluded for bringing administration of justice into disrepute -- [Canadian Charter of Rights and Freedoms](#), ss. 10(a), (b), 24(2).

Appellant, a youth of subnormal mental capacity, was convicted of first degree murder in the brutal killings of two women. Initially, the police thought his brother had committed the murders and arrested the appellant on a marijuana charge in the hope that he would be able to provide evidence

against his brother. The police informed Evans of his right to counsel but were given a negative answer when asked if he understood his rights. Any understanding that the accused may have had of his rights was confined to a garbled version based on American television. No attempt was made to communicate the meaning of his right to counsel to him. During the course of the interrogation that followed, Evans became the prime suspect in the two murders. The police did not formally advise the appellant that he was then being detained for murder, nor did they reiterate his right to counsel. The police investigation was aggressive and marked by their lying about finding the appellant's fingerprint at one of the murder scenes. Eventually incriminating statements were obtained from the appellant. These statements formed virtually the entire basis of his conviction for the two murders. An appeal to the Court of Appeal was dismissed. At issue here is whether appellant's rights under ss. 7, 10(a) and 10(b) of the *Canadian Charter of Rights and Freedoms* were violated so that the resultant confessions should have been excluded pursuant to s. 24(2) of the *Charter*.

Held: The appeal should be allowed.

Per Gonthier, Cory and McLachlin JJ.: The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the *Charter* is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the *Charter*. In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.

When considering whether there has been a breach of s. 10(a) of the *Charter*, the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, must govern. What the accused was told, viewed reasonably in all the circumstances of the case, must be sufficient to permit him to make a reasonable decision to decline to submit to arrest or, alternatively, to undermine his right to counsel under s. 10(b).

The police indicated that they were investigating the appellant for murder shortly after he became the prime suspect in the killings and the appellant in turn seemed to recognize that the nature

of the questioning had altered. The appellant therefore was given the facts relevant to determining whether he should continue to submit to the detention. Any failure to comply with s. 10(b) cannot be attributed to failure to advise the accused of the reasons why his detention and questioning was continuing.

The police did not comply with s. 10(b) at the time of the initial arrest. Although they informed the appellant of his right to counsel, they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(b) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. But where, as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.

A second violation of the appellant's s. 10(b) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. The police have a duty to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. The accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge. The new circumstances may require reconsideration of an initial waiver of the right to counsel. The police in the course of an exploratory investigation, however, need not reiterate the right to counsel every time that the investigation touches on a different offence.

The reception of the appellant's statements would tend to bring the administration of justice into disrepute. Three broad categories of factors bear on a s. 24(2) determination: (a) the effect of the admission of the evidence on the fairness of the trial; (b) the seriousness of the *Charter* violation; and, (c) the effect of exclusion on the repute of the administration of justice.

The admission of appellant's statements, which were essential to his conviction, worked an unfairness against him. Using an incriminating statement, obtained from an accused in violation of his rights, generally results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way -- by supplying evidence which would not be otherwise available. There can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence. Here the appellant's deficient mental state, combined with the circumstances in which the statements were taken, cast significant doubt on their reliability.

The violation of the accused's right to counsel was very serious. The police, despite knowledge of the appellant's deficient mental status and despite his statement to them that he did not understand his right to counsel, proceeded to subject him to a series of interviews and other investigative techniques. Moreover, they lied to him in the course of the interviews, falsely suggesting that his fingerprint had been found. The pressure the police were under to find a suspect did not justify their conducting repeated and dishonest interrogations of a weak person in violation of his *Charter* rights. The seriousness of this *Charter* violation was not mitigated by appellant's notion of his rights. This "understanding" was confined to a garbled version based on American television. The appellant had, moreover, initially asserted to the police that he did not understand what his right to counsel entailed.

The exclusion of this evidence would not bring the administration of justice into disrepute. Its admission was not required in order to avoid the disrepute that would follow the acquittal of a self-confessed killer on the basis of *Charter* infringement. Such reasoning was flawed because it rests on the questionable assumption that the confessions were reliable and true. More fundamentally, it rests on the assumption that the appellant is guilty. The appellant was entitled not to be found guilty except upon a fair trial. To justify the unfairness of his trial by presuming his guilt is to stand matters on their head and violate that most fundamental of rights, the presumption of innocence. Few things could be more calculated to bring the administration of justice into disrepute than to permit the imprisonment of a man without a fair trial. As a practical matter, it cannot be said that such imprisonment would prevent further murders by the killer. Only a conviction after a fair trial based on reliable evidence could give the public that assurance.

Per Sopinka J.: The conclusions of McLachlin J. with respect to ss. 10(b) and 24(2) of the *Canadian Charter of Rights and Freedoms* were agreed with. Section 10(a) was violated as well.

Section 10(a) requires that a person be informed of the reasons for the arrest or detention so that he or she can immediately undertake his or her defence, including a decision as to what response, if any, to make to the accusation. This information should therefore be conveyed prior to questioning and obtaining a response from the person under arrest or detention.

The initial questions put before an incriminatory response is obtained can, but did not here, disclose the true ground for an arrest. The appellant, whose mental development was equated to that of a 14-year-old, should not have been required to deduce from the content of questions that the initial explicit reason for his arrest had shifted to a far more serious ground. The arresting officers had advised him that he was in jeopardy for trafficking in narcotics and were obliged to disabuse him of this false information before seeking to elicit incriminatory evidence from him. This could only be accomplished by an equally explicit statement of the true ground for his arrest.

Per Stevenson J.: The police violated s. 10(b) of the *Charter* in failing to make a reasonable effort to explain to the accused his right to counsel and the appeal should be allowed solely on this ground. This was not a case in which to decide whether there is an obligation to reiterate the right to counsel when the course of the investigation takes some change.

Section 10 does not apply to police investigations or questioning in the absence of detention. The object of the section is to provide safeguards in the circumstances of detention. On one hand, the police may be found to have detained someone on one charge with the object of questioning on another charge. On the other extreme, there can be cases in which an accused under detention fortuitously discloses information relating to other activities. These raise fact issues not dependent on the nature or seriousness of the other activities. One extreme would be readily characterized as an abuse of the detention and a violation of s. 10(a) and (b), while the other does not appear to violate the section.

McLachlin J.'s analysis and application of s. 24 of the *Charter* was agreed with.

Cases Cited

By McLachlin J.

Referred to: *R. v. Kelly* (1985), 1985 CanLII 3483 (ON CA), 17 C.C.C. (3d) 419; *R. v. Black*, 1989 CanLII 75 (SCC), [1989] 2 S.C.R. 138; *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233; *R. v. Ross*, 1989 CanLII 134 (SCC), [1989] 1 S.C.R. 3; *R. v. Anderson* (1984), 1984 CanLII 2197 (ON CA), 10 C.C.C. (3d) 417; *R. v. Nelson* (1982), 1982 CanLII 3760 (MB QB), 32 C.R. (3d) 256; *R. v. Broyles* (1987), 1987 ABCA 222 (CanLII), 82 A.R. 238; *Clarkson v. The Queen*, 1986 CanLII 61 (SCC), [1986] 1 S.C.R. 383; *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265.

By Sopinka J.

Referred to: *Christie v. Leachinsky*, [1947] A.C. 573.

By Stevenson J.

Distinguished: *R. v. Broyles* (1987), 1987 ABCA 222 (CanLII), 82 A.R. 238; **referred to:** *R. v. Black*, 1989 CanLII 75 (SCC), [1989] 2 S.C.R. 138.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 10(a), (b), 24(2).

Criminal Code, R.S.C. 1970, c. C-34, s. 218.

APPEAL from a judgment of the British Columbia Court of Appeal (1988), [1988 CanLII 3282 \(BC CA\)](#), 45 C.C.C. (3d) 523, dismissing an appeal from conviction by Callaghan J. sitting with jury. Appeal allowed.

Glen Orris, Q.C., for the appellant.

John E. Hall, Q.C., for the respondent.

//Sopinka J.//

The following are the reasons delivered by

SOPINKA J. -- I agree with the conclusion reached by Justice McLachlin with respect to [s. 10\(b\)](#) of the *Canadian Charter of Rights and Freedoms* and that the admission of the statements would bring the administration of justice into disrepute. I also agree with her disposition of the appeal. As was Southin J.A., however, I am of the opinion that [s. 10\(a\)](#) was violated as well.

Section 10(a) and (b) set out very fundamental rights of a person arrested or detained. The instructions to the authorities which they contain are relatively simple. In each case, the detainee is to be "informed". In the case of [s. 10\(a\)](#), the right is to be informed of the reasons for the arrest or detention. The right to be informed of the true grounds for the arrest or detention is firmly rooted in the common law which required that the detainee be informed in sufficient detail that he or she "knows in substance the reason why it is claimed that this restraint should be imposed" (*Christie v. Leachinsky*, [1947] A.C. 573, at pp. 587-88). When an arrest is made pursuant to a warrant, this is set out in writing in the warrant. An arrest without warrant is only lawful if the type of information which would have been contained in the warrant is conveyed orally. The purpose of communicating this information to the accused in either case is, *inter alia*, to enable the person under arrest or detention to immediately undertake his or her defence, including a decision as to what response, if any, to make to the accusation. It seems axiomatic, therefore, that this information should be conveyed prior to

questioning and obtaining a response from the person under arrest or detention. These basic and important values are included in s. 10(a) of the *Charter*.

In this case, the arresting officers were forewarned that they were dealing with a person of subnormal intelligence. In these circumstances, it was incumbent on them to be scrupulous in ensuring that his rights were respected. Instead, they concocted a ground for the arrest in order to question him about the involvement of his brother in the murders. In my opinion, having explicitly advised the appellant that he was in jeopardy for trafficking in narcotics, the arresting officers were obliged to disabuse him of this false information before seeking to elicit incriminatory evidence from him. This could only be accomplished by an equally explicit statement of the true ground for his arrest.

While in some circumstances the initial questions, which are put before an incriminatory response is obtained, may disclose the true ground for an arrest, in my opinion this is not such a case. The appellant, whose mental development was equated to that of a 14-year-old, should not have been required to deduce from the content of questions that the initial explicit reason for his arrest had shifted to a far more serious ground.

I have agreed that the statements referred to in the reasons of McLachlin J. should be excluded by reason of the violation of s. 10(b). The violation of s. 10(a) gives added support to the reasons for such exclusion.

//McLachlin J.//

The judgment of Gonthier, Cory and McLachlin JJ. was delivered by

MCLACHLIN J. --

Introduction

The appellant Evans, a youth of subnormal mental capacity, was convicted of first degree murder in the brutal killings of two women. Initially, the police thought his brother had committed the murders, and arrested the appellant on a marijuana charge in the hope that he would be able to provide evidence against his brother. The police informed Evans of his right to counsel, but when asked if he understood his rights he replied: "No". During the course of the interrogation that followed, Evans became the prime suspect in the two murders. The police did not formally advise the appellant that he was then being detained for murder, nor did they reiterate his right to counsel. Eventually incriminating statements were obtained from the appellant. These statements formed virtually the entire basis of his conviction for the two murders.

The appellant appeals his conviction to this Court both as of right and by leave. He argues, *inter alia*, that his rights under ss. 7, 10(a) and 10(b) of the *Canadian Charter of Rights and Freedoms* were violated and that the resultant confessions should have been excluded pursuant to s. 24(2) of the *Charter*.

I have concluded that the appeal should be allowed on the basis that the statements were obtained in violation of the appellant's right to counsel, as guaranteed by s. 10(b) of the *Charter*, and that the repute of the administration of justice requires their exclusion under s. 24(2) of the *Charter*.

Facts

The appellant was convicted by a jury of first degree murder contrary to s. 218 (now s. 235) of the *Criminal Code*, R.S.C. 1970, c. C-34, in relation to the deaths of Lavonne Cheryl Willems and Beverley Mary-Ann Seto. The British Columbia Court of Appeal (Hutcheon J.A. dissenting) dismissed an appeal from that verdict.

The body of Ms. Willems was discovered on November 24, 1984 in a home in Matsqui. She had been in the home alone, house sitting while the residents were away on vacation. In addition to having received some minor bruises, her body had been stabbed 25 times. Some months later on March 31, 1985, the body of Ms. Seto was discovered in the bedroom of a newly constructed house in Abbotsford. Ms. Seto was a real estate agent and had been conducting an open house at the home.

She, too, died as a result of multiple stab wounds as well as a severe cutting wound to the front of the neck.

The appellant Evans was born on July 7, 1964. At the age of 9 he was hit by a truck at a cross-walk and suffered brain injuries. Two years later as a result of an accident with a cigarette lighter he suffered extensive third degree burns to the upper part of his body. He has undergone numerous skin grafts to his torso in order to repair the burn damage and remains heavily scarred. He has attained a grade 5 or 6 equivalency in education and spent many years in rehabilitation for "the brain-injured victim" to improve his coordination, speech and living skills. A psychiatrist and a psychologist, who examined him after he was charged, concluded that he has an IQ between 60 and 80 (borderline retardation) and functions at an emotional level of a 14-year-old.

The appellant was arrested on August 1, 1985 along with his older brother, Ron Evans. At the time, Ron Evans was the principal suspect in the murders of Ms. Willems and Ms. Seto. The appellant was ostensibly brought in on a charge of trafficking in narcotics (the police, in the course of their investigation of Ron Evans, had obtained some wiretap evidence indicating that the appellant may have been involved in the sale of a small amount of marijuana), but the police acknowledge that a collateral purpose in arresting the appellant was to try to obtain evidence against Ron Evans, with whom the appellant lived, in relation to the murders of Ms. Willems and Ms. Seto. Some time during the course of the police's first interview with the appellant, police suspicion turned to the appellant and he became the prime suspect in the murders of Ms. Willems and Ms. Seto.

Prior to arresting the appellant, the arresting officers, Detectives Brian Metzgnier and John Spring, had been informed of the appellant's mental deficiency and were cautioned to make sure that the appellant understood the warnings given to him. The arrest took place at 9:52 a.m., shortly after the appellant's brother, Ron Evans, had been arrested and taken from the house. Detective Metzgnier informed the appellant that: "I am arresting you for trafficking in narcotics". He then gave the appellant the *Charter* warning and the standard police warning in the following terms: "It is my duty to inform you that you have the right to retain and instruct counsel without delay. You are not obliged to say anything but anything you do say may be given in evidence. Do you understand?". To the

question: "Do you understand?", the appellant replied: "No". Detective Metzger then instructed the appellant that, "You have to come down to the police office with us now for trafficking in narcotics". No attempt was made to explain the *Charter* or police warning to the appellant.

While the appellant was in custody, the following events occurred: Detectives Metzger and Spring interviewed the appellant on three occasions; an undercover officer was placed in the same cell as the appellant (the "cell plant interviews"); the detectives took the appellant to the scenes of the crimes (the "show and tell expedition"); a police physician interviewed the appellant; and a telephone conversation between the appellant and his oldest brother, Tim Evans, was recorded.

At the commencement of the first interview (10:59 a.m. -- 12:11 p.m.), the following exchange took place:

JS: Okay Wesley, you understand why you're here, eh?

WE: Yes sir, I do.

JS:I think that to explain the prior, that um you are not obliged to say anything unless you wish to do so, but anything you do say, may be given in evidence. And ah I'll also add, we'd like to cancel the delay which was explained to you earlier. You're on a charge of trafficking in soft drugs

WE:. Yes sir.

JS:. and ah it's um marijuana. Do you know what marijuana is?

WE:Yes sir, I do.

JS:And ah you've heard the allegations and anything you'd like to say to us with regards to the allegations being made to you.

WE:No sir. [Emphasis added.]

The emphasized portion was the subject of a dispute at trial. Detective Metzger testified on the *voir dire* at trial that the sentence should read: "I'd like to say you have the right to counsel without delay which was explained to you earlier". However, Crown counsel, Mr. Gillen, stated that he didn't "come close to" sharing Detective Metzger's interpretation of the sentence and stated that in his view the sentence was correctly transcribed. The trial judge, after listening to the tape himself, ultimately accepted Detective Metzger's version.

During this first interview, the appellant admitted to involvement in a plan to sell marijuana to a girl known to him. Toward the end of the interview the police's focus began to shift, as the following excerpt demonstrates:

WE:Are you saying that I killed that lady?

BM:Did you Wes?

WE:Nuts no.

BM:Do you know who did?

WE:No. I don't know. I don't even know why I'm here.

JS:Well, we already explained to you about that earlier on when you were here.

WE:Yeah but

JS: This is quite a serious offence (we're talking about).

WE:(Why me)?

JS: (LONG PAUSE) To traffic marijuana, that was originally why we're here. But now that things have taken quite a change.

WE:Yeah but why are you asking me this? I never killed no one I don't know who did. It's none of my business.

The second interview (1:32 p.m. -- 2:27 p.m.) began with Detective Metzger informing the appellant that he was not compelled to say anything. Referring to a search of the appellant's residence that had occurred between the first and the second interviews, Detective Spring also stated the following at the outset of the second interview:

JS:And we've come up with a few little things which ah I feel are um important in this case and that um ah they also um point to towards you as possibly being the person who committed that crime that night that we were discussing.

During the interview, the following exchange also took place:

BM:(LONG PAUSE) Why can you not explain, or can you give us an explanation as to why your fingerprint would be found inside the house?

WE:(LONG PAUSE) I can't give you an explanation.

BM:No?

WE:Although, all's I can say is I wasn't inside that house. (LONG PAUSE) You said tell the truth right? I'm tellin' the truth.

In suggesting that the appellant's fingerprints were found in the home where Ms. Seto was killed, Detective Metzger lied to the appellant; none of the fingerprints found matched those of the appellant. Nevertheless, by the end of the second interview the appellant had confessed to the killing of Ms. Seto.

By the end of the third interview (3:14 p.m. -- 4:02 p.m.) the appellant had also confessed to the killing of Ms. Willems. With the possible exception of the disputed passage at the commencement of the first interview, at no time during the three interviews was the appellant informed of his right to counsel.

After the interviews, the appellant was placed in a cell where his conversations with an undercover police officer in the cell next to his were recorded. The appellant had two conversations with the undercover officer, Constable Lee Ryan. The first took place between 4:20 p.m. and 5:25 p.m., while the second lasted from 7:30 p.m. to 8:32 p.m. During these conversations, the following exchanges took place:

LR:You confessed?

WE:Yeah.

LR:Did you do it?

WE:No.

LR:Well why did you confess.

WE:Well they, they wouldn't give me a rest until I confessed.

LR:Oh.

WE:So what else, what else was I gonna do

. . .

WE:I wonder if they'd give me a chance and let me talk to a lawyer? I hope so. Cause with a lawyer maybe things could go a little better with me, or for me I should say.

. . .

WE: You know it's funny, I don't remember killing them.

LR: No?

WE: Um-um.

LR: Yeah that is funny.

WE: Yeah. Usually I won't forget somein [*sic*] like that.

Prior to the third exchange reproduced above, the appellant had told the undercover officer that he had killed Ms. Willems and Ms. Seto.

Between the two conversations with the undercover officer, Detectives Metzger and Spring took the appellant to the scenes of the two killings. No evidence was found on this "show and tell expedition", but at one point the appellant did tell the detectives that: "I was going to kill again but I didn't have anyone picked out though".

At approximately 8:30 p.m. that evening the appellant was taken from his cell and asked to provide a written statement. Prior to the writing of the statement the appellant was asked if he wanted to speak to a lawyer. He stated that he did. He was directed to a telephone and provided with a phone book but returned a minute later stating that he was unable to reach a lawyer; he had been advised on the telephone that his lawyer was on vacation and could not be reached at that time. Detective Metzger then told the appellant that he could either contact his lawyer later or continue with the written statement. The appellant stated that he would proceed with the written statement. During the next hour the appellant then wrote a two-paragraph statement in which he confessed to the two killings.

Later that evening, the appellant was introduced to Dr. Swanney, a general practitioner who had come to take hair and blood samples from him. During this interview, the appellant told Dr. Swanney that he had killed the two women because of his frustration with women in general. This, incidentally, is consistent with a suggestion put to the appellant by Detectives Metzger and Spring during their interrogation of him. The appellant also informed Dr. Swanney that he expected to receive 25 years in jail for the crimes.

The following morning, the appellant spoke with his brother, Tim Evans, on the telephone.

The conversation was recorded, and the following exchanges occurred:

TE:Your rights? Do you know what your rights are?

WE:Yeah, the right to remain silent, I know.

TE:Well tell me. Let, let me hear it. Wha-, what kinda rights do you have?

WE:I have the right to remain silent, if I give up the right to remain silent, anything I can and say will be used against me in a court of law. I have a right to speak with an attorney, or to have an attorney present during questioning.

TE:Yeah?

WE:I know that.

TE:How many times did they say that to ya? How many times? Once?

WE:More than once, a couple.

TE:Yeah?

WE:They didn't ask me if I wanted a lawyer until just before I filled out the ass- the assessment, or statement I mean.

TE:Did you know that you had, you were entitled to a lawyer or?

WE:Oh yeah, I know, I watch T.V. man, I know what's goin' on.

...

TE:Are you guilty?

WE:No.

Judgments

At trial, a *voir dire* was held to determine the admissibility of the oral and written statements made by the appellant while in custody. The appellant argued the statements were not freely and voluntarily made and had been obtained in violation of ss. 10(a) and (b) of the *Charter* and ought to be excluded from evidence pursuant to s. 24(2) of the *Charter*. Callaghan J. rejected these arguments and held that the statements were admissible. In his view, the statements were voluntary, and the appellant's rights under the *Charter* had not been violated. At the time of his arrest, he had

been properly advised of the reasons for his arrest and his right to counsel. Moreover, he had offered his knowledge of these rights in the telephone conversation with his brother.

Finally, even if there had been a breach of the *Charter*, Callaghan J. was of the view that admission of the evidence in these circumstances would not bring the administration of justice into disrepute under s. 24(2) of the *Charter*, since the officers had acted in good faith.

The majority of the British Columbia Court of Appeal dismissed the appeal. Southin J.A. wrote the principal judgment of the Court of Appeal. She agreed that the statements were voluntary. While she concluded there had been a breach of s. 10(a) of the *Charter* by reason of the failure of the police to advise Evans at the critical juncture that he was under arrest for murder, she found no breach of his s. 10(b) right to be advised of his right to counsel. On the assumption, however, that both ss. 10(a) and 10(b) had been breached, Southin J. concluded that the evidence should be admitted under s. 24(2) since nothing could bring the administration of justice into greater disrepute than freeing a confessed murderer to kill again, notwithstanding a violation of the *Charter*.

Craig J.A. agreed that the appeal should be dismissed and added comments with respect to the voluntariness of statements made by the appellant and the *Charter* issues. He was of the view there had been no breach of s. 10(b) and was doubtful whether s. 10(a) had been violated. Even if there had been a breach of s. 10(a) by virtue of the failure of the police to inform the appellant during the second interview that he was being detained as a suspect in the killings of the two women, Craig J.A. would not have excluded the evidence under s. 24(2), in view of the seriousness of the charges and Evans' statement on the "show and tell" expedition that he would have killed again.

Hutcheon J.A. dissented. He held that the appellant's s. 10(b) right had been infringed and that the four statements made by the appellant on the day of his arrest ought to have been excluded under s. 24(2) of the *Charter*, in view of the serious and deceptive nature of the police violations of the *Charter* and the suspected reliability of the statements, given Evans' immaturity and defective mental capacity.

Relevant Legislation

Canadian Charter of Rights and Freedoms

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

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; . . .

24. . . .

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Issues

(1) Were the appellant's s. 10(a) rights infringed or denied and if so should the evidence obtained be excluded pursuant to s. 24(2) of the *Charter*?

(2) Were the appellant's s. 10(b) rights infringed or denied and if so should the evidence obtained be excluded pursuant to s. 24(2) of the *Charter*?

(3) Were the undercover cell plant statements obtained in a manner that infringed the appellant's s. 7 rights and if so, should the evidence be excluded pursuant to s. 24(2) of the *Charter*?

(4) Were the statements made by the appellant to the police voluntarily made and hence admissible into evidence?

(5) Did the trial judge err by failing to adequately review for the jury the defence and the evidence in support thereof?

Analysis

1. *Section 10(a) of the Charter*

The right to be promptly advised of the reason for one's detention embodied in s. 10(a) of the *Charter* is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 1985 CanLII 3483 (ON CA), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(b) of the *Charter*. As Wilson J. stated for the Court in *R. v. Black*, 1989 CanLII 75 (SCC), [1989] 2 S.C.R. 138, at pp. 152-53, "[a]n individual can only exercise his s. 10(b) right in a meaningful way if he knows the extent of his jeopardy". In interpreting s. 10(a) in a purposive manner, regard must be had to the double rationale underlying the right.

The majority of the Court of Appeal inclined to the view that the accused's right to be advised of the reasons for his detention was violated by the failure of the police to advise him when the focus of the investigation changed that he was then suspected of murder.

While serious issue was not taken with this conclusion, I am hesitant to let it pass without comment lest the inference be drawn that police conduct, such as that found in this case, necessarily results in a breach of s. 10(a). In fact the police informed the appellant that he was a suspect in the killings shortly after their suspicion of him formed, as the following portion of the interview discloses:

JS:(LONG PAUSE) To traffic marijuana, that was originally why we're here. But now that things have taken quite a change.

WE:Yeah but . . . why are you asking me this? I never killed no one . . . I don't know who did. It's none of my business.

This passage suggests to me that both parties, the police and the appellant, were aware that the appellant was at that point under investigation for murder. Any doubt about that fact is resolved at the beginning of the second interview when Detective Spring states the following:

JS:And we've come up with a few little things which ah I feel are um important in this case and that um ah they also um point to towards you as possibly being the person who committed that crime that night that we were discussing.

Thus, very shortly after the point where the appellant became the prime suspect in the killings, the police indicated that they were investigating the appellant for that purpose, and the appellant in turn seemed to recognize that the nature of the questioning had altered.

When considering whether there has been a breach of s. 10(a) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(b).

The appellant's response to the officer's statement that, while he had originally been arrested on marijuana charges, things had now taken "quite a change", indicates that the appellant was aware that the focus of the questioning had changed and that he was then being questioned with respect to the killings. It might, therefore, be argued that he was given the facts relevant to determining whether he should continue to submit to the detention. Nor can any failure to comply with s. 10(b) be attributed to failure to advise the accused of the reasons why his detention and questioning was continuing.

These considerations suggest that the requirements of s. 10(a) were met in the case at bar.

2. *Section 10(b) of the Canadian Charter of Rights and Freedoms*

The police, on arresting the accused in connection with the marijuana charges, properly advised him that he had the right to retain counsel without delay. When they asked him whether he understood, he answered in the negative. Nevertheless, no attempt was made to clarify his

appreciation of his right to counsel. The police proceeded to take him into custody and question him in the absence of counsel. Depending on how a disputed portion of the transcript is read, there may have been a further attempt at the beginning of the first interview to repeat the advice regarding counsel, but again no attempt was made to explain it to the accused. At a certain point, the police became suspicious that the appellant might have committed the two killings. The focus of the investigation changed from a drug offence to murder. Nothing more, however, was said about counsel. Two more police interviews followed, as well as a cell interview by an undercover agent, a "show and tell" expedition to the scenes of the crimes, and an interview by a police physician -- all without the benefit of counsel. In the course of his conversation with the undercover police officer, the appellant, after telling the officer he confessed because "they wouldn't give me a rest until I confessed So what else, what else was I gonna do . . .", stated:

I wonder if they'd give me a chance and let me talk to a lawyer? I hope so. Cause with a lawyer maybe things could go a little better with me, or for me I should say.

The next mention of a lawyer by the police came with the request to provide a written statement at approximately 8:39 p.m. The appellant was asked if he wanted to speak with a lawyer. He stated that he did. He was directed to a telephone and provided with a phone book but returned about one minute later stating that he was unable to reach a lawyer; he had been told on the telephone that his lawyer was on vacation and could not be reached at that time. Detective Metzger then told the appellant that he could either contact his lawyer later or continue with the written statement. The appellant stated that he would proceed with the written statement. During the next hour the appellant wrote a two- paragraph statement in which he confessed to the two killings. Later, in a telephone conversation with his brother the accused recited a version of his rights suggestive of the United States and to the question of whether he knew he was entitled to a lawyer, said: "Oh yeah, I know, I watch T.V. man, I know what's goin' on."

This evidence must be viewed against the background that the police from the outset were aware that the accused was hampered by a mental deficiency bordering on retardation and that they should take special care to make sure that he understood the warnings required to be given to him. Psychiatric evidence also established that the accused was easily influenceable.

The trial judge rejected the submission that the accused's s. 10(b) right had been violated on the ground that the accused had told his brother he understood that he was entitled to a lawyer. The majority in the Court of Appeal declined to interfere with the conclusion of the trial judge.

The jurisprudence establishes that the duty on the police to inform a detained person of his or her right to counsel encompasses three subsidiary duties: (1) the duty to inform the detainee of his right to counsel; (2) the duty to give the detainee who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and (3) the duty to refrain from eliciting evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel: *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233; *R. v. Ross*, 1989 CanLII 134 (SCC), [1989] 1 S.C.R. 3; *R. v. Black*, *supra*. In *Black*, the rider was added that the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so, otherwise the correlative duty on the police to refrain from questioning him is suspended.

The right to be advised of the right to counsel arguably arises at three points in the dealings of the police with the appellant. The first is the failure of the police upon arresting the appellant to take steps to assist him in understanding his right after he indicated he did not. The second is the failure of the police to reaffirm the appellant's right to counsel when the nature of the investigation changed. The third is the taking of a written statement after the appellant indicated that he would like to speak to a lawyer.

Dealing first with the initial arrest, I am satisfied that the police did not comply with s. 10(b). It is true that they informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(b) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further (unless the detainee indicates a desire to retain counsel, in which case they must comply with the second and third duties set out above). But where, as here, there is a positive indication that the

accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.

This is recognized in *R. v. Anderson* (1984), [1984 CanLII 2197 \(ON CA\)](#), 10 C.C.C. (3d) 417 (Ont. C.A.), where the Court, *per* Tarnopolsky J.A., stated at p. 431:

. . . I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it. No such evidence was put forth in this case. [Emphasis added.]

The question is whether the circumstances here indicated that the accused did not understand his right to retain counsel. In my view, they did. Asked whether he understood his rights, he replied in the negative. The police had no reason to assume otherwise, given their knowledge of his limited mental capacity. The only question is whether his subsequent statement to his brother that he was aware of his right to counsel can be reasonably seen as indicating that the appellant, despite his initial indication to the contrary, in fact understood his right. In my view, it cannot. While the appellant had some idea -- based on U.S. television -- that he was allowed to speak to a lawyer, it is far from clear that the appellant understood from the outset when he was entitled to exercise his right to counsel and how he was permitted to do so. In these circumstances, the failure of the police to make a reasonable effort to explain to the accused his right to counsel violated [s. 10\(b\)](#) of the *Charter*.

A second violation of the appellant's [s. 10\(b\)](#) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. This Court's judgment in *R. v. Black, supra*, per Wilson J., makes it clear that there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one requiring reconsideration of an initial waiver of the right to counsel. On this point I prefer the judgment of *R. v. Nelson* (1982), [1982 CanLII 3760 \(MB QB\)](#), 32 C.R. (3d) 256 (Man. Q.B.), to the

decision in *R. v. Broyles* (1987), [1987 ABCA 222 \(CanLII\)](#), 82 A.R. 238 (C.A.). I add that to hold otherwise leaves open the possibility of police manipulation, whereby the police -- hoping to question a suspect in a serious crime without the suspect's lawyer present -- bring in the suspect on a relatively minor offence, one for which a person may not consider it necessary to have a lawyer immediately present, in order to question him or her on the more serious crime.

I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning.

It remains to consider the appellant's decision to provide a written statement after an unsuccessful attempt to contact his lawyer. Prior to preparation of the written statement, the appellant was asked in terms he could understand whether he wanted to speak to a lawyer. The appellant was then given the choice of contacting his lawyer later or proceeding with the written statement, and he apparently agreed to continue with the written statement. At this point, the appellant both understood that he had a right to counsel and knew that he faced a charge of murder. The Crown argues that this "cured" the earlier s. 10(b) violations, with the result that the written confession was obtained in conformity with [s. 10\(b\)](#) of the *Charter*.

Such an argument could only succeed if it were concluded that by making the written confession the appellant had waived his s. 10(b) right. In *Manninen, supra*, this Court held that a person may implicitly, by words or conduct, waive his or her rights under s. 10(b). The Court cautioned, however, that "the standard will be very high" (at p. 1244) and referred to its judgment in *Clarkson v. The Queen*, [1986 CanLII 61 \(SCC\)](#), [1986] 1 S.C.R. 383, where it was held that for a voluntary waiver to be valid and effective it must be premised on a true appreciation of the consequences of giving up the right. In view of the appellant's subnormal mental capacity and the circumstances surrounding his arrest -- the fact that no attempt was made to explain his rights to him

after he indicated that he did not understand them, as well as the fact that he was subjected to a day of aggressive and at times deceptive interrogation which apparently left him feeling as if he had "no choice" but to confess -- I am not satisfied that he appreciated the consequences of making the written statement and thereby waiving his right to counsel or, to put it another way, that he waived his right "with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process": *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41, at p. 49, as cited in *Clarkson v. The Queen*, *supra*, at p. 395 (emphasis deleted). Accordingly, I am of the view that the written statement was also taken in violation of the appellant's s. 10(b) right.

3. Other Charter Violations

In view of the fact that the statements made to an undercover policeman were not put in evidence, it is unnecessary to consider whether they constituted a violation of s. 7 of the *Charter* or whether they were voluntary.

4. Section 24(2) of the Charter

I have concluded that the statements of the accused were obtained in a manner that infringed the appellant's right to counsel. Section 24(2) provides that where this is the case, "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

The majority of the Court of Appeal concluded that admitting the statements in evidence at the appellant's trial would not bring the administration of justice into disrepute. Southin J.A. considered the matter on the basis that both ss. 10(a) and 10(b) had been violated, and assumed further that had the appellant had access to counsel, he would have been advised to remain, and in fact remained silent. In her view, it was necessary to weigh the appellant's right to "adjudicative fairness" against the s. 7 right to life of possible future victims. Concluding, at p. 563, that something had to be done "to prevent another young woman who has never done Evans any harm [from] being killed by

him without a fair trial", Southin J.A. held that the statements should not be excluded. She concluded with the following peroration at p. 564:

If there be anything more likely, by every rational community standard, to bring the administration of justice into disrepute than letting the accused, a self-confessed killer, go free to kill again on the basis of such infringements, I do not know what it is.

Seventy-five years ago, Wesley Evans would have been hanged for these murders. Twenty-five years ago he would probably have had his death sentence commuted to life imprisonment.

I cannot think that the framers of the [Charter](#) intended that today in the name of adjudicative fairness he should by the application of the Charter be let free to kill again. Such a result would not be the act of a civilized, but of an uncivilized, society.

Craig J.A. found that reception of the statements would not bring the administration of justice into disrepute on the ground that the appellant knew about his right to counsel and was likely, if released, to kill again, in view of his statement after the "show and tell" expedition.

Hutcheon J.A., dissenting, held that the evidence should have been excluded in view of the following considerations: (i) the confessions came into existence following a serious breach of the right to counsel; (ii) the police officers lied to the appellant concerning the discovery of his fingerprints in the house; and (iii) the statements were those of a person who is immature and borderline mentally retarded and there is evidence to cast doubt upon their reliability.

I share the view of Hutcheon J.A. that reception of the written statements would tend to bring the administration of justice into disrepute. In *R. v. Collins*, [1987 CanLII 84 \(SCC\)](#), [1987] 1 S.C.R. 265, this Court identified three broad categories of factors bearing on a s. 24(2) determination:

- (a) the effect of the admission of the evidence on the fairness of the trial;
- (b) the seriousness of the [Charter](#) violation; and
- (c) the effect of exclusion on the repute of the administration of justice.

The effect of the reception of this evidence on the fairness of the trial is the first matter which must be considered. There can be little doubt that the use of these statements at trial worked an unfairness against the accused. Generally speaking, the use of an incriminating statement, obtained from an accused in violation of his rights, results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way -- by supplying evidence which would not be otherwise available: *Collins, supra*; *Black, supra*. For these reasons, Lamer J. (as he then was) stated in *Collins*, at pp. 284-85, that "[t]he use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded."

Admission of the statements taken from the appellant is unfair for the reasons enunciated in *Collins* and *Black*. The statements were obtained in violation of the appellant's rights. They were highly incriminatory. And they provide evidence which was not otherwise available. The Crown concedes that without the confessions, it has no case against the appellant.

This suggests a further reason why it would be unfair to use the statements against the accused. There can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence. Here the appellant's deficient mental state, combined with the circumstances in which the statements were taken, cast significant doubt on their reliability. Consider the record. A young man, borderline mentally retarded, emotionally immature and by his nature subject to suggestion, after being denied his right to counsel, is interviewed at length. The police falsely suggest to him that they have real evidence linking him to the murders. They tell him that his fingerprints place him at the house where one of the victims was killed, when none of his fingerprints has been found there. Asked why he cannot explain why his fingerprints were found inside the house, his response is simple: "... all's I can say is I wasn't inside that house." Nevertheless, by the end of the second interview he has admitted to killing Ms. Seto and by the end of the third interview, to killing Ms. Willems. A little while later in the cells, he denies his involvement to the undercover officer. Asked why he had confessed, he alludes to police pressure -- ". . . they wouldn't give me a rest until I confessed . . . So what else, what else was I gonna do" And then, most significantly, the

following exchange occurs, suggesting that the accused has no memory of the matters he has just confessed to:

WE: You know it's funny, I don't remember killing them.

LR: No?

WE: Um-um.

LR: Yeah that is funny.

WE: Yeah. Usually I won't forget somein [*sic*] like that.

Later, in a taped telephone call to his brother, the appellant once more denies his guilt.

In all the circumstances, the appellant's statements must be regarded as highly unreliable. It would be most unfair to convict him entirely on their strength. I note in passing that significant portions of the evidence which undermines the reliability of the statements was not before the jury.

The second factor relevant to a s. 24(2) determination is the seriousness of the *Charter* violation. In my view, the violation of the accused's right to counsel in this case was highly serious. The police, despite knowledge of the appellant's deficient mental status and despite his statement to them that he did not understand his right to counsel, proceeded to subject him to a series of interviews and other investigative techniques. Moreover, they lied to him in the course of the interviews, falsely suggesting that his fingerprints had been found in the house where Ms. Seto died. One can appreciate the pressure the police were under to find a suspect in these two terrible killings. But that did not justify their conducting repeated and dishonest interrogations of a weak person in violation of his *Charter* rights.

It is argued that the police conduct should not be considered serious since the accused himself stated in his conversation with his brother after the interviews that he knew he had a right to counsel. The strength of this argument is undercut, however, by the fact that the same conversation reveals that the appellant's notion of his rights was confined to a garbled version based on American

television. The argument is also weakened by the appellant's initial assertion to the police that he did not understand what his right to counsel entailed.

I turn finally to the third factor outlined in *Collins* -- the effect of exclusion on the repute of the administration of justice. To Southin J.A.'s mind, the admission of the statement would not bring the administration of justice into disrepute; on the contrary, its admission was required since nothing could be more detrimental to the repute of the administration of justice "than letting the accused, a self-confessed killer, go free to kill again on the basis of such infringements"

The fallacy in this reasoning, with the greatest respect, is that it rests on the questionable assumption that the confessions were reliable and true. More fundamentally, it rests on the assumption that the appellant is guilty. But the very question before the Court of Appeal was whether the appellant was, in fact, guilty -- that is, whether the jury, after a trial conducted in accordance with the law, had properly found him guilty. The appellant was entitled not to be found guilty except upon a fair trial. To justify the unfairness of his trial by presuming his guilt is to stand matters on their head and violate that most fundamental of rights, the presumption of innocence. Few things could be more calculated to bring the administration of justice into disrepute than to permit the imprisonment of a man without a fair trial. Nor, as a practical matter, can it be said that such imprisonment would achieve the end sought by Southin J.A., namely, the prevention of further murders by the killer of Ms. Seto and Ms. Willems. Only a conviction after a fair trial based on reliable evidence could give the public that assurance.

I conclude that the admission of the accused's statements obtained in violation of his *Charter* rights would bring the administration of justice into disrepute.

5. Other Issues

The appellant contends that the charge to the jury failed to sufficiently emphasize the unreliability of the statements put in evidence. In view of my conclusion that the statements should never have been admitted, nothing turns on this allegation, and I need not consider it further. For the

same reason, it is unnecessary for me to consider the appellant's argument concerning the voluntariness of the statements made to the police.

Conclusion

I would allow the appeal. The conviction should be set aside and an acquittal entered.

//Stevenson J.//

The following are the reasons delivered by

STEVENSON J. -- I have had the advantage of reading the judgment of my colleague, Justice McLachlin, and agree with her disposition of the appeal.

I restrict my agreement to the principal ground, namely that the police violated [s. 10\(b\)](#) of the *Canadian Charter of Rights and Freedoms* in failing to make a reasonable effort to explain to the accused his right to counsel. In my view, this is not a case in which to decide whether there is an obligation to reiterate the right to counsel when the course of the investigation takes some change.

Counsel for the accused properly distinguished *R. v. Broyles* (1987), [1987 ABCA 222 \(CanLII\)](#), 82 A.R. 238, a decision I gave for the Alberta Court of Appeal. He correctly distinguished it on the basis that it was "not dealing with somebody who did not understand his rights". Counsel thus staked his position on the "understanding" question and we did not, therefore, have the benefit of full argument on the reiteration question.

In *R. v. Black*, [1989 CanLII 75 \(SCC\)](#), [1989] 2 S.C.R. 138, this Court considered the applicability of [s. 10\(b\)](#) of the *Charter* to a situation in which the accused, having first been detained for attempted murder was subsequently charged with first degree murder and then gave inculpatory statements. The accused was at that point detained for the purposes of that second charge. These statements were obtained notwithstanding the accused's request to speak to the lawyer she had

consulted in relation to the first charge. This Court held that the accused had not fully exercised her *Charter* right to counsel when she spoke to her lawyer about the first charge. Any waiver in relation to the first charge did not extend to the reiteration of the request for counsel in relation to the second charge.

Section 10 does not apply to police investigations or questioning in the absence of detention. The object of the section is to provide safeguards in the circumstances of detention. On one hand, the police may be found to have detained someone on one charge with the object of questioning on another charge. On the other extreme, there can be cases in which an accused under detention fortuitously discloses information relating to other activities. These raise fact issues not dependent on the nature or seriousness of the other activities. One extreme would be readily characterized as an abuse of the detention and a violation of s. 10(a) and (b), while the other does not appear to violate the section.

We do not, of course, lay down rules that determine facts and I am not persuaded that this is a case in which we should attempt to formulate rules that will indelibly characterize some changes in the purpose of an investigation as imposing specific new duties, the breach of which are *Charter* violations.

I agree with McLachlin J.'s analysis and application of s. 24 and would allow the appeal.

Appeal allowed.

Solicitors for the appellant: Orris Burns, Vancouver.

Solicitors for the respondent: DuMoulin, Black, Vancouver.

TAB 13

R. v. Feeney, 1997 CanLII 342 (SCC), [1997] 2 SCR 13

Source:	Supreme Court of Canada
Date:	1997-05-22
File number:	24752
Other citations:	146 DLR (4th) 609 — 212 NR 83 — 148 WAC 1 — [1997] 6 WWR 634 — AZ-97111056 — 115 CCC (3d) 129 — 7 CR (5th) 101 — 91 BCAC 1 — 34 WCB (2d) 266 — 44 CRR (2d) 1 — [1997] CarswellBC 1015 — EYB 1997-00866 — JE 97-1133 — [1997] SCJ No 49 (QL) — [1997] ACS no 49
Citation:	R. v. Feeney, 1997 CanLII 342 (SCC), [1997] 2 SCR 13, < https://canlii.ca/t/1fr1w >, retrieved on 2026-03-22
Most recent unfavourable mention	R. v. Ndikuriyo , 2018 ONSC 7592 (CanLII) [...] As such, this case is distinguishable from those cases recognizing that a Feeny Warrant is required where police enter a dwelling for purposes of arresting an occupant. [...]

R. v. Feeney, [1997] 2 S.C.R. 13

Michael Feeney

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Feeney

File No.: 24752.

1996: June 11; 1997: May 22.*

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

on appeal from the court of appeal for british columbia

Criminal law -- Arrest -- Warrantless arrest occurring at home -- Police entering home forcibly -- No subjective or objective reason for concluding suspect had committed indictable offence -- Arrest effected after evidence found -- Conditions required for valid arrest.

Constitutional law -- [Charter of Rights](#) -- Right to counsel -- Caution read on arrest but no mention made of right to immediate legal counsel or of toll-free telephone to duty counsel -- Whether accused's rights to immediate legal counsel violated -- [Canadian Charter of Rights and Freedoms, s. 10\(b\)](#).

Constitutional law -- [Charter of Rights](#) -- Search and seizure -- Police looking for suspect in serious crime -- Police entering home uninvited and without warrant -- Whether accused's privacy interest violated -- [Canadian Charter of Rights and Freedoms, s. 8](#).

Constitutional law -- [Charter of Rights](#) -- Admissibility of evidence -- Statement given by accused on questioning after caution read but before opportunity to consult legal counsel given -- Finger prints taken on arrest -- Objects seized from home -- Charter breaches serious -- Whether admission of evidence bringing administration of justice into disrepute -- [Canadian Charter of Rights and Freedoms, s. 24\(2\)](#).

The police, during a murder investigation in 1991, entered the accused's house (an equipment trailer) without permission. When they received no answer at the door, they entered, roused the accused, touched his leg, ordered him to get up and took him to the front of the trailer for better lighting. The police arrested him after seeing blood on his shirt. Following a caution with respect to the right to counsel but not the right to immediate counsel, the police asked the accused a couple of questions which he answered. The accused's shirt was seized and he was taken to the police detachment where, before the accused had consulted with counsel, further statements and the accused's fingerprints were taken. The police seized cash, cigarettes and shoes under a warrant obtained on the basis of the initial search of the trailer (the shirt and shoes), the initial interview (the shoes) and the later interview at the detachment (the cash under the mattress).

The accused was convicted of second degree murder and his appeal was unanimously dismissed. At issue here are whether the police violated the *Charter* right to be secure from unreasonable search or seizure (s. 8) and the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right (s. 10(b)) in their investigation of the accused and, if so, what evidence, if any, should be excluded under s. 24(2).

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

Per La Forest, Sopinka, Cory, Iacobucci and Major JJ.: Under the pre-*Charter* common law, a warrantless arrest following a forced entry into private premises is legal if: (a) the officer has reasonable grounds to believe that the person sought is within the premises; (b) proper announcement is made; (c) the officer believes reasonable grounds for the arrest exist; and (d) objectively speaking, reasonable and probable grounds for the arrest exist. Except in exigent circumstances, police should give notice of presence by knocking or ringing the doorbell, give notice of authority by identifying themselves as law enforcement police officers and give notice of purpose by stating a lawful reason for entry. Furthermore, before forcing entry, police should, at minimum, request admission and have admission denied.

The subjective requirement for arrest was not met and its absence rendered the arrest unlawful even under the pre-*Charter* common law. The arresting officer did not believe he had reasonable grounds to arrest prior to the forcible entry. The police officer's testimony and the fact that he did not arrest the accused until after he saw the blood-stained shirt support this conclusion. An objective standard cannot be exclusively relied on because its addition to the requirements for valid arrest at common law did not displace the subjective requirement. Indeed, it would be inconsistent with the spirit of the *Charter* to permit a police officer to make an arrest without a warrant even though he or she does not believe reasonable grounds for the arrest exist.

The question of whether, objectively speaking, reasonable and probable grounds to arrest existed prior to the entry into the trailer is open to review by this Court. The trial judge erred in law by considering an irrelevant factor (the preservation of evidence) and by failing to explain why the officer in charge was incorrect in his conclusion that grounds to arrest did not exist prior to entry into the trailer.

The objective test is that a reasonable person, standing in the shoes of the officer, would have believed that reasonable and probable grounds to make the arrest existed. Any finding that the subjective test is not met will generally imply that the objective test is not met, unless the officer is to be considered to have an unreasonably high standard. An arrest cannot be made solely for the purpose of investigation but, if grounds exist on a subjective and objective basis, the fact that police intend to continue the investigation and do so does not invalidate the arrest. The objective test was not met regardless of the officer's views.

The *Landry* test for warrantless searches, essentially a balancing between aiding the police in their protection of society on the one hand and the privacy interests of individuals in their dwellings on the other, no longer applies. It must be adjusted to comport with *Charter* values which, notwithstanding the high value on the security and privacy of the home at common law, significantly increase the importance of the legal status of the privacy of the home. In general, the

privacy interest now outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited.

Generally a warrant is required to make an arrest in a dwelling house. There are exceptions with respect to the unreasonableness of warrantless searches for things. A warrantless search will respect s. 8 if authorized by law, and both the law and the manner in which the search is conducted are reasonable. In cases of hot pursuit, the privacy interest must give way to the interest of society in ensuring adequate police protection.

An arrest warrant alone is insufficient protection of the suspect's privacy rights. Even though the *Criminal Code* is silent on prior authorization of a search for persons, warrantless searches for persons are not permissible. Privacy rights under the *Charter* demand that the police, in general, obtain prior judicial authorization of entry into the dwelling house in order to arrest the person. If the *Code* currently fails to provide specifically for a warrant containing such prior authorization, such a provision should be read in. While the absence of such a provision could have a profound influence on the common law power of arrest, its absence cannot defeat a constitutional right of the individual. Once a procedure to obtain such prior authorization is created, the concern that suspects may find permanent sanctuary in a dwelling house disappears.

Warrantless arrests in dwelling houses are in general prohibited. Prior to such an arrest, the police officer must obtain judicial authorization for the arrest by obtaining a warrant to enter the dwelling house for the purpose of arrest. Such a warrant will only be authorized if there are reasonable grounds for the arrest, and reasonable grounds to believe that the person will be found at the address named, thus providing individuals' privacy interests in an arrest situation with the protection this Court has required with respect to searches and seizures. Requiring a warrant prior to arrest avoids the *ex post facto* analysis of the reasonableness of an intrusion and invasive arrests without a basis of reasonable and probable grounds are prevented, rather than remedied after the fact.

The protection of privacy does not end with a warrant; before forcibly entering a dwelling house to make an arrest with a warrant for an indictable offence, proper announcement must be made. An exception occurs where there is a case of hot pursuit. Whether or not there is an exception for exigent circumstances generally has not been fully addressed by this Court.

The arrest was unlawful both because the requirements for a warrantless arrest under s. 495 of the *Code* were not met, and, in any event, the police cannot make warrantless arrests in private dwellings unless exceptional circumstances, which were not present here, exist. Consequently, the entry into the trailer and the search and seizure of the accused's clothing violated s. 8 of the *Charter*.

The requirement that a person be informed of his or her s. 10(b) rights begins upon detention or arrest. Detention under s. 10 of the *Charter* occurs when a peace officer assumes control over the movement of a person by a demand or direction. Here, detention began once the officer touched the accused's leg and ordered him to get out of bed. The accused was not given any caution at this time and his s. 10(b) rights were therefore violated.

The accused was not given adequate opportunity to secure counsel. He was not given access to a telephone before being questioned; the police gave him the caution in the trailer, where no telephone existed. The police simply asked him whether he understood his rights, and given an indication that he did, proceeded to ask him questions about the blood on his shirt and his shoes. These police actions violated the accused's s. 10(b) rights.

The police came to know about the cash, the cigarettes and the shoes as the result of violations of ss. 8 and 10(b) of the *Charter* and would not have had grounds for a warrant supporting the second search without the violations. Consequently, the search and seizure under the warrant also violated s. 8. It would be artificial to distinguish the constitutionality of the second search from that of the initial entry into the trailer.

Fingerprinting as an incident to a lawful arrest has been held not to violate the *Charter*. Here, however, the arrest was unlawful and involved a variety of *Charter* breaches. Compelling the accused to provide fingerprints in this context was a violation of s. 8 of the *Charter* for it involved a search and seizure related to the accused's body for which, absent a lawful arrest, there is clearly a high expectation of privacy. Procedures that are taken incidental to and following an unlawful arrest and which impinge on the arrestee's reasonable expectation of privacy breach s. 8 of the *Charter*.

The first step in the trial fairness analysis is to consider whether the particular evidence is conscriptive or non-conscriptive. Evidence will be conscriptive when an accused, in violation of his or her *Charter* rights, is compelled to incriminate him- or herself at the behest of the State by means of a statement, the use of the body or the production of bodily samples.

The statements in the trailer, at the detachment, and the fingerprints were conscriptive and therefore inadmissible as affecting the fairness of the trial. The bloody shirt, the shoes, the cigarettes and the money were not conscriptive evidence, and this evidence, while its admission would not affect trial fairness, must be analysed in light of the second and third branches of the *Collins* test which may require its exclusion.

The violations were very serious in the present case. One of the *indicia* of seriousness is whether the violations were undertaken in good faith. One indication of bad faith is that the *Charter* violation was undertaken without any lawful authority. In light of a pattern of disregard for the accused's rights, the seizure of the shirt, shoes, cigarettes and money was associated with very serious *Charter* violations. The serious disregard for the accused's *Charter* rights suggests that the admission of the evidence would bring greater harm to the reputation of the administration of justice than its exclusion.

Neither of the judgments below should be afforded particular deference with respect to their s. 24(2) findings. First, neither found a breach with respect to the taking of the evidence in question and this error in law likely influenced their alternative conclusion that the breaches, if they existed, were not serious. Second, the trial judge erred in concluding that the police acted in good faith. Third, the reasons of the trial judge and the Court of Appeal were so brief and conclusionary that it was difficult to say whether other errors were made.

Per L'Heureux-Dubé, Gonthier and McLachlin JJ. (dissenting): A warrantless entry is presumed to be unreasonable and in contravention of s. 8 of the *Charter* but this presumption can be rebutted (a) if the search was authorized by law, (b) if the law authorizing the search was reasonable, and (c) if the manner in which the search was conducted was reasonable.

The entry was authorized as an incident to a lawful arrest. Four requirements necessary to effect a lawful arrest on private premises are: (1) the offence must be indictable; (2) the person who is the subject of the arrest must have committed the offence in question, or the peace officer, on reasonable and probable grounds, must believe that the person has committed the offence; (3) there must be reasonable and probable grounds for the belief that the person sought is within the premises; and (4) there must be a proper announcement before entry. That criteria 1 and 3 were fulfilled was not contested here.

In order to arrest, the officer must have a subjective belief in these reasonable and probable grounds, and this belief must be justifiable objectively as well. A reasonable person with the officer's knowledge would have had little difficulty in believing that the accused had committed the offence in question. The combined effect of the facts in light of the particular context of this case must be taken into account.

Different standards may apply to rural and urban settings. The trial judge demonstrated he was sensitive to the nature of the information received, and to the setting in which it was discovered.

A peace officer, before arresting without a warrant, must possess a subjective belief that reasonable and probable grounds to arrest exist. The evidence indicates that the officer held this subjective belief. A police officer seeking to apply this standard should not be held to the strict exactitude of a lawyer or of a justice swearing out a warrant. The existence of reasonable and probable grounds is a legal standard and subject to interpretation and at its core a “common-sense” concept which should incorporate the experience of the officer.

The police, upon entrance into a private dwelling, do not have to focus solely upon arrest and can enter, as here, with the subsidiary intention of investigating to either clear or implicate the suspect. The key element of an arrest is the existence of reasonable and probable grounds. The police are not obliged to arrest in all situations. On the contrary, it is perfectly acceptable for the police to enter for the purpose of arrest, while recognizing that evidence discovered within may well dispel their reasonably held belief. By seeking to confirm the reasonable belief they held, the police are able to avoid using the more intrusive procedure (an arrest) by substituting the less intrusive procedure first (the search). Continuing an investigation after an arrest is made is not improper.

No notice of purpose was given prior to entry. Such a shortcoming is not necessarily fatal to the arrest. If the ability of the officers to make an announcement is frustrated by the refusal of the person sought to come to the door, the officers' obligation to provide complete notice is suspended, and they may enter the premises. The duty to announce their purpose is re-engaged when it becomes feasible to do so, that is, once they encounter someone to whom notice can be given. The only effective way to satisfy the notice requirement here was to suspend its delivery until the accused was in a position to receive it. The arresting officer informed the accused of his purpose for entry, and restated his identity the moment it was feasible to do so.

The law permitting warrantless arrests in a dwelling house is reasonable in certain circumstances. The power of arrest is a crucial part of law enforcement. It is unrealistic to suggest

that the police can never enter private premises without a warrant for the purposes of arrest. The ability of police to capture persons suspected of criminal activity and to preserve evidence necessary to convict them would be severely impeded. Further, hot pursuit is not the only circumstance in which the police are permitted to enter a dwelling house. Other situations will arise in which the threat to society and the danger of having important law enforcement aims frustrated will outweigh concerns about privacy.

Exigent circumstances have always been held to constitute an exception to the notion that “a man’s home is his castle”. A genuine fear that evidence of the crime will be lost can constitute the necessary exigent circumstances for a warrantless entry. Whether these exigent circumstances exist is a finding of fact for the trial judge. Here, the trial judge and the Court of Appeal were of the view that a serious danger existed that evidence would have been destroyed had the police not immediately entered the trailer to arrest the accused.

The suggestion that the police could have simply watched the trailer while waiting for a warrant, failed to recognize the distance and consequent time constraints for obtaining a warrant here. The nature of the crime is also an important factor to consider. There is a greater urgency to investigate quickly in a case of violence.

The police lawfully entered the trailer to effect an arrest of the accused; they accordingly were entitled to search incident to arrest and to seize evidence. The authority to search incident to arrest is well established at common law and has withstood *Charter* scrutiny as well. Similarly, fingerprinting as an incident of a legal arrest does not violate the *Charter*.

The warrant was properly obtained, even assuming the original entry was unlawful. Where a warrant is obtained partially on the strength of tainted evidence, and partially on evidence which was properly obtained, the role of the court is to consider whether the warrant would have been issued solely on the strength of the evidence which was properly obtained. Here, the trial judge ruled that before the officers entered the trailer and arrested the accused there existed

reasonable and probable grounds to believe the accused was the culprit. This ruling is sufficient to infer that the search warrant could properly have been issued based solely on the strength of the information which was obtained prior to the arrest.

Given the finding that the arrest was lawful, ss. 7 and 9 of the *Charter* were not violated.

The police fulfilled their s. 10(b) obligations. They are not obliged to read an accused his or her s. 10(b) rights at the moment of arrest or detention. Rather, they must be permitted the latitude to assess and gain control of the situation and determine whether a potentially dangerous situation exists. The delay here was minimal. A *Charter* breach could not be said to have occurred as the result of this short delay.

Section 10(b) imposes the following duties on law enforcement agents: (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel; (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and (3) to refrain from eliciting evidence from the detainee until he or she had that reasonable opportunity (again, except in cases of urgency or danger). The second and third duties are implementational duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel. This duty, therefore, does not come into existence until the detainee asserts it.

It was unnecessary to consider s. 24(2). Had it been necessary, however, excluding this evidence would clearly bring the administration of justice into disrepute in light of the exigent circumstances and seriousness of the crime.

Per Lamer C.J. (dissenting): Substantial agreement was expressed with the reasons of Lambert J.A. in the Court of Appeal. The reasons and conclusion were not to be taken as a

disagreement with the principles of *R. v. Stillman* as expressed in the reasons of Sopinka J.

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By Sopinka J.

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By L'Heureux-Dubé J. (dissenting)

R. v. Bartle, [1994 CanLII 64 \(SCC\)](#), [1994] 3 S.C.R. 173; *R. v. Edwards*, [1996 CanLII 255 \(SCC\)](#), [1996] 1 S.C.R. 128; *Hunter v. Southam Inc.*, [1984 CanLII 33 \(SCC\)](#), [1984] 2 S.C.R. 145; *R. v. Collins*, [1987 CanLII 84 \(SCC\)](#), [1987] 1 S.C.R. 265; *R. v. Debot*, [1989 CanLII 13](#)

(SCC), [1989] 2 S.C.R. 1140, aff'g (1986), [1986 CanLII 113 \(ON CA\)](#), 30 C.C.C. (3d) 207; *Eccles v. Bourque*, [1974 CanLII 191 \(SCC\)](#), [1975] 2 S.C.R. 739; *R. v. Landry*, [1986 CanLII 48 \(SCC\)](#), [1986] 1 S.C.R. 145; *R. v. Storrey*, [1990 CanLII 125 \(SCC\)](#), [1990] 1 S.C.R. 241; *R. v. Wilson*, [1990 CanLII 109 \(SCC\)](#), [1990] 1 S.C.R. 1291; *R. v. Grunwald*, [1991] B.C.J. No. 235 (QL); *R. v. Zastowny* (1992), [1992 CanLII 580 \(BC CA\)](#), 76 C.C.C. (3d) 492; *R. v. Breton* (1994), [1994 CanLII 939 \(ON CA\)](#), 74 O.A.C. 99; *Illinois v. Gates*, 462 U.S. 213 (1983); *People v. Simon*, 290 P.2d 531 (1955); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *R. v. Charlton* (1992), [1992 CanLII 367 \(BC CA\)](#), 15 B.C.A.C. 272; *R. v. Miller*, [1988 CanLII 99 \(SCC\)](#), [1988] 1 S.C.R. 230, aff'g (1986), [1986 CanLII 4621 \(SK CA\)](#), 25 C.C.C. (3d) 554; *R. v. Jenkins*, [1992] O.J. No. 672 (QL); *R. v. Bennett*, [1996] O.J. No. 4137 (QL); *R. v. Dupuis* (1994), [1994 ABCA 401 \(CanLII\)](#), 162 A.R. 197; *R. v. Anderson* (1996), [1996 CanLII 8301 \(ON SC\)](#), 49 C.R. (4th) 305; *Payton v. New York*, 445 U.S. 573 (1980); *R. v. Maccooh*, [1993 CanLII 107 \(SCC\)](#), [1993] 2 S.C.R. 802; *R. v. Silveira*, [1995 CanLII 89 \(SCC\)](#), [1995] 2 S.C.R. 297; *Lyons v. The Queen*, [1984 CanLII 30 \(SCC\)](#), [1984] 2 S.C.R. 633; *United States v. Reid*, 69 F.3d 1109 (1995); *United States v. Scroger*, 98 F.3d 1256 (1996); *United States v. Wicks*, 995 F.2d 964 (1993), cert. denied, 114 S.Ct. 482 (1993); *R. v. Grant*, [1993 CanLII 68 \(SCC\)](#), [1993] 3 S.C.R. 223; *People v. Johnson*, 637 P.2d 676 (1981); *People v. Williams*, 641 N.E.2d 296 (1994); *State v. Storvick*, 428 N.W.2d 55 (1988); *State v. Gonsalves*, 553 A.2d 1073 (1989); *People v. Smith*, 604 N.E.2d 858 (1992); *R. v. Kokesch*, [1990 CanLII 55 \(SCC\)](#), [1990] 3 S.C.R. 3; *Cloutier v. Langlois*, [1990 CanLII 122 \(SCC\)](#), [1990] 1 S.C.R. 158; *R. v. Beare*, [1988 CanLII 126 \(SCC\)](#), [1988] 2 S.C.R. 387; *R. v. Evans*, [1996 CanLII 248 \(SCC\)](#), [1996] 1 S.C.R. 8; *R. v. Strachan*, [1988 CanLII 25 \(SCC\)](#), [1988] 2 S.C.R. 980; *R. v. Manninen*, [1987 CanLII 67 \(SCC\)](#), [1987] 1 S.C.R. 1233; *R. v. Cobham*, [1994 CanLII 69 \(SCC\)](#), [1994] 3 S.C.R. 360; *R. v. Latimer*, [1997 CanLII 405 \(SCC\)](#), [1997] 1 S.C.R. 217, aff'g (1995), [1995 CanLII 3993 \(SK CA\)](#), 99 C.C.C. (3d) 481; *R. v. Lorincz* (1995), 9 M.V.R. (3d) 186; *R. v. Loudon*, [1995] B.C.J. No. 2446 (QL); *R. v. Anderson* (1984), [1984 CanLII 2197 \(ON CA\)](#), 10 C.C.C. (3d) 417; *R. v. Sabourin* (1984), [1984 CanLII 3535 \(MB CA\)](#), 13 C.C.C. (3d) 68; *R. v. Evans*, [1991 CanLII 98 \(SCC\)](#), [1991] 1 S.C.R. 869; *R. v. Baig*, [1987 CanLII 40 \(SCC\)](#), [1987] 2 S.C.R. 537; *R. v. Brydges*, [1990 CanLII 123 \(SCC\)](#), [1990] 1 S.C.R. 190.

By Lamer C.J. (dissenting)

R. v. Stillman, [1997 CanLII 384 \(SCC\)](#), [1997] 1 S.C.R. 607.

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APPEAL from a judgment of the British Columbia Court of Appeal (1995), [1995 CanLII 1016 \(BC CA\)](#), 54 B.C.A.C. 228, 88 W.A.C. 228, dismissing an appeal from conviction by Leggatt J. sitting with jury. Appeal allowed, Lamer C.J. and L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting.

Charles Lugosi, for the appellant.

William F. Ehrcke, for the respondent.

The following are the reasons delivered by

1 THE CHIEF JUSTICE (dissenting) -- I have had the benefit of the reasons of both of
my colleagues, Justice L'Heureux-Dubé and Justice Sopinka, and cannot agree with either of
them. I do agree with L'Heureux-Dubé J. in the result, but substantially for the reasons given by
Lambert J.A. of the Court of Appeal of British Columbia (1995), [1995 CanLII 1016 \(BC CA\)](#), 54
B.C.A.C. 228.

2 My reasons and conclusion are not to be taken as disagreeing in any way with the
principles of *R. v. Stillman*, [1997 CanLII 384 \(SCC\)](#), [1997] 1 S.C.R. 607, as expressed in the
reasons of Sopinka J. I agree with those principles as stated therein. My disagreement is with
their application on the facts of this case.

3 I would accordingly dismiss this appeal.

The judgment of La Forest, Sopinka, Cory, Iacobucci and Major JJ. was delivered by

4. SOPINKA J. -- This appeal concerns a number of alleged violations of the
Canadian Charter of Rights and Freedoms during the police investigation of the beating
death of Frank Boyle in Likely, British Columbia in June, 1991. Acting on tips, the police
without permission entered the appellant's dwelling house, an equipment trailer he
occupied by arrangement with his sister and her spouse equivalent, detained the appellant,
searched his clothing and, upon seeing blood on his shirt, arrested him. Following a
caution with respect to the right to counsel, which the appellant submitted was inadequate,
the police asked the appellant a couple of questions which he answered. The appellant's
shirt was seized and he was taken to the Williams Lake RCMP detachment where, before
the appellant had consulted with counsel, further statements and the appellant's fingerprints
were taken.

5. The appellant argued that the police violated ss. 7, 8, 9 and 10(b) of the *Charter*. In my view, the police indeed violated ss. 8 and 10(b) and the evidence gathered as a result of these violations should have been excluded under s. 24(2) of the *Charter*. Because of these conclusions, it is unnecessary to consider whether other sections of the *Charter* were also breached.

Facts

6. On Saturday, June 8, 1991, at around 8:20 a.m., the body of Frank Boyle, aged 85 years, was found at his home on Cedar Creek Road in Likely, British Columbia. He had died following a fierce attack involving five blows to the head, each of sufficient force to kill him, with an iron bar or similar object. While the exact time of death could not be ascertained, he was last seen alive the previous evening. The officer in charge of the investigation noted that blood was spattered everywhere at the Boyle residence, and noted also Sportsman brand cigarettes at the scene.
7. As a result of information provided by several bystanders, the three investigating officers went to the scene of a motor vehicle accident, which involved the deceased's red Datsun pickup truck, about half a kilometre west of the Boyle residence. Two local residents, Kelly Spurn and Cindy Potter, offered new information to the police. Cindy Potter told the police that she had seen Boyle's truck in the ditch at 6:45 that morning. Furthermore, she stated that she had seen someone she identified as Michael walking in an easterly direction along Cedar Creek Road a few minutes earlier with a beer or a coffee cup in his hand. The officer in charge testified that Kelly Spurn told him that the appellant was living on Spurn's property which he was renting out to the appellant's sister, Angela Feeney, and her spouse equivalent, Dale Russell. Spurn suggested that the police go and speak to Russell. Spurn testified that he had told the police that he assumed it was the appellant who had crashed the pickup truck because the skid marks and the location of the

accident were in the same place as skid marks from another accident earlier that morning which had involved the appellant and a blue flatbed truck.

8. Upon arrival at the Spurn property where Dale Russell, Angela Feeney and the appellant were living, Russell told police that the appellant had stolen a truck from the Spurn property earlier that morning and that he found it just down from Boyle's residence, exactly where Boyle's truck was found later. He also said that the appellant had come home at 7:00 a.m. after a night of drinking and was now asleep in the trailer behind his residence.

9. The officer in charge went to the windowless trailer and knocked on the door and said, "Police". Receiving no answer, he entered the trailer with his gun drawn and pointing downward, went to the appellant's bed, shook the appellant's leg and said "I want to talk to you." The officer then asked the appellant to get out of bed and move into the better light at the front of the trailer. The officer stated in evidence that he did so in order to inspect the appellant's clothes for bloodstains. The officer conceded that he may have touched the appellant in leading him to the door. The officer noticed blood spattered all over the front of the appellant and had another officer read the appellant his rights in these terms ((1995), [1995 CanLII 1016 \(BC CA\)](#), 54 B.C.A.C. 228, at p. 230):

It is my duty to inform you that you have the right to retain and instruct counsel without delay. You may call any lawyer you want. A Legal Aid duty lawyer is available to provide legal advice to you without charge and can explain the Legal Aid plan to you. If you wish to contact a Legal Aid duty lawyer, I can provide you with a telephone number. Do you understand?...You are not obliged to say anything but anything you do say may be given in evidence.

10. The appellant was arrested and asked whether he understood his rights. He did not respond at first, but when asked again he stated (at p. 230), "Of course, do you think I am illiterate?" or words to that effect. The officer in charge immediately asked the appellant how he got blood on himself, to which the appellant replied that he had been hit in the face with a baseball the day before. When asked whether a particular pair of shoes were the

shoes he had worn the previous evening, the appellant replied that they were the only shoes he owned. There was also some discussion with him about a package of Sportsman cigarettes observed in the trailer.

11. The appellant was led to the police vehicle where the tee shirt he was wearing was seized. He was taken to the Williams Lake RCMP detachment. At around 12:00 noon the appellant tried unsuccessfully several times to contact a lawyer. At 12:17 p.m. he left a message for the lawyer to call back. At 12:23 p.m. a breathalyzer sample was taken from the appellant, who was not told that he had a choice in the matter. The appellant was kept in an observation cell for over eight hours. At 9:10 p.m. two detectives began questioning the appellant. The appellant stated, at p. 231, “I should have a lawyer”, but the interview continued. The appellant admitted to striking Boyle, stealing cigarettes, beer, and cash from Boyle’s residence and stated that he had put the cash under his mattress in his trailer. The police then obtained a search warrant authorizing them to seize the shoes, the Sportsman cigarettes, and the money under the mattress. The appellant was interviewed again for approximately 1 1/2 hours at 3:05 a.m. on June 9. The appellant had still not seen a lawyer. On Monday, June 10, at 9:25 a.m., and again at 10:54 a.m., the accused was fingerprinted. In between these fingerprinting sessions the appellant met with a lawyer for the first time since he had been arrested.

12. The appellant was ultimately convicted of second degree murder following a jury trial in the Supreme Court of British Columbia. The British Columbia Court of Appeal unanimously dismissed his appeal.

Relevant Legislation

13. *Criminal Code*, R.S.C., 1985, c. C-46

495. (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

Canadian Charter of Rights and Freedoms

8. Everyone has the right to be secure against unreasonable search or seizure.

...

10. Everyone has the right on arrest or detention

...

(b) to retain and instruct counsel without delay and to be informed of that right; ...

...

24. ...

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this [Charter](#), the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Prior Judgments

Supreme Court of British Columbia (voir dire)

14. In determining the admissibility of the items seized, Leggatt J. first noted that Likely is a small community of about 300 people. He also noted that there is light to no traffic on Cedar Creek Road “at that time” (presumably in the early morning when Potter observed “Michael” walking along the road), and that it would have been a very unusual occurrence to see an accident and the accused walking away from it. Taking all the circumstances into account, Leggatt J. concluded that, objectively speaking, reasonable grounds to arrest existed and the arrest was lawful under both the *Code* and the [Charter](#). The arrest being lawful implied that the seizure of the appellant’s shirt was also lawful, as was the search incidental to the arrest. Leggatt J. also held that technical omissions in the search warrant did not justify excluding the evidence later obtained under the warrant.

15. Leggatt J. stated that if his rulings with respect to the entry, arrest, incidental search and search warrant were in error, then the evidence should be admitted under [s. 24\(2\)](#) of the *Charter* and *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265: the exclusion of such evidence would bring the administration of justice into disrepute. In reaching this conclusion, Leggatt J. noted, *inter alia*, the urgent circumstances, the good faith of the officers and the fact that real evidence was at issue.
16. The trial judge then turned to the appellant's initial statements at the time of his arrest. Leggatt J. found that when the appellant was given his [s. 10\(b\)](#) *Charter* warning he clearly understood his right to counsel but did not assert his right at that time. Consequently, the trial judge held that the initial statements were admissible. If he erred in that holding, Leggatt J. stated that to exclude the statements would bring the administration of justice into disrepute.
17. With respect to the two longer statements given to police while the appellant was detained at Williams Lake, the trial judge noted that the appellant tried three times to invoke his right to counsel (when he arrived at Williams Lake he left a message for a lawyer, and in each of the two later interviews he indicated his desire to have a lawyer present), but the police overrode that right and questioned him despite the continued absence of counsel. Leggatt J. found this breach of the appellant's right to counsel to be very serious and held that the admission of the longer statements could bring the administration of justice into disrepute. Consequently, he ruled the longer statements inadmissible. However, the real evidence obtained under the search warrant that resulted from information contained in the inadmissible statements was admissible under the real evidence test in *Collins*. Leggatt J. also found that the breathalyser test was performed after the appellant had attempted to invoke his right to counsel and, since it failed the real evidence test in *Collins*, was therefore inadmissible. He added that all other evidence was admissible.

18. In dealing with the appellant's contention that his rights under the *Charter* were violated by the police, Lambert J.A. stated at p. 234, "I do not think that it is necessary to consider each of the alleged *Charter* breaches in this case. Each of them attracts a good deal of jurisprudence and some nice analytical concepts. For the reason that it is not necessary to do so, it is not desirable to do so." The court noted that there had been a savage attack in a small community and that the police had a duty to protect the community. The police thus had a duty to locate and neutralize the killer, as well as to gather evidence to satisfy themselves and others that the killer had been apprehended. Lambert J.A. stated that the police were facing a situation which could be classified as an emergency, or as exigent circumstances which required immediate action. Furthermore, there was a real possibility that evidence, particularly bloodstains, could be destroyed.
19. The court held at p. 234 that the search of the trailer was lawful within "recognized additions" to the rule that a search must be based on reasonable and probable grounds. These additions are where there is an emergency, or where there are exigent circumstances, or where the prevention of the destruction of evidence on an immediate basis is called for. Lambert J.A. stated that it was unnecessary to deal with any particular principle relating to articulable cause creating a basis for entry and search at a level less than reasonable and probable cause. The considerations about emergency, exigency and the potential destruction of evidence also made lawful the detention of the appellant in his bed, if it was a detention, and the requirement that the appellant move to the door of the trailer so that he could be better inspected.
20. Lambert J.A. stated that even if there were *Charter* breaches, having regard to all the circumstances, he would hold the evidence obtained through the police conduct admissible as its admission would not have brought the administration of justice into disrepute.

21. After considering and rejecting the appellant's submissions about drunkenness (an issue which is not under appeal here), the court found that the informational component of the warning that was made at the time of arrest was consistent with this Court's decision in *R. v. Bartle*, 1994 CanLII 64 (SCC), [1994] 3 S.C.R. 173. For these reasons, the court dismissed the appeal. I note here that the respondent did not rely on the Court of Appeal's reasons in argument. The following analysis will only deal with these reasons to the extent that they overlap with the respondent's submissions.

Issues

22. 1. Did the police violate s. 8 of the *Charter* in their investigation of the appellant?
2. Did the police violate s. 10(b) of the *Charter* in their investigation of the appellant?
3. What evidence, if any, should be excluded under s. 24(2) of the *Charter*?

Analysis

The Lawfulness of the Arrest

23. In arguing that the police conduct in the present case did not violate the *Charter*, the respondent relied heavily on the lawfulness of the arrest. Since the arrest was lawful, the argument runs, the search and seizures incidental to the arrest were lawful and complied with the *Charter* according to *Cloutier v. Langlois*, 1990 CanLII 122 (SCC), [1990] 1 S.C.R. 158. In what follows, I will consider first whether the arrest was lawful under the common law rules relating to arrests in a dwelling house. Subsequently, I will consider whether the common law rules are no longer appropriate in light of the *Charter*. I conclude that the arrest was unlawful under either the rules of the common law or the *Charter*.

The Pre-Charter Law of Arrests in Dwelling Houses

24. In setting out the law of arrests in dwelling houses following forcible entry, *Eccles v. Bourque*, [1974 CanLII 191 \(SCC\)](#), [1975] 2 S.C.R. 739, at p. 744, stated that the following rule applies:

Entry can be made against the will of the householder only if (a) there are reasonable and probable grounds for the belief that the person sought is within the premises and (b) proper announcement is made prior to entry.

This case, however, pertained only to arrests with a warrant. In *R. v. Landry*, [1986 CanLII 48 \(SCC\)](#), [1986] 1 S.C.R. 145, a majority of the Court held that police may enter a private dwelling without permission to make a warrantless arrest if the requirements in *Eccles, supra*, are met and the requirements in s. 450 [now s. 495] of the *Code* are met. Recall that s. 495(1)(a) states:

495. (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

Section 495(1)(a) sets out the subjective requirement for a warrantless arrest: the peace officer himself or herself must believe reasonable grounds exist. An objective requirement was added in *R. v. Storrey*, [1990 CanLII 125 \(SCC\)](#), [1990] 1 S.C.R. 241: objectively there must exist reasonable and probable grounds for the warrantless arrest to be legal. Combining *Eccles*, *Landry*, *Storrey*, and s. 495 leads to the following proposition: a warrantless arrest following a forced entry into private premises is legal if: (a) the officer has reasonable grounds to believe that the person sought is within the premises; (b) proper announcement is made; (c) the officer believes reasonable grounds for the arrest exist; and (d) objectively speaking, reasonable and probable grounds for the arrest exist. I will consider these requirements in turn and apply them to the case at bar.

(a) *Reasonable Grounds to Believe the Appellant Was in the Trailer*

25. Given that Russell told him that the appellant was in the trailer, the officer had reasonable grounds to believe that the appellant was in the trailer.

(b) *Proper Announcement*

26. *Eccles, supra*, set out the following requirement for announcements prior to entry of private premises without permission: except in exigent circumstances, police should give notice of presence by knocking or ringing the doorbell, give notice of authority by identifying themselves as law enforcement police officers and give notice of purpose by stating a lawful reason for entry. Furthermore, before forcing entry, police should, at minimum, request admission and have admission denied. In the case at bar, the police officers knocked and said, “Police”, but were not denied admission nor did they announce their purpose before forcing entry. The respondent defends these apparent defects in the announcement by noting that no response was forthcoming since the appellant was asleep and by arguing that the urgency of the situation and the fear of the destruction of evidence legitimized a relatively brief announcement. In my view, this defence is largely inadequate. As I will conclude below, this situation did not appear to comprise exigent circumstances any more than any other situation following shortly after a serious crime. However, whether or not the announcement requirement was met, in my view the subjective and objective requirements for a legal arrest were not met. The announcement question thus does not need to be finally resolved.

(c) *Subjective Grounds*

27. In my view, it is clear that the subjective requirement was not met in the case at bar. The officer in charge who knocked and entered, Sgt. Madrigga, testified in cross-

examination that he did not believe he had reasonable grounds to arrest the appellant when he entered the trailer. Consider the following testimony:

Q And at that point as you are going to the trailer, you would agree with me you had no intention of arresting Mr. Feeney?

A No, I just wanted to check what he had been doing.

Q And, of course, you didn't have a warrant for his arrest?

A No, I did not.

Q Because basically there wouldn't have been enough information to obtain a warrant?

A That's correct.

Later in the cross-examination, the following exchange took place:

Q And from the time you went into the trailer, there was no suggestion that you were going to let Mr. Feeney walk out of the trailer and go away?

A If I had no further evidence. If I had -- when I went in and talked to him, if I had nothing to indicate that he was involved in this, I would -- it was shaky if I would have had grounds for his arrest at that time, but I had to check it out because I had people ask or tell me that this person was in the area.

Q All right, so let's see if we agree on something. At the time you went into the trailer, you didn't feel that you had grounds for his arrest, but when you saw the blood splatter on him after looking at him, that's why you said --

A I had grounds to suspect that he could have been involved, sir, and I would be negligent in my duty if I did not check that out.

Q Oh, I'm not arguing that point, Sargent [*sic*]. But you didn't have grounds for an arrest?

A Not for an arrest at that time.

Such testimony appears to decide the matter, but the respondent claimed that other testimony indicates that Sgt. Madrigga indeed had a subjective belief that he had reasonable grounds to arrest. For example, the respondent referred to the following testimony:

Q On the other hand, what made you think you could walk in?

- A Well, I had, in my mind, sir, I had, as far as I was concerned, I had a suspect. If he would have, as I stated, if he would have come out when I knocked on the door, then I wouldn't have gone in. However, I had two people stating he had been in the area. I had Dale telling me that a vehicle of his had been dumped basically in the same spot that Mr. Boyle's vehicle had been dumped a short time after, like Mr. [sic] or Dale had moved his vehicle and then this other vehicle was dumped there, puts Mr. Feeney right at the area. I have him walking away from the area a short while later. To me that gave me --

Sgt. Madrigga was interrupted at this point, but the respondent argued that one can infer that he believed he had reasonable grounds to enter the trailer and arrest the appellant.

28. I cannot accept the argument of the respondent on this issue. First, the respondent relies on questionable inferences from the officer's testimony, whereas the appellant may simply point to the frank testimony of the officer that he did not believe he had reasonable grounds to arrest. On balance, the testimony suggests the absence of a subjective belief. Second, if the officer believed he had reasonable grounds to arrest the appellant prior to entry, why did he not in fact arrest the appellant until after he had seen the bloodstains on the appellant's shirt? Both the words and actions of the officer suggest that he did not believe he had reasonable grounds to make an arrest when he forcibly entered the trailer.

29. In considering the legality of the arrest in the case at bar under pre-*Charter* law, the trial judge did not consider adequately the lack of subjective belief in the reasonableness of the grounds to arrest. Leggatt J. set out the reasonableness test as an objective one: so long as there were, objectively speaking, reasonable and probable grounds, the standard is satisfied. He stated:

The test is really this. A reasonable person standing in the shoes of the officer would believe reasonable grounds exist. It is an objective test.

Whether or not the trial judge was correct in concluding that the objective standard was met, a conclusion with which I disagree below, the trial judge erred by relying exclusively on an objective standard. According to the plain wording of s. 495, the peace officer may arrest someone only if, on reasonable grounds, he or she believes the person to have committed an indictable offence. An

objective standard was added in *Storrey, supra*, but this did not displace the subjective requirement: see *Storrey, supra*, at p. 250. Indeed, it would be inconsistent with the spirit of the *Charter* to permit a police officer to make an arrest without a warrant even though he or she does not believe reasonable grounds for the arrest exist. The absence of subjective belief, therefore, rendered the arrest in the present case unlawful irrespective of the existence of objective grounds for the arrest and the effect of the *Charter* on powers of police officers to enter a dwelling house without a warrant in order to effect an arrest.

(d) *Objective Grounds*

30. The finding by a trial judge of whether, objectively speaking, reasonable and probable grounds for arrest existed clearly has a significant factual element and thus is owed some deference by an appellate court. In the present case, in arriving at his conclusion that objective grounds for arrest existed, in my view the trial judge committed two errors in principle that invite review of his finding. First, he considered factors that are not relevant to the question of reasonable and probable grounds. In considering the objective test, he stated:

As I have said, in my view it is an objective test. Given the surrounding circumstances I have outlined, the need to preserve evidence, the clear indication that the accused was a prime suspect, I believe the arrest took place in compliance with both the *Criminal Code* and the *Charter*. [Emphasis added.]

In concluding that reasonable and probable grounds for arrest existed, the trial judge considered the need to preserve evidence. In my view, it was an error of law for the trial judge to consider the need to preserve evidence in considering whether reasonable and probable grounds, objectively speaking, existed. Whether or not there is a need to preserve evidence is logically irrelevant to the question of whether there are reasonable and probable grounds for an arrest. The trial judge thus erred in law and his view on reasonable and probable grounds is open to appellate review.

31. Even if the trial judge did not err in considering the need to preserve evidence, in my view the trial judge erred in failing to appreciate the evidence of the officer in charge at the scene of the trailer. The trial judge noted that Sgt. Madrigga testified that he did not think he had sufficient grounds to arrest until he observed the blood on the appellant, but did not advert to this evidence in concluding that reasonable and probable grounds to arrest existed prior to the entry into the trailer. In order to conclude that, objectively speaking, reasonable and probable grounds for arrest existed, one must conclude that the officer on the scene was unreasonable in reaching a different conclusion. The trial judge, however, did not explain his dismissal of the officer's evidence in this respect. In my view, such a failure to clarify the basis for his finding that the objective test was satisfied constituted an error of law. In *R. v. Burns*, [1994 CanLII 127 \(SCC\)](#), [1994] 1 S.C.R. 656, McLachlin J., writing for the Court, stated at p. 665:

This statement should not be read as placing on trial judges a positive duty to demonstrate in their reasons that they have completely appreciated each aspect of relevant evidence. The statement does not refer to the case where the trial judge has failed to allude to difficulties in the evidence, but rather to the case where the trial judge's reasons demonstrate that he or she has failed to grasp an important point or has chosen to disregard it, leading to the conclusion that the verdict was not one which the trier of fact could reasonably have reached.

Major J. elaborated on this passage in *R. v. R. (D.)*, [1996 CanLII 207 \(SCC\)](#), [1996] 2 S.C.R. 291. On behalf of the majority, he stated at p. 318:

The above-quoted passage does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions.

32. In the present case, the officer in charge did not believe reasonable grounds to arrest existed prior to entry into the trailer. In order to explain why he ignored this

evidence, or why he viewed Sgt. Madrigga to be unreasonable, in my view there was a duty on the trial judge to set out his reasons for his conclusions on reasonable and probable grounds. The trial judge, however, simply stated that “[g]iven the surrounding circumstances”, the objective test was met. In essence, the trial judge simply provided his conclusion, not his reasons. As *Harper v. The Queen*, 1982 CanLII 11 (SCC), [1982] 1 S.C.R. 2, stated at p. 14, “[w]here the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.” Given the testimony of the officer in charge, in my view, the absence of reasons constituted an error of law.

33. I have concluded that the trial judge erred in law by considering an irrelevant factor, the preservation of evidence, and by failing to explain why the officer in charge was incorrect in his conclusion that grounds to arrest did not exist prior to entry into the trailer. Consequently, the question of whether, objectively speaking, reasonable and probable grounds to arrest existed prior to the entry to the trailer is open to review by this Court.

34. In my view, as the lack of subjective belief on the part of the officer would suggest, the requirement that, objectively speaking, reasonable and probable grounds for an arrest exist prior to forcible entry is not met. The objective test as set out in *Storrey, supra*, is whether a reasonable person, standing in the shoes of the officer, would have believed that reasonable and probable grounds to make the arrest existed. Any finding that the subjective test is not met will generally imply that the objective test is not met, unless the officer is to be considered to have an unreasonably high standard.

35. In any event, in my view the objective test was not met regardless of the officer’s views. An arrest cannot be made solely for the purpose of investigation, but if grounds exist on a subjective and objective basis, the fact that police intend to continue the investigation and do so does not invalidate the arrest: see *Storrey, supra*. A lawful arrest may be made that allows the police to continue their investigation, such as in *Storrey* where

the police arrested a suspect in order to place him in a police line-up to be identified or not, but it is a fundamental pre-requisite that the police have reasonable grounds to arrest prior to arrest, whether or not the investigation is ongoing, particularly where an arrest is made without the safeguards to the citizen resulting from the warrant process. As Cory J. stated in *Storrey*, at p. 249:

Section 450(1) [s. 495(1)] makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest. [Emphasis added.]

Or, as Scott L.J. stated in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), at p. 329:

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection....

The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty.... I am not suggesting a duty on the police to try to prove innocence; that is not their function; but they should act on the assumption that their *prima facie* suspicion may be ill-founded.

36. In my view, these admonitions were not heeded by the police when they entered the trailer and arrested the appellant. The salient facts known to the police prior to their entry of the trailer are as follows: (a) it appeared that Boyle's truck had been stolen before being in an accident, and Cindy Potter claimed to have seen "Michael" walking near the site of the accident; (b) Kelly Spurn told police that he assumed the appellant had crashed Boyle's truck since the appellant had crashed earlier that morning in about the same place

with a different truck; and (c) Dale Russell told police that the appellant came home around 7:00 a.m. after drinking all night and that the appellant had earlier crashed a vehicle at the spot where Boyle's truck was found. In my view, these facts did not constitute reasonable and probable grounds to arrest the appellant for the murder of Boyle. Whether or not the appellant had been involved in two similar truck accidents, or might have stolen Boyle's truck, does not raise reasonable and probable grounds to believe that he had murdered Boyle. This evidence may have pointed to the appellant as a suspect, but these facts without more do not justify an arrest. When the police entered the trailer, objectively reasonable and probable grounds for an arrest, as opposed to grounds for *prima facie* suspicion, did not exist.

(e) *Conclusion on Lawful Arrest*

37. It is questionable whether the police met the announcement requirement prior to forcibly entering the trailer to make a warrantless arrest. This issue does not need to be settled, in my view, since the requirement that the officer must believe he has reasonable grounds to arrest before forcibly entering private premises was not met. The failure to meet this subjective test is sufficient to render the arrest unlawful. However, even if the subjective test were met, objectively reasonable and probable grounds for the arrest did not exist prior to the forced entry into the trailer. Thus, the arrest was unlawful and could not support the entry into the appellant's dwelling irrespective of the effect of the *Charter* on the right to enter dwellings for the purpose of arrest. In any event, even if the police met the standards of *Landry* and the other cases, a warrantless arrest in the circumstances of the case at bar following a forcible entry is no longer lawful in light of the *Charter*; I turn to this issue now.

The Post-Charter Law of Arrests in Dwelling Houses

(a) *Principles in the Common Law*

38. As noted, *Landry, supra*, set out the law concerning warrantless arrests following forcible entry into a dwelling house. While the case was decided in 1986, it arose before the *Charter* came into effect, as the majority took care to point out at p. 165. In my view, the *Charter* suggests that the *Landry* test for warrantless arrests no longer applies. Before addressing this issue, it is useful first to review extensively the principles underlying the reasons in *Landry* itself.

39. Dickson C.J., writing for the majority, began his analysis of s. 450 (now s. 495) of the *Code* by reviewing the case law on warrantless arrests, with particular emphasis on *Eccles, supra*. Dickson C.J. cited at pp. 156-57 the following passage from *Eccles* at pp. 742-43, which he relied upon in *Landry* to help establish the common law's sanction of warrantless arrests:

For these principles, we go back to vintage common law, to 1604, and *Semayne's Case* [(1604), 5 Co. Rep. 91a, 77 E.R. 194], in which the principle, so firmly entrenched in our jurisprudence, that every man's house is his castle, was expressed.... That, then, is the basic principle, as important today as in Biblical times (Deuteronomy 24:10) or in the 17th century. But there are occasions when the interest of a private individual in the security of his house must yield to the public interest, when the public at large has an interest in the process to be executed. The criminal is not immune from arrest in his own home nor in the home of one of his friends. So it is that in *Semayne's Case* a limitation was put on the "castle" concept and the Court resolved that:

In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...

In Dickson C.J.'s view, the authorities supported the proposition that a warrantless arrest in a dwelling is legal so long as: the officer believes, on reasonable and probable grounds, the person to be the subject of the arrest to have committed an indictable offence; there are reasonable and probable grounds to believe the person sought is within the premises; and proper announcement is made prior to entry.

40. Dickson C.J. also concluded that there were sound policy reasons to retain the law as it was. One policy reason supporting warrantless arrests in dwelling houses was stated to be the absence of alternative means of arresting a suspect who has taken refuge in a private dwelling house. Dickson C.J. stated, at p. 160, that:

The policy underlying the cases, older and more recent, on this issue, is clear and compelling: there should be no place which gives an offender sanctuary from arrest. While the *Criminal Code* empowers a justice to issue a warrant, on proper grounds being shown, authorizing a search for things, there is no power to issue a warrant to search for a person. If the police did not possess the power to arrest on private premises, then a criminal offender might find complete and permanent protection from the law in his or her own home or the home of another.

41. Dickson C.J. further held that there were compelling practical reasons not to require the police to obtain always a warrant for arrest prior to entering a private dwelling to make an arrest. He outlined various scenarios, such as where the police officer witnesses a crime or arrives on the scene shortly thereafter and does not know the name of the suspect whom he or she has seen take refuge in a dwelling house, that illustrate the impracticality and undesirability of obtaining a warrant before making a forcible entry. In *Landry*, as in other cases on the subject, the issue boiled down to a balance between aiding the police in their protection of society on the one hand, and the privacy interests of individuals in their dwellings on the other. Dickson C.J. held at p. 161 that the requirements for warrantless arrest that the majority set out reached the appropriate balance:

These serious limitations against effective police work and public protection must be balanced against the intrusiveness of arresting a person in a house or apartment. This intrusiveness is carefully delineated and restricted by the requirement of reasonable and probable grounds for the belief that the person sought is within the premises, and the requirements of notice of presence, notice of authority and notice of purpose. These requirements minimize the invasiveness of arrest in a dwelling and permit the offender to maintain his dignity and privacy by walking to the doorway and surrendering himself.

(b) *The Charter*

42. In my view, the conditions set out in *Landry* for warrantless arrests are overly expansive in the era of the *Charter*. As noted, *Landry* was largely based on a balance between privacy and the effectiveness of police protection, but in the *Charter* era, as I will presently seek to demonstrate, the emphasis on privacy in Canada has gained considerable importance. Consequently, the test in *Landry* must be adjusted to comport with *Charter* values.

43. There is no question that the common law has always placed a high value on the security and privacy of the home. This emphasis was illustrated as early as the seventeenth century, as evidenced by *Semayne's Case* (1604), 5 Co. Rep. 91a, 77 E.R. 194, and has been illustrated more recently by cases such as *Colet v. The Queen*, 1981 CanLII 11 (SCC), [1981] 1 S.C.R. 2, which held that the police entered Colet's home, a rudimentary shelter, illegally since they did not have explicit authority to search for weapons, but only to seize them. Indeed, the existing legal protection of the security of the home was the basis for the dissenting opinion of La Forest J. in *Landry, supra*, which contained an extensive analysis of doctrine that concluded warrantless arrests in dwelling houses were illegal; see also Graham Parker, "Developments in Criminal Law: The 1985-86 Term" (1987), 9 *Sup. Ct. L. Rev.* 247. Notwithstanding its prior importance, however, the legal status of the privacy of the home was significantly increased in importance with the advent of the *Charter*. Section 8 prevents all unreasonable searches and seizures. In *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, the seminal case on s. 8, Dickson J. (as he then was), writing for the Court, discussed the impact of the *Charter* on searches and seizure in these terms (at p. 158):

In my view the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington* [(1765), 19 St. Tr. 1029, 1 Wils. K.B. 275; a common law case on searches and trespass]. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

The shift in emphasis in the law of searches from trespass and basic property rights to the reasonableness of the search had a significant effect on the disposition of *Hunter*. In that case, there were provisions in the *Combines Investigation Act*, R.S.C. 1970, c. C-23, which permitted searches and seizures on the authority of the Restrictive Trade Practices Commission. The Supreme Court held that searches and seizures may only be undertaken after authorization from an independent judicial body, which has considered the reasonableness of the proposed search and seizure, has been granted. Dickson J. stated at p. 160:

If the issue to be resolved in assessing the constitutionality of searches under [the *Combines Investigation Act*] was in fact the governmental interest in carrying out a given search outweighed that of the individual in resisting the governmental intrusion upon his privacy, then it would be appropriate to determine the balance of the competing interests after the search had been conducted. Such a *post facto* analysis would, however, be seriously at odds with the purpose of s. 8. That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation. [Emphasis in original.]

44. In my view, *Hunter* is helpful in analyzing the case at bar. The analysis in *Landry* was based on a balance between the individual's privacy interest in the dwelling house and society's interest in effective police protection. This Court held that the latter interest prevailed and warrantless arrests in dwelling houses were permissible in certain circumstances. While such a conclusion was debatable at the time, in my view, the increased protection of the privacy of the home in the era of the *Charter* changes the analysis in favour of the former interest: in general, the privacy interest outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited.

45. Such a conclusion is consistent not only with the general treatment of privacy in *Hunter*, but also with the specific implications of the privacy interest found in that case. *Hunter* held that a search and seizure violated s. 8 unless there was prior authorization. The purpose of the *Charter* is to prevent unreasonable intrusions on privacy, not to sort them

out from reasonable intrusions on an *ex post facto* analysis. If *Landry* were to be adopted in the post-*Charter* era, there would be the anomalous result that prior judicial authorization is required to intrude on an individual's privacy with respect to a search for things, but no authorization is required prior to an intrusion to make an arrest. The result becomes more anomalous when *Cloutier v. Langlois, supra*, is considered. *Cloutier* held that a search incidental to a lawful arrest does not violate s. 8. Putting this proposition together with the proposition that a warrantless arrest in a dwelling house is legal may lead to the conclusion that a warrantless search of a dwelling house is legal so long as it is accompanied by a lawful arrest. Such a conclusion is clearly at odds with *Hunter*, which held that warrantless searches are *prima facie* unreasonable. I conclude that generally a warrant is required to make an arrest in a dwelling house.

46. I recognize that there are exceptions with respect to the unreasonableness of warrantless searches for things. A warrantless search will respect s. 8 if authorized by law, and both the law and the manner in which the search is conducted are reasonable. In *R. v. Grant*, 1993 CanLII 68 (SCC), [1993] 3 S.C.R. 223, for example, it was held that s. 10 of the *Narcotic Control Act*, R.S.C., 1985, c. N-1, which provided that a peace officer may search a place that is not a dwelling house without a warrant so long as he believes on reasonable grounds that a narcotic offence had been committed, was consistent with s. 8 of the *Charter* if s. 10 were read down to permit warrantless searches only where there were exigent circumstances. In the present context of searches for persons, in my view, there are also exceptions to the *Charter* prohibition of warrantless arrests in dwelling houses. Indeed, these exceptions answer Dickson C.J.'s policy argument about hampering the effectiveness of police investigations.

47. Dickson C.J. observed that police work might be greatly impeded by a warrant requirement. He provided the example of an officer's arriving on the scene shortly after an offender has slipped into a private dwelling. By the time the officer has discovered the

suspect's name and has obtained a warrant, the criminal will have sought refuge elsewhere. In my view, in circumstances such as these there is an exception to the general rule that warrantless arrests in private dwellings are prohibited. In cases of hot pursuit, the privacy interest must give way to the interest of society in ensuring adequate police protection. This Court explicitly held this to be true in *R. v. Maccooh*, [1993 CanLII 107 \(SCC\)](#), [1993] 2 S.C.R. 802. In *Maccooh*, a police officer was in hot pursuit of a person he had seen drive through several stop signs when the person sought refuge in a private apartment. The officer announced his presence and eventually entered the apartment without permission and arrested the person. There was a question whether *Landry* would apply in *Maccooh* given that the suspect was sought pursuant to an offence that was not indictable, but this Court held that the officer was acting under the well-established common law power of the police to enter private premises to make an arrest in hot pursuit. The policy behind such a rule is captured by the following passage from the dissent of La Forest J. in *Landry*, at p. 179, cited with approval by this Court in *Maccooh*:

As has been seen the common law sets a high value on the security and privacy of the home. The situations where it permitted entry by police without the consent of the owner or occupier were all demonstrably compelling. For example, entry to prevent murder is obviously justified. So too is entry on hot pursuit. Apart from the obvious practicality of that approach, in the case of hot pursuit the police officer is himself cognizant of the facts justifying entry; he acts on the basis of personal knowledge.

In cases of hot pursuit, society's interest in effective law enforcement takes precedence over the privacy interest and the police may enter a dwelling to make an arrest without a warrant. However, the additional burden on the police to obtain a warrant before forcibly entering a private dwelling to arrest, while not justified in a case of hot pursuit, is, in general, well worth the additional protection to the privacy interest in dwelling houses that it brings. I leave for another day the question of whether exigent circumstances other than hot pursuit may justify a warrantless entry in order to arrest. I do not agree with my colleague L'Heureux-Dubé J. that exigent circumstances generally necessarily justify a warrantless entry -- in my view, it is an open question. As with other matters in her reasons, I note that in reaching her conclusion she cites at paras. 153-54 a

dissenting opinion: *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, *per* L'Heureux-Dubé J.

48. While I have decided that a warrant is required prior to entering a dwelling house to make an arrest, I have not yet set out the type of warrant that is required. In my view, an arrest warrant alone is insufficient protection of the privacy rights of the suspect. I agree with Dickson C.J. when he stated in *Landry* at p. 162 that it was questionable whether an arrest warrant would be useful in safeguarding privacy:

I am unable, in any event, to fathom how a warrant for arrest can be perceived as a solution to the question of police authority to trespass incidental to arrest. The warrant is a judicial authorization to arrest and contains no express power of trespass. The justice of the peace must be given evidence as to the reasonable and probable grounds for making an arrest, but hears no evidence as to the likelihood or otherwise that the offender can be found at any particular location. There is no good reason, therefore, why the presence or absence of a warrant of arrest should have any bearing on the right to make an arrest in one particular place or another.

Dickson C.J. concluded that since an arrest warrant would not be useful in safeguarding privacy, and since there was (and is) no provision in the *Code* authorizing a search for persons, warrantless arrests in dwelling houses were permissible; otherwise suspects could take permanent refuge in a dwelling house. While I agree that an arrest warrant fails to safeguard privacy adequately, I disagree that since the *Code* is silent on prior authorization of a search for persons, warrantless searches for persons are permissible. In my view, privacy rights under the *Charter* demand that the police, in general, obtain prior judicial authorization of entry into the dwelling house in order to arrest the person. If the *Code* currently fails to provide specifically for a warrant containing such prior authorization, such a provision should be read in. While the absence of such a provision could have a profound influence on the common law power of arrest, its absence cannot defeat a constitutional right of the individual. Once a procedure to obtain such prior authorization is created, the concern that suspects may find permanent sanctuary in a dwelling house disappears.

49. In my view, then, warrantless arrests in dwelling houses are in general prohibited. Prior to such an arrest, it is incumbent on the police officer to obtain judicial authorization for the arrest by obtaining a warrant to enter the dwelling house for the purpose of arrest. Such a warrant will only be authorized if there are reasonable grounds for the arrest, and reasonable grounds to believe that the person will be found at the address named, thus providing individuals' privacy interests in an arrest situation with the protection *Hunter* required with respect to searches and seizures. Requiring a warrant prior to arrest avoids the *ex post facto* analysis of the reasonableness of an intrusion that *Hunter* held should be avoided under the *Charter*; invasive arrests without a basis of reasonable and probable grounds are prevented, rather than remedied after the fact. Such a policy was reflected in the following recommendation of the Law Reform Commission of Canada (Working Paper 41, *Arrest* (1985), at p. 115):

The sanctity of the family dwelling is such in our legal tradition that, as with search, there ought to be no forcible entry into a private dwelling unless such entry is authorized by judicial authority.

50. I would add that the protection of privacy does not end with a warrant; the other requirements in *Landry* for an arrest in a dwelling house must be met along with the warrant requirement. Specifically, before forcibly entering a dwelling house to make an arrest with a warrant for an indictable offence, proper announcement must be made. As Dickson C.J. stated in *Landry*, at p. 161, these additional requirements “minimize the invasiveness of arrest in a dwelling and permit the offender to maintain his dignity and privacy by walking to the doorway and surrendering himself”.

51. To summarize, in general, the following requirements must be met before an arrest for an indictable offence in a private dwelling is legal: a warrant must be obtained on the basis of reasonable and probable grounds to arrest and to believe the person sought is within the premises in question; and proper announcement must be made before entering. An exception to this rule occurs where there is a case of hot pursuit. Whether or not there is an exception for exigent circumstances generally has not been fully addressed by this

Court, nor does it need to be decided in the present case given my view that exigent circumstances did not exist when the arrest was made. I will elaborate on this last point presently.

(c) *Application to the Case at Bar*

52. When the police entered the trailer where Feeney was sleeping, which constituted his dwelling house (recall that *Colet, supra*, stated that a rudimentary shelter may constitute a dwelling house), they did not have a warrant. Consequently, regardless of whether reasonable and probable grounds existed, or whether proper announcement was made, the arrest was illegal, unless there were exceptional circumstances. This clearly was not a case of hot pursuit, nor, in my view, did exigent circumstances exist. Lambert J.A., for a unanimous Court of Appeal, stated at p. 234 that, “the police were facing a situation which could be classified as an emergency, or as exigent circumstances which would require immediate action, and that in addition they were facing circumstances where the possibility of the destruction of evidence, particularly evidence in relation to bloodstains, was a real one and had to be addressed”. I do not agree with this characterization of the circumstances. According to James A. Fontana (*The Law of Search and Seizure in Canada* (3rd ed. 1992), at pp. 786-89), exigent circumstances arise usually where immediate action is required for the safety of the police or to secure and protect evidence of a crime. With respect to safety concerns, in my view, it was not apparent that the safety of the police or the community was in such jeopardy that there were exigent circumstances in the present case. The situation was the same as in any case after a serious crime has been committed and the perpetrator has not been apprehended. In any event, even if they existed, safety concerns could not justify the warrantless entry into the trailer in the present case. A simple watch of the trailer in which the police were told the appellant was sleeping, not a warrantless entry, would have sufficiently addressed any safety concerns involving the

appellant. With respect to concern about the potential destruction of evidence, at the time the police entered the trailer, they had no knowledge of evidence that might be destroyed; at best, they had a suspicion that the appellant was involved in the murder. Simply because the hunch may have turned out to be justified does not legitimize the actions of the police at the time they entered the trailer. As I stated in *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3, at p. 29, “[i]t should not be forgotten that *ex post facto* justification of searches by their results is precisely what the *Hunter* standards were designed to prevent”.

53. The circumstances surrounding the police entry into the trailer were similar to those following any serious crime: a dangerous person is on the loose and there is a risk that he or she will attempt to destroy evidence linking him or her to the crime. To define these as exigent circumstances is to invite such a characterization of every period after a serious crime. In my view, exigent circumstances did not exist when the police entered the trailer. Consequently, even if there is an exception to the warrant requirement in exigent circumstances generally, rather than only in hot pursuit, which I refrain from deciding in the present case, the forcible entry in this case required a warrant. Given that the police had not obtained a warrant, the arrest was illegal.

The Constitutionality of the Initial Search of the Trailer

54. *Hunter* held that, under s. 8 of the *Charter*, there is a presumption that warrantless searches of premises where the occupant has a reasonable expectation of privacy is unreasonable; the onus is on the party who performed the search to prove its reasonableness. *Collins, supra*, outlined three requirements for a search to be reasonable: (a) the search must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search is carried out must be reasonable. In the specific case of arrest, *Cloutier, supra*, held that searches incidental to a lawful arrest may comply with s. 8. In the present case, however, the search was performed without a warrant or any other legal authority, and was not incidental to a lawful arrest. The arrest was unlawful both because

the requirements for a warrantless arrest under s. 495 of the *Code* were not met, and, in any event, the police cannot make warrantless arrests in private dwellings unless exceptional circumstances, which were not present here, exist. Consequently, the entry into the trailer and the search and seizure of the appellant's clothing violated s. 8 of the *Charter*. The other evidence, the shoes, the cash and the cigarettes, was obtained under a search warrant the following day. I will return below to the question of whether this search and seizure violated the *Charter*.

Section 10(b)

55. Section 10(b) states that, “[e]veryone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right.” With respect to the informational component of a proper s. 10(b) caution, *R. v. Brydges*, 1990 CanLII 123 (SCC), [1990] 1 S.C.R. 190, held that the detainee must be informed of the applicable duty counsel and legal aid systems available in the jurisdiction. *R. v. Pozniak*, 1994 CanLII 66 (SCC), [1994] 3 S.C.R. 310, and *Bartle, supra*, further held that the detainee must be informed of any opportunity to access immediate, free legal advice, such as the existence of a 1-800 telephone number.

56. The requirement that a person be informed of his or her s. 10(b) rights begins upon detention or arrest. According to *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, detention under s. 10 of the *Charter* occurs when a peace officer assumes control over the movement of a person by a demand or direction. In the case at bar, upon entering the trailer with gun drawn, the police officer shook the appellant's leg and told him to get out of bed. I agree with the appellant that detention began once the officer touched the appellant's leg and ordered him to rise. The appellant was not given any caution at this time. Only after the appellant had been escorted to the light, where the bloodstains were seen, and was placed under arrest was any information regarding counsel provided. In my view, the appellant had his s. 10(b) rights violated at the time of his initial detention.

57. Moreover, the majority in *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233, stated at pp. 1241-43 that:

... [section] 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay. The detainee is in the control of the police and he cannot exercise his right to counsel unless the police provide him with a reasonable opportunity to do so.

...

Further, s. 10(b) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights.

In the case at bar, the appellant was not given adequate opportunity to secure counsel. He was not given access to a telephone before being questioned; the police gave him the caution in the trailer, where no telephone existed. The police simply asked him whether he understood his rights, to which he replied, “Of course, do you think I am illiterate?”, or words to that effect, and then proceeded to ask him questions about the blood on his shirt and his shoes. The appellant’s s. 10(b) rights were violated by these police actions.

58. While the trial judge found a violation of the appellant’s s. 10(b) rights only after he had been taken to the Williams Lake detachment, in my view these rights were violated from the moment of detention forward. The appellant was not cautioned in any way when he was first detained, and the caution that was eventually given did not satisfy the informational requirements of s. 10(b). Furthermore, the appellant was not given an adequate opportunity to consult with counsel before being questioned. For these reasons, in my view, the statements taken in the trailer (the appellant claimed that he had been hit in the face with a baseball the previous day and stated that he only owned one pair of shoes) were taken in violation of the *Charter*.

Section 8 and the Search with the Warrant

59. After the initial search of the trailer and during the detention of the appellant, the police obtained a search warrant of the trailer, swearing an information that they believed they would find \$300 in cash, Sportsman cigarettes, and the appellant's shoes. They then found and seized these items in the trailer. According to *Kokesch, supra*, and *Grant, supra*, the police cannot constitutionally rely upon a search warrant issued on the basis of information obtained as the result of prior *Charter* violations. In *Kokesch*, a warrant was issued on the basis of information obtained in an earlier unconstitutional, warrantless perimeter search; the search under the warrant was held to be in violation of s. 8. In the case at bar, the police obtained a warrant on the basis of the initial search of the trailer (the shirt and shoes), the initial interview (the shoes) and the later interview at Williams Lake (the cash under the mattress). As I have outlined above, in my view the police came to know about these items as the result of violations of ss. 8 and 10(b) of the *Charter* and would not have had grounds for a warrant supporting the second search without the violations. Consequently, the search and seizure under the warrant also violated s. 8. It would be artificial to distinguish the constitutionality of the second search from that of the initial entry into the trailer.

Section 8 and the Fingerprints

60. After he was taken to the Williams Lake detachment, the appellant was fingerprinted. The fingerprints matched prints found on the deceased's refrigerator and on an empty beer can in the deceased's truck. *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, held that fingerprinting as an incident to a lawful arrest did not violate the *Charter*. In the present case, however, the arrest was unlawful and involved a variety of *Charter* breaches. Compelling the accused to provide fingerprints in the present context was, in my view, a violation of s. 8 of the *Charter*, involving as it did a search and seizure related to the appellant's body, about which, at least in the absence of an lawful arrest, there

is clearly a high expectation of privacy. I should add that procedures that are taken incidental to and following an unlawful arrest, which impinge on the reasonable expectation of privacy of the arrestee, will generally constitute a breach of s. 8. Where, however, the arrest is unlawful by reason of a technicality, the product of the search may be admissible under [s. 24\(2\)](#) of the *Charter*.

Section 24(2)

61. Having found *Charter* breaches in the gathering of much of the evidence, it remains to determine whether the evidence should be excluded pursuant to s. 24(2). The evidence to consider in the s. 24(2) analysis is comprised of the bloody shirt, the initial statements given in the trailer that the appellant had been bloodied at a baseball game the previous evening and that he owned only one pair of shoes, the shoes themselves, the Sportsman cigarettes, the cash under the mattress and the fingerprints taken at Williams Lake. The inculpatory statements the appellant made at Williams Lake virtually admitting guilt, and the breathalyser sample also taken at Williams Lake, were excluded by the trial judge and these rulings are not before this Court.

Trial Fairness

62. *Collins, supra*, stated that the first set of factors to be considered under s. 24(2) pertains to the fairness of the trial. The majority in *R. v. Stillman*, [1997 CanLII 384 \(SCC\)](#), [1997] 1 S.C.R. 607, building on *Collins* and more recent authorities, refined and clarified the trial fairness aspect of the *Collins* test. Cory J. provided a helpful summary of trial fairness analysis at para. 119:

1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.
2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-

conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.

3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the *Charter* breach and the effect of exclusion on the repute of the administration of justice will have to be considered. [Emphasis in original.]

63. Thus, the first step in the trial fairness analysis is to consider whether the particular evidence is conscriptive or non-conscriptive. In defining non-conscriptive evidence, Cory J. stated at para. 75:

If the accused was not compelled to participate in the creation or discovery of the evidence (i.e., the evidence existed independently of the *Charter* breach in a form useable by the state), the evidence will be classified as non-conscriptive.

In defining conscriptive evidence, Cory J. stated at para. 80:

Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.

64. Characterizing the evidence in the case at bar, the first step in the trial fairness inquiry, I conclude that the bloody shirt is non-conscriptive, and thus its admission does not go to trial fairness. The bloody shirt existed in a form useable by the state independent of any actions by the state. Moreover, with respect to the bloody shirt, the appellant was not compelled to incriminate himself by means of a statement, the use of the body, or the production of bodily samples. While the appellant was asked to step into the light in order better to see him, equally the police could have simply turned on a light or inspected the shirt closely in order to examine it. The taking of the shirt did not involve the use of the appellant's body or bodily samples in a manner that rendered the evidence conscriptive; his body was not integral to the taking of the bloody shirt and thus the shirt is not conscriptive.

65. On the other hand, the statements obtained by the police in the trailer in violation of the appellant's s. 10(b) rights are clearly conscriptive evidence. By not informing the appellant of his immediate right to counsel, the police in effect compelled the statements, which statements are paradigmatic self-incriminating evidence. Having found the statements conscriptive, the next question set out in *Stillman* is whether alternative legal means to obtain the conscriptive evidence existed. As the Crown did not attempt to prove that the statements would have been made even in the absence of a violation of s. 10(b) (see *Harper, supra*, where such proof was tendered), I conclude that the statements were conscriptive and would not have been obtained without breaching the *Charter*. Thus, following the *Stillman* analysis, the statements were not "discoverable". The admission of the statements therefore would affect the fairness of the trial. Given that no exceptional circumstances exist in this case, the admission of the conscriptive, non-discoverable statements would render the trial unfair; thus the statements are inadmissible under s. 24(2).

66. The shoes were observed by the police during the initial unconstitutional search of the trailer. The shoes were later seized in a search which I have concluded violated s. 8. The shoes are clearly non-conscriptive evidence, given that they are not compelled statements or bodily samples, and did not involve the use of the appellant's body. The admission of the shoes would thus not affect trial fairness.

67. The cigarettes were also observed by the police in the initial unconstitutional search of the trailer. Later, the appellant, in the inadmissible statements given at Williams Lake, told the police that he had stolen both cash and cigarettes from Boyle. While the cigarettes, like the shoes, are facially non-conscriptive, *Stillman*, following on earlier cases such as *R. v. Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 S.C.R. 206, confirmed that evidence may be considered conscriptive if it was found as the result of other conscriptive evidence, typically a statement. A characterization of such evidence as conscriptive, "derivative evidence" is appropriate where the initial conscriptive evidence is a necessary

cause of the obtention of the derivative evidence. In the present case, the statements given to the police at Williams Lake did not indicate the location of the cigarettes; thus the statements could not even have been a sufficient cause for obtaining the cigarettes. While the statements might, if admissible, have added evidentiary significance to the cigarettes, the statements were not related to the discovery and seizure of the evidence; thus the cigarettes are not conscriptive, derivative evidence. Their admission would not affect trial fairness.

68. Also in making a conscriptive statement at Williams Lake, the appellant told police that he had stolen cash and had hidden it under his mattress. In the second unconstitutional search of the trailer, the police seized the cash. Like the cigarettes and the shoes, the cash is facially non-conscriptive evidence. Unlike the statement about the cigarettes, however, the conscriptive statement at Williams Lake about the cash was a sufficient cause for obtaining the cash, stating as it did the location of the cash. However, in my view, the statement was not a necessary cause of the taking of the cash. The police clearly intended to search the trailer again and I am satisfied would have done so even in the absence of the statement as to the location of the money. In conducting a second search, in my view they would have located the cash under the mattress. Given that the conscriptive statement was not a necessary cause of the taking of the money, the money was not conscriptive, derivative evidence. In this respect, this situation is similar to *R. v. Black*, 1989 CanLII 75 (SCC), [1989] 2 S.C.R. 138.

69. It is important to note the distinction between the test for characterizing evidence as conscriptive, derivative evidence and the test for determining whether conscriptive evidence is discoverable. Discoverability is concerned with whether a *Charter* breach was necessary to the discovery and obtaining of conscriptive evidence. If the conscriptive evidence would have been obtained even if the *Charter* had not been breached, the evidence is discoverable and its admission, despite the conscription of the accused, would

not affect trial fairness. In determining discoverability, therefore, the alternative means to obtain the evidence must comply with the *Charter*.

70. The derivative evidence inquiry, on the other hand, is directed at determining whether a piece of evidence should be viewed as having a conscriptive nature because of its intimate relationship with other conscriptive evidence. Evidence is derivative evidence if it would not have been obtained but for the conscriptive evidence. In analyzing this question, it is not relevant whether the means by which the evidence would have been discovered in the absence of the conscription were constitutional. The inquiry is directed at whether evidence should be treated as a product of the accused's mind or body for the purposes of s. 24(2), which treatment does not depend on the constitutionality of the alternative means of discovery. Thus, in the present case, to conclude that the cash is not derivative evidence, it is sufficient to conclude that the police would have discovered the cash even if the conscripted statement at Williams Lake had not been made. It is irrelevant for the purpose of the derivative evidence inquiry that the police would have found the evidence by unconstitutional means such as the second search. Given the probable, although unconstitutional, discovery of the cash even if the conscripted statement had not been made, the cash was not conceptually a product of the appellant's mind or body. The cash, therefore, should be treated not as derivative evidence, but as non-conscriptive evidence; its admission would not affect trial fairness. I note, of course, that the unconstitutionality of the second search is a factor to be considered under other branches of the *Collins* test.

71. The fingerprints, as stated above, were taken in violation of the *Charter*. Moreover, they were conscriptive evidence -- the appellant was compelled to provide evidence from his body, his fingerprints, which incriminated him. The police would not have obtained this evidence without violating the appellant's *Charter* rights as they did not have reasonable and probable grounds to arrest him. The fingerprints were not discoverable. The fingerprints were conscriptive, non-discoverable evidence whose

admission, given the absence of exceptional circumstances, would render the trial unfair. Consequently, the fingerprints are inadmissible.

72. Summarizing the trial fairness analysis, the bloody shirt, the shoes, the cigarettes and the money were not conscriptive evidence and thus their admission would not affect trial fairness; the statements in the trailer, as well as those at the Williams Lake detachment, and the fingerprints were conscriptive and were not discoverable, thus their admission would affect trial fairness. The statements and the fingerprints are inadmissible. The other evidence which does not affect trial fairness must be analyzed in light of the second and third branches. Analyses under these branches of the *Collins* test may require exclusion of the evidence.

Seriousness of the Violation

73. The violations were, in my view, very serious in the present case. One of the *indicia* of seriousness is whether the violations were undertaken in good faith: see *Therens*, *supra*, at p. 652; *Collins*, *supra*, at p. 285. One indication of bad faith is that the *Charter* violation was undertaken without any lawful authority. In *R. v. Genest*, 1989 CanLII 109 (SCC), [1989] 1 S.C.R. 59, for example, the Court held that a search in violation of well-known common law principles was performed in bad faith. In the instant case, the police did not even have subjective belief in reasonable and probable grounds for the appellant's arrest prior to their warrantless, forced entry into his dwelling house where he was sleeping. Aside from the impact of the *Charter* on the requirements for warrantless arrests in dwelling houses, the absence of subjective belief in reasonable grounds indicated that the police could not have lawfully arrested the appellant under s. 495 of the *Code* even had he been in a public place. That they flagrantly disobeyed the law of warrantless arrests in dwelling houses as set out in *Landry* certainly renders the more serious the violation which directly led to the taking of the bloody shirt, and indirectly led to the taking of the shoes, cigarettes and money.

74. The trial judge found that the breach in searching the trailer “was not deliberate, wilful or flagrant and that if it occurred, it was committed in good faith”. In my view, the following passage from the majority in *Kokesch, supra*, at p. 32, is instructive in the present case:

The police must be taken to be aware of this Court’s judgments in *Eccles* and *Colet*, and the circumscription of police powers that those judgments represent.

Either the police knew they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in “good faith”, as that term is understood in s. 24(2) jurisprudence.

In the present case, the police did not have subjective grounds to arrest, and thus the requirements for a warrantless arrest in a dwelling house set out in *Landry* were not met. Indeed, the statutory requirements to make a warrantless arrest in any location were not met. In these circumstances, as in *Kokesch*, the police either knew they were trespassing, or they ought to have known. The police could not be held to have acted in good faith and the trial judge erred in this respect.

75. The respondent submits that the seriousness of the violation is mitigated by the fact that if the grounds for arrest fell short of reasonable and probable grounds, they did not fall far short. I disagree that this is a mitigating factor. As discussed above, Sgt. Madrigga himself did not believe that there were reasonable grounds to arrest the appellant. In my view, the absence of a subjective belief that a necessary element of a lawful entry and arrest was present is a strong suggestion of bad faith.

76. The respondent argued that the evidence of the bloody shirt would have been discovered in any event, stating in its factum: “The police could have waited outside the trailer until the appellant eventually came out. At that time they would have observed the bloodstains on him, unless he had destroyed that evidence.” The respondent assumes that the appellant would walk out in broad daylight with bloodstains on his shirt. In my view,

this suggestion is unrealistic. Moreover, the appellant need not have destroyed the evidence on the shirt in order to avoid displaying it in public, but simply could have stored the shirt in the trailer. In any event, the availability of alternative constitutional means to discover the shirt does not mitigate the seriousness of the violation even if such means did exist. As Lamer J. (as he then was) stated in *Collins, supra*, at p. 285, “the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* tend to render the *Charter* violation more serious”. If other techniques were indeed available, it is demonstrative of bad faith and is particularly serious that the police chose to violate the appellant’s rights.

77. A conclusion that the violations were serious is reinforced by the fact that they involved the unconstitutional entry of the appellant’s dwelling house. The sanctity of the home has been recognized time and again by courts at least since *Semayne’s Case, supra*. The police in the present case did not have sufficient grounds either to arrest the appellant, or to obtain a search warrant, yet they forcibly entered the sleeping appellant’s one-room dwelling with guns drawn, shook him awake and began questioning him. Such behaviour is antithetical to the privacy interests protected by the *Charter* and cannot be condoned. I note that the respondent suggested that the police did not know the trailer was a dwelling house, but this is clearly contradicted by the evidence that Spurn had told police that the appellant was living on land he owned and that Russell had told police that the appellant was sleeping in the trailer.

78. The respondent argued that the seriousness of the intrusion into the dwelling house is mitigated by Sgt. Madrigga’s belief that the owner of the trailer had given his tacit consent to enter the trailer. In my view, this submission is unacceptable. First, the owner of the trailer did not consent to the search, but rather did not object when the police stated that they were going to “check it out” at the trailer. An inference of consent to a warrantless, forcible entry from Russell’s silence is dubious. However, even accepting that Russell had consented, this would not have justified the search nor should it mitigate the

seriousness of the violation entailed by the search. *Hunter, supra*, was clear that an ownership interest is unnecessary in invoking s. 8; what is required is a reasonable expectation of privacy. It would be inconsistent with this emphasis on the expectation of privacy to mitigate the seriousness of the violation based on the consent of the owner of the premises rather than the person with the profound expectation of privacy associated with his dwelling house.

79. The respondent also argued that there were exigent circumstances in this case, which, according to *Silveira, supra*, may be a relevant consideration in a s. 24(2) analysis. As discussed above, in my view exigent circumstances did not exist in this case any more than they would exist in any situation following a serious crime. After any crime is committed, the possibility that evidence might be destroyed is inevitably present. To tend to admit evidence because of the mitigating effect of such allegedly exigent circumstances would invite the admission of all evidence obtained soon after the commission of a crime. In my view, however, there were no exigent circumstances in this case that mitigated the seriousness of the *Charter* breach. This is not to say that there may not be exigent circumstances arising out of matters other than the recent commission of the offence that serve to mitigate the seriousness of the breach.

80. In summary, the violations in the instant case that were associated with the gathering of the shirt, shoes, cigarettes and money were serious. The police flagrantly disregarded the appellant's privacy rights and moreover showed little regard for his s. 10(b) rights. Indeed, while such misconduct was not directly responsible for the gathering of the shirt, shoes, cigarettes and money, the fact that the appellant did not speak with a lawyer for two days following his detention, yet the police did not cease in their efforts to gather evidence from him, indicates the lack of respect for the appellant's rights displayed by the police. In light of this pattern of disregard for the rights of the appellant, in my view the obtention of the shirt, shoes, cigarettes and money was associated with very serious *Charter* violations.

Effect of Exclusion on the Repute of the Administration of Justice

81. The admission of the conscriptive evidence, the statements and the fingerprints, would, as discussed above, impact on the fairness of the trial. Consequently, the repute of the administration of justice would be harmed by their admission and they are inadmissible. The other evidence, while not conscriptive, was obtained as the result of a very serious intrusion of the appellant's privacy rights. Moreover, the evidence was associated with serious violations of the appellant's s. 10(b) rights, indicating a pattern of disregard for the *Charter* by the police in the present case.

82. While the appellant stood accused of a very serious crime, in my view the following words of Iacobucci J. in *Burlingham, supra*, at p. 242, apply to the present case:

... we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).

83. The serious disregard for the appellant's *Charter* rights in the case at bar suggests that the admission of the evidence would bring greater harm to the repute of the administration of justice than its exclusion. The shirt, shoes, cigarettes and money were inadmissible under s. 24(2), along with the statements and the fingerprints. If the exclusion of this evidence is likely to result in an acquittal of the accused as suggested by L'Heureux-Dubé J. in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law.

Conclusion on Section 24(2)

84. As stated, in my view the statements, fingerprints, shirt, shoes and money are inadmissible under s. 24(2). The respondent pointed out that this Court has stated that appellate courts owe deference to lower courts on the question of the admissibility of evidence under s. 24(2): see, e.g., *Grant, supra*. In the case at bar, both the trial judge and the Court of Appeal held, as alternative holdings, that they would admit the evidence in question even if there had been breaches of the *Charter*. In my view, both the trial judge and the Court of Appeal erred in these alternative conclusions, and it is difficult to evaluate their reasoning since very little was said in this respect. The trial judge simply listed the factors set out in *Collins, supra*, with a brief conclusion on each point. The trial judge did not group the points into the three broad factors, nor did he set out his reasons for each conclusion. The Court of Appeal listed the *Collins* factors and stated its conclusion that, on balance, the evidence should be admitted. In my view, neither of these judgments should be afforded particular deference. First, neither the trial judge nor the Court of Appeal found a breach with respect to the taking of the evidence in question, which error in law likely influenced their alternative conclusion that the breaches, if they existed, were not serious. Second, as noted above, the trial judge erred in concluding that the police acted in good faith. Third, the reasons of the trial judge and the Court of Appeal were so brief and conclusionary that it is difficult to say whether other errors were made. In my view, pursuant to s. 24(2), the shirt, the statements, the shoes, the cigarettes, the cash and the fingerprints should not have been admitted.

Conclusion and Disposition

85. The trial judge erred by failing to find a *Charter* breach with respect to the taking of the bloody shirt, the statements in the trailer, the shoes, the cigarettes and the fingerprints. Moreover, the evidence was inadmissible according to s. 24(2) of the *Charter*. I would allow the appeal, set aside the conviction and order a new trial.

The reasons of L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

86. L'HEUREUX-DUBÉ J. (dissenting) -- The main issue raised in this appeal concerns the authority of the police to enter a private dwelling without a warrant in order to effect an arrest. I have had the advantage of reading the reasons of my colleague Justice Sopinka, but am unable to agree with his disposition of this case, or with many of his conclusions. Although Sopinka J. has set out the facts and judgments, the particular circumstances of this case are important to the ultimate decision I reach, and I will thus recount the salient facts in some detail and outline aspects of the judgments which I find of particular relevance to the issues.

I. Facts

87. Early on the morning of June 8, 1991, at around 8:20 a.m., 85-year-old Frank Boyle was found dead in his home, the victim of several vicious blows to the head from a blunt, metal instrument. The blows were apparently struck with such force that the pathologist called to give evidence testified that any one of them by itself could have caused death. The murder scene was covered with the deceased's blood which was spattered over the surrounding walls and furniture. The murder took place near the town of Likely, British Columbia, a small, isolated community with a population of roughly 300 people.

88. The nearest RCMP detachment was in Williams Lake, over one hour's drive from the Boyle residence. Among the first officers to arrive, at around 9:30 a.m., was Sergeant Madrigga, who took charge of the investigation. After examining the murder scene, the officers learned that the victim's red Datsun pickup truck had been found abandoned in a ditch, driven off the road that morning about half a kilometer west of the Boyle residence on Cedar Creek Road. The police attended there and were met by a resident of the area, Cindy Potter, who informed them that she had driven along that road near the victim's

home earlier that morning. At that time, she noticed the appellant walking away from the scene of the truck accident toward his home. He had something in his hand which looked like a stick or a beer.

89. The police also spoke with Kelly Spurn, another resident of the area, who informed them that there had been a second accident at exactly the same spot earlier that morning. Spurn had been told by Dale Russell that the appellant, who lived on the property of his sister and Mr. Russell, had stolen a vehicle off Russell's property that morning and crashed it on the same spot as the pickup truck which was later discovered. Spurn examined the site and assumed that the two accidents were caused by the same person because "the skid marks were the same and it was crashed on the same side of the road". Neither resident believed Boyle had been driving his vehicle at the time of the crash as he was known to be a slow, extremely cautious driver. Spurn urged the police to speak with Russell who, he said, had some information about the crime. At this point, the police began to proceed on the assumption that whoever had stolen the victim's vehicle was likely to have been involved in the murder as well. Sgt. Madrigga also suspected that the murderer would likely be covered in blood, given the severity of the crime.

90. When the police arrived at the property where the appellant was living, Russell confirmed that the appellant was staying with them as a guest. He added that earlier that morning the appellant had stolen a vehicle and crashed it into a telephone pole just down from Boyle's residence, in exactly the same spot as Boyle's truck was later found. After retrieving the vehicle, Russell returned home. Around 7:00 a.m. he saw the appellant return home and go to bed in a small storage trailer behind the house where he normally slept.

91. After receiving all this information, Sgt. Madrigga, accompanied by two other officers, went to the trailer, knocked on the door and yelled, "Police". There was no

answer. With his gun drawn, but by his side, he opened the door and entered. He saw the appellant lying on a bunk at the back of the trailer, apparently asleep. Sgt. Madrigga walked into the trailer, shook the appellant's leg and said, "Wake up, police. I want to talk to you." The officer asked the appellant to step to the entrance because the trailer was dark and he could not see well. They moved toward the door, and the officer saw that the appellant's shirt was splattered with blood. Sgt. Madrigga then placed the appellant under arrest and advised another officer to read him his rights. The appellant acknowledged that he understood his rights.

92. Sgt. Madrigga then asked the appellant how he got the blood on him. He replied that he had been hit in the face by a baseball the previous day. The appellant had no marks on his face. The police removed the shirt the appellant was wearing and took him to the Williams Lake RCMP detachment. Nothing was seized from the trailer at that time. The police subsequently obtained a search warrant and retrieved a sum of money hidden under a mattress, a package of cigarettes, and the appellant's running shoes.

93. Once at the police station, the appellant tried several times unsuccessfully to contact a lawyer. A few minutes later, the police administered a breathalyser test without telling the appellant he had any choice in the matter. His alcohol blood readings, taken 17 minutes apart, were .08 and .07.

94. That evening, despite the fact that he wished to speak with a lawyer and had not yet done so, the appellant was questioned. He eventually admitted striking Boyle, and stealing beer, money and cigarettes from his residence. The next morning, the appellant was fingerprinted and photographed and finally spoke with a lawyer.

II. Judgments

95. During the course of a lengthy *voir dire*, the appellant challenged the admissibility of most of the evidence sought to be adduced against him, alleging violations of ss. 7, 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms*. Essentially, the appellant's position was that the initial entry into the trailer was an unlawful one as the police officers lacked any legal authority to enter. As such, it was an unreasonable search which contravened s. 8 of the *Charter*. The arrest which subsequently took place was an arbitrary one as it was not based on reasonable and probable grounds as required by law. The appellant argued that the officer who entered the trailer had only a mere suspicion that the appellant was involved in the crime, which was confirmed when he saw the bloody shirt. As for the statements, breathalyser results and fingerprints, these were the product of the appellant's not having been properly informed of his right to counsel and being prevented from exercising it. As a result, the appellant asked the court to exclude the evidence pursuant to s. 24(2) as admitting it would bring the administration of justice into disrepute.

96. Leggatt J. made several important findings of fact in making his ruling. At the outset, he stated that "it [was] important to note that Likely is a small community of about 300 people". He found that normally there tended to be very little traffic on Cedar Creek Road that early in the morning and it was therefore an unusual occurrence to see an accident and the appellant walking away from it at that time. Taking into consideration the totality of the circumstances, it was reasonable to assume that the appellant was a prime suspect in the murder. In addition, he found that the investigating officer "had to be concerned about the destruction of vital evidence" when he went to the trailer and that he was "in active pursuit of what had to be his prime suspect, not long after the alleged crime". He also accepted the testimony of the investigating officer that a proper announcement was made before entry. Perhaps most importantly, he found that when Sgt. Madrigga entered the trailer, objectively, there were reasonable and probable grounds for the arrest of the appellant.

97. The trial judge found that both the entry and the subsequent arrest were lawful, concluding:

Given the surrounding circumstances I have outlined, the need to preserve evidence, the clear indication that the accused was a prime suspect, I believe the arrest took place in compliance with both the [Criminal Code](#) and the [Charter](#). I rule the arrest is lawful.

The arrest being lawful, the action to seize the accused's shirt was reasonable. That being the case the incidental search to the arrest was also lawful.

He subsequently went on to discuss s. 24(2), and found that in the event he was mistaken with regard to the arrest and entry, he would admit the evidence anyway, as to exclude it would bring the administration of justice into disrepute. Since the initial entry was ruled lawful, it also followed that the search warrant withstood scrutiny.

98. As for the statements, Leggatt J. found that the appellant's initial response regarding why his shirt was covered with blood was made after the appellant had been properly informed of his rights under s. 10(b) of the [Charter](#) and thus, was admissible. He did find, however that both the breathalyser evidence and the statements made at the police station were obtained as a result of a breach of the right to counsel. Pursuant to s. 24(2) of the [Charter](#), this evidence was excluded. The rulings with respect to the statements at the police station and the breathalyser results were not disputed on appeal by the respondent, and are not at issue here.

99. After the impugned evidence was admitted, the appellant was found guilty by a jury of second degree murder.

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100. A unanimous court dismissed the appeal. The court refrained from dealing individually with each of the alleged [Charter](#) breaches related to the entry of the trailer, as it found that even had the trial judge made an error on the resolution of these issues, the

police conduct in question was justified by the existence of exigent circumstances.

Lambert J.A. concluded at p. 234:

...in my opinion, the search of the premises constituted by the trailer was lawful within recognized additions to the rule that a search must be based on reasonable and probable grounds. Those additions are that reasonable and probable grounds may not be necessary where there is an emergency or where there are exigent circumstances or where the prevention of the destruction of evidence on an immediate basis is called for. It is therefore not necessary in this case to deal with any particular principle relating to articulable cause creating a basis for entry and search at a level less than reasonable and probable cause.

The same emergency and exigency and fear for the destruction of evidence also made lawful the detention of the appellant in his bed, if it was a detention, and the requirement that he move to the door of the trailer where his clothing and appearance could be seen.

Continuing, Lambert J.A. said *inter alia*:

Quite separately, even if there could be said to have been a *Charter* breach or a number of *Charter* breaches lying in the police conduct before the arrest, it is my opinion that “having regard to all of the circumstances” (to use the words of s. 24(2) of the *Charter*) the admission of the evidence that was obtained by the police conduct and admitted by the trial judge was not such that its “admission ... in the proceedings would bring the administration of justice into disrepute”.

101. Lambert J.A. went on to address s. 10(b) and concluded that the warning given to the accused was in compliance with the requirements mandated by the decision of this Court in *R. v. Bartle*, 1994 CanLII 64 (SCC), [1994] 3 S.C.R. 173.

III. Analysis

102. The appellant’s position before this Court is that the police investigation included several violations of the *Charter*. During the course of their inquiries, the police are alleged to have breached ss. 7, 8, 9 and 10(b) of the *Charter*. Essentially, with the exception of the s. 10(b) argument, with which I propose to deal separately, the allegations focus upon the conduct of the police from the point they entered the trailer where the appellant was sleeping. According to the appellant, the police did not have reasonable and

probable grounds to believe that he was the perpetrator of the crime, and thus the entry into the trailer was unlawful. As a result, the entry, along with the search that followed, contravened s. 8 of the *Charter*. The appellant also maintains that the arrest only occurred after the police officer confirmed his “hunch” by discovering new evidence, and thus violated ss. 7 and 9 of the *Charter*. Finally, the subsequent search of the trailer was performed on the basis of a search warrant obtained primarily on the strength of unconstitutionally obtained evidence and the resulting evidence should also be excluded.

103. As can be seen, all of these contentions are linked by a common focal point: they stand or fall on the strength of the appellant’s argument that the original entry by the police into the trailer was unlawful. The trial judge, after carefully weighing the evidence, determined that the police entered the trailer in order to arrest the appellant and were justified in so doing. In my view, this finding was a proper one, and this appeal therefore need not be resolved in the manner chosen by the Court of Appeal.

(A) *Section 8 of the Charter -- The Initial Entry*

104. The appellant has contended that the initial entry by the police trespassed upon his right to privacy under s. 8 of the *Charter*. In analyzing a potential s. 8 breach, two inquiries must take place. The first is concerned with determining whether the police conduct, taking into account all of the circumstances, interfered with the reasonable expectations of privacy enjoyed by the appellant. If so, the second part of the s. 8 analysis relates to whether this interference was reasonable: *R. v. Edwards*, 1996 CanLII 255 (SCC), [1996] 1 S.C.R. 128, at para. 33.

105. The first inquiry is easily satisfied here. Notwithstanding the fact that he was not the owner of the trailer, the appellant clearly enjoyed a reasonable expectation of privacy there: *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 158-59.

The facts demonstrate that he was the usual occupant of the premises, paid rent to his sister, and thus, under normal circumstances had a right to be left alone.

106. The second inquiry raises more cause for concern. A warrantless entry such as the one in the case at hand is presumed to be unreasonable and in contravention of s. 8 of the *Charter*. The Crown can rebut this presumption, and demonstrate that the invasion of privacy was reasonable if:

(a) the search was authorized by law;

(b) the law authorizing the search was reasonable, and;

(c) the manner in which the search was conducted was reasonable.

(See *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, at p. 278, and *R. v. Debot*, 1989 CanLII 13 (SCC), [1989] 2 S.C.R. 1140.)

107. The respondent has argued that the entry in this instance was authorized by law as a valid exercise of the police arrest power. According to this theory, Sgt. Madrigga's entry into the trailer was justified on the basis of its being necessary to exercise his power of arrest without a warrant under s. 495(1) of the *Criminal Code*, R.S.C., 1985, c. C-46. In addition, reliance is placed upon the common law authority to enter a private residence for the purpose of arrest as described in the pre-*Charter* case of *Eccles v. Bourque*, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739, and the post-*Charter* case of *R. v. Landry*, 1986 CanLII 48 (SCC), [1986] 1 S.C.R. 145 (although the offence was committed prior to the advent of the *Charter*).

108. My colleague Sopinka J. has concluded that the entry and subsequent search in the case at bar did, in fact, violate s. 8 of the *Charter*. He comes to this conclusion essentially

for two reasons: (1) the entry did not comply with the common law and statutory requirements, and hence was not authorized by law and, (2) even assuming the entry was authorized by law, the common law as set out in *Landry, supra*, and *Eccles, supra*, cannot withstand *Charter* scrutiny. With respect, I am unable to agree with either of these conclusions. As will be seen, I am of the view that the officers did, in fact, comply with the legal requirements necessary to effect an arrest upon private premises, and that arrests of this kind maintain the appropriate balance between privacy and the need to enforce the law in the *Charter* era.

Was the Search Authorized by Law?

109. The *Code* provides for several situations where a police officer may arrest a suspect without a warrant. These are specifically enumerated in s. 495(1) which states:

495. (1) A peace officer may arrest without warrant

(a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(b) a person whom he finds committing a criminal offence; or

(c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

110. Aside from these requirements, however, the *Code* does not offer guidance as to exactly where an arrest can be effected. In the case at bar, the appellant's concern is that the arrest occurred in a private residence, where, it has been suggested, different rules apply as to exactly when the police may enter without the consent of the occupant.

111. As Sopinka J. sets out, however, the power to arrest without warrant on private premises was confirmed at common law in the cases of *Eccles, supra* and *Landry, supra*. In *Landry*, Dickson C.J., at p. 165, set out four requirements necessary to effect a lawful arrest on private premises:

(1) The offence must be indictable.

(2) The person who is the subject of the arrest must have committed the offence in question, or the peace officer, on reasonable and probable grounds, must believe that the person has committed the offence.

(3) There must be reasonable and probable grounds for the belief that the person sought is within the premises.

(4) There must be a proper announcement before entry.

112. I agree with my colleague Sopinka J. that both criteria 1 and 3 were fulfilled in the case at bar. Therefore, the issues remaining to be resolved are whether the requisite reasonable and probable grounds for arrest existed, and whether proper announcement was made prior to entry.

113. The police are never required to demonstrate that they possessed anything more than reasonable and probable grounds prior to making an arrest. It is not necessary to establish that proof of culpability exists beyond a reasonable doubt, or that there is even a *prima facie* case for conviction: *R. v. Storrey*, [1990 CanLII 125 \(SCC\)](#), [1990] 1 S.C.R. 241, at p. 250. In *Storrey*, this Court ruled that in order to arrest, the officer must have a subjective belief in these reasonable and probable grounds, and that this belief must be justifiable objectively as well.

114. The trial judge found that, objectively speaking, there were reasonable and probable grounds to arrest the appellant. In my view, he was justified in coming to that conclusion. A reasonable person with the officer's knowledge would have had little

difficulty in believing that the appellant had committed the offence in question. The reasonable grounds could be based on the following:

- (a) the victim had been very recently murdered and his home ransacked;
- (b) the killing took place in a small community at a time when there would not be very many people moving around;
- (c) the victim's pickup truck was driven off the road one-half kilometer from his home at some time between 6:20 a.m. and 6:48 a.m.;
- (d) the circumstances of the accident made it apparent that the driver of the pickup was not the victim since he was known to be a very slow and cautious driver;
- (e) the garage where the pickup was normally kept was left open which, according to one witness, was rather unusual;
- (f) the reasonable inference from these facts that someone had stolen the victim's vehicle and that this person was also the one who had ransacked his home and killed him, or at least had been involved in the crime;
- (g) a witness who saw the appellant walking along the road away from the scene of the accident toward his home;
- (h) the fact that earlier the same morning, the appellant had stolen another vehicle and had driven it off the road in exactly the same spot;
- (I) the statement of a resident of the community who had examined skid marks from both accidents and based on his knowledge of the circumstances of the first accident, believed that the appellant had also taken the victim's car.

115. My colleague, at para. 36, has concluded that these facts, taken together, do not constitute sufficient reasonable and probable grounds, as all the police were aware of was the following:

The salient facts known to the police prior to their entry of the trailer are as follows: (a) it appeared that Boyle's truck had been stolen before being in an accident, and Cindy Potter claimed to have seen "Michael" walking near the site of the accident; (b) Kelly Spurn told police that he assumed the appellant had crashed Boyle's truck since the appellant had crashed earlier that morning in about the same place with a different truck; and (c) Dale Russell told police that the appellant came home around 7:00 a.m. after drinking all night and that the appellant had earlier crashed a vehicle at the spot where Boyle's truck was found. In my view, these facts did not constitute reasonable and probable grounds to arrest the appellant for the murder of Boyle. Whether or not the appellant had been involved in two similar truck accidents, or might have stolen Boyle's truck, does not raise reasonable and probable grounds to believe that he had murdered Boyle. This evidence may have pointed to the appellant as a suspect, but these facts without more do not justify an arrest.

116. In my view, this approach, with respect, fails to take into account the combined effect of the facts in light of the particular context of this case. On the contrary, it would seem that my colleague has lifted these circumstances from where they occurred and instead, treated them as if they took place in a vacuum. Once the facts are returned to their proper setting, however, I believe a much different picture emerges.

117. As the trial judge recognized, this crime occurred in a very small community, at a time of day when there was not likely to be a lot of traffic on the road. For the appellant to be seen walking a short distance away from the scene of a motor vehicle accident involving the victim's car at that time of the morning, was, as three separate witnesses testified, an extremely unusual occurrence. While the mere fact of the appellant's being present at the scene of an accident involving the deceased's car might not be particularly probative in a city with thousands of people, it is extremely probative given the location, the time in which it occurred and the remote possibility, given the corroborating evidence to that effect, that someone else in the small community was the person who had driven the car off

the road. I find it extremely significant that several officers as well as residents of the area all immediately came to the conclusion that it was the appellant who had taken the victim's car and driven it off the road. As one witness put it, "A led to B and C and we assumed that it was caused by him." In my view, it was a logical inference for the police to suppose that whoever had stolen the vehicle was also the person who had committed the murder. Once the police linked the appellant to the accident scene, it was obvious that he was the prime suspect.

118. In this regard, I note that our Court has previously discussed the different standards applicable to rural and urban settings in *R. v. Wilson*, [1990 CanLII 109 \(SCC\)](#), [1990] 1 S.C.R. 1291. What may not reach the level of reasonable and probable grounds in one place may well in another. Here, the unusual circumstances of the offence that the officers were informed of should not be examined as if they occurred in downtown Vancouver. The trial judge demonstrated that he was sensitive to the nature of the information received and to the setting in which it was discovered. On the basis of these facts, I concur with his finding that there existed reasonable and probable grounds to conclude that it was the appellant who had committed the offence.

119. This finding of objectively reasonable and probable grounds is not determinative, however. As aforementioned, a peace officer, before arresting without warrant, must possess a subjective belief that reasonable and probable grounds to arrest exist. The appellant has alleged that in the case at bar, this subjective belief was manifestly lacking. In support of his argument he has referred to Sgt. Madrigga's testimony on the *voir dire*, in which the officer responded to cross-examination as follows:

Q Okay. Now at that point, the three of you were going to see Mr. Feeney?

A That's correct.

Q Because you wanted to question him about this, right?

A That's correct.

Q And at that point as you are going to the trailer, you would agree with me you had no intention of arresting Mr. Feeney?

A No, I just wanted to check what he had been doing.

Q And, of course, you didn't have a warrant for his arrest?

A No, I did not.

Q Because basically there wouldn't have been enough information to obtain a warrant?

A That's correct.

A few minutes later, the following exchange occurred:

Q And from the time you went into the trailer, there was no suggestion that you were going to let Mr. Feeney walk out of the trailer and go away?

A If I had no further evidence. If I had -- when I went in and talked to him, if I had nothing to indicate that he was involved in this, I would -- it was shaky if I would have had grounds for his arrest at that time, but I had to check it out because I had people ask or tell me that this person was in the area.

Q All right, so let's see if we agree on something. At the time you went into the trailer, you didn't feel that you had grounds for his arrest, but when you saw the blood splatter on him after looking at him, that's why you said --

A I had grounds to suspect he could have been involved, sir, and I would be negligent in my duty if I did not check that out.

Q Oh, I'm not arguing that point, Sargent [*sic*]. But you didn't have grounds for an arrest?

A Not for an arrest at that time.

120. The appellant alleges that these paragraphs support the inference that Sgt. Madrigga, upon entering the trailer, did not have reasonable and probable grounds to arrest. In my view, these paragraphs must be viewed in context and cumulatively with all the evidence of the officer. Later on in Sgt. Madrigga's testimony, he said the following:

Q On the other hand, what made you think you could walk in [to the trailer]?

A Well, I had, in my mind, sir, I had, as far as I was concerned, I had a suspect. If he would have, as I stated, if he would have come out when I knocked on the door, then I wouldn't have gone in. However, I had two people stating he had been in the area. I had Dale telling me that a vehicle of his had been dumped basically in the same spot that Mr. Boyle's vehicle had been dumped a short time after, like Mr. [*sic*] or Dale had moved his vehicle and then this other vehicle was dumped there, puts Mr. Feeney right at the area. I have him walking away from the area a short while later. To me that gave me --

Q Walking to his home?

A Walking to his home, coming from, basically from the area. Now, in Likely there is not a lot of people walking on the streets maybe at night in Likely but in the morning, I policed this area for seven years and I'm not saying that it is not unusual but when the people first started moving, which Cindy Potter was going to work, and she drives that road quite regular and to her, it was unusual that this person was walking down there because that's why she mentioned it to us.

...

Q Let's get this plain. You had no permission from anybody to walk into that building? Permission, not somebody stopping you?

A No, not verbal permission as such but, yes, but then I felt a person who was involved in a crime was in that residence.

121. These passages in their totality give a much better impression of the arresting officer's state of mind leading up to the arrest. What they illustrate is an officer who knew that a suspect, someone involved in a crime, was inside the trailer. These responses demonstrate that, contrary to what some of the earlier passages might suggest, the officer did indeed possess the requisite reasonable and probable grounds to enter the house.

122. Of course, the phrase "reasonable and probable grounds" is not a term of everyday usage and when precisely that threshold is reached is open to some debate. A police officer seeking to apply this standard should not be held to the strict exactitude of a lawyer, or justice swearing out a warrant. Where, as here, a skillful cross-examination elicits the desired responses from an officer, it should not automatically be assumed that the officer lacked the required justification to effect an arrest. The statements of Macfarlane J.A. in *R. v. Grunwald*, [1991] B.C.J. No. 235, at pp. 19-20, are apposite:

In short, the appellant submits that the police had nothing but suspicion before the vehicle was searched, and that the appellant had the right to be left alone. Reference is made to the cross-examination of Constable McGowan who testified that he "was speculating" that a drug transaction had occurred between Cundict and the appellant and that "I believed there were narcotics in that blue bag and I wanted to confirm my suspicions".

Taken at face value, these words would support a conclusion that "he did not believe on reasonable grounds" but one must be careful when addressing a question of this kind of proceeding on the footing that police constables use words with the precision of a judge or a professor of classics. [Emphasis added.]

(See also: *R. v. Zastowny* (1992), [1992 CanLII 580 \(BC CA\)](#), 76 C.C.C. (3d) 492 (B.C.C.A.), at p. 499.)

123. I find further support for this conclusion in the decision of the Ontario Court of Appeal in *R. v. Breton* (1994), [1994 CanLII 939 \(ON CA\)](#), 74 O.A.C. 99. In that case, a police officer was questioned on a *voir dire* as to whether he believed he possessed the requisite reasonable and probable grounds to obtain a search warrant. Under cross-examination, the officer testified that he “suspected” the accused was engaging in criminal behavior. After adopting *Grunwald, supra*, Morden A.C.J.O., at p. 106, went on to say that the officer “used the term ‘suspected’ to refer to persons whom he believed had committed an offence”. Virtually identical language was used by the arresting officer in this case.

124. The existence of reasonable and probable grounds is a legal standard and is subject to interpretation. Furthermore, I believe that, at its core, reasonable and probable grounds is “a ‘common-sense’ concept which should incorporate the experience of the officer”: Christopher Slobogin, “Testilying: Police Perjury and What to Do About It” (1996), 67 *U. Colo. L. Rev.* 1037, at p. 1056. There are no absolute magic words necessary to define when this standard has been reached. As the United States Supreme Court stated in *Illinois v. Gates*, 462 U.S. 213 (1983), at pp. 231-32:

... the central teaching of our decisions bearing on the probable-cause standard is that it is a “practical, nontechnical conception.” *Brinegar v. United States*, 338 U.S. 160, 176 ... (1949). “In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Our observation in *United States v. Cortez*, 449 U.S. 411, 418 ... (1981), regarding “particularized suspicion,” is also applicable to the probable-cause standard:

“The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”

As these comments illustrate, probable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules. [Emphasis added.]

125. Here, an officer believed he was legally justified in entering a private dwelling to pursue a suspect whom he felt had been involved in a serious criminal offence. His belief was also supported by an objective assessment of the evidence at hand. The fact that a skillful cross examination elicited a response which could be interpreted as doubt should not detract from this intention. An officer's inability to articulate the legal terminology properly which granted the authority to enter should not invalidate a proper entry.

126. In summary, I conclude that in effecting the arrest of the appellant, the officer possessed the requisite reasonable and probable grounds. As a result, it is unnecessary for me to consider the suggestion of the Court of Appeal that, had the police not possessed reasonable and probable grounds to arrest, they would have nonetheless been authorized to enter because of the presence of exigent circumstances.

127. As a secondary argument, counsel for the appellant also stressed that upon entry Sgt. Madrigga did not possess an intention to arrest the appellant, and that that shortcoming is fatal to any claim to have entered lawfully on that basis. According to this view, upon entrance into a private dwelling the police must be focused solely upon arrest, and cannot enter, as here, with the subsidiary intention of investigating to either "clear or implicate Mr. Feeney". I disagree. It is well established that the key element of an arrest is the existence of reasonable and probable grounds. The police are not obliged to arrest in all situations. On the contrary, it is perfectly acceptable for the police to enter for the purpose of arrest, while recognizing that evidence discovered within may well dispel their reasonably held belief. As Traynor J., for a majority of the Supreme Court of California said in *People v. Simon*, 290 P.2d 531 (1955), at p. 533:

Thus, if the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it. In either case the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest. [Emphasis added.]

This statement has been approved of by the United States Supreme Court: *Rawlings v. Kentucky*, 448 U.S. 98 (1980), at pp. 109-110; and by various appellate courts in Canada: *R. v. Debot* (1986), 1986 CanLII 113 (ON CA), 30 C.C.C. (3d) 207 (Ont. C.A.), at p. 225, appeal dismissed without reference to this point, 1989 CanLII 13 (SCC), [1989] 2 S.C.R. 1140; *R. v. Charlton* (1992), 1992 CanLII 367 (BC CA), 15 B.C.A.C. 272, at p. 280.

128. This approach has much to commend it. As Martin J.A. stated in *Debot, supra*, at p. 225:

The reasoning of Traynor J. contemplates the situation where an officer has probable cause to arrest the suspect but postpones his or her decision to arrest the suspect. The officer, thus, avoids making an actual arrest, if the search proves that his or her belief that there was probable cause was erroneous. In my view, it may also very well be that a police officer, notwithstanding that he or she has reasonable and probable grounds upon which to make an arrest, may decide that, if the search does not disclose evidence of the offence, there would be no chance of obtaining a conviction. Hence, the officer may decide not to proceed further by making an arrest.

129. This type of procedure has the benefit of being less intrusive than an arrest. By seeking to confirm the reasonable belief they held, the police are able to avoid using the more intrusive procedure (an arrest) by substituting the less intrusive procedure (the search) first. There is, of course, nothing improper about continuing an investigation after an arrest is made: *Storrey, supra*, at pp. 252-55.

130. It follows, therefore, that the arrest in the case at bar complied with the second requirement set out in *Landry, supra*, in that the necessary reasonable and probable grounds were present. The sole remaining factor to consider is whether a proper announcement was made before the police entered the premises.

131. My colleague Sopinka J. implies, albeit without firmly deciding, that the announcement in this case was somehow deficient by virtue of the fact that the police did not state their purpose prior to entry as required by *Eccles, supra*. In that case, Dickson J. (as he then was) described the requirements for a proper announcement as follows, at p. 747:

In the ordinary case police officers, before forcing entry, should give (i) notice of presence by knocking or ringing the doorbell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry. Minimally they should request admission and have admission denied although it is recognized there will be occasions on which, for example, to save someone within the premises from death or injury or to prevent destruction of evidence or if in hot pursuit notice may not be required.

132. It is not contested by the appellant that, in the case at bar, the first two criteria were satisfied. He does submit, however, that the notice of purpose was not properly made. I agree with him to the extent that no notice of purpose was given prior to entry. Nevertheless, in my view, such a shortcoming is not necessarily fatal.

133. This is not the first time this Court has been faced with an allegedly deficient notice requirement. In *R. v. Miller*, 1988 CanLII 99 (SCC), [1988] 1 S.C.R. 230, aff'g (1986), 1986 CanLII 4621 (SK CA), 25 C.C.C. (3d) 554 (Sask. C.A.), the police entered a dwelling house and did not make an announcement of their purpose until they actually encountered the owner of the property. The trial judge found that this late notice of purpose was unlawful. The Saskatchewan Court of Appeal, however, unanimously reversed, making it clear that the exact requirements of an announcement would depend on the unique circumstances of each case. As stated by Vancise J.A., at pp. 565-66:

In the circumstances of this case, I am satisfied that the police officers made “a proper announcement” of their identity and their purpose as soon as possible to the owner and that in these circumstances they discharged their duty to gain entry for the purpose of arresting without warrant.... [Emphasis added.]

134. This Court unanimously dismissed the appeal as of right, Dickson C.J. stating at p. 230 that “We find no error on the part of the Court of Appeal”.

135. In *R. v. Jenkins*, [1992] O.J. No. 672 (Prov. Div.), a similar situation arose. In that case, the officers had good reason to believe that the subject of the arrest was choosing to ignore the arrival of the officers. After knocking for some time, and aware that the suspect was inside, one of the officers finally entered the apartment. The accused contended that the entry was unlawful as there was no notice of purpose. MacDonnell Prov. Div. J. disagreed, holding:

In my opinion, it follows that while the police must satisfy certain requirements before entering a dwelling house to effect an arrest, and in particular must make a proper announcement, the person sought cannot yet obtain sanctuary by placing him or herself within the house in a position where no proper announcement can be heard and no request for permission to enter can be made. If the ability of the officers to make an announcement is frustrated by the refusal of the person sought to come to the door, the officers' obligation to provide complete notice is suspended, and they may enter the premises. The duty to announce their purpose is re-engaged when it becomes feasible to do so, that is, once they encounter someone to whom notice can be given. [Emphasis added.]

See also: *R. v. Bennett*, [1996] O.J. No. 4137 (Gen. Div.).

136. I agree. Simply stated, the notice of purpose requirement would be rather hollow if it had to be made, in all cases, in such a way that the entire reason for giving it would be defeated. As stated by Dickson C.J. in *Landry, supra*, at p. 161 the notice requirement “permit[s] the offender to maintain his dignity and privacy by walking to the doorway and surrendering himself.” The approach suggested above recognizes that in some cases it

would be contrary to common sense to announce the purpose of entry once it was clear that the person inside was refusing or unable to answer the request to enter.

137. In my view, we are clearly faced with such a case here. Before entering, the officers were informed that the appellant was, in all likelihood, sound asleep. After knocking on the door, calling out “police” and receiving no answer, they were perfectly entitled to assume that the appellant was either asleep or ignoring their requests to enter. In either case, it would have been useless for them to have called out their purpose for entry. On the contrary, the only effective way to satisfy the notice requirement was to suspend its delivery until the appellant was in a position to receive it.

138. It is clear from the facts that the arresting officer informed the appellant of his purpose for entry, and restated his identity the moment it was feasible to do so. As he woke the appellant, Sgt. Madrigga stated: “Wake up, it’s the police. I want to talk to you.” While this is not the most complete notice of purpose imaginable, I do not believe this requirement was ever intended to compel the police to make complex legal statements: *R. v. Dupuis* (1994), [1994 ABCA 401 \(CanLII\)](#), 162 A.R. 197 (C.A.), at p. 199. In this light, I agree with the comments of Hill J. in *R. v. Anderson* (1996), [1996 CanLII 8301 \(ON SC\)](#), 49 C.R. (4th) 305 (Ont. Gen. Div.), at p. 317, that “[p]rovided that the words of the police bear some rough equivalency in terms of communicating notice of a lawful exercise of duty the announcement is adequate”. In my view, given the circumstances of this case, the wording utilized by the officer was sufficient.

139. I note in passing that my colleague Sopinka J. also appears to suggest that the announcement requirement might not have been met in this case because of the fact that the officers were not denied admission prior to entering. I disagree. Having admission denied does not require a formal refusal by the person within the premises into which entrance is sought. Such a requirement would be completely inconsistent with the entire justification for entry. It would be a rather strange result if a person evading arrest could avoid capture

merely by ignoring the request of the police for admission. Surely, where the police have reasonable and probable grounds to believe the person is actually on the premises, silence must be taken to amount to an implied denial of the request to enter.

140. I conclude therefore, that the announcement in this case was properly made. It follows, therefore, that the criteria set out in *Landry* were indeed met, and correspondingly that the entry into the appellant's trailer was indeed authorized as part of a lawful arrest. It remains to consider whether or not the law authorizing this entry is reasonable under the *Charter*.

Is the law reasonable?

141. As my colleague Sopinka J. points out, the law concerning warrantless arrests following forcible entry into a dwelling house was set out in *Landry, supra*, which was, at least technically, a pre-*Charter* case. Essentially, *Landry* stands for the proposition that an entry into private premises is, assuming certain steps are followed, permissible any time the police wish to effect an arrest. Sopinka J. concludes that, at least in the case of a standard arrest in which there is no urgency present, this wide discretion is "overly expansive in the era of the *Charter*" (para. 42). He explicitly refrains from deciding upon situations in which exigent circumstances exist, as he is of the view that no such circumstances are present in this case.

142. I am unable to agree with my colleague that exigent circumstances were not present here, especially given the conclusions of the trial judge and the Court of Appeal in that regard. As such, it is neither necessary nor desirable for me to make a conclusive determination as to whether *Landry* is constitutionally sound in all cases in which the police wish to make an arrest in a dwelling house. The reasonableness of the common law was a relatively minor issue at trial and on appeal, and I am wary of addressing such an important question in the absence of argument with regards to the potential impact a change

in this area would have upon the police, as well as some context regarding the frequency in which these types of arrests occur. In addition, when this issue was decided by the United States Supreme Court, in *Payton v. New York*, 445 U.S. 573 (1980), it provoked strong opposing views which are also worthy of consideration. While the majority adopted a solution similar to that of Sopinka J., there was a forceful dissent by White J. who was gravely concerned about the effect this restriction would have upon legitimate law enforcement techniques.

143. I believe it is preferable to deal with each situation as it arises, consistent with the approach taken by this Court in *R. v. Maccooh*, 1993 CanLII 107 (SCC), [1993] 2 S.C.R. 802. Therefore, I propose to analyze whether the presence of exigent circumstances, combined with the requirements established by *Landry*, can be considered “reasonable” for the purposes of s. 8 of the *Charter*.

144. The common law limitations to the principle of the sanctity of the home have recently been addressed by this Court in *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297. It is well recognized, of course, that a private residence does not guarantee sanctuary from a police investigation. The policy underlying the common law cases is that there should be no place which gives an offender sanctuary. As Dickson J. stated in *Eccles*, *supra*, at p. 743: “[t]he criminal is not immune from arrest in his own home nor in the home of one of his friends”.

145. In *Landry*, *supra*, Dickson C.J., examining the common law, found no reason to limit the ability of the police to enter a private dwelling to situations where they possessed a warrant. In his view, police officers could not afford to waste valuable time searching out a warrant when a suspect could easily flee the premises and remain at large in a community. While there are obvious privacy interests at issue, these are balanced to a large extent by the requirements set out by the *Code* and the common law (at p. 161):

This intrusiveness is carefully delineated and restricted by the requirement of reasonable and probable grounds for the belief that the person sought is within the premises, and the requirements of notice of presence, notice of authority and notice of purpose. These requirements minimize the invasiveness of arrest in a dwelling and permit the offender to maintain his dignity and privacy by walking to the doorway and surrendering himself.

146. In concurring reasons, Estey J. added in *Landry* (Beetz and McIntyre JJ. concurring), at p. 166, that the ancient principle of the inviolability of the home "must yield to the legitimate requirements of law enforcement" and cited the following passage from the case of *Lyons v. The Queen*, 1984 CanLII 30 (SCC), [1984] 2 S.C.R. 633, where for the majority he wrote, at p. 657:

The home is not a castle in isolation; it is a castle in a community and draws its support and security of existence from the community. The law has long recognized many compromises and outright intrusions on the literal sense of this concept. . . . [Emphasis added.]

147. In *Macooh, supra*, this Court considered the constitutionality of arrests made without warrant in residential premises in cases of "hot pursuit" and concluded that these types of entries were acceptable under the *Charter*. I would note that, in a real sense, "hot pursuit" is actually nothing more than a variety of exigent circumstances, and not really a separate doctrine. While there are several criteria which must be satisfied for "hot pursuit" to apply, the underlying concern is to prevent the escape of the offender, in the sense that he or she could frustrate a police investigation merely by closing the front door.

148. It is clear from the foregoing that the power of arrest is a crucial part of law enforcement. For that reason, it is unrealistic to suggest that the police can never enter private premises without a warrant for the purposes of arrest. As our jurisprudence has always recognized, this would severely impede the ability of police to capture persons suspected of criminal activity and to preserve evidence necessary to convict them. Neither can I accept that it is only in circumstances of hot pursuit that the police are permitted to enter a dwelling house without a warrant for the purpose of arrest.

149. This conclusion is not unique. In fact, it has been accepted in the United States for some time. While it is recognized that an arrest warrant is the preferable manner to proceed, the American experience clearly demonstrates that it is not always practical or possible for the officers to obtain a warrant. Where these types of exigent circumstances exist, arrests without warrant upon private premises have been deemed lawful: *Payton v. New York*, *supra*; *United States v. Reid*, 69 F.3d 1109 (11th Cir. 1995); *United States v. Scroger*, 98 F.3d 1256 (10th Cir. 1996). Simply as a matter of logic, it is reasonable to assume that aside from cases of hot pursuit, situations will arise in which the threat to society and the danger of having important law enforcement aims frustrated will outweigh concerns about privacy.

150. What types of circumstances will be considered exigent? While I believe a number of factors can indicate a situation of urgency, it is best not to attempt to define conclusively every possible type of exigent circumstances, as this can preferably be determined on a case by case basis. As stated by Barrett J. of the United States Court of Appeals, in *Scroger*, at p. 1259, quoting *United States v. Wicks*, 995 F.2d 964 (10th Cir. 1993), at p. 970, cert. denied 114 S.Ct. 482 (1993):

“(T)here is no absolute test for the presence of exigent circumstances because such a determination depends on the unique facts of each controversy.”

See also *United States v. Scroger*, *supra*, and *Anderson*, *supra*.

151. In this vein, I do not wish to decide authoritatively upon exactly what is required to constitute exigent circumstances for the purposes of arrest, especially given that this is the first case on this subject to come before this Court. I would prefer to examine the particular factors at issue in the case at bar.

152. The main factor relied upon by the respondent, and also cited by both the trial judge and the Court of Appeal, was that the police were gravely concerned about the potential destruction of evidence. In addition, the Court of Appeal noted the serious and violent nature of the offence, the fact that it had very recently occurred, and that a murderer was likely at large in the community. I propose to examine each of these factors.

153. It has been recognized on more than one occasion that the potential destruction of evidence can constitute exigent circumstances: *Silveira, supra*; *R. v. Grant*, 1993 CanLII 68 (SCC), [1993] 3 S.C.R. 223; *Collins, supra*. In *Silveira*, I stated that this rationale necessitated an exception to the principle of the sanctity of the home at paras. 112 and 114:

Finally, with respect to the American case law, Martin J.A. observed at p. 119 of *Rao* that a number of American appellate courts have specifically found that an entry and search of premises to prevent the removal or destruction of illicit drugs fall within the "exigent circumstances" exception. (See *United States v. Edwards*, 602 F.2d 458 (1st Cir. 1979); *Commonwealth v. Amaral*, 450 N.E.2d 656 (Mass. 1983); for more recent examples, see *United States v. Mabry*, 809 F.2d 671 (10th Cir. 1987); *United States v. Riley*, 968 F.2d 422 (5th Cir. 1992).) It therefore appears that exigent circumstances are described by American case law in the same way as they have been defined by this Court, i.e., in terms of imminent loss of evidence, amongst others, notably in the cases of *Eccles*, *Macooh* and more recently in *Grant, supra*.

...

Sopinka J. reiterated in *Grant*, at pp. 241-42, that exigent circumstances have generally been held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed. Although the case in *Grant* dealt with warrantless perimeter searches as opposed to warrantless entries into dwelling-houses, I am of the view that the same reasoning must apply in all cases of exigent circumstances. [Emphasis in original.]

154. As I stated in *Silveira, supra*, preventing the removal or destruction of evidence is a legitimate law enforcement concern which warrants setting aside the strict rules concerning the sanctity of the home. Frankly, I see no reason why this rationale should be addressed any differently in the context of arrest than it is in the context of a search. Indeed, given the restrictions needed to effect an arrest in a dwelling house, it is arguable that these types of intrusion are in most cases considerably less invasive of privacy than warrantless

searches. The announcement requirement, for example, allows the suspect to surrender him- or herself at the door of the residence and prevent any real intrusion of the premises.

155. I also find it instructive that the prevention of the destruction of evidence is part of the basis upon which the “hot pursuit” exception to the arrest warrant requirement is founded. As the Chief Justice stated in *Maccooh, supra*, at p. 816, without such an exception authorizing police entry into private dwellings, “evidence of the offence leading to the pursuit or a related offence may be lost”.

156. In my view, where there is a genuine fear that evidence of the crime will be lost, this can constitute the necessary exigent circumstances for a warrantless entry. Whether these exigent circumstances exist in a given case, is, of course, a finding of fact for the trial judge.

157. In this case, the trial judge, who had the advantage of hearing all the evidence, was of the view that a serious danger existed that had the police not immediately entered the trailer to arrest the appellant, evidence would have been destroyed. As he found, after reviewing the facts:

Were there other investigatory techniques available? The answer is no, when one looks at the bloody shirt evidence. There was a real risk that that shirt would not have been available had they simply sealed the premises.

158. The Court of Appeal came to the same conclusion, as Lambert J.A. stated at p. 234 that the police were “facing circumstances where the possibility of the destruction of evidence, particularly evidence in relation to bloodstains, was a real one and had to be addressed”.

159. My colleague, however, concludes that both the trial judge and the Court of Appeal were in error, and that in actuality there was no fear that evidence would be destroyed. He states, at paras. 52 and 53:

In any event, even if they existed, safety concerns could not justify the warrantless entry into the trailer in the present case. A simple watch of the trailer in which the police were told the appellant was sleeping, not a warrantless entry, would have sufficiently addressed any safety concerns involving the appellant. With respect to concern about the potential destruction of evidence, at the time the police entered the trailer, they had no knowledge of evidence that might be destroyed; at best, they had a suspicion that the appellant was involved in the murder. Simply because the hunch may have turned out to be justified does not legitimize the actions of the police at the time they entered the trailer. As I stated in *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3, at p. 29, “[i]t should not be forgotten that *ex post facto* justification of searches by their results is precisely what the *Hunter* standards were designed to prevent.”

The circumstances surrounding the police entry into the trailer were similar to those following any serious crime: a dangerous person is on the loose and there is a risk that he or she will attempt to destroy evidence linking him or her to the crime. To define these as exigent circumstances is to invite such a characterization of every period after a serious crime.

160. In my view, Sopinka J. has not shown appropriate deference to a factual finding made by the trial judge who was in a much better position to assess the particular circumstances. Furthermore, I find that the trial judge’s assessment was, in fact, the correct one in that there was good reason for the police to believe that absent immediate intervention, crucial evidence would have been destroyed. Several elements point to this conclusion, most importantly the fact that the police were pursuing the offender a short time after the occurrence of the crime. They had every reason to believe that the killer, if apprehended quickly, would still have bloodstains on him, which would be important evidence. I cannot agree with my colleague that “[the police] had no knowledge of evidence that might be destroyed” (para. 52). Sgt. Madrigga clearly testified as to his belief that the perpetrator of the crime would possess clothing with bloodstains on it. It was reasonable for him to fear that if he did not act quickly, the killer would have an opportunity to destroy that vital evidence.

161. As the trial judge stated, not only was there a real fear that evidence would be lost, but it was also crucial evidence which “form[ed] a very important part of the chain of evidence the Crown seeks to introduce”.

162. In any event, I would point out that it was not only the potential destruction of evidence which motivated the actions of the police in the case at bar. As stated by Lambert J.A. in the Court of Appeal, at p. 234, the police were investigating the commission of an extremely violent crime, and they felt an obligation to find out for certain who the offender was as soon as possible:

The fundamental point in relation to the police conduct in this case was that there had been a savage attack on an elderly man in a small community which suggested a killer who was out of control in the community and that the police had a duty to protect the community. They also had a duty to try to locate and neutralize the killer and if possible to gather evidence that would satisfy them then and there that the killer had been apprehended, and that would later tend to establish that the correct person had been apprehended and made to stand trial.

In those circumstances it is my opinion that the police were facing a situation which could be classified as an emergency, or as exigent circumstances which would require immediate action, and that in addition they were facing circumstances where the possibility of the destruction of evidence, particularly evidence in relation to bloodstains, was a real one and had to be addressed.

163. I completely agree. The nature of the crime is an important factor to consider. There can be little doubt that there is a greater urgency to investigate quickly in a case of violence than, for example, a case of theft: see *United States v. Scroger, supra*, at p. 1260.

164. Additionally, the serious nature of the crime is not a factor to be examined in isolation. It must be recognized that, especially in the case of violent crimes, it is a sound practice for the police to try and apprehend the offender as quickly and with as much certainty as possible. In this regard the learned author of Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (3rd ed. 1996), vol. 3, at p. 271, has noted

that the courts should recognize a distinction between a “planned” arrest and one which is the product of an “in the field” investigation. Indeed, he believes, at pp. 271-74, that this should be the defining criterion in making a determination as to whether exigent circumstances are present in a given case:

Although it is not readily apparent how a more workable but yet fair warrantless entry standard could best be expressed, it would seem that a solution is most likely to be found by distinguishing the truly “planned” arrest from the arrest which is made in the course of an ongoing investigation in the field. A “planned” arrest is one which is made after a criminal investigation has been fully completed at another location and the police make a deliberate decision to go to a certain place, either the arrestee’s home or some other premises where he is believed to be in order to take him into custody.... Courts have understandably been reluctant to accept police claims of exigent circumstances in these situations, for it ordinarily appears that whatever exigencies thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained. In the “planned” arrest situation, then, the only exception to any existing warrant requirement would be the presence of exigent circumstances prior to the time the officers went out into the field for the purpose of making the arrest.

On the other hand, when the occasion for arrest arises while the police are already out in the field investigating the prior or ongoing conduct which is the basis for the arrest, there should be a far greater reluctance to fault the police for not having an arrest warrant. Here, the presumption should be in favor of a warrantless arrest rather than against it, as the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it. [Emphasis added.]

165. This rationale has been accepted in the U.S., and applied in a number of decisions with facts which closely mirror the situation in the case at bar. In *People v. Johnson*, 637 P.2d 676 (Cal. 1981), for example, the police investigated a shooting in which the accused shot a man whom he believed had kicked his car. Within 75 minutes of the incident, the police located the accused’s car at his girlfriend’s home, entered, and arrested him. The California Supreme Court ruled that this was permissible given the circumstances, concluding at p. 680:

As we ... recently reaffirmed in *People v. Escudero* (1979) ... 592 P.2d 312, “in appropriate circumstances the fresh pursuit of a fleeing felon may constitute a sufficiently grave emergency to justify an exception to the warrant requirement and make it constitutionally reasonable for the police to enter a private dwelling without prior authorization of a magistrate”. In that case we approved an arrest within a defendant’s residence when he had been surprised in the act of committing a burglary, had escaped, and had been identified through a description and car registration. The

police then proceeded directly to the defendant's residence, made a warrantless entry and arrested him. We observed "that although 'fresh pursuit' of a fleeing felon must be substantially continuous and afford the law enforcement authorities no reasonable opportunity to obtain a warrant, it is not necessary that the suspect be kept physically in view at all times." Here, the officers were in expeditious pursuit which was continuous and direct.

Moreover, as we have stated, defendant was suspected of a violent offense involving the repeated discharge of a firearm. Exigent circumstances validating a defendant's arrest within a dwelling may be deemed to exist when there is a "likelihood that one of the suspects may have been an armed killer (see *James v. Superior Court* (1978) ... 151 Cal.Rptr. 270)".

166. Another decision worthy of consideration is *People v. Williams*, 641 N.E.2d 296 (Ill. 1994). In that case, the police investigated a murder where a woman was shot to death while in the process of entering her apartment building. After a 27-hour investigation, the officers proceeded to the accused's residence, and without a warrant forcibly entered and arrested him. Despite argument by the accused that the entry was unconstitutional, the court ruled at pp. 306-7 that in the circumstances, it was entirely proper:

The crime invoked was of the most serious nature, involving unprovoked, deadly violence against the victim. From the time of the murder until defendant's arrest only 27 hours later, the police conducted an around-the-clock investigation, acting on every lead they received without delay....

Defendant's argument that, given the time lapse between Golden's statement and his arrest, the police could have obtained an arrest warrant is unpersuasive.... The officers clearly acted without delay in initiating efforts to apprehend defendant following receipt of information from Golden concerning defendant and his possible whereabouts.

See also: *State v. Storvick*, 428 N.W.2d 55 (Minn. 1988); *State v. Gonsalves*, 553 A.2d 1073 (R.I. 1989); *People v. Smith*, 604 N.E.2d 858 (Ill. 1992).

167. In my view, these cases illuminate the difficulties which can be faced by police when conducting an investigation "in the field". They also recognize that a finding of exigency will vary depending on the nature of the crime and the manner in which the investigation is conducted as a result of legitimate fears that the suspect will either abscond, commit further violence or otherwise frustrate law enforcement efforts.

168. Furthermore, I believe that many of the factors gleaned from the above noted authorities were present in the case at bar. In particular, I note that:

- (a) the police were investigating a very violent murder;
- (b) the arrest was made “in the field” in the midst of an ongoing investigation. As LaFave notes, this should lead to the presumption of a lawful arrest;
- (c) as set out previously, it was extremely impractical to obtain an arrest or search warrant given the location of the community;
- (d) the police were in the midst of a “fresh pursuit” which was continuous and direct;
- (e) the police had a reasonable fear that if they did not neutralize the killer, he would commit further violence.

169. This should not be taken as an exhaustive list of factors which are necessary in every case. Nevertheless, when combined with the earlier mentioned concern about the loss of evidence, they leave no doubt in my mind that exigent circumstances existed here. I am further persuaded by the fact that the officers involved, the trial judge and the Court of Appeal were all of the view that an emergency situation existed. This is not a factor which should be discounted lightly. As I stated in my minority reasons in *Silveira, supra*, at para. 121:

On the facts of this case, the trial judge, with the benefit of having heard the whole of the evidence regarding the circumstances which led the police to enter the appellant's private dwelling, did not find that in so doing, the police had acted in bad faith.... It is not the proper function of this Court to now second-guess the trial judge

on pure findings of fact, particularly when no error of the kind that would attract appellate intervention has been demonstrated with respect to the trial judge's findings of fact on this point (see, e.g., *R. v. L. (D.O.)*, 1993 CanLII 46 (SCC), [1993] 4 S.C.R. 419, at p. 467).

170. Sopinka J., however, suggests that simply watching the trailer would have been a sufficient response by the officers and would have prevented the appellant from committing any further harm or destroying evidence. In my view, this conclusion appears to utilize the same sort of *ex post facto* reasoning of which my colleague so strongly disapproves: *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3. I agree that this type of reasoning is of little help in determining whether an entry was justified; however, I believe that, in fairness, the same approach should apply to a review of the presence of exigent circumstances. My colleague's conclusion is dependant upon the fact that the appellant was actually in the trailer and not in the process of committing other harm or destroying evidence. Given the urgency of the situation, if the police had adopted the procedure suggested by my colleague and had been incorrect as to their belief of his presence inside the trailer, this error could have had grave consequences.

171. While it may be true that the appellant at the time of arrest was asleep, in the trailer and not in the process of destroying evidence, this does not displace the legitimate concern the police possessed. It is highly likely that, given enough time, the appellant would have destroyed the evidence.

172. Furthermore, the suggestion that the police could have simply watched the trailer while waiting for a warrant, fails to recognize that the nearest police station was over one hour's drive away. Even assuming that it would have been possible to see a Justice of the Peace and obtain a warrant at that time, the entire procedure of communicating with the station, conveying the necessary information and arranging for another officer to obtain a warrant and drive to Likely, would probably have taken, at a minimum, close to two hours. This would have given the appellant ample time to destroy evidence. In addition, as stated

above, this delay would have had even greater significance if in actuality the police had been incorrect about the appellant's whereabouts or his involvement in the crime. In that case, the delay likely would have allowed for the offender to escape.

173. For all of the reasons set out above, I believe that exigent circumstances were indeed present in the case at bar. Additionally, I am of the view that where these circumstances exist, the common law authorizing entries onto private premises constitutes a “reasonable” entry for the purposes of s. 8 of the *Charter*.

Was the search conducted in a reasonable manner?

174. The entry into the trailer was conducted in as non-intrusive a manner as possible. Sergeant Madrigga announced himself and waited for the appellant to answer. As he testified, he would not even have entered had the appellant answered the door. He drew his gun, an entirely reasonable decision given the circumstances, but kept it at his side. Once inside, he woke the appellant, pulled him into the light and immediately arrested him. The search the police eventually conducted was also minimally intrusive. Despite having the legal authority to do so, the officer chose not to search the premises at that time but instead decided to obtain a search warrant. The search was reasonably conducted.

Conclusion

175. It follows that as the police's entry was for the purpose of effecting an arrest, there was no breach of s. 8 at that time. Given my conclusion that the police lawfully entered the trailer to effect an arrest of the appellant, it naturally follows that they were entitled to search incident to arrest, and to seize the appellant's shirt as evidence. The authority to search incident to arrest is well established at common law and has withstood *Charter* scrutiny as well. In *Cloutier v. Langlois*, 1990 CanLII 122 (SCC), [1990] 1 S.C.R. 158, at pp. 180-81, I reviewed the history of this police power and concluded:

In general, despite certain comments in scholarly discussion, it seems beyond question that the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him. The common thread in this line of authority is the objective of guaranteeing safety and applying the law effectively.

See also: *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, at pp. 403-4; *Debot*, *supra*, at p. 1146, *per* Lamer J. (as he then was).

176. The search of the appellant consisted mainly of the shirt that he was wearing and his immediate surroundings. While the police would have been justified in doing so, they refrained from searching the immediate area and seizing objects which obviously could have been used as evidence. This minimal search incident to arrest did not violate the *Charter*.

(B) *Section 8 -- The Search Warrant*

177. The appellant has also submitted that the warrant which was obtained following the arrest was based on information obtained during an unlawful arrest. Given that I do not share the appellant's conclusion regarding the legality of the arrest, this line of argument must fail as well. In my view, the warrant was properly obtained.

178. Even were I to agree that the arrest which took place in this case was unlawful, I would have no difficulty concluding that the search warrant was properly issued. Where a warrant is obtained partially on the strength of tainted evidence, and partially on evidence which was properly obtained, the role of the court is to consider whether or not the warrant

would have been issued solely on the strength of the evidence which was properly obtained: *R. v. Evans*, 1996 CanLII 248 (SCC), [1996] 1 S.C.R. 8, at para. 26; *Grant*, *supra*, at pp. 251-52; *Kokesch*, *supra*. In the case at bar, the trial judge ruled that before the officers entered the trailer and arrested the appellant there existed reasonable and probable grounds to believe the appellant was the culprit. This ruling is sufficient to infer that a search warrant could properly have been issued based solely on the strength of the information which was obtained prior to the arrest.

(C) *Section 8 and the Fingerprints*

179. My colleague Sopinka J. has concluded that compelling the appellant to provide fingerprints was, in the circumstances of this case, a violation of s. 8 of the *Charter*, in that it occurred in the absence of a lawful arrest. As I have set out above, I am of the view that the arrest was, indeed, a lawful one. It is clear that fingerprinting as an incident of a legal arrest does not violate the *Charter*: *Beare*, *supra*. This ground of appeal must also be dismissed.

(D) *Sections 7 and 9 of the Charter*

180. The appellant has also raised arguments under ss. 7 and 9 of the *Charter*. His position is predicated on the assumption that the arrest which took place was unlawful. Given my finding that the arrest was not unlawful, it cannot be said that these sections of the *Charter* have been violated.

(E) *Right to Counsel*

181. The appellant additionally submits that his right to counsel was violated when the police first entered the trailer. His argument on this point is two-fold. First, he asserts that from the moment Sgt. Madrigga entered the trailer and shook him by the foot in order to

wake him up, he was “detained”, and the officer was obliged to inform him of his right to counsel. The second branch of the argument deals with the caution itself, which was given a few minutes later after the appellant was arrested. The appellant asserts that the caution fell short of the standard mandated by this Court in the case of *Bartle, supra*. In my view, neither of these arguments possesses any merit.

182. Contrary to the appellant’s submissions, the police are not obliged to read an accused his s.10(b) rights the instant he is detained or arrested. The police must be permitted the latitude to assess and gain control of the situation and determine whether a potentially dangerous situation exists: *R. v. Strachan*, 1988 CanLII 25 (SCC), [1988] 2 S.C.R. 980. Here, the appellant was being sought for a very serious and violent crime, and there was no way for the officer entering the premises to know how the appellant might have reacted. In addition, the officer was walking into a dark room and the appellant was sleeping. Surely, the officer was not supposed to read the appellant his rights while he was asleep. The caution was given at the first reasonable opportunity. The delay in this case between the time Sgt. Madrigga grabbed the appellant’s leg to wake him up and the time he was read his right to counsel was no more than a few minutes. It is inconceivable that a *Charter* breach could be said to have occurred as the result of this short delay alone. I note in passing that a very similar situation occurred in the case of *R. v. Manninen*, 1987 CanLII 67 (SCC), [1987] 1 S.C.R. 1233. In that case, the accused was detained by two officers for approximately five minutes before being formally arrested and given his right to counsel. Despite concluding that there had been a s.10(b) violation owing to other irregularities, this Court found that there was nothing wrong with a short delay prior to reading the accused his or her rights.

183. As to the second concern, there was no indication in the case at bar that the appellant received a deficient s.10(b) warning. After being arrested, the appellant was informed:

It is my duty to inform you that you have the right to retain and instruct counsel without delay. You may call any lawyer you want. A Legal Aid duty lawyer is available to provide legal advice to you without charge and can explain the Legal Aid plan to you. If you wish to contact a Legal Aid duty lawyer, I can provide you with a telephone number. Do you understand?

184. After giving this portion of the warning, the appellant was asked if he understood.

He nodded in assent. The officer then proceeded to warn the accused that he was “not obliged to say anything but anything [he did] say may be given in evidence.”

185. The officer then asked the appellant once again if he understood. After staring blankly at him, the officer repeated the question, to which the appellant replied: “Yes, what do you think, I am illiterate?”

186. The appellant has argued that this caution falls short of the requirements set out by a majority of this Court in *Bartle, supra*. In that decision, the scope of the right to counsel and the information required to be given to an accused upon arrest was considerably enlarged. Specifically, Lamer C.J. set out the expanded duty of police officers as follows at p. 198:

...police authorities are required to inform detainees about Legal Aid and duty counsel services which are in existence and available in the jurisdiction at the time of detention. In case there is any doubt, I would add here that basic information about how to access available services which provide free, preliminary legal advice should be included in the standard s.10(b) caution. This need consist of no more than telling a detainee in plain language that he or she will be provided with a phone number should he or she wish to contact a lawyer....

At the time, I stated at p. 224, that s. 10(b) should not require the police to inform all detainees of existing duty counsel programs, absent an expression of concern by the detainee regarding his or her ability to afford a lawyer. To require the police to do otherwise is to require a standard of perfection not mandated by s. 10(b) of the *Charter*.

187. In any event, the warning given in the case at bar clearly satisfied the components set out by the majority of this Court in *Bartle*. The appellant was informed that free legal

advice was available to him and that he could telephone to receive it. In addition, the officer offered to provide the number to the appellant if requested. The appellant was advised that he was under no obligation to say anything at all. As the Chief Justice stated in *Bartle*, at p. 198, a satisfactory warning “need consist of no more than telling a detainee in plain language that he or she will be provided with a phone number should he or she wish to contact a lawyer”. This requirement was obviously satisfied here. The warning, therefore, was not deficient.

188. I would also note that the retroactive application of *Bartle* and its companion cases has recently come into question as a result of events following the Court’s decision in those cases. Immediately after the decisions were handed down, the Attorney General for Alberta, who had been a party to the case of *R. v. Cobham*, [1994 CanLII 69 \(SCC\)](#), [1994] 3 S.C.R. 360, sought a stay of the operation of *Cobham* for a 21-day period until October 20, 1994. On October 20, 1994, this Court handed down an order which stated:

The application for a re-hearing is granted on the issue of whether there should be a transition period, and the operation of the judgment herein [i.e. *Cobham*] is stayed for a period of 21 days from the date such judgment was issued, namely September 29, 1994.

There has been some question as to whether this order has the effect of suspending the retroactive application of *Bartle* throughout Canada to all potential violations which took place prior to October 20, 1994. I note that more than one court has reached exactly this conclusion: *R. v. Latimer* (1995), [1995 CanLII 3993 \(SK CA\)](#), 99 C.C.C. (3d) 481 (Sask. C.A.), aff’d without reference to this point, [1997 CanLII 405 \(SCC\)](#), [1997] 1 S.C.R. 217; *R. v. Lorincz* (1995), 9 M.V.R. (3d) 186 (Alta. C.A.); *R. v. Loudon*, [1995] B.C.J. No. 2446 (S.C.). In *Latimer*, *supra*, this issue was raised before this Court but the Chief Justice declined to address the point as it was not necessary to decide it in order to resolve the case. I take a similar position here.

189. Aside from the caution's actual wording, Sopinka J. finds that the police violated the appellant's s. 10(b) rights by not affording him a proper opportunity to contact counsel before questioning him. Additionally, the appellant submits that the police erred in merely reading him the standard warning. He asserts that the police were obligated to ensure that he understood exactly what his rights were. In my view, this reasoning is based upon a fundamental misconception of how the right to counsel operates.

190. Contrary to the appellant's submissions, the police are not under an obligation to assure themselves positively that an accused understands what his right to counsel entails. It was recognized very early in *Charter* jurisprudence that placing this burden on the police would be prohibitive and would inhibit legitimate police investigative techniques: *R. v. Anderson* (1984), 1984 CanLII 2197 (ON CA), 10 C.C.C. (3d) 417 (Ont. C.A.); *R. v. Sabourin* (1984), 1984 CanLII 3535 (MB CA), 13 C.C.C. (3d) 68 (Man. C.A.). This principle has been affirmed numerous times. As McLachlin J. stated in *R. v. Evans*, 1991 CanLII 98 (SCC), [1991] 1 S.C.R. 869, at p. 891:

The purpose of s. 10(b) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further.... [Emphasis in original.]

See also *R. v. Baig*, 1987 CanLII 40 (SCC), [1987] 2 S.C.R. 537, at p. 540; *Bartle*, *supra*, at p. 204; *Latimer*, *supra*.

191. Once an accused has indicated that he understands the rights which have been explained to him in plain language, the police are perfectly entitled, in the absence of clear indications demonstrating otherwise, to accept what he says and are not obliged to inquire further. Here, the police had no reason whatsoever to conclude that the appellant did not understand his s.10(b) rights. On the contrary, the appellant expressly responded twice that

he did understand them. I see no reason why the police should not have taken him at his word.

192. I am also unable to agree with Sopinka J. that the police were obliged to refrain from questioning the appellant until he had an opportunity to exercise his right to counsel. An accused must indicate a desire to exercise this right before the police are under any obligation to provide an opportunity to do so. As the Chief Justice stated in *Bartle, supra*, at p. 192, s. 10(b) imposes the following duties on law enforcement agents:

(1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

(2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

(3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger). [Emphasis added.]

(See also *Evans, supra*, at p. 890; *Manninen, supra*, at pp. 1241-42; *R. v. Brydges*, 1990 CanLII 123 (SCC), [1990] 1 S.C.R. 190, at pp. 203-4.)

193. Lamer C.J. went on to add that, at p. 192, the second and third duties are “implementation duties and are not triggered unless and until a detainee indicates a desire to exercise his or her right to counsel” (emphasis in original). This duty, thus, does not come into existence until the detainee invokes it. Consequently, it cannot be said that the police here were in violation of their s. 10(b) obligations in this regard.

194. The appellant in this case had the benefit of a caution which informed him of all the essential components mandated by *Bartle, supra*. Prior to their questioning him, the police had no indication from the accused that he wanted to speak with a lawyer or that he was confused as to the scope of his rights. I therefore conclude that at this stage of the investigation there was no breach of s. 10(b) of the *Charter*.

IV. Conclusion

195. As I have found that the actions of the police in this case did not breach the *Charter*, it is unnecessary for me to consider s. 24(2). Had it been necessary, however, I would have concurred with the findings of the trial judge and the Court of Appeal that considering the exigent circumstances and seriousness of the crime, excluding this evidence would clearly bring the administration of justice into disrepute, particularly since this result would likely preclude the appellant, who was convicted by a jury, of being brought to justice.
196. This is sufficient to dispose of the appeal. Before concluding, however, I feel compelled to address some of the statements made by my colleague Sopinka J. in his reasons. Reading his assessment of the conduct of the investigation in this case, one might draw the conclusion that the police officers were operating as lawless vigilantes, flagrantly and deliberately violating the *Charter* at every turn. Frankly, I could not disagree more. As I have described above, I am of the view that this “litany” of *Charter* abuses does not stand up to close scrutiny.
197. Indeed, although this is in no way determinative, if the conduct of the police was truly of such a horrific nature I find it rather peculiar that neither the trial judge nor three judges of the Court of Appeal had a similar appreciation of the facts. On the contrary, they found that for the most part, the actions of the police were not such as to have been in violation of the appellant’s *Charter* rights.
198. In my view, from the first stages of the investigation through to the apprehension of the appellant the police proceeded in a forthright and proper manner; indeed, had the police not moved immediately to arrest, it is likely that they would have been criticized for allowing a murderer to continue to remain at large in the community. This was indeed the view of the Sgt. Madrigga, who testified:

... I had to check it out because I had people ask or tell me that this person was in the area.

...

I had grounds to suspect he could have been involved, sir, and I would be negligent in my duty if I did not check that out.

199. The police were in the process of investigating a serious crime, one which had recently been committed and involved a savage, physical beating inflicted on a helpless victim for no apparent reason. Given the brutality of the murder scene and the seeming randomness of the act, there is little doubt that the police felt obliged to act quickly in order to prevent any further violence of that nature in the community. For this foresight, they should be commended, not rebuked.

200. I would dismiss the appeal.

Appeal allowed, LAMER C.J. and L'HEUREUX-DUBÉ, GONTHIER and MCLACHLIN JJ. dissenting.

Solicitors for the appellant: Lugosi & Company, Prince George.

Solicitor for the respondent: The Attorney General of British Columbia, Vancouver.

* See: [1997 CanLII 343 \(SCC\)](#), [1997] 2 S.C.R. 117.

TAB 14

R. v. Grant, 2009 SCC 32 (CanLII), [2009] 2 SCR 353

Source:	Supreme Court of Canada
Date:	2009-07-17
File number:	31892
Other citations:	97 OR (3d) 318 — 309 DLR (4th) 1 — 391 NR 1 — 253 OAC 124 — AZ-50566222 — 245 CCC (3d) 1 — 66 CR (6th) 1 — 193 CRR (2d) 1 — [2009] CarswellOnt 4104 — EYB 2009-161617 — JE 2009-1379 — [2009] SCJ No 32 (QL) — [2009] ACS no 32 — 82 MVR (5th) 1
Citation:	R. v. Grant, 2009 SCC 32 (CanLII), [2009] 2 SCR 353, < https://canlii.ca/t/24kwz >, retrieved on 2026-03-22
Most recent unfavourable mention	R. v. Carmola-Chambers , 2020 ONCJ 493 (CanLII) [...] Despite this, in applying the Grant [6] analysis, I find that the applicant/defendant has failed to establish that the admission of the breath samples into evidence at trial would bring the administration of justice into disrepute. [...]

SUPREME COURT OF CANADA

CITATION: R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353

DATE: 20090717

DOCKET: 31892

BETWEEN:

Donnohue Grant
Appellant
and
Her Majesty The Queen

Respondent
- and -
**Director of Public Prosecutions of Canada, Attorney General of British Columbia,
Canadian Civil Liberties Association and Criminal Lawyers' Association (Ontario)**
Intervenors

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

JOINT REASONS FOR JUDGMENT: McLachlin C.J. and Charron J. (LeBel, Fish and Abella JJ. c
(paras. 1 to 149) oncurring)

PARTIALLY CONCURRING REASONS: Binnie J.
(paras. 150 to 184)

PARTIALLY CONCURRING REASONS:
(paras. 185 to 230) Deschamps J.

R. v. Grant, 2009 SCC 32, [2009] 2 S.C.R. 353

Donnohue Grant

Appellant

v.

Her Majesty The Queen

Respondent

and

**Director of Public Prosecutions of Canada,
Attorney General of British Columbia,
Canadian Civil Liberties Association and
Criminal Lawyers' Association (Ontario)**

Intervenors

Indexed as: R. v. Grant

Neutral citation: 2009 SCC 32.

File No.: 31892.

2008: April 24; 2009: July 17.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Arbitrary detention — Right to counsel — Encounter between accused and police going from general neighbourhood policing to situation where police effectively took control over accused and attempted to elicit incriminating information — Whether police conduct would cause a reasonable person in accused's position to conclude that he or she was not free to go and had to comply with police demand — Whether accused arbitrarily detained — Whether accused's right to counsel infringed — Meaning of "detention" in ss. 9 and 10 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Enforcement — Exclusion of evidence — Firearm discovered as result of accused's statements taken in breach of his right against arbitrary detention and right to counsel — Firearm admitted into evidence at trial and accused convicted of five firearms offences — Whether admission of firearm bringing administration of justice into disrepute — Revised framework for determining whether evidence obtained in breach of constitutional rights must be excluded — Canadian Charter of Rights and Freedoms, s. 24(2).

Criminal law — Firearms — Possession of firearm for purposes of weapons trafficking — Whether simple movement of firearm from one place to another without changing hands amounts to weapons trafficking — Meaning of "transfer" of weapon for purposes of ss. 84, 99 and 100 of Criminal Code, R.S.C. 1985, c. C-46.

Three police officers were on patrol for the purposes of monitoring an area near schools with a history of student assaults, robberies, and drug offences. W and F were dressed in plainclothes and driving an unmarked car. G was in uniform and driving a marked police car. The accused, a young black man, was walking down a sidewalk when he came to the attention of W and F. As the two officers drove past, the accused stared at them, while at the same time fidgeting with his coat and pants in a way that aroused their suspicions. W and F suggested to G that he have a chat with the approaching accused to determine if there was any need for concern. G initiated an exchange with the accused, while standing on the sidewalk directly in his intended path. He asked him what was going on, and requested his name and address. At one point, the accused, behaving nervously, adjusted his jacket, which prompted the officer to ask him to keep his hands in front of him. After a brief period observing the exchange from their car, W and F approached the pair on the sidewalk, identified themselves to the accused as police officers by flashing their badges, and took up positions behind G, obstructing the way forward. G then asked the accused whether he had anything he should not have, to which he answered that he had “a small bag of weed” and a firearm. At this point, the officers arrested and searched the accused, seizing the marijuana and a loaded revolver. They advised him of his right to counsel and took him to the police station.

At trial, the accused alleged violations of his rights under ss. 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms*. The trial judge found no *Charter* breach and admitted the firearm. The accused was convicted of five firearms offences. The Court of Appeal upheld the convictions for different reasons. It concluded that a detention had crystallized during the conversation with G, before the accused made his incriminating statements, and that the detention was arbitrary and in breach of s. 9 of the *Charter*. However, it held that the gun should be admitted into evidence under s. 24(2) of the *Charter*. The court agreed with the trial judge that the accused’s act of moving the gun from one place to another fell within the definition of “transfer” in the *Criminal Code*, and that this justified the conviction for possession of a firearm for the purposes of weapons trafficking.

Held : The appeal should be allowed on the trafficking charge and an acquittal entered. The appeal should be dismissed on all other counts.

Per McLachlin C.J. and LeBel, Fish, Abella and Charron JJ.: Existing jurisprudence on the issues of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results. It is the duty of the Court, without undermining the principles that animate the jurisprudence to date, to take a fresh look at the frameworks that have been developed for the resolution of these two issues. [3]

Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors: (a) the circumstances giving rise to the encounter as they would reasonably be perceived by the individual; (b) the nature of the police conduct; and (c) the particular characteristics or circumstances of the individual where relevant. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law. [32] [43-44]

In this case, the accused was detained within the meaning of ss. 9 and 10 of the *Charter* before being asked the questions that led him to disclose his possession of the firearm. The encounter began with G approaching the accused and making general inquiries. Such preliminary questioning is a legitimate exercise of police powers. G then told the accused to keep his hands in front of him. While this act, in isolation, might be insufficient to indicate detention, consideration of the entire context of what transpired from that point forward leads to the conclusion that the accused was detained. Two other officers approached, flashed their badges and took tactical adversarial positions behind G, who began to engage in questioning driven by, and indicative of, focussed suspicion of the accused. The sustained and restrictive tenor of the conduct after the direction to the accused to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond. At this point, the accused's liberty was clearly constrained and he was in need of the *Charter* protections associated with detention. The encounter took on the character of an interrogation, going from general neighbourhood policing to a situation where the police had effectively taken control over the accused and were attempting to elicit incriminating information. Although G's questioning was respectful, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by the accused's youth and inexperience. Because the test is an objective one, the fact that the accused did not testify as to his perceptions of the interaction is not fatal to his argument that there was a detention. The evidence supports his contention that a reasonable person in his position would conclude that his or her right to choose how to act had been removed by the police, given their conduct. [45] [47-52]

The evidence of the firearm was obtained in a manner that breached the accused's rights under ss. 9 and 10(b) of the *Charter*. An unlawful detention is necessarily arbitrary, in violation of s. 9. The officers acknowledged at trial that they did not have legal grounds or a reasonable suspicion to detain the accused prior to his incriminating statements. Therefore, the detention was arbitrary. The police also failed to advise the accused of his right to speak to a lawyer before the questioning that led to the discovery of the firearm. The right to counsel arises

immediately upon detention, whether or not the detention is solely for investigative purposes. [11]
[55] [57-58]

The criteria relevant to determining when, in “all the circumstances”, admission of evidence obtained by a *Charter* breach “would bring the administration of justice into disrepute” must be clarified. The purpose of s. 24(2), as indicated by its wording, is to maintain the good repute of the administration of justice. Viewed broadly, the term “administration of justice” embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole. The phrase “bring the administration of justice into disrepute” must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. While exclusion of evidence resulting in an acquittal may provoke immediate criticism, s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Section 24(2)’s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system. Section 24(2)’s focus is also societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. [66-70]

When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the *Charter*-protected interests of the accused, and (3) society’s interest in the adjudication of the case on its merits. At the first stage, the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. The more severe or deliberate the

state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage. The weighing process and the balancing of these concerns is a matter for the trial judge in each case. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination. [71-72] [76-77] [79] [86] [127]

Here, the gun was discovered as a result of the accused's statements taken in breach of the *Charter*. When the three-stage inquiry is applied to the facts of this case, a balancing of the factors favours the admission of the derivative evidence. The *Charter*-infringing police conduct was neither deliberate nor egregious and there was no suggestion that the accused was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions, but the point at which an encounter becomes a detention is not always clear and the officers' mistake in this case was an understandable one. Although the impact of the *Charter* breach on the accused's protected interests was significant, it was not at the most serious end of the scale. Finally, the gun was highly reliable evidence and was essential to a determination on the merits. The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision. However, when all these concerns are weighed, the courts below did not err in concluding that the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute. The significant impact of the breach on the accused's *Charter*-protected rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its

admission. However, the police officers were operating in circumstances of considerable legal uncertainty, and this tips the balance in favour of admission. [132-133] [139-140]

The accused's conviction for possession of a firearm for the purposes of weapons trafficking under s. 100(1) of the *Criminal Code* should be quashed on the ground that he did not "transfer" the firearm within the meaning of that section. A contextual reading of s. 100 and the related provisions reveals that Parliament intended to reserve the stiffest penalties for transfers that amount to weapons trafficking, not for the mere movement of a firearm from place to place. Since the trial judge did not find that the accused was in possession of the gun for the purpose of transferring it to another person, the s. 100(1) conviction cannot stand. [141] [143]

Per Binnie J.: The majority's approach to the definition of "detention" in ss. 9 and 10 of the *Charter* lays too much emphasis on the claimant's perception of psychological pressure, albeit as filtered through the eyes of the hypothetical reasonable person in the claimant's situation. The objective facts of such encounters as well as the perception of the police in initiating the encounter, and whatever information the police possess at the time or acquire as the encounter proceeds, all of which may or may not be known to the person stopped, should be factored into a more comprehensive analysis of when a "detention" occurs for *Charter* purposes. [150] [180]

The Court's embrace of a wholly claimant-centred approach may lead to the impression that it is more important to enquire whether the hypothetical reasonable person "in the individual's circumstances" would think himself or herself to be detained than whether he or she is detained. The perspective of the person stopped is important and it is true that there can be no detention unless the liberty of the person stopped is (or is reasonably perceived by that person to be) significantly constrained, but this does not exhaust the relevant considerations. [151]

It is important to be able to determine at what moment an interaction between the police and a member of the public is converted into a detention of that individual, thereby triggering the rights subsidiary to detention including the right to involve his or her lawyer.

Re-examining the concept of “psychological detention” with a view to broadening the perspectives from which the encounter is viewed is one way to ease the “obvious tension” between the requirement to inform detained persons of their right to counsel and the proper and effective use of brief investigative detentions. The police know, but the claimant may not know, the point at which he or she graduates from being a person of interest to a person around whom suspicion is starting to focus, and becomes a person whose legal rights are seriously in issue. [153] [160] [165] [177]

There are a number of problems with the Court’s continuing endorsement of the *Therens* approach for the purpose of determining when a simple interaction crystallizes into a detention. Insistence that the claimant’s circumstances be viewed from the more detached perspective of a “reasonable person” in some cases exaggerates the ability of ordinary people to stand up to police assertion of authority, and may compel the conclusion that the claimant had the choice to walk away whereas in reality no such choice existed. On the other hand, if the concept of the reasonable person is intended to describe average cooperative members of the public, the Canadian reality is that such people will almost always regard a direction from a police officer as a demand that must be complied with. Viewed in this way, police instructions or demands readily constrain a claimant’s choice to leave and, therefore, even the less intrusive encounters between the police and citizens ought frequently to be declared detentions under the claimant-centred approach adopted by the majority. [166] [170]

A further problem in calibrating the “reasonable person” is to define exactly what information this fictional person possesses and what experience he or she brings to the assessment of the encounter. This is of particular relevance to visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive and subsequently argued by the police to be sufficient grounds of suspicion to justify a *Mann* detention. The police perspective on such encounters, whether or not conveyed to the person stopped, is relevant. In the absence of explicit criteria various judges will tend to read into the “reasonable person” their own projections

of the moment at which, in their view, the person stopped ought to be able to call a lawyer. This may encourage a results-oriented analysis. [169] [172-174]

The *Therens* approach does not take into account adequately what the police know and when they knew it except insofar as this information is conveyed to the person stopped, but the police may not consider it to be in their interest to convey the information. Apparent general inquiries by the police may be designed, unknown to the person stopped, to elicit the missing piece by way of self-incrimination. Possession of such knowledge may in fact place the police in an adversarial relationship with the person approached whether that person is aware of the jeopardy or not. It is the adversarial relationship together with the “stop” that generates the need for counsel. On the other hand, a more benign police purpose may deprive even an unambiguous police command of the legal effect of a detention, and thereby enure to the benefit of the prosecution. [167] [178-179]

A finding of detention requires a police command or direction as well as compliance by the person claiming a s. 9 detention in the reasonable belief that there was no other choice. However, police words and conduct should be interpreted in light of the purpose of the encounter from the police perspective, whether disclosed to the person from whom cooperation was requested or not. Moreover, when considering the perception of the person stopped, serious weight should be given to the values and experience of the person actually stopped, including the experience of visible minorities. [176-177]

On the facts of this case, the conclusion of the majority that the accused was arbitrarily detained is agreed with. The purpose of the police officers was to investigate crime, whether actual or anticipated. The police had no information whatsoever that the accused may have been implicated in criminal activity or even whether a crime had been committed. The police order to the accused to “keep his hands in front of him” crystallized the detention. However, the finding of a detention is properly the product not only of the accused’s perception (filtered through the hypothetical reasonable person) but also of the objective facts of why the encounter was initiated

(crime detection) and the perception of the police, who at the outset lacked any information on which to base such aggressive tactics. The majority's analysis under s. 24(2) and the consequent disposition of the appeal are also agreed with. [181-184]

Per Deschamps J.: The facts of this case, considered as a whole, support the conclusion that the accused was detained. The detention came to a head when the officers asked him certain direct questions that, viewed objectively, might have caused a reasonable person to feel singled out, cornered and, therefore, detained. Owing to the nature of the questions asked by G, the line between prevention and suppression was crossed. G asked the accused if he had committed a crime. Once such a question had been asked of a person who had known he was being watched from the time he had crossed paths with W and F — who had since arrived on the scene — the encounter could no longer be described simply as an interaction between a police officer and a member of the public. The exchange was no longer an impromptu conversation that the accused would think he could walk away from as he pleased. [191]

Regarding the factors to consider in deciding whether to admit or exclude evidence obtained in violation of a *Charter* right, the new test proposed by the majority is inconsistent with the purpose of s. 24(2) of the *Charter*, which is to maintain public confidence in the administration of justice. The statement that s. 24(2) has a long-term societal purpose is of great significance for the identification of the factors to be considered in the analysis. The proposed test, by focussing the analysis on the conduct of the police in the first branch and on the interest of the accused in the second, and by attaching less importance to the seriousness of the offence in the third, does not give sufficient consideration to the long-term societal interest that must guide the judge in reaching a decision. In determining whether the maintenance of confidence in the administration of justice would be better served by admitting the evidence or by excluding it, the judge must instead strike a fair balance between two societal interests: the public interest in protecting *Charter* rights and the public interest in an adjudication on the merits. On the first branch, any facts that help show the effect of the violation on the protected rights must be considered, including the state conduct that

gave rise to the violation. The impact of a violation on protected interests will vary with the circumstances, and the judge must therefore consider all the facts that will enable him or her to assess the long-term impact of his or her decision on the reputation of the administration of justice, that is, not on the rights of the accused being tried, but rather on those of every individual whose rights might be violated in a similar way. As for the second branch, whether the evidence is reliable and whether it is essential or peripheral are factors that are crucial to the maintenance of public confidence, as is the seriousness of the offence. [185] [195] [198] [202] [223-226]

In this case, to admit the weapon in evidence would have a positive effect on the reputation of the administration of justice. According to the trial judge's findings of fact, the exchange lasted only a few minutes, the officers were polite to the accused, and they were motivated by a desire to take a proactive approach in patrolling an area near schools with serious problems related to youth crime and safety. On the protection of the public, it should be noted that the charge is firearms-related, that it would be impossible to establish guilt without the evidence and that the evidence is eminently reliable. When balanced against each other, the limited impact of the violation on the protected interests and the great importance of the evidence for the purposes of the trial favour admitting the physical evidence. [228-229]

There is agreement with the majority on the charge of possession of a firearm for the purposes of trafficking. [229]

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APPEAL from a judgment of the Ontario Court of Appeal (McMurtry C.J.O. and Laskin and Lang JJ.A.) (2006), [2006 CanLII 18347 \(ON CA\)](#), 81 O.R. (3d) 1, 213 O.A.C. 127, 209 C.C.C. (3d) 250, 38 C.R. (6th) 58, 143 C.R.R. (2d) 223, 2006 CarswellOnt 3352, [2006] O.J. No. 2179 (QL), affirming the accused's conviction entered by M. H. Harris J., 2004 CarswellOnt 8783. Appeal allowed in part.

Jonathan Dawe and Frank R. Addario, for the appellant.

Michal Fairburn and John Corelli, for the respondent.

James C. Martin and *Paul Adams*, for the intervener the Director of Public Prosecutions of Canada.

Michael Brundrett and *Margaret A. Mereigh*, for the intervener the Attorney General of British Columbia.

Don Stuart and *Graeme Norton*, for the intervener the Canadian Civil Liberties Association.

Marlys A. Edwardh and *Jessica R. Orkin*, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of McLachlin C.J. and LeBel, Fish, Abella and Charron JJ. was delivered by

THE CHIEF JUSTICE AND CHARRON J. —

I. Overview

[1] Mr. Grant appeals his convictions on a series of firearms offences, relating to a gun seized by police during an encounter on a Toronto sidewalk. The gun was entered as evidence against Mr. Grant and formed the basis of his convictions. The question on this appeal is whether that evidence was obtained in breach of Mr. Grant's *Charter* rights, and if so, whether the evidence should have been excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms*.

[2] Resolving these questions requires us to revisit two important and contentious areas of criminal law *Charter* jurisprudence. The first is the definition of “detention” under ss. 9 and 10 of the *Charter*. The second is the test for exclusion of evidence obtained in violation of the *Charter* pursuant to s. 24(2).

[3] The submissions before us reveal that existing jurisprudence on the issues of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results. Without undermining the principles that animate the jurisprudence to date, we find it our duty, given the difficulties that have been pointed out to us, to take a fresh look at the frameworks that have been developed for the resolution of these two issues. We will also consider the subsidiary issue that arises in this case: the meaning of “transfer” of a weapon for the purposes of ss. 84, 99 and 100 of the *Criminal Code*, R.S.C. 1985, c. C-46.

II. Facts

[4] The encounter at the centre of this appeal occurred at mid-day on November 17, 2003, in the Greenwood and Danforth area of Toronto. With four schools in the area and a history of student assaults, robberies, and drug offences occurring over the lunch hour, the three officers involved in the encounter were on patrol for the purposes of monitoring the area and maintaining a safe student environment. Two of the officers, Constables Worrell and Forde, were dressed in plainclothes and driving an unmarked car. Although on patrol, their primary task was to visit the various schools to determine if there were persons on school property who should not have been there — either non-students or students from another school. The third officer, Constable Gomes, was in uniform and driving a marked police car. On “directed patrol”, he had been tasked with maintaining a visible police presence in the area in order to provide student reassurance and to deter crime during the high school lunch period.

[5] Mr. Grant, a young black man, was walking northbound on Greenwood Avenue when he came to the attention of Constables Worrell and Forde. As the two officers drove past, Cst. Worrell testified that the appellant “stared” at them in an unusually intense manner and continued

to do so as they proceeded down the street, while at the same time “fidgeting” with his coat and pants in a way that aroused their suspicions. Given their purpose for being in the area and based on what he had just seen, Cst. Worrell decided that “maybe we should have a chat with this guy and see what’s up with him”. Cst. Worrell wanted to know whether Mr. Grant was a student at one of the schools they were assigned to monitor, and, if he was not, whether he was headed to one of the schools anyway. Noticing Cst. Gomes parked on the street ahead of Mr. Grant, and in light of his uniformed attire, the two plainclothes officers suggested to Cst. Gomes that he “have a chat” with the approaching appellant to determine if there was any need for concern.

[6] Cst. Gomes then got out of his car and initiated an exchange with Mr. Grant, while standing on the sidewalk directly in his intended path. The officer asked the appellant “what was going on”, and requested his name and address. In response, the appellant provided a provincial health card. At one point, the appellant, behaving nervously, adjusted his jacket, prompting the officer to ask him to “keep his hands in front of him”. By this point, the two other officers had returned and parked on the side of the street.

[7] Cst. Worrell testified on cross-examination that he and Cst. Forde pulled up because he got a funny feeling based on Mr. Grant’s way of looking over at them, looking around “all over the place”, and adjusting himself. On direct examination he said that “[h]e still seemed to be, I don’t know, looking a bit nervous the way he was looking around, looking at us, looking around when speaking to Officer Gomes. And at this time, I suggested to my partner, you know, I don’t think it would hurt if we just go up to Officer Gomes and just stand by, just to make sure everything was okay.” Thus, after a brief period observing the exchange from their car, the two officers approached the pair on the sidewalk, identified themselves to the appellant as police officers by flashing their badges, and took up positions behind Cst. Gomes, obstructing the way forward. The exchange between Cst. Gomes and Mr. Grant subsequent to the arrival of the two officers was as follows:

Q. Have you ever been arrested before?

A. I got into some trouble about three years ago.

Q. Do you have anything on you that you shouldn't?

A. No. Well, I got a small bag of weed.

Q. Where is it?

A. It's in my pocket.

Q. Is that it?

A. (Male puts his head down.) Yeah. Well, no.

Q. Do you have other drugs on you?

A. No, I just have the weed, that's it.

Q. Well, what is it that you have?

A. I have a firearm.

[8] At this point, the officers arrested and searched the appellant, seizing the marijuana and a loaded revolver. They then advised Mr. Grant of his right to counsel and took him to the police station.

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III. Judgments Below

[9] At trial, Mr. Grant alleged violations of his rights under ss. 8, 9 and 10(b) of the *Charter*. The trial judge held that the officers' inquiries did not amount to a search within the meaning of s. 8. He further concluded that Mr. Grant was not detained prior to his arrest or, if he was detained, he waived his rights by cooperating with the officers' requests. Having found no *Charter* breach, he had no difficulty admitting the firearm: 2004 CarswellOnt 8779. Mr. Grant was

convicted of five firearms offences, including possession of a restricted firearm for the purpose of transferring it without lawful authority (s. 100(1) of the *Criminal Code*).

[10] In the Ontario Court of Appeal, Laskin J.A. held that the trial judge's conclusion on the question of detention was undermined by several mischaracterizations as to what had occurred, thereby entitling the court to revisit the issue. He concluded that a detention had crystallized during the conversation with Cst. Gomes, before the appellant made his incriminating statements. Because the officers had no reasonable grounds to detain the appellant, the detention was arbitrary and a breach of s. 9 was established. Laskin J.A. did not deal with s. 10(b) and found no breach of s. 8. On the question of exclusion under s. 24(2), Laskin J.A. determined that the firearm was "derivative" evidence emanating from a self-incriminatory statement and would very often be excluded on that basis alone. However, after a review of recent developments in the s. 24(2) jurisprudence, Laskin J.A. concluded that the admission of the gun would not unduly undermine trial fairness. He held that the reputé of the administration of justice would be damaged more by the exclusion of the gun than by its admission. He therefore held that the gun was properly admitted into evidence. On the firearms issue, Laskin J.A. held that Mr. Grant's act of moving the gun from one place to another fell within the definition of "transfer" in s. 84 of the *Code*, justifying the conviction under s. 100(1). He therefore dismissed the appeal: (2006), 2006 CanLII 18347 (ON CA), 81 O.R. (3d) 1.

IV. Analysis

A. *Breach of the Charter*

[11] The first issue in this case is whether the evidence of the gun was obtained in a manner that breached Mr. Grant's rights under the *Charter*. Mr. Grant argues that the police breached his *Charter* rights by arbitrarily detaining him contrary to s. 9 and by failing to advise him of his right

to speak to a lawyer contrary to s. 10(b), before the questioning that led to the discovery of the firearm that is the subject of these charges. Alternatively, if the Court finds he was not detained, Mr. Grant argues that the Court of Appeal erred in finding that there was no violation of s. 8's protection against unreasonable search and seizure.

[12] The threshold question is whether the appellant was detained before he produced the firearm and was arrested. If he was detained, the detention was arbitrary; all parties are agreed that the police lacked legal grounds to detain the appellant. Further, if detained, Mr. Grant was entitled to be advised of the right to counsel at that point, which would establish breach of s. 10(b) of the *Charter*.

1. The Meaning of "Detention" Under the *Charter*

- (a) *The Positions of the Parties*

[13] Mr. Grant argues that he was detained before he made his inculpatory statements and revealed the gun. He contends that his liberty to choose to remain or leave was taken away by the conduct of the police officers in blocking his path, and that this detention was arbitrary because at this point the officers lacked reasonable grounds to detain him under the standard for investigative detention elaborated in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59. Because he was detained, he argues, the police were required to advise him under s. 10(b) that he had the right to speak to a lawyer.

[14] The Crown argues that Mr. Grant was not detained until the police arrested him after he disclosed his firearm, at which point they advised him of his right to talk to a lawyer. It says that the officers' prior conduct was not directed at curtailing the appellant's liberty, but rather at

protecting their own safety while asking him some questions. The Crown says that the officers were engaging in community policing, which involves a dynamic interaction between the police and the citizens they serve. The Crown contends that preliminary, non-coercive questioning pursuant to police policy is a legitimate exercise of investigative police powers, is essential to the effective fulfilment of the police's duty to enforce the law, and does not amount to detention triggering the right to counsel.

(b) *Interpretative Principles*

[15] As for any constitutional provision, the starting point must be the language of the section. Where questions of interpretation arise, a generous, purposive and contextual approach should be applied.

[16] Constitutional guarantees such as ss. 9 and 10 should be interpreted in a “generous rather than . . . legalistic [way], aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection” (*R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344). Unduly narrow, technical approaches to *Charter* interpretation must be avoided, given their potential to “subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*” (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 23).

[17] While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at pp. 36-30 and 36-31). While a narrow approach risks impoverishing a *Charter* right, an overly generous approach

risks expanding its protection beyond its intended purposes. In brief, we must construe the language of ss. 9 and 10 in a generous way that furthers, without overshooting, its purpose: *Big M Drug Mart*, at p. 344.

[18] To interpret “detention” in ss. 9 and 10 generously, yet purposively, we must consider the context in which it is embedded — in other words, the role it plays in conjunction with related protections in the *Charter*.

(c) *The Purpose of the Rights Linked to Detention*

[19] Detention represents a limit on the broad right to liberty enjoyed by everyone in Canada at common law and by virtue of s. 7 of the *Charter*, which guarantees that liberty will only be curtailed in accordance with the principles of fundamental justice. Section 9 of the *Charter* establishes that “[e]veryone has the right not to be arbitrarily detained or imprisoned”. Section 10 accords certain rights to people who are arrested or detained, including the right to retain and instruct counsel.

[20] The purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference. As recognized by this Court in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, “liberty”, for *Charter* purposes, is not “restricted to mere freedom from physical restraint”, but encompasses a broader entitlement “to make decisions of fundamental importance free from state interference” (para. 49). Thus, s. 9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification. The detainee’s interest in being able to make an informed

choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about.

[21] More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), [1985 CanLII 118 \(ON CA\)](#), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *Dedman v. The Queen*, [1985 CanLII 41 \(SCC\)](#), [1985] 2 S.C.R. 2, at p. 11, citing Martin J.A. in the Ontario Court of Appeal ((1981), [1981 CanLII 1631 \(ON CA\)](#), 32 O.R. (2d) 641, at p. 653):

Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless . . . [he] arrests him

See also *Application under s. 83.28 of the Criminal Code (Re)*, [2004 SCC 42](#), [2004] 2 S.C.R. 248, at para. 131. Where this choice has been removed — whether by physical or psychological compulsion — the individual is detained. Section 9 guarantees that the state’s ability to interfere with personal autonomy will not be exercised arbitrarily. Once detained, the individual’s choice whether to speak to the authorities remains, and is protected by the s. 10 informational requirements and the s. 7 right to silence.

[22] “Detention” also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered. These rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control. More specifically, they are designed to ensure that the person whose liberty has been curtailed retains an informed and effective *choice* whether to speak to state authorities, consistent with the overarching principle against self-incrimination. They also ensure that the person who is under the control of the state be afforded the opportunity to seek legal advice in order to assist in

regaining his or her liberty. As this Court observed in *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151:

In a broad sense, the purpose of ss. 7 to 14 is two-fold to preserve the rights of the detained individual, and to maintain the repute and integrity of our system of justice. More particularly, it is to the control of the superior power of the state vis-à-vis the individual who has been detained by the state, and thus placed in its power, that s. 7 and the related provisions that follow are primarily directed. The state has the power to intrude on the individual's physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power. [Emphasis added; pp. 179-80.]

[23] By setting limits on the power of the state and imposing obligations with regard to the detained person through the concept of detention, the *Charter* seeks to effect a balance between the interests of the detained individual and those of the state. The power of the state to curtail an individual's liberty by way of detention cannot be exercised arbitrarily and attracts a reciprocal obligation to accord the individual legal protection against the state's superior power.

(d) *Defining Detention*

[24] The word "detention" admits of many meanings. Read narrowly, "detention" can be seen as indicating situations where the police take explicit control over the person and command obedience. Read expansively, "detention" can be read as extending to even a fleeting interference or delay. Neither of these extremes offers an acceptable definition of "detention" as used in ss. 9 and 10 of the *Charter*.

[25] The first extreme was rejected by this Court in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, which held that detention for *Charter* purposes occurs when a state agent, by way of physical or psychological restraint, takes away an individual's choice simply to walk away. This encompasses not only explicit interference with the subject's liberty by way of physical interference or express command, but any form of "compulsory restraint". A person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (*Therens*, at p. 644). It is clear that a person may reasonably believe he or she has no choice in circumstances where there has been no formal assertion of police control. Thus the first interpretation must be rejected. This comports with the principle that a generous rather than legalistic approach must be applied to the interpretation of *Charter* principles and avoids cramping the purpose of the protections conferred by ss. 9 and 10 of the *Charter*.

[26] The second interpretation of "detention", reducing it to any interference, however slight, must also be rejected. As held in *Mann*, at para. 19, *per* Iacobucci J.:

. . . the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

It is clear that, while the forms of interference s. 9 guards against are broadly defined to include interferences with both physical and mental liberty, not every trivial or insignificant interference with this liberty attracts *Charter* scrutiny. To interpret detention this broadly would trivialize the applicable *Charter* rights and overshoot their purpose. Only the individual whose liberty is

meaningfully constrained has genuine need of the additional rights accorded by the *Charter* to people in that situation.

[27] Having rejected the extreme positions advanced, the question is where between them the line that marks detention under ss. 9 and 10 is to be traced. This is a question that is not easily answered in the abstract; as in so many areas of the law, the most useful guidance derives from the decided cases. In what follows, we set out the general principle of choice that underlies the determination. We then discuss situations which illustrate where the line should be drawn.

[28] The general principle that determines detention for *Charter* purposes was set out in *Therens*: a person is detained where he or she “submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist” (*per* Le Dain J., at p. 644). This principle is consistent with the notion of choice that underlies our conception of liberty and, as such, shapes our interpretation of ss. 9 and 10 of the *Charter*. When detention removes the “choice to do otherwise” but comply with a police direction, s. 10(b) serves an indispensable purpose. It protects, among other interests, the detainee’s ability to choose whether to cooperate with the investigation by giving a statement. The ambit of detention for constitutional purposes is informed by the need to safeguard this choice without impairing effective law enforcement. This explains why the extremes of formally asserted control on the one hand and a passing encounter on the other have been rejected; the former restricts detention in a way that denies the accused rights he or she needs and should have, while the latter would confer rights where they are neither necessary or appropriate.

[29] The language of ss. 9 and 10 is consistent with this purpose-based approach to detention. The pairing of “detained” and “imprisoned” in s. 9 provides textual guidance for determining where the constitutional line between justifiable and unjustifiable interference should be drawn. “Imprisonment” connotes total or near-total loss of liberty. The juxtaposition of

“imprisoned” with “detained” suggests that a “detention” requires significant deprivation of liberty. Similarly, the words “arrest or detention” in s. 10 suggest that a “detention” exists when the deprivation of liberty may have legal consequences. This linguistic context requires exclusion of police stops where the subject’s rights are not seriously in issue.

[30] Moving on from the fundamental principle of the right to choose, we find that psychological constraint amounting to detention has been recognized in two situations. The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject’s position would feel so obligated. The rationale for this second form of psychological detention was explained by Le Dain J. in *Therens* as follows:

In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist. [Emphasis added; p. 644.]

[31] This second form of psychological detention — where no legal compulsion exists — has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police. As discussed in more detail below and summarized at para. 44, the focus must be on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.

[32] The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections. However, the subjective intentions of the police are not determinative. (Questions such as police “good faith” may become relevant when the test for exclusion of evidence under s. 24(2) is applied, in cases where a *Charter* breach is found.) While the test is objective, the individual’s particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual’s right to choose, and conduct that does not.

[33] In most cases, it will be readily apparent whether or not an encounter between the police and an individual results in a detention. Making the task easier is the fact that what would reasonably be understood by all concerned is often informed by generally understood legal rights and duties, as a few examples illustrate.

[34] At one end of the spectrum of possibilities, detention overlaps with arrest or imprisonment and the *Charter* will clearly apply. Similarly, a legal obligation to comply with a police demand or direction, such as a breath sample demand at the roadside, clearly denotes s. 9 detention. As Le Dain J. observed in *Therens*, “[i]t is not realistic to speak of a person who is liable to arrest and prosecution for refusal to comply with a demand which a peace officer is empowered by statute to make as being free to refuse to comply” (p. 643).

[35] At the other end of the spectrum lie encounters between individual and police where it would be clear to a reasonable person that the individual is not being deprived of a meaningful choice whether or not to cooperate with a police demand or directive and hence not detained.

[36] We may rule out at the outset situations where the police are acting in a non-adversarial role and assisting members of the public in circumstances commonly accepted as lacking the essential character of a detention. In many common situations, reasonable people understand that the police are not constraining individual choices, but rather helping people or gathering information. For instance, the reasonable person would understand that a police officer who attends at a medical emergency on a 911 call is not detaining the individuals he or she encounters. This is so even if the police, in taking control of the situation, effectively interfere with an individual’s freedom of movement. Such deprivations of liberty will not be significant enough to attract *Charter* scrutiny because they do not attract legal consequences for the concerned individuals.

[37] Another often-discussed situation is when police officers approach bystanders in the wake of an accident or crime, to determine if they witnessed the event and obtain information that may assist in their investigation. While many people may be happy to assist the police, the law is clear that, subject to specific provisions that may exceptionally govern, the citizen is free to walk away: *R. v. Grafe* (1987), 1987 CanLII 170 (ON CA), 36 C.C.C. (3d) 267 (Ont. C.A.). Given the existence of such a generally understood right in such circumstances, a reasonable person would not conclude that his or her right to choose whether to cooperate with them has been taken away. This conclusion holds true even if the person may feel compelled to cooperate with the police out of a sense of moral or civic duty. The Ontario Court of Appeal adverted to this concept in *Grafe*, where Krever J.A. wrote, at p. 271:

The law has long recognized that although there is no legal duty there is a moral or social duty on the part of every citizen to answer questions put to him or her by the police and, in that way to assist the police: see, for example, *Rice v. Connolly*, [1966] 2 All E.R. 649 at p. 652, *per* Lord Parker C.J. Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed. To be asked questions, in these circumstances, cannot be said to be a deprivation of liberty or security.

[38] In the context of investigating an accident or a crime, the police, unbeknownst to them at that point in time, may find themselves asking questions of a person who is implicated in the occurrence and, consequently, is at risk of self-incrimination. This does not preclude the police from continuing to question the person in the pursuit of their investigation. Section 9 of the *Charter* does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel.

[39] Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(b) rights. That the obligation arises only on detention represents part of the balance between, on the one hand, the individual rights protected by ss. 9 and 10 and enjoyed by all members of society, and on the other, the collective interest of all members of society in the ability of the police to act on their behalf to investigate and prevent crime.

[40] A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. This is the situation that arises in this case.

[41] As discussed earlier, general inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter into a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the *Charter* does not

confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.

[42] The length of the encounter said to give rise to the detention may be a relevant consideration. Consider the act of a police officer placing his or her hand on an individual's arm. If sustained, it might well lead a reasonable person to conclude that his or her freedom to choose whether to cooperate or not has been removed. On the other hand, a fleeting touch may not, depending on the circumstances, give rise to a reasonable conclusion that one's liberty has been curtailed. At the same time, it must be remembered that situations can move quickly, and a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed.

[43] Whether the individual has been deprived of the right to choose simply to walk away will depend, to reiterate, on all the circumstances of the case. It will be for the trial judge to determine on all the evidence. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law.

[44] In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal

obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

2. Was the Appellant Detained Prior to Incriminating Himself?

[45] Against this background, we return to the question at hand: Was Mr. Grant detained within the meaning of ss. 9 and 10 of the *Charter* before the questions that led him to disclose his firearm? The trial judge held that he was not. An appellate court must approach a trial judge's decision on this issue with appropriate deference. However, we agree with Laskin J.A. that the trial judge's conclusion on the question of detention is undermined by certain key findings of fact

that cannot reasonably be supported by the evidence. In the circumstances, it is necessary to revisit the issue.

[46] This is not a clear case of physical restraint or compulsion by operation of law. Accordingly, we must consider all relevant circumstances to determine if a reasonable person in Mr. Grant's position would have concluded that his or her right to choose how to interact with the police (i.e. whether to leave or comply) had been removed.

[47] The encounter began with Cst. Gomes approaching Mr. Grant (stepping in his path) and making general inquiries. Such preliminary questioning is a legitimate exercise of police powers. At this stage, a reasonable person would not have concluded he or she was being deprived of the right to choose how to act, and for that reason there was no detention.

[48] Cst. Gomes then told the appellant to "keep his hands in front of him". This act, viewed in isolation, might be insufficient to indicate detention, on the ground that it was simply a precautionary directive. However, consideration of the entire context of what transpired from this point forward leads to the conclusion that Mr. Grant was detained.

[49] Two other officers approached, flashing their badges and taking tactical adversarial positions behind Cst. Gomes. The encounter developed into one where Mr. Grant was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers. The nature of the questioning changed from ascertaining the appellant's identity to determining whether he "had anything that he should not". At this point the encounter took on the character of an interrogation,

going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were attempting to elicit incriminating information.

[50] Although Cst. Gomes was respectful in his questioning, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by Mr. Grant's youth and inexperience. Mr. Grant did not testify, so we do not know what his perceptions of the interaction actually were. However, because the test is an objective one, this is not fatal to his argument that there was a detention. We agree with Laskin J.A.'s conclusion that Mr. Grant was detained. In our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct.

[51] The police conduct that gave rise to an impression of control was not fleeting. The direction to Mr. Grant to keep his hands in front, in itself inconclusive, was followed by the appearance of two other officers flashing their badges and by questioning driven by focussed suspicion of Mr. Grant. The sustained and restrictive tenor of the conduct after the direction to Mr. Grant to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond.

[52] We conclude that Mr. Grant was detained when Cst. Gomes told him to keep his hands in front of him, the other two officers moved into position behind Cst. Gomes, and Cst. Gomes embarked on a pointed line of questioning. At this point, Mr. Grant's liberty was clearly constrained and he was in need of the *Charter* protections associated with detention.

3. Was the Detention Arbitrary Under Section 9?

[53] We have determined that the appellant was detained prior to his arrest. The question at this point is whether the detention was “arbitrary” within the meaning of s. 9.

[54] The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person’s liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: “This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law” (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 88). Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

[55] Earlier suggestions that an unlawful detention was not necessarily arbitrary (see *R. v. Duguay* (1985), 1985 CanLII 112 (ON CA), 18 C.C.C. (3d) 289 (Ont. C.A.)) have been overtaken by *Mann*, in which this Court confirmed the existence of a common law police power of investigative detention. The concern in the earlier cases was that an arrest made on grounds falling just short of the “reasonable and probable grounds” required for arrest should not automatically be considered arbitrary in the sense of being baseless or capricious. *Mann*, in confirming that a brief investigative detention based on “reasonable suspicion” was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.

[56] This approach mirrors the framework developed for assessing unreasonable searches and seizures under s. 8 of the *Charter*. Under *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, and subsequent cases dealing with s. 8, a search must be authorized by law to be reasonable;

the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. We add that, as with other rights, the s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures “prescribed by law as can be demonstrably justified in a free and democratic society”: see *R. v. Hufsky*, 1988 CanLII 72 (SCC), [1988] 1 S.C.R. 621, and *R. v. Ladouceur*, 1990 CanLII 108 (SCC), [1990] 1 S.C.R. 1257.

[57] Here, the officers acknowledged at trial that they did not have legal grounds or reasonable suspicion to detain the accused prior to his incriminating statements. No issue was taken with this concession on appeal. We therefore conclude that the detention was arbitrary and in breach of s. 9.

4. Was the Appellant’s Section 10(b) Right to Counsel Infringed?

[58] In *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, we conclude that the s. 10(b) right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes. That being the case, s. 10(b) of the *Charter* required the police to advise Mr. Grant that he had the right to speak to a lawyer, and to give him a reasonable opportunity to obtain legal advice if he so chose, before proceeding to elicit incriminating information from him. Because he now faced significant legal jeopardy and had passed into the effective control of the police, the appellant was “in immediate need of legal advice”: *R. v. Brydges*, 1990 CanLII 123 (SCC), [1990] 1 S.C.R. 190, at p. 206. Because the officers did not believe they had detained the appellant, they did not comply with their obligations under s. 10(b). The breach of s. 10(b) is established.

B. *Exclusion of the Evidence*

1. Background

[59] When must evidence obtained in violation of a person's *Charter* rights be excluded?

Section 24(2) of the *Charter* provides the following answer:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[60] The test set out in s. 24(2) — what would bring the administration of justice into disrepute having regard to all the circumstances — is broad and imprecise. The question is what considerations enter into making this determination. In *Collins* and in *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607, this Court endeavoured to answer this question. The *Collins/Stillman* framework, as interpreted and applied in subsequent decisions, has brought a measure of certainty to the s. 24(2) inquiry. Yet the analytical method it imposes and the results it sometimes produces have been criticized as inconsistent with the language and objectives of s. 24(2). In order to understand these criticisms, it is necessary to briefly review the holdings in *Collins* and *Stillman*.

[61] In *Collins*, the Court (*per* Lamer J., as he then was) proceeded by grouping the factors to be considered under s. 24(2) into three categories: (1) whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against himself or herself; (2) the seriousness of the *Charter* breach; and (3) the effect of excluding the evidence on the long-term repute of the administration of justice. While Lamer J. acknowledged that these categories were

merely a “matter of personal preference” (p. 284), they quickly became formalized as the governing test for s. 24(2).

[62] *Collins* shed important light on the factors relevant to determining admissibility of *Charter*-violative evidence under s. 24(2). However, the concepts of trial fairness and conscription under the first branch of *Collins* introduced new problems of their own. Moreover, questions arose about what work (if any) remained to be done under the second and third categories, once conscription leading to trial unfairness had been found. Finally, issues arose as to how to measure the seriousness of the breach under the second branch and what weight, if any, should be put on the seriousness of the offence charged in deciding whether to admit evidence.

[63] The admission of physical or “real” evidence obtained from the body of the accused in breach of his or her *Charter* rights proved particularly problematic. Ten years after *Collins*, the Court revisited this question in *Stillman*. The majority held that evidence obtained in breach of the *Charter* should, at the outset of the s. 24(2) inquiry, be classified as either “conscriptive” or “non-conscriptive”. Evidence would be classified as conscriptive where “an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples”: *Stillman*, at para. 80, *per* Cory J. The category of conscriptive evidence was also held to include real evidence discovered as a result of an unlawfully conscripted statement. This is known as derivative evidence.

[64] *Stillman* held that conscriptive evidence is generally inadmissible — because of its presumed impact on trial fairness — unless if it would have been independently discovered. Despite reminders that “all the circumstances” must always be considered under s. 24(2) (see *R. v. Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 S.C.R. 206, *per* Sopinka J., *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, *per* LeBel J.), *Stillman* has generally been read as creating an all-but-

automatic exclusionary rule for non-discoverable conscriptive evidence, broadening the category of conscriptive evidence and increasing its importance to the ultimate decision on admissibility.

[65] This general rule of inadmissibility of all non-discoverable conscriptive evidence, whether intended by *Stillman* or not, seems to go against the requirement of s. 24(2) that the court determining admissibility must consider “all the circumstances”. The underlying assumption that the use of conscriptive evidence always, or almost always, renders the trial unfair is also open to challenge. In other contexts, this Court has recognized that a fair trial “is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused”: *R. v. Harrer*, 1995 CanLII 70 (SCC), [1995] 3 S.C.R. 562, at para. 45. It is difficult to reconcile trial fairness as a multifaceted and contextual concept with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances in which it was obtained. In our view, trial fairness is better conceived as an overarching systemic goal than as a distinct stage of the s. 24(2) analysis.

[66] This brief review of the impact of *Collins* and *Stillman* brings us to the heart of our inquiry on this appeal: clarification of the criteria relevant to determining when, in “all the circumstances”, admission of evidence obtained by a *Charter* breach “would bring the administration of justice into disrepute”.

2. Overview of a Revised Approach to Section 24(2)

[67] The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term “administration of justice” is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly,

however, the term embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.

[68] The phrase “bring the administration of justice into disrepute” must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall reputation of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[69] Section 24(2)’s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the reputation of the justice system.

[70] Finally, s. 24(2)’s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term reputation of the justice system.

[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s.

24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

(a) *Seriousness of the *Charter*-Infringing State Conduct*

[72] The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

[73] This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s.

24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.

[74] State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

[75] Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach: *R. v. Silveira*, 1995 CanLII 89 (SCC), [1995] 2 S.C.R. 297, *per* Cory J. “Good faith” on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, 1989 CanLII 109 (SCC), [1989] 1 S.C.R. 59, at p. 87, *per* Dickson C.J.; *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3, at pp. 32-33, *per* Sopinka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

(b) *Impact on the Charter-Protected Interests of the Accused*

[76] This inquiry focusses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

[77] To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) — all stemming from the principle against self-incrimination: *R. v. White*, 1999 CanLII 689 (SCC), [1999] 2 S.C.R. 417, at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

[78] Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

(c) *Society's Interest in an Adjudication on the Merits*

[79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.

[80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray*, 1970 CanLII 2 (SCC), [1971] S.C.R. 272) is inconsistent with the *Charter*'s affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.

[81] This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[82] The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to “balance the interests of truth with the integrity of the justice system”: *Mann*, at para. 57, *per* Iacobucci J. The court must ask “whether the vindication of the specific *Charter* violation through the exclusion of evidence exacts too great a toll on the truth-seeking goal of the criminal trial”: *R. v. Kitaitchik* (2002), 2002 CanLII 45000 (ON CA), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.

[83] The importance of the evidence to the prosecution’s case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the reputation of the administration of justice where the remedy effectively guts the prosecution.

[84] It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society’s interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term reputation of the justice system that is s. 24(2)’s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) “operate independently of the type of crime for which the individual stands accused” (para. 51). And as Lamer J. observed in *Collins*, “[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be

left to that majority” (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term reputé of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

[85] To review, the three lines of inquiry identified above — the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits — reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the reputé of the administration of justice. Having made these inquiries, which encapsulate consideration of “all the circumstances” of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.

[86] In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.

3. Application to Different Kinds of Evidence

[87] We have seen that a trial judge on a s. 24(2) application for exclusion of evidence obtained in breach of the *Charter* must consider whether admission would bring the administration of justice into disrepute, having regard to the results of the three lines of inquiry identified above.

[88] We now turn to some of the types of evidence the cases have considered.

(a) *Statements by the Accused*

[89] Statements by the accused engage the principle against self-incrimination, “one of the cornerstones of our criminal law”: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 2. This Court in *White*, at para. 44, *per* Iacobucci J., described the principle against self-incrimination as “an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence”. The principle also informs “more specific procedural protections such as, for example, the right to counsel in s. 10(b), the right to non-compellability in s. 11(c), and the right to use immunity set out in s. 13”. Residual protection for the principle against self-incrimination is derived from s. 7.

[90] This case concerns s. 24(2). However, it is important to note at the outset that the common law confessions rule, quite apart from s. 24(2), provides a significant safeguard against the improper use of a statement against its maker. Where a statement is made to a recognized person in authority, regardless of whether its maker is detained at the time, it is inadmissible unless the Crown can establish beyond a reasonable doubt that it was made voluntarily. Only if such a statement survives scrutiny under the confessions rule and is found to be voluntary, does the s. 24(2) remedy of exclusion arise. Most commonly, this will occur because of added protections under s. 10(b) of the *Charter*.

[91] There is no absolute rule of exclusion of *Charter*-infringing statements under s. 24(2), as there is for involuntary confessions at common law. However, as a matter of practice, courts have tended to exclude statements obtained in breach of the *Charter*, on the ground that admission on balance would bring the administration of justice into disrepute.

[92] The three lines of inquiry described above support the presumptive general, although not automatic, exclusion of statements obtained in breach of the *Charter*.

[93] The first inquiry focusses on whether admission of the evidence would harm the reputation of justice by associating the courts with illegal police conduct. Police conduct in obtaining statements has long been strongly constrained. The preservation of public confidence in the justice system requires that the police adhere to the *Charter* in obtaining statements from a detained accused.

[94] The negative impact on the justice system of admitting evidence obtained through police misconduct varies with the seriousness of the violation. The impression that courts condone serious police misconduct is more harmful to the reputation of the justice system than the acceptance of minor or inadvertent slips.

[95] The second inquiry considers the extent to which the breach actually undermined the interests protected by the right infringed. Again, the potential to harm the reputation of the justice system varies with the seriousness of the impingement on the individual's protected interests. As noted, the right violated by unlawfully obtained statements is often the right to counsel under s. 10(b). The failure to advise of the right to counsel undermines the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination. These rights protect the

individual's interest in liberty and autonomy. Violation of these fundamental rights tends to militate in favour of excluding the statement.

[96] This said, particular circumstances may attenuate the impact of a *Charter* breach on the protected interests of the accused from whom a statement is obtained in breach of the *Charter*. For instance, if an individual is clearly informed of his or her choice to speak to the police, but compliance with s. 10(b) was technically defective at either the informational or implementational stage, the impact on the liberty and autonomy interests of the accused in making an informed choice may be reduced. Likewise, when a statement is made spontaneously following a *Charter* breach, or in the exceptional circumstances where it can confidently be said that the statement in question would have been made notwithstanding the *Charter* breach (see *R. v. Harper*, 1994 CanLII 68 (SCC), [1994] 3 S.C.R. 343), the impact of the breach on the accused's protected interest in informed choice may be less. Absent such circumstances, the analysis under this line of inquiry supports the general exclusion of statements taken in breach of the *Charter*.

[97] The third inquiry focusses on the public interest in having the case tried fairly on its merits. This may lead to consideration of the reliability of the evidence. Just as involuntary confessions are suspect on grounds of reliability, so may, on occasion, be statements taken in contravention of the *Charter*. Detained by the police and without a lawyer, a suspect may make statements that are based more on a misconceived idea of how to get out of his or her predicament than on the truth. This danger, where present, undercuts the argument that the illegally obtained statement is necessary for a trial of the merits.

[98] In summary, the heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the *Charter*, while the third factor, obtaining a decision

on the merits, may be attenuated by lack of reliability. This, together with the common law's historic tendency to treat statements of the accused differently from other evidence, explains why such statements tend to be excluded under s. 24(2).

(b) *Bodily Evidence*

[99] Bodily evidence is evidence taken from the body of the accused, such as DNA evidence and breath samples. [Section 8](#) of the [Charter](#) protects against unreasonable search and seizure, and hence precludes the state from obtaining such evidence in a manner that is unreasonable.

[100] The majority in *Stillman*, applying a capacious definition of conscription, held that bodily evidence is “conscriptive” and that its admission would affect trial fairness. This resulted in a near-automatic exclusionary rule for bodily evidence obtained contrary to the [Charter](#).

[101] *Stillman* has been criticized for casting the flexible in “all the circumstances” test prescribed by s. 24(2) into a straitjacket that determines admissibility solely on the basis of the evidence’s conscriptive character rather than all the circumstances; for inappropriately erasing distinctions between testimonial and real evidence; and for producing anomalous results in some situations: see, e.g., *Burlingham*, per L’Heureux-Dubé J.; *R. v. Schedel* (2003), [2003 BCCA 364 \(CanLII\)](#), 175 C.C.C. (3d) 193 (B.C.C.A.), at paras. [67-72](#), per Esson J.A.; D. M. Paciocco, “*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)” (1997), 2 *Can. Crim. L.R.* 163; R. Mahoney, “Problems with the Current Approach to [s. 24\(2\)](#) of the [Charter](#): An Inevitable Discovery” (1999), 42 *Crim. L.Q.* 443; S. Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the *Charter*” (2004), 49 *McGill L.J.* 105; D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at p. 581. We will briefly review each of these criticisms.

[102] The first criticism is that the *Stillman* approach transforms the flexible “all the circumstances” test mandated by s. 24(2) into a categorical conscriptive evidence test. Section 24(2) mandates a broad contextual approach rather than an automatic exclusionary rule: D. M. Paciocco, “The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule” (1989-90), 32 *Crim. L.Q.* 326; A. A. McLellan and B. P. Elman, “The Enforcement of the [Canadian Charter of Rights and Freedoms: An Analysis of Section 24](#)” (1983), 21 *Alta. L. Rev.* 205, at pp. 205-8; *Orbanski*, at para. 93. As stated in *Orbanski*, per LeBel J., the inquiry under s. 24(2) “amounts to finding a proper balance between competing interests and values at stake in the criminal trial, between the search for truth and the integrity of the trial All the *Collins* factors remain relevant throughout this delicate and nuanced inquiry” (para. 94).

[103] A flexible, multi-factored approach to the admissibility of the evidence is required, not only by the wording of s. 24(2) but by the wide variation between different kinds of bodily evidence. The seriousness of the police conduct and the impact on the accused’s rights of taking the bodily evidence, may vary greatly. Plucking a hair from the suspect’s head may not be intrusive, and the accused’s privacy interest in the evidence may be relatively slight. On the other hand, a body cavity or strip search may be intrusive, demeaning and objectionable. A one-size-fits-all conscription test is incapable of dealing with such differences in a way that addresses the point of the s. 24(2) inquiry — to determine if the admission of the evidence will bring the administration of justice into disrepute.

[104] Recent decisions suggest a growing consensus that the admissibility of bodily samples should not depend solely on whether the evidence is conscriptive: *R. v. Richfield* (2003), [2003 CanLII 52164 \(ON CA\)](#), 178 C.C.C. (3d) 23 (Ont. C.A.), per Weiler J.A.; *R. v. Dolynchuk* (2004), [2004 MBCA 45 \(CanLII\)](#), 184 C.C.C. (3d) 214 (Man. C.A.), per Steel J.A.; *R. v. Banman*, [2008](#)

MBCA 103, 236 C.C.C. (3d) 547, *per* MacInnes J.A. This Court in *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, dealing with the constitutionality of DNA warrant provisions in the *Criminal Code*, acknowledged that the *Charter* concerns raised by the gathering of non-testimonial evidence are better addressed by reference to the interests of privacy, bodily integrity and human dignity, than by a blanket rule that by analogy to compelled statements, such evidence is always inadmissible. See also: L. Stuesser, “*R. v. S.A.B.*: Putting ‘Self-Incrimination’ in Context” (2004), 42 *Alta. L. Rev.* 543.

[105] The second and related objection to a simple conscription test for the admissibility of bodily evidence under s. 24(2) is that it wrongly equates bodily evidence with statements taken from the accused. In most situations, statements and bodily samples raise very different considerations from the point of view of the administration of justice. Equating them under the umbrella of conscription risks erasing relevant distinctions and compromising the ultimate analysis of systemic disrepute. As Professor Paciocco has observed, “in equating intimate bodily substances with testimony we are not so much reacting to the compelled participation of the accused as we are to the violation of the privacy and dignity of the person that obtaining such evidence involves” (“*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)”, at p. 170). Nor does the taking of a bodily sample trench on the accused’s autonomy in the same way as may the unlawful taking of a statement. The pre-trial right to silence under s. 7, the right against testimonial self-incrimination in s. 11(c), and the right against subsequent use of self-incriminating evidence in s. 13 have informed the treatment of statements under s. 24(2). These concepts do not apply coherently to bodily samples, which are not communicative in nature, weakening self-incrimination as the sole criterion for determining their admissibility.

[106] A third criticism of the conscription test for admissibility of bodily evidence under s. 24(2) is that from a practical perspective, the conscriptive test has sometimes produced anomalous results, leading to exclusion of evidence that should, in principle and policy, be admitted: see

Dolynchuk; R. v. Shepherd, 2007 SKCA 29, 218 C.C.C. (3d) 113 (*per* Smith J.A. dissenting), *aff'd* 2009 SCC 35, [2009] 2 S.C.R. 527 (released concurrently); and *R. v. Padavattan* (2007), 2007 CanLII 18137 (ON SC), 223 C.C.C. (3d) 221 (Ont. S.C.J.), *per* Ducharme J. Notably, breath sample evidence tendered on impaired driving charges has often suffered the fate of automatic exclusion even where the breach in question was minor and would not realistically bring the administration of justice into disrepute. More serious breaches in other kinds of cases — for instance, those involving seizures of illegal drugs in breach of s. 8 — have resulted in admission on the grounds that the evidence in question was non-conscriptive. This apparent incongruity has justifiably raised concern.

[107] We conclude that the approach to admissibility of bodily evidence under s. 24(2) that asks simply whether the evidence was conscripted should be replaced by a flexible test based on all the circumstances, as the wording of s. 24(2) requires. As for other types of evidence, admissibility should be determined by inquiring into the effect admission may have on the reputation of the justice system, having regard to the seriousness of the police conduct, the impact of the *Charter* breach on the protected interests of the accused, and the value of a trial on the merits.

[108] The first inquiry informing the s. 24(2) analysis — the seriousness of the *Charter*-infringing conduct — is fact-specific. Admission of evidence obtained by deliberate and egregious police conduct that disregards the rights of the accused may lead the public to conclude that the court implicitly condones such conduct, undermining respect for the administration of justice. On the other hand, where the breach was committed in good faith, admission of the evidence may have little adverse effect on the reputation of the court process.

[109] The second inquiry assesses the danger that admitting the evidence may suggest that *Charter* rights do not count, thereby negatively impacting on the reputation of the system of justice.

This requires the judge to look at the seriousness of the breach on the accused's protected interests. In the context of bodily evidence obtained in violation of s. 8, this inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused. The seriousness of the intrusion on the accused may vary greatly. At one end of the spectrum, one finds the forcible taking of blood samples or dental impressions (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology. The greater the intrusion on these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused.

[110] The third line of inquiry — the effect of admitting the evidence on the public interest in having a case adjudicated on its merits — will usually favour admission in cases involving bodily samples. Unlike compelled statements, evidence obtained from the accused's body is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission.

[111] While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.

(c) *Non-Bodily Physical Evidence*

[112] The three inquiries under s. 24(2) will proceed largely as explained above. Again, under the first inquiry, the seriousness of the *Charter*-infringing conduct will be a fact-specific determination. The degree to which this inquiry militates in favour of excluding the bodily evidence will depend on the extent to which the conduct can be characterized as deliberate or egregious.

[113] With respect to the second inquiry, the *Charter* breach most often associated with non-bodily physical evidence is the s. 8 protection against unreasonable search and seizure: see, e.g., *Buhay*. Privacy is the principal interest involved in such cases. The jurisprudence offers guidance in evaluating the extent to which the accused's reasonable expectation of privacy was infringed. For example, a dwelling house attracts a higher expectation of privacy than a place of business or an automobile. An illegal search of a house will therefore be seen as more serious at this stage of the analysis.

[114] Other interests, such as human dignity, may also be affected by search and seizure of such evidence. The question is how seriously the *Charter* breach impacted on these interests. For instance, an unjustified strip search or body cavity search is demeaning to the suspect's human dignity and will be viewed as extremely serious on that account: *R. v. Simmons*, 1988 CanLII 12 (SCC), [1988] 2 S.C.R. 495, at pp. 516-17, *per* Dickson C.J.; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679. The fact that the evidence thereby obtained is not itself a bodily sample cannot be seen to diminish the seriousness of the intrusion.

[115] The third inquiry, whether the admission of the evidence would serve society's interest in having a case adjudicated on its merits, like the others, engages the facts of the particular case. Reliability issues with physical evidence will not generally be related to the *Charter* breach. Therefore, this consideration tends to weigh in favour of admission.

(d) *Derivative Evidence*

[116] The class of evidence that presents the greatest difficulty is evidence that combines aspects of both statements and physical evidence — physical evidence discovered as a result of an unlawfully obtained statement. The cases refer to this evidence as derivative evidence. This is the type of evidence at issue in this case.

[117] We earlier saw that at common law, involuntary confessions are inadmissible. The common law's automatic exclusion of involuntary statements is based on a sense that it is unfair to conscript a person against himself or herself and, most importantly, on a concern about the unreliability of compelled statements. However, the common law drew the line of automatic inadmissibility at the statements themselves and not the physical or "real" evidence found as a result of information garnered from such statements. Because reliability was traditionally the dominant focus of the confessions rule, the public interest in getting at the truth through reliable evidence was seen to outweigh concerns related to self-incrimination: *Wray* and *R. v. St. Lawrence*, 1949 CanLII 100 (ON SC), [1949] O.R. 215 (H.C.J.).

[118] Section 24(2) of the *Charter* implicitly overruled the common law practice of always admitting reliable derivative evidence. Instead, the judge is required to consider whether admission of derivative evidence obtained through a *Charter* breach would bring the administration of justice into disrepute.

[119] The s. 24(2) jurisprudence on derivative physical evidence has thus far been dominated by two related concepts — conscription and discoverability. Physical evidence that would not

have been discovered but for an inadmissible statement has been considered conscriptive and hence is inadmissible: *R. v. Feeney*, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13, and *Burlingham*. The doctrine of “discoverability” has been developed in order to distinguish those cases in which the accused’s conscription was necessary to the collection of the evidence, from those cases where the evidence would have been obtained in any event. In the former cases, exclusion was the rule, while in the latter, admission was more likely.

[120] The conscription-discoverability doctrine has been justifiably criticized as overly speculative and capable of producing anomalous results: D. Stuart, “Questioning the Discoverability Doctrine in Section 24(2) Rulings” (1996), 48 C.R. (4th) 351; Hogg, at section 41.8(d). In practice, it has proved difficult to apply because of its hypothetical nature and because of the fine-grained distinctions between the tests for determining whether evidence is “derivative” and whether it is “discoverable”: see *Feeney*, at paras. 69-71.

[121] The existing rules on derivative evidence and discoverability were developed under the *Collins* trial fairness rationale. They gave effect to the insight that if evidence would have been discovered in any event, the accused’s conscription did not truly *cause* the evidence to become available. The discoverability doctrine acquired even greater importance under *Stillman* where the category of conscriptive evidence was considerably enlarged. Since we have concluded that this underlying rationale should no longer hold and that “trial fairness” in the *Collins/Stillman* sense is no longer a determinative criterion for the s. 24(2) inquiry, discoverability should likewise not be determinative of admissibility.

[122] Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence.

The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.

[123] To determine whether the admission of derivative evidence would bring the administration of justice into disrepute under s. 24(2), courts must pursue the usual three lines of inquiry outlined in these reasons, taking into account the self-incriminatory origin of the evidence in an improperly obtained statement as well as its status as real evidence.

[124] The first inquiry concerns the police conduct in obtaining the statement that led to the real evidence. Once again, the extent to which this inquiry favours exclusion will depend on the factual circumstances of the breach: the more serious the state conduct, the more the admission of the evidence derived from it tends to undermine public confidence in the rule of law. Were the police deliberately and systematically flouting the accused's *Charter* rights? Or were the officers acting in good faith, pursuant to what they thought were legitimate policing policies?

[125] The second inquiry focusses on the impact of the breach on the *Charter*-protected interests of the accused. Where a statement is unconstitutionally obtained, in many cases the *Charter* right breached is the s. 10(b) right to counsel, which protects the accused's interest in making an informed choice whether or not to speak to authorities. The relevant consideration at this stage will be the extent to which the *Charter* breach impinged upon that interest in a free and informed choice. Where that interest was significantly compromised by the breach, this factor will strongly favour exclusion. In determining the impact of the breach, the discoverability of the derivative evidence may also be important as a factor strengthening or attenuating the self-

incriminatory character of the evidence. If the derivative evidence was independently discoverable, the impact of the breach on the accused is lessened and admission is more likely.

[126] The third inquiry in determining whether admission of the derivative evidence would bring the administration into disrepute relates to society's interest in having the case adjudicated on its merits. Since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence. Thus, the public interest in having a trial adjudicated on its merits will usually favour admission of the derivative evidence.

[127] The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

[128] The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible. The judge should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence. Where derivative evidence is obtained by way of a deliberate or flagrant *Charter* breach, its admission would bring the administration of justice into further disrepute and the evidence should be excluded.

4. Application to This Case

[129] The issue is whether the gun produced by Mr. Grant after Toronto police stopped and questioned him should be excluded from the evidence at his trial. The trial judge held that had a *Charter* breach been established, he would not have excluded the evidence. While the trial judge's s. 24(2) conclusion may not command deference where an appellate court reaches a different conclusion on the breach itself (see *R. v. Grant*, 1993 CanLII 68 (SCC), [1993] 3 S.C.R. 223, at pp. 256-57, *per* Sopinka J.; *R. v. Harris*, 2007 ONCA 574, 225 C.C.C. (3d) 193, at p. 212), the trial judge's underlying factual findings must be respected, absent palpable and overriding error.

[130] Here, the admissibility of Mr. Grant's incriminatory statements is not in issue, the statements having no independent evidentiary value. The only issue is the admission or exclusion of the gun. This falls to be determined in accordance with the inquiries described earlier.

[131] At the outset, it is necessary to consider whether the gun was "obtained in a manner" that violated Mr. Grant's *Charter* rights: see *R. v. Strachan*, 1988 CanLII 25 (SCC), [1988] 2 S.C.R. 980, and *R. v. Goldhart*, 1996 CanLII 214 (SCC), [1996] 2 S.C.R. 463. As explained above, we have concluded that Mr. Grant's rights under ss. 9 and 10(b) of the *Charter* were breached. The discovery of the gun was both temporally and causally connected to these infringements. It follows that the gun was obtained as a result of a *Charter* breach.

[132] Because the gun was discovered as a result of statements taken in breach of the *Charter*, it is derivative evidence. The question, as always, is whether its admission would bring the administration of justice into disrepute. To answer this question, it is necessary to consider the concerns that underlie the s. 24(2) analysis, as discussed above, in "all the circumstances" of the case, including the arbitrary detention and the breach of the right to counsel.

[133] We consider first the seriousness of the improper police conduct that led to the discovery of the gun. The police conduct here, while not in conformity with the *Charter*, was not abusive. There was no suggestion that Mr. Grant was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions. However, the point at which an encounter becomes a detention is not always clear, and is something with which courts have struggled. Though we have concluded that the police were in error in detaining the appellant when they did, the mistake is an understandable one. Having been under a mistaken view that they had not detained the appellant, the officers' failure to advise him of his right to counsel was similarly erroneous but understandable. It therefore cannot be characterized as having been in bad faith. Given that the police conduct in committing the *Charter* breach was neither deliberate nor egregious, we conclude that the effect of admitting the evidence would not greatly undermine public confidence in the rule of law. We add that the Court's decision in this case will be to render similar conduct less justifiable going forward. While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is.

[134] The second inquiry under the s. 24(2) analysis focusses on whether the admission of the evidence would bring the administration of justice into disrepute from the perspective of society's interest in respect for *Charter* rights. This inquiry focusses on the impact of the breach on the accused's protected interests. Because the two infringed *Charter* rights protect different interests, it is necessary to consider them separately at this stage.

[135] The initial *Charter* violation was arbitrary detention under s. 9 of the *Charter*, curtailing Mr. Grant's liberty interest. This interaction, beginning as a casual conversation, quickly developed into a subtly coercive situation that deprived Mr. Grant of his freedom to make an

informed choice as to how to respond. This is so, notwithstanding the fact that the detention did not involve any physical coercion and was not carried out in an abusive manner. We therefore conclude that the impact of this breach, while not severe, was more than minimal.

[136] The second *Charter* violation was breach of Mr. Grant's s. 10(b) right to counsel. Cst. Gomes, by his own admission, was probing for answers that would give him grounds for search or arrest. Far from being spontaneous utterances, the appellant's incriminating statements were prompted directly by Cst. Gomes' pointed questioning. The appellant, in need of legal advice, was not told he could consult counsel.

[137] As discussed, discoverability remains a factor in assessing the impact of *Charter* breaches on *Charter* rights. The investigating officers testified that they would not have searched or arrested Mr. Grant but for his self-incriminatory statements. Nor would they have had any legal grounds to do so. Accordingly, the fact that the evidence was non-discoverable aggravates the impact of the breach on Mr. Grant's interest in being able to make an informed choice to talk to the police. He was in "immediate need of legal advice" (*Brydges*, at p. 206) and had no opportunity to seek it.

[138] Considering all these matters, we conclude that the impact of the infringement of Mr. Grant's rights under ss. 9 and 10(b) of the *Charter* was significant.

[139] The third and final concern is the effect of admitting the gun on the public interest in having a case adjudicated on its merits. The gun is highly reliable evidence. It is essential to a determination on the merits. The Crown also argues that the seriousness of the offence weighs in favour of admitting the evidence of the gun, so that the matter may be decided on its merits,

asserting that gun crime is a societal scourge, that offences of this nature raise major public safety concerns and that the gun is the main evidence in the case. On the other hand, Mr. Grant argues that the seriousness of the offence makes it all the more important that his rights be respected. In the result, we do not find this factor to be of much assistance.

[140] To sum up, the police conduct was not egregious. The impact of the *Charter* breach on the accused's protected interests was significant, although not at the most serious end of the scale. Finally, the value of the evidence is considerable. These effects must be balanced in determining whether admitting the gun would put the administration of justice into disrepute. We agree with Laskin J.A. that this is a close case. The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision. However, weighing all these concerns, in our opinion the courts below did not err in concluding that the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute. The significant impact of the breach on Mr. Grant's *Charter*-protected rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission. Unlike the situation in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, the police officers here were operating in circumstances of considerable legal uncertainty. In our view, this tips the balance in favour of admission, suggesting that the reputation of the justice system would not suffer from allowing the gun to be admitted in evidence against the appellant.

C. *The Meaning of "Transfer" in Sections 84, 99 and 100 of the Criminal Code*

[141] Mr. Grant argues that his conviction of possession of a firearm for the purposes of weapons trafficking under s. 100(1) of the *Criminal Code* should be quashed on the grounds that he did not "transfer" the firearm within the meaning of that section. Section 100(1) states:

100. (1) Every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition for the purpose of

- (a) transferring it, whether or not for consideration, or
- (b) offering to transfer it,

knowing that the person is not authorized to transfer it under the *Firearms Act* or any other Act of Parliament or any regulations made under any Act of Parliament.

[142] In the Court of Appeal, Laskin J.A. noted that “[t]he word ‘transfer’ is defined in s. 84 to mean ‘sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver’” (para. 72 (italics in original, underlining added)). He observed that the dictionary definition of “transport” is to “carry, convey or remove from *one place or person to another*” (para. 72 (emphasis in original)). He also noted that ss. 84 and 100 of the *Code* were enacted with reference to the *Firearms Act*, S.C. 1995, c. 39, and he considered this wider context. Laskin J.A. was not persuaded that there was any reason to depart from the plain meaning of the word. On this definition, Mr. Grant’s admission that he was “dropping off” the gun somewhere “up the road” entailed moving the gun from one place to another and was therefore sufficient to establish all elements of the offence defined by s. 100(1).

[143] Mr. Grant submits that a contextual reading of s. 100 and the related provisions reveals that Parliament intended to reserve the stiffest penalties for transfers that amount to weapons trafficking, not the mere movement of a firearm from place to place. Since the trial judge did not find that he was in possession of the gun for the purpose of transferring it to another person, Mr. Grant argues that the s. 100(1) conviction cannot stand.

[144] We agree with Mr. Grant that Parliament did not intend s. 100(1) to address the simple movement of a firearm from one place to another. First, according to the “associated meaning” principle of statutory interpretation, “when two or more words linked by ‘and’ or ‘or’ serve an analogous grammatical and logical function within a provision, they should be interpreted with a

view to their common features”: *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, at para. 30, *per* McLachlin C.J. See also R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 227-31. Once again, the definition of “transfer” is given in s. 84 as “sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver”. Of these words, only “transport” can plausibly be said to include moving a thing from place to place without the thing actually changing hands. The common element is the notion of a *transaction*. This suggests a more restrictive meaning than indicated by the dictionary definition of “transport”.

[145] It should also be noted that s. 100(1)(a) applies to the transfer of a firearm, “whether or not for consideration”. Even if “transfer” is equated with “transport”, the underlined words suggest that the import of the provision is to criminalize the transfer of firearms for purposes that implicate others. In other words, the inclusion of the phrase “whether or not for consideration” in s. 100(1)(a) suggests that Parliament did not intend to criminalize simple movement of firearms by this provision, but rather transport for purposes that implicate another person. Further, the criminalization of an “offer” to transfer a firearm under s. 100(1)(b) suggests that a “transfer” is transactional in nature.

[146] We do not accept, as did Laskin J.A., the proposition that the more restrictive reading of s. 100(1) would “destroy the cohesion between the *Criminal Code* provisions on firearms and the *Firearms Act*” (para. 77). While it is undoubtedly true that Parliament intended to place tight restrictions on the movement of firearms, there are other provisions in both regimes that deal specifically with “transfers” that fall short of trafficking. Moving a firearm in an unauthorized manner could result in prosecution under s. 86(2) of the *Criminal Code*, which penalizes the transportation of a firearm in contravention of the regulations made pursuant to the *Firearms Act*. Moreover, the *Firearms Act* defines “transfer” differently from the *Criminal Code*, so their cohesion should not be overstated: see s. 21 of the Act.

[147] Finally, s. 100(1) appears in the *Code* under the heading “Trafficking Offences”. As the Court held in *R. v. Davis*, [1999 CanLII 638 \(SCC\)](#), [1999] 3 S.C.R. 759, at para. 53, *per* Lamer C.J., headings “should be considered part of the legislation and should be read and relied on like any other contextual feature” (quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 269). Firearms trafficking offences are extremely serious, carrying substantial penalties. Indeed, since amendments to the *Code* in 2008, a conviction under s. 100(1) now carries a mandatory minimum penitentiary sentence of three years for a first-time offender, up from one year when Mr. Grant was convicted. It should not be lightly assumed that Parliament intended to deem anyone moving a firearm from place to place without authorization to be a weapons trafficker, liable to at least three years’ imprisonment on a first offence. In our view, a contextual reading of the applicable provisions suggests the contrary. Mr. Grant’s offence was serious and potentially extremely dangerous, but on the evidence he did not commit the crime of trafficking.

[148] We would therefore allow the appeal on Count 4.

V. Conclusion

[149] We would allow the appeal on Count 4 (the trafficking charge) and enter an acquittal. On all other counts, we would dismiss the appeal.

The following are the reasons delivered by

[150] BINNIE J. — I concur with the disposition of the appeal proposed by my colleagues the Chief Justice and Charron J. and with their modified framework for determinations under [s. 24\(2\)](#)

of the *Canadian Charter of Rights and Freedoms* regarding the admission or rejection of evidence obtained in a manner that violates the *Charter*. I differ, with respect, on their approach to the definition of “detention” in ss. 9 and 10 of the *Charter*. In particular, I believe their approach lays too much emphasis on the *claimant’s* perception of psychological pressure, albeit as filtered through the eyes of the hypothetical reasonable person in the claimant’s situation. My colleagues summarize their position on this point as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual’s liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. [Emphasis added; para. 44.]

My colleagues then set out a number of factors to help “determine whether the reasonable person in the individual’s circumstances would conclude that he or she had been deprived by the state of the liberty of choice” (*ibid.*).

[151] The Court’s continued embrace of a wholly claimant-centred approach may lead to the impression that it is more important to enquire whether the hypothetical reasonable person “in the individual’s circumstances” would *think* himself or herself to be detained than whether he or she *is* detained. The perspective of the person stopped (or a “reasonable person” caught in that particular situation) is important because it is *that* person’s liberty that is at issue, but, in my view, the claimant’s perspective does not exhaust the relevant considerations. I agree there can be no detention unless the liberty of the person stopped is (or is reasonably perceived by that person to be) significantly constrained, but there may be much happening of which the person stopped is unaware, and this other context ought potentially to affect the legal characterization of the encounter. I agree with Professor Stuart when he writes that

the focus should not be exclusively on the state of mind of the accused. As Courts of Appeal have persuasively suggested, detention should also take into account the perceptions of the police. . . . [Otherwise] [t]hose perhaps most in need of [Charter](#) protection against coercive police practices will have none. On the other hand, it would be unfortunate if preliminary police questioning of any suspect would have to be peppered with Charter warnings.

(D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at p. 327)

My colleagues do take into account some police-related factors (e.g., whether the individual is singled out for “focussed investigation” (para. 44(2)(a)) but, as will be seen, they do so only to the extent this information is made evident to the person stopped.

[152] Also important, in my view, is an *objective* assessment of the facts of the encounter divorced from the perception of both parties, neither of whom may have a very clear idea of what is going on in the rush of events.

A. When Does a “Stop” Become a Detention?

[153] While the uniformed police embody society’s collective desire for public order and livable and safe communities, they also present a serious and continuing risk to the individual’s right to be left alone by the state in the absence of objective justification for the state’s intervention. Interactions between the police and members of the public are not only rich in diversity but exceedingly common. Quite apart from police assistance offered to the general public, a traditional part of the daily routine of the “cop on the beat” is to check out “suspicious persons”. Clear guidance on the rules governing such encounters is, or ought to be, an important part of police training: C. D. Shearing and P. C. Stenning, *Police Training in Ontario: An Evaluation of Recruit and Supervisory Courses* (1980), at p. 41. This case is about a pedestrian. No one doubts the importance of being able to determine at what moment an *interaction* between the police and a pedestrian is converted into a *detention* of that individual, thereby triggering the

rights subsidiary to detention, including the right to involve his or her lawyer who can generally be expected to advise his or her client not to say anything further. In the first instance it is the police who must decide if a detention exists because they are the people who administer the caution and inform the person detained about the right to counsel. Their intentions and perceptions will inevitably be factored into their determinations whether disclosed to the claimant or not, and should be taken into account in the legal test for detention when the matter eventually comes before a judge.

[154] A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified “low visibility” police interventions in their lives: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 83. See also A. Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991), 29 *Osgoode Hall L.J.* 329, at p. 390; D. M. Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002), 40 *Osgoode Hall L.J.* 145; Ontario Human Rights Commission, Inquiry Report. *Paying the Price: The Human Cost of Racial Profiling* (2003); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995), at p. 337. The appellant, Mr. Grant, is black. Courts cannot presume to be colour-blind in these situations.

[155] At the same time, members of visible minorities may, as much as anyone else, be approached and asked questions by police. While, even more so than others, they may feel unable to choose to walk away, the perspective of the police and the information (if any) the police possess when they initiate an encounter would help assess whether the liberty interest of the person stopped is truly at issue, even if the police perspective on the encounter is not made known by words or conduct to the person stopped.

B. A Brief History of the “Reasonable Perception” Test

[156] Our approach to detention, as with so much of this area of the law, draws heavily on the U.S. Fourth Amendment jurisprudence. Both societies, Canada and the United States, place a high value on the right of citizens to go about their business without being arbitrarily stopped by the police and told to give an account of activities that they consider to be none of the police's affair. We therefore want a definition of detention that protects our liberty. Accordingly, in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, Le Dain J. held, and subsequent cases have agreed, that a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (p. 644). This approach corresponded to earlier decisions of the U.S. Supreme Court establishing that "a person has been 'seized' [i.e. detained] within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave": *United States v. Mendenhall*, 446 U.S. 544 (1980), at p. 554, endorsed in *Florida v. Royer*, 460 U.S. 491 (1983), and subsequent cases.

[157] Stewart J. in *Mendenhall* stated quite categorically that the "subjective intention" of the state authority (a drugs enforcement officer) "to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent" (p. 554, fn. 6 (emphasis added)). The approach of excluding from consideration information not reasonably evident to the person stopped is endorsed by my colleagues at numerous points in their judgment, for example:

The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. [para. 31]

...

Accordingly, we must consider all relevant circumstances to determine if a reasonable person in Mr. Grant's position would have concluded that his or her right to choose

how to interact with the police (i.e. whether to leave or comply) had been removed. [para. 46]

...

In our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct. [para. 50]

[158] The *Mendenhall* approach to detention adopted in *Therens* and affirmed in this case by my colleagues has different consequences in the U.S. than it does here. In relation to the right to counsel, for example, that right does not arise in the U.S. "without delay" upon a psychological detention ("or seizure"), but only where there is "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest": *California v. Beheler*, 463 U.S. 1121 (1983), at p. 1125; *Oregon v. Mathiason*, 429 U.S. 492 (1977), at p. 495. See also *Escobedo v. Illinois*, 378 U.S. 478 (1964), at pp. 490-91; *Miranda v. Arizona*, 384 U.S. 436 (1966), at p. 444; *Thompson v. Keohane*, 516 U.S. 99 (1995), at p. 112. Whether such a situation of formal restraint exists under U.S. law "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned": *Stansbury v. California*, 511 U.S. 318 (1994), at p. 323 (emphasis added). In other words, in the U.S. psychological detention does not, without more, invoke entitlement to the assistance of counsel. The U.S. courts take a generous view of when "psychological detention" occurs because it triggers scrutiny under the Fourth Amendment of police conduct that would otherwise lie outside judicial oversight under their Constitution. In practical terms, the U.S. can live with such a broad claimant-centred definition because it does not have the effect of bringing in the lawyers at an early stage in encounters between the police and the citizen. The significant effect of a finding of detention in the U.S., as under our decision in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, is to require the police to meet the standard of reasonable suspicion. Thus, the *Mendenhall* doctrine of psychological detention, when imported into Canada, raises a complication under s. 10(b) not present in the United States.

C. Recognizing an “Obvious Tension”

[159] In this case, Laskin J.A., speaking for the Ontario Court of Appeal, recognized that:

The definition of “psychological detention” reflects a judicial balance between competing values. On the one hand, the police have the duty and the authority to investigate and prevent crime in order to keep our community safe. In carrying out their duty, they must interact daily with ordinary citizens. Not every such encounter between the police and a citizen amounts to a constitutional “detention”. This court and other courts have recognized that police must be able to speak to a citizen without triggering that citizen’s *Charter* rights.

...

On the other hand, ordinary citizens must have the right to move freely about their community.

((2006), 2006 CanLII 18347 (ON CA), 81 O.R. (3d) 1, at paras. 10 and 12)

[160] In the companion case of *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, where the police intercepted an individual as he tried to leave an Ontario liquor store where a fraud had just been committed, Doherty J.A., also speaking for the Ontario Court of Appeal, recognized the “obvious tension between the requirement to inform detained persons of their right to counsel and the proper and effective use of brief investigative detentions” (2007 ONCA 60, 85 O.R. (3d) 127, at para. 41).

[161] Having found a breach of s. 9, Laskin J.A. did not go on in this case to deal with the s. 10(b) right to counsel. However, as my colleagues treat *Suberu* in this Court as a more or less straightforward application of their analysis of detention in *Grant*, I propose to deal with both ss. 9 and 10(b) here.

[162] The Crown’s argument is that by introducing a right to legal counsel (and “to be informed of that right”) prematurely into commonplace interactions between police and members of the public, the Court would hamstring essential police services and unduly tilt the constitutional balance against the public interest in effective law enforcement. For the police, in Professor Uviller’s mellifluous phrase, “[t]he confession is the ‘queen of the evidentiary chessboard’” (quoted in Young, at pp. 365-66). When lawyers are on the scene, the potential for obtaining confessions tends to dry up.

[163] The defence, on the other hand, supports a broad definition of detention and quick access to legal advice because under a less generous *Charter* approach a member of the public risks serious prejudice to his or her defence before the lawyer can get involved, since few members of the public are clear about their *Charter* rights. The solution to this dilemma offered by the Ontario Court of Appeal in *Suberu* was to read down s. 10(b) so that the concept of “without delay” is stretched more readily to accommodate the reasonable needs of law enforcement (which in practice might well result in a situation similar to that prevailing in the U.S.). The problem with the Ontario court’s solution, as my colleagues note, is that the interpretation does not sit easily with what those words mean, whether interpreted purposefully, textually or contextually with the *Charter*.

[164] The appellant, supported by the Criminal Lawyers’ Association (Ontario) and the Canadian Civil Liberties Association, suggests that the “obvious tension” could be eased by declaring inadmissible any incriminating statements made by an accused between the moment the detention crystallized and the subsequent notification to the accused of the right to retain and instruct counsel. However, this presupposes that the s. 9 detention has indeed crystallized, which is the point in issue.

[165] Another way to ease the “obvious tension” (other than resort to s. 1) would be for the courts to re-examine the concept of “psychological detention” with a view to broadening the perspectives from which the encounter is viewed. This would help obviate some of the problems with a purely claimant-centred approach, in my opinion.

D. Problems With the Claimant-Centred Approach

[166] I believe there are a number of problems with the Court’s continuing endorsement of the Therens/Mendenhall approach to determine when a simple interaction crystallizes into a detention. Insistence that the claimant’s circumstances be viewed from the more detached perspective of a “reasonable person” provides in some cases a welcome corrective, but in other cases, by exaggerating the ability of ordinary people to stand up to police assertion of authority, that approach may compel the conclusion that the claimant had the choice to walk away whereas in reality no such choice existed.

1. The Perception of the Police May Be of Significance

[167] My colleagues refer to the “complex situation”, for example,

where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. [para. 40]

I agree that this “subtle” change of police perspective is relevant to the analysis but it will not always be made apparent to a person who is unambiguously stopped but remains unsure whether the encounter is benign or perilous. Police investigators assemble a mosaic of facts. Apparent

“general inquiries” may be designed, unknown to the person stopped, to elicit the missing piece of self-incrimination. The success of the police investigation may indeed depend on the police skill in masking their information and intentions from the person stopped.

[168] Of relevance in this respect is the judgment of Martin J.A. in *R. v. Moran* (1987), 1987 CanLII 124 (ON CA), 36 C.C.C. (3d) 225 (Ont. C.A.), leave to appeal refused, [1988] 1 S.C.R. xi, setting out some of the considerations he thought relevant to finding a detention, including

the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused; [p. 259]

These are matters that would certainly be known to the police but not necessarily communicated to the person stopped. Perhaps, as mentioned, the stage of the investigation will be intentionally concealed with a view to a more productive interrogation. Other *Moran* considerations would be apparent to the person stopped, for example,

the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt; [p. 259]

If, for example, the police arrive at a street disturbance and it is not clear to them whether the occurrence is a crime or an accident, and they tell everyone to stay put until the situation is clarified, such a “stay put” direction should carry a different legal consequence than if used at what is clearly a crime scene to hold an individual they believe is a likely suspect. In the former case, the situation may be explicable by reference to police responsibilities for public safety and order.

In the latter case, the police are attempting to gather evidence about (and from) a particular individual in relation to a particular crime. The reality is that in *both* cases, to borrow Laskin J.A.'s formulation in the court below, "any reasonable person hearing these words from a uniformed officer three feet away would treat them not as a request that might be ignored, but as a command that must be obeyed" (para. 24). Although in both cases the police command to "stay put" will likely constrain psychologically the individuals subject to the police direction from walking away, only in the latter instance ought the *Charter* right to be triggered because it is only in that instance that "a person may reasonably require the assistance of counsel" (*Therens*, at pp. 641-42).

2. *The Uncertain Characteristics of the "Reasonable Person"*

[169] In a useful commentary on the U.S. *Mendenhall* test, Professor Butterfoss writes:

Application of the test has created a broad "nonseizure" category of police-citizen encounters that permits officers substantial leeway in approaching and questioning citizens without being required to show objective justification for such conduct. This has been accomplished both by constructing a highly artificial "reasonable person," who is much more assertive in encounters with police officers than is the average citizen, and by ignoring the subjective intentions of the officer. The result is that fourth amendment rights of citizens are determined through a legal fiction. [Emphasis added.]

(E. J. Butterfoss, "Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins" (1988-1989), 79 *J. Crim. L. & Criminology* 437, at p. 439)

In other words, encounters with police that average citizens would consider left them with no choice but to comply are denied the status of "detentions" through the device of putting in their place an artificially robust and assertive "reasonable person". Self-incriminatory conduct may also be rationalized in the state's favour by the attributed sense of "moral or social duty on the part of every citizen to answer questions put to him or her by the police" (see *R. v. Grafe* (1987), 1987 CanLII 170 (ON CA), 36 C.C.C. (3d) 267 (Ont. C.A.), at p. 271). This gap between the reality on

the street and the court constructed “reasonable person” is of particular relevance to visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive and later be argued by the police to constitute sufficient grounds of suspicion to justify a *Mann* detention.

[170] Leaving aside the issue of visible minorities, is the concept of the reasonable person intended to describe average cooperative members of the public? If so, the Canadian reality is that such people will almost always regard a direction from a police officer as a demand that must be complied with. This was recognized in *Therens* (and adopted in this case by my colleagues) when Le Dain J. acknowledged that “[m]ost citizens are not aware of the precise legal limits of police authority” and “the reasonable person is [therefore] likely to err on the side of caution, assume lawful authority and comply with the demand” (p. 644). Viewed in this way, police instructions or demands readily constrain a claimant’s choice to leave and, therefore, on that interpretation, even the less intrusive encounters between the police and citizens ought frequently to be declared detentions despite the fact that at that stage such people do not reasonably require the assistance of counsel.

[171] On the other hand, perhaps the “reasonable person” is to be invested with a higher level of legal sophistication, leading to a more robust attitude towards the police. My colleagues refer to the reasonable person’s assessment being informed by “generally understood legal rights and duties” (para. 33; see also para. 37). This more erudite version of the “reasonable person” might know that apart from some statutory exceptions, he or she ordinarily has the right to walk away from the encounter regardless of what the police officer says, unless and until the police possess reasonable grounds to suspect involvement in a criminal offence and therefore grounds for a *Mann*-type investigative detention. If the test envisages the perception of this more knowledgeable type of “reasonable person”, then anything short of an investigative detention as described in *Mann*

would fail to constrain freedom of choice, and whatever is said in those critical early moments of an encounter will be presumed to be “voluntary” and based on consent.

[172] A further problem with the “reasonable person” device is to define exactly what information this fictional person possesses. While “the factors” identified by my colleagues include “whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation” (para. 44(2)(a)), it is not suggested that the “reasonable person” is a mind-reader. On their view, this information can only affect the “reasonable person” assessment to the extent it is made manifest to the claimant, whose perception would otherwise remain oblivious and unaffected.

[173] Yet, another difficulty with calibrating the “reasonable person” approach is that it is not at all clear what experience this hypothetical individual brings to the assessment of the encounter and what criteria this individual applies in deciding whether or not the person stopped is free to choose to break off the encounter. There is a difference between the listing of a broad range of factors to be considered by a court and identifying their relative weight and importance.

[174] In the absence of explicit criteria, various judges will tend to read into the “reasonable person” their own projections of the moment at which, in *their* view, the person stopped *ought* to be able to call a lawyer. This creates the risk of a very results-oriented analysis. Perceptions will vary depending on the personality of the judge seized with the case. My colleagues emphasize at different places the need for deference to the assessment of the trial judges (e.g., para. 43) which may further complicate the task of developing a consistent approach. In other words, continued reliance on the “reasonable person” whose attributed experience and choice of criteria are

unspecified except for a presumed commitment to “reasonableness” helps to mask rather than clarify the actual criteria being applied by the Court.

E. Broader Approach

[175] As a majority of the Court is satisfied with the *Therens/Mendenhall* claimant-centred approach, I will not belabour the existence of alternatives. However, I believe more attention should be paid to the *objective* facts of the encounter between a police officer and members of the public, whether or not such facts are made apparent to the person stopped.

[176] There is, of course, an important continuing role for psychological detention as perceived by the person stopped, but in that respect serious weight should be given to the values and experience of the person *actually* stopped, including the experience of visible minorities, and less emphasis on the hypothetical opinion of the “reasonable person” insofar as the latter is presumed to be able to handle such stressful encounters without sensing “significant . . . psychological restraint” (*Mann*, at para. 19). As mentioned, Mr. Grant is black. In determining whether he (or a reasonable person in his position) would feel free to choose to walk away from three policemen, contrary to their wishes in the circumstances here, his ethnicity raises a significant issue. As the above-mentioned studies show, trial judges differ in the weight they are willing to accord to ethnicity in such “low visibility” encounters, despite the over-representation of Aboriginals and other visible minorities in encounters with police patrols. That is why, from my point of view, the police perspective and the information (if any) the police possessed when they initiated the encounter is important to shed light on whether or not the liberty interest of the person stopped was truly compromised.

[177] I agree with my colleagues that a claim of psychological detention must meet the three-fold test of (i) a police command or direction (ii) compliance by the person now claiming a s. 9 detention and (iii) grounds for a reasonable belief that there was no choice but to comply. However, in my view, police words and conduct should be interpreted in light of the *purpose* of the encounter from the police perspective — whether disclosed to the person from whom cooperation is requested or not. The U.S. *Model Code of Pre-Arrest Procedure* (ALI 1975), § 110.1(2), for instance, includes special provisions for questioning suspects as opposed to seeking cooperation from citizens and requires warnings to suspects that no legal obligation exists to respond to questioning. See also the English *Judges' Rules*, Rules I and II (*Practice Note (Judges' Rules)*), [1964] 1 W.L.R. 152 (C.C.A.), at p. 153). The police know, but the claimant does not know, the point at which a person of interest begins to emerge as a suspect and ceases to be, as my colleagues put it, a person whose “rights are not seriously in issue” (para. 29).

[178] A central problem with the *Therens/Mendenhall* claimant-centred approach, as I see it, is that it does not take adequately into account what the police know and when they knew it except insofar as this information is conveyed to the person stopped, but which the police may not consider to be in their interest to convey. Police may know (as in *Suberu*) if a crime has allegedly been committed and whether they are making the approach to an individual with a view to obtaining general information or, on the other hand, corralling a suspect and collecting admissible evidence to bring him or her to justice. Possession of such knowledge may in fact place the police in an adversarial relationship to the person approached whether that person is aware of the jeopardy or not. It is the adversarial relationship together with the “stop” that generates the need for counsel. At that point, the power imbalance is significant. The unsuspecting suspect may fatally compromise his or her position simply through ignorance of his or her rights and the fact the police have now adopted an adversarial position. At that point, as Le Dain J. put it in *Therens*, “a person may reasonably require the assistance of counsel” (pp. 641-42), but may not have any idea of the perilous turn of events.

[179] On the other hand, a more benign police purpose may deprive even an unambiguous police command of the legal effect of a detention, and thereby enure to the benefit of the Crown. Had Constable Roughley in the *Suberu* case, for example, come rushing up to Mr. Suberu in the parking lot of the liquor store saying “Wait a minute. I need to talk to you before you go anywhere” because police had just received information, unknown to Mr. Suberu, that Mr. Suberu’s van had been wired with an explosive device by a local member of the Hell’s Angels, the detention analysis ought to be quite different although the constable’s words and the forcefulness of their expression may be the same.

[180] It is not controversial that in the early stages of a criminal investigation the police must be afforded some flexibility before the lawyers get involved. The police do have the right to ask questions and they need to seek the co-operation of members of the public, including those who turn out to be miscreants. The question is how to accommodate that need within a plausible framework of s. 9 analysis. In my view, without wishing to prolong this discussion, a better and broader approach to detention would explicitly take into account (i) the objective facts of such encounters, whether or not evident to the person stopped, as well as (ii) the perception of the police in initiating the encounter, whether or not evident to the person stopped, and (iii) whatever information the police possess at the time, which may or may not be known to the person stopped, as well as whatever change in the police perception occurs as the encounter develops. These matters should all be factored into a more comprehensive analysis of when a “detention” occurs for *Charter* purposes than is provided in the *Therens/Mendenhall* claimant-centred approach affirmed today by the Court.

F. Application to the Facts

[181] In this case, I agree with my colleagues that Mr. Grant was arbitrarily detained. The safety of school neighbourhoods is of great importance but under our system of law it cannot be

achieved by random detention of pedestrians on the off-chance that some of them might (or might not) be implicated in criminal activity.

[182] The purpose of these police officers, whether or not couched in terms of community policing, was to investigate crime, whether actual or anticipated. Constable Worrell testified that when the officers drove past in an unmarked car, Mr. Grant “stared” at them in an unusually intense manner and continued to do so as they proceeded down the street. He wore a “big jacket” and was “fidgeting” with his coat and pants. Staring at an unmarked car and fidgeting are lawful activities but it was enough to cause three police officers to converge on Mr. Grant. The police purpose for initiating the encounter is important, I believe, and Constable Worrell testified:

Q. Well, when you stop these people, I take it, the object of the exercise in light of what you said about the nature of the area is to find out if perhaps they might be involved in swarmings or robberies or drugs?

A. That’s correct.

Q. And when you and your partner talked about potentially stopping Mr. Grant yourselves and what you had in mind was having a chat with him —

A. Mm-hmm.

Q. — to determine whether he might be involved in swarmings or robberies or drugs, correct?

A. It’s possible he may have been, but we didn’t know for sure.

The police had no information whatsoever that Mr. Grant may have been implicated in criminal activity or even whether a crime had been committed, but Mr. Grant’s further “fidget” with his jacket convinced Constable Gomes to take charge of the situation (whether or not Mr. Grant was aware of how his fidgets were being interpreted by Constable Gomes) and to order Mr. Grant to “keep his hands in front of him”. That command crystallized the detention.

[183] However, in my view, the finding of a detention is properly the product not only of Mr. Grant's perception (filtered through the hypothetical reasonable person) but also of the objective facts of why the encounter was initiated (crime detection) and the other facts surrounding the encounter whether or not evident to Mr. Grant, e.g., the agreement among the three officers (unknown to Mr. Grant) to converge on him and thereafter effectively to form "a small phalanx blocking the path in which the appellant was walking" (Laskin J.A., at para. 29). As Mr. Grant did not testify, we do not have any first-hand evidence of *his* perception, although his lack of choice must have been manifest when every time he moved Constable Gomes, who was standing only three feet away, moved in a corresponding way to maintain the nose-to-nose impasse. What we do have in considerable detail is the perception of each of the three police officers. Their forthright account of their own intentions and their acknowledged lack of any information that any crime was or was about to be committed, apart from a "hunch", none of which was conveyed to Mr. Grant, give rise to the conclusion that Mr. Grant *was* arbitrarily detained.

[184] I therefore concur in the conclusion of the Chief Justice and Charron J. that Mr. Grant was detained. I also agree with their analysis under s. 24(2) and the consequent disposition of the appeal.

English version of the reasons delivered by

[185] DESCHAMPS J. — The difficulty in resolving the problems related to detention and to the exclusion of evidence in three appeals now before the Court reveals a number of deficiencies in the applicable rules. These three cases show that it is sometimes hard to reconcile the protection of constitutional rights with the public interest in bringing cases to trial. I have read the reasons of the majority, and I agree with them that the tests for determining whether a person was actually detained and whether evidence should be excluded need to be reformulated. With respect, however, I must comment further on the application of the new rules concerning detention to the

facts of this case. As for the factors to consider in deciding whether to admit or exclude evidence obtained in violation of constitutional rights, I find that the test proposed by the majority is problematic, and that it is inconsistent with the purpose of the constitutional provision that applies to such decisions. Although my analysis differs from the majority's, I reach the same conclusion as them.

1. Test for Determining Whether a Person Was Detained

[186] Where the state interacts with citizens in a criminal law context, be it in the streets or in a courtroom, the applicable rules must be clear so that all those involved in the criminal justice system know the scope of their respective rights and powers. I agree with the majority that the police cannot do their work effectively without the co-operation of the public (para. 39). The applicable rules must therefore take into account the fact that the police need to act so as to foster public co-operation, not to discourage it.

[187] In the instant case, the trial judge stressed the fact that the police officers, who were patrolling an area around four schools where numerous disturbances had been reported, had conducted themselves politely and seemed to have been conscientious in doing their work. On whether the law prohibits or should prohibit this type of police action, the trial judge quoted with approval the following comment by one of his colleagues:

We do not expect the police to sit in their station houses waiting for those who commit offences to walk in and confess. We expect them to be out in the community and when suspicious events occur to make inquiries. The Charter is not a barrier to those inquiries.

(2004 CarswellOnt 8779, at para. 9, quoting *R. v. Orellana*, [1999] O.J. No. 5746 (QL) (Ct. J.))

This approach is the very one on which the majority of this Court are basing the test adopted today to guide the public, law enforcement agencies and judges in determining at what point a person is “detained” in the legal sense of this term.

[188] In the companion case of *R. v. Suberu*, [2009 SCC 33](#), [2009] 2 S.C.R. 460, the majority of the Court acknowledge that police officers may interact with the public and that not every contact between a police officer and a member of the public constitutes detention. There is a clear distinction between the nature of the police action in the case at bar and that of the action in *Suberu*. *Suberu* concerns a targeted action by officers who had received specific information. In the case at bar, the action was one of prevention, and the officers’ approach was necessarily different. It will be helpful to consider the trial judge’s findings of fact.

[189] Constables Worrell and Forde were on patrol, in plainclothes in an unmarked car, in an area where four high schools are located. The area was experiencing problems related to intimidation, robberies and drug offences involving students. The two officers had been ordered to maintain a presence there for purposes of prevention. They drove past an individual, Mr. Grant, and noted that he was staring at them. After they had passed him, Constable Worrell turned around and saw that he was still watching them and that he was fidgeting with his clothes at his waist and pulling on his pants with his right hand. At this point, the officers felt that it would be appropriate to speak with him. As they continued along their way, they saw another officer, Constable Gomes, who was on patrol in a marked cruiser. They suggested that he go speak with Mr. Grant, which he did. While speaking with Constable Gomes, Mr. Grant behaved nervously and touched his clothes at his waist, which prompted Constable Gomes to ask him to keep his hands in front of him. At first, constables Worrell and Forde stayed apart from Mr. Grant and Constable Gomes, but on seeing that Mr. Grant still appeared nervous and continued to look at them, they decided to move closer to make sure everything was all right. They identified themselves, showing their badges, and then stood behind Constable Gomes. I will not repeat the exchange that took place between

Constable Gomes and Mr. Grant. The relevant passages are reproduced in the majority's reasons.

All I need say here is that Mr. Grant made an incriminating statement.

[190] In analysing all these facts, the trial judge found that Mr. Grant had not been detained.

The following is his own lengthy summary of his reasons for so finding:

- (1) The Location being the sidewalk of a main street in the City of Toronto in full view of the public.
- (2) The means by which the police spoke to the accused; i.e., on the street, and the accused not being required to stay or get into any vehicle or any closed type of situation.
- (3) The time of day. It was broad daylight. It was approximately 12:30 p.m., the usual noon hour for students.
- (4) There was no physical force. There was no pat down search and there was no grabbing where someone, especially the accused, in any situation might feel intimidated.
- (5) There was no actual search or physical search, of course. There were just some questions put.
- (6) There was an absence of reasonable and probable grounds to conduct an arrest and there was no reason to take physical control of the accused until, of course, the marijuana and firearm surfaced.
- (7) What would Police Constable Gomes have done if the accused, for example, left the scene? He may have followed him. He may have asked him further questions. There again, that is subject to speculation.
- (8) The length of the interaction. It was short. It consisted of minutes. This was not a one-half hour or hour interrogation. It wasn't off the street or in a police cruiser.
- (9) The response of the other police officers. These officers stood behind Gomes, but they were not involved in the discussion. They didn't surround the accused nor did they detain him. And I may address that issue further in due course.
- (10) The nature of the conversation with Gomes. It was not in aggressive language. There were no demands or directions. The only request was that he keep his hands in front of him. There was no demand to enter a cruiser, and nothing was said that I find would be compelling. There were no threats or inducements. This officer just asked some general questions and in response to

those questions the accused produced identification as to who he was, where he lived, and he even gave his phone number.

(11) The accused could have walked away. He could have walked around the one police officer or the three police officers and could have kept going. All he had to do, in my view, is say, “Excuse me.” To suggest for one moment that he couldn’t or they wouldn’t permit it is speculation. There was no evidence that the accused felt compelled or had a subjective belief in relation to anything. The inference is, that the accused decided to cooperate all the way with the police. The quantity of time spent was referred to.

I conclude very easily that this was a conversation of an extremely short duration, lasting no more than several moments, but no more than three or four minutes. So much so, that I find the ultimate crime, the solving of the crime and the arrest and search incidental to the arrest took some four minutes more or less.

I also find that the limited conversation between Police Constable Gomes and the accused was no more than that, a conversation and an attempt to chit chat or make chit chat. Here again, I find it was all meant to check on the temperature of the community.

(2004 CarswellOnt 8779, at para. 9)

[191] Unlike the trial judge, the Court of Appeal concluded that Mr. Grant had been detained: (2006), [2006 CanLII 18347 \(ON CA\)](#), 81 O.R. (3d) 1. I agree with this conclusion: viewed as a whole, the facts support the conclusion that there was indeed a detention. However, I wish to point out that the detention came to a head when the officers asked Mr. Grant certain direct questions that, viewed objectively, might have caused a reasonable person to feel singled out, cornered and, therefore, detained. Owing to the nature of the questions asked by Constable Gomes, the line between prevention and suppression was crossed. Constable Gomes asked Mr. Grant if he had committed a crime. Once such a question had been asked of a person who had known he was being watched from the time he had crossed paths with constables Worrell and Forde — who had since arrived on the scene — the encounter could no longer be described simply as an interaction between a police officer and a member of the public. I agree with the Court of Appeal’s conclusion that the exchange was no longer an impromptu conversation that a young man such as Mr. Grant would think he could walk away from as he pleased.

[192] In light of the conclusion that Mr. Grant was detained, I must consider the power of the police to detain a person for investigation purposes in performing their crime prevention function. Unlike in the context of crime suppression, police officers who are charged with preventing crime — in particular, as in the instant case, in an area near schools experiencing problems related to violence — know that unlawful acts have been or will be committed, but do not know when, where or by whom a specific crime will be committed. They must therefore have some leeway to be able to perform this function adequately.

[193] Although I cannot conclude that the officers in the case at bar had a reasonable suspicion that an offence had been committed, I would not want what is said in this judgment to discourage them from intervening. As can be seen from the trial judge's reasons, the officers were calm and polite. Even though their actions may, viewed objectively, have constituted detention, that was most likely not intentional. It would therefore be best in future for police officers to avoid asking incriminating questions of people who are likely to be viewed as suspects. The direct questions in the instant case can be compared with the circumspect approach taken by the officers in *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456. If, in the course of an exchange of words in which officers act circumspectly, the behaviour of the person they are speaking with changes, the next question is whether the facts are sufficient to give rise to a reasonable suspicion that an offence has been or will be committed. If they are sufficient, it will then be open to the officers to exercise their power of investigative detention.

[194] In short, I believe it is important to educate the police about how their conduct affects members of the public. If they do not really intend to detain a person, they should — by their deeds and their words — let the person know that he or she is not being singled out.

2. Factors Supporting the Admission or Exclusion of Evidence Obtained in Violation of the Charter

[195] The majority propose revising the test developed in *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, for admitting or excluding evidence obtained in violation of a right protected by the *Canadian Charter of Rights and Freedoms*. I agree with them that the test needs to be revised, but in my view, the formulation they propose is inconsistent with the purpose of s. 24(2). I will be proposing a simpler rule that focusses the analysis on two aspects: the societal interest in protecting constitutional rights and the societal interest in the adjudication of the case on the merits. On the basis of these two aspects, it will be possible to consider all the relevant circumstances in order to determine whether the exclusion or admission of the evidence would bring the administration of justice into disrepute.

A) *Purpose of Section 24(2) of the Charter*

[196] The identification of the purpose of s. 24(2) of the *Charter* is of prime importance for the determination of the factors to be considered in applying this provision. According to Professor David M. Paciocco, “[r]ecent experience in the United States has demonstrated that the vitality of the exclusionary rule depends entirely on the purposes that are identified for exclusion. This is because each of the rationales has its own level of vulnerability and its own sphere of operation” (“The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule” (1989-90), 32 *Crim. L.Q.* 326, at p. 334). However, Professor Kent Roach cautions that “[i]f none of the approaches is in a preferred position, the choice of which rationale will prevail in a particular case is likely to be inconsistent and result-oriented” (“Constitutionalizing Disrepute: Exclusion of Evidence after *Therens*” (1986), 44 *U.T. Fac. L. Rev.* 209, at p. 228).

[197] *Collins* had the merit of setting out the first test for applying s. 24(2). But neither in that case nor in those that followed can the Court be said to have identified a guiding principle or taken a clear position ranking the various purposes that are often cited for the provision and can be

drawn — sometimes implicitly and sometimes explicitly — from the case law. The failure to do so is surprising, given the importance the Court has attached to contextual analysis and to the need, in interpreting any provision, to consider its purpose.

[198] I accordingly agree with the majority that the purpose of s. 24(2) of the *Charter* is found in the words of the provision. Section 24 reads as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The purpose of s. 24(2) is to maintain public confidence in the administration of justice.

[199] Since this purpose is a general one, it makes it possible to take the various functions of the criminal justice system into account. This purpose also makes it possible to identify a common denominator between ss. 24(1) and (2). It is clear that one of the purposes of the remedy provided for in s. 24(1), more specifically a stay of proceedings for abuse of process, is to maintain the repute of the administration of justice: *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667. Although a stay of proceedings can be granted only in the clearest of cases because it allows the accused to go free, the comparison with s. 24(2) is not without interest, especially in a case where the exclusion of evidence would in practice lead to the discharge of the accused by resulting in his or her acquittal.

[200] A court that must decide under s. 24(1) whether to order a stay of proceedings may consider the “balance . . . between the public interest in having all charges dealt with on their merits [and] the public interest in having all charges stayed to show the court’s determination to ensure the continued vigour of checks and balances in the criminal justice system” (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, dissent, at para. 231 (emphasis deleted); see also the majority’s reasons, at para. 57). This balancing exercise is also essential to the analysis required by s. 24(2). Under s. 24(2), the judge must decide whether the best way to maintain the reputé of the administration of justice would be to admit the evidence or to exclude it.

[201] I also agree with the majority’s proposition that the exclusionary rule has, primarily, a prospective societal role and that the judge’s analysis must focus on systemic concerns (para. 70). The court cannot consider the case of the accused person who is on trial without addressing the long-term impact of its decision on the administration of justice in general. If, where the stay of proceedings and the admission or exclusion of evidence are concerned, the point of convergence between the first and second subsections of s. 24 is the balancing of two factors, what distinguishes these provisions is that the purpose of the first is to provide for an individual remedy, whereas the ultimate purpose of the second lies in the societal interest in maintaining public confidence in the administration of justice. The first is focussed on the individual, the second on society.

[202] The statement that s. 24(2) has a long-term societal purpose is of great significance for the identification of the factors to be considered in the analysis. In my view, the test proposed by the majority, by focussing the analysis on the conduct of the police in the first branch and on the interest of the accused in the second, and by attaching less importance to the seriousness of the offence in the third, does not give sufficient consideration to the long-term societal interest that must guide the judge in reaching a decision.

B) *The Test: Branches and Factors*

[203] Since *Collins*, the courts have generally applied a test under which the factors relevant to the analysis to be conducted in applying s. 24(2) were grouped in three broad branches. This Court has applied this test in many subsequent decisions, including *R. v. Greffe*, 1990 CanLII 143 (SCC), [1990] 1 S.C.R. 755, at pp. 783-84, in which Lamer J. (as he then was) summarized the test as follows:

The first set of factors are those relevant to the fairness of the trial. The second set of factors concerns the seriousness of the *Charter* violations as defined by the conduct of the law enforcement authorities. The third set of factors recognizes the possibility that the administration of justice could be brought into disrepute by excluding the evidence despite the fact that it was obtained in a manner that infringed the *Charter*.

[204] First, the courts had to determine the nature of the evidence obtained in violation of the rights of the accused. Where real evidence was adduced, admitting it rarely led to a finding that trial fairness had been impaired. Second, they had to assess the seriousness of the violation in light of both the interests protected by the infringed right and the state conduct. Third, the courts considered the consequences of excluding the evidence and determined, more specifically, whether the evidence was essential, having regard to the seriousness of the offence (*Greffe*, per Dickson C.J., at pp. 762-63).

[205] In the case at bar, the majority propose to reformulate the test. The new version continues to have three branches: a review of the state conduct, the impact of the violation on the *Charter*-protected interests and the public interest in an adjudication on the merits.

[206] It is appropriate that trial fairness is no longer a cornerstone of the test. One of the problems with the reliance on trial fairness in the first branch of the *Collins* test was that it is a concept with several possible meanings and can accordingly lead to confusion.

[207] Trial fairness is sometimes defined narrowly and sometimes more broadly. Defined narrowly, it concerns solely the reliability of the evidence. More broadly, trial fairness corresponds to “courtroom fairness” (P. Mirfield, “The Early Jurisprudence of Judicial Disrepute” (1987-88), 30 *Crim. L.Q.* 434, at pp. 444 and 452). In the latter sense, fairness is related to the concept of “conscriptive evidence”. Its purpose is to safeguard certain fundamental rights of the accused at trial, such as the right against self-incrimination. This interpretation is essentially the same as the one in *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607. Finally, trial fairness has been defined very broadly by certain commentators and in certain judgments (see the dissent in *R. v. Burlingham*, 1995 CanLII 88 (SCC), [1995] 2 S.C.R. 206, at para. 86). According to this approach, any use of evidence obtained in violation of constitutional rights is — regardless of the quality of the evidence (reliable, conscriptive, derivative, etc.) — a breach of trial fairness. It is clear that, although the concept of fairness seems to go hand in hand with any system of justice worthy of that name, it is not precise enough to serve as a reliable guide.

[208] The reformulation of the first of the criteria from *Collins* so as to exclude the trial fairness concept and take *Charter*-protected interests into account in the second branch of the new test is a refinement that may help judges refer to concrete and objective factors. I am in complete agreement that the greater the impact of the violation on the *Charter*-protected interests, the more likely it is that there will be negative consequences for public confidence in the administration of justice. For example, interference with bodily integrity and a search of a rented car will not have the same impact on the confidence an objective person with good knowledge of the circumstances of the case will have in the administration of justice (*Collins*, at p. 282).

[209] However, I cannot agree with focussing the analysis on the accused, as the purpose remains at all times to maintain public confidence in the administration of justice in the long term, and what is important is the public interest in the protection of constitutional rights. Nor can I accept that one of the factors — state conduct — formerly taken into account when analysing the seriousness of a violation is now a separate branch of the test. In pursuing the purpose of maintaining confidence in the administration of justice, the courts must dissociate themselves from violations of protected rights, regardless of whether or not they were intentional. Although state conduct is of course the source of the violation, it is but one of the factors to be considered in analysing the impact of the violation on *Charter*-protected interests.

[210] I find the majority's emphasis on state conduct puzzling in view of the purpose of s. 24(2). Although the majority acknowledge that the purpose of the s. 24(2) rule is neither to punish the police officers nor to compensate the accused, the importance they attach to this factor places the judge on a slippery slope. Since any distinction between the role of the exclusion of evidence as a way for a court to dissociate itself from a violation and its role as a deterrent — which has been sharply criticized — will be a fine one, I wonder what role this factor will actually play. The Court's attitude in this respect has already been criticized as being one of "doublespeak" (D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at pp. 543-44). I fear that the same word will also be used to refer to the new test. Moreover, by making state conduct a separate branch of the test, the Court is drawing closer to the rules applied in the United States, which are based on very different constitutional provisions and a very different socio-political context (see the reasons of Esson J.A. in *R. v. Strachan* (1986), 1986 CanLII 1281 (BC CA), 25 D.L.R. (4th) 567 (B.C.C.A.)).

[211] It might have been thought that the courts would over time have understood that it is unhelpful to begin the constitutional analysis by considering state conduct. The main problem

with the importance attached to this factor is that the deterrent effect of the exclusion of evidence has never been proved empirically (S. Penney, “Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the *Charter*” (2004), 49 *McGill L.J.* 105, at p. 114).

[212] In the United States, many commentators have attempted to demonstrate that the exclusionary rule is either effective or ineffective as a deterrent, and the question is still open to debate: L. T. Perrin et al., “If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule — A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule” (1998), 83 *Iowa L. Rev.* 669; W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), vol. 1, at pp. 32-37; *Herring v. United States*, 555 U.S. 1 (2009); Law Reform Commission of Canada, Working Paper 10, *Evidence — The Exclusion of Illegally Obtained Evidence* (1974), at pp. 19-20. The question has also been the subject of debate in Canada. According to Paciocco, at p. 340, s. 24(2) cannot have a deterrent effect, because it does not establish a clear and predictable rule requiring the exclusion of evidence. To other commentators, from the perspective of the conduct of state agents, exclusion is not an effective sanction. The police certainly have an interest in the conviction of an accused, but that interest is above all one of society as a whole. Administrative or disciplinary measures may have a greater deterrent effect on the police (Law Reform Commission, at pp. 20-22; *R. v. Duguay*, 1989 CanLII 110 (SCC), [1989] 1 S.C.R. 93, at pp. 123-24, and *Burlingham*, at para. 104, per L’Heureux-Dubé J., dissenting). In my view, the reservations expressed regarding the effectiveness of the exclusion of evidence as a deterrent are an invitation to be very prudent as regards the importance attached to state conduct.

[213] Furthermore, a parallel can be drawn with the order for a stay of proceedings for abuse of process, which also has as its purpose the maintenance of public confidence in the

administration of justice. As the Court pointed out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391, at para. 91, and in *R. v. Taillefer*, [2003 SCC 70](#), [2003] 3 S.C.R. 307, at para. 119, the purpose of such an order is not to punish state misconduct. In my view, there is no justification for attributing this role, even indirectly, to s. 24(2). Although I agree that the exclusion of evidence may have a deterrent *effect*, I do not think state conduct should be considered separately in the determination of what must be done to maintain public confidence in the administration of justice. If a judge must decide whether to admit or exclude evidence, a violation of rights must already have been proved. It is therefore the impact of that violation that needs to be examined, not the inherent seriousness of the state conduct.

[214] In sum, I agree with incorporating into the assessment of the impact of the violation a broader perspective according to which all *Charter*-protected interests are taken into account. However, this new approach should be focussed not on the accused, but on the public interest in the protection of constitutional rights. Moreover, even though this approach may permit the courts to examine state conduct in order to determine its impact on the protected interests and, if necessary, to dissociate themselves from it, the purpose being pursued is to maintain public confidence in the administration of justice. The need for the courts to dissociate themselves from state conduct is at most one factor to be considered in relation to the overall purpose. Furthermore, in applying the *Collins* test, the courts have considered both state conduct and the seriousness of the infringement of the interests protected by the violated right in their review of the seriousness of the violation. In my view, therefore, the proposed change incorporates into the test a branch that is in itself inconsistent with the purpose of the provision and that does not make the rule any clearer or easier to apply. I accordingly find that the objective of the reformulation has not been achieved.

[215] At the third stage of the *Collins* analysis, the judge had to determine the effect that excluding the evidence would have on the repute of the administration of justice. The third branch

of the new test proposed by the majority requires the judge to assess the “public interest in an adjudication on the merits”. Although this formulation is clearly broad enough that it will be possible to consider the factors formerly regarded as important in the third branch of the *Collins* test, certain factors are unduly de-emphasized or simply disregarded in the new test.

[216] In this regard, the majority’s position on the seriousness of the offence being prosecuted is ambiguous. Although the majority describe this factor as a “valid consideration”, they mention that it “has the potential to cut both ways”, that is, in favour of either excluding or admitting evidence. Their justification for this position is that although the public has a heightened interest in an adjudication on the merits where the crime is a serious one, it also has a heightened interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high (para. 84). I note that they also consider the heightened interest of the accused in having a justice system that is above reproach, especially where the crime with which he or she is charged is a serious one. These comments by the majority help me put the problem in context, and they suggest that the interest of the accused is equal to that of society where the charge is serious. In addition to my doubts about how the seriousness of the offence actually fits into the majority’s test, I must say that I disagree with the proposition that in the analysis relating to the maintenance of the repute of the administration of justice, this factor is neutral.

[217] First of all, the third branch of the majority’s test requires the judge to consider the factors that weigh in favour of or against proceeding to trial. At first glance, it is hard to imagine how the seriousness of the offence, and even the harshness of the sentence, could weigh against proceeding to trial. However, it is conceivable that when the factor of the seriousness of the offence is combined with other circumstances — where, for example, the evidence is unreliable — the accused might claim to have a greater interest in not standing trial if he or she could face a harsher sentence owing to the seriousness of the charge. But this interest is subsumed in the public’s interest, which is of course opposed to having an accused convicted on the basis of

unreliable evidence. Moreover, a well-informed person who is objective and is apprised of all the circumstances would surely be shocked if unreliable evidence were used in any criminal trial (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 62).

[218] What the majority suggest is in reality that, on the one hand, the interest of the accused in having the evidence excluded increases with the seriousness of the offence and the harshness of the potential sentence and, on the other hand, the societal interest in an adjudication on the merits increases with the seriousness of the offence. The result is that this factor is considered to be neutral. But I find it unacceptable to place value in the benefit derived by the accused from the exclusion of reliable evidence. The accused has a legitimate interest in having his or her rights protected, but not in having the evidence truncated to his or her advantage. In other words, the outcome of the analysis cannot be factored into the analysis itself. Moreover, the protection of the interests of the accused is considered in the first and second branches of the test proposed by the majority, not in the third.

[219] The analysis to be conducted under s. 24(2) should not be more likely to result in the exclusion of evidence where the charge is murder than where it is theft. To the extent that the majority's approach has the effect of including, in the third branch of the test, factors related to the consequences of the charges for the accused, it is inconsistent with the analysis required at this stage.

[220] The suggestion that the effect of the factor of the seriousness of the offence is neutral because of the heightened societal interest in having a system of justice that is above reproach is also problematic. What might be criticized is the admission of evidence obtained in violation of constitutional rights. This implies that the violation is taken into account at this stage of the analysis. In other words, the violation will have been taken into account at every stage: at the

first, in reviewing the conduct of the police; at the second, in assessing the impact of the violation on the protected interests; and lastly, at the third, in considering the interest in maintaining a system of justice that is above reproach. Furthermore, this approach evokes the broad concept of trial fairness even though that concept is not formally included in the test proposed by the majority. Thus, trial fairness would be reintroduced indirectly, but in a more diffuse sense that is potentially much broader than the one in which it was used in the approach developed in *Collins* and *Stillman*.

[221] In my view, assessing the seriousness of the offence is as important as determining whether the evidence is reliable or essential. To disregard this factor would make as little sense as to disregard the fact that an accused who is granted a stay of proceedings will not be prosecuted.

[222] If the role of the courts is to conduct trials to seek the truth about the commission of crimes, the importance of this role reaches its apogee where the crime is a particularly serious one. I think it goes without saying that society has a greater interest in an adjudication on the merits where the crime is a serious one, such as murder, sexual assault or importing hard drugs, than where it is less serious, as in the case of shoplifting, possession of cannabis or assault.

C) *Proposed Test*

[223] In short, I agree that the time has come for the Court to revisit the test for the admission or exclusion of evidence obtained in violation of a *Charter* right. I am proposing a simple test that takes into account both the public interest in protecting *Charter* rights and the public interest in an adjudication on the merits. I agree with the majority that the judge's approach should be to foster the maintenance of public confidence in the administration of justice in the long term, but I would add that it is by striking a fair balance between these two societal interests that this result will be

attained. These are the only two aspects that a judge should consider in determining whether the maintenance of confidence in the administration of justice would be better served by admitting the evidence or by excluding it.

[224] On the branch related to the protection of constitutional rights, I would suggest that any facts that help show the effect of the violation on the protected rights be considered. In this respect, the state conduct that gave rise to the violation is obviously a relevant factor. However, the purpose of the judge's review is not to punish the police officers or to compensate the accused for the violation. Rather, it is to assess the impact of that conduct on the protected interests with a view to ultimately balancing the societal interest in the protection of constitutional rights against the role of the judicial system as the institution responsible for holding trials. There may be cases in which conduct is so serious that the courts feel a need to dissociate themselves from it and, in the end, to attach paramount importance to it in their analysis. In the test I am proposing, however, state conduct is but one of the factors to be considered in assessing the impact of the violation on the protected rights.

[225] The impact of a violation on protected interests will vary with the circumstances, and it would be impossible here to list all the circumstances that might be relevant. Suffice it to mention the place of the search, the nature of the evidence, the nature of the violated right, the urgency of the situation for the police officers, the availability of other less intrusive investigation methods, the officers' knowledge of the applicable law, their training, and the clarity of the law. In short, the judge must take into account all the facts that may be used to assess the long-term impact of his or her decision on the repute of the administration of justice, that is, not on the rights of the accused being tried, but rather on those of every individual whose rights might be violated in a similar way.

[226] As for the branch related to the public interest in an adjudication on the merits, I would suggest taking the reliability of the evidence into account. In my view, this consideration is crucial to the maintenance of public confidence. On the one hand, unreliable evidence will invariably undermine public confidence in the courts' ability to determine whether accused persons are guilty or innocent. On the other hand, a decision to exclude reliable evidence without good reason is also likely to be seen as an abdication by the court of its institutional role. As a corollary, whether the evidence in issue is essential or peripheral is highly significant. Similarly, the importance of the factor of the seriousness of the offence must be recognized, given society's strong interest in being protected from the commission of serious crimes. I have already explained why I feel this factor cannot reasonably be excluded without causing the test itself to bring the administration of justice into disrepute. This is why I would make it an important factor in the analysis.

[227] The question the judge must answer is whether the repute of the administration of justice would be better protected by admitting the evidence or by excluding it. In some cases, the impact on constitutional rights will be the determining factor because, owing to certain circumstances of the violation, the long-term effect of admitting the evidence would be to bring the administration of justice into disrepute. But the converse is also true. Thus, there will be other cases in which it is the public interest in an adjudication on the merits that should prevail: see, for example, the companion case of *R. v. Harrison*, [2009 SCC 34](#), [2009] 2 S.C.R. 494. Absent an error in principle, the decision is a matter for the trier of fact.

3. Application of the Principles to the Facts of the Case

[228] On whether admitting the weapon in evidence would have a positive effect on the repute of the administration of justice, I agree with the majority's conclusion. I refer to the following findings of fact made by the trial judge: the exchange lasted only a few minutes, the officers were polite to Mr. Grant, and they were motivated by a desire to take a proactive approach

in patrolling an area near schools with serious problems related to youth crime and safety. On the protection of the public, it should be noted that the charge here is firearms-related, that it would be impossible to establish guilt without the evidence and that the evidence is eminently reliable.

[229] When balanced against each other, the limited impact of the violation on the protected interests and the great importance of the evidence for the purposes of the trial favour admitting the physical evidence. Furthermore, on the charge of possession of a firearm for the purposes of trafficking, I am in complete agreement with the majority.

[230] For these reasons, I reach the same conclusion as the majority.

Appeal allowed in part.

Solicitors for the appellant: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Halifax.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Canadian Civil Liberties Association: Queen's University, Kingston.

*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Meryl
Edwardh Barristers Professional Corporation, Toronto.*

TAB 15

Henry v. British Columbia (Attorney General), 2015 SCC 24 (CanLII), [2015] 2 SCR 214

Source: Supreme Court of Canada

Date: 2015-05-01

File number: 35745

Other citations: 383 DLR (4th) 383 — 470 NR 200 — 251 ACWS (3d) 590 — [2015] 6 WWR 407 — [2015] EXP 1352 — 70 BCLR (5th) 1 — 18 CR (7th) 338 — 369 BCAC 47 — 336 CRR (2d) 270 — EYB 2015-251516 — JE 2015-743 — [2015] SCJ No 24 (QL)

Citation: Henry v. British Columbia (Attorney General), 2015 SCC 24 (CanLII), [2015] 2 SCR 214, <<https://canlii.ca/t/ghdq1>>, retrieved on 2026-03-23



SUPREME COURT OF CANADA

CITATION: Henry v. British Columbia (Attorney General), 2015 SCC 24, [2015] 2 S.C.R. 214 **DATE:** 20150501
DOCKET: 35745

BETWEEN:

Ivan William Mervin Henry

Appellant

and

**Her Majesty The Queen in Right of the Province of British Columbia
as Represented by the Attorney General of British Columbia and
Attorney General of Canada**

Respondents

- and -

**Attorney General of Ontario, Attorney General of Quebec,
Attorney General of Nova Scotia, Attorney General of New Brunswick,
Attorney General of Manitoba, Attorney General for Saskatchewan,**

**Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Association
in Defence of the Wrongly Convicted, David Asper Centre
for Constitutional Rights, British Columbia Civil Liberties Association,
Canadian Civil Liberties Association, Criminal Lawyers' Association and
Canadian Association of Crown Counsel**
Intervenors

CORAM: McLachlin C.J. and LeBel, * Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.

REASONS FOR JUDGMENT: Moldaver J. (Abella, Wagner and Gascon JJ. concurring)
(paras. 1 to 100)

JOINT REASONS CONCURRING IN THE RESULT: McLachlin C.J. and Karakatsanis JJ.
(paras. 101 to 138)

* LeBel J. took no part in the judgment.

Henry v. British Columbia (Attorney General), 2015 SCC 24, [2015] 2 S.C.R. 214

Ivan William Mervin Henry

Appellant

v.

**Her Majesty The Queen in Right of the Province of
British Columbia as represented by the Attorney General
of British Columbia and Attorney General of Canada**

Respondents

and

**Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Nova Scotia,
Attorney General of New Brunswick,
Attorney General of Manitoba,
Attorney General for Saskatchewan,
Attorney General of Alberta,
Attorney General of Newfoundland and Labrador,
Association in Defence of the Wrongly Convicted,**

**David Asper Centre for Constitutional Rights,
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association,
Criminal Lawyers' Association and
Canadian Association of Crown Counsel**

Interveners

Indexed as: Henry v. British Columbia (Attorney General)

2015 SCC 24

File No.: 35745.

2014: November 13; 2015: May 1.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Remedies — Damages — Civil action — Prosecutorial misconduct in criminal proceedings — Disclosure obligations of prosecutors — Wrongful non-disclosure — Malice — Claimant wrongfully convicted and incarcerated for almost 27 years — Claimant bringing civil action alleging breach of Charter rights resulting from Crown counsel's wrongful non-disclosure of relevant information — Damages under s. 24(1) sought against Crown — Whether s. 24(1) authorizes courts to award damages against Crown for wrongful non-disclosure — Level of fault claimant must establish to meet liability threshold for awarding s. 24(1) damages — Whether malice required — Canadian Charter of Rights and Freedoms, s. 24(1).

H was convicted in 1983 of 10 sexual offences, declared a dangerous offender, and imprisoned for almost 27 years. In October 2010, the B.C. Court of Appeal quashed all 10 convictions and substituted acquittals for each, finding serious errors in the conduct of the trial and

concluding that the guilty verdicts were unreasonable in light of the evidence as a whole. H brought a civil suit against the Attorney General of British Columbia (“AGBC”), seeking damages under s. 24(1) of the *Charter* for harm suffered as a consequence of his wrongful convictions and imprisonment.

H alleges that the Crown failed to make full disclosure of relevant information before, during, and after his trial. H made numerous requests for disclosure of all victim statements as well as medical and forensic reports. The Crown did not disclose any of the requested material before the commencement of trial. At trial, the Crown provided him with several victim statements, but approximately 30 additional statements were not disclosed. These statements revealed inconsistencies that could have been used to attack the already-suspect identification evidence put forward by the Crown. Key forensic evidence was also not disclosed. Furthermore, the Crown failed to disclose the existence of another suspect who had been arrested twice in the vicinity of the attacks.

In his Notice of Civil Claim, H pleaded various causes of action, including negligence, malicious prosecution, and breach of his ss. 7 and 11(d) *Charter* rights. The AGBC moved to strike the causes of action grounded in negligence and the *Charter*. The B.C. Supreme Court struck the negligence claim as inconsistent with this Court’s holding in *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, but allowed H’s *Charter* claim to proceed since it was founded on allegations of malicious conduct. The court noted, however, that if H intended to pursue a *Charter* damages claim against the AGBC for conduct falling short of malice, he would have to seek leave to amend his pleadings. H applied for leave to amend his pleadings to claim *Charter* damages against the AGBC for non-malicious conduct. In permitting H to amend his claim accordingly, the application judge found that a threshold lower than malice should apply and that s. 24(1) damages awards are justified where the Crown’s conduct represents a marked and unacceptable departure from the reasonable standards expected of prosecutors. The Court of Appeal unanimously allowed the AGBC’s appeal, concluding that H was not entitled to seek *Charter* damages for the non-malicious acts and omissions of Crown counsel.

Held: The appeal should be allowed. [Section 24\(1\)](#) of the *Canadian Charter of Rights and Freedoms* authorizes courts of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice.

Per Abella, Moldaver, Wagner and Gascon JJ.: Where, as here, a claimant seeks *Charter* damages based on allegations that the Crown's failure to disclose violated his or her *Charter* rights, proof of malice is not required. Instead, a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence. This represents a high threshold for a successful *Charter* damages claim, albeit one that is lower than malice. Only by keeping liability within strict bounds can a reasonable balance be struck between remedying serious rights violations and maintaining the efficient operation of our public prosecution system.

In *Vancouver (City) v. Ward*, [2010 SCC 27](#), [2010] 2 S.C.R. 28, this Court recognized that [s. 24\(1\)](#) of the *Charter* authorizes damage claims directed against the state for violations of the claimant's constitutional rights. The Chief Justice outlined a framework to determine the state's liability for *Charter* damages. Under this framework, the claimant must demonstrate that the state has breached one of his or her *Charter* rights and that an award of damages would serve a compensation, vindication, or deterrence function. Once that burden is met, the onus shifts to the state to rebut the claimant's case based on countervailing considerations.

The countervailing consideration at issue in this case relates to concerns over good governance. *Ward* recognizes that policy factors may justify restricting the state's exposure to civil liability by establishing a minimum threshold of gravity. If the threshold of gravity is set too low for a *Charter* damages claim alleging Crown misconduct, the ability of prosecutors to discharge their important public duties will be undermined, with adverse consequences for the administration of justice. Specifically, the spectre of liability may influence the decision-making of prosecutors and make them more "defensive" in their approach. A low threshold would also open up the

floodgates of civil liability and force prosecutors to spend undue amounts of time and energy defending their conduct in court.

The AGBC submits that, to attract liability for *Charter* damages, the Crown's conduct must rise to the level of "malice". The malice standard has been extensively canvassed in this Court's malicious prosecution jurisprudence. Under the tort of malicious prosecution, a prosecutor will be liable for the decision to initiate or continue a prosecution against an individual without reasonable and probable cause, provided that such decision was characterized by malice. Malice requires more than recklessness or gross negligence. Rather, the plaintiff must demonstrate a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. The malice standard will only be met in exceptional cases where the plaintiff can prove that a prosecutor's decision was driven by an improper purpose or motive, wholly inconsistent with Crown counsel's role as minister of justice.

There are several reasons why malice does not provide a useful liability threshold for *Charter* damages claims alleging wrongful non-disclosure by prosecutors. First, the malice standard is firmly rooted in the tort of malicious prosecution, which has a distinctive history and purpose. Second, malice requires an inquiry into whether the prosecutor was motivated by an improper purpose. Such an inquiry is apt when the impugned conduct is a highly discretionary decision such as the decision to initiate or continue a prosecution, because discretionary decision-making can best be evaluated by reference to the decision-maker's motives. However, the decision to disclose relevant information is not discretionary. It is a constitutional obligation which must be properly discharged by the Crown in accordance with an accused's *Charter* right to make full answer and defence. As such, the motives of the prosecutor in withholding information are immaterial. Third, unlike the decision to initiate or continue a prosecution, disclosure decisions do not fall within the core of prosecutorial discretion, and therefore do not warrant such an onerous threshold to insulate them from judicial scrutiny. Finally, a purposive approach to s. 24(1) militates against the malice standard.

While the malice standard is not directly applicable, the compelling good governance concerns raised in our malicious prosecution jurisprudence must be taken into account in determining the appropriate liability threshold for cases of wrongful non-disclosure. The liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a litany of civil claims. Moreover, a widespread “chilling effect” on the behaviour of prosecutors must be avoided. Therefore, the threshold must allow for strong claims to be heard on their merits, while guarding against a proliferation of marginal cases.

Good governance concerns mandate a high threshold that substantially limits the scope of liability. The standard adopted by the application judge, which is akin to gross negligence, does not provide sufficient limits. H submits that an even lower threshold — a simple breach of the *Charter* without any additional element of fault — should apply in this context. This approach fails to address the compelling policy and practical concerns that justify limiting prosecutorial liability. H alleges very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his *Charter* rights. His claim as pleaded meets the liability threshold established here. However, H’s exceptional case should not be used to justify a substantial expansion of prosecutorial liability.

Whether considered at the pleadings stage or at trial, the same formulation of the test applies. At trial, a claimant must convince the fact-finder on a balance of probabilities that (1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result. To withstand a motion to strike, a claimant would only need to plead facts which, taken as true, would be sufficient to support a finding on each of these elements.

The liability threshold focuses on two key elements: the prosecutor’s intent, and his or her actual or imputed knowledge. The purpose of these elements is not to shield prosecutors from liability by placing an undue burden on claimants to prove subjective mental states. Rather, they are

designed to set a sufficiently high threshold to address good governance concerns while preserving a cause of action for serious instances of wrongful non-disclosure.

The consequences of setting a lower threshold in this context — simple negligence, or even the gross negligence standard adopted by the application judge — would be serious. This type of threshold implicates a duty of care paradigm that ignores the basic realities of conducting a criminal prosecution. The problems with a negligence-based standard are even more apparent when considering how this lower threshold would operate at the pleadings stage. It would be far too easy for a claimant with a weak claim to plead facts disclosing a cause of action for negligence and thus drive prosecutors into civil court. Bringing a *Charter* damages claim for prosecutorial misconduct should not be a mere exercise in artful pleading.

In addition to establishing a *Charter* breach and the requisite intent and knowledge, a claimant must prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognizable harm. Liability attaches to the Crown only upon a finding of “but for” causation. Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that “but for” the wrongful non-disclosure he or she would not have suffered that harm. The “but for” causation test may, however, be modified in situations involving multiple alleged wrongdoers.

H may seek to amend his pleadings to include a claim for *Charter* damages alleging that the Crown, in breach of its constitutional obligations, caused him harm by intentionally withholding information when it knew, or should reasonably have known, that the information was material to his defence and that the failure to disclose would likely impinge on his ability to make full answer and defence.

Per McLachlin C.J. and Karakatsanis J.: H need not allege that the Crown breached its constitutional obligation intentionally, or with malice, in order to access *Charter* damages. Applying the principles from *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, to this case, H must plead facts that, if true, establish a breach of his *Charter* rights and that damages

constitute an appropriate and just remedy to advance the purposes of compensation, vindication or deterrence. If proven at trial, the facts alleged by H would indisputably establish a breach of H's disclosure rights under s. 7 of the *Charter*, which had a direct and serious impact on the fairness of his trial. In these circumstances, an award of *Charter* damages under s. 24(1) may provide some compensation for the hardships H has endured and may also help publicly vindicate such a serious violation of the *Charter* rights the Crown is alleged to have breached. The objective of deterrence may also be served by an award of damages that highlights the need for the state to remain vigilant in meeting its constitutional obligations.

At step three of the *Ward* analysis, the government has an opportunity to advance any countervailing considerations that would make it inappropriate or unjust to award damages under s. 24(1). At the current stage of proceedings in this case, it is far from clear that there is an alternative remedy that will fulfill the functional objectives of *Charter* damages. As to good governance concerns, the second set of countervailing considerations discussed in *Ward*, those raised by the Attorney General of British Columbia are misplaced in this case. H's case does not involve the exercise of prosecutorial discretion in the usual sense of the term. The discretion to commence and pursue a prosecution is vital to the effective prosecution of criminal cases and claims can only be brought against prosecutors for misuse of this discretion if malice can be shown. The legal duty on the Crown to disclose relevant evidence, however, is not a discretionary function but a legal obligation. This obligation is absolute. The only discretion left to the prosecutor is a limited operational discretion relating to timing, relevance in borderline cases, privilege and protection of witness identity. An action for failure to disclose relevant evidence to the defence is different from an action for misuse of prosecutorial discretion in bringing or pursuing a prosecution. It is not an action for abuse of discretion, but an action for breach of a legal duty imposed on the state by the *Charter*. Recognizing H's claim will not chill the exercise of prosecutorial discretion, nor will it change the high standard of malice for tort actions for misuse of prosecutorial discretion, or divert prosecutors from their day-to-day work.

H should be allowed to amend his pleadings to include a claim for *Charter* damages based on a breach by the Crown of its constitutional obligation to disclose relevant information. On

the facts as pleaded, *Charter* damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence.

Cases Cited

By Moldaver J.

Referred to: *Nelles v. Ontario*, [1989 CanLII 77 \(SCC\)](#), [1989] 2 S.C.R. 170; *Vancouver (City) v. Ward*, [2010 SCC 27](#), [2010] 2 S.C.R. 28; *R. v. 974649 Ontario Inc.*, [2001 SCC 81](#), [2001] 3 S.C.R. 575; *Proulx v. Quebec (Attorney General)*, [2001 SCC 66](#), [2001] 3 S.C.R. 9; *Miazga v. Kvello Estate*, [2009 SCC 51](#), [2009] 3 S.C.R. 339; *Mackin v. New Brunswick (Minister of Finance)*, [2002 SCC 13](#), [2002] 1 S.C.R. 405; *R. v. Imperial Tobacco Canada Ltd.*, [2011 SCC 42](#), [2011] 3 S.C.R. 45; *R. v. Anderson*, [2014 SCC 41](#), [2014] 2 S.C.R. 167; *Krieger v. Law Society of Alberta*, [2002 SCC 65](#), [2002] 3 S.C.R. 372; *R. v. Babos*, [2014 SCC 16](#), [2014] 1 S.C.R. 309; *R. v. Nixon*, [2011 SCC 34](#), [2011] 2 S.C.R. 566; *R. v. Stinchcombe*, [1991 CanLII 45 \(SCC\)](#), [1991] 3 S.C.R. 326; *R. v. Mills*, [1999 CanLII 637 \(SCC\)](#), [1999] 3 S.C.R. 668; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#), [2003] 3 S.C.R. 3; *Elguzouli-Daf v. Commissioner of Police of the Metropolis*, [1995] Q.B. 335; *R. v. Walle*, [2012 SCC 41](#), [2012] 2 S.C.R. 438; *R. v. Daley*, [2007 SCC 53](#), [2007] 3 S.C.R. 523; *R. v. McNeil*, [2009 SCC 3](#), [2009] 1 S.C.R. 66; *R. v. B. (L.)* (1997), [1997 CanLII 3187 \(ON CA\)](#), 35 O.R. (3d) 35; *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007 SCC 41](#), [2007] 3 S.C.R. 129; *Clements v. Clements*, [2012 SCC 32](#), [2012] 2 S.C.R. 181.

By McLachlin C.J. and Karakatsanis J.

Applied: *Vancouver (City) v. Ward*, [2010 SCC 27](#), [2010] 2 S.C.R. 28; **referred to:** *R. v. Gamble*, [1988 CanLII 15 \(SCC\)](#), [1988] 2 S.C.R. 595; *Mills v. The Queen*, [1986 CanLII 17 \(SCC\)](#), [1986] 1 S.C.R. 863; *Mackin v. New Brunswick (Minister of Finance)*, [2002 SCC 13](#), [2002] 1 S.C.R. 405; *Nelles v. Ontario*, [1989 CanLII 77 \(SCC\)](#), [1989] 2 S.C.R. 170; *Miazga v. Kvello Estate*, [2009 SCC 51](#), [2009] 3 S.C.R. 339; *R. v. Stinchcombe*, [1991 CanLII 45 \(SCC\)](#), [1991] 3

S.C.R. 326; *R. v. McNeil*, [2009 SCC 3](#), [2009] 1 S.C.R. 66; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015 SCC 4](#), [2015] 1 S.C.R. 401.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, [11\(d\)](#), [24\(1\)](#).

Constitution Act, 1982, s. 52.

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 14(6).

Authors Cited

Roach, Kent. “A Promising Late Spring for Charter Damages: *Ward v. Vancouver*” (2011), 29 *N.J.C.L.* 135.

APPEAL from a judgment of the British Columbia Court of Appeal (Hall, MacKenzie and Stromberg-Stein JJ.A.), [2014 BCCA 15](#), 53 B.C.L.R. (5th) 262, 349 B.C.A.C. 175, 596 W.A.C. 175, 370 D.L.R. (4th) 742, 6 C.C.L.T. (4th) 175, 299 C.R.R. (2d) 35, 8 C.R. (7th) 108, [2014] 3 W.W.R. 231, [2014] B.C.J. No. 71 (QL), 2014 CarswellBC 100 (WL Can.), setting aside a decision of Goepel J., [2013 BCSC 665](#), 47 B.C.L.R. (5th) 335, 359 D.L.R. (4th) 171, 100 C.C.L.T. (3d) 298, 281 C.R.R. (2d) 24, [2013] 8 W.W.R. 518, [2013] B.C.J. No. 769 (QL), 2013 CarswellBC 990 (WL Can.). Appeal allowed.

Joseph J. Arvay, Q.C., Alison Latimer, Marilyn Sandford and Cameron Ward, for the appellant.

Peter Juk, Q.C., Karen A. Horsman and E. W. (Heidi) Hughes, for the respondent Her Majesty The Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia.

Mitchell R. Taylor, Q.C., and Diba B. Majzub, for the respondent the Attorney General of Canada.

Hart Schwartz and Matthew Horner, for the intervener the Attorney General of Ontario.

Michel Déom and Amélie Dion, for the intervener the Attorney General of Quebec.

James A. Gumpert, Q.C., for the intervener the Attorney General of Nova Scotia.

Gaétan Migneault and Kathryn Gregory, for the intervener the Attorney General of New Brunswick.

Michael Conner and Denis Guénette, for the intervener the Attorney General of Manitoba.

Graeme Mitchell, Q.C., for the intervener the Attorney General for Saskatchewan.

Jolaine Antonio and Kate Bridgett, for the intervener the Attorney General of Alberta.

Frances Knickle and Philip Osborne, for the intervener the Attorney General of Newfoundland and Labrador.

Sean Dewart and Tim Gleason, for the intervener the Association in Defence of the Wrongly Convicted.

Marlys A. Edwardh and Frances Mahon, for the interveners the David Asper Centre for Constitutional Rights and the British Columbia Civil Liberties Association.

Bradley E. Berg, Erin Hoult and Nickolas Tzoulas, for the intervener the Canadian Civil Liberties Association.

Richard Macklin, Breese Davies and Neil G. Wilson, for the intervener the Criminal Lawyers' Association.

Written submissions only by *Paul J. J. Cavalluzzo* and *Adrienne Telford*, for the intervener the Canadian Association of Crown Counsel.

The judgment of Abella, Moldaver, Wagner and Gascon JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] Ivan Henry was convicted in March 1983 of 10 sexual offences involving 8 different complainants. He was declared a dangerous offender and sentenced to an indefinite period of incarceration. He remained imprisoned for almost 27 years. In October 2010, the British Columbia Court of Appeal quashed all 10 convictions and substituted acquittals for each, finding serious errors in the conduct of the trial and concluding that the guilty verdicts were unreasonable in light of the evidence as a whole: *R. v. Henry*, 2010 BCCA 462, 294 B.C.A.C. 96 (“*Henry No. 1*”), at para. 154.

[2] Mr. Henry brought a civil suit against the City of Vancouver (“City”), the Attorney General of British Columbia (“AGBC”), and the Attorney General of Canada (“AGC”), seeking damages for his wrongful convictions and imprisonment. The claims against the City and the AGC are not at issue in this appeal. We are concerned only with the claim against the AGBC for damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. Specifically, Mr. Henry alleges that the provincial Crown should be held liable for its failure — before, during, and after his criminal trial — to meet its disclosure obligations under the *Charter*. The sole question before us is

the level of fault that Mr. Henry must establish to sustain a cause of action against the AGBC in these circumstances.

II. Factual Background

[3] This appeal arises from proposed amendments to the pleadings in Mr. Henry's civil case. Because this case is at the pleadings stage, the allegations of prosecutorial misconduct made by Mr. Henry — including those recited in this factual background — must be accepted as true.

A. Mr. Henry's 1983 Convictions

[4] From November 1980 to June 1982, a series of sexual assaults occurred in Vancouver. The perpetrator of each assault used a similar *modus operandi*: he targeted female victims who were alone at night in certain neighbourhoods, threatening them with a knife and covering their heads with a pillow or pillowcase. In many of the cases, the perpetrator told the victim that he had been “ripped off” and was owed money by someone who supposedly lived at the victim's residence: *Henry No. 1*, at para. 11. After investigation, Vancouver Police concluded that a single perpetrator was responsible for the attacks.

[5] Donald McRae lived in Mount Pleasant, one of the Vancouver neighbourhoods in which the assaults took place. In the spring of 1981, Mr. McRae was placed under police surveillance as a suspect, but was not arrested in connection with the attacks. In March 1982, Mr. Henry moved to a house in the same city block as Mr. McRae.

[6] Police came to regard Mr. Henry as a suspect, and he was arrested in May 1982. He was taken to the police station and forced to participate against his will in an identification line-up. When Mr. Henry refused to cooperate, an officer held him in a headlock to keep his head up so it could be seen by the complainants viewing the line-up. Some of the victims identified Mr. Henry as the perpetrator, but others did not, and the police decided to release him after these inconclusive results.

[7] Five days after Mr. Henry's arrest and release, Mr. McRae was arrested and charged with trespass by night for prowling outside a residence several blocks away from the locations of two of the previous assaults. Two months later, Mr. McRae was again arrested and charged with breaking and entering and theft at a residence six blocks away from one of the previous sexual assaults.

[8] Mr. Henry was re-arrested in July 1982, after the victim of a June attack made an identification from an array of photographs shown to her by the police. The photograph of Mr. Henry pictured him standing in front of a jail cell, with the arm of a uniformed officer visible in front of him. None of the six "foils" were photographed in this manner, and all six differed significantly from Mr. Henry in terms of age, hair style, and facial hair.

[9] Mr. Henry was charged with 17 offences, although only 10 of these ultimately proceeded to trial. He initially had legal representation, and made numerous requests for disclosure of all victim statements as well as medical and forensic reports. Despite these requests, the Crown did not disclose any of the requested material before the commencement of trial.

[10] Mr. Henry represented himself at trial. There was no reliable out-of-court identification suggesting he was the perpetrator, no evidence linking him to any of the victims, and no physical evidence placing him at any of the crime scenes. The Crown's entire case rested on in-court identifications of Mr. Henry by the complainants.

[11] At the outset of his trial, Mr. Henry again requested disclosure of all victim statements. The Crown provided him with 11 statements made by the 8 trial complainants. However, approximately 30 additional statements made by the complainants were not disclosed, including those contained in the notes of the original crime scene investigators. These statements revealed inconsistencies that could have been used to attack the already-suspect identification evidence put forward by the Crown.

[12] Furthermore, key forensic evidence was not disclosed. Investigators had recovered sperm from several of the crime scenes that could have been used to include or exclude a suspect based on blood type, yet this evidence was never brought to Mr. Henry's attention. The Crown also failed to disclose that Mr. McRae had been considered a suspect, and had been arrested twice in the vicinity of the attacks.

[13] At the conclusion of his trial, a jury convicted Mr. Henry on all 10 charges. He was declared a dangerous offender and sentenced to an indefinite period of incarceration.

B. *Mr. Henry's Initial Appeal Efforts*

[14] Mr. Henry's initial appeal to the British Columbia Court of Appeal was dismissed for want of prosecution because of his failure to file trial transcripts and appeal books. His application for leave to appeal to this Court was denied, [1984] 1 S.C.R. viii, as were several subsequent *habeas corpus* applications and a 1997 application to appoint counsel and reopen his appeal.

[15] In total, between 1984 and 2006, Mr. Henry filed more than 50 applications in different courts and with the federal Crown seeking to have his convictions reviewed, while continuing to seek disclosure relating to his case.

C. *Project Smallman and the Unsolved Sexual Assaults*

[16] Between November 1982 and July 1988, more than 25 sexual assaults occurred in close geographic proximity to the assaults for which Mr. Henry was convicted. These additional assaults bore similar hallmarks to those attributed to Mr. Henry. However, he could not have been the perpetrator, as he was in custody during this period. These ongoing assaults were not disclosed to him.

[17] In 2002, as part of an effort designated "Project Smallman", Vancouver Police reopened investigations into a number of unsolved sexual assaults committed between 1983 and

1988 that they believed were carried out by a single perpetrator. DNA evidence linked Mr. McRae to three of the assaults, and he pleaded guilty to these offences in May 2005.

[18] The similarity in both geography and *modus operandi* between these subsequent assaults and the assaults for which Mr. Henry was convicted led the provincial Crown to appoint an independent investigator to review Mr. Henry's convictions. On the recommendation of this investigator, the provincial Crown provided full disclosure to Mr. Henry, including information gathered during the initial police investigation that should have been disclosed at trial and information subsequently discovered during Project Smallman. Mr. Henry successfully applied to reopen his appeal and was released on bail pending a hearing on the merits. The application was unopposed by the Crown, based on the recommendation of the independent investigator.

D. *Mr. Henry's Appeal and Acquittals*

[19] In *Henry No. 1*, the British Columbia Court of Appeal considered Mr. Henry's appeal on the merits for the first time. In October 2010, Low J.A., for a unanimous court, found significant errors in the trial judge's jury instructions. He also found that the charges should have been severed, and a mistrial declared, after the Crown abandoned its submission that the evidence on each count should be treated as similar fact evidence. These errors would have been sufficient for Low J.A. to order a new trial. However, he also held that the evidence as a whole was incapable of proving identification, and the verdicts were therefore unreasonable. As a result, he substituted acquittals for each of Mr. Henry's 10 convictions.

E. *Mr. Henry's Civil Claims*

[20] Mr. Henry filed a civil action in June 2011, seeking damages against the City, the AGBC, and the AGC for harm suffered as a consequence of his wrongful convictions and incarceration. His claim against the City relates to the investigation of the crimes for which he was convicted, and the failure of the Vancouver Police to inform Crown counsel of the subsequent offences that were later re-investigated as part of Project Smallman. His claim against the AGC

relates to the denial of his various applications for review of his convictions. As indicated, these claims are not at issue in this appeal.

[21] Mr. Henry's claim against the AGBC alleges that the Crown failed to make full disclosure of relevant information before and during his trial, and in subsequent proceedings. In his Notice of Civil Claim, he pleaded various causes of action: negligence, malicious prosecution, misfeasance in public office, abuse of process, and breach of his ss. 7 and 11(d) *Charter* rights. The AGBC moved to strike Mr. Henry's causes of action grounded in negligence and the *Charter*. In September 2012, Goepel J. of the British Columbia Supreme Court struck the negligence claim as inconsistent with this Court's holding in *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170; *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1401 ("Henry No. 2"), at paras. 43-60. Goepel J. allowed Mr. Henry's *Charter* claim to proceed since it was founded on allegations of malicious conduct. However, he noted that, if Mr. Henry intended to pursue a *Charter* damages claim against the AGBC for conduct falling short of malice, he would have to seek leave to amend his pleadings (paras. 61-72).

III. Judgments Below

A. *British Columbia Supreme Court*, 2013 BCSC 665, 47 B.C.L.R. (5th) 335 (Goepel J.)

[22] Following the decision in *Henry No. 2*, Mr. Henry applied to amend his pleadings to claim *Charter* damages against the AGBC for non-malicious conduct. The AGBC opposed this application, arguing that a claim for *Charter* damages grounded in alleged prosecutorial misconduct requires proof of malice. The application judge rejected this submission.

[23] Goepel J. held that the case law on malicious prosecution is not dispositive of the required threshold. Relying on this Court's seminal decision on *Charter* damages in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, he observed that s. 24(1) affords courts a broad discretion to craft appropriate remedies, and that this discretion should not be limited "by casting it in a strait-jacket of judicially prescribed conditions" (para. 28, quoting *Ward*, at para. 18). However,

he recognized that it may be necessary, as a matter of policy, for courts to mandate a minimum threshold of liability for a successful *Charter* damages claim.

[24] In Mr. Henry's case, Goepel J. found that there were competing policy considerations that must be weighed in arriving at the appropriate threshold. He determined that a threshold lower than malice should apply — namely, the standard for awarding costs in criminal proceedings for *Charter* breaches. Referring to this Court's decision in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (“*Dunedin*”), he noted that costs awards made under s. 24(1) in criminal proceedings are only justified in limited circumstances where the Crown's conduct represents a marked and unacceptable departure from the reasonable standards expected of prosecutors. Goepel J. thus permitted Mr. Henry to amend his Notice of Civil Claim in accordance with this threshold.

B. *British Columbia Court of Appeal*, 2014 BCCA 15, 53 B.C.L.R. (5th) 262 (Hall J.A., MacKenzie and Stromberg-Stein J.J.A., Concurring)

[25] The Court of Appeal unanimously allowed the AGBC's appeal, concluding that Mr. Henry was not entitled to seek *Charter* damages for the non-malicious acts and omissions of Crown counsel.

[26] Speaking for the court, Hall J.A. relied heavily on this Court's “trilogy” of malicious prosecution cases — *Nelles, Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, and *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339. He noted that, in *Nelles*, this Court rejected an absolute immunity for Crown counsel, and preserved a right to pursue civil damages against a prosecutor who acts intentionally to subvert justice. Referring to *Proulx*, he observed that “malicious prosecution can be an efficacious remedy to one harmed by prosecutorial misconduct” (para. 23).

[27] In the same vein, Hall J.A. determined that making *Charter* damages available to compensate for malicious acts and omissions of prosecutors would offer plaintiffs an effective recourse for *Charter* violations, but he was not prepared to go further. In his view, the application

judge erred in adopting the lower standard of fault developed in criminal cases where costs were awarded. That standard — a marked and unacceptable departure from the reasonable standards expected of Crown counsel — was akin to gross negligence and would result in “a new head of liability against prosecutors” (para. 20).

[28] Hall J.A. rejected the view that *Ward* altered the parameters of civil liability for prosecutors. He underscored the fact that, in *Ward*, this Court recognized that good governance considerations can militate against *Charter* damages awards, and that existing causes of action in private law may provide the appropriate liability threshold in a particular context.

[29] Hall J.A. concluded that he was bound by this Court’s jurisprudence on the scope of civil liability for prosecutors, and therefore the malice threshold was applicable. In his view, “it would be an unwarranted extension of the language in *Ward* to find that the Supreme Court of Canada was altering the principles set forth in *Nelles* and *Miazga*” (para. 29). To the extent that prosecutorial liability ought to be expanded to include claims of negligence, it should be done by the legislature or a court of last resort. Accordingly, Hall J.A. allowed the appeal and dismissed Mr. Henry’s application to amend his pleadings.

IV. Analysis

A. Overview of the Charter Damages Threshold for Wrongful Non-disclosure by Prosecutors

[30] A constitutional question is posed in this case:

Does s. 24(1) of the *Canadian Charter of Rights and Freedoms* authorize a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice?

[31] In the context of Mr. Henry’s claims, I would answer this question in the affirmative. Where a claimant seeks *Charter* damages based on allegations that the Crown’s failure to disclose violated his or her *Charter* rights, proof of malice is not required. Instead, a cause of action will lie

where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence. This represents a high threshold for a successful *Charter* damages claim, albeit one that is lower than malice.

[32] I will discuss the legal basis and precise scope of this threshold in greater detail below. Briefly, it recognizes that while malice does not provide a useful or workable framework for dealing with allegations of wrongful non-disclosure by prosecutors, the policy underpinnings of this Court's malicious prosecution jurisprudence inform the proper scope of Crown liability for *Charter* damages in this context.

[33] I emphasize "this context" because, in my view, it is neither prudent nor necessary to decide whether a similar threshold would apply in circumstances not involving wrongful non-disclosure. Mr. Henry's claim against the AGBC is rooted in allegations that Crown counsel failed to disclose certain relevant information. It would be unwise to speculate about other types of prosecutorial misconduct that might violate the *Charter*, or to fix a blanket threshold that governs all such claims against the Crown. The threshold established in this case may well offer guidance in setting the applicable threshold for other types of misconduct, but the prudent course of action is to address new situations in future cases as they arise, with the benefit of a factual record and submissions.

B. *Ward Provides the Governing Legal Framework*

[34] Under s. 24(1) of the *Charter*,

[a]nyone whose rights or freedoms . . . have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In *Ward*, this Court recognized that the language of s. 24(1) is broad enough to encompass damage claims for *Charter* breaches. Such claims are brought by an individual as a public law action directed against the state for violations of the claimant's constitutional rights.

[35] *Charter* damages are a powerful tool that can provide a meaningful response to rights violations. They also represent an evolving area of the law that must be allowed to “develop incrementally”: *Ward*, at para. 21. When defining the circumstances in which a *Charter* damages award would be appropriate and just, courts must therefore be careful not to stifle the emergence and development of this important remedy.

[36] However, *Charter* damages are not a silver bullet. They are just one of many remedies that may be available to individuals whose *Charter* rights have been breached, and their availability is not without limit. In *Ward*, the Chief Justice outlined a four-step framework to determine the state's liability for *Charter* damages:

The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages. [para. 4]

[37] Under this framework, the claimant bears the initial burden of making out a *prima facie* case. The claimant must demonstrate that the state has breached one of his or her *Charter* rights and that an award of damages would serve a compensation, vindication, or deterrence function. Once that burden is met, the onus shifts to the state to rebut the claimant's case based on countervailing considerations. The Chief Justice identified two important countervailing considerations, while maintaining that a “complete catalogue” of such considerations would be elaborated over time: *Ward*, at para. 33.

[38] The first countervailing consideration is the existence of alternative remedies. Section 24(1) is a broad remedial provision that provides a range of responses to *Charter* violations beyond a monetary award. In addition, there may be substantial overlap between private law and s. 24(1) actions against the government. Where the state can show that another remedy is available to effectively address a *Charter* breach — whether under the *Charter* or in private law — a damages claim may be defeated at the third step of *Ward*. For instance, if a declaration of a *Charter* breach would adequately achieve the objectives that would otherwise be served by a damages award, then granting damages as well as a declaration would be superfluous, and therefore inappropriate and unjust in the circumstances: *Ward*, at para. 37.

[39] The second countervailing consideration — and the one at issue in this case — relates to concerns over good governance. *Ward* does not define the phrase “[g]ood governance concerns” (para. 38), but it serves as a compendious term for the policy factors that will justify restricting the state’s exposure to civil liability. As the Chief Justice observed:

In some situations, . . . the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. [Emphasis added; para. 39.]

This is precisely what the AGBC, the AGC, and the numerous intervening Attorneys General argue in this case. There is a common theme driving their submissions: if the threshold of gravity is set too low for a *Charter* damages claim alleging Crown misconduct, the ability of prosecutors to discharge their important public duties will be undermined, with adverse consequences for the administration of justice.

[40] This theme finds expression in a number of specific policy concerns. For example, the Attorneys General argue that the spectre of liability may influence the decision-making of prosecutors and make them more “defensive” in their approach. The public interest is not well served when Crown counsel are motivated by fear of civil liability, rather than their sworn duty to fairly and effectively prosecute crime. By the same token, the Attorneys General suggest that a low

threshold would open up the floodgates of civil liability and force prosecutors to spend undue amounts of time and energy defending their conduct in court instead of performing their duties.

[41] As I will explain, these concerns are very real, and they provide compelling reasons why the availability of *Charter* damages should be circumscribed through the establishment of a high threshold.

[42] *Ward* provides an example of a prior case where a heightened *per se* liability threshold was justified by policy reasons. In *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, this Court held that *Charter* damages were unavailable for state action taken pursuant to a law, considered valid at the time but later declared invalid, unless the state action was “clearly wrong, in bad faith or an abuse of power” (para. 78). In other words, state actors were afforded a limited immunity for actions taken in good faith under a law they believed to be valid. Citing *Mackin*, the Chief Justice in *Ward* noted that, “absent threshold misconduct”, no cause of action for *Charter* damages will lie in these circumstances (para. 39).

[43] When a heightened *per se* liability threshold has been imposed, this will have consequences at the pleadings stage. To survive a motion to strike, a claimant must plead sufficient facts to disclose a reasonable cause of action: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. If the alleged *Charter* violation occurs in a context where courts have imposed a heightened *per se* liability threshold, the claimant must particularize facts that, if proven, would be sufficient to establish that the state conduct met the required threshold of gravity. The failure to do so will be fatal to the claim. With these principles in mind, I turn to the applicable threshold for wrongful non-disclosure by prosecutors.

C. *Establishing the Charter Damages Threshold for Wrongful Non-disclosure by Prosecutors*

(1) “Malice” Does Not Offer a Useful Liability Threshold for Wrongful Non-disclosure by Prosecutors

[44] The AGBC, the AGC, and the intervening Attorneys General unanimously submit that the Crown’s conduct must rise to the level of “malice” — as defined in the tort of malicious prosecution — to attract liability for *Charter* damages. I do not agree. As I will explain, the malice standard is ill suited to the task of adjudicating allegations of wrongful non-disclosure.

(a) *The Malice Standard Articulated in the Malicious Prosecution Jurisprudence*

[45] The malice standard has been extensively canvassed in this Court’s malicious prosecution trilogy — *Nelles*, *Proulx*, and *Miazga*. In *Nelles*, the Court ruled that Crown prosecutors do not enjoy absolute immunity from civil claims. Lamer J. (as he then was) held that policy considerations favour only a qualified immunity, and that Crown prosecutors are not shielded from claims of malicious prosecution. He outlined the four necessary elements of the malicious prosecution tort as follows: (1) legal proceedings “must have been initiated by the defendant”; (2) those proceedings “must have terminated in favour of the plaintiff”; (3) the defendant did not have “reasonable and probable cause” to initiate the proceedings; and (4) the defendant’s conduct was characterized by “malice, or a primary purpose other than that of carrying the law into effect” (pp. 192-93).

[46] This final element was described by Lamer J. in the following terms:

The required element of malice is for all intents, the equivalent of “improper purpose”. It has . . . a “wider meaning than spite, ill-will, or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage” To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of “minister of justice”. In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. [Emphasis in original; citation omitted.]

(*Nelles*, at pp. 193-94)

[47] In *Proulx*, the Court applied this standard in the Quebec civil law context. Iacobucci and Binnie JJ. affirmed that malice requires “more than recklessness or gross negligence” (para. 35). Rather, the plaintiff must demonstrate “a willful and intentional effort on the Crown’s part to abuse or distort its proper role within the criminal justice system” (*ibid.*). *Proulx* was a case where the plaintiff was successful in proving malice on “highly exceptional” facts (para. 44). Iacobucci and Binnie JJ. found that the Crown made “an active effort to obtain a conviction at any price” by misleading the court, and thus stepped out of its proper role as minister of justice (paras. 41 and 45). Furthermore, the prosecutor’s actions were motivated by an improper purpose since he allowed his office to be used to the ends of a private individual. Given these circumstances, his conduct amounted to “an abuse of prosecutorial power” that crossed the boundary set out in *Nelles* (paras. 44-45).

[48] *Miazga* is this Court’s most recent decision involving the tort of malicious prosecution, in which Charron J. reiterated that “malice in the form of improper purpose is the key to proving malicious prosecution” (para. 8). This high standard was, in her view, justified by the need to give prosecutors a sphere of independence from judicial scrutiny:

It is readily apparent from its constituent elements that the tort of malicious prosecution targets the decision to initiate or continue with a criminal prosecution. When taken by a Crown prosecutor, this decision is one of the “core elements” of prosecutorial discretion, thus lying “beyond the legitimate reach of the court” under the constitutionally entrenched principle of independence [Citation omitted; para. 6.]

[49] It is a bedrock principle that the exercise of core prosecutorial discretion is immune from judicial review, subject only to the doctrine of abuse of process: see *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 48; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 32. Abuse of process may be found where the Crown’s conduct “shocks the community’s conscience” or “offends its sense of fair play and decency”: *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 41. The presence of bad faith and improper motives may indicate this type of conduct: see *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at para. 68; *Anderson*, at para. 49.

[50] Seen in this light, the malice standard under the tort of malicious prosecution generally operates as an analogue in private law to the doctrine of abuse of process. The link between these two standards was made clear in *Miazga*:

Where an accused is wrongly prosecuted as a result of the prosecutor's abusive actions, he or she may bring an action in malicious prosecution. Like the test for abuse of process, however, there is a stringent standard that must be met before a finding of liability will be made, in order to ensure that courts do not simply engage in the second-guessing of decisions made pursuant to a Crown's prosecutorial discretion. [Emphasis added; para. 49.]

In highlighting this link, I should be clear that malice and abuse of process are distinct standards that have their respective areas of application in private and public law. That said, they have a similar purpose: they are high standards *deliberately designed* to capture only very serious conduct that undermines the integrity of the judicial process. By preserving this high bar for judicial intervention, the exercise of prosecutorial discretion can be properly protected.

[51] It is evident that the malice standard will only be met in exceptional cases where the plaintiff can prove, on a balance of probabilities, that a prosecutor's decision to initiate or continue a prosecution was driven by an improper purpose or motive. To be improper, that purpose or motive must be wholly inconsistent with Crown counsel's role as minister of justice. *Miazga* makes this point abundantly clear. As Charron J. observed, "[m]alice requires a plaintiff to prove that the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice" (para. 80 (emphasis in original)). She went on to emphasize that conduct merely reflecting "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" will necessarily fall short (para. 81 (emphasis added)).

(b) *The Malice Standard is Not Applicable to Claims for Charter Damages Alleging Wrongful Non-disclosure*

[52] The Attorneys General advance several arguments in favour of imposing malice as the liability threshold necessary to sustain a *Charter* damages award in this case. These arguments

effectively boil down to a single core submission: the balancing of policy factors in *Nelles* — which led this Court to establish a qualified immunity shielding prosecutors from tort liability absent a showing of malice — is also dispositive here. Indeed, the heart of the AGBC’s submission is that “the specific cause of action alleged is immaterial to the policy rationale which underlies the immunity” (R.F., at para. 38). In other words, it is irrelevant that the claim at issue is brought under s. 24(1) of the *Charter*. If the qualified immunity in *Nelles* is to be effective, it must be treated as a general principle of law that applies equally to a claim for *Charter* damages as it does to an action in tort (*ibid.*, at paras. 69-71).

[53] The AGBC makes a number of points in support of this submission. First, it argues that *Nelles* “assumed that an immunity rule would equally apply to a claim for *Charter* damages”, and that “this was one of the considerations that led the Court to reject absolute immunity” in favour of a qualified immunity based on malice (R.F., at para. 60). In support of this assertion, it cites the following passage from *Nelles*:

Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the *Charter*. [p. 195]

According to the AGBC, the choice of a qualified rather than absolute immunity was meant to preserve the availability of damages in tort *and* under the *Charter*, and it is therefore implicit in *Nelles* that the liability threshold required in relation to tort actions would necessarily extend to s. 24(1) claims.

[54] Second, the AGBC emphasizes that *Ward* expressly connected the availability of *Charter* damages for prosecutorial misconduct to the tort of malicious prosecution:

Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that “malice” be proven because of the highly discretionary and quasi-judicial role of prosecutors When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be “appropriate and just”. While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law,

the existing causes of action against state actors embody a certain amount of “practical wisdom” concerning the type of situation in which it is or is not appropriate to make an award of damages against the state.

(*Ward*, at para. 43)

The AGBC argues that the malice standard established in *Nelles* and elaborated in *Proulx* and *Miazga* has withstood the test of time, and is a sound and workable standard for civil claims against prosecutors. It embodies “practical wisdom” and represents a “careful balance” of competing concerns — on the one hand, “the need to ensure that the common law is responsive to claims of wrongful prosecution”, and on the other, the “the powerful policy considerations that support the existence of a qualified immunity” (R.F., at para. 72). In the AGBC’s view, there is no reason to depart from this careful balance when a claim alleging prosecutorial misconduct is framed as a claim for *Charter* damages under s. 24(1). While liability thresholds developed under the *Charter* are intended to be distinct from those in private law, it does not follow that common law immunities should simply be abandoned in the face of a *Charter* damages claim.

[55] Third, the AGBC argues that exempting s. 24(1) claims from the malice standard would have adverse consequences. If a claimant can prevail on a lower liability threshold in a *Charter* damages claim than under a related common law tort, the qualified immunity will lose much of its force and the careful balance of policy factors struck in *Nelles* will be destabilized.

[56] With respect, I do not find these points persuasive. In my view, *Nelles* and its progeny are not dispositive in this case, and malice does not provide a useful liability threshold for *Charter* damages claims alleging wrongful non-disclosure by prosecutors. I come to this conclusion for several reasons.

[57] First, the malice standard is firmly rooted in the tort of malicious prosecution, which has a distinctive history and purpose. The tort is a judicial creation of the 18th century, when prosecutions were carried out by private litigants: *Miazga*, at para. 42. This historical peculiarity should give us pause when we are called upon to transplant elements of this tort into new contexts far beyond those envisioned at the time of its creation. As Charron J. warned in *Miazga*:

Given that the tort of malicious prosecution predates the development of our contemporary system of public prosecutions, courts must take care not to simply transpose the principles established in suits between private parties to cases involving Crown defendants without necessary modification. [para. 44]

[58] Second, the purpose of the malicious prosecution tort must be kept in mind in determining whether to expand the reach of the malice standard. Recall that the wrongdoing targeted by this tort is the decision to initiate or continue an improperly motivated prosecution. In contrast, the alleged wrongdoing at issue in this case is markedly different — the Crown’s failure to discharge its constitutional obligations to disclose relevant information to Mr. Henry.

[59] The malice standard translates awkwardly into cases where the alleged misconduct is wrongful non-disclosure. Malice requires a showing of improper purpose on the part of the prosecutor. This “improper purpose” inquiry is apt when the impugned conduct is a highly discretionary decision such as the decision to initiate or continue a prosecution, because discretionary decision-making can best be evaluated by reference to the decision-maker’s motives. Unlike the decision to initiate or continue a prosecution, the decision to disclose relevant information is not discretionary. Rather, disclosure is a constitutional obligation which must be properly discharged by the Crown in accordance with an accused’s right to make full answer and defence, as guaranteed under ss. 7 and 11(d) of the *Charter*: see *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, at p. 336; *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668, at para. 5.

[60] I readily acknowledge that disclosure decisions often involve difficult judgment calls. As the intervener Attorney General of Ontario observes, disclosure decisions may require consideration of numerous factors, such as whether the information is subject to special protections for sexual assault complainants, special considerations concerning highly sensitive material, or one of the various privileges that attach to information obtained in the course of a criminal prosecution. Even the basic question of relevance may be difficult to assess before the Crown is made aware of the defence theory of the case, and where disclosure requests are not explained or particularized.

Furthermore, disclosure obligations are ongoing, which requires prosecutors to continuously evaluate the information in their possession.

[61] However, while I recognize that disclosure decisions pose challenges for prosecutors, they do not implicate the high degree of discretion involved in the decision to initiate or continue a prosecution. As described in Crown policy manuals throughout the country, the decision to lay charges is governed by two primary factors: first, whether there is a reasonable prospect of conviction and second, whether the prosecution would be in the public interest. Manifestly, the “public interest” factor puts substantial discretion in the hands of Crown counsel. That discretion gives prosecutors such a high degree of latitude that the only plausible way to contest it is to assess the underlying motives. No such discretion exists in the disclosure context, and it is therefore unhelpful to require proof of an improper purpose in an action alleging wrongful non-disclosure. Given that disclosure decisions are not a matter of discretion, the motives of the prosecutor in withholding certain information from the accused are immaterial.

[62] Third, the decision to initiate or continue a prosecution falls within the core of prosecutorial discretion, whereas disclosure decisions do not. Whether in private or public law, the threshold to intrude upon that core discretion must be onerous, since it squarely implicates the independence of prosecutors. As this Court held in *Krieger*:

Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

...

. . . these powers emanate from the office holder’s role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts [paras. 43 and 45]

Both malice and abuse of process therefore represent very high thresholds deliberately chosen to insulate core prosecutorial functions from judicial scrutiny. In contrast, disclosure decisions are not

part of core prosecutorial discretion:

In *Stinchcombe*, . . . the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not . . . a matter of prosecutorial discretion but, rather, is a prosecutorial duty. [*ibid.*, at para. 54]

[63] In *Anderson*, this Court held that “the Crown possesses no discretion to breach the *Charter* rights of an accused”, and that “prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations such as the duty to provide proper disclosure to the defence” (para. 45). This suggests that disclosure decisions will not necessarily warrant the same level of protection from judicial scrutiny as the decision to initiate or continue a prosecution. Indeed, in the course of criminal trials, disclosure is routinely subject to judicial review. This review is not predicated on a showing of abuse of process. Likewise, in an action for *Charter* damages, a threshold lower than malice is justified when a court is asked to determine whether the Crown is liable for wrongful non-disclosure.

[64] Finally, a purposive approach to s. 24(1) militates against the malice standard. As this Court held in *Dunedin*, “s. 24(1), like all *Charter* provisions, commands a broad and purposive interpretation” and “must be construed generously, in a manner that best ensures the attainment of its objects” (para. 18). Section 24(1) guarantees that rights are upheld by granting “effective remedies” to claimants, and is crucial to the overall structure of the *Charter* because “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach” (*ibid.*, at paras. 19-20).

[65] In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, Iacobucci and Arbour JJ. stressed the importance of a purposive approach to remedies under s. 24(1):

A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive

remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies. [Emphasis in original; para. 25.]

In my view, restricting the availability of *Charter* damages for wrongful non-disclosure to cases where the Crown acted with malice would offer neither a responsive nor effective remedy to claimants. A malice standard grounded in “improper purpose” sets too high a bar, and fails to respond adequately to the state conduct at issue. It is also not well suited to the disclosure context. A threshold specifically tailored to that context is preferable.

[66] For these reasons, I reject the application of the malice standard. In doing so, I do not in any way seek to undercut this Court’s malicious prosecution jurisprudence. The qualified immunity established in *Nelles* continues to govern tort actions for malicious prosecution. Furthermore, as I will explain, while the malice standard is not directly applicable, the policy factors outlined in *Nelles* inform the liability threshold in this case.

(2) Policy Concerns Informing the Liability Threshold for Wrongful Non-disclosure

[67] Disclosure is one of the Crown’s fundamental obligations in a criminal prosecution. The Crown is duty-bound to disclose relevant information to the defence, and this obligation is a continuing one. This stringent and, at times, heavy burden on the Crown guarantees an accused’s ability to make full answer and defence. Indeed, this was precisely the reason that the Court affirmed a *constitutional* right to disclosure more than two decades ago in *Stinchcombe*:

. . . there is [an] overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice. . . . The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. [Citation omitted; p. 336.]

[68] Canadians thus rightly expect that the Crown will fulfill its disclosure obligations with diligence and rigour. By and large, Crown attorneys working on the front lines of our criminal justice system exceed these expectations on a daily basis. I pause here to note that Mr. Henry’s

allegations of non-disclosure arise, in the main, from events that occurred during the pre-*Stinchcombe* era, when Crown disclosure practices were not as robust as they are today. Nevertheless, our system remains imperfect, and wrongful failure to disclose is not a mere hypothetical — it can, and does, happen, sometimes taking an extraordinary human toll and resulting in serious harm to the administration of justice.

[69] At the same time, all failures to disclose are not made equal. Highly blameworthy conduct, such as the intentional suppression of crucial evidence to obtain a conviction at all costs, sits at one end of the spectrum. At the other, one finds good faith errors in judgment about the relevance of certain tangential information. Both scenarios constitute a breach of an accused's *Charter* rights. Yet, manifestly, these scenarios do not possess the same persuasive force in terms of justifying a *Charter* damages award under s. 24(1).

[70] Given the complex nature of many disclosure decisions, courts should be exceedingly wary of setting a liability threshold that would award *Charter* damages for even minor instances of wrongful non-disclosure. Crown counsel will, from time to time, make good faith errors. Exposing prosecutors to potential liability every time such errors are made would, in my view, interfere with the proper execution of prosecutorial functions. Setting the liability threshold too low would also pose a considerable risk that baseless damages claims against the Crown would proliferate.

[71] These compelling good governance concerns — raised in *Nelles* and its progeny — must be taken into account in determining the appropriate liability threshold for cases of wrongful non-disclosure. As the Chief Justice held in *Ward*, “the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state” (para. 22). There are two policy considerations from the malicious prosecution trilogy that I wish to emphasize. First, the liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a litany of civil claims. Second, the liability threshold must avoid a widespread “chilling effect” on the behaviour of prosecutors.

[72] The first concern — diversion from duties — underscores the need for a high liability threshold. In the disclosure process, mistakes are certainly the exception rather than the rule. That said, if every minor instance of wrongful non-disclosure were to expose prosecutors to liability for *Charter* damages, they would find themselves spending much of their limited time and energy responding to lawsuits rather than doing their jobs. They “would be constantly enmeshed in an avalanche of interlocutory civil proceedings and civil trials”, an outcome that “bode[s] ill for the efficiency of [Crown prosecutors] and the quality of our criminal justice system”: *Elgouzouli-Daf v. Commissioner of Police of the Metropolis*, [1995] Q.B. 335 (C.A.), at p. 349. That avalanche would no doubt contain a few strong claims of serious wrongful non-disclosure, but would invariably bring with it scores of meritless claims, each of which would have to be defended at the expense of core Crown functions. The collective interest of Canadians is best served when Crown counsel are able to focus on their primary responsibility — the fair and effective prosecution of crime. In my view, the liability threshold must allow for strong claims to be heard on their merits, while guarding against a proliferation of marginal cases.

[73] The second policy concern — the chilling effect on Crown counsel — also supports a high liability threshold. Fear of civil liability may lead to defensive lawyering by prosecutors. One consequence of this defensive approach would be disclosure decisions motivated less by legal principle than by a calculated effort to ward off the spectre of liability. The public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown’s role as a quasi-judicial officer.

[74] For these reasons, I conclude that good governance concerns mandate a threshold that substantially limits the scope of liability for wrongful non-disclosure. In my view, the standard adopted by the application judge, which is akin to gross negligence, does not provide sufficient limits. As I will explain, a negligence-type standard poses considerable problems, and ought to be rejected.

[75] Mr. Henry submits that an even lower threshold — a simple breach of the *Charter* without any additional element of fault — should apply in this context. The Chief Justice and

Karakatsanis J. take this approach. Specifically, they adopt the *Ward* framework without modification and rely on case-by-case policy considerations at step three, rather than a heightened threshold, to limit liability. In my respectful view, this approach fails to address the compelling policy and practical concerns that justify limiting prosecutorial liability.

[76] For more than two decades, this Court has steadfastly affirmed the principle that prosecutorial liability should be carefully circumscribed. My colleagues reject the relevance of *Nelles* and its progeny to this case. In their view, our malicious prosecution jurisprudence has no bearing here, since “[t]he legal duty on the Crown to disclose relevant evidence does not involve prosecutorial discretion in the sense discussed in *Nelles* and *Miazga*” (para. 128). I grant that there are significant distinctions between the Crown’s discretionary decision to initiate or continue a prosecution, and its disclosure obligations. However, the policy concerns raised in the malicious prosecution trilogy are not confined to the exercise of core prosecutorial discretion. In my view, those concerns have a broader reach and are implicated wherever there is a risk of undue interference with the ability of prosecutors to freely carry out their duties in furtherance of the administration of justice.

[77] My colleagues’ proposal would permit claimants to pursue *Charter* damages based on *any* allegation that the Crown breached its disclosure obligations — whether the wrongful non-disclosure was intentional, negligent, or accidental. In my respectful view, this casts too wide a net, exposing prosecutors to an unprecedented scope of liability that would affect the exercise of their vital public function.

[78] No doubt many cases might be thwarted by countervailing considerations invoked at the third step of *Ward* — and in any event would attract a modest quantum of damages at step four, if the claimant were to succeed at trial. However, given the absence of a liability threshold, a claim alleging a relatively minor breach with minimal harm to the claimant might well survive a motion to strike at the pleadings stage, and could lead to an award of damages. With respect, I fear that my colleagues’ approach runs the risk of opening the floodgates to scores of marginal claims.

[79] My colleagues suggest that their proposal would not divert Crown counsel from their duties. In their view, since the inquiry would be focused “on the existence and relevance of the [undisclosed] documents, [and] not on the more complex questions of how discretion should have or could have been exercised”, the role of the prosecutor in civil proceedings would be limited (para. 132). With respect, I disagree. In my view, a detailed examination of prosecutors’ conduct is inevitable. Such an examination would be necessary, for example, to determine whether case-by-case considerations militate against an award of damages or to set the appropriate quantum of damages for a successful claim.

[80] Similarly, my colleagues imply that their proposal would not have a chilling effect — first, because Crown conduct is already tightly constrained by the obligation to disclose relevant information and second, because “it is the state and not the individual prosecutor who faces liability” (para. 129). With respect, I take a different view. As I have explained, while the obligation to disclose is non-discretionary, there are invariably difficult judgment calls to be made. Those difficult decisions should be motivated by legal principle, not the fear of incurring civil liability. Furthermore, the fact that damages claims lie against the state and not individual prosecutors does not mitigate this concern. Like all lawyers, Crown counsel are professionals who jealously guard their reputations and whose actions are motivated by more than personal financial consequences.

[81] I agree with my colleagues that Mr. Henry alleges very serious instances of wrongful non-disclosure that demonstrate a shocking disregard for his *Charter* rights. His claim as pleaded meets the threshold I would establish. However, we should be wary of using Mr. Henry’s exceptional case to justify a substantial expansion of prosecutorial liability. It is only by keeping liability within strict bounds that we can ensure a reasonable balance between remedying serious rights violations and maintaining the efficient operation of our public prosecution system.

D. *Applying the Charter Damages Threshold for Wrongful Non-disclosure by Prosecutors*

[82] As discussed, a cause of action for *Charter* damages will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by intentionally withholding

information when it knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence. I now turn to how this standard will operate in practice.

(1) Policy Concerns May Still Be Considered on a Case-by-Case Basis

[83] In setting a heightened *per se* threshold, I should not be taken as saying that there are no additional good governance concerns that could negate a claim for *Charter* damages in the wrongful non-disclosure context. There may be case-specific policy concerns that militate against an award, even if the claimant has made out the heightened *per se* threshold. For example, the claimant may have an adequate alternative remedy under the *Charter* or in private law. Where a case-specific policy concern tips the balance against a *Charter* damages award, this remedy may properly be denied.

(2) What a Claimant Must Show to Meet the Liability Threshold in Cases of Wrongful Non-disclosure

[84] The liability threshold is tailored to the wrongful non-disclosure context. There is no inquiry into the Crown's motive or purpose, which are concepts better-suited to cases where the exercise of core prosecutorial discretion is challenged. Rather, the focus is on two key elements: the prosecutor's intent, and his or her actual or imputed knowledge. Specifically, a cause of action will lie against the state — subject to proof of causation — where a prosecutor breaches an accused's *Charter* rights by intentionally withholding information when he or she knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.

[85] Whether considered at the pleadings stage or at trial, the same formulation of the test applies. At trial, a claimant would have to convince the fact finder on a balance of probabilities that (1) the prosecutor intentionally withheld information; (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose

would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result. To withstand a motion to strike, a claimant would only need to plead facts which, taken as true, would be sufficient to support a finding on each of these elements.

[86] Nothing in the formulation of this test alters the methods by which finders of fact assess intent. The common sense inference that individuals intend the natural and probable consequences of their actions applies: *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, at paras. 58-63, citing *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523. As a result, the evidentiary burden on the claimant is not a high one. To demonstrate that the Crown intentionally withheld information, a claimant need only prove that prosecutors were actually in possession of the information and failed to disclose it. Alternatively, a claimant could show that prosecutors were put on notice of the existence of the information and failed to obtain possession of it, in contravention of their disclosure obligations: see *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 49. In both of these circumstances, the intention to withhold may be inferred. This inference is available to the finder of fact, but is not mandatory. Furthermore, it is always open to the Crown to lead rebuttal evidence to show that the withholding was not intentional.

[87] The next element of the test relates to the Crown's knowledge of the materiality of the information and the consequences of withholding it. Under this element, to be *material*, the information must be relevant and "directed at a matter in issue in the case": *R. v. B. (L.)* (1997), 1997 CanLII 3187 (ON CA), 35 O.R. (3d) 35 (C.A.), at p. 44. That said, the mere fact that information is material to the defence does not necessarily mean that the failure to disclose it will likely impinge on the accused's ability to make full answer and defence. While related, the two concepts are distinct, and each must be established.

[88] Knowledge of the materiality of the information and the consequences of a failure to disclose can be imputed based on what a reasonable prosecutor would know in the circumstances. Once it is found that information was intentionally withheld which any prosecutor, acting reasonably, should have disclosed, I see no reason why an accused who has suffered harm should

be denied a cause of action. I stress, however, that by incorporating a reasonableness aspect into the knowledge element, I am not endorsing a negligence-based standard as the applicable liability threshold. Taken together, the two elements I have described — intent, and actual or imputed knowledge — rise above a purely objective “reasonableness” or “marked departure” standard grounded in a duty of care paradigm.

[89] The purpose of the intent and knowledge elements is not to shield prosecutors from liability by placing an undue burden on claimants to prove subjective mental states. Rather, these elements are designed to set a sufficiently high threshold to address good governance concerns, while preserving a cause of action for serious instances of wrongful non-disclosure. As pleaded, the facts of Mr. Henry’s case would meet this threshold.

[90] One final point on the liability threshold bears mentioning. It is not uncommon in the course of a criminal prosecution for disclosure decisions to be challenged, and for a court to determine the lawfulness of the Crown withholding certain information. If a court rules that information sought by the defence need not be disclosed, then the Crown’s failure to disclose will have the benefit of a judicial imprimatur. It would not be accurate to say, in these circumstances, that the Crown intentionally “withheld” information from the accused. Even if the judicial determination is later overturned, no liability for *Charter* damages will lie for non-disclosure.

(3) Policy Implications of the Liability Threshold

[91] It may seem harsh to deny *Charter* damages for cases of wrongful non-disclosure which, while less serious, still result in a violation of an accused’s *Charter* rights. However, it is a reality that wrongful non-disclosures will cover a spectrum of blameworthiness, ranging from the good faith error, quickly rectified, to the rare cases of egregious failures to disclose exculpatory evidence. Given the policy concerns associated with exposing prosecutors to civil liability, it is necessary that the liability threshold be set near the high end of the blameworthiness spectrum. In reaching this conclusion, I do not purport to create silos of *Charter* violations, classifying some as worthy of concern and others as inconsequential. Courts should endeavour, as much as possible, to

rectify *Charter* breaches with appropriate and just remedies. Nevertheless, when it comes to awarding *Charter* damages, courts must be careful not to extend their availability too far.

[92] Indeed, the consequences of setting a lower threshold in this context — simple negligence, or even the gross negligence standard adopted by the application judge — would be serious. This type of threshold implicates a duty of care paradigm that ignores the basic realities of conducting a criminal prosecution. Mr. Henry’s case illustrates the fact that the information ultimately disclosed to an accused is not simply a product of what prosecutors decide to disclose on their own initiative. Rather, disclosure depends on the interplay of a number of factors, including the rigour of the police investigation, the forthrightness of the police in communicating information to prosecutors, and the disclosure decisions taken by the Crown.

[93] A duty of care paradigm risks opening up a Pandora’s box of potential liability theories. For example, if prosecutors were subject to a duty of care, a claimant could allege that they failed to probe the police forcefully enough to ensure that relevant information was not being suppressed. Such an approach would effectively impose an obligation on prosecutors to “police” the police. In my view, widening the Crown’s exposure to liability in this way would be unwarranted. If police act improperly, then a civil claim can and should lie against them: see *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

[94] The problems with a negligence-based standard are even more apparent when considering how this lower threshold would operate at the pleadings stage. The lower the threshold, the greater the number of claims that would have to be defended. The mere fact of having to respond to an onslaught of litigation, even if ultimately unsuccessful, would chill the actions of prosecutors and divert them from their proper functions. It would be far too easy for a claimant with a weak claim to plead facts disclosing a cause of action for negligence — *simpliciter* or gross — and thus drive prosecutors into civil court. Bringing a *Charter* damages claim for prosecutorial misconduct should not be a mere exercise in artful pleading. In contrast, the threshold I have outlined ensures that many unmeritorious claims will be weeded out at an early stage, either on a motion to strike or on a motion for summary judgment.

(4) The Causation Requirement

[95] In addition to establishing a *Charter* breach and the requisite intent and knowledge, a claimant must prove that, as a result of the wrongful non-disclosure, he or she suffered a legally cognizable harm. Liability attaches to the Crown only upon a finding of “but for” causation. In cases involving wrongful convictions, this “but for” test avoids the thorny issue of whether or not factual innocence is required — that is, proof that the accused did not in fact commit the crimes alleged. Instead, the focus of the inquiry is on the proceedings that occurred at the time of the intentional failure to disclose. That said, without deciding the issue, I would not foreclose the possibility that evidence of factual innocence or guilt could go to the quantum of damages.

[96] Harm can be shown by the claimant in different ways. I do not propose an exhaustive list, but offer several examples. A historical wrongful conviction would certainly qualify. *Charter* damages would also be available where the wrongful non-disclosure led to a conviction at trial that was later overturned on appeal, and ultimately replaced by an acquittal — either entered directly on appeal or following a new trial. Even if the claimant was acquitted at trial, a *Charter* damages award would be available where it could be shown that the charges would have been dismissed or withdrawn at an earlier stage of proceedings had proper disclosure been made. In such a case, damages might serve to compensate for time wrongfully spent in custody and any consequential harm suffered as a result of the criminal proceedings.

[97] Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that “but for” the wrongful non-disclosure he or she would not have suffered that harm. This guarantees that liability is restricted to cases where the intentional failure to disclose was actually the cause of the harm to the accused.

[98] The “but for” causation test may, however, be modified in situations involving multiple alleged wrongdoers. For example, where the claimant alleges that a wrongful conviction was caused in part by the failure of police to provide material information to prosecutors, and in part by the Crown’s failure to disclose, then a showing of “but for” causation will not be necessary.

In this scenario, the causation requirement will be satisfied if the claimant can prove that the prosecutorial misconduct materially contributed to the harm suffered: *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181.

V. Conclusion

[99] I would allow the appeal. Proof of malice is not required to make out a cause of action for *Charter* damages against the provincial Crown in this case. Mr. Henry may seek to amend his pleadings to include a claim for *Charter* damages against the AGBC alleging that the Crown, in breach of its constitutional obligations, caused him harm by intentionally withholding information when it knew, or should reasonably have known, that the information was material to his defence and that the failure to disclose would likely impinge on his ability to make full answer and defence.

[100] As success is divided in this appeal, I would order costs in the cause throughout.

The following are the reasons delivered by

THE CHIEF JUSTICE AND KARAKATSANIS J. —

I. Introduction

[101] This case raises questions about the availability of damages under s. 24(1) of the *Canadian Charter of Rights and Freedoms* as a remedy for the breach of the Crown's constitutional disclosure obligations.

[102] The notice of civil claim in this case alleges egregious violations of an accused's right to disclosure, with devastating consequences. In 1983, Mr. Henry was convicted of 10 counts of sexual assault, declared a dangerous offender, and sentenced to an indefinite period of incarceration. Before, during, and in the many years after his trial, Mr. Henry repeatedly sought

disclosure of exculpatory evidence held by the police and prosecution, to no avail. In 2002, police began re-investigating a series of unsolved sexual assaults. Ultimately, a Special Prosecutor was appointed to review Mr. Henry's convictions, leading to the 2008 disclosure of substantial police file materials. In 2010, the British Columbia Court of Appeal acquitted Mr. Henry on all counts, on the basis that the evidence as a whole was incapable of proving the element of identification: [2010 BCCA 462](#), 294 B.C.A.C. 96. He served nearly 27 years in prison. He now seeks an award of damages under s. 24(1) of the *Charter*, for the breach of the Crown's constitutional disclosure obligations.

[103] This appeal asks: What facts must Mr. Henry plead in order to be able to advance such a claim in court? In particular, must he allege malice or fault on the part of state officials who violated his rights?

[104] The Attorney General of British Columbia argues that claims for damages resulting from prosecutorial misconduct require, at a minimum, that the claimant establish malice. In our view, the Attorney General's argument is misplaced. Imposing a fault requirement for *Charter* damages, where the Crown has breached its duty to disclose, is inconsistent with the purpose of s. 24(1) and with the principled framework established in *Vancouver (City) v. Ward*, [2010 SCC 27](#), [2010] 2 S.C.R. 28, for assessing whether an award of damages would be appropriate and just in the circumstances of a particular case.

II. The Purpose of Section 24(1) and the *Ward* Framework

[105] The *Charter* guarantee of rights and freedoms is meaningful only to the extent that breaches are appropriately remedied. To this end, s. 52 of the *Constitution Act, 1982* provides for the nullification of laws which are inconsistent with the Constitution, including the *Charter*. It is complemented by s. 24 which authorizes courts to grant remedies where an individual's *Charter* rights have been infringed by state action. These remedial provisions, like all *Charter* provisions, should be given a generous and purposive interpretation: *R. v. Gamble*, [1988 CanLII 15 \(SCC\)](#), [1988] 2 S.C.R. 595.

[106] In *Ward*, this Court examined the broad grant of powers provided in s. 24(1) of the *Charter*, which empowers courts of competent jurisdiction to grant remedies that are “appropriate and just in the circumstances”. Quoting *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, the Court observed that “[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion”: *Ward*, at para. 18, citing *Mills*, at p. 965. While the court’s discretion is not unfettered, “[w]hat is appropriate and just will depend on the facts and circumstances of the particular case”: *Ward*, at para. 19. To determine whether damages are an appropriate and just remedy, a court must be empowered to look at and balance all relevant considerations arising in a given case.

[107] *Ward* provides a framework for evaluating these competing considerations. The *Ward* test for an award of damages under s. 24(1) of the *Charter* consists of four steps:

- (1) The applicant must establish a *Charter* breach by the state;
- (2) The applicant must establish that damages would serve at least one of the functions of compensation, vindication or deterrence;
- (3) If (1) and (2) are established, the onus shifts to the state to show that there are countervailing considerations (such as alternative remedies or good governance concerns) that would make *Charter* damages inappropriate or unjust;
- (4) Finally, if the government fails to establish that countervailing considerations make *Charter* damages inappropriate or unjust, the last step in the *Ward* analysis is to determine the quantum of damages.

[108] Applying these principles to this case, Mr. Henry must plead facts that, if true, establish (1) a breach of his *Charter* rights and (2) that damages constitute an appropriate and just

remedy to advance the purposes of compensation, vindication or deterrence. It is for the state to plead facts on the third step of countervailing factors, should it choose to do so.

III. Application of the *Ward* Framework to This Case

A. *Step One: Breach of Charter Rights*

[109] The first step in the *Ward* analysis requires that the claimant establish a breach of his or her *Charter* rights. Mr. Henry makes a number of specific allegations about the failure of the Crown to disclose evidence before, during and after his criminal trial on sexual assault charges. These allegations, if true, amount to blatant violations of his right to full disclosure, as protected under s. 7 of the *Charter*.

[110] For instance, according to Mr. Henry, the Crown withheld a large number of victim statements despite repeated defence requests for full disclosure of these statements. No victim statements, police reports or forensic reports were disclosed prior to the commencement of trial. Many victim statements remained undisclosed throughout the trial and, according to Mr. Henry, contain material inconsistencies that would have been helpful for his defence. Mr. Henry also alleges that forensic evidence relating to the perpetrator's spermatozoa remained undisclosed throughout the trial, again despite repeated specific requests. On the contrary, the Crown adduced evidence to the effect that no forensic evidence was located at any of the crime scenes that could be used to help identify the perpetrator. Further, police reports relating to another suspect were not disclosed. The sole issue at trial was the identity of the perpetrator and the Crown's case rested on victim identifications.

[111] If proven at trial, these facts would indisputably establish a breach of Mr. Henry's disclosure rights under s. 7 of the *Charter*. The government does not appear to dispute the violation of Mr. Henry's *Charter* rights.

B. *Step Two: A Functional Justification of Damages*

[112] The second step in the *Ward* analysis requires that the claimant establish that an award of *Charter* damages would serve one or more of the objectives of compensation, vindication, and deterrence. Compensation is about remedying personal loss (para. 25). Vindication is about remedying the harm the infringement causes society (para. 28). Deterrence is forward-looking and serves a preventative function (para. 29).

[113] By any measure, the facts alleged by Mr. Henry are egregious. The Crown allegedly withheld highly relevant and exculpatory evidence, despite repeated and specific defence requests for disclosure. The impact on Mr. Henry's ability to make full answer and defence is obvious. Mr. Henry was convicted on all charges at trial, was declared a dangerous offender, and spent 27 years behind bars. Following his convictions in 1983, Mr. Henry continued to proclaim his innocence and seek review of his case. His pleas were finally heard after the police reopened its investigation into a string of unsolved sexual assaults similar to those for which Mr. Henry was convicted. This investigation resulted in the conviction of a man who had been a suspect in Mr. Henry's case. As a result, a Special Prosecutor was appointed to review Mr. Henry's convictions, leading to the 2008 disclosure of substantial police file materials. In 2010, he was finally acquitted on all counts by the British Columbia Court of Appeal. The court held that no properly instructed jury, acting reasonably, could have rendered a guilty verdict on any of the counts (para. 142).

[114] Mr. Henry was wrongfully convicted and imprisoned by the state for 27 years. On the facts alleged, the fairness of his trial was directly and seriously compromised by the breach of his s. 7 right to full disclosure. In these circumstances, an award of *Charter* damages under s. 24(1) may provide some compensation for the hardships Mr. Henry has endured. Obviously, no amount of money can restore to him the decades he has spent behind bars. However, a monetary award may offer some compensation for this long period of wrongful imprisonment and the many lost life opportunities it entails.

[115] An award of *Charter* damages may also help vindicate the *Charter* rights that the Crown is alleged to have breached in Mr. Henry's case. As explained in *Ward*, vindication in this context refers to repairing the damage done to the public through the state's violation of *Charter*

rights. There are few scenarios that can shake the public's confidence in the justice system more deeply than those alleged by Mr. Henry. According to the allegations, state action in breach of the *Charter* seriously undermined the fairness of Mr. Henry's trial and the state subsequently imprisoned him for nearly three decades. In these circumstances, an award of *Charter* damages may help to publicly vindicate such a serious violation of *Charter* rights. Such an award would recognize the state's responsibility for the miscarriage of justice that occurred in Mr. Henry's case, and the importance of respecting *Charter* rights in order to guarantee trial fairness.

[116] Finally, in the context of *Charter* damages under s. 24(1), “[d]eterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution”: *Ward*, at para. 29. An award of *Charter* damages might also serve the objective of “influencing government behaviour in order to secure state compliance with the *Charter* in the future”: *ibid*. Proper disclosure of Crown evidence is obviously a matter under the control of the state and its agents, primarily Crown prosecutors. The objective of deterrence may be served by an award of damages that highlights the need for the state to remain vigilant in meeting its constitutional obligations.

[117] Step two of *Ward* establishes a functional approach to determining whether *Charter* damages would constitute, in the language of s. 24(1), an “appropriate and just” remedy for a given *Charter* breach: *Ward*, at paras. 24-31. Moreover, *Ward* holds explicitly that damages may be appropriate and just even where no causal connection is established between a *Charter* breach and harm suffered by the claimant: “. . . the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award” (para. 30).

[118] The objective of compensation, however, requires a causal connection between the *Charter* breach and the loss suffered by the claimant; this objective aims “to compensate the claimant for the loss caused by the *Charter* breach”: *Ward*, at para. 27. As the issue of causation was neither addressed in the decisions below nor argued before us, we prefer to leave any detailed

discussion for another day. This said, we are not convinced that the “but for” test proposed by Moldaver J. is appropriate here.

C. *Step Three: Countervailing Considerations — Has the Government Shown That Damages Are Inappropriate or Unjust?*

[119] At step three of the *Ward* analysis, the government has an opportunity to advance any countervailing considerations that would make it inappropriate or unjust to award damages under s. 24(1).

[120] The first countervailing consideration discussed at the third stage of the *Ward* test is whether there are remedies other than s. 24(1) that “adequately meet the need for compensation, vindication and/or deterrence” (para. 34) in the particular case before the court. This is an individualized inquiry, not an abstract one. The question is not whether the law in the abstract provides a remedy for the wrong, but whether it is available in the particular case:

The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. [Emphasis added; para. 35.]

[121] The Court in *Ward* went on to state:

. . . it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages. [Emphasis added; para. 35.]

[122] At the current stage of proceedings in this case, it is far from clear that there is an alternative remedy that will fulfill the functional objectives of *Charter* damages. The alleged wrong occurred decades ago. The lead prosecutor is dead. An action for damages under s. 24(1)

may ultimately be the only remedy that will function to provide compensation, vindication or deterrence.

[123] The second set of countervailing considerations discussed in *Ward* — and the set relied on by the Attorney General of British Columbia — concerns good governance. *Ward* states:

In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. [para. 39]

[124] By way of example, the Court in *Ward* opined that a claim for damages under s. 24(1) ought not to be permitted for the state’s enforcement of a law until it is declared invalid, unless the state conduct under the law was “clearly wrong, in bad faith or an abuse of power”: para. 39, citing *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 78. This elevated fault threshold is justified because “[t]he rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid” (para. 39).

[125] The Attorney General of British Columbia argues that permitting Mr. Henry’s s. 24(1) claim to proceed: (1) will inappropriately interfere with prosecutorial discretion; (2) will inappropriately lower the standard for prosecutorial liability; and (3) will divert prosecutors from their day-to-day work by involving them in claims in the courts for prosecutorial misfeasance. The Attorney General says that these countervailing considerations mean that claims such as Mr. Henry’s should be completely barred; or alternatively that a high fault threshold should be set.

[126] *Ward* recognizes that there may be a need for limited immunity from s. 24(1) damages for a *Charter* breach that arises from the exercise of discretion. This is “because the law does not wish to chill the exercise of policy-making discretion” (para. 40). In this context, *Ward* mentions malice as a possible threshold for exercise of prosecutorial discretion. Our colleague, Moldaver J., in a variation on this, would reduce the threshold for s. 24(1) damages in this case to intentional conduct.

[127] In our view, however, the countervailing concerns raised by the Attorney General of British Columbia are misplaced in this case. Mr. Henry's case does not involve the exercise of prosecutorial discretion in the usual sense of the term or as it was discussed in cases such as *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, and *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339. The discretion at issue in those cases is the discretion to commence and pursue a prosecution. This is a wide discretion long acknowledged by the law. It is as difficult to exercise as it is vital to the effective prosecution of criminal cases. The common law has struck a balance that reflects these complex concerns by allowing claims to be brought against prosecutors for misuse of this discretion, but only if malice can be shown: *Miazga*, at para. 7.

[128] However, none of this applies to the prosecution's disclosure obligation. The legal duty on the Crown to disclose relevant evidence does not involve prosecutorial discretion in the sense discussed in *Nelles* and *Miazga*. This duty is not a discretionary function but a legal obligation: *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, at p. 333; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at paras. 17-18. This obligation is absolute, not discretionary, and it is one that Crown prosecutors take seriously. The only discretion left to the prosecutor is a limited operational discretion relating to timing, relevance in borderline cases, privilege and protection of witness identity. *Stinchcombe* states that matters falling within this limited discretion are to be resolved by the trial judge. In other words, prosecutorial discretion with respect to the disclosure of evidence is limited in scope (to operational issues) and duration (the judge, not the prosecutor will make the final decision). It may be helpful to quote the relevant passages from *Stinchcombe*:

The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. . . .

. . .

The discretion of Crown counsel is . . . reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule. [pp. 335-36 and 340]

[129] Thus any prosecutorial discretion in the process is both limited and judicially controlled. An action for failure to disclose relevant evidence to the defence is different from an action for misuse of prosecutorial discretion in bringing or pursuing a prosecution. It is not an action for abuse of discretion, but an action for breach of a legal duty imposed by the *Charter*. Where this *Charter* duty is breached, it is the state and not the individual prosecutor who faces liability: *Ward*, at para. 22. The focus is accordingly not on the fault of any particular individual, but on the failure to disclose. Where breaches of the duty to disclose occur, *Charter* liability flows from the constitutionally entrenched mechanisms that permit individuals to hold the state to account. This is distinct from tort liability, which imposes conduct-based thresholds to regulate tortious conduct as between individuals. Good governance is strengthened, not undermined, by holding the state to account where it fails to meet its *Charter* obligations. As Kent Roach has noted, “routine arguments that *Charter* damage awards adversely affect good governance discount the fact both deterrence and compliance with the *Charter* ‘is a foundation principle of good governance’”: “A Promising Late Spring for Charter Damages: *Ward v. Vancouver*” (2011), 29 *N.J.C.L.* 135, at p. 150, quoting *Ward*, at para. 38.

[130] Against this background, we return to the arguments of the Attorneys General of British Columbia and Canada that to allow damages for failure to disclose will chill the exercise of prosecutorial discretion, undermine the high threshold of malice for actions against prosecutors, and divert prosecutors from their proper functions by requiring them to participate in s. 24(1) actions. We conclude it would not.

[131] The concerns raised by the Attorneys General are all based on the assumption that disclosure is a matter of prosecutorial discretion as discussed in *Nelles* and *Miazga* — the discretion to commence and pursue a prosecution. But, as just discussed, this assumption is false. Prosecutors do not have discretion as to whether to disclose relevant evidence — they have a *legal duty* to disclose it. Their only discretion concerns peripheral matters relating to the timing of disclosure, privilege and whether a particular document is relevant — matters which are promptly resolved by trial judges.

[132] Recognizing Mr. Henry's claim will not chill the exercise of prosecutorial discretion. Nor will it change the high standard of malice for tort actions for misuse of prosecutorial discretion, since those actions are concerned with true exercises of prosecutorial discretion. And there is no reason to suppose that recognizing Mr. Henry's claim will divert prosecutors from their day-to-day work. Most issues of disclosure are settled at trial. In the rare case, like this one, where they arise after conviction, the prosecutor, if alive, may be called on to testify. The involvement of prosecutors is nonetheless likely to be limited. Since the prosecution is under a *legal duty* to disclose all relevant documents, the focus would be on the existence and relevance of the documents, not on the more complex questions of how discretion should have or could have been exercised.

[133] In summary, we are not persuaded that recognizing the right of Mr. Henry to claim damages for failure to disclose relevant documents will interfere with prosecutorial discretion, imperil the high threshold for suing prosecutors in cases like *Nelles* or *Miazga*, or divert prosecutors from their day-to-day work. The Attorney General of British Columbia's contention that these concerns constitute a countervailing consideration that should prevent Mr. Henry from bringing his action for *Charter* damages must, in our view, be rejected. There is thus no principled basis for imposing any threshold of fault or intention on Mr. Henry's claim for *Charter* damages, as our colleague Moldaver J. proposes to do.

[134] In our view, this is the right result in law and justice. Mr. Henry has suffered egregiously as a result, he alleges, of the state's breach of its legal obligation under the *Charter* to disclose all relevant documents to him when it should have. If he is denied the right to bring a claim for damages under s. 24(1) of the *Charter*, he may be denied any remedy. The legally desirable goals of compensation for wrong, vindication and deterrence elaborated in *Ward* will be unrealized.

[135] This result also upholds Canada's international obligations. Canada has committed itself internationally to compensating those who have been wrongfully convicted. Canada has

ratified the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (“*ICCPR*”), which provides, at art. 14(6):

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

[136] Parliament has not passed legislation to implement this obligation domestically. The obligation expressed in the *ICCPR* is therefore not directly enforceable in Canadian courts. However, our Court has stated many times that the *Charter* should be interpreted consistently with Canada’s international obligations. This was reaffirmed most recently in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 401, at para. 64:

LeBel J. confirmed in *R. v. Hape*, 2007 SCC 26 (CanLII), [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court “has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other”: para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), [2013] 3 S.C.R. 157, at para. 23, “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified”.

[137] Canada has committed itself to providing compensation to those who have been wrongfully convicted, as expressed in art. 14(6) of the *ICCPR*. Mr. Henry alleges that he was wrongfully convicted following a trial that was rendered unfair through violation of his right to disclosure. Section 24(1) authorizes the courts to award damages to compensate Mr. Henry for the harm suffered as a result of this *Charter* breach. It would be inconsistent with the international obligation undertaken by Canada through art. 14(6) of the *ICCPR* to predicate an award of damages under s. 24(1) on Mr. Henry’s ability to establish an intentional violation of his *Charter* rights. To require proof of intention would be to lower *Charter* protection below the level of protection found in an international human rights instrument that Canada has ratified. The commitment embodied in

art. 14(6) thus further supports our conclusion that Mr. Henry need not establish fault to justify an award of damages under s. 24(1).

VI. Conclusion

[138] We would allow Mr. Henry's appeal and grant his application to amend his pleadings to include a claim for *Charter* damages against the Attorney General of British Columbia in accordance with these reasons. It is sufficient for Mr. Henry to allege that the Crown breached its constitutional obligation to disclose relevant information and that *Charter* damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence. Mr. Henry need not allege that the Crown breached its constitutional obligation intentionally, or with malice, in order to access *Charter* damages. His pleadings allege that significant non-disclosure resulted in wrongful convictions and 27 years of incarceration. There can be little doubt that, if these allegations are proven, damages would be "appropriate and just" under s. 24(1) of the *Charter*.

Appeal allowed with costs.

Solicitors for the appellant: Farris Vaughan Wills & Murphy, Vancouver; Ritchie Sandford, Vancouver; A. Cameron Ward & Company, Vancouver.

Solicitor for the respondent Her Majesty The Queen in Right of the Province of British Columbia as represented by the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Montréal.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Dewart Gleason, Toronto.

Solicitors for the interveners the David Asper Centre for Constitutional Rights and the British Columbia Civil Liberties Association: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Blake Cassels Graydon, Toronto.

*Solicitors for the intervener the Criminal Lawyers' Association: Stevensons, Toronto;
Breese Davies Law, Toronto.*

*Solicitors for the intervener the Canadian Association of Crown Counsel: Cavalluzzo
Shilton McIntyre Cornish, Toronto.*

*

LeBel J. took no part in the judgment.

TAB 16

Hinse v. Canada (Attorney General), 2015 SCC 35 (CanLII), [2015] 2 SCR 621

Source: Supreme Court of Canada
 Date: 2015-06-19
 File number: 35613
 Other citations: AZ-51186223 — [2015] EXP 1931 — EYB 2015-253449 — JE 2015-1060 — [2015] SCJ No 35 (QL)
 Citation: Hinse v. Canada (Attorney General), 2015 SCC 35 (CanLII), [2015] 2 SCR 621, <<https://canlii.ca/t/gjl6n>>, retrieved on 2026-03-23



SUPREME COURT OF CANADA

CITATION: Hinse v. Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621 **DATE:** 20150619
DOCKET: 35613

BETWEEN:

Réjean Hinse
 Appellant
 and
Attorney General of Canada
 Respondent
 - and -
Association in Defence of the Wrongly Convicted,
Centre Pro Bono Québec and Pro Bono Law Ontario
 Interveners

OFFICIAL ENGLISH TRANSLATION

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

JOINT REASONS FOR JUDGMENT: Wagner and Gascon JJ. (McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)

* LeBel J. took no part in the judgment.

Hinse v. Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621

Réjean Hinse

Appellant

v.

Attorney General of Canada

Respondent

and

**Association in Defence of the Wrongly Convicted,
Centre Pro Bono Québec and Pro Bono Law Ontario**

Interveners

Indexed as: *Hinse v. Canada (Attorney General)*

2015 SCC 35

File No.: 35613.

2014: November 10; 2015: June 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Crown law — Crown liability — Prerogatives — Public law immunity — Crown’s power of mercy vested in federal Minister of Justice under [Criminal Code, R.S.C. 1985, c. C-46](#) — Characterization of nature of Minister’s power — Circumstances in which exercise of power of mercy can expose Crown to liability — [Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 2](#) “liability”, 3(a)(i) — [Civil Code of Québec, arts. 1376, 1457](#).

Civil liability — Crown liability — Fault — Qualified immunity — Individual wrongly convicted of armed robbery — Federal Minister of Justice refusing to exercise Crown’s power of mercy, which is vested in him under [Criminal Code](#) — Standard of fault applicable to Minister’s conduct — Whether individual has proven on balance of probabilities that Minister acted in bad faith or with serious recklessness in reviewing applications for mercy — Civil Code of Lower Canada, art. 1053 — [Civil Code of Québec, art. 1457](#).

Damages — Punitive damages — Extrajudicial fees — Pro bono representation — Whether individual entitled to compensatory or punitive damages — Whether, in case of abuse of process and where there is pro bono agreement, damages can be awarded in Quebec in respect of extrajudicial fees in order to compensate party who has suffered damage resulting from fault of other party — [Civil Code of Québec, art. 1608](#).

In 1964, H was unjustly sentenced to 15 years’ imprisonment for armed robbery. He was granted parole after serving a third of his sentence. In 1966, he had persuaded three of the five perpetrators of the robbery to sign affidavits to clear his name. Between 1967 and 1981, H submitted three applications for mercy to the federal Minister of Justice (“Minister”) under the [Criminal Code](#) and an application for a pardon to the Governor General in Council. They were all denied. In 1988, he applied to the Commission de police du Québec, which, following an investigation, said that it hoped the Attorney General of Quebec (“AGQ”) would intervene with the Solicitor General of Canada so that justice would be done. In 1990, H submitted a fourth application for mercy, but the Minister replied that he should seek relief in the Quebec Court of Appeal, which he did. The Court of Appeal allowed the appeal, but instead of entering an acquittal or ordering a new trial, it directed a stay of proceedings. On January 21, 1997, the Supreme Court of Canada

unanimously acquitted H in a judgment delivered from the bench, as it was of the view that the evidence could not allow a reasonable and properly instructed jury to find H guilty beyond a reasonable doubt. H then instituted an action in civil liability for an order for solidary payment against the AGQ, the Attorney General of Canada (“AGC”) and the town of Mont-Laurier. Under out-of-court settlements, the town and the AGQ paid him a total of \$5,550,000 in compensation. After these settlements, H continued to claim \$1,079,871 for his pecuniary losses and \$1,900,000 for his non-pecuniary losses, as well as \$10,000,000 in punitive damages, from the AGC.

The Superior Court allowed the action and ordered the AGC to pay H a total of almost \$5.8 million. It found, pursuant to the *Crown Liability and Proceedings Act*, that the Minister was subject to Quebec’s rules of civil liability, that he was not protected by any immunity, that he had committed a fault of “institutional inertia” or “institutional indifference”, and that a sustained, concerted and extensive review would have uncovered the errors. It ordered the AGC to pay H more than \$850,000 for pecuniary damage and \$1,900,000 for non-pecuniary damage, as well as \$2,500,000 in punitive damages. It also found that the AGC’s conduct at trial had amounted to an abuse of process and ordered him to pay \$100,000 for fees H had paid to the first law firm that had represented him, as well as \$440,000 for the value of the services rendered by the second even though that firm had never billed him for fees, as they had entered into a *pro bono* agreement.

The Court of Appeal reversed the judgment. It found that the exercise of the Minister’s power of mercy is protected by a qualified immunity and that the Crown can be held liable only if the decision was made in bad faith, and with malice. In this case, the court found that it had not been proven that the Minister had committed a fault and that, even if it were assumed that a fault had been committed, there was nothing to suggest that the miscarriage of justice would have been ascertained quickly if the Minister had acted promptly.

Held: The appeal should be dismissed.

The power of mercy codified in the *Criminal Code* derives from the royal prerogative of mercy. At the material time, the applicable provisions of the *Criminal Code* left it up to the Minister to determine in what circumstances he or she should intervene. In making this discretionary decision, the Minister had to assess and weigh public policy considerations on the basis of social, political and economic factors. This power came into play after all judicial remedies had been exhausted, and the Minister, in exercising it, had to be careful to avoid usurping the role of the courts and short-circuiting the usual judicial process. The history and the nature of the power of mercy show that the exercise of that power was a true core policy act. The exercise of such a power could not therefore expose the Crown to liability unless the Minister acted irrationally or in bad faith.

To assess the Minister’s conduct in the exercise of his power of mercy, it would be inappropriate to apply a standard of fault that limits bad faith to malice. In Quebec civil law, bad faith is broader than just intentional fault or a demonstrated intent to harm another. Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person, or by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed. In light of the applicable provisions of the *Criminal Code* and of the fact that there was, at the relevant time, no established procedure to guide the exercise of

the power of mercy, the Minister was required to conduct a meaningful review of any application that was neither frivolous nor vexatious. However, this review was not equivalent to the one that would be expected from a police investigation or a commission of inquiry. The duty to conduct a meaningful review entails a duty to make a decision in good faith on the basis of the evidence uncovered by that review.

The trial judge erred in approaching the issue of the federal Crown's civil liability from the perspective of a fault of institutional inertia or indifference. The analysis should instead have focused on the individual conduct of each Minister acting in his or her capacity as a servant of the federal Crown. The trial judge also erred in considering the powers of a commissioner under the *Inquiries Act* as a basis for determining whether the review conducted by the Minister was a meaningful one, given that those powers were not conferred on the Minister until 2002, when Parliament reformed the procedure in respect of applications for mercy. Moreover, there is no legislation establishing an obligation for the federal government or the provinces to compensate victims of miscarriages of justice, nor is there any legislation establishing a right to such compensation. Nor did the *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons* require the federal government to compensate H, as they do not constitute binding legislation.

In this case, H has failed to prove, on a balance of probabilities, that the Minister acted in bad faith or with serious recklessness in reviewing his applications for mercy. The documentary evidence negates the trial judge's inference that there was no review whatsoever of H's initial application for mercy. Although there are only a few documents in the record, they attest to the fact that a certain review was conducted and that certain actions were taken in this regard. By way of admissions, the parties acknowledged that certain government employees would have confirmed that, as they had understood the facts, an extensive and careful review of the case was under way at the time in question. A delay in reviewing the initial application was raised, but despite this, an analysis of the circumstances does not support the conclusion that the Minister acted in bad faith or with serious recklessness. As for H's three subsequent applications, it cannot reasonably be argued that no meaningful review was conducted in respect of them. The relevant correspondence shows the opposite to be true. Regarding the second application, which was very brief and contained no new evidence or legal arguments, it was open to the Minister to find it frivolous and to reject it on that basis. As for the third application, given that it did not go into much detail, the allegations based on vague irregularities could have struck the Minister as being of little consequence. In the case of the fourth application, it was reasonable for the Minister to justify her decision by noting that the Court of Appeal could consider the case on its own without her having to intervene, particularly given that the Minister did not reject the application outright.

Some additional comments on causation and damages are in order. Even if it were assumed that the Minister failed to conduct a meaningful review of the first application, the evidence does not establish that he would probably have discovered at that time the key evidence uncovered by the investigator of the Commission de police 20 years later. To conclude otherwise would be to rely on mere conjecture or remote hypotheticals. H has failed to establish a causal connection between the Minister's fault and the alleged damage.

On the issue of damages, the trial judge failed to take into account the requirement that the liability be apportioned solidarily, and to establish the amounts being awarded on the basis of the actual liability of each of the solidary debtors. To the extent that more than one solidary debtor could be liable for

heads of claim, the releases granted by H to the AGQ and the town of Mont-Laurier made it necessary to examine the causal faults and apportion liability. H should have borne the shares of the solidary debtors he had released (arts. 1526 and 1690 *C.C.Q.*). In addition to this overriding error, the grounds for each of the heads of damages were also flawed. Where the question of pecuniary damage is concerned, there is no direct connection between the Minister's conduct and H's decision to retire at age 60, the fees and costs incurred in respect of the proceedings brought in the Court of Appeal and the Supreme Court between 1990 and 1997 did not result from the alleged faults, and wasted time and efforts expended to obtain justice are inconveniences that are inherent in the efforts of anyone who is involved in legal proceedings. As for non-pecuniary damage, an order that the AGC pay \$1,900,000 after the AGQ had paid \$1,100,000 under the same head of damages would seem to be disproportionate, and the amounts granted in other cases of miscarriages of justice were mostly made further to the recommendations of advisory bodies and were based on considerations that are different from those on which damages are based in principle. Moreover, those cases were different in that they involved the much more serious crime of murder and in that the period of incarceration was longer in almost all of them. On the issue of punitive damages, even though the reference in the *Crown Liability and Proceedings Act* to the Quebec rules of extracontractual civil liability encompasses the remedy of punitive damages provided for in the *Charter of human rights and freedoms*, it was not appropriate to award such damages in this case. Given that the Minister's conduct cannot be equated with bad faith or serious recklessness, it cannot be concluded that there was intentional interference with a right protected by the *Charter*. The evidence does not support a finding that the Minister's state of mind was such that he intended to harm H or had knowledge of the adverse consequences his conduct would have for H.

In Quebec law, it is only in exceptional cases that a party can be required to pay the fees of lawyers retained by the opposing party, and such compensation must be consistent with the general rules of civil liability. Only an abuse of process can justify awarding extrajudicial fees as damages. However, by virtue of art. 1608 *C.C.Q.*, the obligation to pay damages to the other party is neither reduced nor altered by the fact that the latter received a gratuitous benefit from his or her counsel. In this case, the AGC's conduct did not amount to an abuse of process. The law on the federal Crown's liability for a fault committed by the Minister in exercising his or her power of mercy was far from clear at the time of the dispute, and it was reasonable and appropriate for the AGC to contest H's action and raise the defence that he did. The trial judge committed a palpable and overriding error in finding that there had been an abuse of process in the context of this case. H was not entitled to the extrajudicial fees that were awarded.

Cases Cited

Applied: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304; *Viel v. Entreprises Immobilières du Terroir ltée*, 2002 CanLII 41120 (QC CA), [2002] R.J.Q. 1262; **distinguished:** *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9; *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170; 1465778 *Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 2006 CanLII 35819 (ON CA), 82 O.R. (3d) 757; **approved:** *Thatcher v. Canada (Attorney General)*, 1996 CanLII 4092 (FC), [1997] 1 F.C. 289; **referred to:** *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657; *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663; *Attorney General for Canada v. Attorney General of the*

Province of Ontario (1894), [1894 CanLII 12 \(SCC\)](#), 23 S.C.R. 458; *Therrien (Re)*, [2001 SCC 35](#), [2001] 2 S.C.R. 3; *Krieger v. Law Society of Alberta*, [2002 SCC 65](#), [2002] 3 S.C.R. 372; *Bilodeau v. Canada (Ministre de la Justice)*, [2009 QCCA 746](#), [2009] R.J.Q. 1003; *Operation Dismantle Inc. v. The Queen*, [1985 CanLII 74 \(SCC\)](#), [1985] 1 S.C.R. 441; *Bilodeau v. Canada (Minister of Justice)*, [2011 FC 886](#), 394 F.T.R. 235; *Daoulov v. Canada (Attorney General)*, [2009 FCA 12](#), 388 N.R. 54; *Timm v. Canada (Attorney General)*, [2012 FC 505](#), 409 F.T.R. 8, aff'd [2012 FCA 282](#), 451 N.R. 250; *Barrette v. Union canadienne, compagnie d'assurances*, [2013 QCCA 1687](#), [2013] R.J.Q. 1577; *France Animation s.a. v. Robinson*, [2011 QCCA 1361](#), aff'd [2013 SCC 73](#), [2013] 3 S.C.R. 1168; *Longpré v. Thériault*, [1979] C.A. 258; *Crispino v. General Accident Insurance Company*, [2007 QCCA 1293](#), [2007] R.R.A. 847; *St-Yves v. Laurentienne générale, compagnie d'assurance inc.*, [1997 CanLII 10732](#); *Wilson v. Minister of Justice*, [1983 CanLII 5071 \(FC\)](#), [1983] 2 F.C. 379, aff'd [1985 CanLII 5589 \(FCA\)](#), [1985] 1 F.C. 586; *Parrot v. Thompson*, [1984 CanLII 118 \(SCC\)](#), [1984] 1 S.C.R. 57; *Dallaire v. Paul-Émile Martel Inc.*, [1989 CanLII 29 \(SCC\)](#), [1989] 2 S.C.R. 419; *Housen v. Nikolaisen*, [2002 SCC 33](#), [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, [2005 SCC 25](#), [2005] 1 S.C.R. 401; *Andrews v. Grand & Toy Alberta Ltd.*, [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George)*, [1978 CanLII 12 \(SCC\)](#), [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978 CanLII 2 \(SCC\)](#), [1978] 2 S.C.R. 287; *Proulx v. Québec (Procureur général)*, [1997 CanLII 8157 \(QC CS\)](#), [1997] R.J.Q. 2509; *Proulx v. Québec (Procureur général)*, [1997 CanLII 8342 \(QC CS\)](#), [1997] R.J.Q. 2516; *Chaput v. Romain*, [1955 CanLII 74 \(SCC\)](#), [1955] S.C.R. 834; *de Montigny v. Brossard (Succession)*, [2010 SCC 51](#), [2010] 3 S.C.R. 64; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996 CanLII 208 \(SCC\)](#), [1996] 2 S.C.R. 345; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004 SCC 30](#), [2004] 1 S.C.R. 789; *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996 CanLII 172 \(SCC\)](#), [1996] 3 S.C.R. 211; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003 SCC 71](#), [2003] 3 S.C.R. 371; *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 S.C.R. 3; *Human Rights Commission (Ont.) v. Brillinger* (2004), [2004 CanLII 16323 \(ON CA\)](#), 185 O.A.C. 366; *Reynolds v. Kingston (Police Services Board)*, [2007 ONCA 375](#), 86 O.R. (3d) 43.

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APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Bich and Bouchard JJ.A.),
[2013 QCCA 1513](#), [2013] R.J.Q. 1451, [2013] AZ-51000894, [2013] Q.J. No. 7562 (QL), 2013

CarswellQue 13456 (WL Can.), setting aside a decision of Poulin J., [2011 QCCS 1780](#), [2011] R.J.Q. 794, [2011] AZ-50742270, [2013] J.Q. n° 3760 (QL), 2011 CarswellQue 3905 (WL Can.). Appeal dismissed.

Guy J. Pratte, Alexander De Zordo and Marc-André Grou, for the appellant.

Bernard Letarte and Vincent Veilleux, for the respondent.

Brian H. Greenspan and Naomi M. Lutes, for the intervener the Association in Defence of the Wrongly Convicted.

Bernard Larocque and Jonathan Lacoste-Jobin, for the intervener Centre Pro Bono Québec.

Ranjan K. Agarwal and Nathan J. Shaheen, for the intervener Pro Bono Law Ontario.

English version of the judgment of the Court delivered by

WAGNER AND GASCON JJ. —

I. Introduction

[1] Although it receives praise from around the world, the Canadian criminal justice system is not free from the risk of miscarriages of justice. Where such situations arise — although fortunately very rare, they have serious consequences — certain remedies are available to the victims. One such remedy is the discretionary power of mercy provided for in the [Criminal Code](#), R.S.C. 1985, c. C-46 (“Cr. C.”), which enables the federal Minister of Justice (“Minister” or “Ministers”) to help rectify miscarriages of justice in certain cases. In this appeal, the Court is being asked for the first time to rule on the standard of conduct that applies to the exercise of this power and on the circumstances in which the federal Crown might be exposed to liability.

[2] The appellant, Réjean Hinse, was wrongly convicted of armed robbery. Under out-of-court settlements, the town of Mont-Laurier (“Mont-Laurier”) and the Attorney General of Quebec (“AGQ”) paid him a total of \$5,550,000 in compensation for this miscarriage of justice. According to Mr. Hinse, this compensation was incomplete, however, since the Ministers who had decided on his applications for mercy over the years had also committed a fault against him by failing to diligently exercise their power in his favour.

[3] The Quebec Superior Court found that a simple fault was sufficient for the Crown to be liable in respect of the Minister’s conduct. The trial judge concluded that a fault of [TRANSLATION] “institutional inertia” or “institutional indifference” on the federal government’s part had caused Mr. Hinse damage equivalent to nearly \$5.8 million. The Court of Appeal reversed that judgment, expressing the opinion that the person who exercises this power of mercy is protected by an immunity analogous to the one that applies to a Crown prosecutor in a case of malicious prosecution. Given that there was no intentional or gross fault, or even a simple fault, on the Minister’s part, it dismissed Mr. Hinse’s action against the Attorney General of Canada (“AGC”).

[4] We are of the opinion that, at the material time, the exercise of the Minister's power of mercy was a true policy decision. The Minister was therefore protected by a qualified (or "relative") immunity. On being presented with an application for mercy that was neither frivolous nor vexatious, the Minister had a duty to conduct a meaningful review of the application, and a breach of that duty amounting to bad faith, which encompasses serious recklessness, could expose the Crown to liability.

[5] We agree with the Court of Appeal that, on a balance of probabilities, the evidence does not support the trial judge's inference that the Ministers violated the rules of civil liability in this case. We also agree with the judges of that court that, in any event, Mr. Hinse failed to discharge his burden of proving the requisite causal connection between the Ministers' actions and the alleged damage. Finally, we agree with the Court of Appeal that the damages awarded to the appellant in excess of the \$5,550,000 he had already received were inappropriate. The appeal should therefore be dismissed.

II. Background and Judicial History.

[6] In September 1964, Mr. Hinse was found guilty of an armed robbery that he claimed not to have committed. He was sentenced to 15 years' imprisonment. Because a request he made for legal aid was denied, he did not appeal his conviction. However, he began to take steps to have his conviction recognized as a miscarriage of justice.

[7] In 1966, he persuaded three of the five perpetrators of the robbery to sign affidavits to clear his name. On April 24, 1967, he wrote to the Minister, seeking recognition of the miscarriage of justice of which he claimed to be a victim. This was the beginning of a correspondence that would span more than three decades. Although he was in prison at the time of the initial exchanges, Mr. Hinse was granted parole in 1969 after serving a third of his sentence.

[8] Mr. Hinse submitted three applications for mercy between 1967 and 1981. He also applied to the Governor General in Council for a pardon in 1971. All these applications were denied. In 1988, he applied to the Commission de police du Québec ("Commission de police"). Following an investigation into Mr. Hinse's allegations, the Commission de police found that his complaint was [TRANSLATION] "sufficiently troubling" and the facts gathered were "sufficiently probative" to warrant submitting a report, which it forwarded to the AGQ and the Quebec Minister of Public Security: A.R., vol. XI, at p. 36. In its report, the Commission de police said that it hoped the AGQ would intervene with the Solicitor General of Canada so that "justice will be done" to Mr. Hinse: *ibid.*, at p. 68. The Quebec Minister of Public Security sent the report to the Solicitor General of Canada on November 20, 1990. It was at this point that Mr. Hinse submitted a fourth application for mercy. The Minister replied that he should seek relief in the Quebec Court of Appeal, which he did.

[9] On June 8, 1994, after granting Mr. Hinse leave to file a notice of appeal and introduce fresh evidence, the Court of Appeal allowed his appeal: (1994), 64 Q.A.C. 53. But instead of entering an acquittal or ordering a new trial, the court exercised its inherent jurisdiction and directed a stay of proceedings for abuse of process, although that was not the result Mr. Hinse had requested.

[10] Mr. Hinse then appealed the case to this Court, challenging the legality and the constitutionality of the stay of proceedings. The Court denied him leave to appeal to it: [1995] 1 S.C.R. viii. Mr. Hinse refused to

give up, filing an application for reconsideration. On November 30, 1995, the Court allowed his application and granted him leave to appeal: [1995 CanLII 54 \(SCC\)](#), [1995] 4 S.C.R. 597. On January 21, 1997, it unanimously acquitted him in a judgment delivered from the bench, “being of the view that the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt”: [1997 CanLII 394 \(SCC\)](#), [1997] 1 S.C.R. 3, at para. 2.

[11] On February 4, 1997, Mr. Hinse sent the AGC a formal notice. On June 5, 1997, he instituted an action for an order for solidary payment against three defendants: the AGQ, the AGC and Mont-Laurier. On November 15, 2002, Mont-Laurier signed a transaction with him for a total of \$250,000. On December 2, 2010, the AGQ, too, entered into a transaction, this one for a total of \$5,300,000 in principal, interest and costs. This out-of-court settlement came more than four weeks into the hearing on the merits of the action, after the parties had presented their evidence but before they had made their oral arguments.

[12] The hearing on the merits thus ended with the AGC as the sole defendant. In respect of the AGC, Mr. Hinse alleged that the federal government had helped to perpetuate and exacerbate the damage he had suffered by failing to act diligently to acknowledge and rectify the miscarriage of justice of which he had been the victim. He submitted that the conduct of the federal government [TRANSLATION] “was indicative of reprehensible carelessness, recklessness and total denial, which must be denounced and condemned [by the award of] exemplary damages”: A.R., vol. IV, at p. 31. After the settlement with the AGQ was reached, he continued to claim \$1,079,871 for his pecuniary losses and \$1,900,000 for his non-pecuniary losses, as well as \$10,000,000 in punitive damages, from the AGC.

A. *Quebec Superior Court*, [2011 QCCS 1780](#), [2011] R.J.Q. 794

[13] The Superior Court allowed Mr. Hinse’s action and ordered the AGC to pay him a total of almost \$5.8 million.

[14] Poulin J. began by determining that the out-of-court settlements Mr. Hinse had reached with Mont-Laurier and with the AGQ constituted an express release from the debt. Mr. Hinse therefore did not have to prove any fault on their parts. However, the federal Crown could be held liable only for the share of the damage caused by its servants: paras. 17-22; art. 1690 of the *Civil Code of Québec* (“C.C.Q.”).

[15] Poulin J. then found that the Minister was subject to Quebec’s rules of civil liability and was not protected by any immunity: paras. 62-63. She concluded that he had committed a fault of [TRANSLATION] “institutional inertia” or “institutional indifference”: paras. 33, 55 and 75-76. The Minister had had a duty to conduct a meaningful review of Mr. Hinse’s applications, but had failed to do so: paras. 71 and 73.

[16] Poulin J. was of the opinion that Mr. Hinse had proved causation by means of presumptions of fact, given that [TRANSLATION] “[a] sustained, concerted, extensive, competent and timely review of his initial efforts would surely have brought the errors to the AGC’s attention”: paras. 75 and 98. In her view, Mr. Hinse had proved the damage he had suffered. She ordered the AGC to pay him more than \$850,000 for pecuniary damage and \$1,900,000 for non-pecuniary damage. She also found that the AGC was guilty of unlawful and intentional interference with Mr. Hinse’s right to dignity and awarded Mr. Hinse \$2,500,000 in exemplary damages. Finally, she found that the AGC’s conduct at trial had amounted to an abuse of process. She ordered him to pay Mr. Hinse \$100,000 for fees he had paid to the first law firm that had represented

him, as well as \$440,000 for the value of the services rendered by the second even though it had never billed him for fees, as they had entered into a *pro bono* agreement.

B. *Quebec Court of Appeal, 2013 QCCA 1513*

[17] The Court of Appeal reversed Poulin J.'s judgment. It expressed disagreement with her finding on the issue of immunity. In its view, the exercise of the Minister's power of mercy is protected by a qualified immunity: para. 141. As a result, the Crown can be held liable only if the Minister's decision was made in bad faith, and with malice: paras. 144 and 150.

[18] The Court of Appeal found that it had not been proven that the Minister had committed a fault: para. 157. The court acknowledged that it was difficult [TRANSLATION] "to accurately gauge what kind of study was conducted, because of the summary nature of the evidence adduced", but inferred nothing negative from the brevity of the Minister's decision: para. 170 (CanLII). At the time in question, the Minister was under no obligation to give reasons for his or her decisions, and good faith on his or her part had to be presumed. The Court of Appeal also rejected the view that the time it had taken the Minister to reach a decision had caused the damage: even if it were assumed that a fault had been committed, there was nothing to suggest that the miscarriage of justice would have been ascertained quickly if the Minister had acted promptly (paras. 171-72).

[19] The Court of Appeal went on to say that even if it were assumed that there had been some fault on the AGC's part, Poulin J. had failed to apportion liability among the AGC, the AGQ and Mont-Laurier for the purpose of calculating the damages: paras. 193 et seq. On the issue of punitive damages, the court found that even if a fault had been proven, there had been no unlawful and intentional interference with Mr. Hinse's fundamental rights: paras. 228-32. Finally, it rejected Poulin J.'s findings with respect to abuse of process: para. 242.

III. Issues

[20] The appeal raises several issues, which can be summarized as follows:

1. What rules of civil liability apply to the Minister's power of mercy?
2. Has the appellant shown that the Minister's conduct constituted a fault in this case?
3. If so, has the appellant proven a causal connection between the Minister's fault and the alleged damage?
4. If so, is the appellant entitled to compensatory or punitive damages and to compensation for his counsel's extrajudicial fees?

IV. Analysis

A. *Rules of Civil Liability That Apply to the Minister's Power of Mercy*

(1) Extracontractual Liability of the Crown

[21] The original legislation respecting civil liability of the federal Crown was the *Crown Liability Act*, S.C. 1952-53, c. 30, which later became the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (“*C.L.P.A.*”). The *C.L.P.A.* provides that whether the federal Crown is liable for damages is governed by the law of the jurisdiction where the acts in question were committed. In Quebec, the combined effect of the *C.L.P.A.* and the *C.C.Q.* is that the federal Crown is generally subject to the rules of civil liability set out in art. 1457 *C.C.Q.*: *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657, at paras. 25-26. In the instant case, the Crown is alleged to be liable in respect of the fault of its servants: ss. 2 “liability” and 3(a)(i) *C.L.P.A.*

[22] However, art. 1376 *C.C.Q.* provides that the rules respecting liability set out in the *C.C.Q.* apply “to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them”. This Court has found, for example, that general principles or rules of public law may either prevent the general rules of civil liability from applying or substantially alter how they are applied: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 27; *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 31; *Canadian Food Inspection Agency*, at para. 26.

[23] The principles in question include those relating to Crown immunity, which the Court considered in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; see also *Canadian Food Inspection Agency*, at para. 27; s. 8 *C.L.P.A.* In *Imperial Tobacco*, the Court noted that the prevailing view in Canada is that only “true” policy decisions are protected by Crown immunity. The Court explained that it is not helpful to posit a stark dichotomy between policy decisions and operational decisions, or to define policy decisions negatively as decisions that are not “operational” decisions: paras. 84-86. Although it refrained from establishing a black-and-white test, the Court concluded that core policy government decisions that are protected from suit are “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith”: para. 90. Policy decisions form a narrow subset of discretionary decisions. Such a decision is a considered decision that represents “a ‘policy’ in the sense of a general rule or approach, applied to a particular situation”: para. 87. To determine whether a decision is a policy decision, the role of the person who makes it may be of assistance, given that employees working at the operational level are not usually involved in making policy choices: paras. 87-90.

[24] In *Imperial Tobacco*, the Court did not lay down a strict rule that only “true” core policy decisions can be protected by a qualified immunity. On the contrary, it stated that “[a] black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical”: para. 90. Although that case concerned the federal Crown’s liability for negligence at common law, its conclusions on the issue of immunity for acts of the Crown pertained to public law, which means that they are applicable to Quebec’s rules relating to Crown liability.

[25] With these principles in mind, we must begin by characterizing the nature of the ministerial power at issue so as to determine whether it is a true core policy act to which a qualified immunity applies. Having done this, we must identify the standard of fault that applies to this power and then, after defining the nature of the duties owed by the Minister during the material period, apply this standard to the facts.

(2) Nature of the Ministerial Power at Issue

[26] In the case at bar, Poulin J. found that the Minister is subject to the rules of civil liability and is not protected by any immunity when he or she exercises the power of mercy. But the Court of Appeal held that the Minister is in fact protected by a qualified immunity, given that the power in question stems from a royal prerogative and is exercised in a policy rather than an operational capacity. In this Court, the appellant submits that the Minister acts in the context of a statutory process, not of a royal prerogative, and that the standard is the existence of a simple fault. He argues that there is a distinction between the processing of applications for mercy and the Minister's final decision. In his view, the processing of applications falls within the operational sphere and should not be protected by any immunity. As for the respondent, he supports the Court of Appeal's analysis and its conclusion.

[27] Applications for mercy are governed by the *Cr. C.* Four successive provisions applied during the material period. They are reproduced in the Appendix. It can be seen from these provisions that the discretionary nature of the Minister's power ("[t]he Minister of Justice may") and the requirement that the Minister conduct an inquiry ("if after inquiry he is satisfied that in the circumstances") were constants throughout this period.

[28] We agree with the Court of Appeal that the power of mercy codified in the *Cr. C.* derives from the royal prerogative of mercy. Most academic commentators are also in agreement with this. Historically, the royal prerogative of mercy has had two strands and two objectives: to show compassion by relieving an individual of the full weight of his or her sentence, and to correct miscarriages of justice such as wrongful convictions (G. T. Trotter, "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review" (2001), 26 *Queen's L.J.* 339, at p. 344, citing A. T. H. Smith, "The Prerogative of Mercy, the Power of Pardon and Criminal Justice", [1983] *P.L.* 398). The prerogative was incorporated into Canadian law and conferred on the Governor General by letters patent: *Attorney General for Canada v. Attorney General of the Province of Ontario* (1894), 1894 CanLII 12 (SCC), 23 S.C.R. 458, at pp. 468-69; *Letters Patent Constituting the Office of Governor General of Canada* (1947), *Canada Gazette*, Part I, vol. 81, p. 3014 (reproduced in R.S.C. 1985, App. II, No. 31).

[29] Until 2002, the second strand of the royal prerogative of mercy, that of the rectification of miscarriages of justice, was codified primarily in s. 690 *Cr. C.* Originally, in 1892, the forerunner of this provision read as follows:

748. If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper.

(*Criminal Code*, 1892, S.C. 1892, c. 29)

[30] The provision has evolved over time, but the link between the referral procedure and the concept of mercy has always remained, as can be seen from the words "upon an application for the mercy of the Crown" (*Criminal Code*, S.C. 1953-54, c. 51, s. 596). In *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 113, Gonthier J. considered the effect of a pardon, which he defined as "an expression of the sovereignty of the monarch, the result of the unilateral and discretionary exercise of the Royal prerogative of mercy or clemency". He explained that in Canada, statutory provisions merely set out various ways to exercise this prerogative but do not limit its scope. The types of pardons include "the pardon granted after a

referral for hearing or referral to a court of appeal in accordance with s. 690 of the *Code* . . . which results in a new trial or a new hearing”: *Therrien*, at para. 114.

[31] The fact that the Minister’s power derives from the royal prerogative of mercy attests to the broad discretion that is conferred on him or her. Although the fact that a decision is discretionary is not on its own sufficient to justify finding that a public law immunity applies, it is nonetheless a helpful criterion.

[32] Moreover, the various relevant provisions of the *Cr. C.* over the years were all drafted in broad and general language. They offered little guidance for the exercise of this discretion and accordingly gave the Minister a great deal of latitude. They gave the Minister the power to, *inter alia*, direct a new trial or refer the matter to the court of appeal, and left it up to the Minister to determine in what circumstances he or she should intervene:

596. The Minister of Justice may . . .

(a) direct . . . a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed:

(*Criminal Code*, S.C. 1953-54)

[33] In making this discretionary decision, the Minister necessarily had to assess and weigh public policy considerations on the basis of social, political and economic factors. This power, which derived from the royal prerogative, fell outside the traditional sphere of criminal law in that it came into play after all judicial remedies had been exhausted. In exercising it, the Minister had to be careful to avoid usurping the role of the courts and short-circuiting the usual judicial process. It clearly did not constitute a new level of appeal. As the Court of Appeal noted in the case at bar, the Minister’s duties required

[TRANSLATION] . . . diverse (and often diverging) legal and social interests, ranging from the specific interest of the particular individual and a concern for justice to the preservation of the independence and integrity of the judicial system and of the stability of judgments — each of them being no less important than the others — to be weighed [in relation to] facts that are seldom clear. [para. 141]

[34] Furthermore, Part XXI.1 of the *Cr. C.*, which was introduced in 2002 by the *Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13, s. 71, has as its purposes to provide greater guidance for the exercise of this power and to enhance the transparency of the process: Library of Parliament, “Bill C-15A: An Act to amend the *Criminal Code* and to amend other Acts”, Legislative Summary LS-410E, October 12, 2001 (“Legislative Summary”). Under the current s. 696.3(3)(a) *Cr. C.*, the Minister may now direct a new trial or refer the matter to the court of appeal “if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred”. Unlike when Mr. Hinse made his applications, s. 696.4 *Cr. C.* now sets out specific criteria on which the Minister’s decision must be based. Public policy considerations, such as certainty of judgments and judicial independence, were taken into account when the new provisions were enacted, and their importance in the Minister’s decision-making process has been reduced.

[35] Finally, because the decision maker’s role may also be a relevant factor in characterizing the power in question, it should be borne in mind that the Minister, in making such policy decisions, does not act as a mere public servant working in an administrative or operational capacity. In this regard, the appellant’s argument that a distinction should be drawn between the processing of applications for mercy by government

employees and the Minister's decision is wrong. Such a distinction is both difficult to justify and difficult to make in practice. This power is a single power — to review a conviction — that cannot be split into two unconnected steps. Although the ministerial review process does of course require administrative support, this fact alone does not, in the case before us, justify dividing the process into distinct compartments of policy decisions and operational decisions. The decision to consider a case further or to deny an application is an integral part of the evaluation process.

[36] The history and the nature of the Minister's power of mercy lead us to find that the exercise of that power was a true core policy act at the relevant time. In light of the principles from *Imperial Tobacco*, the exercise of such a power could not therefore expose the Crown to liability unless the Minister acted irrationally or in bad faith. In the instant case, it is not necessary to consider in detail what might constitute an irrational decision by the Minister. That is not the issue Mr. Hinse raises here. He merely complains of the failure to conduct adequate reviews of his applications. What is really at issue in this case is whether the Minister conducted a meaningful review. This means that it is important to define what constitutes bad faith in Quebec civil law in the context of the case at bar.

(3) Characterization of the Fault

[37] Mr. Hinse maintains that the Minister's conduct when exercising his power of mercy must be assessed against a standard of simple fault. In the alternative, he argues that the fault threshold required to lift the Crown's qualified immunity includes carelessness or serious recklessness. The AGC counters that the Crown cannot be held liable in respect of the Minister's conduct absent "bad faith or other similar conduct": R.F., at paras. 43 and 51. At the hearing in this Court, the AGC conceded that bad faith can be proven indirectly by showing conduct so blameworthy and inexplicable that it cannot be concluded that the person in question acted in good faith, since the only possible explanation is that he or she did so in bad faith. In the AGC's opinion, this is a very high threshold. A total failure by the Minister to review an application for mercy would be one example of such conduct: transcript, at pp. 77-78.

[38] The Superior Court, having found that the Minister was not protected by any immunity, decided on and applied a standard of simple fault. The Court of Appeal, being of the opinion that the Minister's actions were protected by an immunity, preferred to apply the malice standard developed in the context of the liability of Crown prosecutors for malicious prosecution. It pointed to the similarities between the Minister's duties and those of prosecutors. It did not rule definitively on the issue, however, as in its view, the appellant had not proven that a fault of any kind had been committed: paras. 150-57.

(a) Applicable Standard of Fault Is Not Malice

[39] In our opinion, it would be inappropriate to import the malice standard applicable to the liability of Crown prosecutors for malicious prosecution into a case concerning an application for mercy. Although there is a certain similarity between the duties discharged by the Minister in exercising his or her power of mercy and those discharged by Crown prosecutors in exercising their discretion in criminal prosecutions, there are significant differences between the two roles.

[40] First, although it is possible, in rare cases, to hold Crown prosecutors liable for malicious prosecution, there are policy reasons that justify an extremely high threshold for success in such an action:

Miazga v. Kvello Estate, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 43; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, at para. 4; *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170. As a result, an action for malicious prosecution must be based on malice or on an improper purpose: *Miazga*, at paras. 56 and 81. The decision to initiate or continue criminal proceedings lies at the core of the Crown prosecutor's powers, and the principle of independence of the prosecutor's office shields prosecutors from the influence of improper political factors: *Miazga*, at para. 45; see also *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. Prosecutors must be able to act independently of any political pressure from the government and must be beyond the reach of judicial review, except in cases of abuse of process. This independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched: *Miazga*, at para. 46; *Krieger*, at paras. 30-32.

[41] The imposition of a high fault threshold thus flows from an intentional choice made to preserve a balance "between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing": *Miazga*, at para. 52.

[42] These policy reasons do not apply to the Minister's power of mercy, however. Although this power is a highly discretionary one, the Minister's latitude in deciding whether to exercise it is not fundamental to the integrity and efficiency of the criminal justice system *per se*. Indeed, the mercy process [TRANSLATION] "begins where the law ends": *Bilodeau v. Canada (Ministre de la Justice)*, 2009 QCCA 746, [2009] R.J.Q. 1003, at para. 14; see also *Thatcher v. Canada (Attorney General)*, 1996 CanLII 4092 (FC), [1997] 1 F.C. 289 (T.D.), at para. 9. Furthermore, although prosecutorial authority must be shielded from political influence, the Minister must weigh social, political and economic factors in making his or her decision. As well, the Minister's independence in the context of this decision-making process is not entrenched in the Constitution.

[43] Second, it must be borne in mind that the exercise of the royal prerogative, like the exercise of any other statutory power, can be reviewed by the courts. Ministerial decisions on applications for mercy are therefore subject to judicial review: *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 26; see also *Bilodeau v. Canada (Minister of Justice)*, 2011 FC 886, 394 F.T.R. 235; *Daoulov v. Canada (Attorney General)*, 2009 FCA 12, 388 N.R. 54; *Bilodeau* (QCCA); *Timm v. Canada (Attorney General)*, 2012 FC 505, 409 F.T.R. 8, aff'd 2012 FCA 282, 451 N.R. 250; *Thatcher*. This is generally not the case for Crown prosecutors' decisions on whether to prosecute.

[44] A comparison between the prosecutorial prerogative of Crown prosecutors and the evolution of the Minister's power of mercy under the *Cr. C.* reveals significant differences between the contents of the two prerogatives. This means that these prerogatives must be analyzed from different perspectives.

[45] Third, what is at issue in the instant case is whether the general Quebec rules of extracontractual civil liability apply to the federal Crown, as provided for in the *C.L.P.A.* Intent is not usually a prerequisite for establishing such liability. Even where gross fault is alleged, intent is not required, unlike in the case of the tort of malicious prosecution, for which intent must be proven.

[46] Finally, we note that the AGC did not insist on this very high standard at the hearing in this Court.

[47] It is therefore our opinion that to assess the Minister's conduct in the exercise of his power of mercy, it would be inappropriate to apply a standard of fault that limits bad faith to malice. The bad faith referred to in *Imperial Tobacco* to circumscribe the qualified immunity of the Crown for acts of political authority does not require such a result.

(b) *Applicable Standard of Fault in This Case*

[48] In Quebec civil law, the concept of bad faith is flexible, and its content varies from one area of the law to another: *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304, at para. 25. In *Finney*, this Court defined the scope of a statutory immunity according to which the Barreau du Québec could not be prosecuted for acts carried out in good faith. The Court held that bad faith is broader than just intentional fault or a demonstrated intent to harm another: para. 37. It also encompasses serious recklessness. LeBel J. wrote the following:

. . . recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised. [Emphasis added; para. 39.]

[49] In *Sibeca*, this Court applied the definition of bad faith from *Finney* in the context of the qualified immunity that protects a municipality when exercising its regulatory discretion. Deschamps J.'s comments on the nature of that discretion can be transposed to the instant case:

Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justifies incorporating a form of protection both in civil law and at common law. [para. 24]

[50] In Deschamps J.'s view, the interpretation of bad faith proposed in *Finney* is applicable both to cases in which acts were committed deliberately with intent to harm and to those in which circumstantial evidence of bad faith must be relied on: *Sibeca*, at para. 26.

[51] In our opinion, a standard of bad faith that encompasses serious recklessness as defined in *Finney* and applied in *Sibeca* is consistent with the logic of Quebec's principles of civil liability. Moreover, this standard is akin to the concept of gross fault, which includes gross recklessness: see art. 1474 C.C.Q.; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at No. 1-190.

[52] This standard is of course higher than the standard of simple fault that the trial judge incorrectly applied in the case at bar. A simple fault such as a mistake or a careless act does not correspond to the concept of bad faith that defines the limits of the Crown's qualified immunity. Moreover, it would be paradoxical if the exercise of the Minister's power of mercy were subject to a reasonableness standard on judicial review while being considered from the standpoint of a simple fault in extracontractual liability.

[53] In sum, decisions of the Minister that are made in bad faith, including those demonstrating serious recklessness — as defined in *Finney* and *Sibeca* — on the Minister's part, fall outside the Crown's

qualified immunity. Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person. It can also be established by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed. It is with this in mind that the duty owed by the Minister when exercising his or her power of mercy must be analyzed.

(4) Minister's Duty

[54] The trial judge held that the Crown's extracontractual liability under art. 1457 *C.C.Q.* is based on [TRANSLATION] "the breach of a duty flowing from the conduct required of a reasonable person in society": para. 32. She found that when the Minister exercises the power of mercy, he or she has a duty to react as quickly as possible when evidence of a miscarriage of justice arises: para. 68. At a minimum, this duty requires the Minister to conduct a meaningful review of applications for mercy, since he or she has the powers of a commissioner under Part I of the *Inquiries Act*, R.S.C. 1985, c. I-11: para. 71. The trial judge described the meaningful review as a "thorough" investigation (para. 95) or a "sustained, concerted [and] extensive . . . review" (para. 75).

[55] The Court of Appeal concluded that the trial judge had erred in law in defining the scope of the Minister's duty at the time of Mr. Hinse's initial application for mercy on the basis of current standards and practices: para. 165. It instead found that the scope of that duty had been correctly defined in *Thatcher*: paras. 166-68. When presented with an application for mercy that was neither frivolous nor vexatious, the Minister was required to conduct a meaningful review of it, although not a review equivalent to the one that would be expected from a police investigation or a commission of inquiry.

[56] In our opinion, the Court of Appeal was right, in defining the scope of the Minister's duty at the relevant time, to endorse the conclusions reached by the Federal Court in *Thatcher*, to mention that the Minister was under no obligation to give reasons for his or her decisions, and to point out that good faith on the Minister's part had to be presumed: para. 170.

[57] Mr. Hinse's applications for mercy were made to the Minister between 1967 and 1990, and the response to his final application was sent to him in April 1991, that is, before the *C.C.Q.* came into force in 1994. It will therefore be necessary to refer to the standard that was provided for in art. 1053 of the *Civil Code of Lower Canada* ("*C.C.L.C.*") (now art. 1457 *C.C.Q.*), which was in force at the time of the facts alleged against the AGC:

Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

[58] Under the *C.L.P.A.*, the federal Crown can be held liable not on its own account, but solely for the fault of its servants (in this case, the Minister): s. 3(a)(i). In Quebec civil law, it was art. 1054 *C.C.L.C.* — now art. 1463 *C.C.Q.* — that provided for this type of liability. However, this liability scheme was based on the same concept of fault as the one described in the general provisions on extracontractual liability, or, in this case, art. 1053 *C.C.L.C.*

[59] To define the duty owed by the Minister when exercising his or her power of mercy, we must take the *Cr. C.* and the procedure that applied at the material time into account. These factors will make it

possible to establish a general definition of the scope of that duty.

[60] In finding that the Minister is protected by a qualified immunity, we noted that the *Cr. C.*'s successive provisions on mercy that applied during the relevant period (from 1967 to 1990) granted the Minister a broad discretion. Regardless of the amendments Parliament made over the years to the section of the *Cr. C.* that conferred this power on the Minister, the wording remained essentially the same: "The Minister of Justice may, upon an application for the mercy of the Crown" These various sections did not include the verb "shall" in relation to the Minister's powers, and nowhere in them was any specific duty imposed on the Minister.

[61] We also mentioned that Parliament left it up to the Minister to decide on the circumstances in which it would be appropriate to direct a new trial or refer the matter to the court of appeal. Ideally, Parliament could have defined the types of circumstances that were relevant and given better guidance on the procedure the Minister was to follow. But it did not do so. This reflects Parliament's choice to give the Minister considerable latitude and must be taken into account when defining the scope of the Minister's duty.

[62] As we mentioned above, Parliament modified the power of mercy significantly in 2002, choosing to provide greater guidance for the exercise of the power. Since then, the Minister has been required to review applications for mercy in accordance with the *Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice*, SOR/2002-416: s. 696.2 *Cr. C.* The Minister is also required to submit an annual report to Parliament in relation to such applications: s. 696.5 *Cr. C.* This change underlines the fact that there was no applicable procedural framework when Mr. Hinse made his applications for mercy. Moreover, the following appears in the Legislative Summary:

Prior to 1994, the Department of Justice took a more or less *ad hoc* approach to section 690 applications. There was no set procedure or designated personnel to deal with them. . . .

. . .

In 1994, the Department of Justice instituted a number of measures to address complaints about the section 690 application process. [Emphasis added; pp. 17-18.]

[63] While the procedure to be followed is now more detailed, it does not actually require the Minister to conduct an investigation in every case. Section 3 of the *Regulations* provides that the Minister must conduct a preliminary assessment of the application. After that, the Minister is in principle required to conduct an investigation only "if [he or she] determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred": s. 4 of the *Regulations*. Finally, unlike with the powers the Minister had at the material time in this case, he or she now has and may exercise the powers of a commissioner under Part I of the *Inquiries Act* and the powers that may be conferred on a commissioner under s. 11 of that Act: s. 696.2(2) *Cr. C.*

[64] In light of the applicable provisions of the *Cr. C.* and of the fact that there was, at the relevant time, no established procedure to guide the Minister in exercising his or her power of mercy, we, like the Court of Appeal, agree with the conclusions of Rothstein J. (then a judge of the Federal Court — Trial Division) in *Thatcher* regarding the scope of the Minister's duty. *Thatcher* concerned an application for judicial review of a decision to deny an application for mercy made under s. 690 *Cr. C.* and, therefore, the scope of the duty of fairness the Minister owed when exercising the power. Although that is not the issue in

the instant case, Rothstein J.'s analysis of the Minister's power was nonetheless correct, and his conclusions will be helpful in determining the scope of the Minister's duty in the context of the Crown's civil liability.

[65] Rothstein J. began by indicating that the mercy procedure is not the subject of legal rights, as it is initiated only after a convicted person has exhausted his or her rights: *Thatcher*, at para. 9. He then made the following observation:

That the function of the Minister of Justice under section 690 is an "exemplar of a purely discretionary act" is reflected in the wide allowance given to the Minister to exercise his discretion. There are no statutory provisions directing the Minister as to the manner in which he should exercise his discretion. There are no requirements as to the type of investigation the Minister must carry out under section 690. [para. 10]

[66] Rothstein J. pointed out that no procedure had been established and that the Minister's decision was not subject to appeal: *Thatcher*, at para. 11. He concluded that "the Minister must act in good faith and conduct a meaningful review, provided that the application is not frivolous or vexatious": para. 13. An application usually had to introduce some new matter "indicating it is likely that there has been a miscarriage of justice": para. 14. Rothstein J. stated that the applicant had no general right to disclosure of what the Minister or his officials had considered in their review: para. 13. However, the applicant was entitled to disclosure of any new information uncovered by the Minister's investigation: para. 14.

[67] Finally, Rothstein J. wrote:

Exceptionally, as a result of new information that is substantial and would provide a reasonable basis for a finding of miscarriage of justice, the Minister may find it necessary to consider material in police or prosecution files. In such a case, the material, or at least the gist of the material the Minister or his officials review, if not already known by the applicant, would have to be disclosed to him. But there is no general obligation on the Minister to review police and prosecution files or to disclose those files merely because of a request by a convicted person. [Emphasis added.]

(*Thatcher*, at para. 15)

[68] It is our opinion that, for the purpose of establishing liability under the Quebec rules of extracontractual liability, the Minister's duty can be defined in terms of a meaningful review of an application for mercy. What a meaningful review entails must be understood in light of Rothstein J.'s comments. It is not the extensive and thorough review referred to by Poulin J. As well, this review is clearly not intended to be equivalent to a new level of appeal. And it is inappropriate to compare the Minister's review to a police investigation or to the work of a commission of inquiry. On the other hand, a slapdash investigation could hardly be described as a meaningful one either. It goes without saying that, as the AGC agreed at the hearing, a total failure to conduct a meaningful review of an application that is neither frivolous nor vexatious would constitute a breach of the Minister's duty. In addition, as we concluded above that it is inappropriate to draw a distinction between the processing of an application for mercy and the Minister's decision with respect to that application, these two aspects of the power of mercy are intrinsically linked. The duty to conduct a meaningful review therefore entails a duty to make a decision in good faith on the basis of the evidence uncovered by that review. Finally, we would add that at the time, the Minister did not have to document his or her investigation or give any reasons whatsoever for his or her discretionary decision. This fact will be important for our assessment of the evidence that has been submitted.

[69] Since we have concluded that the Minister is protected by a qualified immunity when exercising his or her power of mercy, only a breach of the Minister's duty that amounts to bad faith or serious recklessness could expose the Crown to liability. In short, the evidence had to show that the Minister had acted in bad faith or with serious recklessness in conducting the required review of Mr. Hinse's applications for mercy.

B. Evidence of Fault in This Case

[70] Although the basis for the Crown's extracontractual liability in respect of the Minister's conduct is governed by the *C.C.L.C.*, it is the *C.C.Q.* that governs the rules of evidence and procedure in this case: ss. 2 and 3 of the *Act respecting the implementation of the reform of the Civil Code* (see also the second para. of s. 9). Article 2803 *C.C.Q.* provides that "[a] person seeking to assert a right shall prove the facts on which his claim is based." The onus was therefore on Mr. Hinse to prove fault on the AGC's part, damage he himself had suffered, and a causal connection between the two: see J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 158.

[71] In this case, there is no direct evidence regarding the quality of the Minister's review. The appellant's argument was based on proof by presumption of fact, and the trial judge relied on this argument to conclude that the Minister had not conducted a meaningful review. Article 2846 *C.C.Q.* provides that "[a] presumption is an inference drawn by the law or the court from a known fact to an unknown fact." Regarding presumptions of fact, art. 2849 *C.C.Q.* provides that courts may, at their discretion, take such presumptions into account, but only if they are "serious, precise and concordant". These modifiers can be defined as follows:

[TRANSLATION] Presumptions are serious when the connection between the known fact and the unknown fact is such that the existence of one establishes the existence of the other in a clear and obvious manner. . . .

Presumptions are precise when the conclusions that flow from the known fact tend to establish the contested unknown fact in a direct and specific manner. If it were also possible to draw different and even contrary results, to infer the existence of various and contradictory facts, the presumptions would not be precise in nature and would give rise only to doubt and uncertainty.

Finally, they are concordant, whether or not they each spring from a common or different source, when they tend[, as a whole and in how they accord with one another,] to establish the fact to be proven. . . . If, on the contrary, they contradict each other . . . and cancel each other out, they are no longer concordant, and create only doubt in the magistrate's mind. [Emphasis added.]

(M. L. Larombière, *Théorie et pratique des obligations* (new ed. 1885), vol. 7, at p. 216, reproduced in *Barrette v. Union canadienne, compagnie d'assurances*, 2013 QCCA 1687, [2013] R.J.Q. 1577, at para. 33; *France Animation s.a. v. Robinson*, 2011 QCCA 1361, at para. 120 (CanLII), quoting *Longpré v. Thériault*, [1979] C.A. 258, at p. 262.)

[72] Thus, [TRANSLATION] "[a] presumption of fact cannot be deduced from a pure hypothesis, from speculation, from vague suspicions or from mere conjecture": Royer and Lavallée, at No. 842, citing *Crispino v. General Accident Insurance Company*, 2007 QCCA 1293, [2007] R.R.A. 847. An unknown fact will not be proven if the known facts cause another fact that is inconsistent with the fact the plaintiff wants to prove to be more or less likely, or if they do not reasonably rule out another possible cause of the damage he or she suffered: see, e.g., *Crispino*. However, it is not necessary to rule out every other possibility: Royer and

Lavallée, at No. 842; see also *St-Yves v. Laurentienne générale, compagnie d'assurance inc.*, 1997 CanLII 10732 (Que. C.A.).

[73] After reviewing the steps taken by Mr. Hinse and the authorities' responses, Poulin J. concluded that [TRANSLATION] "the federal government's conduct was marked by institutional indifference": para. 55. She made the following points, *inter alia*, in this regard:

- despite the multiple and urgent distress calls Mr. Hinse sent out, no one really listened to him, no one helped him, no one looked into his allegations, no one tried to validate them;
- even though he was acquitted by this Court in 1997, and despite the Quebec government's proposal, the federal government refused to compensate him in accordance with the *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons* (1988) ("Guidelines"); and
- the AGC contested Mr. Hinse's action firmly and vigorously for more than 13 years, thereby perpetuating the miscarriage of justice (paras. 57 and 59-60).

[74] Poulin J. then expressed the opinion that [TRANSLATION] "the federal government is liable for the faults committed by its servants and agents, manifested primarily in their indifference toward him": para. 61. In this regard, she notably criticized the federal government for a number of actions:

- it let more than a year and a half go by and did not respond to the appellant's first application for review until it had received the third letter from the appellant or his spouse;
- it created confusion in the instructions it gave them;
- it misled the appellant by referring him to the provincial authorities on several occasions;
- it deliberately caused the appellant to lose precious time;
- it repeatedly asked the appellant to tell his story; and
- it forwarded documents the appellant had sent to it to third parties who were not involved in his case (para. 63).

[75] Moreover, Poulin J. expressed the opinion that the AGC had had a duty to react as quickly as possible to Mr. Hinse's application for mercy, as a wrongful conviction is a flagrant example of a miscarriage of justice: para. 68. In her view, the Minister [TRANSLATION] "had at the very least a duty to conduct a meaningful review of Hinse's review applications simply because he 'has and may exercise the powers of a commissioner under Part I of the [Inquiries Act](#)'": para. 71, quoting s. 696.2(2) *Cr. C.* She added that the Minister should, in exercising his power, have taken into account certain concerns raised in an article published in 1992, in which Philip Rosen describes the procedure followed when an application for mercy is sent to the Minister: para. 72, citing Library of Parliament, "Wrongful Convictions in the Criminal Justice System", Background Paper BP-285E, January 1992, at pp. 10-11. Poulin J. observed that this exercise had "clearly" not been undertaken in this case, which amounts to a fault of omission: para. 73.

[76] She concluded her remarks regarding fault as follows:

[TRANSLATION] The evidence that Hinse adduced by presumption of fact satisfies the Court that the AGC's wrongful inaction compounded his suffering. . . . Institutional inertia exacerbated

and extended it by perpetuating the impact of the criminal past that the whole of society had attached to Hinse for a robbery he had not committed, whereas the AGC was the only one in a position to remedy the injustice.

That, it should be repeated, is where his fault lies. [paras. 75-76]

[77] The Court of Appeal found that the Minister had had a duty to conduct a meaningful review of Mr. Hinse's case, because the affidavits submitted by Mr. Hinse had indicated that a miscarriage of justice may have occurred. The court acknowledged that it was difficult [TRANSLATION] "to accurately gauge what kind of study was conducted, because of the summary nature of the evidence adduced", but nevertheless inferred nothing negative from that: para. 170. At the time in question, the Minister had not been under an obligation to give reasons for his or her decisions, and good faith on his or her part was presumed. In the court's view, the evidence in the record did not justify the trial judge's inferring from the refusals Mr. Hinse had met with that the Ministers had not conducted a meaningful review or had acted maliciously: para. 177. The Court of Appeal pointed out that when Mr. Hinse had made his applications, he had not yet exhausted his legal remedies, and that at his trial, Judge Côté had made some very harsh comments regarding his credibility: paras. 168-69. Finally, the court stated that, even if it considered the handling of all Mr. Hinse's applications globally, it could not identify any wrongful conduct: para. 183.

[78] The appellant submits that the trial judge did not err in law in defining the meaningful review standard. In his view, it can be seen from *Thatcher* and from *Wilson v. Minister of Justice*, 1983 CanLII 5071 (FC), [1983] 2 F.C. 379 (T.D.), aff'd 1985 CanLII 5589 (FCA), [1985] 1 F.C. 586 (C.A.), that in those cases, Department of Justice officials had conducted exhaustive investigations and reviews, and [TRANSLATION] "[t]he contrast between the work carried out in those cases and the total absence of any documentation and/or any information showing any enquiry whatsoever carried out by the AGC in this case is striking": A.F., at para. 58 (emphasis deleted). The respondent contends that the trial judge erred in law by reviewing the Minister's conduct on the basis of the provisions of the *Cr. C.* that came into force in 2002 and the practices followed in the 1990s. She should have conducted this review on the basis of the standards that applied at the time of the acts in question. The respondent relies on the conclusions reached in *Thatcher* to himself conclude that the Minister's conduct in the case at bar was not wrongful.

[79] We are of the opinion that the trial judge not only erred in finding that no immunity whatsoever applied to the Minister's exercise of his power, but also made several errors regarding the scope of the Minister's duty, and that those errors led her to conclude, incorrectly, that the Minister had committed a fault. We will discuss the errors in question first, before turning to the determinative issue of the allegation that the Minister failed to conduct a meaningful review.

(1) Anachronism in the Scope of the Minister's Duty.

[80] The Court of Appeal was right to find that Poulin J. had erred in considering the powers of a commissioner under the *Inquiries Act* as a basis for determining whether the review conducted by the Minister was a meaningful one. Those powers were not conferred on the Minister until 2002, when Parliament reformed the procedure in respect of applications for mercy. As the Court of Appeal pointed out, this anachronism had distorted Poulin J.'s analysis of the nature of the meaningful review the Minister was required to conduct, as she had found that the Minister had [TRANSLATION] "extremely broad" latitude in this regard and could seek assistance from the RCMP, from local police forces and from forensic scientists or other experts: para. 71, citing Rosen, at p. 11. As was established in *Thatcher*, however, the Minister would

be required to consult the files of the prosecutor or of the police only in exceptional circumstances. In our opinion, requiring the Minister to assume the role of a police investigator or to enlist the aid of such investigators or any other experts would have been even less appropriate.

[81] Similarly, as the Court of Appeal observed, the 1992 study by Philip Rosen could be helpful, but not determinative, in the analysis of the Minister's conduct: para. 165. Although Rosen briefly reviewed the history of the Minister's power, his study was really limited to s. 690 *Cr. C.*, the Department of Justice's "present practice" (i.e. the one followed since 1985), problems with that practice, and proposals for change. But s. 690 *Cr. C.* did not come into force until 1988, whereas Mr. Hinse made the first three of his applications before that date. As for the fourth application, which he made in 1990, it is enough at this point to note that Mr. Hinse did not meet with a firm refusal from the Minister then in office; rather, the Minister asked Mr. Hinse to seek relief directly from the Quebec Court of Appeal, and to contact her again if he was unsuccessful: A.R., vol. XI, at p. 75.

[82] In his study, Rosen discussed problems with the Department of Justice's "present practice" that the lawyers of certain applicants had denounced. Those problems confirm some of the criticisms of the Minister made by Mr. Hinse and the trial judge, which included the following (pp. 13-14):

- a lack of established rules of procedure;
- issues with respect to the types of evidence and documents collected by the Department and the nature of the report submitted to the Minister;
- concerns about the fact that applicants or their counsel were not advised of adverse findings and allowed to make further legal or evidentiary responses before the investigation report was submitted to the Minister; and
- the Minister's response to an application for mercy, which might not provide the reasons for rejecting the application in sufficient detail.

(2) Confusion of the Minister's Conduct With That of the AGC

[83] Furthermore, Poulin J. sometimes confused the Minister's actions with those of the AGC. Thus, she faulted the AGC for vigorously contesting Mr. Hinse's action and for asserting in his oral argument that there was no evidence showing beyond a reasonable doubt that Mr. Hinse had not committed the crime: paras. 60, 64 and 66. Although the AGC is the Minister's representative for the purposes of this proceeding, it is important to distinguish the conduct of the former from that of the latter. It is the Minister's conduct that must be reviewed to determine whether the federal Crown is civilly liable. In the part of her judgment dealing with fault, the judge should have confined her analysis to the Minister's conduct. If the criticisms levelled against the AGC regarding the conduct of the litigation are at all relevant, it is only for the purpose of determining whether there was an abuse of process, which is an issue that must be considered separately.

(3) Federal Crown's Obligation to Compensate

[84] Canada has recognized that it is desirable to compensate victims of miscarriages of justice. In particular, it acceded to the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("ICCPR"), which provides, in art. 14(6):

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(Entry into force, March 23, 1976; accession by Canada, May 19, 1976.)

[85] However, Canada has not enacted legislation to incorporate the *ICCPR* into Canadian domestic law. There is no legislation establishing an obligation for the federal government or the provinces to compensate victims of miscarriages of justice, nor is there any legislation establishing a right to such compensation. The federal and provincial governments did adopt the *Guidelines* in 1988. The *Guidelines* establish a set of criteria that a wrongfully convicted person must meet to be entitled to compensation. In addition to fixing the maximum amount of such compensation, they require, *inter alia*, that the person first receive a statement to the effect that he or she is innocent: a free pardon or the quashing of a guilty verdict is not, on its own, sufficient. The *Guidelines* are not binding legislation, however, and have never been regarded as such: see, e.g., S. L. Robins, *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation*, March 28, 2008 (online), at pp. 18-23.

[86] As a result, the *Guidelines* did not require the federal government to compensate Mr. Hinse, particularly given that his “factual innocence” had not been proven. Moreover, Quebec had decided not to compensate the appellant for this very reason: examination on discovery of D. Grégoire, May 28, 2009, R.R., vol. II, at pp. 89-90, 94-96 and 99. The trial judge therefore could not hold this against the AGC when assessing the alleged fault.

(4) Refusal Based on the Earlier Applications

[87] The trial judge faulted the federal authorities for denying subsequent applications on the basis of the original refusal:

[TRANSLATION] Even though they had fresh evidence establishing that he was the victim of a miscarriage of justice, the federal authorities based their subsequent refusals on the rejection of the initial application. [Footnotes omitted; para. 74.]

[88] In support of this conclusion, she relied on the following excerpts from the examination of Kerry Scullion, Director and General Counsel for the Criminal Conviction Review Board of the Department of Justice, who represented the AGC:

- Do you know what the federal government did after that?
- If he's repeating the same claims that he made in the previous applications, probably not much. There would be no further reviews if the same material is being put forward in support of subsequent applications as what was put forward in past applications that were denied. It probably wouldn't go any further than somebody having reviewed what was done in the past and a letter written back saying I mean you have to look at it to see if there is something new as to what was maintained in the previous ones, but other than that, that would be the extent of it. It looks like something was written back to him possibly.

. . .

- So basically, Mr. Hinse's request is once again turned down?
- Yes. There would have been nothing new from the last request. [Emphasis added.]

(A.R., vol. VII, at pp. 164-65)

[89] In our opinion, the comments the trial judge attributed to the AGC’s representative must be qualified. It is true that the AGC’s representative stated that if Mr. Hinse had submitted new applications to the Minister without raising any new facts or evidence, then the subsequent refusals would very likely have been due to the first refusal.

[90] With respect, however, these statements do not establish that, in the instant case, the Ministers failed to consider what was described as fresh evidence. It should be borne in mind that the Minister’s duty is owed in respect only of serious applications and that such an application will usually arise from some new matter indicating that it is likely there has been a miscarriage of justice: *Thatcher*, at para. 14. Absent exceptional circumstances, the Minister may deny a new application for mercy on the basis of previous refusals if the new application does not introduce any new facts or issues.

(5) Fault of Institutional Inertia or Indifference

[91] At trial, Mr. Hinse linked the fault allegedly committed by the federal authorities to what his counsel described as [TRANSLATION] “institutional indifference”: paras. 33, 40 and 52. Poulin J. summarized Mr. Hinse’s position in this regard as follows:

[TRANSLATION] More specifically, he submits that the government acted wrongfully toward him for over 40 years by failing to act as a competent, prudent and diligent authority would have done, given that it knew or ought to have known about the miscarriage of justice of which he was the unfortunate victim and that it could not therefore have been unaware that its failure to act was exacerbating the damage Hinse was sustaining. [para. 33]

Although Poulin J. referred to specific, time-limited wrongful actions, she ultimately characterized the AGC’s fault as one of “institutional inertia” (para. 75; see also para. 209) or “institutional indifference” (paras. 55, 89, 149 and 203), as if there were one continuous fault that subsumed the individual actions of the successive Ministers. In her view, this “institutional inertia” had exacerbated and extended the duration of the miscarriage of justice of which Mr. Hinse was the victim, and that was the essence of the AGC’s fault: paras. 75-76.

[92] To thus characterize the fault as one of “institutional inertia” or “institutional indifference” amounted to accusing the federal Crown itself of a fault. But under the *C.L.P.A.*, the federal Crown cannot be held liable for its own actions, but is only liable in respect of the fault of its servants (in this case, the Minister): s. 3(a)(i). The trial judge erred in approaching the issue of the federal Crown’s civil liability from the perspective of a fault of institutional inertia or indifference. She should instead have analyzed the individual conduct of each of the successive Ministers acting in his or her capacity as a servant of the federal Crown.

(6) Alleged Failure to Conduct a Meaningful Review

[93] Regarding the alleged failure to conduct meaningful reviews of Mr. Hinse’s applications for mercy, we will begin by pointing out that Poulin J. erred in law first in finding that a simple fault on the Minister’s part had exposed the Crown to liability. She then erred in law a second time when she determined that the Minister’s duty at the relevant time was to conduct a [TRANSLATION] “sustained, concerted [and] extensive . . . review” or a “thorough investigation”: paras. 75 and 95. Her finding of fault on the Minister’s

part must be attributed to these two errors. The analysis of Mr. Hinse's applications must be reconsidered in light of both the duty the Ministers owed at the relevant time and the applicable standard of civil fault.

[94] Before doing so, we must make two preliminary remarks. First, given the scope of the meaningful review the Minister was required to conduct, the appellant is wrong to compare the reviews conducted in his case to the ones conducted in *Thatcher* and *Wilson*. Mr. Hinse submits that [TRANSLATION] “[t]he contrast between the work carried out in those cases and the total absence of any documentation and/or any information showing any enquiry whatsoever carried out by the AGC in this case is striking”: A.F., at para. 58 (emphasis deleted). He points out that in *Thatcher*, counsel for the Department prepared a draft investigative summary that included the trial evidence, the appellate proceedings, the material provided by the applicant, and other information gathered during the investigation. Counsel sent this summary to the applicant's lawyer, who had a chance to make further submissions, and the Minister rendered a detailed 73-page decision.

[95] In the case at bar, Mr. Hinse had the opportunity to introduce any new facts or evidence he wished to present in order to flesh out his applications for mercy. The federal authorities asked him several times to provide specific facts to support his application. Mr. Hinse had a “reasonable opportunity to state his case”: *Thatcher*, at para. 13. This being said, it should be borne in mind that under the law as it then stood, the Minister was under no obligation to provide Mr. Hinse with an investigative summary or to give reasons for his or her decision.

[96] In *Wilson*, there had been newspaper reports suggesting that members of the jury had been involved in improprieties. The provincial attorney general had therefore ordered a police investigation, which led him to conclude that no offences had been committed. Mr. Wilson submitted an application for mercy, and federal officials asked him several times for additional information that was needed. The Minister ultimately refused to exercise his power of mercy in Mr. Wilson's favour. In his refusal letter, he stated that he had reviewed Mr. Wilson's submissions, information obtained in the provincial attorney general's investigation, and other information gathered in the course of inquiries made at his own request.

[97] At that time, however, absent exceptional circumstances, the Minister was under no obligation to consult the files of the prosecutor or the police, let alone to contact other sources or to organize any investigation whatsoever. The fact that the Minister decided to do so in Mr. Wilson's case does not mean that he should have done the same in Mr. Hinse's case. It is important to note that the Minister had a broad discretion in exercising his or her power of mercy. It was open to the Minister to take special or additional measures if he or she deemed it appropriate to do so. But that could not create a legitimate expectation that he or she was to do so in every case.

[98] The second remark concerns the appellant's argument that there is no documentary or testimonial evidence attesting to any review whatsoever having been conducted in his case. In his oral argument in this Court, counsel for the appellant noted that his client had demanded that the AGC turn over any documents confirming that a meaningful review had been conducted in his case, and that he was told that he had been provided with all the documentation there was. His client had therefore done all that he could, because only the Minister could really prove what sort of review he had conducted: transcript, at pp. 19-20. In the absence of such evidence, counsel argued, the trial judge was right to find that there had been no review.

[99] It should be pointed out, however, that in this situation, the burden of proof was on Mr. Hinse. It was therefore up to him to establish the Minister's fault, that is, a breach equivalent to bad faith or serious recklessness in the review of the applications for mercy. He could of course present evidence by presumption of fact that would lead the court to infer that a meaningful review had not been conducted, or that one had been conducted in bad faith or with serious recklessness. Nevertheless, that burden was on him, and it was up to him to discharge it. This is particularly significant as regards Mr. Hinse's first application. At the hearing, counsel for the appellant and counsel for the respondent agreed that the key period for determining whether the Crown is liable in respect of the Minister's conduct is the period of that first application.

(a) *The 1967 Application*

[100] We will limit our review to a summary of the initial correspondence between Mr. Hinse and the federal authorities. Mr. Hinse sent his first application for mercy to the Minister on July 19, 1967. He proclaimed his innocence and stated that he had identified the five people who actually committed the crime. Three of them had agreed to sign affidavits, which he had photocopied and enclosed with his application. The affidavits of Yvon Savard and Laurent Beausoleil were identical, so we will reproduce only that of Mr. Savard:

[TRANSLATION] I, Yvon Savard, hereby admit that I was one of the perpetrators of the armed robbery committed on December 14, 1961 at the residence of Mr. and Mrs. Henriot Grenier, of Mont-Laurier.

Consequently, I solicit the attention of the appropriate person so that I may be called to testify in the case of Réjean Hinse and exonerate him of that crime, of which I know, beyond a doubt, he is innocent.

(A.R., vol. VI, at p. 152)

[101] The affidavit of Claude Levasseur was different:

[TRANSLATION] I, Claude Levasseur, hereby admit that I know the facts of what happened during the robbery committed on December 14, 1961 at the residence of Mr. and Mrs. Henriot Grenier, of Mont-Laurier.

Consequently, I solicit the attention of the appropriate person so that I may be called to testify in the case of Réjean Hinse and exonerate him of that crime, of which I know, beyond a doubt, he is innocent. [Emphasis added.]

(A.R., vol. VI, at p. 155)

[102] Mr. Hinse had also identified the other two perpetrators of the robbery: Georges Beaulieu and Léopold Véronneau. But he explained that they had refused categorically to sign any statement whatsoever and would refuse to testify even if they were offered court protection.

[103] J. A. Bélisle acknowledged receipt of the application on behalf of the Director of the Criminal Law Section on July 28, 1967. That same day, Mr. Bélisle wrote to Quebec's Deputy Minister of Justice, asking the latter to send him the police reports. Mr. Hinse's file then remained inactive for more than a year after being sent to the Canadian Penitentiary Service, which did not return it to the federal Department of Justice. It was Mr. Hinse's spouse who, by writing to the Minister in September 1968, caused the loss of the file to be discovered, and the file itself to be reactivated.

[104] A series of letters were then exchanged, between the office of the Deputy Solicitor General of Canada and the Criminal Law Section of the Department of Justice in particular. In addition, the Quebec government sent [TRANSLATION] “certain documentation” to the Minister in April 1969: A.R., vol. X, at p. 78. Mr. Bélisle asked his Quebec counterpart about the possibility that they [TRANSLATION] “compare [their] files at a future date”: *ibid.*, at p. 75.

[105] On March 12, 1971, Mr. Hinse applied to the Governor General in Council for a free pardon under s. 655 *Cr. C.* (now s. 748 *Cr. C.*), continuing to proclaim his innocence. On March 30 of that same year, J. L. Cross of the Privy Council Office wrote to the Solicitor General of Canada. He enclosed the conclusions of the Special Committee of the Privy Council that had reviewed Mr. Hinse’s application for a pardon. The following is an excerpt from those conclusions:

It is our opinion that subject did not provide us with sufficient fresh facts that were not available at the time of the trial and that could have been a basis to prove his innocence under the royal prerogative of mercy.

However, it is suggested that the case be referred to your department for further study in this matter based on our above inquiry, and for the Minister’s approval as to whether Mr. Hinse should be given a new trial.

(A.R., vol. X, at p. 83)

[106] In October 1971, Mr. Hinse obtained two additional affidavits, one from Jean-Claude Pressé and the other from Laurent Beausoleil. They are almost identical:

[TRANSLATION] I hereby declare that on or about September 10, 1961, I was one of the passengers in the vehicle of Laurent Beausoleil (a 1957 Buick) when said vehicle was searched and its passengers were checked by officer Arthur Scott of the municipality of Mont-Laurier.

I declare that, besides me, there were: Laurent Beausoleil, Hugues Duval and Léopold Véronneau.

I wish to attest to the fact that neither Réjean Hinse nor André Lavoie was in the vehicle or was with us on that day.

(A.R., vol. X, at p. 85)

[107] Mr. Hinse sent these affidavits to the National Parole Board, which forwarded them to the federal Minister of Justice in November. On December 22, 1971, S. F. Sommerfeld, Director of the Criminal Law Section, informed the National Parole Board of the Minister’s refusal in the following words:

[TRANSLATION] We have carefully reviewed the file of Réjean Hinse and have come to the conclusion that a new trial should not be granted in this matter.

(A.R., vol. X, at p. 102)

[108] The National Parole Board forwarded this response to Mr. Hinse on February 10, 1972. This response was not unrelated to the result of Mr. Hinse’s parallel application for a free pardon. The Special Committee of the Privy Council was of the opinion that there was not enough fresh evidence to conclude that Mr. Hinse was innocent, but nevertheless suggested that his case be submitted to the Minister.

[109] In our opinion, this documentary evidence negates the trial judge’s inference that there had been no review whatsoever of Mr. Hinse’s initial application for mercy. Although there are only a few documents in the record, they nevertheless attest to the fact that a certain review was conducted and that certain actions were taken in this regard. As the Court of Appeal stated, given that the Minister was under no obligation to

give reasons for his decision at that time, it is inappropriate to draw a negative inference from the summary nature of the Minister's file in this matter.

[110] Moreover, the record contains minutes of hearing that record an admission by the parties regarding the production of determinative documents:

[TRANSLATION] The parties admitted the following with regard to all the documents in respect of which they make admissions for the purposes of production:

- they are certified copies of the originals;
- if the person who signed a document were to testify, he or she would confirm having written the document in question and having sent it to its recipient, who received it, if such is the case; and
- finally, he or she would confirm that the document is proof of the truth of its content.

(Minutes from the hearing of November 9, 2010, A.R., vol. IV, at p. 57)

[111] One of the documents to which this admission applied was a letter sent to Mrs. Hinse in January 1969 by Mr. Bélisle on behalf of the Director of the Criminal Law Section in which Mr. Bélisle wrote:

[TRANSLATION] Rest assured that we will contact you [regarding your husband's application] in the near future, as we are currently conducting an extensive review of this case. [Emphasis added.]

(A.R., vol. X, at p. 62)

[112] Another document to which the admission applied was a letter in which Mr. Sommerfeld, the Director of the Criminal Law Section, forwarded the Minister's refusal to the National Parole Board. In it, Mr. Sommerfeld said the following: [TRANSLATION] "We have carefully reviewed the file of Réjean Hinse . . ." (A.R., vol. X, at p. 102). By their admission, therefore, the parties had acknowledged that if Mr. Bélisle and Mr. Sommerfeld were to testify, they would have confirmed that these letters were proof of the truth of their content — in short, that as Mr. Bélisle and Mr. Sommerfeld had understood the facts, an extensive and careful review of Mr. Hinse's case was under way at the time in question. The trial judge did not mention this admission. It is true that the obligation to give reasons for judgments does not imply that a judge must address every little detail of a case. However, given the state of the documentary evidence in the record, the trial judge should have considered this admission before inferring that no review had been conducted. Taken together with the other relevant evidence that we have just discussed, it did not support her inference that a review had not been undertaken.

[113] The probative value of this admission is enhanced by the fact that the appellant, for reasons known only to him, asked merely to examine a single representative of the AGC and did not specifically summon the decision makers who had played a role in the review of his applications for mercy: R.R., vol. I, at p. 16. Moreover, when the appellant began his action, he concentrated his efforts on the suit against the AGQ and Mont-Laurier, no doubt because it was they who were primarily responsible for the damage he had suffered.

[114] If we disregard the inferences drawn from the presumptions of fact on which Mr. Hinse relies, we must find that, on a balance of probabilities, the evidence does not support his assertion that the Minister failed to conduct a meaningful review of his initial application. The appellant has also failed to prove, on a balance of probabilities, that the Minister acted in bad faith or with serious recklessness in reviewing his

application. Although he points to the fact that the Minister misplaced his file for a period of time, this fact cannot be equated with bad faith or serious recklessness. The review of the application stretched over several years from the time it was received until the time the Minister gave his final answer. Despite the delay at issue, an analysis of the circumstances does not support the conclusion that the Minister acted in bad faith or with serious recklessness. Here again, the burden of proof was on Mr. Hinse. We cannot find that he discharged it.

(b) *The Other Applications*

[115] The appellant submitted a second application for mercy on July 23, 1980. This application was only three paragraphs long. On December 30 of that same year, a special adviser to the Minister informed Mr. Hinse that his application had been denied because it contained only [TRANSLATION] “vague allegations of mistaken identification that occurred during [his] trial”, and because after reading Judge Omer Côté’s judgment, the Department had “found nothing to support [his] affirmation”: A.R., vol. X, at p. 108.

[116] A week later, on January 6, 1981, Mr. Hinse submitted a third application to the Minister. On January 22, the special adviser to the Minister asked him to set out in writing, and in detail, the grounds that he intended to raise in support of his application for mercy, as well as all the contacts he had had with other judicial and political authorities. The adviser stated that [TRANSLATION] “it is essential that you disclose the new facts that lead you to request an interview with the Minister”: A.R., vol. X, at p. 111. Mr. Hinse sent the Minister a more detailed letter on March 9, 1981.

[117] As the Court of Appeal observed, most of the facts Mr. Hinse alleged in that letter were the same as the ones that had been set out in his 1967 application, the exception being allegations with respect to an identification error made by officer Scott and to the conduct of counsel and of the judge at his trial. First, Mr. Hinse claimed that Mr. Véronneau — with whom he had been jointly tried — had retained a criminal lawyer [TRANSLATION] “who had close ties to Judge Omer Côté” and who had previously defended Mr. Beaulieu, Mr. Levasseur and Mr. Savard in another case: A.R., vol. XI, at p. 10. This lawyer allegedly recommended to these three individuals that they not testify for the defence, and this enabled him to have Mr. Véronneau acquitted. Next, Mr. Hinse explained that officer Scott had had an excellent lead from the outset. Upon arriving at the scene of the crime, he had made a connection with a search he had undertaken two months earlier when he had stopped four suspicious individuals in a car with its lights turned off at about 10:00 p.m. in front of the victims’ house. Those four individuals were Mr. Beausoleil, Mr. Véronneau, Mr. Duval and Mr. Pressé. According to Mr. Hinse, Mr. Beausoleil and Mr. Duval had confided to him that officer Scott had also taken down the name of André Lavoie, since the vehicle was registered in his name. Mr. Hinse said that at the trial, officer Scott had referred to his notes from that initial arrest and that he had been “shocked” to hear the officer testify that he had been the fifth occupant of the car even though his name did not appear in the officer’s notebook: *ibid.*, at p. 11.

[118] On September 23, 1981, the special adviser responded to Mr. Hinse as follows:

[TRANSLATION] I regret to inform you that, despite the additional explanations you gave to the Minister, your case is not one that justifies his intervention. Indeed, the Minister of Justice exercises his power of intervention in exceptional circumstances only, and no such circumstances were revealed in the thorough examination of your file.

(A.R., vol. XI, at p. 16)

[119] Finally, several years later, the appellant retained a lawyer who, in November 1990, sent a fourth application for mercy to the Minister of the day. The lawyer explained that the Commission de police had conducted an investigation and prepared a report, which he enclosed with his letter. In reply, the Minister acknowledged that the report [TRANSLATION] “describes fresh evidence highly deserving of consideration”: A.R., vol. XI, at p. 75. However, she expressed the opinion that the issues raised by the Commission de police could also be heard by the Quebec Court of Appeal without this task having to be imposed on it under s. 690 Cr. C. The Minister invited Mr. Hinse’s lawyer to contact her again should the Court of Appeal refuse to consider his case.

[120] As in the case of the first application for mercy, we find that none of the Ministers who considered the three subsequent applications acted in bad faith or with serious recklessness. Mr. Hinse cannot reasonably argue that the Minister failed to conduct a meaningful review in respect of any of those applications. The relevant correspondence shows the opposite to be true. Nor has the requisite element of bad faith or serious recklessness been proven. Regarding Mr. Hinse’s second application (1980), which was very brief and contained no new evidence or legal arguments, it was open to the Minister to find it frivolous and to reject it on that basis. As for the third application, as the Court of Appeal wrote, [TRANSLATION] “[g]iven that Mr. Hinse did not go into much detail, the new allegations, based on vague irregularities committed by the police officers, attorneys and trial judge, could have struck the Minister as being of little consequence”: para. 181. In the case of the fourth application (1990), the Minister justified her decision by noting that the Court of Appeal could agree on its own to consider the case without her having to intervene. This was a reasonable attitude to adopt, particularly since the Minister did not reject Mr. Hinse’s application outright, but asked him to contact her again should the Court of Appeal refuse to consider his case. It should be noted that an application for mercy is an exceptional remedy that is available only after the applicant’s legal rights have been exhausted: *Thatcher*, at para. 9.

[121] In short, after a proper analysis of the Ministers’ conduct based on the duty they owed and the applicable standard of fault, we cannot conclude that Mr. Hinse has discharged his burden, namely that of proving that the Ministers acted in bad faith or with serious recklessness in dealing with his applications for mercy. Our analysis could end with this finding, but like the Court of Appeal, we believe that some comments on causation and damages are in order.

C. Causation

[122] The trial judge concluded that Mr. Hinse had proven causation, once again by means of presumptions of fact. In her view, [TRANSLATION] “[a] sustained, concerted, extensive, competent and timely review of his initial efforts would surely have brought the errors to the AGC’s attention”: para. 75. Her finding on causation was based primarily on the 1990 report of the Commission de police: because the Commission de police had concluded that a miscarriage of justice had occurred, a meaningful review by the Minister should logically have led to the same result. In light of the nine years that had elapsed between the time when Mr. Hinse contacted the Commission de police (1988) and the date of his acquittal by this Court (1997), the trial judge found that Mr. Hinse could have been acquitted in the mid-1970s were it not for the AGC’s fault: paras. 77 and 97.

[123] We agree with the Court of Appeal that, even if it were assumed that the Minister failed to conduct a meaningful review between 1967 and 1972, it was not possible to conclude that such a review

would inevitably have led to the discovery of the irregularities brought to light in 1990 by the report of the Commission de police. A comparison of the information in that report with the information that was available when Mr. Hinse made his initial application to the Minister reveals two crucial pieces of evidence that could not, in all likelihood, have been discovered at that time.

[124] According to the evidence in the record, it was not until November 1988, when Mr. Hinse wrote to the Commission de police, that he provided [TRANSLATION] “for the first time certain crucial details that would guide the work of Commissioner Fourcaudot”: C.A. decision, at para. 65. The report of the Commission de police shows that the most significant facts that emerged from the investigation were officer Scott’s recantation of his testimony and, to a lesser degree, the willingness of the true perpetrators of the crime to co-operate with the investigator in 1989 and 1990.

[125] Where the perpetrators of the crime are concerned, it should be noted that after they had signed their affidavits in 1966, Mr. Beausoleil, Mr. Savard and Mr. Levasseur refused to co-operate further with the police. In the second set of affidavits signed in 1971, Mr. Pressé and Mr. Beausoleil merely attested to their having been in the car that was searched by officer Scott in Mont-Laurier on September 10, 1961, and to the fact that Mr. Lavoie and Mr. Hinse had not been in it. They made no declarations about the robbery committed in December of that same year of which Mr. Hinse had been found guilty. At the time of the investigation carried out by Mr. Fourcaudot in 1989, Mr. Beausoleil added [TRANSLATION] “many details” about the events, and Mr. Véronneau, although he had refused to sign an affidavit, ended up stating that Mr. Hinse [TRANSLATION] “wasn’t even there”: A.R., vol. XI, at pp. 54 and 53.

[126] Even more importantly, the investigator received a call from Mr. Duval, who was then living in the Dominican Republic, in 1990. Mr. Duval revealed for the first time several details regarding the conspiracy and the robbery, stating that Mr. Hinse was in no way involved. He subsequently sent the investigator a letter confirming this information. However, the police report of September 12, 1966, prepared by an officer named Bourgeois (officer in charge of the Sûreté du Québec detachment at Mont-Laurier), indicated that Mr. Duval had provided the police with information about the robbery and that he was supposed to be questioned further. Mr. Duval was never questioned after that.

[127] This “oversight” can perhaps be explained by a comment made by Mr. Duval in his conversation with the investigator in 1990 that he knew officer Bourgeois quite well at the time, as the latter had taken part in some chain letter schemes he was operating. This is why Mr. Duval [TRANSLATION] “was never bothered by the police, even though he believed that they knew he was behind the robbery”: A.R., vol. XI, at p. 56. Officer Bourgeois had played an important role in the initial investigation, particularly in the identification of Mr. Hinse by the victims of the robbery.

[128] Nevertheless, the evidence does not support an assertion that Mr. Duval would have been prepared to incriminate himself in this way or to co-operate with the police (or the Minister) at the time of the initial police investigation, or at the time of Mr. Hinse’s first application for mercy. This information was in fact highly incriminating. As the AGC points out, these statements were ultimately made from the Dominican Republic, a country with which Canada does not have an extradition treaty.

[129] Moreover, the particular focus of the report of the Commission de police is on officer Scott’s recantation of his testimony. This is clear from both the language used and the number of pages dedicated to

this subject. Out of the report's 35 pages, the role of officer Scott takes up approximately 9, whereas the analysis of each of the other exculpatory factors rarely exceeds 2 pages. The officer's testimony had [TRANSLATION] "made a strong impression" on the trial judge, because he had declared under oath, without any hesitation, that he had seen Mr. Hinse among the individuals in the car he had stopped on September 10, 1961: A.R., vol. XI, at p. 56. This declaration contradicted Mr. Hinse's version of the facts. The officer testified that he had known Mr. Hinse for a long time and swore categorically that Mr. Hinse had been in Mont-Laurier that day. It was not until his third meeting with the investigator of the Commission de police, on July 31, 1990, that officer Scott admitted he might have been mistaken.

[130] It should be mentioned that officer Scott had difficulty identifying the exact year in which he had started having doubts about his testimony. He said it may have been around 1974 or 1975, after a friend of Mr. Duval's (Yves Chalifoux) and Mr. Duval himself both told him he was wrong. It was these conversations that in all likelihood sowed a doubt in his mind, and that doubt finally surfaced during the investigation of the Commission de police. On this point, too, it cannot be assumed that officer Scott would have recanted his testimony earlier.

[131] As a result, even if the Minister had decided to conduct a more extensive investigation at the time of Mr. Hinse's first application, there is no evidence that officer Scott would have recanted his testimony then, as he did later, or that the individuals involved in the robbery would have been inclined to answer the Minister's questions. It is highly likely that, 20 years after the events, these individuals agreed to co-operate with the authorities because they had less to fear, or because they no longer had anything to lose.

[132] Also, Poulin J.'s assertion that the Minister's investigation should [TRANSLATION] "surely" have led to the same result as the report of the Commission de police is based on assumptions and inferences that are not supported by any analysis. It is well established that, even where a fault has been committed, the person who committed it cannot be held liable for damage that was not related to the fault. Rather, the damage must have been a logical, direct and immediate consequence of the fault (art. 1053 *C.C.L.C.*; *Parrot v. Thompson*, 1984 CanLII 118 (SCC), [1984] 1 S.C.R. 57, at p. 71; *Dallaire v. Paul-Émile Martel Inc.*, 1989 CanLII 29 (SCC), [1989] 2 S.C.R. 419; Baudouin, Deslauriers and Moore, at No. 1-683).

[133] Furthermore, as the Commission de police explained in a letter to Mr. Hinse, it [TRANSLATION] "may, at the written request of a citizen, investigate the conduct of municipal police or Sûreté du Québec officers if the citizen provides sufficient grounds for his or her request": A.R., vol. XI, at p. 23. In the case at bar, the Commission de police instructed an investigator to conduct an investigation in accordance with the *Act respecting police organization*, R.S.Q., c. O-8.1, ss. 64 to 88 (later replaced by the *Police Act*, CQLR, c. P-13.1 (S.Q. 2000, c. 12, s. 353)). Under that Act, the investigator had the power to enter any police station and examine any documents or other effects relating to the complaint. He could also require of any person any information or document he considered necessary. Moreover, all persons were prohibited from hindering his work in any manner whatever, deceiving him through concealment or by making a false declaration, refusing to furnish him with information or a document relating to the complaint, refusing to allow him to make a copy of such a document, or concealing or destroying such a document: ss. 71, 84 and 85 of the *Act respecting police organization*.

[134] In this case, the report of the Commission de police indicates that the investigator

[TRANSLATION] [f]or several months . . . focused his efforts on building up a huge file: he met with numerous individuals and collected their stories; he searched through the records of several courthouses and examined all the documents he could lay his hands on; and, finally, he reported his findings to the Commission.

(A.R., vol. XI, at p. 35)

[135] However, it is clear that the Minister did not have those same powers at the material times. It was not until 2002 that the Minister was given the powers of a commissioner under the *Inquiries Act*, including the power to summon witnesses and to compel them to testify and to produce documents: s. 696.2(2) *Cr. C.*; ss. 4 and 5 of the *Inquiries Act*. These new powers were deemed necessary because of the inefficiency of the existing review process: *House of Commons Debates*, vol. 137, No. 054, 1st Sess., 37th Parl., May 3, 2001, at p. 3583; *Debates of the Senate*, vol. 139, No. 66, 1st Sess., 37th Parl., November 1, 2001, at p. 1612.

[136] A distinction must therefore be made between the investigation conducted by the Commission de police from 1988 to 1990 and the meaningful review of an application for mercy that the Minister was required to conduct in the late 1960s. At that time, the Minister had neither the power nor the duty to compel witnesses to testify, to require the production of documents, or to review police or prosecution files, which would have enabled him or her to build up a file as extensive and exhaustive as the one amassed by the Commission de police. On this point, we cannot accept Mr. Hinse's argument that officer Scott might have retracted his testimony sooner had the Minister confronted him with certain evidence that discredited it. The Minister was not required to take such action; he was simply required to consider Mr. Hinse's application in good faith and to determine on the basis of the file submitted to him whether additional information was needed or intervention was appropriate. The evidence does not establish that at the time of the first application, the Minister would probably have discovered the key evidence uncovered by the investigator of the Commission de police 20 years later. The burden of proving that the Minister would probably have done so was on Mr. Hinse, and it was up to him to discharge this burden.

[137] In this regard, Poulin J. did not really explain her reasoning on the issue of causation, but merely stated that the facts set out in her reasons, which Mr. Hinse had proven by means of presumptions of fact, established a causal connection: para. 98. However, it is clear from her reasons that her finding that the miscarriage of justice would have been ascertained quickly if the AGC had acted promptly and competently (para. 97) is based on the erroneous premise that the Minister, like the investigator of the Commission de police, had a duty to conduct a thorough investigation. Because Poulin J., in so doing, drew inferences and made findings of fact that were not supported by the evidence, the Court of Appeal was justified in intervening: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 22; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 4. It has therefore not been proven that the alleged failure, namely the failure to conduct a meaningful review or to conduct one more expeditiously, was the probable cause of the failure to discover the miscarriage of justice in Mr. Hinse's case. To conclude otherwise would be to rely on mere conjecture or remote hypotheticals. A court's conclusion with respect to civil liability cannot be based on speculation such as this.

D. Damages

[138] In our opinion, the Court of Appeal was also right to intervene on the issue of damages. There was an overriding error in the trial judge's analysis. She failed to take into account the requirement that the

liability be apportioned solidarily, and to establish the amounts being awarded on the basis of the actual liability of each of the solidary debtors. As the Court of Appeal noted, [TRANSLATION] “to every extent that more than one solidary debtor could be liable for the heads of claim, Mr. Hinse’s releases made it necessary to examine the causal faults and apportion liability”: para. 189. Mr. Hinse should have borne the shares of the solidary debtors he had released: arts. 1526 and 1690 *C.C.Q.*

[139] The trial judge addressed the issue of damages as if the Minister were the only party to commit a fault and as if the damage sustained by Mr. Hinse was due solely to the Minister’s [TRANSLATION] “institutional inertia”: paras. 75-77. Indeed, rather than fixing the damages amounts that could be specifically attributed to the AGC, she simply relied on Mr. Hinse’s claims:

[TRANSLATION] Furthermore, since, following the transaction entered into between the AGQ and Hinse, the latter amended his proceeding so as to claim from the AGC only the portion he had attributed to [the AGC] on the basis of the various heads of damage he raised, the Court will examine, for the purpose of this proceeding and in compliance with the provisions quoted above, only the applications that are in line with this new reality and that concern solely the AGC. [para. 22]

[140] Thus, except in the case of the punitive damages, the trial judge awarded the amounts being claimed on the assumption that Mr. Hinse had correctly limited them to the amounts that solely concerned the AGC. However, the apportionment of the liability of Mr. Hinse’s various co-debtors had to be determined on the basis of the seriousness of each one’s fault: art. 1478 *C.C.Q.* The trial judge could not simply rely on the apportionment suggested by Mr. Hinse; her role as the arbiter of damages required that she herself fix each debtor’s share of the liability.

[141] In addition to this overriding error, which skews the amounts awarded under all the heads of damages, the grounds for each of those amounts were also flawed.

(1) Pecuniary Damage

[142] Poulin J. ordered the AGC to pay a total of \$855,229.61 in respect of pecuniary damage. This amount seems excessive, given that the AGQ had already paid \$1,100,000 under this head pursuant to the transaction entered into with Mr. Hinse. At the very least, the onus was on Mr. Hinse to show that the payments concerned distinct heads of compensation. He did not do so. Moreover, when the amounts awarded are broken down, it is clear that there was no justification for the amounts being claimed.

[143] The amount of \$127,214 awarded for a loss of income by Mr. Hinse that resulted from his retiring at age 60 instead of at 65 is unjustified. In Quebec law, only an injury which is an immediate and direct consequence of a wrongful act gives rise to an entitlement to damages: art. 1607 *C.C.Q.* This was a personal decision on Mr. Hinse’s part. There is no direct connection between the Ministers’ conduct and his decision. Poulin J. erred in awarding damages under this head of claim.

[144] Poulin J. ordered the AGC to pay Mr. Hinse \$193,660.88 under the head of claim for fees and costs incurred in respect of the proceedings he brought in the Court of Appeal and the Supreme Court between 1990 and 1997. She was wrong to do so. Even if the Minister had granted one of Mr. Hinse’s applications, he would have either ordered a new trial or referred the matter to the Court of Appeal. In short, Mr. Hinse would have had to pay these fees anyway. This is not damage that resulted from the alleged faults.

[145] Poulin J. awarded \$500,000 for investigation costs, wasted time and effort, photocopies, transcripts, travel, postage, etc. The Court of Appeal correctly found that wasted time and efforts expended to obtain justice are inconveniences that are inherent in the efforts of anyone who is involved in legal proceedings: para. 215. Unless there has been an abuse of process, these are not heads of damage under which Mr. Hinse can seek compensation. Moreover, they fall under non-pecuniary damage, given that there is no evidence of lost income. Since Poulin J. awarded a separate amount in respect of non-pecuniary damage, this resulted in double recovery.

(2) Non-pecuniary Damage

[146] In the *Andrews* trilogy, this Court set an upper limit of \$100,000 for non-pecuniary losses resulting from a serious bodily injury: *Andrews v. Grand & Toy Alberta Ltd.*, [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George)*, [1978 CanLII 12 \(SCC\)](#), [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978 CanLII 2 \(SCC\)](#), [1978] 2 S.C.R. 287. This limit applies in the common law provinces and Quebec alike. Relying on its own decision in *France Animation*, the Court of Appeal applied the limit in the instant case. But when it rendered its decision, the Court of Appeal did not have the benefit of this Court's judgment in *Cinar*, which confirmed that the limit is inapplicable to damages for non-pecuniary loss that do not stem from bodily injury: *Cinar Corporation v. Robinson*, [2013 SCC 73](#), [2013] 3 S.C.R. 1168, at para. 97. This being said, even if the Court of Appeal erred on this point, the trial judge had nonetheless erred in awarding an amount under this head of damages.

[147] Poulin J., after comparing the amount — \$1,900,000 — claimed by Mr. Hinse for non-pecuniary damage with the amounts granted in the Marshall, Proulx, Sophonow, Milgaard and Truscott cases, ordered the AGC to pay him the exact amount he sought, expressing the opinion that it was [TRANSLATION] “not excessive”: para. 198. In *Cinar*, this Court reiterated that to properly assess the amounts to be awarded, a court should compare the case at hand with other analogous cases in which amounts were awarded for non-pecuniary damage: paras. 105-6. In the case at bar, the comparisons made were shaky and did not justify a quantum of that magnitude.

[148] In the case of Donald Marshall Jr., a royal commission was struck to review the case in 1989. In his report submitted in 1990, Justice Evans valued the amount to compensate for non-pecuniary losses at \$225,000, to which were added \$158,000 in interest, for a total of \$383,000 in compensation. Mr. Marshall, who had been convicted of murder in 1971, had spent 11 years in prison (between the ages of 17 and 28) and had been acquitted in 1983: G. T. Evans, Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, Jr., *Report of the Commissioner* (1990); *In the Matter of Steven Truscott*, at p. 48; C.A. decision, at paras. 221-22; Sup. Ct. decision, at para. 184.

[149] In the Proulx case, Mr. Proulx had been convicted of murder on November 10, 1991, and was acquitted on August 20, 1992: *Proulx v. Québec (Procureur général)*, [1997 CanLII 8157 \(QC CS\)](#), [1997] R.J.Q. 2509 (Sup. Ct.). He sued the AGQ for \$1,443,000 in damages. In 1997, Letarte J. awarded him \$250,000 in compensation for non-pecuniary damage: [1997 CanLII 8342 \(QC CS\)](#), [1997] R.J.Q. 2516 (Sup. Ct.), at p. 2524.

[150] In the inquiry regarding Thomas Sophonow, the Honourable Peter Cory recommended in 2001 the payment in compensation of approximately \$2,600,000, including interest, of which \$1,750,000 would

be for non-pecuniary damage. Mr. Sophonow had undergone three trials and spent nearly four years in prison after being unjustly charged with murder. The liability for payment of the compensation was to be apportioned among the city (Winnipeg), the province (Manitoba) and the federal government: P. deC. Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001); C.A. decision, at para. 222; Sup. Ct. decision, at para. 184.

[151] In the Milgaard case, a total of \$10,000,000 was paid to Mr. Milgaard in 2008 following the settlement of two civil liability suits. The exact apportionment of liability among the levels of government is unknown. Mr. Milgaard had been charged with murder in 1970 and had spent 23 years in prison. He had been shot during one of two escape attempts and had suffered abuse while incarcerated: *In the Matter of Steven Truscott*, at p. 49.

[152] Finally, in the Truscott case, Justice Robins recommended in 2008 that a payment of \$6,500,000 be made to Mr. Truscott, who had been convicted of murder at the age of 14 and sentenced to death by hanging. Mr. Truscott, who was the subject of an unprecedented reference to this Court, had spent 10 years in prison and had finally been on parole for almost 40 years, living under an assumed name. Justice Robins felt that, in the circumstances, Mr. Truscott should be paid \$250,000 per year of incarceration and \$100,000 per year on parole. Given that both levels of government had been involved in the case virtually from the beginning, Justice Robins was of the opinion that they should share the costs of the compensation equally: *In the Matter of Steven Truscott*, at p. 56.

[153] As the Court of Appeal pointed out, the amounts granted in the Marshall, Sophonow and Truscott cases were made further to the recommendations of advisory bodies. They did not result from judicial awards and were based on considerations that are very different from those on which damages are based: C.A. decision, at para. 222. Only the compensation assessed in *Proulx* was the result of a judicial process. What is more, all these cases can be distinguished from the case at bar in that they involved the much more serious crime of murder and in that the period of incarceration was longer in almost all of them.

[154] Moreover, we note that under the transaction between the AGQ and Mr. Hinse, the latter was paid only \$1,100,000 under this head of damages, whereas he had been claiming \$3,000,000 in this regard from the AGQ and the AGC, for which they were to be solidarily liable. We realize that care must be taken in comparing amounts agreed to in transactions with amounts resulting from judicial awards. Nevertheless, in this case, Mr. Hinse and the AGQ fixed the amount under this head of damages in their agreement after each side had made its case. In the circumstances of this case, we have difficulty seeing why the federal government should be ordered to pay more in respect of non-pecuniary damage than the amount paid by the province. Even if the Minister had committed a fault, we find it hard to justify finding that such a fault would be as serious as, or even more serious than, the ones committed by Mont-Laurier and the AGQ with regard to the arrest, the police investigation and the criminal prosecution that led to Mr. Hinse's wrongful conviction and imprisonment. At the very most, such a fault would have prolonged the damage already caused by the town and the AGQ.

[155] In our opinion, therefore, an order that the AGC pay \$1,900,000 after the AGQ had paid \$1,100,000 under the same head of damages would be disproportionate. In a civil liability case, the court's primary objective is to compensate the plaintiff for damage he or she has suffered, not to punish the debtor.

(3) Punitive Damages

[156] Poulin J. ordered the AGC to pay Mr. Hinse \$2,500,000 in punitive damages under [s. 49](#) of the [Charter of human rights and freedoms](#), CQLR, c. C-12 (“*Charter*”). [Section 3 C.L.P.A.](#) provides that the federal Crown is liable for damages for which, if it were a person, it would be liable for the purpose of assessing damage caused by the fault of a servant of the Crown. According to [s. 2 C.L.P.A.](#), “liability” means “extracontractual civil liability” in the Quebec context. It must therefore be determined whether this reference in the *C.L.P.A.* encompasses the remedy of punitive damages provided for in the *Charter*. This question does not appear to have been answered by the courts. We are of the opinion that it must be answered in the affirmative.

[157] First, when Parliament enacted the *Crown Liability Act*, the predecessor to the [C.L.P.A.](#), in 1953, the intention was “to make the federal crown liable to the full extent to which a person in a private capacity would be liable under the provincial law”: *House of Commons Debates*, vol. IV, 7th Sess., 21st Parl., March 26, 1953, at p. 3330; see also [s. 3\(1\)](#) of the *Crown Liability Act*. Under the *C.L.P.A.*, the Crown continues to be liable for damages for which, if it were a person, it would be liable in respect of damage caused by the fault of a servant of the Crown, the word “person” meaning a natural person of full age and capacity: [ss. 3 and 2.1](#).

[158] Second, as can be seen from the language used in the *C.L.P.A.* and from its bijural nature, Parliament has referred to the applicable provincial law in very general terms: extracontractual civil liability in Quebec and liability in tort in any other province. Even before 1953, this Court [TRANSLATION] “had already held that the suppletive law in delict and in tort is the law of the place where the right of action arose”: P. Garant, with the collaboration of P. Garant and J. Garant, *Droit administratif* (6th ed. 2010), at p. 913. The applicable provincial law to which the [C.L.P.A.](#) refers includes not only the relevant articles of the *C.C.Q.*, but also all the provincial statutes that modify the liability law of the province where the cause of action arose, including the *Charter*: see [s. 8.1](#) of the [Interpretation Act](#), R.S.C. 1985, c. I-21; Hogg, Monahan and Wright, at p. 436.

[159] Third, although it is true that there is a “purist” view according to which the concept of punitive damages does not exist in the traditional civil law (see, e.g., *Chaput v. Romain*, 1955 CanLII 74 (SCC), [1955] S.C.R. 834, at p. 841; Baudouin, Deslauriers and Moore, at No. 1-373), the awarding of such damages has been permitted in Quebec civil law in certain circumstances for many years: see, e.g., the [Tree Protection Act](#), CQLR, c. P-37. In addition, at the time of the reform of the *C.C.Q.*, the draft [Civil Code of Québec](#) provided that punitive damages could be widely awarded in cases involving gross or intentional fault: Baudouin, Deslauriers and Moore, at No. 1-373. Although the legislature ultimately abandoned this idea, punitive damages are now referred to in [art. 1621 C.C.Q.](#), but they remain an exceptional remedy given that they can be awarded only where they are expressly provided for by law: *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 48; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, 1996 CanLII 208 (SCC), [1996] 2 S.C.R. 345, at para. 20.

[160] In our opinion, the scheme established by the *Charter* in this regard can be seen as complementing the rules of extracontractual liability. The *Charter* [TRANSLATION] “has the effect of complementing the protection afforded by the [Civil Code](#) by creating a new remedy that enables victims to claim punitive damages that are not available under the [Civil] Code”: L. Perret, “De l’impact de la Charte

des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec” (1981), 12 R.G.D. 121, at p. 170.

[161] Thus, the scheme of punitive damages provided for in s. 49 of the *Charter* is not distinct from and inconsistent with the rules of extracontractual civil liability. Rather, they contribute to this area of the law without being totally subsumed by it. The two sets of rules intersect at several levels, but the remedy under s. 49 is not entirely subordinate to the conditions for civil liability. It can constitute an autonomous scheme that creates remedies that are not based in civil liability: *de Montigny*, at para. 44; *Cinar*, at para. 124; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789, at para. 26.

[162] Before the *Charter* came into force in 1976, fundamental rights were protected by the civil liability provisions of the *C.C.L.C.* And [TRANSLATION] “the civil law concept of fault is an extremely flexible one that affords protection to individuals in all spheres”: Perret, at p. 124; L. LeBel, “La protection des droits fondamentaux et la responsabilité civile” (2004), 49 *McGill L.J.* 231, at p. 235. In the instant case, the alleged wrongful conduct essentially occurred before the *C.C.Q.* came into force. The preliminary provision of the *C.C.Q.* now expressly provides that the *C.C.Q.*, “in harmony with the Charter . . . and the general principles of law, governs persons, relations between persons, and property”. The *C.C.L.C.* lacked equivalents for both the preliminary provision and art. 1621 of the *C.C.Q.*, but we are nevertheless of the opinion that this does not affect our analysis. Although these provisions attest to the relationship between the *Charter* and the *C.C.Q.*, they do not create that relationship and are therefore not essential to our conclusion.

[163] For these reasons, we conclude that the reference in the *C.L.P.A.* to provincial law encompasses the remedy of punitive damages provided for in the *Charter*. We would add that since punitive damages are also available in the law of the common law provinces, this conclusion favours a more uniform application of the law of Crown liability across the country. Having resolved this preliminary issue, we will now consider whether it was appropriate to award such damages in this case.

(b) *Award of Punitive Damages*

[164] Section 49 of the *Charter* provides that, “[i]n case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.” This Court explained what “unlawful and intentional interference” means in *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, 1996 CanLII 172 (SCC), [1996] 3 S.C.R. 211:

Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause. This test is not as strict as specific intent, but it does go beyond simple negligence. Thus, an individual’s recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test. [Emphasis added; para. 121.]

[165] In the instant case, given that the Ministers’ conduct cannot be equated with bad faith or serious recklessness, we cannot conclude that there was intentional interference. The evidence does not support a finding that the Ministers’ state of mind was such that they intended to harm Mr. Hinse or had knowledge of

the adverse consequences their conduct would have for him. This stringent test was not met, and punitive damages should not have been awarded.

(4) Extrajudicial Fees

[166] Finally, the trial judge concluded that the AGC's conduct had amounted to an abuse of process, and she ordered the AGC to pay Mr. Hinse \$100,000 for the fees paid to the first law firm he had retained: para. 230. She also awarded \$440,000 for services rendered by the firm that had replaced the first and with which Mr. Hinse had entered into a *pro bono* agreement: para. 240. To justify her decision to award this amount even though Mr. Hinse had not had to pay his lawyers, the trial judge relied on an Ontario judgment: para. 236, quoting *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), [2006 CanLII 35819 \(ON CA\)](#), 82 O.R. (3d) 757 (C.A.). She was of the opinion that it would be [TRANSLATION] "unfair for a person at fault to have the benefit of an agreement [concluded] for the purpose of helping out a victim": para. 239. However, she stated that in order to avoid unjust enrichment, such an award could be made only if there was an agreement under which the party was to remit the amount to his or her counsel: paras. 237-39. It should be pointed out that the total amount of the transaction with the AGQ — \$5.3 million — had included \$800,000 for Mr. Hinse's lawyers.

[167] The Court of Appeal reversed the trial judge's conclusion, finding that the AGC was entitled to answer the case against him given the amounts being claimed and the legal principles at issue. It found that the AGC had not shown bad faith in defending himself and that he had not taken multiple procedural steps or unnecessarily and improperly continued the proceedings. The Court of Appeal also cautioned against [TRANSLATION] "[indiscriminately] importing common law precedents" and stated that "[t]he judge wrongly referred to a case from Ontario case law to grant the claim, extrajudicial fees being different from costs": paras. 243-44.

[168] In *Viel v. Entreprises Immobilières du Terroir ltée*, [2002 CanLII 41120 \(QC CA\)](#), [2002] R.J.Q. 1262, the Court of Appeal had confirmed that in Quebec law, it is only in exceptional cases that a party can be required to pay the fe 72-73. There must be a fault committed by the other party, damage, and a causal connection between the fault and the damage. In *Viel*, the Court of Appeal mentioned the distinction between an abuse on the merits and an abuse of process, and noted that only an abuse of process can justify awarding extrajudicial fees as damages:

[TRANSLATION] In theory, and save exceptional circumstances, the fees paid by one party to its attorney cannot, in my opinion, be considered direct damages that sanction abuse on the merits. There is no adequate causation between the fault (abuse on the merits) and the damage. Adequate causation corresponds to the event or events having a logical, direct and immediate relation with the origin of the injury suffered. . . .

. . .

Conversely, regardless of whether there is abuse on the merits, a party [whose conduct amounts to an abuse of process] causes injury to the opposing party, which, to combat the abuse, needlessly pays judicial fees to its attorney. In that event, there is an actual causation between the fault and the damage. [Emphasis added; emphasis in original deleted.]

(*Viel*, at paras. 77-79)

[169] Since *Viel*, the Quebec legislature has added provisions to the [Code of Civil Procedure](#), CQLR, c. C-25 ("C.C.P."), that confirm the power of the courts to impose sanctions for improper use of procedure: see arts. 54.1 to 54.6. [Article 54.4 C.C.P.](#) provides that a court may, *inter alia*, "condemn a party

to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party”.

[170] Thus, in Quebec, damages can be awarded in respect of extrajudicial fees in cases of abuse of process in order to compensate a party who has suffered damage resulting from the fault of the other party. In the common law provinces, costs are traditionally awarded to indemnify the successful party for expenses incurred either in defending an unfounded claim (if the successful party is the defendant) or in pursuing a valid legal right (if the plaintiff prevails): see, e.g., *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 21; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 135. This Court has pointed out that at common law, the modern rules with respect to costs have objectives that are not limited to compensation. For example, an order as to costs could penalize a party who has refused a reasonable settlement offer. It could also be used to sanction conduct that increased the duration or the expense of litigation, or that was otherwise unreasonable or vexatious: *Okanagan Indian Band*, at para. 25. In the common law provinces, therefore, the purpose of costs is not limited to compensation, but also includes repression. In this sense, costs differ from an order to pay extrajudicial fees as damages in Quebec law. These differences must be taken into account when considering judgments on these issues from the other provinces.

[171] The trial judge did not refer to any Quebec cases in which extrajudicial fees had been awarded in respect of *pro bono* representation. Rather, she turned to the case law of the Ontario Court of Appeal, which has stated on various occasions that a *pro bono* representation agreement is no bar to an award of costs: see, *inter alia*, 1465778 Ontario Inc.; *Human Rights Commission (Ont.) v. Brillinger* (2004), 2004 CanLII 16323 (ON CA), 185 O.A.C. 366; *Reynolds v. Kingston (Police Services Board)*, 2007 ONCA 375, 86 O.R. (3d) 43. Since costs at common law are different in nature from extrajudicial fees in Quebec law, the comparison was inappropriate.

[172] In this Court, the appellant relies on art. 1608 C.C.Q. in support of the awarding of extrajudicial fees in an abuse of process case despite the existence of a *pro bono* agreement. This is the first time art. 1608 has been raised in this context. It reads as follows:

1608. The obligation of the debtor to pay damages to the creditor is neither reduced nor altered by the fact that the creditor receives a benefit from a third person, as a result of the injury he has suffered, except so far as the third person is subrogated to the rights of the creditor.

[173] The interveners Centre Pro Bono Québec and Pro Bono Law Ontario submit that this is exactly what happened in the situation now before us: counsel, acting on a *pro bono* basis, indemnified the victim of an abuse of process for the injury he sustained, and this intervention by a third person did not release the debtor from his obligation to make reparation for the injury. The AGC disputes this assertion, arguing that the damage that is normally compensable by an order to pay extrajudicial fees in a case of abuse of process is non-existent when representation is without cost. A party that is the victim of such an abuse cannot be a “creditor” within the meaning of art. 1608 C.C.Q.

[174] On its face, the AGC’s argument is appealing. The Court of Appeal held in *Viel* that the damage sustained by a party as a result of an abuse of process is the obligation to pay unnecessary legal fees: para. 79. If there is a *pro bono* agreement, the victim of the abuse of process pays no fees to his or her counsel (subject to the particulars of the agreement in each case). On the basis of this reasoning, given that the victim

of the abuse of process has suffered no damage, he or she cannot be a creditor of the party whose conduct constituted such an abuse.

[175] However, if this were true in the case of an abuse of process, it would also have to be true in the other situations to which art. 1608 *C.C.Q.* applies. A person who suffers an injury caused by the fault of another person but receives an indemnity or a benefit from a third person under a contract of insurance or a contract of employment has not really suffered an injury either. But it is clear from the commentary of the Minister of Justice from the time of enactment of the *C.C.Q.* that it is to that type of situation in particular that art. 1608 *C.C.Q.* applies:

[TRANSLATION] [This article] is intended to resolve the question of whether the obligation on a debtor to compensate can be reduced or altered by payments made to the creditor by a third party, whether those payments are gratuitous or for consideration. This would be the case if, for example, without being required to do so, the creditor's employer continued to pay him his salary while he was unable to work; it would also be the case if the creditor's insurer paid him, in his capacity as an insured, the proceeds of an insurance policy he had taken out.

Giving a negative answer to this question may sometimes result in giving the creditor double compensation — what he receives from the third party and what he is paid by the debtor — and so conferring an enrichment on him; such an answer may also seem contrary to the principle of compensation for injury, since in some cases the injury may no longer exist as the third party may have already given compensation for it.

On the other hand, an affirmative answer seems contrary to the preventive function of the obligation to compensate, and may also lead to the somewhat disturbing result of relieving the debtor of any obligation to compensate solely as the result of the good will of a third party or the creditor's foresight in protecting himself at his own expense against the possibility of the injury.

The article comes down in favour of a negative answer to this question of whether the debtor's obligation to compensate may be reduced or altered by payments the creditor receives from a third party; but so as to avoid the principal cases in which double compensation would result, it expressly excludes situations where the third party is legally or by agreement subrogated to the creditor's rights.

This is the solution which seems fairest in the circumstances, especially as most of the payments made by third parties — social security indemnities, insurance payments or payments resulting from collective labour agreements — are not really in the nature of an indemnity and in any case are not meant to compensate for the injury sustained by the creditor. [Emphasis added.]

(Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. I, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 994)

[176] We are aware that the drafting of art. 1608 *C.C.Q.* may have left something to be desired: “. . . that the creditor receives a benefit from a third person, as a result of the injury he has suffered” However, the legislature's intent is unambiguous, and we must give effect to it. Moreover, this interpretation is consistent with art. 1440 *C.C.Q.*:

1440. A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

[177] Litigants are required to refrain from conduct that would amount to an abuse of process. A litigant who defaults on this obligation commits a fault and may be ordered to pay damages. By virtue of art. 1608 *C.C.Q.*, the litigant's obligation to pay damages to the other party is neither reduced nor altered by the fact that the latter received a gratuitous benefit from his or her counsel. The rationale for art. 1608 *C.C.Q.*, which is explained in the Minister of Justice's commentary, applies with equal force in a case of abuse of process: damages must be allowed to fully perform their preventive function, and a person who causes an “injury” must not be exempted from liability.

[178] Article 1608 *C.C.Q.* also attests to the legislature’s intention not to relieve debtors of their obligation to compensate even if this may result in double recovery for the victim. The legislature chose to exclude cases involving subrogation, as they are the ones that most often give rise to double recovery. The courts must defer to that choice. This means that, contrary to what the trial judge said, it is not necessary for the *pro bono* agreement to stipulate that any extrajudicial fees that might be awarded are to be paid to counsel. It is up to the parties and their counsel to negotiate the particulars of such agreements.

[179] Having made these clarifications, we will now consider the trial judge’s finding that the AGC’s conduct in this case amounted to an abuse of process. In particular, she stressed the fact that the AGC had

- insisted that Mr. Hinse prove every little detail;
- refused to give him certain documents;
- faulted Mr. Hinse for failing to call the decision makers who had played a role in his case to testify before the court;
- repeatedly stated that it was up to Mr. Hinse to discharge his burden of proof;
- blindly endorsed the theory of his own experts;
- waited until November 2, 2010, the first day of the trial, to acknowledge that Mr. Hinse was the victim of a miscarriage of justice;
- refused to allow the report of the Commission de police to be filed in the record; and
- contended that the witnesses who provided the “new evidence” adduced in the Court of Appeal that led to the stay of proceedings in June 1994 should be heard (para. 226).

[180] Like the Court of Appeal, however, we can see no abuse of process in the AGC’s conduct. It is true that the position taken by Dr. Chamberland, a psychiatric expert, that the effects of Mr. Hinse’s incarceration had been “beneficial” was unfortunate; the AGC should have disassociated himself from it. But this on its own does not amount to an abuse of process. The AGC did not multiply proceedings in an unreasonable manner or call unnecessary witnesses. He did not use procedural mechanisms excessively or unreasonably, nor did he act in bad faith or recklessly. The law on the federal Crown’s liability for a fault committed by the Minister in exercising his or her power of mercy was far from clear at the time of the dispute. It was reasonable and appropriate for the AGC to contest the appellant’s action and raise the defence that he did. The trial judge committed a palpable and overriding error in finding that there had been an abuse of process in the context of this case. The appellant was not entitled to the extrajudicial fees that were awarded.

V. Disposition

[181] There is no denying that the miscarriage of justice of which Mr. Hinse was a victim is most regrettable. However, in the absence of bad faith or serious recklessness on the Minister’s part, and of a causal connection between his actions and the alleged damage, Mr. Hinse’s action against the AGC must fail. We would dismiss the appeal without costs, as the Court of Appeal did.

596. [Powers of Minister of Justice] The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment,

- (a) direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person; or
- (c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

62. Section 596 of the said Act is repealed and the following substituted therefor:

596. [Powers of Minister of Justice] The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

- (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
- (c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

617. [Powers of Minister of Justice] The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

- (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
- (c) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

690. [Powers of Minister of Justice] The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,

- (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
- (c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly. [rep. [2002, c. 13, s. 70](#)]

Solicitors for the appellant: Borden Ladner Gervais, Montréal.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

*Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Greenspan
Humphrey Lavine, Toronto.*

Solicitors for the intervener Centre Pro Bono Québec: Lavery, de Billy, Montréal.

Solicitors for the intervener Pro Bono Law Ontario: Bennett Jones, Toronto.

[\[*\]](#) LeBel J. took no part in the judgment.

TAB 17

R. v. Jordan, 2016 SCC 27 (CanLII), [2016] 1 SCR 631

Source:	Supreme Court of Canada
Date:	2016-07-08
File number:	36068
Other citations:	398 DLR (4th) 381 — AZ-51302609 — [2016] EXP 2173 — 29 CR (7th) 235 — 335 CCC (3d) 403 — 388 BCAC 111 — 130 WCB (2d) 596 — 358 CRR (2d) 97 — [2016] CarswellBC 1864 — EYB 2016-267713 — JE 2016-1212 — [2016] SCJ No 27 (QL) — [2016] ACS no 27
Citation:	R. v. Jordan, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, < https://canlii.ca/t/gsds3 >, retrieved on 2026-03-23
Most recent unfavourable mention	R v Tai Nguyen , 2025 ABCJ 211 (CanLII) [...] The Court also suggests there are discrete events which may arise during a trial, such as: a witness recanting or scheduling miscalculations, despite best efforts to predict timing: R v Jordan at 72-73. [...]



SUPREME COURT OF CANADA

CITATION: R. v. Jordan, 2016 SCC 27, [2016] 1 S.
C.R. 631

APPEAL HEARD: October 7, 2015
JUDGMENT RENDERED: July 8, 2016
DOCKET: 36068

BETWEEN:

Barrett Richard Jordan
Appellant

and

Her Majesty The Queen
Respondent

- and -

**Attorney General of Alberta,
British Columbia Civil Liberties Association and
Criminal Lawyers' Association (Ontario)**
Interveners

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

JOINT REASONS FOR JUDGMENT:
(paras. 1 to 141)

Moldaver, Karakatsanis and Brown JJ. (Abella and Côté JJ. concurring)

REASONS CONCURRING IN THE RESULT:
(paras. 142 to 303)

Cromwell J. (McLachlin C.J. and Wagner and Gascon JJ. concurring)

R. v. Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631

Barrett Richard Jordan

Appellant

v.

Her Majesty The Queen

Respondent

and

**Attorney General of Alberta,
British Columbia Civil Liberties Association and
Criminal Lawyers' Association (Ontario)**

Interveners

Indexed as: R. v. Jordan

2016 SCC 27

File No.: 36068.

2015: October 7; 2016: July 8.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Delay of more than four years between charges and end of trial — Whether accused's right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed — New framework for applying s. 11(b).

J was charged in December 2008 for his role in a dial-a-dope operation. His trial ended in February 2013. J brought an application under s. 11(b) of the *Canadian Charter of Rights and Freedoms*, seeking a stay of proceedings due to the delay. In dismissing the application, the trial judge applied the framework set out in *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771. Ultimately, J was convicted. The Court of Appeal dismissed the appeal.

Held: The appeal should be allowed, the convictions set aside and a stay of proceedings entered.

Per Abella, Moldaver, Karakatsanis, Côté and Brown JJ.: The delay was unreasonable and J's s. 11(b) *Charter* right was infringed. The *Morin* framework for applying s. 11(b) has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it. Doctrinally, the *Morin* framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts. From a practical perspective, the *Morin* framework's after-the-fact rationalization of delay does not encourage participants in the justice system to take preventative measures to address inefficient practices and resourcing problems.

A new framework is therefore required for applying s. 11(b). This framework is intended to focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice

system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives.

At the heart of this new framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied.

It is obviously impossible to identify in advance all circumstances that may qualify as exceptional for the purposes of adjudicating a s. 11(b) application. Ultimately, the determination of whether circumstances are exceptional will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

If the exceptional circumstance relates to a discrete event (such as an illness or unexpected event at trial), the delay reasonably attributable to that event is subtracted from the total delay. If the exceptional circumstance arises from the case's complexity, the delay is reasonable and no further analysis is required.

An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on, nor can chronic institutional delay. Most significantly, the absence of prejudice can in no circumstances be used to justify delays after the presumptive ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

Below the presumptive ceiling, however, the burden is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(b) application must fail. Stays beneath the presumptive ceiling should only be granted in clear cases.

As to the first factor, while the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(b) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

Turning to the second factor, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. These requirements derive from a variety of factors, including the complexity of the case and local considerations. Determining the time the case reasonably should have taken is not a matter of precise calculation, as has been the practice under the *Morin* framework.

For cases currently in the system, a contextual application of the new framework is required to avoid repeating the post-*Askov* situation, where tens of thousands of charges were stayed as a result of the abrupt change in the law. Therefore, for those cases, the new framework applies, subject to two qualifications. First, for cases in which the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice.

The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls below the ceiling. For these cases, the two criteria — defence initiative and whether the time the case has taken markedly exceeds what was reasonably required — must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. Further, if the delay was occasioned by an institutional delay that was, before this decision was released, reasonably acceptable in the relevant jurisdiction under the *Morin* framework, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

In this case, the total delay between the charges and the end of trial was 49.5 months. As the trial judge found, four months of this delay were waived by J when he changed counsel shortly before the trial was set to begin, necessitating an adjournment. In addition, one and a half months of the delay were caused solely by J for the adjournment of the preliminary inquiry because his counsel was unavailable for closing submissions on the last day. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The Crown has failed to discharge its burden of demonstrating that the delay of 44 months (excluding defence delay) was reasonable. While the case against J may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify such a delay.

Nor does the transitional exceptional circumstance justify the delay in this case. Since J's charges were brought prior to the release of this decision, the Crown was operating without notice of the new framework within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable. While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. And the systemic delay problems that existed at the time cannot justify the delay either. Much of the institutional delay could have been avoided had the

Crown proceeded on the basis of a more reasonable plan by more accurately estimating the amount of time needed to present its case. To the extent that the trial judge held that this delay was reasonable, he erred.

All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. Broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts. Timely trials are possible. More than that, they are constitutionally required.

Per McLachlin C.J. and Cromwell, Wagner and Gascon JJ.: This Court's jurisprudence for dealing with alleged breaches of s. 11(b) of the *Canadian Charter of Rights and Freedoms* over the last 30 years supplies a clear answer to this appeal. Striking out in the completely new direction adopted by the majority is unnecessary. A reasonable time for trial under s. 11(b) cannot and should not be defined by numerical ceilings, as the majority concludes.

The right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific; its application to specific cases is unavoidably complex. The relevant factors and general approach set out in *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771, respond to these complexities. With modest adjustments to make the analysis more straightforward and with some additional clarification, a revised *Morin* framework will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations. In order to do so, the *Morin* considerations should be regrouped under four main analytical steps.

First, the accused must establish that there is a basis for the s. 11(b) inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length merits further inquiry.

Second, the court must determine on an objective basis what would be a reasonable time for the disposition of a case like the one under review — that is, how long a case of this nature should reasonably take. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed, and is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial courts and six to eight months before the superior courts. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse. The guidelines should not be understood as precluding allowance for any sudden and temporary strain on resources that causes a temporary congestion in the courts. The inherent time requirements of a case, on the other hand, represent the period of time that is reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court, and are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence. In estimating a reasonable time period, the court should also take into account the liberty interests of the accused.

Third, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay. When the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than mere acquiescence in the inevitable, and that it meets the high bar of being clear, unequivocal, and informed acceptance. Delay resulting from unreasonable actions solely attributable to the accused must also be subtracted from the period for which the state is responsible, such as last-minute changes in counsel or adjournments flowing from a lack of diligence. It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state, including unavoidable delays due to inclement weather or illness of a trial participant.

Fourth, the court must determine whether the actual period of time that fairly counts against the state exceeds the reasonable time by more than can be justified on any acceptable basis. Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can show that the delay was justified. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. The accused still may be able to demonstrate actual prejudice. Although actual prejudice need not be proved to find an infringement of s. 11(b), its presence would make unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable. As a result, justification may be found to be lacking.

Under this revised *Morin* framework, any delay in excess of the reasonable time requirements and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment and prompt trial of accused persons and, on the other, determination of cases on their merits. If there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an acceptable basis upon which exceeding the inherent and institutional requirements of a case can be justified.

This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

Applying these four steps of the revised *Morin* framework in this case, J's constitutional right to be tried within a reasonable time was violated. The 49.5-month delay from the charges to the end of the scheduled trial date is sufficient to trigger an inquiry into whether the delay is unreasonable. There were 10.5 months of inherent delay and 18 months of institutional delay. These findings make it appropriate to conclude that the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest — a period of 17 months — counts against the state. In other words, this case took

almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature. This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a similar case. While there are societal interests in the trial on the merits of the serious drug crimes alleged against J, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

In contrast, the majority's new framework is not an appropriate approach to interpreting and applying the s. 11(b) right, for several reasons. First, the new approach reduces reasonableness to numerical ceilings. Reasonableness cannot be judicially defined with precision or captured by a number. As well, the majority's judicially created ceilings largely uncouple the right to be tried within a reasonable time from the bedrock constitutional requirement of reasonableness, which is the core of the right.

Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. When the elapsed time is below the ceiling, an accused would have to show not only that the case took markedly longer than it reasonably should have but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. This requirement has no bearing on whether the delay was unreasonable.

The majority's approach also exceeds the proper role of the Court. Creating fixed or presumptive ceilings is a task better left to legislatures. The ceilings place new limits on the exercise of the s. 11(b) right to a trial within a reasonable time for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. This is inconsistent with the judicial role.

As well, the ceilings have no support in the record in this case. What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist and are more likely to feed such a culture.

The majority's approach also risks negative consequences for the administration of justice. The presumptive ceilings are unlikely to improve the pace at which the vast majority of cases move through the system. As well, if this new framework were applied immediately, the majority's transitional provisions would not avoid the risk of thousands of judicial stays.

Moreover, the increased simplicity which is said to flow from the majority's new framework is likely illusory. Even if creating ceilings were an appropriate task for the courts and even if there were an appropriate evidentiary basis for them, there is little reason to think these ceilings would avoid the complexities inherent in deciding whether a particular delay is unreasonable. The majority's framework simply moves the complexities of the analysis to a new location: deciding whether to rebut the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases.

Ultimately, the majority's new framework casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change, has not been the subject of adversarial scrutiny or debate, and risks thousands of judicial stays. In short, the new framework is wrong in principle and unwise in practice.

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[2014] B.C.J. No. 1263 (QL), 2014 CarswellBC 1760 (WL Can.), affirming a decision of Verhoeven J., [2012 BCSC 1735](#), [2012] B.C.J. No. 2448 (QL), 2012 CarswellBC 3655 (WL Can.). Appeal allowed.

Eric V. Gottardi and Tony C. Paisana, for the appellant.

Croft Michaelson, Q.C., and *Peter R. LaPrairie*, for the respondent.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Tim A. Dickson and Martin Twigg, for the intervener the British Columbia Civil Liberties Association.

Frank Addario and Erin Dann, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of Abella, Moldaver, Karakatsanis, Côté and Brown JJ. was delivered by

MOLDAVER, KARAKATSANIS AND BROWN JJ. —

I. Introduction

[1] Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. [Section 11\(b\)](#) of the *Canadian Charter of Rights and Freedoms* attests to this, in that it guarantees the right of accused persons “to be tried within a reasonable time”.

[2] Moreover, the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused persons remain in a state of uncertainty, often in pre-trial detention. Victims and their families who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs.

[3] An efficient criminal justice system is therefore of utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high.

[4] Our system, however, has come to tolerate excessive delays. The circumstances in this appeal are illustrative. Notwithstanding a delay of over four years in bringing a drug case of modest complexity to trial, both the trial judge and the Court of Appeal were of the view that the appellant was tried within a reasonable time. Their analyses are reflective of doctrinal and practical difficulties plaguing the current analytical framework governing s. 11(b). These difficulties have fostered a culture of complacency within the system towards delay.

[5] A change of direction is therefore required. Below, we set out a new framework for applying s. 11(b). At the centre of this new framework is a presumptive ceiling on the time it should take to bring an accused person to trial: 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. Of course, given the contextual nature of reasonableness, the framework accounts for case-specific factors both above and below the presumptive ceiling. This framework is intended to focus the s. 11(b) analysis on the issues that matter and encourage all participants in the criminal justice system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(b)'s important objectives.

[6] Applying this new framework, including its transitional features, we conclude that the appellant was not brought to trial within a reasonable time. We would allow the appeal, set aside his convictions and direct a stay of proceedings.

II. Facts

[7] The appellant, Mr. Jordan, was arrested in December 2008 following an RCMP investigation into a “dial-a-dope” operation in Langley and Surrey, British Columbia. He was eventually charged with nine other co-accused on a 14-count information alleging various offences relating to possession and trafficking. Mr. Jordan remained in custody until February 2009, when he was released under strict house arrest and other restrictive bail conditions.

[8] The 10 co-accused made numerous appearances through the early months of 2009 as they obtained counsel, made their elections, and coordinated schedules. By May 2009, all counsel had agreed that the preliminary inquiry would require approximately four days, and it was eventually set for May 13, 14, 17 and 18, 2010. Several of the co-accused entered guilty pleas or were severed from the information. By the time the preliminary inquiry commenced, there were five co-accused left on the information, including Mr. Jordan.

[9] At the preliminary inquiry, it quickly became apparent that the initial time estimate of four days was too low. Crown counsel advised the preliminary inquiry judge that the Crown would be able to present all of the evidence against the four co-accused, but that the Crown would require significantly more court time to present the “mountain of evidence” it had in respect of Mr. Jordan. The parties sought and obtained continuation dates throughout 2010 and into 2011. In May 2011, Mr. Jordan (along with two co-accused) was committed to stand trial on all 14 counts. The preliminary inquiry — which ended up taking nine days of court time — had taken a full year to complete. It was now two and a half years since Mr. Jordan had been charged.

[10] Following committal, the matter moved to the British Columbia Supreme Court. Crown counsel estimated that six weeks would be required for trial, and the trial was set for the first available six-week block — in September 2012. A new Crown counsel took over the file in July 2011, and wrote to Mr. Jordan’s counsel advising of her estimate that only two to three weeks would be needed to present the Crown’s case, and offering to seek earlier trial dates. Mr. Jordan’s counsel did not respond to this offer. Later, in December 2011, one of the remaining two co-accused was severed from the information. Only Mr. Jordan and one co-accused remained.

[11] As Mr. Jordan awaited trial, his liberty was restricted. He spent two months in custody following his arrest in December 2008, which was followed by close to four years of restrictive bail conditions. However, in July 2011, Mr. Jordan was convicted of prior drug charges and was sentenced to a 15-month conditional sentence order (“CSO”), which he served until October 2012. The conditions of the CSO were similar to the bail conditions Mr. Jordan was under for the charges at issue in this appeal. Therefore, for 15 months of the delay, Mr. Jordan’s liberty was restricted by both the bail conditions and the CSO.

[12] At the start of his trial in September 2012, Mr. Jordan brought an application for a stay of proceedings alleging a breach of his s. 11(b) right to be tried within a reasonable time. This application was dismissed. The trial was adjourned, and it eventually concluded in February 2013 with his conviction on five drug-related offences. The total delay from Mr. Jordan's charges to the conclusion of the trial was 49.5 months.

III. Judgments Below

A. *British Columbia Supreme Court, 2012 BCSC 1735*

[13] The trial judge found that the delay in bringing this matter to trial was not unreasonable, and declined to enter a stay of proceedings. In concluding there was no s. 11(b) breach, he applied the framework from this Court's decision in *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771, including the guidelines set out in it for how much institutional delay is generally tolerable.

[14] The trial judge found that the inherent time requirements for this case were 10.5 months. He also found that, of the total delay, four months (incurred when Mr. Jordan changed counsel and requested an adjournment of his trial) were attributable to the defence, and two months were attributable to the Crown.

[15] The bulk of the delay — 32.5 months — was attributable to institutional delay, of which 19 months occurred at the Provincial Court and 13.5 months occurred at the B.C. Supreme Court. This was, as the trial judge noted, well outside the *Morin* guidelines for tolerable institutional delay of eight to ten months in the provincial court, and six to eight months in the superior court. However, the trial judge held that institutional delay should be given less weight than Crown delay in the final balancing.

[16] The trial judge then considered the issue of prejudice. He reasoned that if the institutional delay had been within the *Morin* guidelines, the trial would have concluded by May 2011. Most of the additional delay coincided with the term of Mr. Jordan's CSO. The trial judge therefore found that Mr. Jordan's liberty interest was not significantly prejudiced by the delay. While Mr. Jordan's security of the person was affected, any prejudice was minimized by the fact that he was facing other outstanding

charges for much of the delay. Finally, he found no prejudice to Mr. Jordan's right to make full answer and defence because the Crown's case did not depend on the memory of witnesses.

[17] The trial judge balanced all of the factors and concluded that Mr. Jordan's s. 11(b) right had not been infringed, due primarily to the fact that Mr. Jordan did not suffer significant prejudice.

B. *British Columbia Court of Appeal, 2014 BCCA 241, 357 B.C.A.C. 137*

[18] Mr. Jordan appealed. He argued that the trial judge erred in his assessment of prejudice and gave inadequate weight to the excessive institutional delay. The Court of Appeal found that the trial judge did not err in his attribution of the delay, or in his weighing of the institutional delay. Further, the trial judge's determination on prejudice was a finding of fact that was entitled to deference. Finally, the trial judge did not err by declining to infer prejudice based on the length of the delay alone. The appeal was dismissed.

IV. Analysis

A. *The Right to Be Tried Within a Reasonable Time Is Important to Individuals and Society as a Whole*

[19] As we have said, the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.

[20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little time as possible held in pre-trial custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because

the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses, or lost or degraded evidence.

[21] At the same time, we recognize that some accused persons who are in fact guilty of their charges are content to see their trials delayed for as long as possible. Indeed, there are incentives for them to remain passive in the face of delay. Accused persons may seek to avoid responsibility for their crimes by embracing delay, in the hope that the case against them will fall apart or they will obtain a stay of proceedings. This operates to the detriment of the public and of the system of justice as a whole. Section 11(b) was not intended to be a sword to frustrate the ends of justice (*Morin*, at pp. 801-2).

[22] Of course, the interests protected by s. 11(b) extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.

[23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, [1990 CanLII 45 \(SCC\)](#), [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

[24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the "worry and frustration [they experience] until they have given their testimony" (*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.

[25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, "delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice" (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community's sense of justice (see *Askov*, at p. 1220). Failure "to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures" (p. 1221).

[26] Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as “a fair and balanced criminal justice system simply cannot exist without the support of the community” (*Askov*, at p. 1221).

[27] Canadians therefore rightly expect a system that can deliver quality justice in a reasonably efficient and timely manner. Fairness and timeliness are sometimes thought to be in mutual tension, but this is not so. As D. Geoffrey Cowper, Q.C., wrote in a report commissioned by the B.C. Justice Reform Initiative:

. . . the widely perceived conflict between justice and efficiency goals is not based in reason or sound analysis. The real experience of the system is that both must be pursued in order for each to be realised: they are, in practice, interdependent.

(*A Criminal Justice System for the 21st Century* (2012), at p. 75)

[28] In short, timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does not. Swift, predictable justice, “the most powerful deterrent of crime” is seriously undermined and in some cases rendered illusory by delayed trials (McLachlin C.J., “The Challenges We Face”, remarks to the Empire Club of Canada, published in (2007), 40 *U.B.C. L. Rev.* 819, at p. 825).

B. *Problems With the Current Framework*

[29] While this Court has always recognized the importance of the right to a trial within a reasonable time, in our view, developments since *Morin* demonstrate that the system has lost its way. The framework set out in *Morin* has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it.

[30] The *Morin* framework requires courts to balance four factors in determining whether a breach of s. 11(b) has occurred: (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused’s interests in liberty, security of the person, and a fair trial. Prejudice can be either actual or inferred from the length of the delay. Institutional delay in

particular is assessed against a set of guidelines developed by this Court in *Morin*: eight to ten months in the provincial court, and a further six to eight months after committal for trial in the superior court. The *Morin* guidelines reflect the fact that resources are finite and there must accordingly be some tolerance for institutional delay. Institutional delay within or close to the guidelines has generally been considered to be reasonable.

[31] This framework suffers from a number of related doctrinal shortcomings.

[32] First, its application is highly unpredictable. It has been interpreted so as to permit endless flexibility, making it difficult to determine whether a breach has occurred. The absence of a consistent standard has turned s. 11(b) into something of a dice roll, and has led to the proliferation of lengthy and often complex s. 11(b) applications, thereby further burdening the system.

[33] Second, as the parties and interveners point out, the treatment of prejudice has become one of the most fraught areas in the s. 11(b) jurisprudence: it is confusing, hard to prove, and highly subjective. As to the confusion prejudice has caused, courts have struggled to distinguish between “actual” and “inferred” prejudice. And attempts to draw this distinction have led to apparent inconsistencies, such as that prejudice might be inferred even when the evidence shows that the accused suffered no actual prejudice. Further, actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests. Courts have also found that “it may not always be easy” to distinguish between prejudice stemming from the delay versus the charge itself (*R. v. Pidskalny*, 2013 SKCA 74, 299 C.C.C. (3d) 396, at para. 43). And even if sufficient evidence is adduced, the interpretation of that evidence is a highly subjective enterprise.

[34] Despite this confusion, prejudice has, as this case demonstrates, become an important if not determinative factor. Long delays are considered “reasonable” if the accused is unable to demonstrate significant actual prejudice to his or her protected interests. This is a problem because the accused’s and the public’s interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured. Delayed trials may also cause prejudice to the administration of justice.

[35] Third, the *Morin* framework requires a retrospective inquiry, since the analysis of delay arises only after the delay has been incurred. Courts and parties are operating within a framework that is designed not to prevent delay, but only to redress (or not redress) it. As a consequence, they are not motivated to manage “each case in advance to achieve *future compliance* with consistent standards” (M. A. Code, *Trial Within a Reasonable Time* (1992), at p. 117 (emphasis in original)). Courts are instead left to pick up the pieces once the delay has transpired. This after-the-fact review of past delay is understandably frustrating for trial judges, who have only one remedial tool at their disposal — a stay of proceedings. It is therefore unsurprising that courts have occasionally strained in applying the *Morin* framework to avoid a stay.[1]

[36] The retrospective analysis required by *Morin* also encourages parties to quibble over rationalizations for vast periods of pre-trial delay. Here, for example, the Crown argues that the trial judge erred in characterizing most of the delay as Crown or institutional delay. Had he assessed it properly, the argument goes, he would have attributed only 5 to 8 months as Crown or institutional delay, as opposed to 34.5 months. Competing after-the-fact explanations allow for potentially limitless variations in permissible delay. As the intervener the Criminal Lawyers’ Association (Ontario) submits: “Boundless flexibility is incompatible with the concept of a *Charter* right and has proved to serve witnesses, victims, defendants and the justice system’s reputation poorly” (I.F., at para. 12).

[37] Finally, the *Morin* framework is unduly complex. The minute accounting it requires might fairly be considered the bane of every trial judge’s existence. Although Cromwell J. warned in *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3, that courts must avoid failing to see the forest for the trees (para. 18), courts and litigants have often done just that. Each day of the proceedings from charge to trial is argued about, accounted for, and explained away. This micro-counting is inefficient, relies on judicial “guesstimations”, and has been applied in a way that allows for tolerance of ever-increasing delay.

[38] In sum, from a doctrinal perspective, the s. 11(b) framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts.

[39] These doctrinal problems have contributed to problems in practice.

[40] As we have observed, a culture of complacency towards delay has emerged in the criminal justice system (see, e.g., Alberta Justice and Solicitor General, Criminal Justice Division, “Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases”, report by G. Lepp (April 2013) (online), at p. 17; Cowper, at p. 4; P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15; Canada, Department of Justice, “The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System” (2006) (online), at pp. 5-6). Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay. This culture of delay “causes great harm to public confidence in the justice system” (LeSage and Code, at p. 16). It “rewards the wrong behaviour, frustrates the well-intentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system” (Cowper, at p. 48).

[41] The *Morin* framework does not address this culture of complacency. Delay is condemned or rationalized at the back end. As a result, participants in the justice system — police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament — are not encouraged to take preventative measures to address inefficient practices and resourcing problems. Some courts, with the cooperation of counsel, have undertaken commendable efforts to change courtroom culture, maximize efficiency, and minimize delay, thereby showing that it is possible to do better. Some legislative changes and government initiatives have also been taken. In many cases, however, much remains to be done.

[42] Aggravating the tolerance for delay is the increased complexity of pre-trial and trial processes since *Morin*. New offences, procedures, obligations on the Crown and police, and legal tests have emerged. Many of them put a premium on fairness, reasonableness, and a fact-specific analysis. They take time. They also take up judges, courtrooms, and other resources.

[43] Complexity is sometimes unavoidable in order to achieve fairness or ensure that the state lives up to its constitutional obligations. But the quality of justice does not always increase proportionally to the length and complexity of a trial. Unnecessary procedural steps and inefficient advocacy have the opposite effect, weighing down the entire system. A criminal proceeding does not take place in a vacuum. Each procedural step or motion that is improperly taken, or takes longer than it

should, along with each charge that should not have been laid or pursued, deprives other worthy litigants of timely access to the courts.

[44] The intervener Attorney General of Alberta submits that a change in courtroom culture is needed. This submission echoes former Chief Justice Lamer’s two decades-old call for participants in the justice system to “find ways to retain a fair process . . . that can achieve practical results in a reasonable time and at reasonable expense” (“The Role of Judges”, address to the Empire Club of Canada, 1995 (online)).

[45] We agree. And, along with other participants in the justice system, this Court has a role to play in changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time. We accept Mr. Jordan’s invitation — which was echoed by the Criminal Lawyers’ Association (Ontario), the British Columbia Civil Liberties Association, and Mr. Williamson in the companion appeal of *R. v. Williamson*, 2016 SCC 28, [2016] 1 S.C.R. 741 — to revise the s. 11(b) analysis. While departing from a precedent of this Court “is a step not to be lightly undertaken” (*Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 56), as we have explained, “there are compelling reasons to do so” (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44).

V. A New Framework for Section 11(b) Applications

A. Summary

[46] At the heart of the new framework is a ceiling beyond which delay is presumptively unreasonable. The presumptive ceiling is set at 18 months for cases going to trial in the provincial court, and at 30 months for cases going to trial in the superior court (or cases going to trial in the provincial court after a preliminary inquiry).

[47] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay) *exceeds* the ceiling, then the delay is presumptively unreasonable. To rebut this presumption, the

Crown must establish the presence of exceptional circumstances. If it cannot, the delay is unreasonable and a stay will follow.

[48] If the total delay from the charge to the actual or anticipated end of trial (minus defence delay or a period of delay attributable to exceptional circumstances) falls *below* the presumptive ceiling, then the onus is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. We expect stays beneath the ceiling to be rare, and limited to clear cases.

B. *The Presumptive Ceiling*

[49] The most important feature of the new framework is that it sets a ceiling beyond which delay is presumptively unreasonable. For cases going to trial in the provincial court, the presumptive ceiling is 18 months from the charge to the actual or anticipated end of trial. For cases going to trial in the superior court, the presumptive ceiling is 30 months from the charge to the actual or anticipated end of trial.^[2] We note the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry.^[3] As we will discuss, defence-waived or -caused delay does not count in calculating whether the presumptive ceiling has been reached — that is, such delay is to be discounted.

[50] A presumptive ceiling is required in order to give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time: court administration, the police, Crown prosecutors, accused persons and their counsel, and judges. It is also intended to provide some assurance to accused persons, to victims and their families, to witnesses, and to the public that s. 11(b) is not a hollow promise.

[51] While the presumptive ceiling will enhance analytical simplicity and foster constructive incentives, it is not the end of the exercise: as we will explain in greater detail, compelling case-specific factors remain relevant to assessing the reasonableness of a period of delay both above and below the ceiling. Obviously, reasonableness cannot be captured by a number alone, which is why the new framework is not solely a function of time. Contrary to what our colleague Cromwell J. asserts, we do

not depart from the concept of reasonableness; we simply adopt a different view of how reasonableness should be assessed.

[52] In setting the presumptive ceiling, we were guided by a number of considerations. First, it takes as a starting point the *Morin* guidelines.^[4] In *Morin*, this Court set eight to ten months as a guide for institutional delay in the provincial court, and an additional six to eight months as a guide for institutional delay in the superior court following an accused's committal for trial. Thus, under *Morin*, a total of 14 to 18 months was the measure for proceedings involving both the provincial court and the superior court.

[53] Second, the presumptive ceiling also reflects additional time to account for the other factors that can reasonably contribute to the time it takes to prosecute a case. These factors include the inherent time requirements of the case and the increased complexity of criminal cases since *Morin*. In this way, the ceiling takes into account the significant role that process now plays in our criminal justice system.

[54] Third, although prejudice will no longer play an explicit role in the s. 11(b) analysis, it informs the setting of the presumptive ceiling. Once the ceiling is breached, we presume that accused persons will have suffered prejudice to their *Charter*-protected liberty, security of the person, and fair trial interests. As this Court wrote in *Morin*, “prejudice to the accused can be inferred from prolonged delay” (p. 801; see also *Godin*, at para. 37). This is not, we stress, a rebuttable presumption: once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one.

[55] Fourth, the presumptive ceiling has an important public interest component. The clarity and assurance it provides will build public confidence in the administration of justice.

[56] We also make this observation about the presumptive ceiling. It is not an aspirational target. Rather, it is the point at which delay becomes presumptively unreasonable. The public should expect that most cases can and should be resolved before reaching the ceiling. For this reason, as we will explain, the Crown bears the onus of justifying delays that exceed the ceiling. It is also for this reason

that an accused may in clear cases still demonstrate that his or her right to be tried within a reasonable time has been infringed, even before the ceiling has been breached.

[57] There is little reason to be satisfied with a presumptive ceiling on trial delay set at 18 months for cases going to trial in the provincial court, and 30 months for cases going to trial in the superior court. This is a long time to wait for justice. But the ceiling reflects the realities we currently face. We may have to revisit these numbers and the considerations that inform them in the future.

[58] Our colleague Cromwell J. misapprehends the effect of the presumptive ceiling, asserting that this framework “reduces reasonableness to two numerical ceilings” (para. 254). As we will explain in greater detail, this is clearly not so. The presumptive ceiling marks the point at which the burden shifts from the defence to prove that the delay was unreasonable, to the Crown to justify the length of time the case has taken. As our colleague acknowledges, pursuant to our framework, “the judge must look at the circumstances of the particular case at hand” in assessing the reasonableness of a delay (para. 301).

[59] We now turn to discussing the various case-specific factors that must be accounted for both above and below the presumptive ceiling.

C. *Accounting for Defence Delay*

[60] Application of this framework, as under the *Morin* framework, begins with calculating the total delay from the charge to the actual or anticipated end of trial. Once that is determined, delay attributable to the defence must be subtracted. The defence should not be allowed to benefit from its own delay-causing conduct. As Sopinka J. wrote in *Morin*: “The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits” (p. 802).

[61] Defence delay has two components. The first is delay waived by the defence (*Askov*, at pp. 1228-29; *Morin*, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, “[i]n considering the issue of ‘waiver’ in the context

of s. 11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness” (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, per L’Heureux-Dubé J., at p. 1686).

[62] Accused persons sometimes, either before or during their preliminary hearing, wish to re-elect from a superior court trial to a provincial court trial for legitimate reasons. To do so, the Crown’s consent must be obtained (*Criminal Code*, R.S.C. 1985, c. C-46, s. 561). Of course, it would generally be open to the Crown to ask the accused to waive the delay stemming from the re-election as a condition of its consent.

[63] The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises “those situations where the accused’s acts either directly caused the delay . . . or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial” (*Askov*, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.

[64] As another example, the defence will have directly caused the delay if the court and the Crown are ready to proceed, but the defence is not. The period of delay resulting from that unavailability will be attributed to the defence. However, periods of time during which the court and the Crown are unavailable will not constitute defence delay, even if defence counsel is also unavailable. This should discourage unnecessary inquiries into defence counsel availability at each appearance. Beyond defence unavailability, it will of course be open to trial judges to find that other defence actions or conduct have caused delay (see, e.g., *R. v. Elliott* (2003), 2003 CanLII 24447 (ON CA), 114 C.R.R. (2d) 1 (Ont. C.A.), at paras. 175-82).

[65] To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. For example, the defence must be allowed preparation time, even where the court and the Crown are ready to proceed. In addition, defence applications and requests that are not frivolous will also generally not count against the defence. We have already accounted for procedural

requirements in setting the ceiling. And such a deduction would run contrary to the accused's right to make full answer and defence. While this is by no means an exact science, first instance judges are uniquely positioned to gauge the legitimacy of defence actions.

[66] To summarize, as a first step, total delay must be calculated, and defence delay must be deducted. Defence delay comprises delays waived by the defence, and delays caused solely or directly by the defence's conduct. Defence actions legitimately taken to respond to the charges do not constitute defence delay.

[67] The next step of the analysis depends upon whether the remaining delay — that is, the delay which was not caused by the defence — is *above* or *below* the presumptive ceiling.

D. *Above the Ceiling — Presumptively Unreasonable Delay*

[68] Delay (minus defence delay) that exceeds the ceiling is presumptively unreasonable. The Crown may rebut this presumption by showing that the delay is reasonable because of the presence of exceptional circumstances.

Exceptional Circumstances

[69] Exceptional circumstances lie *outside the Crown's control* in the sense that (1) they are reasonably unforeseen *or* reasonably unavoidable, *and* (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. So long as they meet this definition, they will be considered exceptional. They need not meet a further hurdle of being rare or entirely uncommon.

[70] It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The

Crown, we emphasize, is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay.

[71] It is obviously impossible to identify in advance all circumstances that may qualify as “exceptional” for the purposes of adjudicating a s. 11(b) application. Ultimately, the determination of whether circumstances are “exceptional” will depend on the trial judge’s good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

[72] Commencing with the former, by way of illustration, it is to be expected that medical or family emergencies (whether on the part of the accused, important witnesses, counsel or the trial judge) would generally qualify. Cases with an international dimension, such as cases requiring the extradition of an accused from a foreign jurisdiction, may also meet the definition.

[73] Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

[74] Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.

[75] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course,

the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

[76] If the remaining delay falls below the ceiling, the accused may still demonstrate in clear cases that the delay is unreasonable as outlined below. If, however, the remaining delay exceeds the ceiling, the delay is unreasonable and a stay of proceedings must be entered.

[77] As indicated, exceptional circumstances also cover a second category, namely, cases that are particularly complex. This too requires elaboration. Particularly complex cases are cases that, because of the nature of the *evidence* or the nature of the *issues*, require an inordinate amount of trial or preparation time such that the delay is justified. As for the nature of the evidence, hallmarks of particularly complex cases include voluminous disclosure, a large number of witnesses, significant requirements for expert evidence, and charges covering a long period of time. Particularly complex cases arising from the nature of the issues may be characterized by, among other things, a large number of charges and pre-trial applications, novel or complicated legal issues, and a large number of significant issues in dispute. Proceeding jointly against multiple co-accused, so long as it is in the interest of justice to do so, may also impact the complexity of the case.

[78] A typical murder trial will not usually be sufficiently complex to comprise an exceptional circumstance. However, if an inordinate amount of trial or preparation time is needed as a result of the nature of the evidence or the issues such that the time the case has taken is justified, the complexity of the case will qualify as presenting an exceptional circumstance.

[79] It bears reiterating that such determinations fall well within the trial judge's expertise. And, of course, the trial judge will also want to consider whether the Crown, having initiated what could reasonably be expected to be a complex prosecution, developed and followed a concrete plan to minimize the delay occasioned by such complexity (*R. v. Auclair*, 2014 SCC 6, [2014] 1 S.C.R. 83, at

para. 2). Where it has failed to do so, the Crown will not be able to show exceptional circumstances, because it will not be able to show that the circumstances were outside its control. In a similar vein, and for the same reason, the Crown may wish to consider whether multiple charges for the same conduct, or trying multiple co-accused together, will unduly complicate a proceeding. While the court plays no supervisory role for such decisions, Crown counsel must be alive to the fact that any delay resulting from their prosecutorial discretion must conform to the accused's s. 11(b) right (see, e.g., *Vassell*). As this Court said in *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760:

Certainly, it is within the Crown's discretion to prosecute charges where the evidence would permit a reasonable jury to convict. However, some semblance of a cost-benefit analysis would serve the justice system well. Where the additional or heightened charges are marginal, and pursuing them would necessitate a substantially more complex trial process and jury charge, the Crown should carefully consider whether the public interest would be better served by either declining to prosecute the marginal charges from the outset or deciding not to pursue them once the evidence at trial is complete. [para. 45]

[80] Where the trial judge finds that the case was particularly complex such that the time the case has taken is justified, the delay is reasonable and no stay will issue. No further analysis is required.

[81] To be clear, the presence of exceptional circumstances is *the only basis* upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. As discussed, an exceptional circumstance can arise from a discrete event (such as an illness, extradition proceeding, or unexpected event at trial) or from a case's complexity. The seriousness or gravity of the offence cannot be relied on, although the more complex cases will often be those involving serious charges, such as terrorism, organized crime, and gang-related activity. Nor can chronic institutional delay be relied upon. Perhaps most significantly, the absence of prejudice can in no circumstances be used to justify delays after the ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

E. *Below the Presumptive Ceiling*

[82] A delay may be unreasonable even if it falls below the presumptive ceiling. If the total delay from the charge to the actual or anticipated end of trial (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) is less than 18 months for cases going to trial in

the provincial court, or 30 months for cases going to trial in the superior court, then the defence bears the onus to show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(b) application must fail.

[83] We expect stays beneath the ceiling to be granted only in clear cases. As we have said, in setting the ceiling, we factored in the tolerance for reasonable institutional delay established in *Morin*, as well as the inherent needs and the increased complexity of most cases.

(1) Defence Initiative — Meaningful and Sustained Steps

[84] To discharge its onus where delay falls below the ceiling, the defence must demonstrate that it took meaningful, sustained steps to expedite the proceedings. “Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider” (*Morin*, at p. 802). Here, the trial judge should consider what the defence could have done, and what it actually did, to get the case heard as quickly as possible. Substance matters, not form.

[85] To satisfy this criterion, it is not enough for the defence to make token efforts such as to simply put on the record that it wanted an earlier trial date. Since the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded, it is incumbent on the defence, in order to justify a stay below the ceiling, to demonstrate having taken meaningful and sustained steps to be tried quickly. While the defence might not be able to resolve the Crown’s or the trial court’s challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(b) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

[86] Our colleague Cromwell J. criticizes this requirement as diminishing the right to be tried within a reasonable time. We respectfully disagree. First, this Court already considers defence conduct in assessing s. 11(b) applications. And the level of diligence displayed by the accused is relevant in the context of other *Charter* rights as well, like the s. 10(b) right to counsel (*R. v. Tremblay*, 1987 CanLII 28 (SCC), [1987] 2 S.C.R. 435, at p. 439). Second, as mentioned, the requirement of defence initiative below the ceiling is a corollary to the Crown’s justificatory burden above the ceiling. Third, this requirement reflects the practical reality that a level of cooperation between the parties is necessary in planning and conducting a trial. Encouraging the defence to be part of the solution will have positive ramifications not only for individual cases but for the entire justice system, thereby enhancing — rather than diminishing — timely justice.

(2) Reasonable Time Requirements of the Case — Time Markedly Exceeded

[87] Next, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. The reasonable time requirements of a case derive from a variety of factors, including the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings.

[88] The reasonable time requirements of the case will increase proportionally to a case’s complexity. As Sopinka J. wrote in *Morin*: “All other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins” (pp. 791-92).

[89] In considering the reasonable time requirements of the case, trial judges should also employ the knowledge they have of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of the relevant local and systemic circumstances.

[90] Where the Crown has done its part to ensure that the matter proceeds expeditiously — including genuinely responding to defence efforts, seeking opportunities to streamline the issues and evidence, and adapting to evolving circumstances as the case progresses — it is unlikely that the

reasonable time requirements of the case will have been markedly exceeded. As with assessing the conduct of the defence, trial judges should not hold the Crown to a standard of perfection.

[91] Determining whether the time the case has taken markedly exceeds what was reasonably required is not a matter of precise calculation. Trial judges should not parse each day or month, as has been the common practice since *Morin*, to determine whether each step was reasonably required. Instead, trial judges should step back from the minutiae and adopt a bird's-eye view of the case. All this said, this determination is a question of fact falling well within the expertise of the trial judge (*Morin*, per Sopinka J., at pp. 791-92).

F. *Applying the New Framework to Cases Already in the System*

[92] When this Court released its decision in *Askov*, tens of thousands of charges were stayed in Ontario alone as a result of the abrupt change in the law. Such swift and drastic consequences risk undermining the integrity of the administration of justice.

[93] We recognize that this new framework is a departure from the law that was applied to s. 11(b) applications in the past. A judicial change in the law is presumed to operate retroactively and apply to past conduct (*Canada (Attorney General) v. Hislop*, [2007 SCC 10](#), [2007] 1 S.C.R. 429, at para. 84). Slightly more relaxed rules apply to judicial changes to the interpretation of constitutional provisions (para. 88). Transition periods, suspended declarations of invalidity, and purely prospective remedies are part of the discretionary remedial framework of our constitutional law (paras. 88-92; *R. v. Brydges*, [1990 CanLII 123 \(SCC\)](#), [1990] 1 S.C.R. 190, at pp. 217-18; *R. v. Feeney*, [1997 CanLII 343 \(SCC\)](#), [1997] 2 S.C.R. 117).

[94] Here, there are a variety of reasons to apply the framework contextually and flexibly for cases currently in the system, one being that it is not fair to strictly judge participants in the criminal justice system against standards of which they had no notice. Further, this new framework creates incentives for both the Crown and the defence to expedite criminal cases. However, in jurisdictions where prolonged delays are the norm, it will take time for these incentives to shift the culture. As well, the administration of justice cannot tolerate a recurrence of what transpired after the release of *Askov*,

and this contextual application of the framework is intended to ensure that the post-*Askov* situation is not repeated.

[95] The new framework, including the presumptive ceiling, applies to cases currently in the system, subject to two qualifications.

[96] First, for cases in which the delay *exceeds* the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice. For example, prejudice and the seriousness of the offence often played a decisive role in whether delay was unreasonable under the previous framework. For cases currently in the system, these considerations can therefore inform whether the parties' reliance on the previous state of the law was reasonable. Of course, if the parties have had time following the release of this decision to correct their behaviour, and the system has had some time to adapt, the trial judge should take this into account.

[97] Moreover, the delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems. Judges in jurisdictions plagued by lengthy, persistent, and notorious institutional delays should account for this reality, as Crown counsel's behaviour is constrained by systemic delay issues. Parliament, the legislatures, and Crown counsel need time to respond to this decision, and stays of proceedings cannot be granted *en masse* simply because problems with institutional delay currently exist. As we have said, the administration of justice cannot countenance a recurrence of *Askov*. This transitional exceptional circumstance recognizes that change takes time, and institutional delay — even if it is significant — will not automatically result in a stay of proceedings.

[98] On the other hand, the s. 11(b) rights of all accused persons cannot be held in abeyance while the system works to respond to this new framework. Section 11(b) breaches will still be found and

stays of proceedings will still be entered for cases currently in the system. For example, if the delay in a simple case vastly exceeds the ceiling because of repeated mistakes or missteps by the Crown, the delay might be unreasonable even though the parties were operating under the previous framework. The analysis must always be contextual. We rely on the good sense of trial judges to determine the reasonableness of the delay in the circumstances of each case.

[99] The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls *below* the ceiling. For these cases, the two criteria — defence initiative and whether the time the case has taken markedly exceeds what was reasonably required — must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. However, in close cases, any defence initiative during that time would assist the defence in showing that the delay markedly exceeds what was reasonably required. The trial judge must also still consider action or inaction by the accused that may be inconsistent with a desire for a timely trial (*Morin*, at p. 802).

[100] Further, if the delay was occasioned by an institutional delay that was reasonably acceptable in the relevant jurisdiction under the *Morin* framework before this decision was released, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

[101] We note that given the level of institutional delay tolerated under the previous approach, a stay of proceedings below the ceiling will be even more difficult to obtain for cases currently in the system. We also emphasize that for cases in which the charge is brought shortly after the release of this decision, the reasonable time requirements of the case must reflect this high level of tolerance for institutional delay in particular localities.

[102] Ultimately, for most cases that are already in the system, the release of this decision should not automatically transform what would previously have been considered a reasonable delay into an unreasonable one. Change takes time. In his dissenting opinion in *Mills v. The Queen*, [1986 CanLII 17](#)

(SCC), [1986] 1 S.C.R. 863, Lamer J. (as he then was) was alive to this concern and his comments are apposite here:

This case is the first to have presented this Court with the opportunity of establishing appropriate guidelines for the application of s. 11(b). The full scope of the section, and the nature of the obligation it has imposed upon the government and the courts has remained uncertain for the period prior to the rendering of this judgment.

Given this uncertainty and the terminative nature of the remedy for a violation of the section, i.e., a stay of proceedings, I am of the view that a transitional approach is appropriate, and indeed necessary, to enable the courts and the governments to properly discharge their burden under s. 11(b). This is not to say that different criteria ought to apply during the transitional period, that is, the period prior to the rendering of this judgment, but rather that the behaviour of the accused and the authorities must be evaluated in its proper context. In other words, it would be inaccurate to give effect to behaviour which occurred prior to this judgment against a standard the parameters of which were unknown to all. [Emphasis added; p. 948.]

[103] We echo Lamer J.’s remarks. For cases already in the system, the presumptive ceiling still applies; however, “the behaviour of the accused and the authorities” — which is an important consideration in the new framework — “must be evaluated in its proper context” (*Mills*, at p. 948). The reasonableness of a period of time to prosecute a case takes its colour from the surrounding circumstances. Reliance on the law as it then stood is one such circumstance.

[104] We disagree with Cromwell J. that our framework’s allowance for present realities somehow creates a *Charter* amnesty. For cases currently in the system, the s. 11(b) right will receive no less protection than it does now. The point is that, on an ongoing basis, our framework has the potential to effect positive change within the justice system, rather than succumb to the culture of complacency we have described.

G. *Concluding Comments on the New Framework*

[105] The new framework for s. 11(b) can be summarized as follows:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court

(or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.

- **Once the presumptive ceiling is exceeded**, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.
- **Below the presumptive ceiling**, in clear cases, the defence may show that the delay is unreasonable. To do so, the defence must establish two things: (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (2) the case took markedly longer than it reasonably should have.
- **For cases currently in the system**, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

[106] As part of the process of developing this framework, we conducted a qualitative review of nearly every reported s. 11(b) appellate decision from the past 10 years, and many decisions from trial courts. These cases assisted in developing the definition of exceptional circumstances, as they highlighted the types of circumstances that judges have found to justify prolonged delays. By reading these cases with the new framework in mind, we were able to get a rough sense of how the new framework would have played out in some past cases. Indeed, we note that in the seminal case of *Askov*, the delay was in the range of 30 months, as it was in *Godin* some 19 years later, and in both cases, this Court found the delays to be unreasonable.

[107] It is also clear from this case law review that the ceiling will not permit the parties or the courts to operate business as usual. The ceiling is designed to encourage conduct and the allocation of resources that promote timely trials. The jurisprudence from the past decade demonstrates that the current approach to s. 11(b) does not encourage good behaviour. Finger pointing is more common than

problem solving. This body of decisions makes it clear that the incentives inherent in the status quo fall short in the ways we have described.

[108] We acknowledge that this new framework represents a significant shift from past practice. First, its standpoint is prospective. Participants in the criminal justice system will know, *in advance*, the bounds of reasonableness so proactive measures can be taken to remedy any delay. And the public will more clearly understand what it means to hold a trial within a reasonable time. Enhanced clarity and predictability befits a *Charter* right of such fundamental importance to our criminal justice system.

[109] Second, the new framework resolves the difficulties surrounding the concept of prejudice. Instead of being an express analytical factor, the concept of prejudice underpins the entire framework. Prejudice is accounted for in the creation of the ceiling. It also has a strong relationship with defence initiative, in that we can expect accused persons who are truly prejudiced to be proactive in moving the matter along.

[110] Prejudice has been one of the most fraught areas of s. 11(b) jurisprudence for over two decades. Understanding prejudice as informing the setting of the ceiling, rather than treating prejudice as an express analytical factor, also better recognizes that, as we have said, prolonged delays cause prejudice to not just specific accused persons, but also victims, witnesses, and the system of justice as a whole.

[111] Third, the new framework reduces, although does not eliminate, the need to engage in complicated micro-counting. While judges will still have to determine defence delay, the inquiry beneath the ceiling into whether the case took markedly longer than it reasonably should have replaces the micro-counting process with a global assessment. This inquiry need only arise if the accused has taken meaningful and sustained steps to expedite matters. And above the ceiling, a s. 11(b) analysis is triggered only where the Crown seeks to rely on exceptional circumstances. A framework that is simpler to apply is itself of value: “. . . we must remind ourselves that the best test will be relatively easy to apply; otherwise, stay applications themselves will contribute to the already heavy load on trial judges and compound the problem of delay” (*Morin*, per McLachlin J., at p. 810).

[112] In addition, the new framework will help facilitate a much-needed shift in culture. In creating incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem solving. From the Crown's perspective, the framework clarifies the content of the Crown's ever-present constitutional obligation to bring the accused to trial within a reasonable time. Above the ceiling, the Crown will only be able to discharge its burden if it can show that it should not be held accountable for the circumstances which caused the ceiling to be breached because they were genuinely outside its control. Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise. Below the ceiling, a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary.

[113] The new framework also encourages the defence to be part of the solution. If an accused brings a s. 11(b) application when the total delay (minus defence delay and delay attributable to exceptional circumstances that are discrete in nature) falls below the ceiling, the defence must demonstrate that it took meaningful and sustained steps to expedite the proceedings as a prerequisite to a stay. Further, the deduction of defence delay from total delay as a starting point in the analysis clearly indicates that the defence cannot benefit from its own delay-causing action or inaction.

[114] The new framework makes courts more accountable, too. Absent exceptional circumstances, the ceiling limits the extent to which judges can tolerate delays before a stay must be imposed. Indeed, courts are important players in changing courtroom culture. Many courts have developed robust case management and trial scheduling processes, focussing attention on possible sources of delay (such as pre-trial applications or unrealistic estimates of trial length) and thereby seeking to avoid or minimize unnecessary delay. Some courts, however, have not.

[115] As we have said, this Court also has a role to play. On many occasions, this Court has established detailed guidelines and minimum requirements to give meaningful content to constitutional rights in the criminal law context (see, e.g., *R. v. Fearon*, [2014 SCC 77](#), [2014] 3 S.C.R. 621, at para. 83; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002 SCC 61](#), [2002] 3 S.C.R. 209, at para. 49; *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015 SCC 7](#), [2015] 1 S.C.R. 401, at paras. 53-56). Section 11(b) has received its content in much the same way. Cromwell J.'s

framework, like ours, and like *Morin* and *Askov*, is entirely judicially created. And, like ours, and like *Morin* and *Askov*, it relies heavily on numerical guidelines (with such guidelines acting as guideposts, not absolute limitation periods). Our approach is entirely consistent with the judicial role.

[116] Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts. As Sharpe J.A. wrote in *R. v. Omar*, 2007 ONCA 117, 84 O.R. (3d) 493:

The judicial system, like all other public institutions, has limited resources at its disposal, as do the litigants and legal aid. . . . It is in the interest of all constituencies — those accused of crimes, the police, Crown counsel, defence counsel, and judges both at trial and on appeal — to make the most of the limited resources at our disposal. [para. 32]

[117] Sharpe J.A.’s reference to finite resources is an important point. We are aware that resource issues are rarely far below the surface of most s. 11(b) applications. By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.

VI. Application to This Case

[118] Having established the new framework for s. 11(b), we now turn to the case before us.

[119] The first step in determining whether Mr. Jordan’s s. 11(b) right was infringed is to determine the total delay between the charges and the end of trial. In this case, the total delay was 49.5 months.

[120] Turning to the first case-specific factor that must be accounted for, the next step is to determine whether any of that delay was waived or caused solely by the defence. We see no reason to interfere with the trial judge’s finding that four months of this delay were waived by Mr. Jordan when he changed counsel shortly before the trial was set to begin, necessitating an adjournment.

[121] The more difficult assessment is whether any of the remaining delay was caused solely by the action or inaction of the defence. The Crown argues that the trial judge erred by failing to attribute significant periods of delay to the defence, and that the defence was equally culpable in the delay in bringing this matter to trial. The Crown cited several examples: the defence consented to numerous adjournments; defence counsel initially suggested the four-day estimate for the preliminary inquiry; defence counsel's unavailability resulted in the preliminary inquiry not being completed as scheduled in December 2010; defence counsel failed to respond to the Crown's offer in July 2011 of an earlier trial; and there was no evidence that defence counsel would have been available for trial earlier than June 2012.

[122] While these instances that the Crown points to are symptomatic of the systemic complacency towards delay that we have described, most of them are not attributable solely to the defence. The Crown and defence both share responsibility for the preliminary inquiry underestimation. Similarly, responsibility for the delay resulting from consent adjournments and the defence's failure to respond to the Crown's offer of a shorter trial time in July 2011 should not be borne solely by the defence. These adjournments were part of the legitimate procedural requirements of the case, and it does not appear from the record that any occurred when the Crown and court were otherwise ready to proceed. Further, there was no evidence that, had the defence responded to the Crown's offer of an earlier trial, the Crown and the court would have been able to accommodate an earlier date. Rather, the only evidence before the trial judge was that the earliest available trial dates were in September 2012.

[123] The defence should, however, bear responsibility for the delay resulting from the adjournment of the preliminary inquiry necessitated by defence counsel's unavailability for closing submissions on December 22, 2010, the last day scheduled for the preliminary inquiry. We would only attribute one and a half months of that delay to the defence, however, given the evidence that Crown counsel was unable to attend at the first available continuation date for the preliminary inquiry of February 3, 2011.

[124] In total then, four months of delay were waived by the defence and one and a half months of delay were caused solely by the defence. This leaves a remaining delay of 44 months, an amount that

vastly exceeds the presumptive ceiling of 30 months in the superior court. The burden is therefore on the Crown to demonstrate that the delay is reasonable in light of exceptional circumstances.

[125] There is nothing in the record to indicate that any discrete, exceptional circumstances arose. And although particularly complex cases may present an exceptional circumstance, this is not one of those cases. In terms of the legal issues, while Mr. Jordan was initially charged along with nine other co-accused, this number quickly dropped as the case progressed. At the time of trial, only one co-accused remained on the indictment with Mr. Jordan. Further, none of the alleged offences involved novel or complex points of law. Relatively few pre-trial applications were scheduled. In short, the legal issues in Mr. Jordan's case were not particularly complex.

[126] As for the evidence, it was substantial but it was relatively straightforward. It consisted of surveillance evidence by police officers, undercover buys by police officers, a small amount of expert evidence regarding how dial-a-dope operations are conducted, and a search warrant for Mr. Jordan's apartment. There was nothing particularly complex about this evidence.

[127] In the end, while the case against Mr. Jordan may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify a delay of 44 months (excluding defence delay).

[128] However, since Mr. Jordan's charges were brought prior to the release of this decision, we must also consider whether the transitional exceptional circumstance justifies the delay. In our view, it does not. We recognize that the Crown was operating without notice of this change in the law within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable.

[129] We note that a good portion of the delay resulted from the inaccurate assessment of the time required for the preliminary inquiry, and in particular, the Crown's failure to communicate with the parties with a view to tying down the evidence that it needed to call at the preliminary inquiry. A similar

problem occurred with the trial. While the fault for the delay in bringing this matter to trial certainly did not lie solely with Crown counsel, it is equally clear that the Crown prosecutors assigned to the case did not have a solid plan for bringing the matter to trial within a reasonable time. The Crown was aware of potential s. 11(b) issues as early as December 2010, yet it took few steps to expedite the matter. Instead, the Crown was content to rely on an overly large estimate of trial time without attempting to streamline the issues or consider severing the co-accused from the indictment.

[130] The Crown did make a good faith effort to bring the matter to trial more quickly in light of the s. 11(b) issue when Crown counsel wrote to defence counsel in July 2011 with a revised estimate of the length of the Crown's case. But by this point, approximately 31 months had already elapsed from the date of Mr. Jordan's charges. This is a substantial length of time to wait before making efforts to expedite the matter. At this point, the scheduled trial was still more than a year away.

[131] While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. The previous state of the law cannot reasonably support the Crown's conduct. And the systemic delay problems that existed in the Surrey Provincial Court at the time cannot justify the delay either. As discussed, much of the institutional delay could have been avoided had the Crown proceeded on the basis of a more reasonable plan.

[132] To the extent that the trial judge held that this delay was reasonable under the *Morin* framework, he erred. Citing the Court of Appeal's decision in *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74, at para. 52, he incorrectly held that institutional delay is entitled to less weight than delay within the Crown's control. The parties agree that this was in error.

[133] It follows that the delay was unreasonable and Mr. Jordan's s. 11(b) right was infringed.

VII. Conclusion

[134] The right to a trial within a reasonable time has aptly been described as "discipline for the justice system", in that it may cause "discomfort in the short term but [it will bring] achievement in the long term" (Code, at pp. 133-34).

[135] In this case, the system was undisciplined. It failed. Mr. Jordan's s. 11(b) right was breached when it took 49.5 months to bring him to trial. All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. There is simply no reasonable explanation for why the matter took as long as it did. The appeal must be allowed, the convictions set aside and a stay of proceedings entered.

[136] We agree with Cromwell J. that our differences of opinion are indeed fundamental. In our view, given the considerable doctrinal and practical problems confronting the *Morin* approach, further minor refinements to the model are incapable of responding to the challenges facing timely justice in this country.

[137] Real change will require the efforts and coordination of all participants in the criminal justice system.[\[5\]](#)

[138] For Crown counsel, this means making reasonable and responsible decisions regarding who to prosecute and for what, delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently. It may also require enhanced Crown discretion for resolving individual cases. For defence counsel, this means actively advancing their clients' right to a trial within a reasonable time, collaborating with Crown counsel when appropriate and, like Crown counsel, using court time efficiently. Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.

[139] For the courts, this means implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.

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

[141] Thus, broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Timely trials are possible. More than that, they are constitutionally required.

The reasons of McLachlin C.J. and Cromwell, Wagner and Gascon JJ. were delivered by

CROMWELL J. —

I. Introduction

A. Overview

[142] Every person charged with an offence in Canada has a constitutional right to be tried within a reasonable time: *Canadian Charter of Rights and Freedoms*, s. 11(b). The right has ancient origins and finds expression across legal systems. In the Great Charter of 1215 (the *Magna Carta*) the King promised that “[t]o no one will we . . . delay right or justice”: clause 40. The *International Covenant on Civil and Political Rights* (1966), Can. T.S. 1976 No. 47, calls for trial “without undue delay”: art. 14(3) (c). A right of this nature is also found in the United States, New Zealand, Australia, India, South Africa, the Caribbean, the United Kingdom, Ireland, and in the European Union, among others: see Justice C. Hill and J. Tatum, “Re-Chartering an Old Course Rather than Staying Anew in Remediating Unreasonable Delay under the *Charter*” (paper presented at the Crown Defence Conference in Winnipeg September 2012) (online), at p. 59.

[143] This Court over the last 30 years has developed a sophisticated jurisprudence for dealing with allegations of s. 11(b) breaches: see *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863; *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588; *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659; *R. v. Smith*, 1989 CanLII 12 (SCC), [1989] 2 S.C.R. 1120; *R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199; *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771; and *R. v. Godin*, 2009 SCC 26, [2009] 2 S.C.R. 3. The framework developed in this jurisprudence, which is most fully set out in *Morin*, identifies the many considerations that should be taken into account in order to determine whether the time to try a particular criminal case is reasonable.

[144] Determining reasonableness requires a court to balance a number of factors, including the length of the delay, waiver of any time periods by the accused, the reasons for the delay, including the time requirements for the case, the actions of the parties, limitations on institutional resources, and prejudice to the person charged. It is necessary to consider these factors on a case-by-case basis: the answer to the question of whether an accused is tried within a reasonable time is inherently case-specific.

[145] There is much wisdom, based on accumulated experience, in the Court's jurisprudence about unreasonable delay. But the Court has made adjustments over time and has been clear that further adjustments will likely need to be made in the future. As Sopinka J. wrote in *Morin*, "Embarking as we did on uncharted waters it is not surprising that the course we steered has required, and may require in the future, some alteration in its direction to accord with experience": p. 784. To be sure, some issues that need clarification have arisen in the case law and this appeal provides an opportunity to provide such clarification. But the orientation of our jurisprudence to case-specific determinations of reasonableness is sound. With modest adjustments to make the analysis more straightforward and with some additional clarification, that approach will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations.

[146] My reasons on this appeal and those of my colleagues, Justices Moldaver, Karakatsanis and Brown, present contrasting visions of how our s. 11(b) jurisprudence should develop.

[147] My colleagues would define reasonableness by assigning a number of months of delay — “ceiling[s]” (para. 5) — that will be taken to be reasonable unless the accused establishes not only that the case took markedly longer than it reasonably should have, but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. As I see it, this is not an appropriate approach to interpreting and applying the s. 11(b) right for several reasons. First, reasonableness cannot be captured by a number; the ceilings substitute a right for “trial under the ceiling[s]” (para. 74) for the constitutional right to be tried within a reasonable time. Second, creating these types of ceilings is a task better left to legislation. Third, the ceilings are not supported by the record or by my colleagues’ analysis of the last 10 years of s. 11(b) jurisprudence and have not been the subject of adversarial debate. Fourth, there is a serious risk that the introduction of these ceilings will put thousands of cases at risk of being judicially stayed. Fifth, the ceilings are unlikely to achieve the simplicity that is claimed for them. Finally, setting aside 30 years of jurisprudence and striking out in this new direction is unnecessary. My colleagues easily conclude that our existing jurisprudence supplies a clear answer to this appeal: paras. 125 and 128. I agree with them that it does: the appeal must be allowed and a stay of proceedings entered.

[148] In contrast, my view is that a reasonable time for trial under s. 11(b) cannot and should not be defined by numerical ceilings. The accumulated wisdom of the past 30 years of jurisprudence, modestly clarified, provides a workable framework to determine whether the right to be tried in a reasonable time has been breached in a particular case.

B. *The Nature of the Section 11(b) Right*

[149] The right to be tried within a reasonable time is easy to state and understand: people charged with offences should be tried within a reasonable time. Determining whether the right has been breached in a specific case, however, may be far from straightforward. The right is by its very nature fact-sensitive and case-specific. There are several reasons for this.

[150] First, the term “delay” is not entirely apt. While delay has a pejorative connotation, delay, in the sense of the passage of time, is inherent in any legal proceeding. In fact, some delay may be desirable. As stated by Lamer J., dissenting but not on this point, with Dickson C.J. concurring, undue

haste itself can make a trial unfair: see *Mills*, at p. 941. Therefore, delay only becomes problematic when it is unreasonable.

[151] Second, unreasonableness is not conducive to being captured by a set of rules: a reasonable time for the disposition of one case may be entirely unreasonable for another. Reasonableness is an inherently contextual concept, the application of which depends on the particular circumstances of each case. This makes it difficult and in fact unwise to try to establish the reasonable time requirements of a case by a numerical guideline. Inevitably, the ceiling will be too high for some cases and too low for others. More fundamentally, a fixed guideline is inconsistent with the notion of reasonableness in the context of the infinitely varied situations that arise in real cases.

[152] Third, the *Charter* protects only against state action. Even if a case took too long to be dealt with, there will only be a breach of the right if that unreasonable delay counts against the state. And so it follows that the focus is not on unreasonable delay in general, but on unreasonable delay that properly counts against the state. We must therefore attribute responsibility for the delay that has occurred and only factor in the delay which can fairly be counted against the state in deciding whether the *Charter* right has been infringed.

[153] Finally, s. 11(b) implicates several distinct interests, both individual and societal. Excessive delay implicates the liberty, security, and fair trial interests of persons charged, as well as society's interest in the prompt disposition of criminal matters and in having criminal matters determined on their merits: *Morin*, at p. 786. Historically, the liberty interest was the focus: *Mills*, at p. 918, per Lamer J.; *Rahey*, at p. 642, per La Forest J., concurring.

[154] More recently, the “overlong subjection to the vexations and vicissitudes of a pending criminal accusation” — the stigmatization, loss of privacy, stress and anxiety of those awaiting trial — has been recognized as implicating the security of the person charged: *Rahey*, at p. 605, per Lamer J., quoting A. G. Amsterdam, “Speedy Criminal Trial: Rights and Remedies” (1975), 27 *Stan. L. Rev.* 525, at p. 533; see also *Mills*, at pp. 919-20. As Cory J. for the majority put it in *Askov*, at p. 1219:

There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an

unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family.

[155] A third interest protected by s. 11(b) is the accused's interest in mounting a full and fair defence. As Sopinka J. said in *Morin*, the "right to a fair trial is protected [by s. 11(b)] by attempting to ensure that proceedings take place while evidence is available and fresh": p. 786. When delay is present, "justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate": p. 810, per McLachlin J. (as she then was), concurring. Delay "can prejudice the ability of the defendant to lead evidence, cross-examine witnesses, or otherwise to raise a defence": *Godin*, at para. 30.

[156] Finally, the right to be tried within a reasonable time has a societal dimension: see e.g. *Askov*, at p. 1219, per Cory J. But societal interests do not all point in the same direction. On one hand, the wider community has an interest in "ensuring that those who transgress the law are brought to trial and dealt with according to the law" (pp. 1219-20) and in "preventing an accused from using the [s. 11(b)] guarantee as a means of escaping trial": p. 1227. On the other hand, there is a broad societal interest in ensuring that individuals on trial are "treated fairly and justly": p. 1220. The community benefits "by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law" and witnesses and victims benefit from a prompt resolution of a criminal matter: *ibid*.

[157] While the right to be tried within a reasonable time implicates all of these interests, it is important to recognize that it is a free-standing right. As Martin J.A. put it in *R. v. Beason* (1983), [1983 CanLII 1873 \(ON CA\)](#), 36 C.R. (3d) 73 (Ont. C.A.), at p. 96, cited with approval in *Morin*, at p. 786: "Trials held within a reasonable time have an intrinsic value." As such, actual impairment of the various interests protected by s. 11(b) "need not be proven by the accused to render the section operative": *Conway*, at p. 1694, per Lamer J.; see also *Mills*, at p. 926, per Lamer J. The proper approach is to "recognize that prejudice underlies the right, while recognizing at the same time that actual proven prejudice need not be, indeed, is not, relevant to establishing a violation of s. 11(b)": *Mills*, at p. 926, per Lamer J.

[158] To sum up, the right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific. Like other broadly expressed constitutional guarantees, its application to specific cases is

unavoidably complex. Our experience to date suggests that the relevant factors and general approach set out in *Morin* respond to these complexities. However, experience also suggests that the way in which *Morin* has come to be applied is unduly complicated and that aspects of the relevant factors require clarification. This can be done without losing the case-specific focus on whether a particular case has been or will be tried within a reasonable time.

II. The Analytical Framework

[159] The purpose of carrying out the s. 11(b) analysis is to decide whether the length of time to try the case which counts against the state is “substantially longer than can be justified on any acceptable basis”: *Smith*, at p. 1138. If so, the delay is unreasonable and in breach of s. 11(b).

[160] The *Morin* framework identifies and describes the many factors that are relevant to whether a delay is reasonable or unreasonable. But one of the limitations of the framework is that it provides little assistance as to how these various factors are to be weighed in order to reach a final conclusion. In order to simplify and clarify this analysis, it will be helpful to regroup the *Morin* considerations under four main analytical steps, which may be framed as questions to guide a court when confronted with a s. 11(b) claim. Doing so will make what is being considered and why more apparent, without losing the necessarily case-specific focus of the reasonableness inquiry. The questions are:

1. Is an unreasonable delay inquiry justified?
2. What is a reasonable time for the disposition of a case like this one?
3. How much of the delay that actually occurred counts against the state?
4. Was the delay that counts against the state unreasonable?

[161] This framework, along with elaboration of the relevant considerations, will clarify questions that have arisen in this case, namely: whether different periods of delay receive different

weighting in the analysis; what is meant by “waiver” by the accused; and what is the role of prejudice in the analysis.

[162] I will now turn to a brief elaboration of each of these four analytical steps.

A. *Is an Unreasonable Delay Inquiry Justified?*

[163] The accused must establish as a threshold matter that there is a basis for the *Charter* inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length is such that it merits further inquiry. As stated by McLachlin J. in her concurring opinion in *Morin*, this determination can be made by referring to “‘norms’ representing the time reasonably taken to bring the offence charged to the point of trial in all the circumstances”: p. 811. If there is no reasonable basis to think that the delay in question is excessive, the accused’s s. 11(b) claim fails and the inquiry stops at this stage.

B. *What Is a Reasonable Time for the Disposition of a Case Like This One?*

[164] This second analytical step is to determine on an objective basis what would be a reasonable time for the trial of a case like the one under review. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. The period of institutional delay is the period that is reasonably required for the court to be ready to hear the case (including interlocutory motions) once the parties are ready to proceed. The reasonable inherent time requirements of the case represent the period of time that is reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court.

[165] Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial courts and six to eight months before the superior courts (see *Morin*, at pp. 798-99). The inherent time requirements of a case, on the other hand, are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence in relation to the reasonable time requirements of a case of a similar nature to the

one before the court. As I will describe below, these two elements must be distinguished in the s. 11(b) analysis.

(1) Institutional Delay

[166] Institutional delay is the period of time that results from the inadequacy of institutional resources. The period of institutional delay “starts to run when the parties are ready for trial but the system cannot accommodate them”: *Morin*, at pp. 794-95. At this stage of the objective analysis, the court will determine an acceptable period of time for the court to be available to hear the case once the parties are ready to proceed.

(a) *The Morin Administrative Guidelines Are Appropriate for Determining Institutional Delay*

[167] As stated in *Morin*, “institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the *Charter*”: p. 794. The difficulty arises because we do not live in a “Utopia” in which there is always fully adequate funding, personnel, and facilities in order to administer criminal matters: p. 795. The courts must account for both the fact that the state does not have unlimited funds to attribute to the administration of the criminal justice system and the fact that an accused has a fundamental *Charter* right to be tried within a reasonable time: *ibid*.

[168] The period of institutional delay is generally not case-specific, unlike the inherent time requirements of a particular case. Institutional delay is therefore more amenable to generalization based on evidence than is the element of the reasonable inherent time requirements of particular types of cases. Moreover, institutional delay is largely the result of government choices about how to allocate resources. Accordingly, the courts “cannot simply accede to the government’s allocation of resources and tailor the period of permissible delay accordingly”: *Morin*, at p. 795.

[169] The *Morin* administrative guidelines, namely eight to ten months for trials in provincial courts and six to eight months for trials before the superior courts, were established on the basis of extensive statistical and expert evidence. There is no basis in the record in this case to revise them and I would therefore confirm these guidelines as appropriate for determining reasonable institutional delay.

(b) *Determining Institutional Delay*

[170] I would add two comments about determining institutional delay using the *Morin* administrative guidelines.

[171] First, in determining where a particular case should fit within the range established by the *Morin* guidelines, the court should consider whether the accused is in remand custody pending trial or subject to stringent bail conditions in identifying a reasonable period of institutional delay for a particular type of case. The period of reasonable institutional delay should generally be at the lower end of the range in these circumstances because these types of cases should receive higher priority by the courts. This period might even be shortened below the range described in the guidelines. As Sopinka J. put it *Morin*:

If an accused is in custody or, while not in custody, subject to restrictive bail terms or conditions or otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. [p. 798]

[172] Second, the guidelines should not be understood as precluding allowance for any “sudden and temporary strain on resources” that causes a temporary congestion in the courts: *Morin*, at p. 797. As I discuss at the final step of the analysis, even a properly resourced system will occasionally buckle under an unusually heavy onslaught of work.

(2) The Inherent Time Requirements of the Case

(a) *Introduction*

[173] The inherent time requirements of a case include the time periods that are reasonably necessary to conclude the proceedings for a case similar in nature to the one before the court. In *Morin*, Sopinka J. described some of the inherent time requirements of the case as including the time required “in processing the charge, retention of counsel, applications for bail and other pre-trial procedures” along with “police and administration paperwork, disclosure, etc.”: pp. 791-92. Separate consideration

of these inherent time requirements is essential given the almost infinitely variable circumstances of particular cases.

[174] As Lamer J. described in *Mills*, the inquiry into the inherent time requirements of a case will necessarily require judges to “rely heavily upon their practical experience and good sense”: p. 932. Judges should “undertake an objective assessment of the delay which may be required in the circumstances of the case”: *ibid.* This inquiry is “wholly objective” (p. 931):

. . . the court must fix an objective and realistic time period for the preparation of the type of case which is at bar. It must determine the period which would normally be required, taking into account the number of charges, the number of accused, the complexity and volume and similar objective elements, for the preparation and completion of the case [Emphasis added; p. 932.]

In the end, we must rely on the good sense and experience of trial judges to determine what would constitute a reasonable period of time required for a particular type of case.

[175] The inherent time requirements of a case are to be determined objectively on a case-by-case basis.

(b) *Determining the Inherent Time Requirements*

[176] The elements to be considered are the amounts of time reasonably required in processing the charge, retaining counsel, applying for bail, completing police and administration paperwork, making disclosure, dealing with pre-trial applications, preparing for and arguing the preliminary inquiry and/or the trial, and trying a case similar in the nature to the one before the court. Included are such things as the time reasonably required to reschedule after a mistrial, the time to resolve legal issues, the time to convene a judicial pre-trial, and a reasonable time to try the case: see e.g. Hill and Tatum, at pp. 14-15.

[177] If a case is more complex, the estimate of the reasonable time period required to dispose of the case will be higher. Given the type of case before the court, it may be expected that there will be more pre-trial motions, or particular types of motions. Most s. 11(b) applications are considered after the

fact, and any incidental proceedings to a trial could help guide this analysis. However, courts should avoid *ex post facto* analysis focusing on whether certain motions in the case before them were unreasonably or unnecessarily taken. The objective nature of this inquiry involves an analysis of the type of case before the court, and all the motions and other pre-trial procedures that could reasonably be expected in such a case.

[178] One example is a case involving a large amount of disclosure, where it could reasonably be expected that such disclosure would lengthen the inherent time requirements to try the case. However, disclosure may be a major factor contributing to delay and should be approached on the basis that the Crown has a duty to make disclosure fully, but also promptly. And defence counsel must not engage in unnecessary fishing expeditions. The reasonable estimation of the objective inherent time requirements of a case must assume both prompt disclosure and the absence of unnecessary fishing expeditions.

[179] Also included in the inherent time requirements of a case is the time required for counsel, both Crown and defence, to be available and to prepare the case: see *Morin*, at p. 791. In *Morin*, Sopinka J. noted that the courts must take account of the fact that “counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case”: p. 792. Or, as I put it in *Godin*, s. 11(b) does not require counsel to “hold themselves in a state of perpetual availability”: para. 23. The court should estimate the reasonable amount of time required for Crown and defence counsel to prepare and to make themselves available in the type of case before them. This estimation is objective, and does not include an analysis of the record which may demonstrate that counsel was available before or after this estimated time period.

[180] *Morin* provides an example of how this may be done. Sopinka J. specifically found that “[a]n additional period for inherent time requirements must be allowed” for the post-preliminary inquiry “second stage”: p. 793. He further inferred, absent concrete evidence to the contrary, that counsel would have required 2 months to make themselves prepared and available for trial and for the matter to be heard, leaving the other 12 months to institutional delay: pp. 804-6. Similarly, in *R. v. Sharma*, 1992 CanLII 90 (SCC), [1992] 1 S.C.R. 814, at pp. 825-26, Sopinka J. estimated 3 months of inherent time requirements in the 12-month period from the set date appearance to the trial date.

[181] Finally, in estimating a reasonable time period for the inherent time requirements of a case, the court should also take into account the liberty interests of the accused. If an accused is in custody or under stringent conditions of release, such as house arrest, counsel and the court system should accord his or her case priority over those of accused persons subject to less onerous conditions pending trial.

(c) *Do the Periods of Institutional Delay and Inherent Time Requirements Overlap?*

[182] The question has arisen of whether the periods of institutional delay (i.e. the time for the court to be ready to hear the matter) and inherent delay (i.e. the time reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court) overlap. On occasion, the elements of institutional and inherent requirements have been intermingled in the application of the s. 11(b) framework such as in considering periods of time during which both counsel and the court are unavailable: see e.g. C. Ruby, “Trial Within a Reasonable Time under Section 11(b): the Ontario Court of Appeal Disconnects from the Supreme Court” (2013), 2 C.R. (7th) 91, at p. 94, citing *Morin*, at p. 793. The short answer to this question of overlap, however, is that, on the objective determination of how much time the case should reasonably take, the two periods are distinct.

[183] The reasonable inherent time requirements are concerned with identifying a reasonable period to get a case similar in nature to the one before the court ready for trial and to complete the trial. The inherent time requirements are not determined, for instance, with reference to the actual availability of particular counsel and court, but rather they are determined by an objective estimation. The other element, the acceptable period of institutional delay, is the amount of time reasonably required for the court to be ready to hear the case once the parties are ready to proceed. This is expressed with reference to the *Morin* guidelines. These guidelines do not relate to inherent time requirements; they reflect only the acceptable period of *institutional delay*.

(3) Conclusion on Objectively Reasonable Time Requirements

[184] To sum up, in assessing a claim under s. 11(b), the courts must first determine the reasonable time requirements, objectively viewed, for the type of case before them. Simply put, the courts must determine how long the case should reasonably take (or have taken). This consists, first, of

the length of time required for that type of case to be prepared, heard, and decided (i.e. the case's inherent time requirements). The second element is the additional time required for the court to be available to hear the parties beyond the point at which they should be prepared to proceed (i.e. the period of institutional delay). This period of institutional delay is assessed by applying the administrative guidelines developed in *Askov* and *Morin*: eight to ten months in provincial court and six to eight months in superior court. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse for excessive delay.

C. *How Much of the Delay That Actually Occurred Counts Against the State?*

[185] Having addressed the objective elements of the analysis — the reasonable institutional delay and the reasonable inherent time requirements of the case — the judge moves on to compare those objectively reasonable time periods against the time actually taken in the case before the court, to determine whether the overall delay is reasonable. Delay in excess of the objectively required time may be reasonable if it is not attributable to the state. As mentioned at the outset, s. 11(b) protects only against unreasonable delay attributable to the state. The period fairly attributable to the state excludes any time period fairly attributable to the accused — including “waiver” — and any extraordinary and unavoidable delays that should not be counted against the state. The main task at this step of the analysis is to identify any portion of the actual elapsed time that should not count against the state.

(1) Delay Attributable to the Accused

[186] Delay attributable to the accused includes any period “waived” by the accused, and other delays attributable to the accused.

(a) *Waiver*

[187] The concept of “waiver” by the accused in the s. 11(b) context has given rise to some confusion and this case provides an opportunity to bring further clarity to that issue.

[188] First, the language of “waiver” in this context may be misleading. As stated by this Court in *Conway*, when the courts speak of “waiver” in the context of s. 11(b), “it is not the right itself which is being waived but merely the inclusion of specific periods in the overall assessment of reasonableness”: p. 1686. This means that periods of time to which the accused has or is deemed to have agreed will not count towards any determination of unreasonable delay.

[189] Second, there is admittedly some lack of clarity in our jurisprudence as to whether the accused’s consent to an adjournment sought by the Crown constitutes “waiver” of the resulting delay. In *Smith*, this Court created a rebuttable inference of waiver if defence consents to a future trial date. This proposition was qualified, however, by the point that “inaction or acquiescence on the part of the accused, short of waiver”, does not result in a forfeiture of an accused’s s. 11(b) rights: *Smith*, at p. 1136. In *Morin*, Sopinka J. explained that the accused’s consent to a trial date “can give rise to an inference of waiver”, but this is not the case “if consent to a date amounts to mere acquiescence in the inevitable”: p. 790. This Court, albeit in very short decisions, upheld this approach in *R. v. Brassard*, 1993 CanLII 42 (SCC), [1993] 4 S.C.R. 287, at p. 287, and *R. v. Nuosci*, 1993 CanLII 40 (SCC), [1993] 4 S.C.R. 283, at p. 284, stating that consent to a future date *will* be characterized as waiver in the absence of evidence that it is acquiescence.

[190] A rebuttable inference of waiver from the accused’s consent to an adjournment does not sit well with the settled law that waiver must be clear, unequivocal and must be established by the Crown: see e.g. *Askov*, at p. 1232. As noted in *Morin*, the waiver must be done “with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights”, and such a test is “stringent”: p. 790.

[191] I conclude that, when the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused’s conduct reveals something more than “mere acquiescence in the inevitable” and that it meets the high bar of being clear, unequivocal, and informed acceptance that the period of time will not count against the state.

(b) *Other Delay Attributable to the Accused*

[192] All steps that are reasonably necessary to make full answer and defence are properly part of the inherent time requirements of the case and do not count against either the Crown or the accused. However, delay resulting from unreasonable actions solely attributable to the accused must be subtracted from the period for which the state is responsible.

[193] Unreasonable actions by the accused may take diverse forms, such as last-minute changes in counsel or adjournments flowing from a lack of diligence (e.g. failure to pursue or review disclosure in a timely way; pursuit of unnecessary information; failure to attend court appearances or to give timely notice of intended *Charter* applications, particularly during case scheduling; unreasonable rejection of earlier dates for preliminary hearing, trial or other court appearances (see Hill and Tatum, at pp. 17-18); and a lack of sufficient effort to accommodate dates available to the court and the prosecution). It is obvious that delays caused by attempts to obstruct the course of the trial, that amount to “deliberate and calculated tactic[s] employed to delay the trial”, or other vexatious or bad faith conduct by the accused, cannot count against the state: *Askov*, at p. 1228.

[194] The question of whether the actions of the accused were unreasonable must be viewed through the lens of reasonable conduct of counsel and the accused at the time the judgments had to be made, not with the benefit of hindsight. The accused must not be penalized for taking all reasonable steps to make full answer and defence even if, with the benefit of hindsight, they were not particularly fruitful.

(2) Extraordinary and Unavoidable Delays That Should Not Count Against the State

[195] It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state. Such time periods could include unavoidable delays due to inclement weather or illness of a trial participant.

D. *Was the Delay That Counts Against the State Unreasonable?*

[196] At this point in the analysis, the judge has determined the reasonable time a case ought to have taken, and the period of time that fairly counts against the state that it actually took. The next and

final step is to determine whether this actual period of time exceeds the reasonable time by more than can be justified on any acceptable basis. This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

(1) Can the Delay Beyond What Would Have Been Reasonable Be Justified?

[197] Determining whether the actual delay was longer than what would have been reasonable is a simple matter of arithmetic. However, qualifying the extent of that excess delay as justified or not requires evaluation. As stated in *Morin*, at p. 787: “The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula” but rather by judicial determination.

[198] Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can show that the delay was justified having regard to the length of the excess delay balanced against certain other factors described below. The point at which the amount of time beyond what would have been a reasonable delay becomes unreasonable cannot be described with precision. We can say, however, that where the delay exceeds what would have been reasonable, justification is required and, as the length of the excess delay increases, justification will be more difficult. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. As I will discuss, given proof of actual prejudice to the accused or of abusive or negligent conduct on the part of the Crown which contributed to the delay, justification may be found to be lacking.

[199] The focus must remain on the fundamental question at this point in the analysis: whether the amount of excess delay can be “justified on any acceptable basis”: *Smith*, at p. 1138.

(2) The Role of Prejudice in the Analysis

[200] The role of prejudice in the unreasonable delay analysis has become unduly complicated. The jurisprudence has distinguished between inferred and actual prejudice and, in some cases, it appears that it has been almost impossible to succeed on an unreasonable delay claim without proof of either type of prejudice.

[201] I would clarify the role of prejudice in the following ways.

[202] First, I would affirm the statements in previous cases to the effect that actual prejudice is not necessary to establish a breach of s. 11(b): see e.g. *Mills*, at p. 926, per Lamer J.; *Askov*, at p. 1232, per Cory J. The question is whether the delay is unreasonable, not whether an unreasonable delay has, in addition to being unreasonable, caused identifiable and actual prejudice.

[203] Second, and as explained earlier, actual prejudice to the liberty interests of the accused, notably being detained in custody or subject to very restrictive bail conditions pending trial, is taken into account in deciding what a reasonable time for trial would be. Prejudice of this nature during the period of reasonable delay need not be considered again in the final assessment of whether the delay is unreasonable.

[204] Third, prejudice to an accused's security and fair trial interests in the general sense — such as stress and stigma or the erosion of evidence — is already considered in this revised framework. Defining the reasonable time requirements of a case recognizes that delay beyond this point will cause such stress and erosion of fair trial interests, regardless of any evidence the Crown may bring to the contrary. Prejudice to these interests during the period of reasonable delay need not be explicitly considered as a separate factor in this final inquiry, and the court should not consider evidence on any vague, general effect that the delay may have had on the security or fair trial interests of the accused.

[205] Fourth, specific examples of actual prejudice to an accused's security and fair trial rights, such as the loss of employment or death of a witness (this, of course, is not an exhaustive list), are properly considered at the final stage of the analysis.

[206] Lastly, the absence of actual prejudice cannot make reasonable what would otherwise be an unreasonable delay. Actual prejudice need not be proved to find an infringement of s. 11(b) and its absence cannot be used to excuse otherwise unreasonable delay. However, even if the excess delay does not exceed the objectively determined reasonable time requirements of a case of that nature, the accused still may be able to demonstrate actual prejudice, thus making unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable.

(3) Extraordinary Reasons for the Delay

[207] Exceptional cases may arise which merit further consideration of the various reasons for the delay at this final stage of the inquiry.

[208] In most cases, the elements of delay apart from delay attributable to the accused will be given equal weight, contrary to the approach in *R. v. Ghavami*, 2010 BCCA 126, 253 C.C.C. (3d) 74, at para. 52. Specifically, institutional delay and other delay that is counted against the state are generally given equal weight. Abusive or grossly negligent Crown conduct causing delay counts more heavily against the state in determining whether the excessive delay may be justified on any acceptable basis. Such conduct not only undermines the accused's rights, but is contrary to society's interest in an effective and fair justice system.

[209] Conversely, institutional delay that is attributable to exceptional and temporary conditions in the justice system may be excused or given somewhat less weight against the state in the overall balancing and may in some cases justify excusing what would otherwise be excessive delay. This should generally be done, however, only if the state has made reasonable efforts to alleviate those conditions: *Askov*, at p. 1242.

(4) Are There Especially Strong Societal Interests in the Prosecution on the Merits of the Case?

[210] As discussed above, s. 11(b) encompasses "a community or societal interest" to "see that the justice system works fairly, efficiently and with reasonable dispatch": *Askov*, at pp. 1219 and 1221. This societal interest supports prompt disposition of criminal cases. However, there is also a societal

interest in “ensuring that those who transgress the law are brought to trial”: pp. 1219-20. Societal interests must be considered “in conjunction” with the interests of the accused in the interpretation of s. 11(b): p. 1222.

[211] In McLachlin J.’s concurring opinion in *Morin*, she held that the societal interests in bringing the accused to trial should be considered in the determination of s. 11(b) claims: the “true issue at stake” in a s. 11(b) analysis is the “determination of where the line should be drawn between conflicting interests”, i.e. those of the accused and those of society: p. 809. Whether a delay becomes unreasonable, on the spectrum of delays apparent in criminal proceedings, must be determined by an analysis in which the interests of society in bringing those accused of crimes to trial are balanced against the rights of the person accused of a crime: pp. 809-10. To this I would add the societal interest in prompt disposition of criminal matters.

[212] I agree with this balancing approach. Under the revised framework I propose, the delay in excess of the reasonable time requirements of the case and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment *and* prompt trial of accused persons and, on the other, determination of cases on their merits. As noted by Cory J. in *Askov*, more serious offences will carry commensurately stronger societal demands that the accused be brought to trial: p. 1226. These interests, however, are in effect factored into the determination of what would be a reasonable time for the disposition of a case like this one. But if there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an “acceptable basis” upon which exceeding the inherent and institutional requirements of a case can be justified.

E. *Summary of the Analytical Framework*

[213] If the accused first establishes a basis that justifies a s. 11(b) inquiry, the court must then undertake an objective inquiry to determine what would be the reasonable time requirements to dispose of a case similar in nature to the one before the court (the inherent time requirements) and how long it would reasonably take the court to hear it once the parties are ready for hearing (the institutional delay).

[214] Next, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay from charge to trial.

[215] Finally, the court must consider whether and to what extent the actual delay exceeds the reasonable time requirements of a case, and whether this can be “justified on any acceptable basis”. If the actual delay that counts against the state is longer than the reasonable time requirements of a case, then the delay will generally be considered unreasonable. The converse is also the case. However, there may be countervailing considerations, such as the presence of actual prejudice, exceptionally strong societal interests, or exceptional circumstances such as Crown misconduct or exceptional and temporary conditions affecting the justice system. These may either shorten or lengthen the period that would otherwise be unreasonable delay.

[216] This straightforward framework does not attempt to gloss over the inherent complexity of determining what delays are unreasonable. It merely clarifies where the various relevant considerations fit into the analysis and how they relate to each other. It also simplifies the analysis of prejudice and makes clear that, as a general rule, institutional and Crown delay should be given equal weight. It retains the focus on the circumstances of the particular case and builds on the accumulated experience found in 30 years of this Court’s jurisprudence.

III. Application

[217] Although, as noted, this appeal would also be allowed applying the existing *Morin* analysis, it will be useful by way of illustration to analyze it under the modified framework that I have just described.

A. *Facts*

[218] In 2008, the RCMP conducted a single, straightforward undercover investigation into a “dial-a-dope” operation involving the sale of drugs out of the Langley and Surrey areas of British Columbia. Undercover police officers purchased cocaine six times over seven months, calling a number

associated with Mr. Jordan. On December 17, 2008, the police executed a search warrant, seizing 42.3 grams of heroin and just under 1.5 kilograms of cocaine and crack cocaine from the apartment that Mr. Jordan and his then-girlfriend, Ms. Kristina Gaudet, shared. On December 17, 2008, the police arrested Mr. Jordan and Ms. Gaudet. Mr. Jordan was charged with possession for the purposes of trafficking on December 18, and Ms. Gaudet was charged on February 20, 2009.

[219] From December 18, 2008 to February 16, 2009, Mr. Jordan was in custody. He was released on February 16, on strict conditions, including house arrest. During this time, the Crown swore additional and amended informations. Ultimately, 10 accused were charged. Mr. Jordan, as the main target of the investigation and prosecution, faced six charges.

[220] The accused elected to be tried in British Columbia Supreme Court. Crown and defence counsel agreed upon a preliminary hearing. For 24 months, the preliminary hearing process was held before the Provincial Court; it took another 16 months to obtain a Supreme Court trial date for the two remaining accused.

B. *Judicial History*

(1) British Columbia Supreme Court, [2012 BCSC 1735](#)

[221] Verhoeven J. of the British Columbia Supreme Court dismissed Mr. Jordan's s. 11(b) motion. He reached the following conclusions with respect to the total time to the end of the trial:

- Total length of delay: 49.5 months
- Inherent requirements: 10.5 months
- Crown delay: 2 months
- Institutional delay: 32.5 months
- Accused delay: 4 months

[222] Some of the delay present in this case was due to an underestimation of the time required to conduct the preliminary inquiry. While the Crown argued that the subsequent delay should be

attributable to the defence, the trial judge ultimately attributed it as institutional delay, citing a lack of evidence supporting the Crown's claims.

[223] The trial judge ultimately concluded that the accused only waived four months of the delay, due to a last-minute change in counsel. He rejected the Crown's arguments that the delay before the superior court was waived. The Crown relied upon a letter it sent to defence counsel, asking whether the latter would be interested in an earlier trial date based upon a three-week (as opposed to a six-week) trial estimation. Defence counsel did not respond to this letter, and there was no evidence as to the reason behind this. The trial judge found that this did not amount to clear and unequivocal waiver.

[224] The trial judge estimated eight months of inherent time requirements before the provincial court (five months of intake requirements, two months for scheduling and preparation, and one month for the hearing and decision), and two and a half months before the superior court (two months to accommodate counsel scheduling, two weeks for the trial itself).

[225] The trial judge found that no time was attributable to the accused, but that the Crown was responsible for two months due to unavailability to continue the preliminary inquiry.

[226] The trial judge concluded that there was 19 months of institutional delay before the provincial court, noting the evidence supporting the shortage of institutional resources in those courts in British Columbia. He further concluded that there was 13.5 months of institutional delay before the superior court.

[227] The trial judge then considered both actual prejudice and inferred prejudice. He concluded that the accused was not greatly prejudiced with respect to any of his liberty or fair trial interests but that he did suffer some prejudice to his security interests in the form of stress and worry. However, he held that the prior charges against Mr. Jordan "substantially reduc[e] the degree of prejudice" that would otherwise be assigned to Mr. Jordan's security interests: para. 124 (CanLII).

[228] The trial judge concluded that the delay present in Mr. Jordan's case "substantially exceeded" the guidelines: para. 138. However, the delay was not unreasonable given the seriousness of

the offences charged, the lack of substantial prejudice against the accused, and the reduced weight attributed to institutional delay.

(2) British Columbia Court of Appeal, 2014 BCCA 241, 357 B.C.A.C. 137

[229] The British Columbia Court of Appeal dismissed Mr. Jordan's appeal.

[230] Justice Stromberg-Stein agreed with the facts laid out by the trial judge. She also confirmed that the "application judge identified and applied the correct legal authorities and principles": para. 13.

[231] On the first ground of appeal, Mr. Jordan argued that the judge should have used the full 34.5 months of delay in his s. 11(b) analysis, instead of the 17 months outside of the *Morin* guidelines. However, the court concluded that the application judge correctly assessed the delay period.

[232] Next, Mr. Jordan argued that the trial judge erred in attaching less weight to institutional delay. Justice Stromberg-Stein found that the judge's assessment of 34.5 months as institutional delay was not based on a proper evidentiary record. However, this assessment was favourable to Mr. Jordan, and she declined to interfere with Verhoeven J.'s weighing of the institutional delay in comparison to other factors.

[233] Finally, Mr. Jordan claimed that the trial judge erred in his assessment of prejudice: by using the wrong quantum of delay and by failing to make a meaningful finding of inferred prejudice. The application judge found that Mr. Jordan experienced "some degree" of prejudice, but not a "substantial" degree of prejudice: C.A. reasons, at para. 46. This finding of fact is reviewable on a standard of palpable and overriding error. The Court of Appeal found that the trial judge's assessment did not rise to this degree. The court affirmed the trial judge's findings regarding actual prejudice, and held that the judge was "alive to the possibility of inferring prejudice" and did, in fact, infer some degree of prejudice from the delay: para. 51.

C. *Analysis*

[234] Applying the analytical framework from *Morin* as elaborated and clarified above, I conclude that Mr. Jordan's appeal should be allowed and the charges against him stayed because his constitutional right to be tried within a reasonable time was violated in this case. I will briefly consider the four steps in the analytic framework.

(1) Is an Unreasonable Delay Inquiry Justified?

[235] I agree with the trial judge that the 49.5-month delay from the charges to the end of the scheduled trial date is sufficient to trigger an inquiry into whether the delay is unreasonable.

(2) What Is a Reasonable Time for the Disposition of a Case Like This One?

(a) *Inherent Time Requirements*

[236] The trial judge identified the periods of inherent delay present in the case as being 10.5 months. While the trial judge did not approach this on a purely objective basis, I nonetheless find no reason to interfere with this assessment as representing the reasonable inherent time requirements of a case of this nature, even treating this case as involving an in-custody accused or an accused subject to very restrictive bail conditions.

(b) *Institutional Delay*

[237] This case proceeded through the Provincial Court and the Supreme Court of British Columbia. Under the *Morin* administrative guidelines, the reasonable institutional delays for both levels of court total between 14 and 18 months. Although it is debatable whether accepting the upper end of the range is appropriate in a case of this nature, for the purposes of my analysis I will proceed on the basis that 18 months of institutional delay would be reasonable.

[238] It follows that a reasonable period for the disposition of this case was 28.5 months.

(3) How Much of the Delay That Actually Occurred Counts Against the State?

[239] We know that this case took 49.5 months in total. To determine the amount of delay that counts against the state we must subtract any period attributable to the defence and any period of unusual or unforeseen delay not fairly counted against the Crown.

(a) *Delay Attributable to the Defence*

[240] The Crown's main argument is that the trial judge erred in categorizing so much of the delay as institutional. The Crown makes multiple submissions regarding the categorization of delay between the charge to the arraignment hearing, from the arraignment hearing to the preliminary inquiry, of the adjournments of the preliminary inquiry, and in setting the six-week trial. For many of these submissions, the Crown argues that various periods should be considered "waiver" or conduct otherwise attributable to the defence.

[241] As stated above, for any period to be considered waived by the defence, the defence must have so indicated in clear and unequivocal terms. The trial judge noted that Mr. Jordan agreed that four months of the delay was "waived" because it resulted from his last-minute change in counsel. However, I see no reason to attribute any other period as being "waived" by Mr. Jordan. Moreover, I see no reason to classify any other period as being fairly attributable to Mr. Jordan.

(b) *Exceptional or Unavoidable Delay*

[242] No such delay is present here.

(4) Was the Delay That Counts Against the State Unreasonable?

[243] As discussed earlier, the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest — a period of 17 months — counts against the state. In other words, this case took almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature.

[244] This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a case of this nature. While there are societal interests in the trial on the merits of the serious drug crimes alleged against Mr. Jordan, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

D. *Other Issues Raised*

[245] The parties raised a number of other issues, explicitly or implicitly, to which I will briefly respond.

- (1) Should some delay where the courts are unavailable be classified as inherent requirements if defence counsel is also unavailable?

[246] The inherent requirements of a case are determined objectively and when this is done as described earlier in my reasons, there is no overlap between the inherent requirements and institutional delay.

- (2) Should institutional delay be accorded “less weight” in determining the overall reasonableness of the delay?

[247] Under the revised framework, institutional delay is not given less weight than other delay that counts against the state.

- (3) Does the accused’s consent to an adjournment or later trial date constitute “waiver”?

[248] The onus is on the Crown to demonstrate that, when an accused agrees to an adjournment initiated by the Crown or to a trial date, it amounts to “waiver” and not “mere acquiescence in the inevitable”.

- (4) Should inherent requirements be subtracted from the final quantum of delay when assessing the overall reasonableness of the delay?

[249] Inherent requirements are not “subtracted” but are rather considered along with institutional delay in deciding what period of delay would be reasonable for a case of this nature.

- (5) Can the constitutionally tolerable length of institutional delay be extended if the accused did not suffer “substantial” or “significant” prejudice?

[250] As explained earlier, the answer is no: proof of actual prejudice is not required to find unreasonable delay.

- (6) Did the trial judge err in finding that the accused only suffered “some” and not “substantial” prejudice?

[251] I see no reason to interfere with the trial judge’s reasons to this effect.

- (7) Did the trial judge err when categorizing the delays in this case, specifically in attributing so much of the delay to Crown and institutional delay?

[252] I see no reason to interfere with the trial judge’s classification of delay in this case.

E. *Conclusion*

[253] I would allow the appeal and would stay the charges against Mr. Jordan.

IV. The Approach of Justices Moldaver, Karakatsanis and Brown

[254] It will by now be obvious that I fundamentally disagree with the approach proposed by my colleagues. It is, in my respectful view, both unwarranted and unwise. The proposed approach reduces reasonableness to two numerical ceilings. But doing so uncouples the right to be tried within a reasonable time from the Constitution’s text and purpose in a way that is difficult to square with our jurisprudence, exceeds the proper role of the Court by creating time periods which appear to have no basis or rationale in the evidence before the Court, and risks negative consequences for the administration of justice. Based on the limited evidence in the record, the presumptive time periods proposed by my colleagues are unlikely to improve the pace at which the vast majority of cases move through the system while risking judicial stays for potentially thousands of cases. Moreover, the increased simplicity which is said to flow from this approach is likely illusory. The complexity inherent in determining unreasonable delay has been moved into deciding whether to “rebut” the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases: para. 47.

A. *Reasonableness Cannot Be Captured by a Number*

[255] One of the themes that appears throughout the Court’s jurisprudence on the right to be tried within a reasonable time is that reasonableness cannot be judicially defined with precision or captured by a number. The proposed ceilings are deeply inconsistent with this constant in our jurisprudence.

[256] In *Mills*, where this Court first considered the scope of s. 11(b), Lamer J. wrote that a “reasonable” time to trial cannot be determined with reference to specific numbers:

Reasonableness is an elusive concept which cannot be juridically defined with precision and certainty. Under s. 11(b), however, as we are dealing with reasonableness as regards the passage of time, we have the advantage of being able to refer to precise stages of proceedings and events.

This is not to say that reasonableness can be predetermined with precision. That would be “falling victim to the tyranny of numbers”. But the advantage to be found when dealing with time is that reasonableness can be determined with the help of the precision surrounding the happening of certain events, e.g. arraignment, the preliminary inquiry, the trial, and the time elapsed between. [p. 923]

[257] In *Conway*, L’Heureux-Dubé J. wrote for the majority that the “protection afforded by s. 11(b) of the *Charter* is not expressed in absolute terms” and that “the right to a speedy trial ‘is

necessarily relative. It is consistent with delays and depends upon circumstances’’: p. 1672, quoting *Beavers v. Haubert*, 198 U.S. 77 (1905), at p. 87.

[258] In *Smith*, Sopinka J. for the Court elaborated on this point:

The question is, at what point does the delay become unreasonable? If this were simply a function of time, the matter could be easily resolved. Indeed a sliding scale of times could be developed with respect to specified offences which could be adjusted because of the special circumstances of the case. But it is not simply a function of time, but of time and several other factors. What those basic factors are is not the subject of disagreement. [p. 1131]

[259] In *Askov* and *Morin*, this Court again reiterated the importance of the balancing test in determining reasonable delay. In fact, in *Morin*, this Court specifically declined to create an administrative guideline for the “inherent” or “intake” time requirements of a case, noting the “significant variation between some categories of offences”: p. 792. Sopinka J. wrote that as “the number and complexity of [intake requirements of a case] increase, so does the amount of delay that is reasonable”: *ibid*.

[260] Thus, the Court has said on several occasions that reasonable inherent time requirements for cases do not lend themselves to the creation of administrative guidelines.

[261] Moreover, a judicially fixed ceiling for overall case disposition is at odds with jurisprudence arising from every other jurisdiction with a speedy trial guarantee of which I am aware. In *Trial Within a Reasonable Time* (1992), Michael A. Code wrote that “[i]t is generally foreign to the U.S. speedy trial jurisprudence to establish numerical standards of any kind”: p. 119. The presence of time limitations, whether judicial or statutory, are virtually unheard of in European jurisdictions. In *Can excessive length of proceedings be remedied?* (2007), the Venice Commission polled a number of jurisdictions ranging from Albania to the former Yugoslav Republic of Macedonia, all of which replied in the negative to the questions as to whether there was a deadline or fixed time frame in which the competent authorities need rule on a criminal matter: Section II (pp. 65-322). Statutory timelines are, of course, an entirely different matter and I will have more to say about them in a moment.

[262] There is no parallel between the administrative guidelines for institutional delay adopted in *Askov* and *Morin* and the ceilings for overall delay proposed in my colleagues' reasons. As I have explained, institutional delay is concerned with how long one should have to wait for the court to be ready to hear the case. This is not a question that depends to any significant extent on the particular circumstances of the case. It is mainly a question of resources. It is quintessentially a judicial function under the Constitution to set some clear limits on the point at which the state's plea of inadequate resources must give way to the constitutionally guaranteed right to be tried within a reasonable time. The administrative guidelines in *Askov* and *Morin* serve the reasonableness analysis by defining when state-provided court services should reasonably be available. Unlike the proposed ceilings, the administrative guidelines do not attempt to define what would be a reasonable time for trying all cases in all circumstances. Moreover, the administrative guidelines were intended to be generous and established "neither a limitation period nor a fixed ceiling on delay": *Morin*, at pp. 795-96.

[263] The proposed judicially created "ceilings" largely uncouple the right to be tried within a reasonable time from the concept of reasonableness which is the core of the right. The bedrock constitutional requirement of reasonableness in each particular case is replaced with a fixed ceiling and is thus converted into a requirement to comply with a judicially legislated metric. This is inconsistent with the purpose of the right, which after all, is to guarantee trial within a reasonable time. Reducing "reasonableness" to a judicially created ceiling, which applies regardless of context, does not achieve this purpose.

[264] Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. As I see it, a case is not tried within a reasonable time if it has taken "markedly longer than it reasonably should have" (para. 48) to be tried. Other than in very unusual circumstances, that is what an accused has to show to establish a breach of s. 11(b) of the *Charter*. But that is not enough under the proposed framework. When the elapsed time is below the ceiling, an accused would have to show not only that the case took "markedly longer" than it reasonably should have but also that he or she "took meaningful steps that demonstrate a sustained effort to expedite the proceedings": para. 48. This requirement has no bearing on whether the time to trial was unreasonable. It is, in effect, a judicially created diminishment of a constitutional right, and one for which there is no justification. I see no basis in the constitutional text or the jurisprudence for imposing this burden on an accused person.

[265] My colleagues’ “qualitative review of nearly every reported s. 11(b) appellate decision from the past 10 years, and many decisions from trial courts” (para. 106) suggests that my concerns on this score are not theoretical. That examination shows that our superior courts found unreasonable delay in 20 percent of the cases where the delay was at or under the 30-month ceiling. The percentage is about the same for the provincial court cases at or under the ceiling. But under the proposed framework, none of these cases could be stayed absent proof by the accused that they had attempted to actively expedite the process. Imposing this burden is contrary to the Court’s holding in *Askov* that “it is the responsibility of the Crown to bring the accused to trial” and that “any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial”: p. 1227.

[266] The proposed approach in effect substitutes a right to be “tried under the ceiling” for a right to be tried within a reasonable time. In doing so, it unjustifiably diminishes the right guaranteed by the *Charter* and sets aside a central teaching of our s. 11(b) jurisprudence — that reasonableness cannot be captured by a number.

B. *Creating Presumptive Ceilings for Reasonableness Is a Legislative, Not a Judicial Task*

[267] Creating fixed or presumptive ceilings is a task better left to legislatures. If such ceilings are to be created, Parliament should do so. As Lamer J. stated in *Mills*: “There is no magic moment beyond which a violation will be deemed to have occurred, and this Court should refrain from legislating same” (p. 942; see also *Conway*, at p. 1697 (concurring)).

[268] Prof. P. W. Hogg’s *Constitutional Law of Canada* (5th ed. Supp.) notes that a number of commentators have advocated that Parliament enact fixed time limits for trials: s. 52.5. The Law Reform Commission in *Trial Within a Reasonable Time: A Working Paper Prepared for the Law Reform Commission of Canada* (1994) (“*Working Paper*”) pointed to a number of considerations that weigh in favour of legislative standards, instead of judicially imposed ceilings: pp. 5-6.

[269] First, courts do not, and should not, function as legislatures. As the *Working Paper* put it:

The courts have been given a greatly expanded role with the *Charter*, but their essential function has not changed. They do not function as legislating bodies; their principal task is adjudicating conflicts brought before them. Rather, it is the role of Parliament to advance

and enhance constitutional rights through legislative standards which the *Charter*, by its very nature, can provide only in general terms. As Chief Justice Dickson stated in *Hunter v. Southam Inc.*[, [1984 CanLII 33 \(SCC\)](#)], [1984] 2 S.C.R. 145, at p. 169]:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. [p. 5]

[270] The *Working Paper* also pointed out that legislative timelines can be more easily changed:

Another advantage of statutory rules or internal court goals is that they can more easily be adjusted and fine-tuned: constitutional standards, in contrast, are difficult to amend. This will be particularly valuable in the case of the right to a trial within a reasonable time. [p. 6]

[271] In addition, the *Working Paper* noted that legislation can more comprehensively address the root causes of delay:

In addition, statutory provisions are not restricted to establishing time-limits. A *Charter* decision can do little beyond setting a maximum allowable delay and providing a remedy when it is exceeded. While this approach may be satisfactory from the perspective of the individual accused, it does not address the societal interest. Statutory provisions, on the other hand, can address the underlying causes of delay, rather than merely responding to failures to meet the standard. [p. 6]

[272] Creating presumptive, fixed ceilings is a matter for Parliament, not for this Court, in my respectful view.

[273] My colleagues write, and I agree, that giving meaningful content to constitutional rights is entirely consistent with the judicial role: para. 115. But that is not what the proposed ceilings do. The proposed ceilings do not so much define the content of the s. 11(b) right to a trial within a reasonable time as place new limits on the exercise of that right for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. In my respectful view, this is inconsistent with the judicial role.

C. *The Proposed Presumptive Ceilings Are Not Supported by the Record*

[274] The proposed ceilings have no support in the record that was placed before the Court in this case. The Court did not hear argument about the impact of imposing them, which remains unknown.

[275] Moreover, the ceilings appear to be illogical. The ceilings accept the *Morin* guidelines for institutional delay: 8 to 10 months in provincial courts and 14 to 18 months in cases involving a preliminary hearing and a trial (para. 52). This means that the proposed ceilings allow 8 to 10 months for the inherent time requirements of the case in provincial courts, which seems long, while allowing only marginally more inherent time requirements (12 to 16 months) for cases — generally significantly more complex cases — that involve a preliminary inquiry and a trial. As well, under the ceilings, the seriousness or gravity of the offence cannot be relied on to discharge the onus which the ceilings impose: para. 81. Yet under the transitional scheme, this remains a relevant factor: para. 96. The illogical result is that serious offences are more likely to be stayed under the ceilings than under the transitional scheme.

[276] What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist. If anything, such high ceilings are more likely to feed such a culture rather than eliminate it.

[277] Consider the statistical information that we have in the record which is from the Provincial Court of British Columbia. It suggests that the proposed ceiling for the provincial courts is too high to be of any use in encouraging more expeditious justice in the vast majority of cases.

[278] The proposed ceiling is set for 18 months in provincial courts. But the median time to disposition of matters in the Provincial Court of British Columbia was 95 days in 2011-2012, with the average being 259 days, both well below the proposed ceiling: B.C. Justice Reform Initiative, *A Criminal Justice System for the 21st Century* (2012), at p. 30. Of course, these statistics relate to all matters, the vast majority of which (about 95 percent) are disposed of without trial: p. 33. The time to trial varies widely by court location with the time to the commencement of trial for a 2-day case varying in the Provincial Court from 12 to 16 months: p. 34. (I note that this period does not include the period from intake until a trial date is set and measures only to the beginning, not the end of the trial: “Justice

Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources” (September 2010) (online), at p. 21.) But there is not much here to lead one to think that the ceilings will do anything to improve the timeliness of the vast majority of criminal cases in the Provincial Court. And, as I will discuss shortly, the ceilings put a small percentage of the total caseload, but a large number of long cases, at serious risk of judicial stay.

[279] The “qualitative review” conducted by Justices Moldaver, Karakatsanis, and Brown “assisted in developing the definition of exceptional circumstances” and provided “a rough sense of how the new framework would have played out in some past cases”: para. 106. This examination has not been the subject of adversarial scrutiny or debate, and how it “assisted” in developing the definition of exceptional circumstances is unstated. In any case, the examination as I have reviewed it suggests that the proposed ceilings are unrealistic and that their implementation risks large numbers of judicial stays.

[280] What does this examination tell us about the appropriateness of the ceilings? Consider first the superior court cases over the past 10 years in which stays were granted. The average “net” delay was about 44 months, with the median “net” delay being about 37 months. This provides no support for a ceiling of 30 months for superior court cases. The examination is no more supportive in relation to the provincial courts. Looking at provincial court cases in which stays were granted, the average “net” delay was about 27 months and the median was 24.5 months (I have excluded Quebec from this calculation because of the distinctive jurisdiction of the Court of Québec). Once again, my colleagues’ examination of the cases fails to support the proposed ceiling of 18 months for provincial court cases.

[281] Developing the proposed ceilings in the absence of evidence and submissions by counsel contrasts with the Court’s development of the administrative guidelines for institutional delay in *Askov* and *Morin*. In those cases, the Court had the benefit of extensive evidence including statistical information from comparable jurisdictions and expert opinion: *Morin*, at p. 797. The record in *Morin* included four volumes of evidence, largely consisting of evidence from three experts with exhibits on the issue of institutional delay across various jurisdictions in Canada — in fact, two volumes of the record were exclusively devoted to such information. This record contained evidence from a solicitor in the region of Durham, the region at issue in *Morin*, who was a member of the trial delay reduction committee in the region. His evidence included statistical information and information about the efforts

made to reduce delay in the region. Furthermore, the record included extensive evidence from Professor Baar, who “has written and consulted extensively on court administration in general and case flow management in particular in Canada, the United States and other jurisdictions”: *R. v. Morin* (1990), 1990 CanLII 10952 (ON CA), 55 C.C.C. (3d) 209 (Ont. C.A.), at p. 213. This extensive record enabled the Court to analyze the respective caseloads of provincial courts and superior courts, the increase in caseload in particular regions (including in Durham), reasons for the growth in this caseload, and the abilities of various courts to handle the increasing caseload: see *Morin* (S.C.C.), at pp. 798-99. The broad range set out in the administrative guidelines in *Morin* (eight to ten months in provincial court; six to eight months from committal to trial) was derived from the considerable mass of evidence then before the Court.

D. *There Is a Significant Risk of Negative Consequences*

[282] My colleagues acknowledge that, if their new framework were applied immediately, there would be a risk of thousands of cases being off-side the new ceilings and being judicially stayed as a result: para. 98. There are worrying signs in the limited record that we do have that large numbers of cases (although not a large percentage of the total cases dealt with by the courts) would be at risk if the presumptive ceilings were applied.

[283] The record indicates that, in the British Columbia Provincial Court, as of March 31, 2010, there were over 2,000 adult criminal cases pending for over 18 months. As of 2011, this represented 13 percent of the caseload of the Provincial Court. As of 2012, 4 percent of pending cases in the Provincial Court had been in the system for more than two years: “Justice Delayed”, at p. 23; B.C. Justice Reform Initiative, at p. 35. Thus the limited record that we do have suggests that the proposed ceiling of 18 months in provincial courts, if applied now, would put thousands of prosecutions in the Provincial Court at serious risk of being judicially stayed. Dramatic improvements for the group of cases at the top end of the delays would be required to avoid thousands of judicial stays under the proposed ceilings.

[284] The examination of the case law undertaken by my colleagues increases rather than diminishes this concern. As I noted earlier, the average time for stays in superior courts, based on that analysis, is about 44 months, with the median being about 37 months. This time period significantly

exceeds the proposed 30-month ceiling. If these figures can be relied on, they suggest that the proposed ceilings would require unrealistic and improbable improvement in case processing times to avoid many judicial stays.

[285] The transitional regime which my colleagues propose is intended to avoid the problems that would arise from immediate application of the presumptive ceilings. In my view, these transitional provisions will not avoid the risk of thousands of judicial stays of proceedings.

[286] Although my colleagues maintain that different criteria should not apply during the transitional period, they in fact establish different criteria for transitional cases. To take only one example, there will be a “transitional exceptional circumstance” if the parties reasonably relied on the law as it previously existed and have not had time “to correct their behaviour”: para. 96. In other words, the ceilings do not apply to some transitional cases.

[287] The basic problem with this is that transitional provisions create a *Charter* amnesty. What is unreasonable according to the Constitution is treated as if it were reasonable. The justification for this is that parties require time to correct their behaviour following the release of this decision. However, this sort of *Charter* amnesty is contrary to our s. 11(b) jurisprudence.

[288] *Morin* ruled against transitional provisions in s. 11(b) cases and explained why purporting to set up a parallel system of rules to govern existing cases is wrong in principle. Sopinka J. for the majority wrote, at pp. 797-98:

. . . the Court of Appeal purported to apply a transitional period to accommodate the situation in *Durham*. While a transitional period may have been appropriate immediately after the *Charter* came into effect, it is not appropriate any longer. This Court so held in *Askov*. The use of a transitional period implies a fixed period during which unreasonable delay will be tolerated while the system adjusts to a new set of rules. It imposes a general moratorium on certain *Charter* rights. For this reason and quite apart from the statement in *Askov* that the transitional period had ended, I would not find it appropriate in this case. It appears to me undesirable to impose a moratorium on *Charter* rights every time a region of the country experiences unusual strain on its resources. It is preferable to simply treat this as one factor in the overall decision as to whether a particular delay is unreasonable. [Emphasis added.]

[289] In my opinion, this teaching is both authoritative and sensible. I would continue to apply it.

[290] Moreover, my colleagues indicate that the proposed transitional exception applies to problems of institutional delay. But it is hard to see how this can be justified by the need to give parties an opportunity to correct their behaviour. The guidelines for reasonable institutional delay were established (at the very latest) in *Morin*, almost a quarter of a century ago. Twenty-four years is long enough for parties to modify their behaviour to comply. No transitional arrangements for institutional delay can now be justified.

[291] My colleagues write that the “contextual application of the [new] framework is intended to ensure that the post-*Askov* situation [in which tens of thousands of charges were stayed in Ontario alone] is not repeated”: para. 94. In other words, the hope is that the presumptive ceilings that are unrealistic now will become realistic in the fairly near future. But there is no basis in the record or in logical reasoning to suppose that these ceilings, if dramatically unrealistic now, will become less unrealistic with the passage of time. In my respectful view, this Court should not impose on the criminal justice system the risk that thousands of prosecutions will be judicially stayed. Doing so is especially regrettable when it is done, as is proposed here, in a virtual factual vacuum, with no opportunity for submissions about either the wisdom of this approach or the accuracy of the assumptions on which it is based.

[292] My colleagues maintain that there is a “culture of complacency towards delay” (para. 40) that has emerged in the criminal justice system, which is not addressed by the *Morin* framework. They argue that their revised approach to s. 11(b) is warranted, given that under the current framework “participants in the justice system . . . are not encouraged to take preventative measures to address inefficient practices and resourcing problems”: para. 41. But, contrary to these broad and unsupported generalizations, even the limited record before the Court indicates that the problem of excessive delay has been the focus of extensive attention by the British Columbia Provincial Court and by the governments of British Columbia, Alberta, Newfoundland and Labrador, and Ontario. The most recent statistics in the record indicate that the situation is, if anything, getting better, not worse: see “The Semi-Annual Time to Trial Report of the Provincial Court of British Columbia to March 31, 2015” (online), at p. 5.

[293] Imposing judicially created ceilings as an aspect of our s. 11(b) jurisprudence presents risks. If we are to take these risks through the imposition of ceilings or other time limits, these limits should be created by legislation and informed by facts.

E. *The Promised Simplicity of the Ceilings Is Likely Illusory*

[294] Even if creating ceilings were an appropriate task for the courts and even if there were an appropriate evidentiary basis for them, there is little reason to think these presumptive ceilings would avoid the complexities inherent in deciding whether a particular delay is unreasonable in all of the circumstances.

[295] We can look to the experience of other jurisdictions. It appears that even fixed limitation periods set by legislatures have not succeeded in avoiding complexity. Various states in the United States have created statutory time limitation periods dealing with overall delay in criminal proceedings. At the federal level, there is the *Speedy Trial Act of 1974*, 18 U.S.C. § 3161, and there are similar provisions in many states: W. R. LaFare et al., *Criminal Procedure* (5th ed. 2009), at pp. 892-93. These provisions create time limitations, but also include a number of contingencies to account for the plethora of different circumstances under which criminal cases may arise: pp. 895-97. In short, to be workable, the legislated limits inevitably require that a number of factors be balanced and considered in determining whether any case or charge should be dismissed: p. 897. But these contingencies and this balancing simply give rise to the sort of litigation that the limits were supposed to avoid: see S. Hopwood, “The Not So Speedy Trial Act” (2014), 89 *Wash. L. Rev.* 709, at p. 715.

[296] Turning to the proposed scheme, it seems to me that rather than avoiding complexity, it simply moves the complexities of the analysis to a new location.

[297] I turn first to cases in which the delay exceeds the presumptive ceiling. Departure from the ceiling may be required by a variety of circumstances: “discrete exceptional events” (para. 75), including delay caused by unexpected recantation by a complainant and other unforeseen trial delays; delay resulting from a case’s particular “complexity” (para. 77); and whether particular periods of delay

could reasonably have been mitigated. It is hard to see how this framework is likely to bring greater simplicity to the analysis.

[298] The same applies to the burden on the defence in cases which fall below the ceilings. Under the proposed framework, the defence has the burden to show, first, that the time required to dispose of the case “markedly exceeds the reasonable time requirements of the case”: para. 87. In order to consider a defence attempt to discharge this burden, the court will have to consider a variety of factors, including “the complexity of the case, local considerations, and whether the Crown took reasonable steps to expedite the proceedings”: *ibid.* These factors largely mirror the test under the existing jurisprudence.

[299] The defence must also show that it took “meaningful, sustained steps to expedite the proceedings”: para. 84. The defence must show that “it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications . . . reasonably”: para. 85. I have already explained why I think it is inappropriate to impose this burden. But putting that aside, the need for these inquiries increases rather than reduces the complexity of the analysis mandated by the existing jurisprudence.

[300] Finally, consider the proposed transitional provisions. It is unexplained how the Crown will be able to satisfy the court that “the time the case has taken is justified based on the parties’ reasonable reliance on the law as it previously existed” in the relevant jurisdiction, let alone how it will be shown that “the parties have [or have not] had time following the release of this decision to correct their behaviour”: para. 96. Little imagination is needed to see the ballooning evidentiary implications of these elements of the scheme. Also, it seems that for transitional cases below the ceiling, unlike cases subject to the new template, the defence does not have to prove having taken initiative to expedite matters in the period preceding this decision in order to make out a case of unreasonable delay. But doing so will assist the defence claim of unreasonable delay. The result is that even in transitional cases, the parties will be parsing the record to show how the defence did, or did not, try to move things along.

[301] These considerations suggest that the proposed presumptive ceilings will do little to simplify the task of determining whether the delay in a particular case violates the accused's right to be tried within a reasonable time. In one way or the other, the judge must look at the circumstances of the particular case at hand.

F. *Conclusion*

[302] I am not convinced that this Court should impose the scheme proposed by my colleagues. It diminishes *Charter* rights. It casts aside three decades of the Court's jurisprudence when no participant in the appeal called for such a wholesale change — and this in the context of a case in which all of us agree that the result is clear under the existing jurisprudence. It has not been the subject of adversarial scrutiny or debate. The record does not support the particular ceilings selected. Nor, so far as I can tell, does the Court-conducted examination of reported cases. And it risks repetition of the *Askov* aftermath in which thousands of prosecutions were judicially stayed. In short, the proposed scheme is, in my respectful view, wrong in principle and unwise in practice.

V. Disposition

[303] I would allow the appeal and enter a stay of proceedings.

Appeal allowed.

Solicitors for the appellant: Peck and Company, Vancouver.

Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitors for the intervener the British Columbia Civil Liberties Association: Farris, Vaughan, Wills & Murphy, Vancouver.

[1] We were not invited to revisit the question of remedy. Accordingly, we refrain from doing so.

[2] This Court has held that s. 11(b) applies to sentencing proceedings (*R. v. MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 S.C.R. 45). Some sentencing proceedings require significant time, for example, dangerous offender applications or situations in which expert reports are required, or extensive evidence is tendered. The issue of delay in sentencing, however, is not before us, and we make no comment about how this ceiling should apply to s. 11(b) applications brought after a conviction is entered, or whether additional time should be added to the ceiling in such cases.

[3] While most proceedings with a preliminary inquiry are eventually tried in the superior court, this is not always the case. For example, a case may go to trial in the provincial court after a preliminary inquiry if the province in which the trial takes place offers this as an option (such as Quebec), or if the accused re-elects a trial in the provincial court following a preliminary inquiry. In either case, the 30-month ceiling would apply.

[4] We note that the appellant and some of the interveners submitted that the *Morin* guidelines were intended to apply to the *entire period* of delay, rather than just the segment of delay caused by a shortfall of institutional resources. This is incorrect. The only reasonable reading of this Court's decisions in *Askov*, *Morin*, and *Godin* is that the guidelines were intended to apply only to institutional delay, not the entire period of delay.

[5] See, for example, some of the recommendations contained in LeSage and Code.

TAB 18

R. v. Krannenburg, 1980 CanLII 179 (SCC), [1980] 1 SCR 1053

Source:	Supreme Court of Canada
Date:	1980-03-03
Other citations:	108 DLR (3d) 333 — 31 NR 206 — [1980] 2 WWR 651 — 20 AR 504 — 17 CR (3d) 357 — 51 CCC (2d) 205 — JE 80-237
Citation:	R. v. Krannenburg, 1980 CanLII 179 (SCC), [1980] 1 SCR 1053, < https://canlii.ca/t/1z46z >, retrieved on 2026-03-24
Most recent unfavourable mention	R. v. Dickie , 1981 ABCA 11 (CanLII) [...] [7] The Crown's submission is that the Krannenburg case is distinguishable , in that the case was called in the proper courtroom on the same day not at 9:30 a.m. but at 2 p.m. The Crown argues that when a case is put over to a certain time and place, this, in accordance with the practice of the Court, does not mean that the [...]

Supreme Court of Canada
R. v. Krannenburg, [1980] 1 S.C.R. 1053
Date: 1980-03-03

Her Majesty The Queen in right of the Province of Alberta *Appellant*;
 and
 Konnie Adriana Krannenburg *Respondent*.

1979: October 17; 1980: March 3.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and McIntyre JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Failure of Court to proceed with case at appointed time and place—Resulting loss of jurisdiction—Jurisdiction over offence not saved by curative section of Code—Criminal Code, s.440.1 [en. 1974-75-76, c. 93, s. 43].

On February 9, 1977, the respondent was charged with unlawfully driving a motor vehicle while impaired. The case was adjourned from time to time until finally set for trial on April 21, 1977, at 2:00 p.m. in Courtroom No. 5 of the Provincial Court Building in the

City of Edmonton. Due to a mix-up, the case was called that morning in Courtroom No. 1 and, the respondent not being present, the provincial judge issued a warrant for her arrest. Unaware of these developments, the respondent and her counsel duly appeared at Courtroom No. 5 at 2:00 p.m. Her name did not appear on the list of cases scheduled to be heard that afternoon. Crown counsel told respondent's counsel that he knew nothing about the charge. The respondent and her counsel departed.

Thereafter, the respondent applied to the Trial Division of the Supreme Court of Alberta for an order (i) setting aside the warrant, and (ii) prohibiting the Provincial Court from dealing further with the information. The order was granted. The Crown conceded that the warrant had been improperly issued, but challenged, in the Appellate Division, that part of the order which prohibited further proceedings on the information. The Appellate Division in a unanimous judgment maintained the order of prohibition. Subsequently, leave to appeal to this Court was granted. The narrow question was whether s. 440.1 of the *Criminal Code*, a curative section proclaimed in force April 26, 1976, remedies a loss of jurisdiction resulting from the failure of a court to proceed with a case at the appointed time and place.

[Page 1054]

Held: The appeal should be dismissed.

The language of s. 440.1(1), read in its grammatical and ordinary sense, is simply not wide enough to cover the situation, as here, where there is failure on the part of the court to proceed. The language of s. 440.1 (2) is equally inapposite.

Section 440.1(1), on a plain reading, contemplates three elements, precedent to the operation of the section, namely, (i) a proceeding before a court, judge, magistrate or justice; (ii) failure to comply with the provisions of the *Code* relating to adjournments or remands; (iii) non-appearance of the accused or defendant at any such proceeding or adjournment thereof. It is doubtful if any one of these elements is present in circumstances where the accused or defendant appears at the time and place appointed, but the court fails to appear and nothing is done.

Section 440.1 is directed to the situation where there has been a procedural defect or irregularity in respect of adjournments or remands. The court may purport to adjourn the trial or remand the accused, but inadvertently breach some provision of the *Criminal Code* in so doing. A good example is the case in which the magistrate contravenes the eight-day time limitation by adjourning the matter beyond eight days without consent or *sine die*. In those circumstances, the proceedings are not to be held to be invalid. Section 440.1, in effect, gives statutory recognition to the earlier practice of issuing a summons or warrant to bring an accused person before the court where there had been an improper adjournment and the accused failed to appear.

The problem in the instant case was not one of contravention of the requisites of the *Code* relating to adjournments. There was no failure to comply with any provision of the *Code*. The imbroglio arose because the court failed to appear and nothing was done at the time and place set for trial.

In the case of *Doyle v. The Queen*, [1976 CanLII 11 \(SCC\)](#), [1977] 1 S.C.R. 597, the Court evidenced a willingness to abandon the distinction between loss of jurisdiction over the person (as in improper adjournments) and loss of jurisdiction over the offence (as in a failure to proceed). Section 440.1, however, cannot be interpreted as embracing both eventualities. It is not so worded as to save jurisdiction over the offence when the court

has not acted. The decision in *Trenholm v. Attorney-General of Ontario*, 1940 CanLII 2 (SCC), [1940] S.C.R. 301, affirmed in *Doyle*, governs this appeal.

[Page 1055]

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division^[1], dismissing the Crown's appeal from the granting of an order of prohibition. Appeal dismissed.

J. Watson, for the appellant.

Brian Burrows, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—It has long been recognized in our law that an inferior court may suffer loss of jurisdiction by reason of some procedural irregularity, as for example, when the date to which an accused is remanded or to which a case is adjourned for trial comes and goes without any hearing or appearance, “with nothing done”. The narrow question in this appeal is whether s. 440.1 of the *Criminal Code*, a curative section proclaimed in force April 26, 1976, remedies a loss of jurisdiction resulting from the failure of a court to proceed with a case at the appointed time and place.

The facts are short and simple. On February 9, 1977, the respondent was charged with unlawfully driving a motor vehicle while impaired. The case was adjourned from time to time until finally set for trial on April 21, 1977, at 2.00 p.m. in Courtroom No. 5 of the Provincial Court Building in the City of Edmonton. Due to a mix-up, the case was called that morning in Courtroom No. 1 and, the respondent not being present, the provincial judge issued a warrant for her arrest. Unaware of these developments, the respondent and her counsel duly appeared at Courtroom No. 5 at 2.00 p.m. Her name did not appear on the list of cases scheduled to be heard that afternoon. Crown counsel told respondent's counsel that he knew nothing about the charge. The respondent and her counsel departed.

Thereafter, the respondent applied to the Trial Division of the Supreme Court of Alberta for an order (i) setting aside the warrant, and (ii) prohib-

[Page 1056]

iting the Provincial Court from dealing further with the information. The order was granted. The Crown conceded that the warrant had been improperly issued, but challenged, in the Appellate Division, that part of the order which prohibited further proceedings on the information. The Appellate Division in a unanimous judgment maintained the order of prohibition.

In circumstances of a failure to act, the leading decision is *Trenholm v. Attorney-General of Ontario*^[2], in which the applicant sought a writ of *habeas corpus*. He had appeared before a magistrate on January 3, 1938, and was remanded to January 10, 1938. An inquiry into his mental condition was being conducted in the interim. By warrant dated January 12, he was detained at a mental institution. It was held the warrant was not validly issued because the remand had expired on the tenth, at which time no steps were taken. Thus, there was no authority under which the warrant could have been issued. There was “no criminal cause or charge in existence”: per Kerwin J. at p. 308. The justice became *functus*: per Davis J. at p. 313. Loss of jurisdiction over the offence occurred when the date of adjournment or remand passed and “nothing was done”. Such procedural defect destroyed the jurisdiction of the court. The indictment or warrant became invalid and of no effect. *R. v. Lights*^[3]; *Ex p. Peters*^[4]; *R. v. Mack*^[5].

In a more recent judgment of this Court, *Doyle v. The Queen*^[6], *Trenholm* was affirmed. Where a court fails to proceed with a hearing, jurisdiction over the information charging the accused with the offence is lost, and thereafter “that information is to be treated as if it had never been laid”: per Ritchie J. at p. 610.

The question for determination in the case at bar, however, is whether s. 440.1 of the *Code* has changed all of this. Does the section have the

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result of saving the jurisdiction which would otherwise have been lost? Section 440.1 reads:

(1) The validity of any proceeding before a court, judge, magistrate or justice is not affected by any failure to comply with the provisions of this Act relating to adjournments or remands, and where such failure has occurred and an accused or a defendant does not appear at any such proceeding or upon any adjournment thereof, the court, judge, magistrate or justice may issue a summons or, if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

(2) Where, in the opinion of the court, judge, magistrate or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1), the court, judge, magistrate or justice may adjourn the proceeding and may make such order as it or he considers proper.

(3) The provisions of Part XIV apply *mutatis mutandis* where a summons or warrant is issued under subsection (1).

The Crown contends that where an adjournment expires with no valid action taken by the court, s. 440.1(1) preserves the court’s jurisdiction on the information charging the accused. Reliance is place upon *Doyle v. The Queen*, *supra*.

Prior to the decision in *Doyle*, there was a respectable body of authority which drew a distinction between loss of jurisdiction over the person and loss of jurisdiction over the offence, *i.e.* the indictment or information. Loss of jurisdiction over the person was considered to arise when the court failed to follow the prescriptions of the *Criminal Code* pertaining to adjournments and remands. Although jurisdiction over the person was said to be lost, it could be regained when the accused appeared before the court voluntarily or in response to a summons or warrant. Proceedings then continued on the original information or indictment. See *R. v. Bence et al, Ex p. Regina Oral Arts Ltd.*^[7]; *Re Kuhn and the Queen*^[8]; *R. v. Stedelbauer Chevrolet Oldsmobile Ltd.*^[9]; *Re*

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Groves Certiorari Application^[10]; but see also *St-Pierre v. The Queen*^[11], and *Kolot v. Hemsworth*^[12].

The judgment in *Doyle* cast doubt upon the validity of a distinction between jurisdiction over the person and jurisdiction over the offence. Very briefly, these were the circumstances in *Doyle*. There had been a number of delays and adjournments, each of which had been met by protest from counsel representing Doyle. Although the information had been initiated December 8, 1973, it was not until April 1, 1974, that the charge was read to the accused. At that time, the Court further adjourned the trial to a time four months later. Doyle then brought an application for a writ of *mandamus* declaring void his recognizance. Mr. Justice Ritchie, writing for this Court, held that the failure to put the accused to his election “involved the loss of jurisdiction over the accused” (p. 607); and, by adjourning the case for more than eight days, “jurisdiction over the person of the accused was accordingly lost” (p. 608). Later in the judgment, in *obiter dicta*, Mr. Justice Ritchie, had this to say:

In the present case if the magistrate had granted an adjournment for eight days and then done nothing, the situation would have been exactly within the *Trenholm* decision and I cannot see that the affirmative violation of the *Code* by adjournment for more than eight days which occurred here affords any distinction in principle from the acquiescence in allowing an eight-day adjournment to expire which is what occurred in *Trenholm*. (p. 609)

It is this language which has been interpreted as removing the distinction between loss of jurisdiction over the information or indictment and loss of jurisdiction over the person. See the annotation “The Wonderful World of Practice”, 35 C.R.N.S. 14 at p. 19; also “Criminal Law and Procedure”, (1977) 9 Ott.L.R. 568 at p. 648.

It should be observed at the outset that this case approximates the situation in *Trenholm*, where “nothing is done”, rather than in *Doyle*, where there was a clear contravention of a specific provision of the *Code* relating to adjournments. *Doyle*

did nothing to erode the view expressed in *Trenholm* that when the assigned date passes, without action taken, jurisdiction is lost. *Doyle* had the effect of recognizing a like loss of jurisdiction when there has been an irregular adjournment or remand. If the *dicta* in *Doyle* could be said to have suppressed the distinction between jurisdiction over the person and jurisdiction over the offence, s. 440.1 may be seen as restoring that distinction, in the sense that it permits the court, judge, magistrate or justice to issue a summons or warrant to secure attendance of an accused or defendant where there is any failure to comply with the provisions of the *Code* relating to adjournments or remands. The validity of the proceeding is not affected by such failure.

The Crown advances two main arguments. First, it is said that in setting an adjournment to a certain time and place, and allowing it to expire without the court taking steps to extend the adjournment or otherwise deal with the matter, there has been a failure to comply with the provisions relating to adjournments. When the court does nothing on the 'adjourned' date, it has failed to comply with the terms of the adjournment and is therefore within the curative scope of s. 440.1.

Second, it is argued that the section ought to be given a liberal construction; taking a fair and liberal reading, failure to deal with a matter on the adjourned date is a failure relating to an adjournment. The spirit in which s. 440.1 was enacted was that of resolving procedural irregularities and losses of jurisdiction. If *Doyle* teaches that there is no difference in principle between the two sets of circumstances in which formerly there would have been a loss of jurisdiction, then s. 440.1 ought to be applied equally to cover losses of jurisdiction over the person and the offence. More particularly, it is urged that the section can be used to remedy a failure by the court to attend proceedings set for a particular day.

The Crown submits that a narrow reading of s. 440.1 will revive the dichotomy of loss of jurisdiction and that the section should receive such large

interpretation as will save jurisdiction in a case such as the one at bar. It might be noted that a broad interpretation was given in *Magna v. R.*^[13]; in *R. v. Griffin, Whyte, Porter, and Bruce* (Ont. Weekly Court, August 15, 1978, unreported); and in *Craven and National Aviation Consultants Ltd. v. R.* (Toronto Weekly Court, March 26, 1979, unreported). A narrow interpretation was preferred by the Supreme Court of Prince Edward Island sitting *in banco* in *R. v. Barry* (October 11, 1978, unreported).

In my view, the interpretation the Crown would give to the word "adjournment", in order to use s. 440.1 to cure a loss of jurisdiction consequent upon a failure of the court to attend,

is both artificial and contrived. The language of s. 440.1(1), read in its grammatical and ordinary sense, is simply not wide enough to cover the situation, as here, where there is failure on the part of the court to proceed. The language of s. 440.1(2) is equally inapposite.

Section 440.1(1), on a plain reading, contemplates three elements, precedent to the operation of the section, namely, (i) a proceeding before a court, judge, magistrate or justice; (ii) failure to comply with the provisions of the *Code* relating to adjournments or remands; (iii) non-appearance of the accused or defendant at any such proceeding or adjournment thereof. In my view, it is doubtful if any one of these elements is present in circumstances where the accused or defendant appears at the time and place appointed, but the court fails to appear and nothing is done.

Section 440.1 is directed to the situation where there has been a procedural defect or irregularity in respect of adjournments or remands. The court may purport to adjourn the trial or remand the accused, but inadvertently breach some provision of the *Criminal Code* in so doing. A good example is the case in which the magistrate contravenes the eight-day time limitation by adjourning the matter beyond eight days without consent (*R. v. Dupras Ltd.*; *R. v. Latraverse*^[14]) or *sine die* (*Queen v.*

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Morse^[15]; *Queen v. Quinn*^[16]; *R. v. Moore*^[17]). In those circumstances, the proceedings are not to be held to be invalid. Section 440.1, in effect, gives statutory recognition to the earlier practice of issuing a summons or warrant to bring an accused person before the court where there had been an improper adjournment and the accused failed to appear.

The problem in the instant case was not one of contravention of the requisites of the *Code* relating to adjournments. There was no failure to comply with any provision of the *Code*. The imbroglio arose because the court failed to appear and nothing was done at the time and place set for trial.

In the case of *Doyle*, the Court evidenced, as I have indicated, a willingness to abandon the distinction between loss of jurisdiction over the person (as in improper adjournments) and loss of jurisdiction over the offence (as in a failure to proceed). Section 440.1, however, cannot be interpreted as embracing both eventualities. It is not so worded as to save jurisdiction over the offence when the court has not acted. The *Trenholm* decision, affirmed in *Doyle*, governs this appeal.

I add this *caveat*. The Appellate Division was of opinion that the Court had lost jurisdiction over the offence, but that a new information was available, if one could be laid within the

limitation period for summary conviction cases. The question of whether a new information may be laid after jurisdiction has been lost is not before us, and I refrain from any extended discussion on the point, in the absence of argument and on the narrow facts of this case. It is manifest, however, that there will be occasions on which the laying of a new information will not be available. Time limitations may preclude it. Indeed, the laying of another information may amount to nothing less than an abuse of process. The successful challenge

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to jurisdiction may not come until after trial on the merits and conviction. The full effect of s. 440.1(2) and possible prejudice to the accused, through the laying of a new information, would require consideration. The *dicta* in *Doyle* should not therefore, in my opinion, be taken as authority for the proposition that in every case it will be possible, when jurisdiction over the offence is lost, to lay another information in the same jurisdiction charging the same offence.

I would dismiss the appeal. Pursuant to the order granting leave to appeal to this Court, the appellant will pay the costs of the respondent on a solicitor and client basis.

Appeal dismissed.

Solicitors for the appellant: The Attorney General for Alberta, Edmonton.

Solicitors for the respondent: McLennan, Ross, Taschuk & Ponting, Edmonton.

[1] 1978 ALTASCAD 181 (CanLII), [1978] 4 W.W.R. 557, 40 C.C.C. (2d) 409.

[2] 1940 CanLII 2 (SCC), [1940] S.C.R. 301.

[3] (1968), 1968 CanLII 829 (BC SC), 5 C.R.N.S. 118 (B.C.S.C.).

[4] (1972), 1972 CanLII 1436 (BC SC), 10 C.C.C. (2d) 221 (B.C.S.C.).

[5] 1975 CanLII 1571 (BC SC), [1976] 1 W.W.R. 657 (B.C.S.C.).

[6] 1976 CanLII 11 (SCC), [1977] 1 S.C.R. 597.

[7] 1969 CanLII 1037 (SK CA), [1970] 2 C.C.C. 151 (Sask. C.A.).

[8] (1975), 19 O.K. (2d) 556 (Ont. C.A.).

[9] 1974 ALTASCAD 67 (CanLII), [1974] 6 W.W.R. 362 (Alta. C.A.).

[10] 1971 CanLII 1186 (BC SC), [1972] 2 W.W.R. 399 (B.C.S.C.).

[11] (1965), 1965 CanLII 1150 (QC CA), 47 C.R. 213 (Que. C.A.).

[12] (1967), 1967 CanLII 371 (SK QB), 59 W.W.R. 755 (Sask. Q.B.).

[13] (1977), 40 C.R.N.S.1.

[14] (1924), 1924 CanLII 439 (QC CS), 47 C.C.C. 324 (Que. K.B.).

[15] (1890), 22 N.S.R. 298.

[16] (1897), 2 C.C.C. 153.

[17] (1924), 1924 CanLII 361 (NS CA), 42 C.C.C. 67.

TAB 19

British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23 (CanLII), [2007] 2 SCR 86

Source: Supreme Court of Canada
Date: 2007-05-31
File number: 30317
Other citations: 281 DLR (4th) 54 — 362 NR 208 — 157 ACWS (3d) 300 —
[2007] 6 WWR 197 — 66 BCLR (4th) 203 — 241 BCAC 1 —
EYB 2007-120168 — JE 2007-1107 —
[2007] SCJ No 23 (QL) — 34 MPLR (4th) 1
Citation: British Columbia (Attorney General) v. Lafarge Canada
Inc., 2007 SCC 23 (CanLII), [2007] 2 SCR 86,
<<https://canlii.ca/t/1rmqz>>, retrieved on 2026-03-23



SUPREME COURT OF CANADA

CITATION: British Columbia (Attorney General) v. Lafarge Canada Inc., [2007] 2 S.C.R. 86, 2007 SCC 23

DATE: 20070531
DOCKET: 30317

BETWEEN:

Attorney General of British Columbia
Appellant
and
Lafarge Canada Inc. and Vancouver Port Authority
Respondents
and
Burrardview Neighbourhood Association and City of Vancouver
Respondents
- and -
**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of New Brunswick
and Attorney General of Alberta**

Interveners

CORAM: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

JOINT REASONS FOR JUDGMENT: Binnie and LeBel JJ. (Deschamps, Fish, Abella and Charron JJ. concurring)

(paras. 1 to 91)

Bastarache J.

CONCURRING REASONS:

(paras. 92 to 143)

British Columbia (Attorney General) v. Lafarge Canada Inc., [2007] 2 S.C.R. 86, 2007 SCC 23

Attorney General of British Columbia

Appellant

v.

Lafarge Canada Inc. and Vancouver Port Authority

Respondents

and

Burrardview Neighbourhood Association and City of Vancouver

Respondents

and

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of
New Brunswick and Attorney General of Alberta**

Interveners

Indexed as: British Columbia (Attorney General) v. Lafarge Canada Inc.

Neutral citation: 2007 SCC 23.

File No.: 30317.

2005: November 8; 2007: May 31.

Present: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Division of powers — Public property — Interjurisdictional immunity — Company seeking to build integrated ship offloading/concrete batching facility on port lands owned by federal undertaking — Whether municipal zoning and development by-law inapplicable — Whether interjurisdictional immunity extends to all federally controlled property — [Constitution Act, 1867, s. 91\(1A\)](#).

Constitutional law — Division of powers — Navigation and shipping — Interjurisdictional immunity — Federal paramountcy — Company seeking to build integrated ship offloading/concrete batching facility on port lands owned by federal undertaking — Whether municipal zoning and development by-law inapplicable in view of Parliament’s jurisdiction over “navigation and shipping” — Whether land use jurisdiction asserted by federal undertaking attracting interjurisdictional immunity — Whether requirements of federal paramountcy doctrine satisfied — [Constitution Act, 1867, s. 91\(10\)](#).

Constitutional law — Division of powers — Interjurisdictional immunity — Scope.

Lafarge Canada Inc. wished to build an integrated ship offloading/concrete batching facility on waterfront lands owned by the Vancouver Port Authority (“VPA”), a federal undertaking constituted pursuant to the 1998 *Canada Marine Act*. The City of Vancouver, which proposed certain modifications, and the VPA approved the project in principle, but a group of ratepayers opposed it and filed an application in the British Columbia Supreme Court, arguing that the City

had declined to exercise jurisdiction over the lands and ought to have insisted that Lafarge obtain a City development permit. The VPA replied that no City permit was necessary because VPA lands enjoy interjurisdictional immunity as “public property” within the meaning of s. 91(1A) of the *Constitution Act, 1867*, or because the management of those lands is vital to the VPA’s “federal undertaking” pursuant to the federal s. 91(10) jurisdiction over “navigation and shipping”. In the alternative, the VPA contended that there was an operational conflict and that, according to the doctrine of federal paramountcy, the conflict must be resolved in favour of federal jurisdiction. The chambers judge granted the ratepayers’ application and declared that the VPA lacked jurisdiction to approve the project. The Court of Appeal set aside the decision, finding that VPA lands are “public property” within the meaning of s. 91(1A) of the *Constitution Act, 1867* and declaring the City’s zoning and development by-law to be inapplicable to the proposed development.

Held: The appeal should be dismissed.

Per Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.: This case should be decided on the basis of federal paramountcy, not interjurisdictional immunity. As explained in *Canadian Western Bank v. Alberta*, released concurrently, the doctrine of interjurisdictional immunity should generally not be applied where the legislative subject matter presents a double aspect and both federal and provincial authorities have a compelling interest. Were there to be no valid federal land use planning controls applicable to the site, federalism does not require a regulatory vacuum, which would be the consequence of interjurisdictional immunity. The matter at issue here — the development of waterfront lands — could potentially fall under either provincial or federal jurisdiction, depending on the ownership of the lands and on the use to which it is proposed that they be put. Waterfront lands do not cease to be “within the province” by reason of their potential use for federally regulated activities, but the federal power will be paramount to

the provincial power where valid federal and provincial laws are applicable to different aspects of the proposed use and come into operational conflict. [4] [37] [43]

The *Canada Marine Act* is a federal law that in pith and substance relates both to the management of “public property” and to “navigation and shipping”. Section 91(1A) of the *Constitution Act, 1867* does not extend interjurisdictional immunity to all federally controlled property. Absent an agency relationship, public property must encompass some element of ownership by Canada in order to receive constitutional immunity from provincial land use regulations. The federal Crown has no proprietary interest in the subject land. The VPA’s letters patent indicate that the lands Lafarge proposes to lease from the VPA for its project are Schedule C lands. Under the *Canada Marine Act*, Schedule C lands are owned by the VPA, not by the Crown, and it is expressly provided that the VPA is not an agent of Canada in relation to those lands. Since s. 91(1A) creates an immunity based on a proprietary interest, Schedule C lands are not “public property” of the federal Crown and do not therefore fall within the scope of s. 91(1A). To impute s. 91(1A) status to the Schedule C lands and thereby subject the lands to a Crown regime which the denial of Crown agent status was designed to avoid, would be inconsistent with Parliament’s intent. [48] [53] [56] [60] [72]

Nor does interjurisdictional immunity apply to every element of an undertaking that has been incorporated federally or is subject to federal regulation; it is restricted to “essential and vital elements” of the undertaking. There is no explicit federal jurisdiction over “port lands”. The VPA’s authority must therefore be derived from the federal power over “navigation and shipping” under s. 91(10) of the *Constitution Act, 1867*. This power may bring within federal jurisdiction a matter otherwise subject to provincial jurisdiction if that matter is “closely integrated” with shipping or navigation. Here, the *Canada Marine Act*’s land use controls reach beyond Crown property to embrace uses that are “closely integrated” with shipping and navigation. This covers the Lafarge project, which has from the outset been conceived of by both the City and the VPA as an integrated transportation/mixing facility in which the marine transportation aspect dominates. The port is not a federal enclave. VPA lands are held and leased for a variety of activities.

Authorizing the construction of a cement mixing facility on these port lands does not fall within the VPA's core or vital functions. On the facts of this case, it is rather an activity incidental to shipping. In the absence of valid and applicable federal regulatory land use controls there would be no regulatory vacuum on the land at issue. Provincial land use controls would apply. The federal arguments in favour of interjurisdictional immunity are therefore rejected. [42] [65-66] [68] [72-73]

The preconditions of federal paramountcy are met, however, and the ratepayers' application should be dismissed on that ground. First, there is a valid and applicable federal law, namely the *Canada Marine Act*. Its land use plan and policies and procedures must be construed in light of the scope of the federal power. The only source of federal power relevant to the Lafarge project lands is the navigation and shipping power. The whole of the Lafarge project on the VPA's Schedule C lands is sufficiently "integrated" into the ship/barge unloading facility to make federal law applicable to all aspects of it. Second, there is a valid and applicable provincial law. The City's zoning and development by-law is a valid expression of provincially authorized legislative power. The land use controls are laws of general application that are not aimed at navigation and shipping. Third, these two valid laws are incapable of simultaneous enforcement: there is an operational conflict in this case because a judge could not have given effect to both the federal law and the municipal law. The record confirms areas of conflict relating to a height restriction, and to noise and pollution standards. To apply the relevant municipal law in these areas would frustrate the federal purpose by depriving the VPA of its final decisional authority on the development of a project that both the City and the VPA have considered to be primarily shipping-related in respect of matters that fall within the legislative authority of Parliament. [75] [77-81] [85]

Per Bastarache J.: The appeal should be dismissed solely on a proper application of the doctrine of interjurisdictional immunity in the context of Parliament's power over navigation and shipping. Although this doctrine has been criticized, its critics have not successfully demonstrated why it should be abandoned. Without it, there would be no remedy permitting a provincial law to be read down in such a way as to be inapplicable to a federal matter while

continuing to be applicable to other, non-federal matters. There would also be no way to prevent the improper application of an otherwise valid provincial law to a federal matter in situations where there is no competing federal law. [93] [103] [107]

The doctrine of interjurisdictional immunity is about jurisdiction: what matters is whether a valid provincial law “affects” the core of a federal head of legislative power. The test for immunity should therefore be focussed not on a specific activity or operation and on whether that activity or operation is immune from the provincial law; rather, its focus should be on whether the federal power in question is immune from the application of the provincial law. Because of this focus on jurisdiction rather than on an action, there need not be any federal legislation or executive action “occupying the field” for federal immunity to be triggered in an area under federal legislative authority. The mere fact that a provincial law or a municipal by-law “affects” a vital part of an area under exclusive federal jurisdiction is enough to render it inapplicable to a federal undertaking. The meaning of the word “affects” should not be interpreted as requiring complete paralysis of the core of the federal power or the operations of the undertaking; rather, to trigger immunity, the impact of the application of the provincial law must be sufficiently severe and serious. [109-110] [139]

Here, the City’s by-law is valid provincial legislation of general application. Its pith and substance is in relation to the regulation of land use planning and development for property situated within the City. The application of the by-law does not invade Parliament’s exclusive legislative jurisdiction over “public property”, because the lands in question do not constitute “public property” within the meaning of s. 91(1A) of the *Constitution Act, 1867* and therefore do not enjoy federal immunity from the application of the municipal by-law on that basis. Since the immunity at the heart of s. 91(1A) is based on a proprietary interest, the relevant test for determining whether lands constitute public property for the purposes of that section is whether there is evidence that the federal Crown has a sufficient proprietary interest in them. Thus, when a Crown corporation owns or holds land other than as a Crown agent, there must be some element of

ownership by the federal Crown for it to receive constitutional immunity from provincial land use laws and regulations. On the facts of this case, the Crown has not established a proprietary interest in the lands that would be sufficient to justify federal immunity on the basis of s. 91(1A). The lands in question are listed in Schedule C of the VPA's letters patent, and it is clear that Parliament explicitly chose to exclude Schedule C lands from the definition of federal lands and lands held in the name of the Crown by Crown agents. In including the lands in Schedule C, Parliament renounced any proprietary interest in them. The lands are held by the VPA in its own name, and not for the benefit of the Crown. [115] [119] [123-125]

The City's by-law is constitutionally inapplicable by reason of federal immunity in respect of the core of the navigation and shipping power under s. 91(10) of the *Constitution Act, 1867*. The core of the s. 91(10) power necessarily extends to and includes the power to regulate land use planning and development for port lands in support of port operations. This provides the necessary link to navigation and shipping in order to trigger federal immunity, and it flows from the inclusion of ports and harbours generally within the federal power over navigation and shipping and, more specifically, from the inclusion of land use planning and development activities and decisions by port authorities in respect of port lands when such activities and decisions have a sufficient connection to navigation and shipping. The s. 91(10) power must also include and extend to federally regulated port authorities such as the VPA, whose creation, role and mandate are undeniably at the core of Parliament's legislative authority over navigation and shipping insofar as their operations and functions are performed in support of port operations. The decision to recognize or deny federal immunity should not be based solely on whether the parcel of port lands in question is to be used directly for "port activities" or merely "in support of" port operations, and on fears that certain uses of the latter category would appear to be somehow less closely connected to shipping and navigation. The regulation of land use planning and development for all port lands lies at the core of s. 91(10). So long as that regulation function is performed properly according to the federal undertaking's terms and mandate and is concerned with port lands for activities in support of port operations (at a minimum), or directly for port activities, the specific status of a particular parcel of port lands and its specific intended use should

not matter. Specific uses of land are relevant to the immunity analysis only to the extent that they might reflect an improper exercise of the core federal power over the regulation of land use for port lands. Here, under the *Canada Marine Act*, Schedule C lands have been deemed to be “necessary to support port operations”, and the VPA’s decision to approve the Lafarge project on such lands was consistent with a valid exercise of its power to regulate land use planning for port lands in support of port operations. Although certain aspects of the project, taken on their own and in isolation, may appear to be only loosely connected with shipping and navigation activities or operations, the project “supports” port operations given that its ultimate objective is to enhance competitiveness and commercial viability. Since the City’s by-law clearly and significantly affects the VPA’s regulation of land use planning for port lands in support of port operations by imposing a zoning regime and an approval process for development proposals and projects on such lands, the by-law is inapplicable because it affects a vital part of the federal power over navigation and shipping. [127] [130-131] [136] [138] [140] [142]

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By Binnie and LeBel JJ.

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and Disputes Investigation Act, [1955 CanLII 1 \(SCC\)](#), [1955] S.C.R. 529; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1978 CanLII 18 \(SCC\)](#), [1979] 1 S.C.R. 754; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933 CanLII 86 \(SCC\)](#), [1933] S.C.R. 629; *Greater Toronto Airports Authority v. Mississauga (City)* (1999), [1999 CanLII 14773 \(ON SC\)](#), 43 O.R. (3d) 9; *Coyne v. Broddy* (1887), 13 O.R. 173; *R. v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board* (1963), [1963 CanLII 299 \(ON CA\)](#), 38 D.L.R. (2d) 530; *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*, [1976 CanLII 185 \(SCC\)](#), [1977] 2 S.C.R. 238; *Halifax (City of) v. Halifax Harbour Commissioners*, [1934 CanLII 79 \(SCC\)](#), [1935] S.C.R. 215; *Nova Scotia Power Inc. v. Canada*, [2004] 3 S.C.R. 53, [2004 SCC 51](#); *R. v. Eldorado Nuclear Ltd.*, [1983 CanLII 34 \(SCC\)](#), [1983] 2 S.C.R. 551; *Queddy River Driving Boom Co. v. Davidson* (1883), [1883 CanLII 60 \(SCC\)](#), 10 S.C.R. 222; *Attorney-General for Ontario v. Winner*, [1954 CanLII 289 \(UK JCPC\)](#), [1954] A.C. 541; *Johannesson v. Rural Municipality of West St. Paul*, [1951 CanLII 55 \(SCC\)](#), [1952] 1 S.C.R. 292; *Re Orangeville Airport Ltd. and Town of Caledon* (1976), [1976 CanLII 743 \(ON CA\)](#), 11 O.R. (2d) 546; *Monk Corp. v. Island Fertilizers Ltd.*, [1991 CanLII 95 \(SCC\)](#), [1991] 1 S.C.R. 779; *Whitbread v. Walley*, [1990 CanLII 33 \(SCC\)](#), [1990] 3 S.C.R. 1273; *Zavarovalna Skupnost Triglav v. Terrasses Jewellers Inc.*, [1983 CanLII 138 \(SCC\)](#), [1983] 1 S.C.R. 283; *Canadian Pacific Railway Co. v. Attorney-General of British Columbia*, [1948 CanLII 18 \(SCC\)](#), [1948] S.C.R. 373, *aff'd* [1949 CanLII 278 \(UK JCPC\)](#), [1950] A.C. 122; *Multiple Access Ltd. v. McCutcheon*, [1982 CanLII 55 \(SCC\)](#), [1982] 2 S.C.R. 161; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, [2005 SCC 13](#); *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, [2001 SCC 67](#); *Bank of Montreal v. Hall*, [1990 CanLII 157 \(SCC\)](#), [1990] 1 S.C.R. 121; *Re Sturmer and Town of Beaverton* (1911), 24 O.L.R. 65; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999 CanLII 648 \(SCC\)](#), [1999] 2 S.C.R. 961.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Mackenzie and Thackray JJ.A.) (2004), [2004 BCSC 104 \(CanLII\)](#), 26 B.C.L.R. (4th) 263, 194 B.C.A.C. 78, 317 W.A.C. 78, 237 D.L.R. (4th) 466, 44 M.P.L.R. (3d) 169, [2004] 7 W.W.R. 27, [2004] B.C.J. No. 355 (QL), 2004 BCCA 104, reversing a decision of Lowry J. (2002), 32 M.P.L.R. (3d) 205, [2002] B.C.J. No. 2245 (QL), [2002 BCSC 1412](#). Appeal dismissed.

Nancy E. Brown and Nathalie Hepburn Barnes, for the appellant.

James Sullivan and Gloria Chao, for the respondent Lafarge Canada Inc.

D. Geoffrey Cowper, Q.C., and W. Stanley Martin, for the respondent the Vancouver Port Authority.

No one appeared for the respondent the Burrardview Neighbourhood Association.

Patsy J. Scheer, for the respondent the City of Vancouver.

Peter M. Southey, for the intervener the Attorney General of Canada.

Shaun Nakatsuru and Mark Crow, for the intervener the Attorney General of Ontario.

Alain Gingras, for the intervener the Attorney General of Quebec.

Written submissions only by *John G. Furey*, for the intervener the Attorney General of New Brunswick.

Robert J. Normey and Nick Parker, for the intervener the Attorney General of Alberta.

The judgment of Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. was delivered by

1 BINNIE AND LEBEL JJ. — Vancouver possesses by far the busiest port in Canada, and its vast operations constitute not only a vital part of the shipping and transportation industry but generate economic activity, commercial opportunities and environmental concerns for the eight surrounding municipalities. Changing land use patterns and more efficient modern shipping methods (containerization, for example) have released stretches of waterfront for other types of development. Vancouver's original Coal Harbour is now a forest of luxury hotels and high-priced condominiums. Elsewhere smokestacks have given way to parkland. Warehouses have been

converted into trendy office buildings. Yet shipping activities flourish. The realities of mixed transportation/industrial/commercial/residential development along urban waterfronts pose a challenge to the venerable “watertight compartments” division of federal legislative jurisdiction over navigation and shipping, on the one hand, and provincial jurisdiction over property and civil rights on the other. How to give practical effect in the harbour context to the exercise of these potentially conflicting legislative and regulatory powers is the central question posed by this litigation.

2 The immediate controversy is the proposal by the respondent Lafarge Canada Inc. to build an “integrated” ship offloading/concrete batching facility in the east harbour area on what is known as the Sterling Shipyard site. Aggregate is to be barged in by sea from the Sunshine Coast, offloaded, stored temporarily in silos on the waterfront, then mixed with cement, and thereafter dispatched to various construction sites, particularly within downtown Vancouver. Some material like cement is to be trucked in. The mixing component of the facility is described as a “twin batch plant” because the ingredients can either be tumbled on site (“wet mix”) and then loaded and dispatched, or loaded in their original state (“dry mix”) with water added in the rotating drums of concrete trucks. In the latter situation, the ingredients are churned into concrete on the way to a construction site. The respondents contend that as a matter of fact the “twin batch plant” will be integrated into the marine unloading facility.

3 The two levels of government are in agreement that the Lafarge project reflects good planning principles, but objection is taken by the Burrardview Neighbourhood Association (the “Ratepayers”). Their legal argument, advanced in this Court by the provincial attorneys general, is that the City ought to have insisted that Lafarge obtain a City development permit. The respondent, Vancouver Port Authority (“VPA”), replies that as a matter of law no City permit is necessary because VPA lands enjoy interjurisdictional immunity as federal “public property”

within the meaning of s. 91(1A) of the *Constitution Act, 1867*, or their management is vital to the VPA's "federal undertaking" pursuant to the federal s. 91(10) jurisdiction over "navigation and shipping". In either case, the VPA says provincial land use controls are rendered inoperative. In the alternative, the respondents say, there is operational conflict between the federal land use controls and provincial land use controls, and the conflict, according to the doctrine of federal paramountcy, must be resolved in favour of federal jurisdiction.

4 For the reasons we gave in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, released concurrently, we agree with the approach outlined by the late Chief Justice Dickson in *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 18, in which he characterized the arguments for interjurisdictional immunity as not particularly compelling, and concluded that they ran contrary to the "dominant tide" of Canadian constitutional jurisprudence. In particular, in our view, the doctrine should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect. Both federal and provincial authorities have a compelling interest. Were there to be no valid federal land use planning controls applicable to the site, federalism does not require (nor, in the circumstances, should it tolerate) a regulatory vacuum, which would be the consequence of interjurisdictional immunity. On the facts, however, there *is* valid and applicable federal legislation which is in conflict, both in its operation and in its purpose, with the provincial land use legislation and regulations adopted under its authority. The appeal is thus easily resolved in favour of the VPA on the basis of federal paramountcy. The British Columbia Court of Appeal rejected the Ratepayers' challenge and, for somewhat different reasons, we agree with its conclusion.

5 The appeal should therefore be dismissed.

I. Facts

6 Vancouver harbour, for navigational purposes, is defined as a stretch of 233 kilometres of coastline from Roberts Bank near the U.S. border through Sturgeon Bank, English Bay, and Burrard Inlet to Port Moody. The VPA claims proprietary jurisdiction over 150 kilometres of shoreline. Within Burrard Inlet, the VPA is responsible for approximately 6,000 hectares of seabed and 460 hectares of “upland” (i.e. mostly reclaimed waterfront land).

7 The VPA has adopted a *Port Land Use Management Plan* (June 1994) (called “*Port 2010*”) whose “strategic rationale” is set out in part as follows:

. . . the port is situated within an urban region which is also experiencing significant growth. Accordingly, there is a need to effectively plan the interface of these two dynamics. [p. 2]

8 *Port 2010* includes adjacent municipalities in its definition of “stakeholders” (p. 12) and acknowledges that

VPC [predecessor to the VPA] will need to work with the municipalities and communities to establish compatible land use plans that support a viable working waterfront. [p. 20]

9 The provincial assessment authority has effectively exempted from local taxes the Sterling Shipyard site and other port lands by assessing them at “nil” for municipal and provincial taxation purposes, although some monies are paid to the municipalities pursuant to the [federal Payments in Lieu of Taxes Act](#), R.S.C. 1985, c. M-13.

The City's *Central Waterfront Official Development Plan* (which was adopted by By-law No. 5261, June 19, 1979) states that: "It is recognized that in order to realize the City's basic objectives, full co-operation will be needed from the various waterfront property owners and authorities. The objectives of the different owners must be clearly understood by the City and must be respected in the planning of the Central Waterfront" (p. 4). Further, the City's statement of planning policies continues:

The [VPA], which is a federal agency, is a major owner of the land, foreshore and water area of the Central Waterfront. The [VPA] provides vital port functions to the Vancouver Harbour, as well as the region. Such existing port functions should continue to operate effectively in the Central Waterfront. The development of urban uses on [VPA] property should be compatible with essential port functions.

The City recognizes that the [VPA], being a Crown Agency, has control over the uses of its property for port and other functions which are largely port-related and are compatible in character to the area, and is not legally bound by the City's development regulations. However, [VPA] officials have clearly indicated to the City that they would endeavour to co-operate in achieving City objectives as long as port functions and future port development objectives are not jeopardized. [p. 4]

For some years, Lafarge has been attempting to find a suitable waterfront site for a new facility. A previous proposal had also been opposed by ratepayer groups and been rejected by the VPA's Project Advisory Committee because it was incompatible with existing land uses in the area. In August 2001, Lafarge submitted for approval its present project to be built on land acquired by the VPA the previous year from the City. The site had for many years been used for shipping and industrial purposes. It is physically separated from residential and commercial uses to the south by a transportation corridor that includes roads and four sets of railway tracks. The City had initially planned to put its own asphalt plant on the site. From the City's planning perspective, the project land lies within the area of Vancouver subject to By-law No. 6718, *Burrard Waterfront*, enacted August 28, 1990, and zoned CD-1 which allows a concrete batch plant.

12 In 1998, the City had entered into a protocol (called a “Charter”) with the VPA which recited in part that “the Port occupies a major proportion of the waterfront lands in the City of Vancouver, and . . . the [City] provides municipal services and access, essential to the effective operation of the port, and manages development adjacent to the port”. The protocol continues “the City and the . . . Port . . . are both committed to the economic development of the region, the provision of jobs, the efficient movement of goods and people, and the maintenance and enhancement of the environment [and] acknowledge the importance of each to the other, and the necessity for a good working relationship between the two bodies” (A.R., at p. 341). They agreed to “work together . . . ensuring that development on Port lands is compatible with both the economic development of the Port and the interests of the City . . . ensuring that development in the City is compatible with the economic development of the Port and the interests of the City [and] ensuring effective public consultation” (A.R., at p. 341).

13 A policy of *Port 2010* is to promote “marine-related” port uses, and the Lafarge project was determined by the VPA (and the City) to qualify as such, stating:

Lafarge’s proposed use of the property includes the barging of aggregate to site. This marine activity is a critical component of their proposed operations. With respect to the batch plant itself, this is essentially a processing operation. There are many examples of processing activities that are permitted on port lands; fish processing plants, grain handling terminals, and a rendering plant, are a few such examples. [A.R., at p. 345]

14 The Ratepayers opposed the Lafarge plant on the Sterling Shipyard site on a number of grounds, including concerns about increased air and noise pollution, truck traffic, loss of trees

and visual obstruction of the residents' view over the harbour. They noted that part of the facility would exceed the City's 30-foot height restriction. By letter dated January 31, 2002, the Ratepayers demanded that the City assert jurisdiction over the "twin plant" component of the Lafarge project. Underlying the Ratepayers' position, it is fair to say, was the belief that elected City politicians would likely be more amenable to ratepayer interests than would be the appointed Board of Directors of the VPA.

15 The Lafarge proposal was referred to the City for comment and considered by its Urban Design Panel, which includes design professionals, architects, landscape architects, professional engineers and representatives of the development industry. Its role is to advise the City on significant development proposals. On November 14, 2001, despite Ratepayers' opposition, the Urban Design Panel gave its support to the Lafarge proposal by a vote of 7 to 1.

16 On March 4, 2002, the Lafarge proposal was considered by the City's Development Permit Board, which heard comments from City staff, representatives of the Vancouver Coastal Health Authority, the VPA, Lafarge, and 37 members of the public. Some ratepayers expressed opposition. In the end, the Development Permit Board supported the Lafarge proposal, subject to recommending certain modifications with respect to exterior colour, signage, retention of trees, and noise abatement. On March 13, 2002, the City wrote to the VPA indicating approval, subject to the stated modifications.

17 The VPA, in the meantime, had followed its own procedure of internal and external consultation pursuant to its *Guide To Project Approvals In Port Vancouver*. The VPA's "Public Review Process" included public meetings and reports from technical advisors retained by the VPA who addressed issues of air quality and noise abatement. The Burrard Environmental Review Committee (comprised of various provincial and federal environmental agencies) also filed a

report. These reports were considered by the VPA along with comments and advice from the City and input from the public at a public meeting and through written submissions.

18 On May 27, 2002, the Vice-President of the Ratepayers wrote the Mayor threatening to sue him personally for damages if the City of Vancouver did not assert jurisdiction over the “twin plant” component of the Lafarge project:

Pursuant to [Section 208](#) of the [Vancouver Charter](#), the Mayor’s duties are to enforce the law for government of the City and “to be vigilant and active at all time in causing the law for the government of the City to be duly enforced and obeyed”. I do not believe the conduct of the Staff has assisted the Mayor in being either vigilant or active in ensuring the bylaws are enforced.

...

In spite of my personal, positive opinion as to your abilities as Mayor, I feel compelled to tell you that one of the results may be that, in the event that our application to Court is successful, the [Ratepayers] may seek damages or other compensation from you, personally, arising from Section 208.

...

It may well be that the position adopted by the Staff and your personal obligations are not the same. [A.R., at p. 874]

19 On July 8, 2002, the VPA issued its Approval in Principle of the Lafarge proposal, subject to certain additional requirements, including satisfactory resolution of the Ratepayers’ challenge over land use jurisdiction. Mr. James P. Crandles, the Director of Port Development testified that the Lafarge project was acceptable because “the marine transportation of aggregate rock, as integrated into the processing of that aggregate rock, is ‘a process related to shipping’. Further, it is consistent with joint transportation-processing-manufacturing practices in other long-term Port of Vancouver industries. Finally, it realizes Policy 2.1 of the Plan, supporting port service industries reliant on waterfront access” (A.R., at p. 412).

20 On April 5, 2002, prior to the VPA's Approval in Principle, the Ratepayers filed a petition in the Supreme Court of British Columbia objecting that the City had "declined to exercise jurisdiction over the Lands to require Lafarge to obtain a valid development permit as required by the City's by-laws before any development on the Lands is undertaken" (A.R., at p. 122) and seeking an order

directing the Respondent, City of Vancouver ("City"), to enforce the provisions of its zoning and development by-law no. 3575 (the "By-law") with respect to the Lands as defined herein and any development by the Respondent, Lafarge Canada Inc. ("Lafarge") of a concrete batch plant or related facility to be constructed on the Lands, in particular, the mandatory By-law requirement that Lafarge obtain a valid development permit before any such development is undertaken; [A.R., at p. 119]

The Ratepayers also sought ancillary injunctive and declaratory relief.

II. Judicial History

A. *Supreme Court of British Columbia* (2002), 32 M.P.L.R. (3d) 205, [2002 BCSC 1412](#)

21 Lowry J. accepted the VPA's formulation of the constitutional issues as follows (at para. 18):

1. Is the land that is the subject of the proposal public property of Canada as contemplated by s. 91(1A) of the [Constitution Act, 1867](#) such that municipal land use and planning laws have no application?
2. Does the proposed use of the land fall within exclusive federal power to legislate in respect of navigation and shipping under s. 91(10) of the [Constitution Act, 1867](#)

such that the Port Authority can be authorized to lease the land thereby rendering the City by-law inapplicable?

3. Does this court have jurisdiction to determine whether the Port Authority has been authorized to lease the land for the proposed purpose and, if so, does the Port Authority have that authority?

(We note parenthetically that the VPA's third issue seems unresponsive to the Ratepayers' application to have *the City* ordered to exercise its land use jurisdiction, because the third issue switched the focus to the exercise by the VPA (not the City) of *its* statutory jurisdiction, which in any event the chambers judge declined to deal with.)

22 As to s. 91(1A) of the *Constitution Act, 1867*, the chambers judge concluded that the VPA in acquiring and leasing the lands to Lafarge was not acting as an agent of the Crown and, therefore, the lands were not "public property":

The scheme of the *Canada Marine Act* gives a port authority a degree of local autonomy. It is to perform port activities as an agent of the federal Crown and other activities that are deemed necessary to support the operation of the port on its own behalf. Its management of "federal real property" is performed as an agent; its management of "other property" is not. [para. 39]

23 Turning to the issue of whether the Lafarge proposal falls within the exclusive federal power to legislate in respect of navigation and shipping under s. 91(10) of the *Constitution Act, 1867*, Lowry J. adopted a "necessity" test, and ruled:

I consider that, even construed broadly, navigation and shipping cannot extend beyond land-based operations that are incidental in the sense of being necessary to marine transport. Aggregate that is carried by sea must, like all marine cargo, be offloaded and it may have to be stored short-term before it is delivered from the dock. However, it does not have to be mixed with other ingredients and made into concrete. That may be related to the carriage in that it is the reason for the transport, but it is not necessary for the transport to be performed.

. . . A marine facility may well be commercially desirable for the efficient operation of a batch plant, but that does not mean that a plant that makes concrete is necessary to the operation of a marine facility. [Emphasis added; paras. 51-52.]

24 Lowry J. granted the Ratepayers' application and made a declaration that the VPA was without jurisdiction to approve the Lafarge project.

B. *Court of Appeal for British Columbia (Finch C.J.B.C. and Mackenzie and Thackray JJ.A.)* (2004), 26 B.C.L.R. (4th) 263, [2004 BCCA 104](#)

25 Finch C.J.B.C. disagreed with the chambers judge's conclusions on the two constitutional grounds. With respect to whether the site was "public property" for the purposes of s. 91(1A) of the *Constitution Act, 1867*, Finch C.J.B.C. concluded, at para. 77:

The finding that a statutory body is not a Crown agent should not lead inevitably to the conclusion that the lands that body holds are not "public property".

In his view, the degree of control exercised by the federal government over the VPA was sufficient to constitute all VPA lands as federal "public property" for constitutional purposes, and therefore its use is immune from provincial/municipal regulation.

26 Finch C.J.B.C. also expressed the view that the development proposal for the site fell within the exclusive legislative jurisdiction granted to Parliament under s. 91(10) over navigation and shipping. Finding that the chambers judge had applied the wrong test, he stated that "[t]he test is not the necessity of a concrete batch plant to navigation and shipping, but rather whether the

application of the City's Bylaw to regulate the development of port lands would affect a vital aspect of the federal power over navigation and shipping" (para. 96). He went on to explain:

I agree with the submissions of the Port Authority and Lafarge that the Port Authority requires the flexibility to adapt its land uses to the changing needs of its customers and the surrounding community. The ability to control the use of port lands adjacent to the harbour ensures that marine access is maintained and that industries compatible with port uses are served. The Port Authority's power to control its own land also ensures consistency rather than a checkerboard of regulation by different municipalities. Integrated land-use planning and control are essential to the continued strength and competitiveness of the Port of Vancouver. [para. 107]

27 Having concluded that compliance with the City by-law would impermissibly affect a vital federal shipping function, Finch C.J.B.C. declared the by-law to be inapplicable to the proposed development. The appeal was allowed, the order of the chambers judge set aside, and the Ratepayers' petition was dismissed.

28 Mackenzie and Thackray JJ.A. agreed with Finch C.J.B.C. that the lands were "public property" within the meaning of s. 91(1A) of the *Constitution Act, 1867*, but did not find it necessary to address the alternative ground of federal jurisdiction over navigation and shipping.

III. Statutory Authorities

29 The statutory authorities are cited in the Appendix.

IV. Constitutional Questions

On January 26, 2005, the Chief Justice stated the following constitutional questions:

1. Is the City of Vancouver Zoning and Development Bylaw No. 3575 constitutionally inapplicable to property, with a legal description of Parcel P, Block 17, Plan LMP 47343, District Lot 184 and the Public Harbour of Burrard Inlet (the “Property”), held by the Vancouver Port Authority, on the basis that the Property is “public property” within the meaning of s. 91(1A) of the *Constitution Act, 1867*?
2. Is the City of Vancouver Zoning and Development Bylaw No. 3575 constitutionally inapplicable to the proposed development on the Property in view of Parliament’s legislative authority over “navigation and shipping” under s. 91(10) of the *Constitution Act, 1867*?

V. Analysis

31 Harbours, as with railways and airports, present difficult land use planning problems. The framers of the *Constitution Act, 1867*, seeking to unify the several colonies into a single country, logically placed the lines of interprovincial communication and transportation in federal hands. Yet transportation has a dramatic impact on land use, and land use is inherently local. Transportation facilities do not exist for their own sake but to serve the needs of the economy and the local communities that depend upon an efficient network for the movement of people and goods. On the other hand, there is a mutual self-interest linking the federally regulated transportation systems and the communities they serve, as is recognized both in the VPA’s *Port 2010* plan and in the City’s *Central Waterfront Official Development Plan*, already discussed.

32 The Attorney General of British Columbia argues that when engaged in activities that are merely “supportive” of shipping and navigation, as by promoting waterfront development that will (incidentally) generate waterborne transportation business (as in the hypothetical case of the dockside car assembly plant mentioned by the chambers judge), the VPA is operating outside

federal jurisdiction and must comply with City by-laws like any other waterfront developer, such as those who put up waterfront condominium residences.

33 The respondent VPA, supported by the City, says that this approach understates the federal interest identified by the Court of Appeal including:

1. the Crown’s ultimate “ownership” or control of all VPA lands, including lands held by the VPA in its own name, and

2. the VPA’s role as exclusive regulator of shipping and navigation activities, a federal power that has traditionally been construed broadly.

34 The VPA is particularly concerned about its ability to function effectively if required to deal in development matters with the eight different municipalities that border the harbour. Lafarge, for its part, points out that it has done what the City and the VPA asked it to do, and is now in its eleventh year of seeking to bring a waterfront project to fruition and its fifth year of litigation, with no project implementation in sight.

35 Whether or not a particular activity is “integral” to the exercise of a federal head of legislative power, or is “sufficiently linked” to validate federal regulation, is essentially a factual inquiry. *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986 CanLII 91 \(SCC\)](#), [1986] 1 S.C.R. 752, held that dockside unloading and storage operations are “integral” to shipping, as would be loading trucks to remove the cargo from the port. The wharves would otherwise become so congested as to cease to operate. The law favours unified regulation of integrated facilities. Insistence on bright jurisdictional lines within what the City and the VPA considered to be a continuous transportation-based project would encourage regulatory conflict

and dampen entrepreneurial activity in the port area that both the City and the VPA agree would comply with good planning principles.

A. *Constitutional Overview*

36 There is no separate head of legislative power over “ports”. The federal government enjoys exclusive jurisdiction in relation to its public property and over shipping and navigation activities. The province exercises jurisdiction over “property and civil rights” and “municipal institutions” within the province but it has, of course, been long recognized that the power to control navigation and shipping conferred by s. 91(10) is “capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights”: *Montreal (City of) v. Montreal Harbour Commissioners*, [1925 CanLII 325 \(UK JCPC\)](#), [1926] 1 D.L.R. 840 (P.C.), at pp. 848-49, *per* Viscount Cave L.C.

37 The development of waterfront land could potentially fall under either provincial or federal jurisdiction, depending on the ownership and the use to which the land is proposed to be put. Waterfront lands do not cease to be “within the province” by reason of their potential use for federally regulated activities (*Cardinal v. Attorney General of Alberta*, [1973 CanLII 980 \(SCC\)](#), [1974] S.C.R. 695), but of course federal authority will be paramount to the provincial authority in cases of overlapping jurisdiction where there is a valid federal law and a valid provincial law applicable to different aspects of the proposed use and the two laws come into operational conflict. In this respect, we agree, as did the Ontario Court of Appeal ((1978), 21 O.R. (2d) 491), with what was said by Griffiths J. (as he then was) in *Hamilton Harbour Commissioners v. City of Hamilton* (1976), [1978 CanLII 1511 \(ON CA\)](#), 21 O.R. (2d) 459 (H.C.J.), at p. 484:

In my opinion, land-use control within a harbour has both provincial and federal aspects. . . . Only if conflict arises with respect to the use of a parcel of land within the limits of the harbour, will the paramountcy of the federal power cause the operation of the by-law of the City to be suspended.

38 The potential for conflict in mixed land use development along urban waterfronts is considerable. In Hamilton, bouts of litigation between the City and the Hamilton Harbour Commissioners over jurisdiction to regulate land use in the harbour area lasted almost as long as the Thirty Years War, beginning in the 1960s with the Hamilton harbour dredging scandal (whose criminal aspects were eventually dealt with in *Canadian Dredge & Dock Co. v. The Queen*, 1985 CanLII 32 (SCC), [1985] 1 S.C.R. 662). More recently, the City of Mississauga, expressing frustration because its development procedures were being disregarded in the enlargement of Toronto's Pearson Airport, threatened to withhold emergency fire services; see *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 2000 CanLII 16948 (ON CA), 50 O.R. (3d) 641 (C.A.), leave to appeal refused, [2001] 1 S.C.R. ix. On the other hand, as the now virtually abandoned airport at Mirabel and the aborted mega-airport project at Pickering show, the federal ability to implement transportation infrastructure without provincial cooperation is seriously circumscribed. Federal-provincial-municipal cooperation in such matters is not unconstitutional. It is essential.

39 It is worth recalling in this connection the plea for cooperation expressed by Houlden J.A. when one of the pitched battles in the *Hamilton Harbour Commissioners* litigation was before the Ontario Court of Appeal:

We are certain that both the [Hamilton Harbour Commissioners] and the city are desirous that this important harbour and the land surrounding it are properly developed and controlled. The extensive litigation between the plaintiff and the city, which has

culminated in this appeal, is, in our opinion, unnecessary and futile. It is our hope that the parties will now be able to resolve their differences by amicable agreement so that further litigation can be avoided and their common objective accomplished. [p. 491]

40 It seems to us that this approach is mirrored in the 1998 protocol ([Charter](#)) made between the City of Vancouver and the VPA, and in their respective land use plans, previously referred to. It remains to be seen of course whether what was done complies with the Constitution.

B. *The Scope of Interjurisdictional Immunity*

41 As discussed in *Canadian Western Bank*, there are circumstances in which the powers of one level of government must be protected against intrusions, even incidental ones, by the other level (para. 32). This is called interjurisdictional immunity and is an exception to the ordinary rule under which legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional (para. 26). Thus a provincial *Planning Act* relating to pith and substance of "Municipal Institutions in the Province" ([Constitution Act, 1867](#), s. 92(8)) and "Property and Civil Rights in the Province" (s. 92(13)) as well as "Matters of a merely local or private Nature" (s. 92(16)) would quite permissibly have "incidental effects" on matters within its scope that would otherwise fall within federal jurisdiction over navigation and shipping, provided such "incidental effects" are not precluded from doing so by (i) the doctrine of interjurisdictional immunity or (ii) the operation of federal paramountcy.

42 In this case, we are dealing with a federal undertaking, the VPA, constituted pursuant to two heads of federal legislative power, the authority in relation to public property ([Constitution Act, 1867](#), s. 91(1A)) and the federal authority in relation to navigation and shipping (s. 91(10)).

In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749 (“*Bell Canada (1988)*”), the Court restricted interjurisdictional immunity to “essential and vital elements” of such undertakings (pp. 839 and 859-60). In our view, as explained in *Canadian Western Bank*, Beetz J. chose his words carefully, and intended to use “vital” in its ordinary grammatical sense of “[e]ssential to the existence of something; absolutely indispensable or necessary; extremely important, crucial” (*Shorter Oxford English Dictionary on Historical Principles* (5th ed. 2002), at p. 3548). The word “essential” has a similar meaning, e.g. “[a]bsolutely indispensable or necessary” (p. 860). The words “vital” and “essential” were not randomly chosen. The expression “vital part” was used in an earlier shipping case *Reference re Industrial Relations and Disputes Investigation Act*, 1955 CanLII 1 (SCC), [1955] S.C.R. 529 (the “*Stevedoring*” case), at p. 592. What is “vital” or “essential” is, by definition, not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation. In the case of federal undertakings, that would include the VPA. Beetz J. referred to a “general rule” that there is *no* interjurisdictional immunity, provided “the application of [the] provincial laws does not bear upon those [federal] subjects in what makes them specifically of federal jurisdiction” (*Bell Canada (1988)*, at p. 762 (emphasis added)).

43 The question before us, therefore, is whether it can be said that federal jurisdiction over all development on VPA lands within the port area of Vancouver, even non-Crown lands *not* used for shipping and navigation purposes, is “absolutely indispensable or necessary” to the discharge by the VPA of its responsibilities in relation to federal “public property” or “navigation and shipping”. We concluded in *Canadian Western Bank* that interjurisdictional immunity is not essential to make these federal powers effective for the purposes for which they were conferred and therefore this appeal should be decided on the basis of federal paramountcy, not interjurisdictional immunity.

C. *The Role and Function of the Vancouver Port Authority*

44

In the reorganization of Canadian ports undertaken after the Great Depression of the 1930s, a distinction was drawn by Parliament between harbours of national importance (e.g. Halifax, Montreal, Vancouver) which were to be run by the National Harbours Board, a Crown agency, and those harbours of lesser significance (Toronto, Hamilton, Cobourg, Windsor, etc.) which were left with their own harbour commissions constituted by special federal statute, with Commissioners nominated in varying proportions by the federal government and the local municipality. As Finch C.J.B.C. rightly pointed out in the present case, the different types of harbour commissioners were subject to varying levels of federal control, and care must be taken in reading the earlier cases not to overgeneralize about their status (paras. 71-72).

45

In 1998, Parliament again substantially reorganized the structure of federal harbours with the *Canada Marine Act*, S.C. 1998, c. 10 (“CMA”). Introduction of the CMA followed publication of a Report by the House of Commons Standing Committee on Transport which had observed:

[T]he [Local port corporations including Vancouver] have major concerns regarding the limitations placed on their present delegations of authority for contracts, leasing, real property acquisition or disposal, and independence within the federal structure. It was pointed out that when government approval is required the process is cumbersome, complicated, and time-consuming to the point where some approvals have taken as long as two years.

(*A National Marine Strategy* (May 1995), at p. 6)

Thus the Minister of Transport assured Members of Parliament:

The revised act will consolidate and simplify maritime regulations, reduce red tape, and speed up commercial decision-making. It will enable the ports to meet client needs more efficiently and to reduce the bureaucracy. Overall, it will make our maritime sector competitive.

(*House of Commons Debates*, vol. 135, 1st Sess., 36th Parl., October 10, 1997, at p. 766)

The general provisions of the *CMA* are supplemented in the case of each designated port authority by Letters Patent, which took effect in the case of the VPA on March 1, 1999 (*Canada Gazette*, Part I, vol. 133, February 27, 1999 (Supplement), at p. 3). The federal government appoints six of the nine directors of the VPA. Mr. James P. Crandles, the Director of Port Development, testified that the *CMA* aimed at making Canadian ports “more efficient, less bureaucratic, and more responsive to the needs of local communities and customers. It also made local ports more accountable, permitting them to perform acts, enter into contracts, and incur debts on their own without acting through the Federal government” (A.R., at p. 401). To achieve this objective, Parliament authorized port authorities such as the VPA to engage *as Crown agents* in their traditional activities related to shipping, navigation, transportation of passengers and goods, handling of goods (s. 7(1)) to the extent that such activities are specified in the letters patent issued to each such port authority (s. 28(2)(a)). At the same time, port authorities were authorized on their own behalf and *not as Crown agent* (s. 28(3)) to undertake “other activities that are deemed in the letters patent to be necessary to support port operations” (s. 28(2)(b)). The verb “to support” is very broad and its ordinary grammatical meaning includes to “contribut[e] to the success of [an undertaking]” (*Shorter Oxford English Dictionary on Historical Principles* (5th ed. 2002), at p. 3119). The VPA has adopted a very broad view of “support” including “indirect support”. *Port 2010*, for example, includes in Policy 3.2.2, a justification for its “non-deep-sea marine operations”:

While the majority of these activities are not directly trade related, they indirectly support the port’s trade functions through rental revenue derived by VPC which is reinvested in terminals and other infrastructure. [Emphasis added; p. 15.]

Activities that “support” port operations (directly or indirectly) are not necessarily in themselves port operations and need not necessarily be of a shipping and navigation nature, provided they

generate revenue for the development of the port as an economic entity. To qualify as “support” in this sense is clearly not sufficient in our view to justify *exclusive* federal jurisdiction.

47 As a good deal of argument was made before us about the different categories of VPA land and the potential implications for federal-provincial jurisdiction, it is necessary to review the legislative framework. The *CMA* creates different categories of ownership of land which are more or less aligned with Crown agent and non-Crown agent objectives. Schedule B to the Letters Patent is aligned to Crown agent activities and lists federal real property that is “under the management of the port authority” (see s. 8(2)(d) of the *CMA* and art. 3.2 of the Letters Patent). In the case of Vancouver, such lands are in Crown ownership but under VPA management. The lands adjacent to the Lafarge project lands were Schedule B lands.

48 On the other hand, Schedule C to the Letters Patent describes “real property . . . other than the federal real property” that is “held or occupied by the port authority” (see s. 8(2)(e) of the *CMA* and art. 3.3 of the Letters Patent). Part of the rationale for Schedule C is to fulfil the Minister’s promise to free lands from such constraints as those imposed on Crown lands by the *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, s. 2. At the relevant time, the only VPA lands listed in Schedule C were the Lafarge project lands acquired by the VPA from the City and approved by supplementary Letters Patent on August 7, 2000. As such they differ from Schedule B Crown lands in the following respects (to summarize):

- (i) Schedule B lands are owned by the Crown; Schedule C lands are owned by the VPA (*CMA*, s. 2);
- (ii) Schedule B lands have been determined by the Minister to be *necessary* for port purposes; Schedule C lands have been determined by the Minister to be necessary to *support* port operations (*CMA*, s. 28(2));

- (iii) The VPA acts as agent of Canada in relation to purposes for which Schedule B lands are managed; the VPA is not an agent of Canada in relation to purposes for which Schedule C lands are held (*CMA*, ss. 7, 28(2) and 28(3));
- (iv) The VPA can mortgage or charge Schedule C lands but it is specifically prohibited from doing so in relation to Schedule B lands (*CMA*, s. 31(3));
- (v) The VPA must stipulate in its contracts relating to Schedule C lands, including contracts to borrow, that is *not* acting as agent for the Crown (*CMA*, ss. 28(2)(b) and 28(5)).

D. *The Federal Land Use Management Plan and Project Approval Scheme Adopted by the VPA*
(*Port 2010*)

49 The VPA is required by s. 48(1) of the *CMA* to develop a detailed land use plan, which must contain objectives and policies for the development of both the federal Crown land that it manages and other land the VPA holds or occupies. *Port 2010* was originally developed in 1994 by its predecessor, the Vancouver Port Corporation (VPC), and adopted in 1999 by the VPA. Policy 3.2.1 of the *Port 2010* is to “protect waterfront land and water lots in support of port service industries that are dependent upon waterfront access” (p. 14). Policy 3.2.2 provides that the VPA will support marine-related commercial and public sector harbour operations. The VPA’s *A Guide To Project Approvals In Port Vancouver* contains provisions analogous to a municipal development permit approval system.

50 Section 48(9) of the *CMA* provides that “[l]and-use plans are not regulations within the meaning of the *Statutory Instruments Act*”. Like a municipal official plan, *Port 2010* sets out

policies and objectives. Unlike a municipal official plan, *Port 2010* applies only to lands owned by the VPA itself, including both Crown land and non-Crown land.

51 *Port 2010* policies extend beyond shipping and navigation uses. For example, the plan shows land uses within federal jurisdiction (e.g. docks) as well as land uses under provincial jurisdiction (e.g. access roads) and identifies non-shipping waterfront uses such as the Cannery Restaurant (p. 41), proposed residential development on its Maplewood North site (p. 50) and industrial freezing facilities (p. 16). Thus, while *Port 2010* sets out land uses it supports and encourages within the port, it must be read in light of the constitutional limits on federal power. Much of the VPA lands are s. 91(1A) “public lands”, and their development is exclusively within federal jurisdiction. This is not the case with development on non-Crown lands, the use of which must be brought within the scope of the navigation and shipping power if federal jurisdiction is to be justified.

52 The City plan, too, shows features of the harbour, but does not thereby invade federal jurisdiction. The harbour is a physical fact of life. Planners at both levels of government simply accept the physical reality of the Vancouver waterfront and recognize overlapping jurisdictions over different activities that can potentially take place on waterfront lands. As *Port 2010* notes, “urban encroachment pressures result in competition for shoreline usage” (p. 14).

53 The existence of such a multi-use plan at either level of government authority is not an assertion that everything shown on the plan is claimed to be within its jurisdiction. Policy 3.2.3, for example, provides that the VPA will support “non-marine dependent land uses” (p. 16 (emphasis added)) in appropriate locations on VPA lands within the port. The Policy reads in part:

Several commercial activities in the port do not require direct marine access. However, given the industrial nature of most of these uses, they are compatible with port facilities. . . . When they occupy sites where eventual deep-sea terminal usage is anticipated, [VPA] leasing policies will continue to take such potential land requirements into account. [p. 16]

The Schedule C land which Lafarge proposes to lease for its project is designated “marine related” industrial and commercial uses.

E. *The Schedule C Lands Are Not the “Public Property” of the Federal Crown Within the Scope of Section 91(1A) of the [Constitution Act, 1867](#)*

54 The first branch of the respondent’s interjurisdictional immunity argument relates to the exclusive federal authority in relation to “public property” within the scope of s. 91(1A).

55 While federal ownership of land does not create an enclave from which all provincial laws are excluded, provincial law cannot affect the exercise of “a vital part” of federal property rights. (See also *Construction Montcalm Inc. v. Minimum Wage Commission*, [1978 CanLII 18 \(SCC\)](#), [1979] 1 S.C.R. 754, at pp. 777-79, *Greater Toronto Airports Authority*, at paras. 62-63, and *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933 CanLII 86 \(SCC\)](#), [1933] S.C.R. 629, at pp. 643-44.)

56 The appellant submits that, “absent an agency relationship, ‘public property’ must encompass some element of ownership by Canada in order to receive constitutional immunity from provincial land use regulations” (A.F., at para. 42). We think this proposition is correct. Section 91(1A) creates an immunity based on a *proprietary* interest. As Professor Peter Hogg states:

The federal Parliament has the exclusive power to make laws in relation to “the public debt and property” (s. 91(1A)). This power enables it to enact laws in respect of federally-owned property. [Emphasis added.]

(P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 28-2)

Interjurisdictional immunity does not, in our view, extend to all federally *controlled* property. In *Greater Toronto Airports Authority v. Mississauga (City)* (1999), [1999 CanLII 14773 \(ON SC\)](#), 43 O.R. (3d) 9 (Gen. Div.), it was “common ground that the federal government is the owner of the land at Pearson Airport” (p. 20). Gérard V. La Forest wrote (prior to his appointment to this Court) that

if the federal government has an interest in property it may legislate respecting that property in such a way as to displace ordinary provincial law. For it should be observed that the Dominion may legislate respecting its property notwithstanding anything in the [[Constitution Act, 1867](#)]. [Emphasis added.]

(*Natural Resources and Public Property under the Canadian Constitution* (1969), at p. 135)

57 For s. 91(1A) purposes, the property can be held directly by the Crown, or indirectly by an agent, because if an agent acquires land on behalf of the principal in the agent’s own name, then the agent is a trustee of the land for the principal who holds a beneficial *proprietary* interest. As the redoubtable Chancellor Boyd stated in *Coyne v. Broddy* (1887), 13 O.R. 173 (Ch. D.), at p. 184:

So it is with an agent dealing with any property; he obtains no interest himself in the subject matter beyond his remuneration; he is dealing throughout for another

In the case of Schedule B lands, the legal and/or beneficial proprietary interest belongs to the Crown in right of Canada. On the other hand, the Schedule C land designated by the VPA for the

Lafarge project is not held in the name of the Crown; nor is it held by the VPA as Crown agent.

Nor is the VPA the Crown.

58 The B.C. Court of Appeal sought to expand the scope of s. 91(1A) beyond a proprietary interest to include lands owned by an entity “controlled” by the Crown. Control is, of course, a leading indicator of Crown agency status, but it is only part of the test:

It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends in part upon the nature and extent of the powers entrusted to it. It depends mainly upon the nature and degree of control exercisable or retained by the Crown.

(*R. v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board* (1963), 1963 CanLII 299 (ON CA), 38 D.L.R. (2d) 530 (Ont. C.A.), at p. 534, *per* Laidlaw J.A., adopted by this Court in *Westeel-Rosco Ltd. v. Board of Governors of South Saskatchewan Hospital Centre*, 1976 CanLII 185 (SCC), [1977] 2 S.C.R. 238, at p. 250.)

59 In *Halifax (City of) v. Halifax Harbour Commissioners*, 1934 CanLII 79 (SCC), [1935] S.C.R. 215, at p. 226, Duff C.J. stated that the Port Authority is “subject at every turn in executing those powers to the control of the [federal Crown]”. See also *Nova Scotia Power Inc. v. Canada*, [2004] 3 S.C.R. 53, 2004 SCC 51, and *R. v. Eldorado Nuclear Ltd.*, 1983 CanLII 34 (SCC), [1983] 2 S.C.R. 551.

60 In the *CMA* however Parliament has taken the trouble to specify in explicit terms when the VPA is acting as a Crown agent and when it is not so acting. Section 28(3) of the *CMA* provides for example that when the VPA is acting merely “in support” of port operations it is *not* acting as Crown agent. This reflects the *CMA* policy to liberate the port authority from the full

measure of constraints imposed on dealings with federal Crown land. To impute s. 91(1A) status to Schedule C lands, and thereby to subject the lands to a Crown regime which the denial of Crown agent status was designed to avoid, is to undermine achievement of Parliament's intent.

61 We decline to accept the invitation of the B.C. Court of Appeal to take one of the elements of the Crown agency test (albeit the key element of control) and elevate it for this purpose above the test of which it forms a part, i.e., the requirement of agency status. The consequences of extending the interjurisdictional immunity enjoyed by federal property proposed by the Court of Appeal would create a significant hole in relevant and appropriate provincial regulation that, with respect, is not justified. We would therefore reaffirm the need for a Crown *proprietary* interest to justify the application of s. 91(1A) and on this point reject the conclusion of the B.C. Court of Appeal. If the respondents are to succeed, they must do so on the basis of the navigation and shipping power, which is another branch of their argument.

F. *Validity of the CMA Land Use Controls Set Out in Port 2010*

62 The methodology for reconciling the exercise of federal power and provincial power is canvassed at length in *Canadian Western Bank* and will not be repeated here. The initial step, as always in cases involving the division of legislative powers, is to identify the “pith and substance” of the respective enactments. As mentioned earlier, the *CMA* in relation to *non*-Crown lands is supported by the federal legislative power relating to navigation and shipping under s. 91(10), which is complemented by such provisions as s. 91(9) (beacons, buoys, etc.), and s. 91(11) (quarantine and marine hospitals). The scope of the s. 91(10) power includes maritime law which establishes the framework of legal relationships arising out of navigation and shipping activities. The federal power also includes the infrastructure of navigation and shipping activities. This power enables the federal government to build or regulate the necessary facilities like ports and to control the use of shipping lanes and waterways (A. Braën, *Le droit maritime au Québec* (1992), at

pp. 68-75). If valid and applicable to development on *non*-Crown lands, the *CMA* may have “incidental effects” in matters that would otherwise fall within provincial authority, such as the planning and development of land uses within the municipality of Vancouver.

63 On the provincial side, the power involved is the authority over municipal institutions and matters of local interest. The province of British Columbia has delegated broad powers to the City on zoning and construction within its boundaries. No one disputes the validity of this delegation of provincial powers. As a result, it is clear that both the Parliament of Canada and the legislature of British Columbia have validly exercised their legislative powers. The regulatory and decision-making power of the VPA and the City flow from them. The question before our Court is their applicability.

64 Historically, the federal navigation and shipping power has been broadly construed (*Queddy River Driving Boom Co. v. Davidson* (1883), [1883 CanLII 60 \(SCC\)](#), 10 S.C.R. 222). The transportation needs of the country cannot be allowed to be hobbled by local interests. Nothing would be more futile than a ship denied the space to land or collect its cargo and condemned like the *Flying Dutchman* to forever travel the seas. Authority for the proposition that transportation undertakings need facilities to pick up and drop cargo, if any is required, is to be found in *Attorney-General for Ontario v. Winner*, [1954 CanLII 289 \(UK JCPC\)](#), [1954] A.C. 541 (P.C.). Effective regulation of harbour facilities are as essential to shipping as airports to aeronautics. As stated by Estey J. in *Johannesson v. Rural Municipality of West St. Paul*, [1951 CanLII 55 \(SCC\)](#), [1952] 1 S.C.R. 292, at p. 319:

. . . it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other.

Similarly, MacKinnon J.A. (later A.C.J.O.) observed in *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 1976 CanLII 743 (ON CA), 11 O.R. (2d) 546 (C.A.), at p. 549:

. . . airports are an integral and vital part of aeronautics and aerial navigation, and cannot be severed from that subject-matter so as to fall under a different legislative jurisdiction.

See also *Hamilton Harbour Commissioners*, at p. 480. Nevertheless, there are limits. Federal undertakings such as the VPA are not, on that account, wholly exempt from valid provincial laws of general application that in their operation do not “bear upon those subjects in what makes them specifically of federal jurisdiction”, *per* Beetz J. in *Bell Canada* (1988), at p. 762.

(1) There Is No Explicit Federal Jurisdiction Over “Port Lands”. Such Authority Must Be Derived From the Federal Power Over Navigation and Shipping, and Is Limited Thereby

65 In *Hamilton Harbour Commissioners*, the Commissioners (two appointed federally, one by the City) took the view that within an area defined by federal regulation as “the port”, the City’s land use powers were inapplicable. The Ontario Court of Appeal rightly rejected the notion that “the port” could be treated as a separate head of federal power or a federal enclave that as such attracted interjurisdictional immunity. It is true that the federal navigation and shipping power can extend to regulate “integral” land-based activities but that does not withdraw all port-located industry that may be said “to support port operations” (such as the waterside car assembly plant mentioned by the chambers judge) from provincial jurisdiction just because such a plant makes use of waterborne transportation and, in a general way, contributes to the profitability of the VPA land lease business.

(2) Federal Jurisdiction Can Be Supported in Relation to Matters “Closely Integrated”
With Navigation and Shipping

66 Our jurisprudence holds that a matter otherwise subject to provincial jurisdiction may be brought within federal jurisdiction if it is “closely integrated” with shipping and navigation. In *Monk Corp. v. Island Fertilizers Ltd.*, [1991 CanLII 95 \(SCC\)](#), [1991] 1 S.C.R. 779, for example, it was held that claims for money owed for excess product delivered, demurrage, and the cost of renting the cranes used to unload goods (normally a contract claim within provincial jurisdiction over property and civil rights) were so “*integrally connected* to maritime matters as to be legitimate Canadian maritime law within federal competence” (pp. 795-96 (emphasis in original)). This test of “close integration” was discussed in *Whitbread v. Walley*, [1990 CanLII 33 \(SCC\)](#), [1990] 3 S.C.R. 1273, at p. 1299, where the Court held that certain provisions of the *Canada Shipping Act*, R.S.C. 1970, c. S-9, applied as well to pleasure craft as to commercial ships. See also *Zavarovalna Skupnost Triglav v. Terrasses Jewellers Inc.*, [1983 CanLII 138 \(SCC\)](#), [1983] 1 S.C.R. 283, at p. 297. On that basis, it seems to us that jurisdiction over “marine-related port uses”, properly circumscribed and interpreted by reference to the shipping component, may also come within the reach of the federal power over navigation and shipping.

67 The chambers judge drew the limit for federal jurisdiction too narrowly when he stated:

Aggregate that is carried by sea must, like all marine cargo, be offloaded and it may have to be stored short-term before it is delivered from the dock. However, it does not have to be mixed with other ingredients and made into concrete. That may be related to the carriage in that it is the reason for the transport, but it is not necessary for the transport to be performed. [Emphasis added; para. 51.]

The issue is not necessity but integration. As Rand J. pointed out in the *Stevedoring* case:

Actual necessity need not appear as the contracting out case shows [*Grand Trunk Railway Co. v. Attorney General of Canada*, [1907] A.C. 65 (P.C.)]; it is the appropriateness, on a balance of interests and convenience, to the main subject matter or the legislation. [Emphasis added; pp. 548-49.]

68 In our view, the [CMA](#) land use controls can constitutionally extend to the Lafarge project, which has from the outset been conceived of by both the City and the VPA as an integrated transportation/mixing facility in which the marine transportation aspect dominates.

(3) The VPA Is a Federal Undertaking With Multiple Mandates

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69 The VPA performs a key shipping and navigation role in Vancouver harbour. It is also a significant owner of *non*-Crown lands on which it contemplates undertaking or authorizing various types of development. It thus joins a long tradition of corporations created by federal statute with multiple mandates, powers and responsibilities. It is no more exclusively a “navigation and shipping” undertaking than is the Canadian Pacific Railway exclusively a federal railway undertaking, as was made clear (by way of illustration) in *Canadian Pacific Railway Co. v. Attorney-General of British Columbia*, [1948 CanLII 18 \(SCC\)](#), [1948] S.C.R. 373, *aff’d* [1949 CanLII 278 \(UK JCPC\)](#), [1950] A.C. 122 (P.C.) (the “*Empress Hotel*” case). The Canadian Pacific Railway was clearly in part a federally regulated railway undertaking, nevertheless

[b]ecause a company is a railway company it does not follow that all its works must be railway works or that all its activities must relate to its railway undertaking. [p. 143]

Much of the *Port 2010* plan relates to activities that clearly have nothing to do with shipping and navigation, let alone qualify as “absolutely indispensable and necessary” to the VPA’s ability to fulfill its shipping and navigation mandate. *Port 2010* land use designations for VPA lands include

Port recreation [including] parks and plazas [and] conditional uses. [p. 29]

...

Conditional Uses . . . are not directly marine-oriented but . . . provide ongoing revenue to VPC and are compatible with neighbouring industrial uses. The Cannery Restaurant and Versatile cold storage plant are two such operations. [p. 41]

...

Urban and mixed port use [including] urban uses, or urban uses combined with compatible port-related facilities. [p. 29]

Port 2010 policies in relation to VPA lands include:

There are three sites that offer the opportunity for both recreational pursuits and waterfront access including Devonian Harbour Park, Portside Park and New Brighton Park. All three parks are maintained by the Vancouver Parks Board. [VPA] has ensured the long-term existence of these parks to the municipality and to the public through new lease agreements with the City of Vancouver. [p. 43]

...

The [Central Waterfront area] has the added capacity to support significant, urban-related development, including commercial, residential and public uses, while also accommodating transportation facilities such as the existing SeaBus terminal and the Heliport. [p. 43]

...

Port Recreation accounts for the largest proportion of waterfront use within Planning Area #2, especially at the head of Burrard Inlet in the City of Port Moody. [p. 44]

...

Maplewood North is the second [VPA] site identified for urban-related development. This 14 hectare site is located to the north of the Dollarton Highway in the District of North Vancouver. Part of the site is currently occupied by the Canadian International College while the balance of the site is being examined for potential

residential use by a private developer together with the District of North Vancouver.
[p. 50]

. . .

In Planning Area #5, two sites are designated Port Recreation in recognition of existing community parks that offer public access to the waterfront. . . . [VPA] encourages public access to the waterfront in these locations through the Port Recreation designation. [p. 55]

Port 2010 thus itself refutes the notion that it is narrowly aligned with s. 91(10). Further, the VPA's view of uses that "support" port operations is extremely broad and cannot be said to be absolutely indispensable and necessary to its shipping and navigation undertaking. It is important to underline at this point that the VPA approved the Lafarge project in part because "it realizes Policy 2.1 of the Plan, supporting port service industries reliant on waterfront access" (A.R., at p. 412 (emphasis added)). Merely "supporting port service industries reliant on waterfront access" does not, it seems to us, qualify as absolutely indispensable and necessary to the VPA's federal undertaking.

G. Conclusion With Respect to Interjurisdictional Immunity

72 The *CMA* is a federal law in pith and substance related to the management of public property and shipping and navigation. Its land use controls reach beyond Crown property to embrace uses that are "closely integrated" with shipping and navigation. This covers the Lafarge project. However, land use jurisdiction asserted by the VPA in this case, while valid, does not attract interjurisdictional immunity. The port is not a federal enclave. VPA lands are held and leased for a variety of activities. Authorizing the construction of a cement plant on these port lands does not fall within the core or vital functions of VPA. On the facts of this case, it rather belongs to an incidental port development business, which because of its integration in marine transportation is reached by federal jurisdiction, but which certainly lies beyond the core of s. 91(10).

73 In the absence of valid and applicable federal regulatory land use controls, there would be no regulatory vacuum on the former Sterling shipbuilding site. The provincial land-use controls would apply.

H. *In this Case, the Federal Power Will Prevail Only if the Requirements of the Federal Paramountcy Doctrine Are Satisfied*

74 The stronger argument presented by the intervener, the Attorney General of Canada, is that the federal land use controls and procedures authorized by s. 48 of the *CMA* and implemented in *Port 2010* are paramount over conflicting provincial land use laws so as to render such laws inoperative. We therefore turn to this alternative argument.

(1) The Application of Federal Paramountcy to *CMA* Section 48 and *Port 2010*

75 The provincial Attorneys General argue that there is no operational conflict because Lafarge could apply for and obtain building permits from both the VPA and the City. But that argument overlooks the fact that the Lafarge project in its present form does not comply with the City's by-law. The by-law imposes a 30-foot height restriction. It would be within the City's discretion to waive the height limit up to 100 feet, but that would impose the condition precedent of an exercise of a discretion by the City to approve a project that has already been approved by the VPA. This would create an operational conflict that would flout the federal purpose, by depriving the VPA of its final decisional authority on the development of the port, in respect of matters which fall within the legislative authority of Parliament.

The principles governing the modern doctrine of federal paramountcy were summarized by Dickson J. in *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at pp. 190-91, where he said:

[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.

...

In principle, there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says “yes” and the other says “no”; “the same citizens are being told to do inconsistent things”; compliance with one is defiance of the other. [Emphasis added.]

We restated the requirements for federal paramountcy in our reasons in *Canadian Western Bank*. The party raising the issue must establish the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reason of an operational conflict or because such application would frustrate the purpose of the enactment, as explained by our Court in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at paras. 11-14. (See also *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at paras. 68-71; *Bank of Montreal v. Hall*, 1990 CanLII 157 (SCC), [1990] 1 S.C.R. 121.)

(a) *The Existence of a Valid Federal Law*

We have already explained why, in our view, the provisions in the *CMA* governing the dedication of land within the port area for uses related to shipping, and the *CMA* authorized land use plan and policies and procedures set out in *Port 2010* construed in light of the scope of the

federal power, are valid federal law. We agree with counsel for the respondents that as a question of fact, the whole of the Lafarge project on the VPA's Schedule C land is sufficiently "integrated" into the ship/barge unloading facility to make federal regulation applicable to all aspects of it.

(b) *The Existence of a Valid and Applicable Provincial Law*

79 There was also, as the Ratepayers contend, a valid provincial law. It is beyond question that City of Vancouver By-law No. 3575 is a valid expression of provincially authorized legislative power. It is a law of general application that is not aimed at navigation and shipping. It does not authorize development that would adversely affect shipping and navigation. (On the contrary, it emphasizes cooperation with the VPA on all such matters.) In the absence of conflicting federal law, the City's By-law No. 3575 would properly regulate where industrial uses such as a cement batch facility would be permitted. This point was recognized as early as 1911 when Middleton J. (as he then was) stated in *Re Sturmer and Town of Beaverton* (1911), 24 O.L.R. 65 (Div. Ct.), at p. 72:

The harbour may be, as a harbour, "within the jurisdiction of the Parliament of Canada;" but is none the less, for purposes within the ambit of provincial legislation, within the jurisdiction of the Province and its Legislatures, provincial and municipal.

Middleton J.'s judgment was upheld on appeal by the Divisional Court and cited with approval in the *Hamilton Harbour Commissioners* case, at p. 483.

(c) *Are the Two Valid Laws Capable of Simultaneous Enforcement?*

80 The Court in *Rothmans, Benson & Hedges* divided this aspect of the test into two parts.

(i) The Existence of an Operational Conflict

81 Operational conflict is present here. Reference has already been made to the City's 30-foot height restriction. The record confirms other areas of conflict in respect of noise and pollution from the offloading activity and the subsequent loading of the aggregates.

82 If the Ratepayers had succeeded in persuading the City to seek an injunction to stop the Lafarge project from going ahead without a city permit, the judge could not have given effect both to the federal law (which would have led to a dismissal of the application) and the municipal law (which would have led to the granting of an injunction). That is an operational conflict, as held in *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, 1999 CanLII 648 (SCC), [1999] 2 S.C.R. 961.

(ii) Frustration of Federal Legislative Purpose

83 Such an application of the relevant municipal standards would frustrate the federal purpose. Although the VPA should seek to cooperate with the municipalities of the Greater Vancouver area, it retains the final say in respect of all matters falling within valid federal jurisdiction, in case of conflict.

84 Assistance can be drawn from *Mangat* where provincial legislation prohibited non-lawyers from appearing for a fee before a tribunal, but the federal legislation authorized non-lawyers to appear as counsel for a fee. *Mangat* confirms that the second prong of the test should not be interpreted as a return to the doctrine of the "occupied field". Rather it intends to capture

those instances where it might be possible to comply with the letter of both laws, but where such compliance would frustrate the purpose intended by Parliament. In *Mangat*, it was argued that both enactments could be complied with, if would-be advocates either became a member in good standing of the Law Society of British Columbia or refrained from charging a fee. However, Gonthier J. held at para. 72 that “[t]o require ‘other counsel’ to be a member in good standing of the bar of the province or to refuse the payment of a fee would go contrary to Parliament’s purpose in enacting ss. 30 and 69(1) of the *Immigration Act*. . . . Where there is an enabling federal law, the provincial law cannot be contrary to Parliament’s purpose.” Here, the [CMA](#) has authorized the VPA to make its decision about the project and has enabled Lafarge to proceed on the basis of that authorization.

85 The City accepted the Lafarge project as a facility with a sufficient level of integration between the transportation and non-transportation aspects to come within VPA jurisdiction. We do not think the City’s factual determination was unreasonable in the circumstances and we would not interfere with it. Given the operational conflict and its impact on the achievement of the federal purpose, the preconditions of federal paramountcy are met and the Ratepayers’ petition should be rejected on that ground.

VI. Conclusion

86 A successful harbour in the 21st century requires federal provincial cooperation. The courts should not be astute to find ways to frustrate rather than facilitate such cooperation where it exists if this can be done within the rules laid down by the Constitution.

87 Here the VPA and the City worked out a cooperative framework. The Lafarge project, although opposed by the Ratepayers, complied with the land use envisaged by both levels of government in their respective planning documents.

88 Of course, consent cannot confer jurisdiction where none exists. In this case, however, the project was found by those most closely concerned in the planning exercise to be sufficiently integrated in the marine offloading and storage operation to be dealt with through federal rather than municipal procedures. No reason has been shown for us to interfere.

89 There will be other cases where both levels of government are vitally interested in a project (such as the hypothetical automotive assembly plant raised by the chambers judge) where the shipping aspect of the project may clearly be severable from the manufacturing operation. In that case, the VPA must yield to the City's procedures in those aspects that concern the manufacturing operation.

90 Where the VPA and the City are in disagreement, of course, the courts will have to resolve the difference. But that is not this case.

91 For these reasons, we would dismiss the appeal with costs and answer the constitutional questions as follows:

1. Is the City of Vancouver Zoning and Development Bylaw No. 3575 constitutionally inapplicable to property, with a legal description of Parcel P, Block 17, Plan LMP 47343, District Lot 184 and the Public Harbour of Burrard Inlet (the "Property"), held by the Vancouver Port Authority, on the basis that the Property is "public property" within the meaning of s. 91(1A) of the *Constitution Act, 1867*?

Answer: No.

2. Is the City of Vancouver Zoning and Development Bylaw No. 3575 constitutionally inapplicable to the proposed development on the Property in view of Parliament's legislative authority over "navigation and shipping" under [s. 91\(10\)](#) of the *Constitution Act, 1867*?

Answer: Yes.

The following are the reasons delivered by

BASTARACHE J. —

1. Introduction

92 The particular facts in this case are set out by Finch C.J.B.C. in his reasons for judgment for the British Columbia Court of Appeal ((2004), 26 B.C.L.R. (4th) 263, [2004 BCCA 104](#)), and by Justices Binnie and LeBel in their reasons for judgment, at paras. 6-20. Justices Binnie and LeBel also summarize the decisions of the B.C. Supreme Court and the Court of Appeal, at paras. 21-28. As a result, I will deal directly with the legal issues involved in this appeal.

93 I am of the view that the appeal should be dismissed solely on a proper application of the doctrine of interjurisdictional immunity with respect to Parliament's power over navigation and shipping, and that it is neither appropriate nor necessary to consider the doctrine of federal paramountcy.

2. The Proper Analytical and Methodological Approach

94 Before undertaking an analysis of the issues raised in this appeal, it will be useful to first provide a brief review of the applicable principles of constitutional law and the proper analytical approach to be undertaken.

2.1 *Validity: The Pith and Substance Analysis*

95 As this case involves a constitutional challenge to a municipal by-law, the first step in the analysis is to examine the validity of the by-law itself. If a law or by-law is held to be constitutionally invalid, it cannot be applicable to the subject matter at hand, and the law must be declared *ultra vires*. This inquiry involves the identification of the “pith and substance” of the impugned law in order to determine its “matter”, its “true meaning”, or its “dominant or most important characteristic” (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at pp. 15-6 and 15-7, and P. J. Monahan, *Constitutional Law* (2nd ed. 2002), at p. 117). The pith and substance analysis involves a consideration of both the law’s purpose and its effects (Monahan, at p. 117), and in particular how the law will actually operate with respect to legal rights and obligations.

2.2 *Applicability: The Interjurisdictional Immunity Doctrine*

96 The second step, assuming the impugned law has been held to be constitutionally valid, is to determine whether the law is applicable to the subject matter in question. When considering a federal matter, as in the present case, the appropriate doctrine to be applied is that of interjurisdictional immunity (see Hogg (loose-leaf ed.), at p. 15-25); the central question is whether the by-law, though valid in its own right, should be read down so as to be inapplicable to the federal matter because that matter enjoys immunity from the application of provincial

legislation, deriving from Parliament's exclusive legislative authority over the matter or over a corresponding head of power under s. 91 of the *Constitution Act, 1867* (see *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, at paras. 15-16). The result of a successful application of the doctrine of interjurisdictional immunity (that is, a finding that the federal matter or undertaking is immune from the impugned provincial law) is that the provincial law in question can never be applicable to that federal matter or undertaking, regardless of whether any federal legislative or executive action has been taken (see Monahan, at p. 124). In most cases, the application of the doctrine of interjurisdictional immunity to federal "undertakings" is concerned with "Works and Undertakings" outlined in s. 92(10) of the *Constitution Act, 1867*, whereby provinces have legislative authority over local works and undertakings other than those enumerated in that provision, such as ships, steam lines, railways, canals, etc., which are international or interprovincial in nature. Yet the immunity doctrine has also been applied to federal undertakings which do not fall within s. 92(10), especially when such undertakings clearly fall within a separate federal head of power mentioned in s. 91 (see Monahan, at p. 123, fn. 67). In my view, the federal undertaking at issue here is the Vancouver Port Authority ("VPA") as an entity established by and falling within Parliament's legislative authority over navigation and shipping under s. 91(10), and the subject matter in question is the VPA's regulation of land use planning and development on port lands in support of port operations.

97 Until 1966, the test for federal immunity was to determine whether the provincial law under scrutiny would significantly "impair" or "sterilize" the federally regulated activity. This changed with the *Quebec Minimum Wage* case, where the test adopted by the Supreme Court of Canada was whether "a vital part of the management and operation of the undertaking" was "affect[ed]" (see *Commission du salaire minimum v. Bell Telephone Co. of Canada*, 1966 CanLII 1 (SCC), [1966] S.C.R. 767, at p. 774 (emphasis added), cited in Hogg (loose-leaf ed.), at p. 15-27). In 1988, the Court reaffirmed that test in *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749 ("*Bell Canada (1988)*"). Beetz J., for the Court, indicated that in order for a federal undertaking to enjoy immunity from the

application of provincial laws, “it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it” (pp. 859-60). Beetz J. stated that provincial laws cannot affect the “basic, minimum and unassailable content” (i.e. the “core”) at the heart of each head of federal power (p. 839).

98 It should be noted that the application of the doctrine of interjurisdictional immunity over federal undertakings is different from its application to federally incorporated companies (see Hogg (loose-leaf ed.), at p. 15-26). In the case of federally incorporated companies, an otherwise valid provincial law cannot “impair the status or essential powers of a federally-incorporated company” (Hogg (loose-leaf ed.), at p. 15-26); because the federal incorporation power does not authorize the regulation of the activities of federal companies, there can be no immunity from provincial regulation of such activities (Hogg (loose-leaf ed.), at p. 15-26, fn. 116). In contrast, “undertakings” which operate in a federal legislative field are, by definition, subject to federal regulation, whether or not they are federally or provincially incorporated, and even where they are unincorporated. As a result, some federal undertakings will be at least partially immune from provincial laws purporting to regulate their activities (see Hogg (loose-leaf ed.), at p. 15-26, fn. 116). In the present case, the undertaking in question is the VPA itself, not Lafarge nor Lafarge’s development proposal, implicitly. As demonstrated later, the question is therefore whether the regulation of land use planning and development with respect to port lands in support of port operations, as exercised by the VPA, a federal undertaking, pursuant to the federal power over navigation and shipping under s. 91(10), is immune from the by-law.

99 It should also be noted that there has been much debate over the use and merits of the doctrine of interjurisdictional immunity. Some authors (and some litigants in recent cases) have urged this Court to abandon the doctrine altogether, arguing that it serves no useful purpose in the constitutional law analysis of the division of powers and that other doctrines (such as pith and

substance or paramountcy) already provide the necessary answers and analytical tools for most if not all constitutional law problems of this nature (see D. Gibson, “Interjurisdictional Immunity in Canadian Federalism” (1969), 47 *Can. Bar Rev.* 40; D. Gibson, “Constitutional Law—Freedom of Commercial Expression Under the [Charter](#)—Legislative Jurisdiction over Advertising—A Representative Ruling: *Attorney General of Quebec v. Irwin Toy Limited*” (1990), 69 *Can. Bar Rev.* 339; J. Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003), 28 *Queen’s L.J.* 411; and J. Leclair, “L’étendue du pouvoir constitutionnel des provinces et de l’État central en matière d’évaluation des incidences environnementales au Canada” (1995), 21 *Queen’s L.J.* 37). Essentially, critiques of the doctrine generally include two types of claims — that the doctrine is too vague or complicated, or that the doctrine unnecessarily and unfairly creates a much wider scope for greater centralization at the expense of the principles of federalism and regionalism.

100 Professor Hogg, in the second edition of *Constitutional Law of Canada* (1985), at pp. 329-32 heavily criticized the Supreme Court’s development of the interjurisdictional immunity doctrine, which he saw as being unnecessary and creating an impediment to natural and acceptable jurisdictional overlaps. This criticism was fully addressed and essentially disarmed by Beetz J. in *Bell Canada* (1988). Professor Hogg, in later editions of his text, has diminished the extent of his critique, acknowledging that “some degree of interjurisdictional immunity is entailed by the Constitution of Canada’s dual lists of exclusive powers. Otherwise, what would be incompetent to a legislative body in a narrowly framed law would be permitted if the law were framed more broadly. That cannot be right” (see Hogg (loose-leaf ed.), at p. 15-28, fn. 129). Ultimately, however, Hogg states that the “vital part” test for immunity casts too wide a net and should be eliminated in favour of the more restrictive and older “sterilization” or “impairment” test. Later on, Hogg agrees with Gibson that it would be best to abandon the doctrine of interjurisdictional immunity altogether in the case of federal undertakings whose functioning is not “threatened” by provincial laws (see Hogg (loose-leaf ed.), at p. 15-30). Hogg states that the impairment of federal

undertakings is “the only situation where the immunity is needed” (*ibid.*); in all other cases, immunity is seen as too broad, too vague and needlessly complicated.

101 These critiques and criticisms of immunity are quite serious and merit some consideration, particularly those concerned with the complexity of the test for immunity and the need for consistency and predictability in its application. In my view, however, many of the criticisms aimed at abandoning the doctrine altogether may be misguided. From a logical and practical perspective, all constitutional legal challenges to legislation should follow the same pattern: considerations of validity, considerations of applicability and, where two laws are potentially in conflict, considerations of operability in terms of federal paramountcy. These steps correspond to Professor Hogg’s description of the three ways in which to “attack” a law that potentially applies to matters outside the jurisdiction of the enacting legislative body (see Hogg (loose-leaf ed.), at pp. 15-25 and 15-26). There is therefore a doctrinal and a practical need to conserve the doctrine of interjurisdictional immunity as an essential legal test concerned with the applicability of a provincial law which purports to apply to federal matters.

102 Other scholars and commentators have argued for the continued preservation and application of the doctrine: see e.g. R. M. Elliot, “Constitutional Law—Division of Powers—Interjurisdictional Immunity, Reading Down and Pith and Substance: *Ontario Public Service Employees Union v. Attorney-General for Ontario*” (1988), 67 *Can. Bar Rev.* 523, and J. E. Magnet, “Research Note: The Difference Between Paramountcy and Interjurisdictional Immunity”, in *Constitutional Law of Canada: Cases, Notes and Materials* (8th ed. 2001), vol. 1, at p. 341. In the context of aboriginal legal disputes, K. Wilkins in “Of Provinces and Section 35 Rights” (1999), 22 *Dal. L.J.* 185, at pp. 206-7, provides an excellent description of the doctrine and a summary of its continued relevance and usefulness:

Restrictions on the application of otherwise valid provincial measures follow necessarily from the fact that federal authority over certain matters is exclusive and remains so whether or not the federal government chooses ever to use it. Subjects within exclusive federal authority, again, are subtracted from the powers conferred on the provinces. For this reason, it makes no difference, at least for some purposes, whether a province sets out to exercise powers or deal with matters reserved exclusively to the federal order. Whatever its intention may be, it simply cannot deal with such matters, and provincial measures that do so can have, to that extent, no legal effect. Provincial activity cannot have enforceable legal consequences that a province is not entitled or empowered to intend. . . .

Seen in this context, the doctrine of interjurisdictional immunity gives courts a way of preserving as much as possible of a provincial measure despite the fact that the measure, if given full scope, would regulate or dispose of matters that lie beyond the reach of provincial authority. . . . Confronted with a measure that would make mandatory provision for some matters that lie outside, as well as some within, the enacting body's authority, the courts will as a general rule "read down" the measure to confine its application exclusively to permissible matters. [Footnotes omitted.]

103 The continued usefulness and worth of the interjurisdictional immunity doctrine essentially depends on the results or consequences of its application. An inquiry into the validity of a law, discussed earlier, may result in a declaration of invalidity which strikes down the law or the specific statutory provision altogether, while a declaration that a federal law is paramount over a provincial law, as discussed below, merely renders the provincial law inoperative to the extent of any conflict between the two laws. Without the availability of the doctrine of interjurisdictional immunity, there would be no remedy available to read down a provincial law which would be rendered "inapplicable" to a federal matter while still preserving the applicability of the provincial law to other non-federal matters. The only solution would be to find the provincial law invalid through a consideration of its pith and substance; this could result in the law or provision actually being struck down altogether. Furthermore, if there were no doctrine of interjurisdictional immunity, there would be no way to prevent the impermissible application of an otherwise valid provincial law to a federal matter in situations where there is no competing federal law.

It should be noted that some critics of interjurisdictional immunity have argued that it is unnecessary and irrelevant in light of the doctrine of federal paramountcy. Magnet convincingly notes the differences between the two doctrines discussed in the preceding paragraphs. Magnet writes that immunity “is different from the paramountcy doctrine in that even where there is no contradiction or meeting of legislation, the provincial legislation offers significant obstruction to the federal thing, person or undertaking, affects its status, or drains off essential federal attributes which make them within federal jurisdiction” (p. 339). Preserving the application of the immunity doctrine in certain contexts demonstrates the full extent and breadth of different types of constitutional legal inquiries.

In addition, those who would argue that interjurisdictional immunity is unnecessary in light of the “doctrine” of pith and substance have, in my respectful view, misinterpreted the scope and nature of that inquiry. Characterizing the “pith and substance” of a law, as described above, is not a “doctrine” or a “legal test” on the same level as or of the same nature as the doctrines of interjurisdictional immunity and federal paramountcy. Rather, a consideration of a law’s pith and substance is merely an analytical tool which helps characterize the true nature of a law in order to determine if it was validly enacted by a legislative body (i.e., by ensuring that the law was enacted pursuant to an existing head of legislative jurisdiction or authority). If the law was not enacted pursuant to an existing head of legislative power within the enacting body’s field of competence, then the law is declared invalid; if it was, then it will not be struck down. But this inquiry tells us nothing about whether or not the law, though valid, could or should *apply* to a particular matter or thing. Immunity helps resolve that question (see Elliot).

Finally, there are those who would argue that the concerns addressed by the doctrine of immunity are already resolved by the “double aspect” doctrine. Once again, those criticisms appear to be misguided in that the double aspect doctrine merely recognizes that some laws may

have a purpose corresponding to a valid head of provincial jurisdiction, but may also have a purpose corresponding to a valid head of federal jurisdiction. With respect, I believe Binnie and LeBel JJ. mischaracterize this doctrine, at para. 4 of their reasons. The recognition of an apparent double aspect to a provincial law does not render it inapplicable or inoperative (nor invalid). Those matters must still be determined using the concepts of federal immunity and paramountcy. Likewise, a finding that a provincial law has only “incidental effects” on a federal head of power is merely a statement about the law’s validity; it says nothing about the *impact* of the provincial law — its effects on federal matters when it is *applied* to those matters. It may in fact be possible for a provincial law to be valid to the extent that its true or essential nature can be seen as having merely “incidental” effects on a federal head of power (pursuant to the pith and substance analysis), but then to be rendered inapplicable because of “impermissible” effects on the *core* of a federal head of power when it is *applied* to certain federal undertakings. Immunity would therefore play a role in preventing constitutionally impermissible applications of provincial laws to federal matters, without the need to strike down such laws and without the need for competing and conflicting federal legislation.

107 Thus, in my view, those opposed to the doctrine of interjurisdictional immunity have not successfully demonstrated why it should be abandoned or why it should not continue to be considered and applied where appropriate. Professor Hogg ((loose-leaf ed.), at pp. 15-25 to 15-34) has correctly identified three types of scenarios or situations where the doctrine has been applied and, I would argue, should continue to be applied: (1) federally incorporated companies, which enjoy immunity from provincial laws of general application that affect their corporate structure or constitution, by virtue of the federal incorporation power; (2) federally regulated undertakings or federal matters falling under distinct heads of legislative power under [s. 91](#) of the *Constitution Act, 1867* (such as the VPA and the s. 91(10) navigation and shipping power in the present case), which enjoy immunity from provincial laws of general application that affect the core of such a power and/or a vital part of such an undertaking; and (3) federal institutions or matters which enjoy immunity from provincial laws that specifically target those institutions or matters. The present situation clearly falls into the second category.

Notwithstanding this defence of the doctrine, I would agree with some critics of interjurisdictional immunity who allege that its application is often difficult and who in particular allege that the criterion for determining when a provincial law “affects” the core of a federal power or vital part of a federal undertaking is often vague or overly broad. It is no doubt time to recognize that defining the word “affects” as simply or merely “touches on” leads to an overly wide scope of immunity in many contexts. While the former standard of “impairment” or “sterilization” appears to be too narrow and restrictive (with the possible exception of special cases like *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, where the provincial law has only “indirect” effects on the federal matter, which is not the case here), an overly broad or vague notion of whether a provincial law “affects” the core of a federal power might confer federal immunity in wholly inappropriate scenarios. Some middle ground should therefore be sought out. In my view, the effect of the application of a provincial law on the core of a federal head of legislative power must be sufficiently severe to justify a finding of immunity. Without going so far as to require the federal core or matter or undertaking to be “sterilized”, I would suggest that we should interpret *Bell Canada (1988)*’s determination of a vital part of the federal core being “affected” to mean that the full or plenary exercise (or potential exercise) of the federal legislative authority in question would need to be “attacked”, “hindered” or “restrained” before immunity could attach. The key, to return to the language used by Beetz J. in *Bell Canada (1988)*, at p. 856, is whether the provincial law “bear[s] upon” a federal matter or subject in what makes it “specifically of federal jurisdiction” (p. 762). As Professor Hogg suggests, the provincial law in its application to the federal matter must “intrude heavily” upon core federal areas of jurisdiction and/or upon core aspects of federal subject matters in order for immunity to be triggered (see Hogg (loose-leaf ed.), at p. 15-34). In my view, these qualifying descriptions of the word “affects” will give more teeth to the notion of immunity and respond to critics of the doctrine who have expressed concern over its overly broad and limitless application. I will not discuss the matter of indirect effects described in *Irwin Toy*; it raises a number of difficulties in its own right that are better left to another day.

109 Regarding the application of the immunity doctrine in cases like the present one, I would disagree with Justices Binnie and LeBel’s treatment of the operation of interjurisdictional immunity, at para. 46 of their reasons, where they focus on an “activities” based notion of jurisdiction. This indicates a focus on the specific nature of the Lafarge proposal and the activities it would carry out. This concern is repeated at para. 71, where the core of the federal power here is found not to include “uses that . . . cannot be said to be absolutely indispensable and necessary to its shipping and navigation undertaking”. With respect, this analysis is problematic because the test for immunity should not focus on any specific *activity* or operation at issue (i.e. the Lafarge proposal for a concrete batch facility or any other particular use of port lands) and whether this activity or use is immune from the municipal by-law, but rather on whether the federal *power* over navigation and shipping (expressed in this case as the federal power over land use planning and development decisions by a port authority, a federally regulated undertaking) is immune from the application of the municipal by-law. The immunity doctrine is about jurisdiction; what matters is whether or not a provincial law affects the core of a *federal head of legislative power*, regardless of whether or how that federal power is exercised or will be exercised, if at all, with respect to a particular project or activity. The only relevance of the activity is that discussed further on in these reasons, i.e. whether approval of the project by the VPA as a federal undertaking is consistent with the regulation of land use planning and development of port lands in support of port operations (which I believe falls within the core of s. 91(10)). But even that determination says nothing of the applicability of the municipal by-law.

110 Because of this focus on jurisdiction rather than action, there need not be any federal legislation or executive action “occupying the field” for federal immunity to be triggered with respect to an area of federal legislative authority. This is one of the key facets of the immunity doctrine; the mere fact that a provincial law or municipal by-law affects a vital part of an area of exclusive federal jurisdiction is enough to render it inapplicable with respect to a federal

undertaking, regardless of whether or not Parliament has itself enacted any laws or taken any specific action with respect to the jurisdictional area or the undertaking. For example, in the *Quebec Minimum Wage* case, the Court concluded that a federally regulated interprovincial undertaking was immune from a provincial minimum wage law because it affected a vital aspect of the management and operation of the federal undertaking, even though at the time there was no federal minimum wage law or policy in existence. The doctrine of federal immunity was triggered even though no federal legislative or executive action had occurred with respect to that subject matter (see Hogg (loose-leaf ed.), at p. 15-27).

111 This conclusion (that a provincial law, if it is found inapplicable to a federal undertaking or matter by reason of interjurisdictional immunity, cannot “fill the gap” left by the absence of any federal legislation or action) is consistent with the principle of “exclusivity” whereby subject matters enumerated in ss. 91 and 92 of the *Constitution Act, 1867* are assigned to one level of government only. According to Monahan, this principle means that “constitutional jurisdiction over a particular work or undertaking is to be undivided: for the purposes of section 92(10), jurisdiction is allocated to a single level of government. The courts have consistently rejected the idea of dividing jurisdiction between the federal and the provincial governments over a single undertaking” (p. 357). The same could be said of undertakings or subject matters covered by a particular head of power under s. 91, such as navigation and shipping in this case (see Monahan, at p. 123, fn. 67).

2.3 *Operability: The Federal Paramountcy Doctrine*

112 The final step, assuming the impugned law is both valid and generally applicable to the federal matter, is to determine whether the provincial law (in this case, the municipal by-law) is inoperative to the extent of any conflict with federal legislation through an application of the

doctrine of federal paramountcy. In order for a consideration of the doctrine to be possible, there must be two valid and applicable laws (one federal and one provincial or municipal) which overlap; the nature and extent of the overlap will then determine whether the federal law should take precedence over the provincial law. According to J. Bakan et al., the authors of *Canadian Constitutional Law* (3rd ed. 2003), at pp. 254-55: “The paramountcy issue only arises after the issues of validity and applicability have been determined. If a court has determined, through the process of characterization, that both the federal and provincial laws in issue are valid, and that both apply to the facts of the case, then a paramountcy issue may arise. The paramountcy issue will not arise if the court finds that one or the other of the laws is invalid or that the provincial law is inapplicable (using the doctrine of interjurisdictional immunity).” (emphasis added). I agree. If the doctrine of paramountcy is considered, and if the overlap constitutes a “conflict” (that is, if the federal legislative purpose is frustrated, or if there is an impossibility of dual compliance — see Hogg ((loose-leaf ed.), at pp. 16-4 to 16-8)), then the doctrine of federal paramountcy will apply so as to render the provincial law inoperable to the extent of the conflict. The result of a finding of federal paramountcy is that the provincial law is still considered valid and applicable but is inoperable so long as there is a conflict with federal legislation (see Monahan, at p. 127). If, however, there is no conflict (either because the overlap does not constitute a conflict, or because any conflict has disappeared through legislative repeal or amendment), then the two laws may validly co-exist, even with respect to the same matter or undertaking.

113 In the present case, I would likely agree with Justices Binnie and LeBel’s conclusion that the operation of the City’s by-law here (if applicable) would frustrate Parliament’s intent; but because I believe the by-law is not applicable, as discussed below, paramountcy need not be discussed. I would add that the mere requirement of a permit under provincial law, without evidence that the permit would not in fact be granted in this case, does not necessarily indicate an express operational conflict with federal law, since compliance with one law does not necessarily mean a breach of the other (see *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161; 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40). Dual compliance could be achieved by satisfying the

requirements of whichever law was “stricter” (see Hogg (loose-leaf ed.), at pp. 16-9 and 16-10). If the City did in fact grant a permit in this case, then dual compliance would therefore be possible; certainly, until the City refuses a permit, dual compliance is not “impossible” here. Federal paramountcy would therefore need to be triggered by some other means, such as the frustration of legislative intent despite the absence of any express operational conflict in terms of impossibility of dual compliance.

3. Application to this Case

3.1 *The Validity of the Municipal By-law and the [Canada Marine Act, S.C. 1998, c. 10](#)*

114 In this case, both parties appear to admit that the municipal by-law in question is valid legislation. The respondents Lafarge Canada Inc. (“Lafarge”), the VPA and the City of Vancouver (“City”) do not challenge the validity of the by-law, but rather the application of the by-law to a particular subject matter, namely property situated in the Port of Vancouver and the proposed development project for the property.

115 In my view, the municipal by-law is indeed valid legislation. In pith and substance, the by-law is concerned with zoning regulations and requirements surrounding land use for property situated within the municipality’s boundaries. It imposes a regulatory regime with respect to development and building permits and an approval process for projects to be undertaken on city grounds. Its purpose can be characterized as the achievement of certainty and efficiency in land use planning and development for municipal land; its effects on interested parties are generally concerned with ensuring the compliance of development proposals with municipal regulations and procedural standards for city council approval. In short, the pith and substance of the by-law is in relation to the regulation of land use planning and development for property situated within the

City of Vancouver. As such, the by-law is an example of delegated legislative authority deriving from the provincial legislative power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. It is a valid provincial law (more precisely, a valid municipal by-law) of general application, which does not target any particular federal subject matter or federal undertaking. In general terms, a valid provincial law of general application can be found to have permissible and incidental effects on federal matters, so long as these effects do not impact on the federal character or nature of the federal matter (see Hogg (loose-leaf ed.), at p. 15-33, citing *Bell Canada (1988)*, at p. 762: “provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction”). However, as discussed below, in this case the application of the municipal by-law to the regulation of land use planning within the Port of Vancouver for port lands in support of port operations would impermissibly affect a vital part of the federal power over navigation and shipping under s. 91(10).

116 It should also be noted that because paramountcy only arises after both the provincial law (or municipal by-law) and the federal law in question have been found to be valid and applicable to the same subject matter, as discussed above, the validity of the federal legislation in this case might also need to be addressed at this first step of the analysis. That is, when assessing the validity of the municipal by-law in question, it might also be useful to consider the validity of the applicable federal legislation which allegedly conflicts with the by-law, in order to properly consider the application of the doctrine of federal paramountcy, should the analysis proceed that far. The relevant federal legislation here is the *Canada Marine Act* in general, and s. 48 in particular, which requires and provides for the development of land use plans by port authorities which contain “objectives and policies for the physical development of the real property” that the port authority “manages, holds or occupies”, and which take into account “relevant social, economic and environmental matters and zoning by-laws that apply to neighbouring lands”. In my view, a consideration of the validity of s. 48 is not necessary, given that it is not challenged; I have also found that there is no need (and no possibility) to consider the application of the doctrine of

paramountcy because the interjurisdictional immunity doctrine applies here. Nevertheless, if the issue were to emerge, I would agree with Justices Binnie and LeBel's conclusion on the validity of the federal law in question. In my view, s. 48 of the *Canada Marine Act* is, in pith and substance, legislation aimed at the regulation of land use planning and development for property related to shipping and navigation. It is legislation properly adopted under s. 91(10) of the *Constitution Act, 1867*, which establishes Parliament's exclusive authority to legislate with respect to navigation and shipping. This power undeniably includes and extends to harbours and ports (see the discussion below); s. 48 of the *Canada Marine Act* is a function of this power.

3.2 *The Application of the Municipal By-law*

117 Having concluded that the municipal by-law in question is valid provincial legislation of general application, the next step in the analysis is to determine whether the by-law is applicable in this case. The respondents Lafarge, the VPA and the City have proposed two possible routes by which the by-law could be held to be inapplicable by virtue of the doctrine of interjurisdictional immunity: the federal power over “public property” under s. 91(1A) of the *Constitution Act, 1867*, and the federal power over “navigation and shipping” under s. 91(10). In my view, the first ground fails to show why the by-law should be inapplicable, while the second ground succeeds.

118 In either case, the analysis remains the same regardless of which federal power is considered. The first step is to identify the “core” of the federal head of power; that is, to determine what the federal power encompasses within its primary scope, and then to determine whether the impugned federal undertaking or matter at issue falls within that core. The second step is to determine whether the impugned provincial law (or in this case, the impugned municipal by-law) impermissibly affects a vital aspect of the federal core of either head of power, so as to render it inapplicable to the federal undertaking or matter (see *Bell Canada (1988)*; see also Hogg (loose-leaf ed.), at pp. 15-25 to 15-28, and Monahan, at pp. 123-26).

3.2.1 Federal Immunity Over Public Property Under Section 91(1A)

119 On this point, I would find that the lands in question do not constitute “public property” under s. 91(1A) of the *Constitution Act, 1867*, and thus do not enjoy federal immunity from the application of the municipal by-law on that basis.

120 In the Court of Appeal, Finch C.J.B.C. found that the chambers judge, Lowry J. of the B.C. Supreme Court, had applied the wrong legal test (and thereby reached the wrong conclusion) in determining whether the port lands in question were “public property” under s. 91(1A) and thus whether they enjoyed federal immunity from the application of the by-law. Lowry J. had essentially adopted a test of “agency” for identifying public property in situations where the land is not owned directly by the Crown, and he had concluded that because here the VPA holds the subject lands in its own name and not as an agent of the federal Crown, the lands in question could not be considered public property under s. 91(1A) and therefore did not enjoy federal immunity from the by-law.

121 In assessing this analysis, Finch C.J.B.C. held that it is the degree of control exercised by the federal Crown over the lands in question which determines its status as public or non-public property under s. 91(1A), not whether there is an agency relationship with the Crown. Finch C.J.B.C. determined that Lowry J. had misinterpreted *Hamilton Harbour Commissioners v. City of Hamilton* (1978), 21 O.R. (2d) 491 (C.A.), as establishing the principle that *only* where a Crown corporation is an agent for the Crown for the purposes of holding land can the lands so held be considered public property; instead, according to Finch C.J.B.C., there may be situations where a Crown corporation that is not a Crown agent is nonetheless subject to a sufficient degree of control by the federal Crown such that the property it holds in its own name is in reality public

property under s. 91(1A). For example, ongoing federal approval for and control over the acquisition, tenure and disposition of land held by a Crown corporation which is not a Crown agent will generally indicate a sufficient degree of federal control. In this case, Finch C.J.B.C. held that the degree of control exercised by the federal Crown through the *Canada Marine Act* over all lands belonging to or held by the VPA was sufficient to characterize the lands in question as public property under s. 91(1A); thus, by application of the doctrine of interjurisdictional immunity, the municipal by-law is inapplicable to the lands in question.

122 I agree with Finch C.J.B.C. that Lowry J. applied the wrong legal test and that in general a provincial law cannot affect the federal power to enact laws in respect of federally owned property (see Hogg (loose-leaf ed.), at p. 28-2; see also *Construction Montcalm Inc. v. Minimum Wage Commission*, 1978 CanLII 18 (SCC), [1979] 1 S.C.R. 754, and *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 2000 CanLII 16948 (ON CA), 50 O.R. (3d) 641 (C.A.), at paras. 62-77). The test for public property under s. 91(1A) cannot be one of “agency”, since this is not an appropriate or principled basis upon which to classify land as “public” or “non-public”. This is reinforced by the fact that the statutory designation of a Crown corporation as an agent for the Crown is more accurately understood as an expression of the Crown’s legal liability in relation to land held by a Crown agent, rather than as a statement about the constitutional status of land (see P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000); see also ss. 23(1) and (2) of the *Canada Marine Act*). Furthermore, agency itself is merely an indicator or a factor in identifying public property; as noted by Finch C.J.B.C., there is a consistent line of jurisprudence which demonstrates that the status of land as public property under s. 91(1A) coincides with its ownership by Crown agents for the benefit of the federal Crown (see para. 74).

123 I would however disagree with Finch C.J.B.C.’s “control” test as a substitute for the agency test in identifying public property. The relevant test is not the degree of control exercised by the federal Crown (which is, in effect, merely an indicator of Crown agency). Rather, the

relevant test is whether there is evidence of a sufficient *proprietary* interest in the lands on the part of the federal Crown. First, it is clear that Crown ownership of land generally coincides with its *prima facie* classification as s. 91(1A) public property; see Hogg (loose-leaf ed.), at p. 28-2. Second, a focus on the federal Crown's proprietary interests is consistent with the historical origins and development of federal jurisdiction over public property as a way to ensure that the federal Crown would possess and be the proprietor of sufficient resources to establish and maintain a transcontinental economy in the early years of Confederation (see Monahan, at pp. 111-12, and G. V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (1969), at p. 58, on the extension of this idea to nation-wide transportation initiatives). Third, even a partial proprietary interest of the federal Crown in land will help establish a sufficient basis for classifying the land as public property under s. 91(1A) (see *Greater Toronto Airports Authority*, at para. 66). Thus, when a Crown corporation owns or holds land other than as a Crown agent, there must be some element of ownership by the federal Crown in order to receive constitutional immunity from provincial land use laws and regulations. Therefore, the immunity at the heart of s. 91(1A) is based on a proprietary interest.

124 In addition to rejecting the “control” test, I cannot accept Finch C.J.B.C.’s conclusion regarding the lands in question here. On the facts of this case, I would conclude that the Crown has not established a proprietary interest in the lands sufficient to justify federal immunity on the basis of s. 91(1A) of the *Constitution Act, 1867*. The property in question is listed in Schedule C of the VPA’s Letters Patent (*Canada Gazette*, Part I, vol. 133, February 27, 1999 (Supplement), at p. 3), and based on a plain reading of the legislative scheme and of the Letters Patent, it is clear that it was Parliament’s explicit and deliberate choice to exclude Schedule C lands from the definition of federal lands and lands held in the name of the Crown by Crown agents. The Letters Patent for the VPA draw a clear distinction between “federal real property” (s. 3.2) and “other than federal real property” (s. 3.3); given that the subject lands fall into the latter category, it is clear that the federal Crown has indicated its legislative and executive intent to consider the lands in question as something other than federal property. By its own decision to include the lands in question in

Schedule C of the VPA's Letters Patent, and thereby to exclude them from lands owned by the Crown or held by agents for the Crown, Parliament has chosen to renounce any proprietary interest in such lands. The property is held by the VPA in its own name and not for the benefit of the Crown.

125 As a result, although the by-law seeks to regulate the land use planning and development of the lands in question, such lands are not public property under s. 91(1A); accordingly, the application of the by-law does not invade Parliament's exclusive legislative jurisdiction over public property, and there is no s. 91(1A) immunity here.

3.2.2 Federal Immunity Over Navigation and Shipping Under Section 91(10)

126 The alternative ground for federal immunity from the application of the municipal by-law is that the by-law cannot apply by virtue of Parliament's exclusive legislative jurisdiction over navigation and shipping under s. 91(10), and in particular over the VPA's regulation of land use planning and development of port lands in respect of port operations, as a federally regulated undertaking rooted in s. 91(10).

3.2.2.1 *The Core of Section 91(10)*

127 As previously mentioned, the first step in the analysis is to determine and identify the core of the federal power at issue (i.e. the exclusive legislative jurisdiction over navigation and shipping under s. 91(10)). As Finch C.J.B.C. noted in his reasons, at para. 97, the proper question to ask is "whether the Port Authority's powers to plan and regulate land use development within the Port form a vital part of the exclusive federal legislative jurisdiction over navigation and

shipping” (see also para. 100). In other words, we must determine whether the regulation of land use planning and development, as exercised by the VPA acting as a federal undertaking, created and governed by the federal government pursuant to its navigation and shipping power, falls within the core of s. 91(10). As discussed earlier, it is important not to define the core too widely, such that the core of the federal sphere of jurisdiction would become as large as its outer boundaries. The attempt to draw bright lines in this area should also be resisted. In my view, it is best to address the issue on a case-by-case basis. Clearly then, there must be a sufficient connection to a basic understanding of navigation and shipping for immunity to attach; in other words, the VPA’s regulation of land use planning and development in respect of port lands must be for purposes relating to navigation and shipping in order to enjoy federal immunity under s. 91(10). This is what must guide the inquiry. It may be that certain uses of land do not appear to have a sufficient connection to navigation and shipping on their own but the VPA’s decision to authorize such uses in exercising its powers over port lands derived from the federal power over navigation and shipping (including port operations) cannot be considered in isolation. In my view, the core of the federal legislative power over navigation and shipping under s. 91(10) necessarily extends to and includes the power (as exercised by the VPA as a federal undertaking) to regulate land use planning and development for port lands *in support of port operations* (i.e. Schedule C lands, according to the preamble of the VPA’s Letters Patent; this is in fact the category of port lands on which the Lafarge facility would be built). That is the only issue that concerns us in this appeal and that governs our inquiry. We must determine whether the regulation of land use in the port is a core function of navigation and shipping. In contrast with Justices Binnie and LeBel’s reasoning, I am of the view that the regulation of land use planning for such lands *in support of* port operations provides the necessary link to navigation and shipping in order to trigger federal immunity; this is discussed in greater detail below. This conclusion flows from the inclusion of ports and harbours generally within the federal power over navigation and shipping and, more specifically, from the inclusion of land use planning and development activities and decisions by port authorities in respect of port lands, when such regulation is sufficiently connected to navigation and shipping.

I would note first of all that the jurisprudence clearly establishes that ports and harbours with interprovincial dimensions fall within the core of s. 91(10) as facilities or undertakings in which various aspects of the federal power over navigation and shipping would logically be exercised (see *Holman v. Green* (1881), [1881 CanLII 35 \(SCC\)](#), 6 S.C.R. 707, at p. 718, *per* Strong J.: “the object of vesting the harbours in the Dominion was doubtless with the object of enabling that Government to carry out with more facility such measures as it might, under the power granted to it to legislate on the subject of navigation and shipping, from time to time think fit to enact”). This is similar in nature to the federal power over aeronautics and consequently over airports and aeronautical facilities. That analogy was recognized by Griffiths J. in the *Hamilton Harbour Commissioners* case, at pp. 479-80, which was subsequently upheld on appeal, in which the inclusion of ports and harbours within s. 91(10) was confirmed:

In *City of Montreal v. Montreal Harbour Com'rs*, [1925 CanLII 325 \(UK JCPC\)](#), [1926] 1 D.L.R. 840 at p. 848, [1926] A.C. 299 at pp. 312-3, 47 Que. K.B. 163, Viscount Haldane stated: “Now there is no doubt that the power to control navigation and shipping conferred on the Dominion by s. 91 is to be widely construed.” By implication the Privy Council in the *Montreal Harbour* case recognized the jurisdiction of the federal Government over harbours. . . .

Even in the absence of authority I would have no hesitation in holding that jurisdiction over Hamilton harbour, operated as an international harbour connected with international trade routes, is implicit in the legislative power conferred on the Dominion in relation to “Navigation and Shipping”.

By analogy, harbours are as essential to the effective jurisdiction over maritime navigation as are airports to effective jurisdiction over aerial navigation. Legislative control over airports has been considered by the Courts to be an integral and vital part of the federal jurisdiction over aeronautics. This latter view was expressed by Estey, J., in *Johannesson et al. v. Rural Municipality of West St. Paul et al.*, [1951 CanLII 55 \(SCC\)](#), [1952] 1 S.C.R. 292 at p. 319, [1951] 4 D.L.R. 609 at pp. 620-1, 69 C.R.T.C. 105:

Indeed, in any practical consideration it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other.

This reasoning was echoed by MacKinnon, J.A., in *Re Orangeville Airport Ltd. and Town of Caledon et al.* (1976), [1976 CanLII 743 \(ON CA\)](#), 11 O.R. (2d) 546 at p. 549, 66 D.L.R. (3d) 610 at p. 613:

As was pointed out by members of the Court in the *Johannesson* case, airports are an integral and vital part of aeronautics and aerial navigation, and cannot be

severed from that subject-matter so as to fall under a different legislative jurisdiction.

As Griffiths J. noted, the absence of an explicit separate head of power for “ports and harbours” is not an obstacle to the conclusion that they fall under exclusive federal jurisdiction by reason of s. 91(10), just as airports remain under federal authority despite the absence of any separate head of power — see *Greater Toronto Airports Authority and Whitbread v. Walley*, [1990 CanLII 33 \(SCC\)](#), [1990] 3 S.C.R. 1273, at p. 1299; see also Finch C.J.B.C.’s reasons, at paras. 102-3. Thus, Justices Binnie and LeBel’s observation, at para. 36, that there is no separate or enumerated head of power over “ports” does not affect the interjurisdictional immunity analysis.

129 As well, the long-accepted principle that s. 91(10) is to be construed broadly and is to include an extensive range of legislative matters has led to the inclusion of a wide range of subjects within its reach and within its core. According to Professor Hogg ((loose-leaf ed.), at p. 22-20), federal jurisdiction has been held to include legislative competence over navigable waters and works of navigation (see *Reference re Waters and Water-Powers*, [1929 CanLII 72 \(SCC\)](#), [1929] S.C.R. 200), harbours (see *Hamilton Harbour Commissioners*) and a wide range of maritime law subject matters. In addition, ports and harbours under the control of federal Crown corporations (like the VPA) are usually international ports intimately connected to routes of international commerce, trade and shipping and, as such, form part of a class of matters traditionally associated with federal rather than provincial jurisdiction.

130 If ports and harbours are part of the core of s. 91(10), then, in my view, it is clear that the regulation of land use within ports also falls within the core when such regulation concerns port lands and port operations and, thus, navigation and shipping. Clearly, if ports themselves are a vital aspect of navigation and shipping, then the use and development of surrounding port lands for port operations must be as well. More specifically, the land use planning activities and operations

of port authorities as federally created and regulated undertakings charged with managing and operating ports, and ensuring their commercial viability, must also fall within the core of s. 91(10). The federal power over navigation and shipping must therefore also include and extend to federally regulated port authorities such as the VPA, whose creation, role and mandate are undeniably at the core of Parliament's legislative authority over navigation and shipping, insofar as its operations and functions are exercised in support of port operations. This legislative authority is expressed most notably in the *Canada Marine Act*, which provides the legislative framework for the creation and governance of port authorities such as the VPA, including its power to regulate land use planning and development of port lands.

131 Even further, in my view, the federal regulation of port lands *in support of* port operations also falls within the core of s. 91(10) — not just federal regulation of port lands used directly or strictly for port “activities” *per se*. As discussed above, the federal power over navigation and shipping is broad and comprehensive; as a result, its core must be defined in a more global and coherent fashion, such that there cannot be an easy or meaningful distinction between land use planning and development for certain port lands, but not for others simply because those other lands are used only for activities to “support” port operations. The federal regulation of land use planning and development on port lands must include *all* port lands, regardless of their status or degree of connection or necessity to port operations. Given the nature and scope of the federal power over the regulation of land use planning on port lands, it makes no sense to either recognize or deny federal immunity based solely on whether the parcel of port lands in question is to be used directly for “port activities” or “in support of” port operations and simply because of fears that certain uses of the latter category would appear to be in their own right somehow “less connected” to shipping and navigation. The fact remains that land use planning and development of all port lands, regardless of the specific status of individual parcels of land, lies at the core of s. 91(10). As for concerns over certain “uses” of land which might not seem closely connected to navigation and shipping, as discussed earlier, those concerns fail to recognize the nature of the doctrine of interjurisdictional immunity as being concerned with areas of potential legislative jurisdiction, not

specific executive action or activities. If immunity extends to the regulation of land use planning on all port lands, then so long as that regulation is properly exercised according to the VPA's terms and mandate and is concerned with port lands for activities in support of port operations (at a minimum) or directly for port activities, then it should not matter what is the specific status of a particular parcel of port lands, and what its specific intended use would be.

132 The VPA, as a federal undertaking linked to navigation and shipping is thus a “vehicle” for the exercise of the power to regulate land use planning and development of port lands in support of port operations (i.e. Schedule C lands); the regulation of land use planning as exercised by the VPA for Schedule C port lands thus falls within the core of s. 91(10). As Finch C.J.B.C. noted at para. 101, “the power to plan and regulate land-use development within the Port of Vancouver is a vital part of the federal power over ‘navigation and shipping’”. The analogy to airports and related activities is again appropriate here. According to Finch C.J.B.C., at para. 103, if, in the aeronautics context, the ability to control the building, design and operational quality of airports is a vital part of the federal jurisdiction over aeronautics (citing *Greater Toronto Airports Authority*), then surely the “ability to plan and regulate the development and use of port lands, which is essential to ensuring the operational quality of the port” should also be considered a vital part of the federal jurisdiction over navigation and shipping.

133 The VPA's regulation of land use planning and development for port lands in support of port operations must therefore fall within the core of s. 91(10), given that such regulation is integral to the VPA's role, mandate and operation (see paras. 104-5 of Finch C.J.B.C.'s reasons). Effective and responsive land use planning is essential to the operations and responsibilities of a port, given that a “port facility” under s. 2 of the *Canada Marine Act* includes “all land incidental” to the use of the port. Indeed, the ability to control and regulate the use of port lands adjacent to the actual harbour is an integral part of ensuring effective marine access to the harbour itself. The significance of land use planning to port operations (and thus to navigation and shipping) is

confirmed by s. 48 of the *Canada Marine Act*, which specifies that a port authority's land use plan should govern land use on all port property, rather than the municipal zoning by-laws which govern neighbouring lands. As previously noted, s. 48 requires the creation of land use plans by port authorities which contain "objectives and policies for the physical development of the real property" that the port authority "manages, holds or occupies", and which take into account "relevant social, economic and environmental matters and zoning by-laws that apply to neighbouring lands". According to Finch C.J.B.C., this reflects "the significance attached to the planning and regulation of land use as part of the Port Authority's activities" (para. 106). From a practical perspective, the ability to control and regulate the use of port lands "ensures that marine access is maintained and that industries compatible with port uses are served" (para. 107), thus fulfilling the objectives of the *Canada Marine Act* by ensuring adaptability and flexibility in the VPA's operations and continued strength and competitiveness. This is also consistent with the statement in *Irwin Toy* that Parliament has exclusive jurisdiction over the "essential and vital elements" of a federal undertaking, "including the management of such an undertaking", because the operation and management of an undertaking may fall within the "basic, minimum and unassailable content" of a relevant head of federal power (p. 955).

134 Thus the regulation of land use planning and development for Schedule C lands (as exercised by the VPA) falls within the protected core of s. 91(10) for a number of reasons: because of the inclusion of ports and harbours generally in that core; because of the VPA's status as a Crown corporation and a federally regulated undertaking whose creation and operation is integrally connected to shipping and navigation; and because the regulation of land use planning and development in respect of port lands (including activities in support of port operations) is a vital part of the VPA's functions and operations as a federally regulated undertaking under s. 91(10) and as a vehicle for the exercise of the federal land use planning power for port lands in support of port operations.

As a further element of this inquiry, it must be shown that the context of the Lafarge proposal is consistent with this characterization of the core of s. 91(10). That is, if federal immunity attaches to the VPA's regulation of land use planning and development on port lands in support of port operations, then it must also be determined whether the approval of the concrete batch facility project proposed by Lafarge would be included in that regulatory authority. As previously stated, the interjurisdictional immunity analysis concerns jurisdiction, not action, and is therefore concerned with Parliament's power to regulate land use planning on port lands (including lands for activities in support of port operations) as part of the core of the navigation and shipping power under s. 91(10), rather than with the actual exercise of that power in this case (i.e. the approval of the Lafarge proposal). The actual content of Lafarge's proposal is of minor importance to the immunity analysis, given that the key question is whether the regulation of land use planning falls within the core of s. 91(10) and whether the by-law affects that regulatory power. I would note simply that the context of the Lafarge proposal illustrates the application of the analysis to a particular set of facts by providing a link to navigation and shipping which is central to the legal issues involved in this appeal. The question could therefore be asked whether the VPA's approval of the Lafarge proposal is a valid exercise of the "core" power to regulate land use planning on port lands, including lands for activities in support of port operations. If it is, then the VPA's decision to approve the project is clearly consistent with the above characterization of the core of s. 91(10), given that the VPA would be acting as a vehicle for Parliament in regulating land use planning within the Port of Vancouver; the VPA's regulation of land use planning in respect of the Lafarge proposal (by approving the project) would thus be indirectly protected from the by-law. If approval of the Lafarge project is not a valid exercise of the core power to regulate land use planning in respect of port operations, then this does not mean that the City's by-law would apply; rather, it would mean that the VPA may have exceeded its jurisdiction in going beyond its statutorily mandated powers and responsibilities, which is a separate issue.

In my view, the VPA's decision to approve the Lafarge project is consistent with a valid exercise of the power to regulate land use planning for port lands in support of port

operations. The proposed project would be situated on land which is part of Burrard Inlet, which falls under Schedule C of the VPA's Letters Patent (i.e. "real property other than federal real property", which the VPA acquired and holds in its own name); such lands have been deemed by the Minister to be "necessary to support port operations" (by operation of [s. 28\(2\)\(b\)](#) of the [Canada Marine Act](#), and the preamble and article 7.3(b) of the VPA's Letters Patent). And the project is undeniably consistent with this goal of "supporting" port operations, given that the project's ultimate objective is to enhance competitiveness and commercial viability within the Port of Vancouver for its users and for the VPA, despite any aspects of the project which, taken on their own and in isolation, may appear to be only loosely connected with shipping and navigation activities or operations. The key factor is that the approval of the project as a whole was clearly intended in law and in fact to be consistent with the VPA's regulation of land use planning and development on port lands, including lands for activities in support of port operations.

137 In my view, Justices Binnie and LeBel's conclusion (at para. 71) that the regulation of land use on port lands for activities in "support" of port operations and for a "port service industr[y] reliant on waterfront access" does not fall within the core of s. 91(10) because it is not "absolutely indispensable and necessary" to the VPA's federal undertaking is really a reflection of their concern that certain possible uses of land (plazas, parks, restaurants, condominiums, etc.) should not receive federal immunity because they would be unconnected to navigation and shipping. With respect, as previously discussed, I do not understand how the regulation of land use planning for port lands "in support of port operations" does not fall within the core of the navigation and shipping power; nor can I understand how certain land uses which support "port service industries reliant on waterfront access" could also be excluded from the core, even if those uses in and of themselves do not appear to be "navigation and shipping" activities. By definition, such uses of land, even if they do not appear at first blush to be part of the core of navigation and shipping, are destined to *support* the operations of a port, which falls within the core of s. 91(10), and would occur *on port lands*, the development and planning of which also falls within the core of s. 91(10). The concern over apparently non-marine related uses of port lands (such as plazas,

condominiums, parks, industrial facilities, etc.) seems rooted in the fear that uses of port lands which merely act as additional sources of income are not sufficiently “marine related” to count as “navigation and shipping”. It could be argued that uses of land which merely generate revenue for the VPA, although potentially falling generally under federal jurisdiction pursuant to s. 91(10), should not receive federal immunity, much in the same way that the sale of liquor on Air Canada flights could not benefit from any federal immunity because it merely maintains an airline’s “competitive edge”. In my view, the two situations are wholly dissimilar. The analogy overlooks the global and integrated nature of land use planning and development under the federal navigation and shipping power. In *Air Canada v. Ontario (Liquor Control Board)*, [1997 CanLII 361 \(SCC\)](#), [1997] 2 S.C.R. 581, a purely economic and unique activity (the sale of liquor) was found to fall outside the core of the federal aeronautics power because there was no connection whatsoever to airports, airlines or aeronautics. In the present case, however, even if some “purely” economic or commercial uses of Schedule C lands could result from the VPA’s regulation of land use planning and development on port lands, such uses are still designed to support port operations and are still occurring on port lands; these factors establish a strong connection to core matters within the federal navigation and shipping power. Furthermore, it is unfeasible to segregate control over land use planning to each use contemplated. The broad nature of the federal navigation and shipping power justifies a more global and cohesive approach in this case, which would allow immunity even for purely economic or commercial activities so long as such activities are still consistent with the regulation of port lands for port operations or in support of port operations. Immunity still protects activities which appear to be at the outer limits of the core of a federal power, even those apparently aimed at generating revenue or increasing the competitive edge of a federal undertaking, but only if such activities can be tied to a core function of the federal power (in this case, the regulation of land use planning and development on port lands, including lands for activities in support of port operations).

extent that they might not reflect a proper exercise of the core federal power over the regulation of land use for port lands, including for activities in support of port operations. If certain uses should not receive federal immunity, that is because they lack a sufficient connection to navigation and shipping and are likely inconsistent with the federal power to regulate land use *in support of port operations*, and would therefore constitute an excess of federal jurisdiction. That would not change the fact that the provincial law in question here (the municipal by-law) affects a vital part of the federal navigation and shipping power because it hinders (by its application to the Port of Vancouver) the regulation of land use planning on port lands in support of operations, a protected “core” matter within s. 91(10) which is intended to be performed exclusively by a federal authority — i.e. the VPA.

3.2.2.2 *The By-law’s Effect on the Core of Section 91(10)*

139 The second step in the interjurisdictional immunity test with respect to navigation and shipping is to determine whether the application of the municipal by-law in this case would “affect” a vital part of the federal legislative authority over navigation and shipping under s. 91(10) — that is, whether it would affect the core of that head of power as defined above. More specifically, the question is whether the application of the by-law would impermissibly affect the power (as exercised by the VPA as a federal undertaking) to regulate land use planning of port lands, including for activities in support of port operations, as a “vital part” of the federal navigation and shipping power under s. 91(10). As noted earlier, the meaning of the word “affects” should be interpreted as a kind of middle ground between the perhaps overly vague or broad standard of “touches on” and the older and overly restrictive standard of “sterilizes” or “impairs”. Without requiring complete paralysis of the core of the federal power or the operations of the undertaking, the impact of the application of the by-law must be sufficiently severe and serious to trigger immunity.

In my view, this question must be answered in the affirmative here. The by-law clearly and significantly affects the VPA's regulation of land use planning and development for port lands in support of port operations by imposing a zoning regime and an approval process for development proposals and projects on such lands. This regulation of land use planning and development within the port for purposes related to navigation and shipping is at the core of the federal power over navigation and shipping under s. 91(10). If the by-law were applied to the Port of Vancouver, the VPA's ability to regulate the land use planning and development of the port would be severely affected (see para. 108 of Finch C.J.B.C.'s reasons on this point). From a practical perspective, it would create a jurisdictional nightmare, given that the port itself lies at the intersection of eight separate municipalities, all of whom could conceivably enforce a land use planning by-law regime which would apply to port lands. It is therefore clear that the application of any of these by-laws would seriously affect or hinder a vital part of the federal navigation and shipping power under s. 91(10) by affecting the ability of the VPA as a federal undertaking to regulate land use planning of port lands in support of port operations. The ideal of federal-provincial-municipal cooperation discussed by Justices Binnie and LeBel at para. 38 must be concerned with actual facts.

It should also be noted that even if this were an "impairment" situation where the provincial law in question applied only "indirectly" to the federal matter (see *Irwin Toy*), immunity would still attach. If the by-law were only indirectly applicable to the VPA's regulation of land use planning and development within the port, it would still be impossible to exercise the s. 91(10) federal power over navigation and shipping (and more specifically over the regulation of land use planning and development on port lands by a federally regulated port authority) in any rational way. The federal power would consistently be subject to interference, and thus impairment, by municipal legislation and action in the form of delays, lengthy approval processes, inconsistent municipal zoning norms and the possibility of a "patchwork" of separate rules over the same relatively small land mass. Thus, even under the *Irwin Toy* version of the doctrine,

interjurisdictional immunity should attach to the VPA's regulation of land use in the port for port lands in support of port operations.

3.3 *The Operation of the Municipal By-law*

142 Having concluded that the by-law in question is constitutionally inapplicable in this case, by reason of interjurisdictional immunity, it is neither necessary nor possible to consider whether the by-law is also constitutionally inoperable by reason of the doctrine of federal paramountcy to the extent of any conflict with s. 48 of the *Canada Marine Act* and with the *Port Land Use Management Plan* adopted by the VPA pursuant to that legislative provision. As previously stated, consideration of the doctrine of federal paramountcy is only triggered when there are two valid and applicable laws which overlap and appear to conflict. That is not the case here, given that the municipal by-law is inapplicable.

4. Conclusion

143 Accordingly, I would dismiss the Attorney General of British Columbia's appeal and would answer the constitutional questions as follows:

1. Is the City of Vancouver Zoning and Development Bylaw No. 3575 constitutionally inapplicable to property, with a legal description of Parcel P, Block 17, Plan LMP 47343, District Lot 184 and the Public Harbour of Burrard Inlet (the "Property"), held by the Vancouver Port Authority, on the basis that the Property is "public property" within the meaning of s. 91(1A) of the *Constitution Act, 1867*?

Answer: No.

2. Is the City of Vancouver Zoning and Development Bylaw No. 3575 constitutionally inapplicable to the proposed development on the Property in view of Parliament’s legislative authority over “navigation and shipping” under [s. 91\(10\)](#) of the *Constitution Act, 1867*?

Answer: Yes.

The by-law cannot apply to the VPA’s regulation of land use planning for port lands in support of port operations, including in this case the approval of the Lafarge proposal. In the result, then, I would uphold the ultimate decision of the Court of Appeal which overturned the chambers judge’s decision and dismissed the neighbourhood association’s petition against the development project.

APPENDIX

Canada Marine Act, S.C. 1998, c. 10

2. (1) . . .

“federal real property” has the same meaning as in [section 2](#) of the *Federal Real Property and Federal Immovables Act*;

5. . . .

“port” means the navigable waters under the jurisdiction of a port authority and the real property and immovables that the port authority manages, holds or occupies as set out in the letters patent.

7. (1) Subject to subsection (3), a port authority is an agent of Her Majesty in right of Canada only for the purposes of engaging in the port activities referred to in paragraph 28(2)(a).

28. . . .

(2) The power of a port authority to operate a port is limited to the power to engage in

(a) port activities related to shipping, navigation, transportation of passengers and goods, handling of goods and storage of goods, to the extent that those activities are specified in the letters patent; and

(b) other activities that are deemed in the letters patent to be necessary to support port operations.

(3) The activities that a port authority may engage in under paragraph 2(b) may be carried on by the port authority directly or through a wholly-owned subsidiary of the port authority. The port authority and the subsidiary are not agents of Her Majesty in right of Canada for the purpose of engaging in those activities.

...

(5) A port authority or wholly-owned subsidiary of a port authority that enters into a contract other than as agent of Her Majesty in right of Canada shall do so in its own name. It shall expressly state in the contract that it is entering into the contract on its own behalf and not as agent of Her Majesty in right of Canada. For greater certainty, the contracts to which this subsection applies include a contract for the borrowing of money.

46. (1) Subject to subsection 45(3), a port authority may not dispose of any federal real property or federal immovable that it manages

...

(2) A port authority may dispose of any real property or immovable that it occupies or holds, other than federal real property or federal immovables, subject to the issuance of supplementary letters patent, and, without the issuance of supplementary letters patent, it may grant road allowances or easements, rights of way or licences for utilities, services or access.

Letters Patent issued to the Vancouver Port Authority (1999)

7.1 Activities of the Authority Related to Certain Port Operations. To operate the port, the Authority may undertake the port activities referred to in paragraph 28(2)(a) of the Act to the extent specified below:

...

7.3 Activities of the Authority Necessary to Support Port Operations. To operate the port, the Authority may undertake the following activities which are deemed necessary to support port operations pursuant to paragraph 28(2)(b) of the Act:

...

- (b) acquisition or disposition of real property other than federal real property subject to the issuance of supplementary letters patent;

...

- (d) occupying or holding real property other than federal real property;

...

- (g) developing, leasing or licensing real property other than federal real property, for, or in connection with the activities described in this Article 7;
- (h) carrying on activities described in section 7.3 on federal real property described in Schedule B or described as federal real property in any supplementary letters patent or on real property other than federal real property described in Schedule C or described as real property other than federal real property in any supplementary letters patent;

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of British Columbia, Victoria.

Solicitors for the respondent Lafarge Canada Inc.: Blake, Cassels & Graydon, Vancouver.

Solicitors for the respondent the Vancouver Port Authority: Fasken Martineau DuMoulin, Vancouver.

Solicitor for the respondent the City of Vancouver: City of Vancouver, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

*Solicitor for the intervener the Attorney General of Alberta: Attorney General of
Alberta, Edmonton.*

TAB 20

Landreville v. Town of Boucherville, 1978 CanLII 202 (SCC), [1978] 2 SCR 801

Source:	Supreme Court of Canada
Date:	1978-02-07
Other citations:	22 NR 407 — 6 MPLR 131
Citation:	Landreville v. Town of Boucherville, 1978 CanLII 202 (SCC), [1978] 2 SCR 801, < https://canlii.ca/t/1z75l >, retrieved on 2026-03-23

Supreme Court of Canada
Landreville v. Town of Boucherville, [1978] 2 S.C.R. 801
Date: 1978-02-07

Lucien Landreville (*Expropriated party*) *Appellant*;

and

Town of Boucherville (*Expropriating party*) *Respondent*.

1977: June 9; 1978: February 7.

Present: Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Expropriation—Contestation of the right to expropriate—Bad faith of the expropriating party—Burden of proof—Code of Civil Procedure, art. 777.

Municipal law—Validity of a by-law disputed by incidental arguments—Statutory right of a municipality to expropriate—Cities and Towns Act, R.S.Q. 1964, c. 193, ss. 411, 605.

Appellant is contesting the right to expropriate of respondent (the “Town”), which passed a by-law ordering the expropriation of his land for purposes of a municipal park and offering him an indemnity of one dollar. The land is a shale quarry covering forty arpents located approximately three miles from the centre of the Town of Boucherville. On December 7, 1965, the Town issued a permit for appellant to work this quarry but made it subject to a number of conditions, *inter alia* that the Town could take 10,000 tons of stone free of charge and that appellant would transfer the part of his lot that was used as a quarry to the Town for \$1. The Town did in fact take the specified quantity of stone free of charge, but appellant refused to transfer his quarry. On March 1, 1966 the municipal council passed a resolution requiring appellant to sign the contract transferring the quarry

to the Town. At the same time counsel for the Town were authorized to take the necessary measures to stop the quarrying of stone until appellant had signed the contract. On April 19, 1966 the municipal council adopted a by-law ordering that part of lot 167, namely appellant's land, be homologated for purposes of a park. On August 9, 1966 the municipal council passed a resolution ordering "that appropriate legal proceedings be taken regarding the operation of a quarry [belonging to appellant] ... and that if existing by-laws are insufficient for this purpose, a recommendation be made to this Council without delay". Finally, on December 6, 1966 the contested expropriation by-law was passed. The Superior Court judge concluded that the Town had expropriated appellant not for the reason put forward but solely to prevent him from operating his quarry, and

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had thus acted in bad faith and abused its power: he found in favour of appellant and quashed the by-law. The Court of Appeal reversed the judgment on the ground that the expropriated party, on whom the burden of proof rested, had failed to establish fraud and flagrant injustice. Hence the appeal to this Court.

Held: The appeal should be allowed.

The trial judge made no error of law and drew no incorrect conclusions from the facts when he decided that the resolutions passed by the Town, and the content of these resolutions, showed clearly that the Town's bad faith was such as to be the equivalent of a fraud upon the party concerned. It may be added that while the resolutions and by-laws passed by the municipal council clearly condemn the Town, this condemnation is confirmed by the other circumstances. There is no legislation permitting the Town to make the issuing of a permit to operate the quarry conditional upon appellant's transferring his land to the Town. Since the wrongful and unjust conduct of the Town with regard to appellant prior to the adoption of the expropriation by-law had been proved, it was up to the Town to prove a subsequent change, which it did not do. On the contrary, in its efforts to acquire appellant's property for \$1, the Town continued to act in bad faith since its valuation was clearly unfair and disregarded a recognized legal principle that the indemnity must be calculated on the basis of the value to the owner, not the value to the expropriating party. Appellant did not have to demonstrate that the Town did not intend to use the quarry as a park. Once the initial bad faith was proved, it vitiated and nullified the Town's actions regardless of the intentions that the Town may eventually have formed in order to attain its objectives. We are dealing with a cause of nullity that transcends the others and vitiates whatever it produces.

The argument that a municipal by-law can be nullified only by a petition to quash, as provided by s. 411 of the *Cities and Towns Act*, cannot be allowed. Section 411 creates an additional but not an exclusive remedy. It is also possible to dispute the validity of a municipal by-law on defence or by incidental arguments, such as the contestation of the right to expropriate in the case at bar. Finally, the Town's statutory right to expropriate under s. 605 of the *Cities and Towns Act* is not an absolute right. It may be contested, as in the case at bar, if the expropriating party commits abuses that vitiate the substance of its decisions.

Kuchma v. Rural Municipality of Taché, [1945 CanLII 27 \(SCC\)](#), [1945] S.C.R. 234; *Lazarus Estates Ltd. v. Beasley*, [1956] 1

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Q.B. 702; *Marquess of Clanricarde v. Congested Districts Board of Ireland* (1915), 79 J.P. 481 (H. of L.); *Duquet v. The Town of Sainte-Agathe-des-Monts*, [1976 CanLII 13](#)

(SCC), [1977] 2 S.C.R. 1132, applied; *City of Sillery v. Sun Oil Co. and Royal Trust Co.*, 1964 CanLII 82 (SCC), [1964] S.C.R. 552; *Cedar Rapids Manufacturing and Power Company v. Lacoste*, 1914 CanLII 585 (UK JCPC), [1914] A.C. 569; *Fraser v. Fraserville*, 1917 CanLII 449 (UK JCPC), [1917] A.C. 187; *The City of Montreal v. McAnulty Realty Co.*, 1922 CanLII 44 (SCC), [1923] S.C.R. 273; *Attorney General of Quebec v. Hébert*, 1967 CanLII 61 (SCC), [1967] S.C.R. 690; *Place Versailles Inc. et al. v. Minister of Justice of Quebec*, 1976 CanLII 215 (SCC), [1977] 2 S.C.R. 1118, referred to; *Hamel v. Town of Asbestos*, 1967 CanLII 91 (CSC), [1967] S.C.R. 534, distinguished.

APPEAL from a decision of the Court of Appeal of Quebec reversing a judgment of the Superior Court. Appeal allowed.

Viateur Bergeron, Q.C., and Richard Gaudreau, for the appellant.

Yvon Denault, for the respondent.

The judgment of the Court was delivered by

BEETZ J.—The issue is whether respondent committed an abuse of power in expropriating appellant's land. The case also raises both procedural and jurisdictional questions.

By-law No. 533 ordering expropriation of this land for purposes of a municipal park was adopted on December 6, 1966 by resolution No. 66-906 of the municipal council of the Town of Boucherville. The notice of expropriation estimated the value of the expropriated immovable (part of lot 167) at one dollar; this was the amount of the indemnity offered to the expropriated party by the expropriating party.

Lucien Landreville contested “the right to expropriate” under art. 777 *C.C.P.*, pleading *inter alia* that:

[TRANSLATION] Under the pretext of exercising a statutory right specifically granted to cities and towns under ss. 605 *et seq.* of the *Cities and Towns Act*, namely the right to expropriate for municipal purposes, the expropriating municipality in its notice of expropriation falsely and unlawfully alleged its desire to acquire the property of the expropriated party for purposes of a municipal park, when in fact it wished to acquire the said property not for municipal purposes but solely with the objective of putting an end to the operation of a

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quarry located on it, more specifically, a shale borrow pit...

Lucien Landreville also pleaded that the Town:

[TRANSLATION] falsely and in bad faith alleged the necessity of developing the said lot P-167 for purposes of a municipal park ...

He further pleaded that:

[TRANSLATION] the expropriating municipality attempted unlawfully and in bad faith to camouflage its true intention, which is to put an end to the operation being carried out on lot P-167...

The Superior Court (Nolan J.) held that the expropriation was motivated by a reason other than the reason put forward: the sole aim of the Town was to prevent Lucien Landreville from operating his quarry. The Town had therefore acted in bad faith, treated Landreville unfairly and abused its power. Consequently, the trial judge found in favour of appellant, dismissed the notice of expropriation and quashed the resolution and the by-law ordering the expropriation.

The Court of Appeal (Tremblay C.J.A. and Casey and Turgeon JJ.A.) reversed the judgment of the Superior Court and dismissed Lucien Landreville's contestation. Turgeon J.A., with whom Tremblay C.J.A. concurred, held that:

[TRANSLATION] the expropriated respondent, on whom the burden of proof rested, failed to establish the fraud and flagrant injustice alleged in his defence. The evidence of the engineer Gilles Chabot and the town planner Victor Lambert convinced me of this.

The Chief Justice and Turgeon J.A. took for granted, without deciding the point, that in its contestation the expropriated party could argue the nullity of the by-law ordering the expropriation. Casey J.A. paid more attention to this latter question, which does not appear to have been raised in Superior Court, but he agreed with the opinion of his colleagues on the main issue:

The motivation of the Councillors or the suspicion that they do not intend to proceed with the work requires proof far stronger than that contained in this record.

The appeal, filed under the old s. 36 of the *Supreme Court Act*, asks this Court to set aside the decision of the Court of Appeal and restore the

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judgment of the Superior Court. (Affidavits attesting that the value of the matter in controversy exceeds ten thousand dollars were filed by appellant. The jurisdiction of this Court was not questioned.)

The evidence consisted mainly of resolutions and by-laws adopted by the Town. The remainder of the evidence included the testimony of Lucien Landreville, Victor Lambert, town planner and witness for Lucien Landreville, Gilles Chabot, engineer and witness for the Town, and Eugène McClish, Town clerk.

The facts are not disputed but the Court of Appeal and the Superior Court did not draw the same conclusions from them.

The land that the Town wished to expropriate is a shale quarry covering forty arpents (1,472,027 sq. ft.) located in an open field approximately three miles from the centre of the Town of Boucherville in the Parish of Sainte-Famille de Boucherville, which was annexed by the Town in 1963. At the time the expropriation was ordered the quarry was approximately twenty-five feet deep and covered forty per cent of the farm belonging to Lucien Landreville. Exploitation began in December 1965 when the owner transferred to contractors the right of quarrying the shale, at first for a one-year period and later for a ten-year period.

Believing he needed a permit, Lucien Landreville sent a written request to the municipal authorities on December 7, 1965, after he had transferred quarrying rights to the first contractor. At first, the Mayor, whom he went to see, told him that the matter was "as good as money in the bank". Later, however, at the Town Hall, the Town's engineer, Gilles Chabot, and the Mayor told him that the Town could not agree to issue him a permit unless he transferred the land to the Town once the quarrying was over. In the application for a permit, dated December 7, 1965, which was dictated to him, Lucien Landreville wrote "that in consideration of this application" he "would undertake" to transfer this part of his lot to the Town "for the sum of \$1 plus other consideration and an access to the said land". (The offer was withdrawn on April 11, 1968.)

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Pursuant to this application, a resolution of the municipal council dated December 16, 1965 authorized Lucien Landreville to lease part of his lot to Mégantic Construction Inc. for quarrying of the stone, but with a number of conditions, including the following: the excavation was limited to a depth of twenty feet; all excavation or quarrying of stone was to end on May 1, 1967; the earth removed was to be deposited at a place to be specified by the Town and to remain its property; the Town could take 10,000 tons of stone free of charge; Lucien Landreville was to transfer to the Town for \$1, by means of a notarized contract, the part of his lot that was used as a quarry; a notary was chosen to prepare the contract, which the Mayor and the Secretary-Treasurer were empowered to sign.

The 10,000 tons of stone, valued at \$0.85 a ton, were in fact used for municipal purposes free of charge, but Lucien Landreville did not agree to transfer his quarry to the Town.

On March 1, 1966 the municipal council passed a resolution refusing to grant Paul-Emile Lamontagne and Lucien Landreville permission to use lot 167 as a dump. The same resolution required Lucien Landreville to sign the contract transferring the quarry to the Town. Counsel for the Town were authorized to take the necessary measures to stop the quarrying of stone until Lucien Landreville had signed the contract. If he refused, they were to see that the quarrying was halted indefinitely and sue him for damages.

On March 15, 1966 a proposal was made to the municipal council that a land surveyor [TRANSLATION] “be authorized to prepare plans for the piece of land to be homologated on lot 167 belonging to Mr. Lucien Landreville”. (The copy in the record does not mention, however, whether this proposal was adopted.)

On April 19, 1966 the municipal council adopted a by-law ordering that part of lot 167 be homologated for purposes of a park. (The record does not show whether the homologation was actually carried out.)

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On August 9, 1966 the municipal council resolved [TRANSLATION] “that appropriate legal proceedings be taken regarding the operation of a quarry known as a borrow pit within our boundaries, namely on lot No. 167 of the official cadastre of the Parish of Ste-Famille, and that if existing by-laws are insufficient for this purpose, a recommendation be made to this Council without delay”.

On December 6, 1966 the council adopted the [TRANSLATION] “by-law to provide for the acquisition by mutual consent or by expropriation of part of lot No. 167 of the official cadastre of the Parish of Ste-Famille de Boucherville, registration division of Chambly, for the sum of \$1 for purposes of a municipal Park”. Counsel for the Town were authorized to take the necessary measures to acquire the land by mutual consent or expropriation with prior taking of possession.

On January 17, 1967, the municipal council adopted construction and zoning by-laws Nos. 545 and 546, covering the entire area of the Town of Boucherville. According to these by-laws and the accompanying plan (D-5), Lucien Landreville’s quarry is in a residential development zone. In the middle of this zone quite a large area is zoned as a park (P-48). This is a proposed regional park outlined on the plan by curved or elliptical lines, with the exception of a single rectangular projection. This rectangle represents Lucien Landreville’s quarry, which the municipality said it wanted to add to the proposed park.

The notice of expropriation is dated February 21, 1967.

The following are the trial judge’s reasons for his conclusions:

If this expropriation were being contested solely on the grounds that the City was wrong or unwise in deciding to add Petitioner’s property to the park zone P-48 because of the alleged incongruity of adding to the said park zone 40 arpents of land used as a quarry, the whole superficies of which consists of a hole some 25 feet deep, the undersigned would have no hesitation in dismissing the Contestation as it is not the function of the Court to substitute its views for those of the municipal council.

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For the same reason, the Court is of the opinion that the fact that the park P-48 may not be built for fifteen years or more (as was proven) should not be considered per se as a valid ground for invalidating the City's by-law decreeing the expropriation. Nor is it its function to pass judgment on the valuation of \$1.00 placed on the Contestant's land in the certificate accompanying the Notice of Expropriation even though the municipal valuation for tax purposes was proven to be \$100.00 per arpent.

The Court's decision has been reached on the evidence as a whole. Considered by themselves the complaints of Petitioner on the three points mentioned above are irrelevant. But considered together with the other actions of Petitioner they help to confirm Contestant's contention that Petitioner acted unjustly towards him in this matter.

The undersigned is satisfied from the proof which was adduced in this case that Petitioner had an ulterior motive in decreeing the expropriation of Contestant's land and that this motive was its determination to stop Contestant from exploiting his quarry.

The resolutions which were passed, and the contents of these resolutions, show clearly that Petitioner was determined to prevent Contestant from operating a quarry on his land unless he first deeded the land over to the City; and that when all other threats and maneuvers failed it was decided to foil Contestant by expropriating his land. In fact, Petitioner was so anxious to teach Contestant a lesson that the by-law decreeing the expropriation of Contestant's land was passed more than a month before Petitioner's land was added to the park zone P-48 by the Plan D-5.

In the opinion of the undersigned, Petitioner's bad faith is further evidenced by the fact that when this case was heard in March 1970, more than three years after Petitioner passed the by-law decreeing the expropriation of Contestant's land, Petitioner had taken no steps to expropriate any of the other lots forming part of the park zone P-48 except for one single lot on which a road was built as part of the network of roads in the Petitioner municipality and which the undersigned seriously doubts was in any way, other than accidentally, related to park zone P-48.

The principle has been clearly laid down in many cases dealing with decisions reached by municipal corporations that the Courts must not interfere unless fraud is established or a violation of the law or an abuse of power, in either case so violent as to be the equivalent of a fraud upon the public or the parties concerned.

Corporation de la Ville de Dorval v. Sanguinet Automobile Ltée, [1960] Que. K.B. 706, Roy v. Corporation

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d'Aubert-Gallion, [1929] 46 Que. K.B. 15—Rivard, J. at pp. 29-30, Sula vs Cité de Duvernay, [1970] Que. K.B. 234.

The undersigned believes this to be a case which falls within the principles laid down in the above cases.

The undersigned therefore has no hesitation in finding that in passing By-law No. 533 on December 6, 1966 decreeing the expropriation of Contestant's property, Petitioner committed an abuse of power, a flagrant injustice equivalent to bad faith towards Contestant.

I find no error of law in the reasons of the trial judge and I cannot say that the conclusions he draws from the facts are manifestly incorrect.

I would, however, add the following reasons to those of the trial judge.

The burden of proof is a heavy one when it involves establishing the commission of an “abuse of power equivalent to fraud” and “resulting in a flagrant injustice”: *City of Sillery v. Sun Oil Co. and Royal Trust Co.*^[1], at p. 557.

In the case at bar, however, the municipal council is clearly condemned by its own resolutions and by-laws, and this condemnation is confirmed by the other circumstances.

In the resolution of December 16, 1965, far from opposing the operation of a quarry on Lucien Landreville’s farm because of existing or expected zoning or a proposed park, the municipal council indicated that it was prepared to allow this operation on the conditions mentioned above: that the earth removed, 10,000 tons of stone and above all the land itself be given to the Town. From the very beginning, therefore, the Town was trying to appropriate the quarry without paying for it.

There is explicit legislation enabling municipalities to require, as a condition precedent to the approval of a subdivision plan, that the owner convey to them free of charge a specified percentage of his land, to be used for parks or playgrounds; or to appropriate without indemnity in specific cases land to be used for streets or lanes or the land necessary for the first public road on a lot. For example, s. 429 of the *Cities and Towns Act*,

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R.S.Q. 1964, c. 193, as amended by L.Q. 1975, c. 66, s. 15—a provision subsequent to the facts at issue—states that the municipal council may make by-laws:

(8) To require, as a condition precedent to the approval of a subdivision plan, whether it provides for streets or not, that the owner convey to the municipal corporation, for park or playground purposes, an area of land not exceeding ten per cent of the land comprised in the plan and situated at a place which, in the opinion of the council, is suitable for the establishment of parks or playgrounds; or to exact from the owner, instead of such area of land, the payment of a sum not exceeding ten per cent of the real value of the land comprised in the plan, notwithstanding the application of section 21 of the Real Estate Assessment Act (1971, chapter 50) ...

See also art. 392f(g) of the *Municipal Code*, ss. 610a, 610b, 610c and 1054 of the *Charter of the City of Montreal*, S.Q. 1959-60, c. 102, S.Q. 1960-61, c. 97, s. 30, S.Q. 1963, c. 70, s. 21, L.Q. 1969, c. 91, s. 6; s. 336(204) of the *Charter of the City of Quebec*, L.Q. 1976, c. 54, s. 15. Municipalities may not, however, extend this legislation by using permit-granting powers that they have or think they have to extort from an owner advantages

such as those that the Town attempted to obtain from Lucien Landreville on December 16, 1965: such action by a municipality demonstrates bad faith and constitutes an abuse of power.

The Town repeated its conduct five and a half months later with its resolution of March 1, 1966. I am not thinking of its refusal to authorize use of lot 167 as a dump but of the notice to transfer title that was sent to Lucien Landreville with a threat of legal proceedings and prevention of further quarrying. The Town still had no objection in principle, however, to the operation of a quarry on this site provided that Lucien Landreville agreed to relinquish his property; and there was no mention of a park.

The threats became more specific with the resolution or proposal of March 15, 1966 authorizing a surveyor to make plans for homologation which necessarily suggests expropriation. There was still no mention of a park.

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The park was mentioned for the first time in the resolution of April 19, 1966, ordering the homologation for purposes of a park of a site that, a month and a half earlier, the Town had been willing in principle to have used as a quarry.

Moreover, the resolution of August 9, 1966 must be interpreted in the light of the resolutions that preceded and followed it: the municipal council was in fact asking for suggestions of how it could attain the objectives that it had been pursuing unlawfully from the beginning.

Finally, there is by-law No. 533, dated December 6, 1966, ordering the expropriation of Lucien Landreville's quarry for purposes of a park. It is this by-law that must be considered, but not in isolation from the events that preceded and culminated in it. If implemented to the letter, this by-law would secure for the Town in substance the very thing it had been wrongfully seeking to obtain by its resolutions of December 16, 1965 and March 1, 1966, namely ownership of Lucien Landreville's land for the sum of \$1. What begins and continues in abuse and bad faith remains vitiated to the end, unless there is evidence of a change in circumstances and attitudes that indicates the supervening of good faith. The resolutions leading up to the by-law of December 6, 1966 establish the initially wrongful and unjust conduct of the Town with regard to Lucien Landreville's property. From that moment on, in my view, it was up to the Town to prove a subsequent change. It did not do so.

The Court of Appeal relied on the testimony of Victor Lambert and Gilles Chabot, to which the trial judge did not refer specifically.

Victor Lambert is a town planner and witness for Lucien Landreville. The part of his testimony most favourable to the Town is the part in which he approves the creation of park zone P-48 by means of a by-law dated January 17, 1967. He also says, however, that he found the addition of the rectangular area representing Lucien Landreville's quarry to be incongruous, and that he could not understand what priorities would lead the Town to acquire this land for a park ten or fifteen

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years before it was needed for this purpose. Taken as a whole, this testimony does not appear to me to strengthen the Town's position.

Gilles Chabot is the Town's engineer. He stated that the Town's planning board had been studying the construction and zoning by-law adopted on January 17, 1967 since 1962. Though he did not actually say so, he implied that the municipal council may have had this by-law in mind before its adoption. In his view, the Town was faced with a "*fait accompli*" in the form of the excavation of Lucien Landreville's quarry; it was better to fill in the excavation completely or partially and add it to what would later become a large regional park than to let it remain in an area that had just been designated residential. As for the nominal value of \$1 offered to Lucien Landreville for his land, he explained that this was due to the fact that the Town's costs for filling in the excavation would be much greater than the value of the land.

This is the same Gilles Chabot, however, who, along with the Mayor, told Lucien Landreville in December 1965 that the Town would agree to let him operate his quarry provided that he transferred the ownership of it after the excavation was completed. How can this witness later speak of a "*fait accompli*" when he contributed to bringing it about? If the operation of a quarry on this site was not desirable in view of a proposed zoning by-law then under study, why, in so far as it believed it could do otherwise, did the Town allow the operation and even become involved in it?

The explanation of the nominal value of \$1 offered to Lucien Landreville for his land is taken up again by the Town in its factum submitted to this Court. This explanation is unexpected, to say the least: the Town takes 10,000 tons of stone free of charge, thereby helping to transform the expropriated property into a hole, which the expropriated party is then charged for filling in by having the cost of this filling deducted from the expropriation indemnity. From the Town's point of view this hole was indeed a treasure-trove. In my view, the offer of \$1 and the explanation seeking to justify it are

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based on a valuation that is clearly unfair, since it disregards the long-recognized legal principle that the indemnity must be calculated on the basis of the value to the owner, not

the value to the expropriating party: *Cedar Rapids Manufacturing and Power Company v. Lacoste*^[2]; *Fraser v. Fraserville*^[3]; *The City of Montreal v. McAnulty Realty Co.*^[4] at pp. 278, 281, 282, 290, 297; *Attorney General of Quebec v. Hébert*^[5], at p. 695; *Place Versailles Inc. et al. v. Minister of Justice of Quebec*^[6], at pp. 1128, 1129. The Town's bad faith is therefore clear from the actual by-law ordering the expropriation, and not only from the preceding resolutions.

In addition, if Lucien Landreville had not contested the right to expropriate, the deposit of this one dollar, representing an indemnity calculated on the basis of a false principle, would have allowed the Town to obtain prior possession until such time as the Public Service Board determined the true value of a piece of land which, for municipal tax purposes, had already been assessed at \$4,000. Furthermore, for the only other expropriation carried out within zone P-48, which took place in 1970 and involved a road, the Town borrowed \$1,600 and did not require prior possession in its by-law.

Under these circumstances, it is not surprising that the trial judge, who saw and heard the witnesses and says that he based his conclusions on the evidence as a whole, did not find it necessary to refer specifically to the oral evidence.

In the Court of Appeal, Casey J.A. expressed the opinion that in order to succeed Lucien Landreville would have had to prove that the Town did not intend to use the quarry as a park. The key allegation in Lucien Landreville's case, however, is the bad faith of the Town. If bad faith is proved, as I believe it was, it vitiates and nullifies the Town's actions regardless of the intentions that the

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Town may eventually have formed in order to attain its objectives.

The appellant here contends that the "by-law is not in the public interest" and further, that the council acted "in bad faith and through fraud and partiality". The authorities are clear that the onus of proving these allegations rests upon the applicant. They are equally clear that if the applicant succeeds in proving these allegations, the by-law is invalid.

Estey J., speaking for the majority of this Court in *Kuchma v. Rural Municipality of Taché*^[7], at p. 239.

Fraud, dishonesty, bad faith, extortion and bribery form a special category of causes of nullity, which transcends all others.

Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...

Lord Denning in *Lazarus Estates Ltd. v. Beasley*^[8], at p. 712.

This was also the opinion of Lord Loreburn in *Marquess of Clanricarde v. Congested Districts Board of Ireland*^[9]:

There is only one point in the case, a short point, whether the Congested Districts Board could be restrained from using its compulsory power to acquire Lord Clanricarde's lands in county Galway. In form their proceedings were regular, but in substance, so the appellant contended, they were proceeding *ultra vires*. At first there was another contention that they were not proceeding bona fide, and it was explained that this conveyed no sort of reflection upon their honesty or good faith, but merely that there was some by-motive. I think it would be better to select some happier expression. I do not understand an honest dishonesty. ... fraud or dishonesty stands on a different footing. A court will always defeat that under any shape, and quite regardless of all form.

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This brings me to the questions of procedure and jurisdiction.

The question of procedure was raised in the Court of Appeal by Casey J.A., who found merit in the argument that a municipal by-law could be nullified only by a petition to quash on the ground of illegality, a direct remedy provided for in s. 411 of the *Cities and Towns Act*, and not by incidental arguments or on defence, as in the case at bar, where Lucien Landreville is disputing the validity of the by-law ordering the expropriation by contesting the notice of expropriation.

Section 411 of the *Cities and Towns Act* creates an additional but not an exclusive remedy; it cannot have the effect of depriving a person of other remedies that would normally be available to him. In my view, it is also possible to dispute the validity of a municipal by-law on defence or by incidental arguments. This is the meaning of the rather long-standing line of authority for which this Court demonstrated its preference in *Duquet v. The Town of Ste-Agathe-des-Monts*^[10].

The Superior Court could not dispose of Lucien Landreville's contestation without ruling on the validity of the resolution and the by-law ordering the expropriation. Having concluded that they were invalid, should the Court have limited itself in the order it made to dismissing the notice of expropriation, without explicitly quashing the resolution and the by-law as requested by the expropriated party? I think not. This would be nothing but formalism, since the resolution and by-law have no purpose other than the expropriation in question. In my view, Lucien Landreville could ask in defence that the resolution and the by-law ordering the expropriation be quashed.

Article 777 C.C.P. provides that:

the party being expropriated can only contest the right to expropriate.

Article 1066e of the old *Code of Civil Procedure* provided that:

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No party being expropriated may file any plea against the notice save to contest the right of the expropriating party to have recourse to expropriation.

In *Hamel v. Town of Asbestos*^[11], this Court, which was called upon to apply art. 1066e, held (at p. 538):

[TRANSLATION] in opposition to the notice, the expropriated party may argue that the expropriating party does not have the statutory right to resort to expropriation, but not that there were irregularities or illegalities in the procedure followed in exercising this right.

In the case at bar, however, the Town contends that the statutory right of the municipal council to expropriate for purposes of a park cannot be questioned in view of s. 605(c) of the *Cities and Towns Act*, which enables it to:

expropriate any immovable property, any part thereof or any servitude it may need for any municipal purpose.

Since the Town's statutory right to expropriate is indisputable, Lucien Landreville's defence would appear to contravene art. 777 *C.C.P.*

This submission by the Town goes beyond procedure and gets into jurisdiction. It cannot be retained, however, since it would enable a town to thwart any efforts to contest its expropriations by wording them in such a way as to give them an appearance of legality.

In *Hamel (supra)*, appellant alleged that the municipality had committed procedural irregularities, and in particular that the by-law ordering the expropriation had been adopted by an illegally convened and improperly held meeting. He did not, however, contest the municipality's right to expropriate his immovable. He did not deny that in his case the expropriating party was entitled to resort to expropriation.

In the case at bar, although in general Lucien Landreville recognized the Town's authority to expropriate immovables, including his own, for municipal purposes, he contested its right to exercise this authority as it had done in the circumstances, by committing not procedural irregularities but abuses that vitiated the substance of its

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decision. In so doing and in so far as he is concerned, Lucien Landreville is in my view contesting "the right to expropriate" in the sense in which this phrase from art. 777 *C.C.P.* must be understood.

The appeal should be allowed, the decision of the Court of Appeal set aside and the judgment of the Superior Court restored, with costs in this Court as in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Bergeron & Gaudreau, Hull, Quebec.

Solicitors for the respondent: Viau, Bélanger, Hébert, Mailloux, Paquet, Pinard & Denault, Montreal.

[1] 1964 CanLII 82 (SCC), [1964] S.C.R. 552.

[2] 1914 CanLII 585 (UK JCPC), [1914] A.C. 569.

[3] 1917 CanLII 449 (UK JCPC), [1917] A.C. 187.

[4] 1922 CanLII 44 (SCC), [1923] S.C.R. 273.

[5] 1967 CanLII 61 (SCC), [1967] S.C.R. 690.

[6] 1976 CanLII 215 (SCC), [1977] 2 S.C.R. 1118.

[7] 1945 CanLII 27 (SCC), [1945] S.C.R. 234.

[8] [1956] 1 Q.B. 702.

[9] (1915), 79 J.P. 481 (H. of L.).

[10] 1976 CanLII 13 (SCC), [1977] 2 S.C.R. 1132.

[11] 1967 CanLII 91 (CSC), [1967] S.C.R. 534.

TAB 21

R. v. McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66

Source:	Supreme Court of Canada
Date:	2009-01-16
File number:	31852
Other citations:	301 DLR (4th) 1 — 383 NR 1 — 246 OAC 154 — AZ-50531046 — 238 CCC (3d) 353 — 62 CR (6th) 1 — 185 CRR (2d) 26 — [2009] CarswellOnt 116 — EYB 2009-153175 — JE 2009-174 — [2009] SCJ No 3 (QL) — [2009] ACS no 3
Citation:	R. v. McNeil, 2009 SCC 3 (CanLII), [2009] 1 SCR 66, < https://canlii.ca/t/2254d >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v. Kennedy , 2010 NLTD 156 (CanLII) [...] Despite that request, no McNeil disclosure was forthcoming prior to the actual conclusion of the Preliminary Inquiry and nor was it made available to the accused prior to their first arraignment date in this Court on November 2, 2009. [...]



SUPREME COURT OF CANADA

CITATION: R. v. McNeil, 2009 SCC 3, [2009] 1 S.C.R. 66

DATE: 20090116

DOCKET: 31852

BETWEEN:

Attorney General of Ontario, 3rd Party Record Holder
Appellant
and
Lawrence McNeil, Her Majesty the Queen and Chief
of Barrie Police Service, 3rd Party Record Holder
Respondents

- and -
**Attorney General of Alberta, Matthew Marshall,
Police Association of Ontario and Criminal
Lawyers' Association (Ontario)**
Intervenors

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

REASONS FOR JUDGMENT: Charron J. (McLachlin C.J. and Binnie, LeBel, Deschamps, (paras. 1 to 61) Fish, Abella and Rothstein JJ. concurring)

* Bastarache J. took no part in the judgment.

R. v. McNeil, 2009 SCC 3, [2009] 1 S.C.R. 66

Attorney General of Ontario, 3rd Party Record Holder

Appellant

v.

**Lawrence McNeil, Her Majesty The Queen and Chief
of Barrie Police Service, 3rd Party Record Holder**

Respondents

and

**Attorney General of Alberta, Matthew Marshall,
Police Association of Ontario and Criminal
Lawyers' Association (Ontario)**

Intervenors

Indexed as: R. v. McNeil

Neutral citation: 2009 SCC 3.

File No.: 31852.

2008: March 19; 2009: January 16.

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

on appeal from the court of appeal for ontario

Criminal law — Evidence — Production — Crown's duty to disclose — Corollary police obligation to disclose to Crown — Accused charged with drug-related offences — Crown's main police witness involved in drug-related misconduct leading to disciplinary proceedings and criminal charges — Accused sought production of arresting officer's police disciplinary records and criminal investigation files — Whether common law production regime for third party records applicable only in cases where these records attract reasonable expectation of privacy — Whether criminal investigation files relating to third party accused attract reasonable expectation of privacy — Whether police records relating to findings of misconduct by officer involved in investigation against accused fall within scope of first party disclosure package from police to Crown.

The accused was convicted on multiple drug charges. The arresting officer was the Crown's main witness. After his conviction but before sentencing, the accused learned that the arresting officer was engaged in drug-related misconduct that had led to both internal disciplinary proceedings under the [Ontario Police Services Act](#) and to criminal charges. In a preliminary motion before the Court of Appeal, the accused sought production of all documents related to the arresting officer's misconduct, claiming that he required this material to assist him in preparing an application to introduce fresh evidence on his appeal from conviction. The Court of Appeal held that an *O'Connor*-type procedure is only required in cases where third party records attract a reasonable expectation of privacy, and concluded that no expectation of privacy existed in respect of the criminal investigation files. Subject to appropriate redactions and the resolution of any privilege claims, the Court of Appeal ordered the third parties to produce the criminal investigation

files in their possession related to the charges against the arresting officer to the federal Crown prosecuting the accused's case. Subsequently, the arresting officer pleaded guilty to one of the criminal charges brought against him. Evidence of the officer's conviction was admitted on the accused's appeal, and the accused's convictions were set aside, following which the Crown undertook not to re-prosecute him. The production issue in this case was rendered moot and the accused withdrew his participation in this appeal. The Court appointed an *amicus curiae* and heard this appeal despite its mootness.

Held: The appeal is allowed and the order in the court below is set aside. The application having become moot, the Court makes no further order.

The Crown's obligation to disclose all relevant information in its possession to an accused is well established at common law under the *Stinchcombe* regime. Under *Stinchcombe*, the Crown's first party disclosure obligation extends only to material relating to the accused's case in the possession or control of the prosecuting Crown. A question then arises as to whether the "Crown" for disclosure purposes encompasses other state authorities. While the roles of the Crown and the police are separate and distinct, the police have a duty to participate in the disclosure process. The necessary corollary to the Crown's disclosure duty under *Stinchcombe* is the obligation of police to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown. Records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the first party disclosure package due to the Crown from police, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. [14-15] [22-23]

Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the

O'Connor regime for third party production. The *O'Connor* procedure provides a general mechanism at common law for ordering production of any record beyond the possession or control of the prosecuting Crown, and is not limited to cases where third party records attract a reasonable expectation of privacy. To limit the applicability of the *O'Connor* regime to those cases where a third party has an expectation of privacy in the targeted documents would raise some uncertainty concerning the appropriate mechanism for accessing third party records when it is unknown whether a reasonable expectation of privacy attaches. [11] [15]

The first step in the *O'Connor* procedure for production of documents in the possession of a third party is for the person seeking production to satisfy the court that the documents are likely relevant to the proceedings. If likely relevance is demonstrated by the applicant, the third party record holder may be ordered to produce the documents for inspection by the court in order to determine whether production should be ordered. Ultimately, what is required at this second stage of the common law regime is a balancing of the competing interests at stake in the particular circumstances of the case. [28] [34] [35]

In most cases, a useful starting point for courts in balancing the competing interests at the second stage of an *O'Connor* application will be to assess the true relevancy of the targeted record in the case against the accused. Once a court has ascertained upon inspection that third party records are indeed relevant to the accused's case, in the sense that they pertain to an issue in the trial, the second stage balancing exercise is easily performed. In effect, a finding of true relevance puts the third party records in the same category for disclosure purposes as the fruits of the investigation against the accused in the hands of the prosecuting Crown under *Stinchcombe*. It may be useful to pose the question in this way: If the third party record in question had found its way into the Crown prosecutor's file, would there be any basis under the first party *Stinchcombe* disclosure regime for not disclosing it to the accused? If the answer to that question is no, there can be no principled reason to arrive at a different outcome on the third party production application. The accused's interest in obtaining disclosure for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in

the material. This is particularly so in respect of criminal investigation files concerning third party accused. [20] [39] [42]

That is not to say that residual privacy interests in the contents of criminal investigation files, police disciplinary records or any other third party records should be disregarded. The court should ensure that a production order is properly tailored to meet the exigencies of the case but do no more. To ensure that only relevant material is produced and that no unwarranted invasion of privacy interests occurs, the court may find it necessary to make a production order subject to redactions or other conditions. In addition, when just and appropriate to do so, the court may well impose restrictions on the dissemination of the information produced for purposes unrelated to the accused's full answer and defence or prosecution of an appeal. [43-44] [46]

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Referred to: *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411; *R. v. Mills*, [1999 CanLII 637 \(SCC\)](#), [1999] 3 S.C.R. 668; *R. v. Stinchcombe*, [1991 CanLII 45 \(SCC\)](#), [1991] 3 S.C.R. 326; *R. v. Stinchcombe*, [1995 CanLII 130 \(SCC\)](#), [1995] 1 S.C.R. 754; *R. v. Gingras* (1992), [1992 CanLII 2826 \(AB CA\)](#), 120 A.R. 300; *R. v. Jack* (1992), [1992 CanLII 2764 \(MB CA\)](#), 70 C.C.C. (3d) 67; *R. v. T. (L.A.)* (1993), [1993 CanLII 3382 \(ON CA\)](#), 14 O.R. (3d) 378; *R. v. Gagné* (1998), [1998 CanLII 12526 \(QC CA\)](#), 131 C.C.C. (3d) 444; *Driskell v. Dangerfield*, [2008 MBCA 60](#), [2008] 6 W.W.R. 615; *R. v. MacPherson* (1991), [1991 CanLII 4570 \(NS SC\)](#), 105 N.S.R. (2d) 123; *R. v. Oliver* (1995), [1995 CanLII 7518 \(NS SC\)](#), 143 N.S.R. (2d) 134; *R. v. Campbell*, [1992] N.S.J. No. 702 (QL); *R. v. Chaplin*, [1995 CanLII 126 \(SCC\)](#), [1995] 1 S.C.R. 727; *R. v. Durette*, [1994 CanLII 123 \(SCC\)](#), [1994] 1 S.C.R. 469; *R. v. Clifford* (2002), [2002 CanLII 14471 \(ON CA\)](#), 163 C.C.C. (3d) 3; *P. (D.) v. Wagg* (2004), [2004 CanLII 39048 \(ON CA\)](#), 239 D.L.R. (4th) 501; *R. v. Arsenault* (1994), [1994 CanLII 5244 \(NB CA\)](#), 153 N.B.R. (2d) 81; *R. v. Ahluwalia* (2000), [2000 CanLII 17011 \(ON CA\)](#), 138 O.A.C. 154.

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General, O. Reg. 123/98 (*Police Services Act*), Sch., s. 2(1)(c)(vi).

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APPEAL from a judgment of the Ontario Court of Appeal (Feldman, Simmons and Blair JJ.A.) (2006), [2006 CanLII 40087 \(ON CA\)](#), 218 O.A.C. 1, 215 C.C.C. (3d) 22, 43 C.R. (6th) 370, [2006] O.J. No. 4746 (QL), 2006 CarswellOnt 7557, allowing a motion for production of certain documents. Appeal allowed.

Christine Bartlett-Hughes and *Elise Nakelsky*, for the appellant.

James C. Martin and *Rick Visca*, for the respondent Her Majesty the Queen.

H. Reginald Watson and *Jill Sexsmith*, for the respondent the Chief of Barrie Police Service, 3rd Party Record Holder.

James A. Bowron, for the intervener the Attorney General of Alberta.

Gary R. Clewley and *Henry S. Brown, Q.C.*, for the intervener Matthew Marshall.

Ian J. Roland and *Danny Kastner*, for the intervener the Police Association of Ontario.

David M. Porter and *Christopher A. Wayland*, for the intervener the Criminal Lawyers’ Association (Ontario).

Marie Henein and *Jordan Glick*, for the *amicus curiae*.

The judgment of the Court was delivered by

CHARRON J. —

1. Introduction

[1] This appeal concerns an accused's motion for production of police disciplinary records and criminal investigation files relating to the Crown's main police witness in the case against him. The respondent Lawrence McNeil brought his motion in accordance with the procedure set out in *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411, for the production of third party records. The proceedings against McNeil have since been discontinued, McNeil has withdrawn his participation in this appeal, and the production issue is now moot.

[2] Issues concerning the production of police disciplinary records and criminal investigation files relating to third party accused occur frequently and, because the proceedings in which these questions generally arise are interlocutory in nature, production orders are often evasive of appellate review. In addition, the third parties in the present case have a subsisting interest in clarifying some of the uncertainties arising from the decision below. For these reasons, the Court appointed an *amicus curiae* and heard this appeal despite its mootness.

[3] The question of whether production of the particular documents at issue in the court below should or should not have been ordered is no longer before us. The evidence and prior proceedings in the current case will therefore be reviewed simply to provide the necessary background for discussion of the issues canvassed by the parties on this appeal.

2. Background

[4] McNeil was arrested by Constable Rodney Hackett and other members of the Barrie Police Service in respect of an alleged drug transaction. He was subsequently prosecuted by the federal Crown and convicted on multiple drug charges, including possession of marijuana and cocaine for the purpose of trafficking. Hackett was the Crown's main witness in the case against McNeil. He was the only witness who testified to the reasonable grounds supporting McNeil's arrest. In addition, the trial judge's ultimate finding that McNeil's admitted possession of marijuana and cocaine was for the purpose of trafficking turned on Hackett's credibility.

[5] After his conviction but before sentencing, McNeil learned that Hackett was engaged in drug-related misconduct that had led to both internal disciplinary proceedings under the [Ontario Police Services Act](#), R.S.O. 1990, c. P.15, and to criminal charges. Both proceedings against Hackett were ongoing at the time. Following an aborted application to reopen his trial to introduce evidence about Hackett's misconduct, McNeil chose to proceed to sentence and appeal his conviction instead.

[6] In a preliminary motion before the Court of Appeal for Ontario, McNeil sought production of all documents related to Hackett's misconduct, claiming that he required this material to assist him in preparing an application to introduce fresh evidence on his appeal from conviction. The police disciplinary and criminal investigation documents at issue were intermingled, and were in the possession of both the Barrie Police Service and the provincial Crown prosecuting the criminal charges against Hackett. Both entities resisted production, and the federal Crown supported their opposition to the motion.

[7] In *O'Connor*, this Court set out a two-part test for production of third party records. First, the applicant must demonstrate that the information contained in the records is likely relevant. In the appellate context, it was therefore incumbent on McNeil to show that the

targeted documents were likely relevant to his proposed application to introduce fresh evidence on his appeal from conviction. Second, if the threshold test of likely relevance is met, the court may order production of the records for its inspection. With the targeted documents before it, the court weighs “the positive and negative consequences of production, with a view to determining whether, and to what extent, production should be ordered” (*O’Connor*, at para. 137). The second part of the *O’Connor* test essentially requires a court to conduct a balancing of the third party’s privacy interest in the targeted documents, if any, and the accused’s interest in making full answer and defence.

[8] In the present case, the Court of Appeal found that some of the targeted records, including both disciplinary police records and criminal investigation files, met the requisite relevancy threshold, satisfying the first part of the *O’Connor* test. Rather than proceeding to the second part of the test, however, the court held that an “*O’Connor*-type procedure” is only required in cases where third party records attract a reasonable expectation of privacy ((2006), 2006 CanLII 40087 (ON CA), 218 O.A.C. 1). The court drew a distinction between criminal investigation files and police disciplinary records, and concluded that no expectation of privacy existed in respect of the former. Accordingly, subject to appropriate redactions and the resolution of any privilege claims, the court ordered the third parties to produce the criminal investigation files in their possession related to the charges against Hackett to the federal Crown prosecuting McNeil’s case. The court directed the prosecuting Crown in McNeil’s case to determine whether the documents were in fact relevant to McNeil’s appeal and, if so, to make disclosure to the accused. As for the police disciplinary records, the court noted the conflicting jurisprudence on whether such records are subject to a reasonable expectation of privacy and invited counsel to make further submissions on this issue. The balance of the motion was adjourned accordingly.

[9] The Attorney General of Ontario, as third party record holder, was granted leave to appeal to this Court and the production order was stayed pending disposition of the appeal.

Subsequently, Hackett pleaded guilty to one of the criminal charges brought against him. Evidence of Hackett's conviction was admitted on McNeil's appeal before the Court of Appeal for Ontario, and his convictions were set aside, following which the Crown undertook not to re-prosecute him. McNeil then withdrew his participation in the appeal. This Court acceded to the remaining parties' request to proceed with the appeal despite its mootness and appointed an *amicus curiae* to maintain a proper adversarial context.

3. Overview of the Issues on Appeal

[10] As stated earlier, the third party record holders in this case seek clarification in respect of some of the uncertainties arising from the decision below. The issues canvassed before this Court are the following.

[11] First, by limiting the applicability of the *O'Connor* production regime to those cases where a third party has an expectation of privacy in the targeted documents, the decision under appeal raises some uncertainty concerning the appropriate mechanism for accessing third party records when it is unknown whether a reasonable expectation of privacy attaches. As I will explain, the procedure set out in *O'Connor* provides a general mechanism at common law for ordering production of *any* record beyond the possession or control of the prosecuting Crown. Whether or not the targeted record is subject to a reasonable expectation of privacy is one of the questions that must be determined at the hearing of an *O'Connor* application. For that pragmatic reason alone, the operation of the common law production regime cannot be premised on the existence of a reasonable expectation of privacy.

[12] Second, to the extent that the decision in the court below suggests that there can be no expectation of privacy in the contents of a criminal investigation file, it is in error. As this

Court stated in *R. v. Mills*, [1999 CanLII 637 \(SCC\)](#), [1999] 3 S.C.R. 668: “Privacy is not an all or nothing right. It does not follow from the fact that the Crown has possession of the records that any reasonable expectation of privacy disappears” (para. 108). This principle holds equally in respect of criminal investigation files relating to third party accused that are *not* in the possession or control of the prosecuting Crown. There can be no assumption that criminal investigation files relating to third party accused persons do not attract an expectation of privacy absent consideration of their particular contents and other relevant factors. The existence of a reasonable expectation of privacy and its impact, if any, on a third party’s obligation to produce is always a contextual, fact-based inquiry. Likewise, no blanket ruling can be made in respect of privacy interests in police disciplinary records without regard to their contents.

[13] Third, to the extent that the operative terms of the production order below may suggest that records in possession of one Crown entity are deemed to be in the possession of another, this interpretation should be discarded. The notion that all state authorities constitute a single indivisible Crown entity for the purposes of disclosure finds no support in law and, moreover, is unworkable in practice. Accordingly, Crown entities other than the prosecuting Crown are third parties under the *O’Connor* production regime. As I will explain, however, this does not relieve the prosecuting Crown from its obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted. The Crown and the defence in a criminal proceeding are not adverse in interest for the purpose of discovering relevant information that may be of benefit to an accused.

[14] In addition to clarifying these three uncertainties, this case provides an appropriate context within which to reiterate the respective obligations of the police and the Crown to disclose the fruits of the investigation under *R. v. Stinchcombe*, [1991 CanLII 45 \(SCC\)](#), [1991] 3 S.C.R. 326, and to consider the extent to which relevant police disciplinary records and third party

criminal investigation files should form part of this “first party” disclosure package. The Crown’s obligation to disclose all relevant information in its possession to an accused is well established at common law and is now constitutionally entrenched in the right to full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms*. The necessary corollary to the Crown’s disclosure duty under *Stinchcombe* is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown.

[15] As I will explain, records relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the “first party” disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under *Stinchcombe*. Production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure package is governed by the *O’Connor* regime for third party production.

[16] I will first review the respective obligations of the Crown and the police to disclose the fruits of the investigation against the accused.

4. The *Stinchcombe* Duty to Disclose the Fruits of the Investigation

[17] The Crown’s obligation to disclose all relevant information in its possession relating to the investigation against an accused is well established. The duty is triggered upon

request and does not require an application to the court. *Stinchcombe* made clear that relevant information in the first party production context includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence (pp. 343-44). The Crown's obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal.

[18] While the *Stinchcombe* automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court.

[19] As this Court confirmed in *Mills*, the Crown's obligation under *Stinchcombe* to disclose the fruits of the investigation does not signify that no residual privacy interest can exist in the contents of the Crown's file. It should come as no surprise that any number of persons and entities may have a residual privacy interest in material gathered in the course of a criminal investigation. Criminal investigative files may contain highly sensitive material including: outlines of unproven allegations; statements of complainants or witnesses — at times concerning very personal matters; personal addresses and phone numbers; photographs; medical reports; bank statements; search warrant information; surveillance reports; communications intercepted by wiretap; scientific evidence including DNA information; criminal records, etc. The privacy legislation of all 10 provinces addresses the disclosure of information contained in law

enforcement files. See *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 14; *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, s. 22; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 15; *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01, s. 18; *Right to Information Act*, S.N.B. 1978, c. R-10.3, ss. 6(a) and 6(f); *An Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1, s. 28; *The Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50, s. 25; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 15; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 20; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 15. See also the *federal Privacy Act*, R.S.C. 1985, c. P-21, s. 22.

[20] Implicit in the Crown's broad duty to disclose the contents of its file under *Stinchcombe* are not the absence of any residual expectation of privacy, but rather the following two assumptions. The first is that the material in possession of the prosecuting Crown is relevant to the accused's case. Otherwise, the Crown would not have obtained possession of it (*O'Connor*, at para. 12). The second assumption is that this material will likely comprise the case against the accused. As a result, the accused's interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in the material. These two assumptions explain why the onus is on the Crown to justify the non-disclosure of any material in its possession.

[21] Although the common law regime of disclosure under *Stinchcombe* generally strikes the appropriate balance between the accused's right to make full answer and defence and the residual privacy interests of other persons in the fruits of the investigation, it is not the only regime that meets constitutional standards. As this Court concluded in *Mills*, it was open to Parliament to enact, as it did, a statutory regime for the disclosure of records containing personal

information of complainants and witnesses in proceedings for sexual offences under [ss. 278.1 to 278.91](#) of the *Criminal Code*, R.S.C. 1985, c. C-46 (commonly referred to as the “*Mills* regime”). Absent an express waiver from the complainant or witness to whom the record relates, production of all records falling within the *Mills* regime, whether in the possession or control of a third person or *of the prosecutor in the proceedings*, can only be made on application to the court and in accordance with the balancing test set out in the *Code* provisions. This statutory regime therefore constitutes an exception to the common law regime of Crown disclosure under *Stinchcombe*. As we shall see, the *Mills* regime is also different from the common law regime for production of third party records under *O’Connor*. It is nonetheless constitutional (*Mills*, at para. 59).

[22] The *Stinchcombe* regime of disclosure extends only to material in the possession or control of the Crown. The law cannot impose an obligation on the Crown to disclose material which it does not have or cannot obtain: *R. v. Stinchcombe*, [1995 CanLII 130 \(SCC\)](#), [1995] 1 S.C.R. 754. A question then arises as to whether the “Crown”, for disclosure purposes, encompasses other state authorities. The notion that all state authorities amount to a single “Crown” entity for the purposes of disclosure and production must be quickly rejected. It finds no support in law and, given our multi-tiered system of governance and the realities of Canada’s geography, is unworkable in practice. As aptly explained in *R. v. Gingras* (1992), [1992 CanLII 2826 \(AB CA\)](#), 120 A.R. 300 (C.A.), at para. 14:

If that line of reasoning were correct, then in order to meet the tests in *Stinchcombe*, some months before trial every Crown prosecutor would have to inquire of every department of the Provincial Government and every department of the Federal Government. He would have to ask each whether they had in their possession any records touching each prosecution upcoming. It would be impossible to carry out 1% of that task. It would take many years to bring every case to trial if that were required.

Accordingly, the *Stinchcombe* disclosure regime only extends to material relating to the accused’s case in the possession or control of the prosecuting Crown entity. This material is commonly

referred to as the “fruits of the investigation”.

[23] Under our Canadian system of law enforcement, the general duty to investigate crime falls on the police, not the Crown. The fruits of the investigation against an accused person, therefore, will generally have been gathered, and any resulting criminal charge laid, by the police. While the roles of the Crown and the police are separate and distinct, the police have a duty to participate in prosecutions: see, for example, s. 42(1)(e) of the [Ontario Police Services Act](#). Of particular relevance here is the police’s duty to participate in the disclosure process. The means by which the Crown comes to be in possession of the fruits of the investigation lies in the corollary duty of police investigators to disclose to the Crown all relevant material in their possession. The police’s obligation to disclose all material pertaining to the investigation of an accused to the prosecuting Crown was recognized long before *Stinchcombe*. The state of the law was well summed up by the Honourable G. Arthur Martin, Q.C., in his *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) (“Martin Report”), at pp. 167-68:

It is well settled and accepted by all, including the police, that the police, although operating independently of Crown counsel, have a duty to disclose to Crown counsel all relevant information uncovered during the investigation of a crime, including information which assists the accused. . . . As one commentator has observed, “the duty of the police to disclose relevant information about a case, to the Crown, is a duty that existed before [*Stinchcombe*, *supra*]”.

[24] The corollary duty of the police to disclose to the Crown the fruits of the investigation is now well recognized in the appellate jurisprudence. See *R. v. Jack* (1992), [1992 CanLII 2764 \(MB CA\)](#), 70 C.C.C. (3d) 67 (Man. C.A.), at p. 94; *R. v. T. (L.A.)* (1993), [1993 CanLII 3382 \(ON CA\)](#), 14 O.R. (3d) 378 (C.A.), at p. 382; *R. v. Gagné* (1998), [1998 CanLII 12526](#)

(QC CA), 131 C.C.C. (3d) 444 (Que. C.A.), at p. 455; and *Driskell v. Dangerfield*, 2008 MBCA 60, [2008] 6 W.W.R. 615, at para. 17. It is also widely acknowledged that the Crown cannot explain a failure to disclose relevant material on the basis that the investigating police force failed to disclose it to the Crown. See *R. v. MacPherson* (1991), 1991 CanLII 4570 (NS SC), 105 N.S.R. (2d) 123 (S.C.), at paras. 37-38; *R. v. Oliver* (1995), 1995 CanLII 7518 (NS SC), 143 N.S.R. (2d) 134 (S.C.), at para. 36; *R. v. Campbell*, [1992] N.S.J. No. 702 (QL) (Prov. Ct.), at paras. 16-17.

[25] Even though, in this narrow sense, the police and the Crown may be viewed as one entity for disclosure purposes, the two are unquestionably separate and independent entities, both in fact and in law. Hence, production of criminal investigation files involving third parties, and that of police disciplinary records, usually falls to be determined in the context of an *O'Connor* application. This is unsurprising because information about third party accused or police misconduct is not likely to make its way into the Crown's *Stinchcombe* disclosure package unless such information is in some way related to the accused's case. I will come back to this point later in discussing the circumstances in which information about third party misconduct should properly form part of the police disclosure package to the Crown. First, I will review the principles governing the production of third party records under the *O'Connor* regime.

5. The *O'Connor* Regime for Production of Third Party Records

[26] In *O'Connor*, this Court was concerned with the manner in which the accused, who was charged with multiple sexual offences, could obtain production of the therapeutic records of the complainants from third party custodians. *O'Connor* has been overtaken by Parliament's subsequent enactment of the *Mills* regime contained in ss. 278.1 to 278.91 of the *Criminal Code* for the disclosure of records containing personal information of complainants and witnesses in sexual assault proceedings. In respect of any other criminal proceeding, however, the *O'Connor*

application provides the accused with a mechanism for accessing third party records that fall beyond the reach of the *Stinchcombe* first party disclosure regime.

[27] Stated briefly, the procedure to be followed on an *O'Connor* application is the following:

- (1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.
- (2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.
- (3) The *O'Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.
- (4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O'Connor* process.

- (5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

The question of privilege is beyond the scope of this appeal. However, I will elaborate on each stage of the *O'Connor* test for production of third party records in turn.

5.1 *First Stage: Screening for Likely Relevance*

5.1.1 Burden Is on the Applicant

[28] The first step in any contested application for production of non-privileged documents in the possession of a third party is for the person seeking production — in this case the accused — to satisfy the court that the documents are likely relevant to the proceedings. This threshold burden simply reflects the fact that the context in which third party records are sought is different from the context of first party disclosure. We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under *Stinchcombe* is premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production — hence the initial onus on the person seeking production to show “likely relevance”. In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in “fishing expeditions” for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.

5.1.2 Burden on Applicant Is Significant but not Onerous

[29] It is important to repeat here, as this Court emphasized in *O'Connor*, that while the likely relevance threshold is “a significant burden, it should not be interpreted as an onerous burden upon the accused” (para. 24). On the one hand, the likely relevance threshold is “significant” because the court must play a meaningful role in screening applications “to prevent the defence from engaging in ‘speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming’ requests for production” (*O'Connor*, at para. 24, quoting from *R. v. Chaplin*, 1995 CanLII 126 (SCC), [1995] 1 S.C.R. 727, at para. 32). The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after *O'Connor*. On the other hand, the relevance threshold should not, and indeed *cannot*, be an onerous test to meet because accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, “to demonstrate the specific use to which they might put information which they have not even seen” (*O'Connor*, at para. 25, quoting from *R. v. Durette*, 1994 CanLII 123 (SCC), [1994] 1 S.C.R. 469, at p. 499).

5.1.3 O'Connor Common Law Threshold Is Significantly Different From Mills Statutory Regime

[30] It is important to note that the common law likely relevance threshold in *O'Connor* differs significantly from the statutory likely relevance threshold set by Parliament for the production of records containing personal information in sexual assault proceedings under the *Mills* regime (see s. 278.3(4) of the *Criminal Code*). As this Court explained at some length in *Mills*, a range of permissible regimes can meet constitutional standards. It was therefore open to Parliament to craft its own solution to address the particular concerns arising from disclosure of third party records in sexual proceedings. In doing so, Parliament “sought to recognize the

prevalence of sexual violence against women and children and its disadvantageous impact on their rights, . . . and to reconcile fairness to complainants with the rights of the accused” (*Mills*, at para. 59). The following differences between the two regimes are particularly noteworthy.

[31] First, the likely relevance standard adopted by Parliament under the *Mills* regime is tailored to counter speculative myths, stereotypes and generalized assumptions about sexual assault victims and about the usefulness of private records in sexual assault proceedings. Such generalized views need not be countered at large in respect of all third party records that fall outside the *Mills* regime. The general common law threshold of likely relevance under *O'Connor* is intended rather to screen applications to ensure the proper use of state authority in compelling production of third party records and to establish the appropriateness of the application so as to avoid squandering scarce judicial resources.

[32] Second, while the *Mills* regime retains the two-stage framework set out in *O'Connor*, it differs significantly in that much of the balancing of the competing interests is effected at the first stage in determining whether production should be made to the court for inspection. This reflects Parliament’s assumption that a reasonable expectation of privacy exists in the types of records targeted by the statutory regime: see *R. v. Clifford* (2002), 2002 CanLII 14471 (ON CA), 163 C.C.C. (3d) 3 (Ont. C.A.), at paras. 48-49. An equivalent presumption of privacy does not attach in respect of all third party records that fall outside the *Mills* regime. Hence, any balancing of competing interests is reserved for the second stage of the *O'Connor* regime, when the documents can be inspected by the court to better ascertain the nature of the privacy interest, if any. Because of these significant differences, it is important not to transpose the *Mills* regime into the *O'Connor* production hearing in respect of documents to which the statutory dispositions do not apply.

5.1.4 Likely Relevance Under the Common Law Regime

[33] “Likely relevant” under the common law *O’Connor* regime means that there is “a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify” (*O’Connor*, at para. 22 (emphasis deleted)). An “issue at trial” here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also “evidence relating to the credibility of witnesses and to the reliability of other evidence in the case” (*O’Connor*, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

5.2 *Second Stage: Balancing the Interests at Play*

[34] If likely relevance is demonstrated by the applicant, the third party record holder may be ordered to produce the documents for inspection by the court in order to determine whether production should be ordered to the accused.

[35] In *O’Connor*, this Court provided the following list of factors for consideration in determining whether or not to order production to the accused (at para. 31):

. . . “(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias” and “(5) the potential prejudice to the complainant’s dignity, privacy or security of the person that would be occasioned by production of the record in question”

The factors set out in *O'Connor* should not be applied mechanically. It should be kept in mind that *O'Connor* involved the production of the complainant's private records in proceedings for a sexual offence, an area of law subsequently overtaken by Parliament's enactment of the *Mills* regime. Some of the factors listed in *O'Connor*, in particular items 4 and 5 above, were obviously tailored to meet the exigencies in sexual assault proceedings and, consequently, are unlikely to be of assistance in other contexts. Ultimately, what is required at this second stage of the common law regime is a balancing of the competing interests at stake in the particular circumstances of the case. No exhaustive list can be crafted to suit every situation; however, I will elaborate somewhat on the balancing process.

5.2.1 A Useful Starting Point: Assessing True Relevance

[36] As we have seen, by the time the court embarks on the second stage of an *O'Connor* hearing, the application has been screened for likely relevance and the judge is satisfied that compelling the production of the documents for inspection by the court is warranted in the circumstances. Once the documents are before the court, the final question to be determined is whether production should be made to the accused.

[37] The *amicus curiae* submits that the starting point for determining whether to order production to the accused of documents in the hands of third parties, including, as in this case, Crown briefs, police briefs and police disciplinary files, requires a determination of the nature of the records to define the existence or absence of a reasonable expectation of privacy (factum, at para. 19). There is some merit to the proposal of looking first at whether there is any expectation of privacy in the targeted records. Indeed, if it is clear upon inspection of the documents and their contents that there is no basis upon which the third party record holder or any other interested person could claim a reasonable privacy interest, there is no balancing of interests left to perform.

Given that likely relevance has by this point been established, the sole remaining interest at stake is the accused's right to make full answer and defence. A production order should therefore issue. It is in this sense that the Court of Appeal's finding in the present case, that an "*O'Connor*-type procedure" is only required in cases where the third party records attract a reasonable expectation of privacy, must be understood.

[38] The difficulty with this approach, however, is that it is largely premised on the conclusion that the existence of a reasonable expectation of privacy may be determined solely by characterizing the *type* of record at issue. While this may be possible in respect of some records, determining whether an expectation of privacy attaches to a particular record usually requires a more contextual approach. As we have seen, even in the context of the Crown's *Stinchcombe* obligation of disclosure, there exists no presumption that all expectations of privacy are lost just because a record has found its way into the prosecuting Crown's file.

[39] The *amicus curiae* submits, and I agree, that determining the existence of a reasonable expectation of privacy requires a contextual assessment having regard to numerous factors, including but not limited to: how the record was created; who created the record; the purpose of the record; the context of the case in which the record would be used; who holds the privacy interest; how the record was obtained by the Crown or police; the presence or absence of waiver; any applicable legislation; and whether the privacy interest extends to all or part of the record. As one can readily appreciate from this non-exhaustive list, determining whether there is any residual expectation of privacy in a document may be a complex and time-consuming exercise that has the potential to significantly delay and detract from the actual proceeding before the court — *the trial of the accused*. For that reason, it is my view that in most cases, a more useful starting point for courts in balancing competing interests at the second stage of an *O'Connor* application will be to assess the true relevancy of the targeted record in the case against the accused. This approach allows the court to remain focussed on the trial of the accused and, given the competing

interests at stake, the relevancy assessment will usually be largely determinative of the production issue. I will explain.

[40] On the one hand, because the accused will not have seen the documents that he or she seeks to have produced, it may be readily apparent upon inspection by the court that the claim of likely relevance established at the first stage of the *O'Connor* application is simply not borne out. If the court is satisfied that the documents are *clearly* irrelevant, there is no basis for compelling production to the accused, and the application can be summarily dismissed.

[41] On the other hand, if the claim of likely relevance is borne out upon inspection, the accused's right to make full answer and defence will, with few exceptions, tip the balance in favour of allowing the application for production. Recall that at this stage of the proceedings, the court has confirmed that the production application concerns non-privileged documents. The existence of any privacy interest in third party records relevant to an accused's defence of a criminal charge may well warrant, in appropriate circumstances, some redactions or the imposition of conditions to ensure that no unnecessary invasion of privacy follows from production to the accused. However, absent an overriding statutory regime governing the production of the record in question, a third party privacy interest is unlikely to *defeat* an application for production.

[42] Once a court has ascertained upon inspection that third party records are indeed relevant to the accused's case, in the sense that they pertain to an issue in the trial as described above, the second stage balancing exercise is easily performed. In effect, a finding of true relevance puts the third party records in the same category for disclosure purposes as the fruits of the investigation against the accused in the hands of the prosecuting Crown under *Stinchcombe*. It may be useful to pose the question in this way: If the third party record in question had found its way into the Crown prosecutor's file, would there be any basis under the first party *Stinchcombe*

disclosure regime for not disclosing it to the accused? If the answer to that question is no, there can be no principled reason to arrive at a different outcome on the third party production application. As we have seen, the Crown's obligation under *Stinchcombe* to disclose to the accused the fruits of the investigation in its possession does not signify that no residual privacy interest exists in the contents of the file. However, it does mean that, with few exceptions (including the *Mills* statutory scheme), the accused's right to access information necessary to make full answer and defence will outweigh any competing privacy interest. The same applies with respect to relevant material in the hands of third parties. This is particularly so in respect of criminal investigation files concerning third party accused. As Professor Paciocco aptly puts it:

. . . it would be perverse to hold that investigative information is not private enough to impose any constraints on the ability of the police to gather it and the Crown to use it to seek the conviction of the target of that investigation, yet that same information is protected by privacy interests when it contains relevant information that would help someone defend himself.

(David M. Paciocco, "Filling the Seam between *Stinchcombe* and *O'Connor*: The 'McNeil' Disclosure Application" (2007), 53 *Crim. L.Q.* 161, at pp. 199-200)

5.2.2 Guarding Against Unnecessary Intrusions Into Privacy Interests

[43] That is not to say, however, that residual privacy interests in the contents of criminal investigation files should be disregarded. As concluded in the Martin Report, at p. 181 (reference in Attorney General of Ontario's factum, at para. 24):

The privacy of the victim and any other witnesses must yield to preparing a full answer and defence. But it need not yield any further. The Committee considers that, provided the making of full answer and defence is not impaired, it is desirable to permit limitations on the use of disclosure materials that recognize the privacy interests of victims and witnesses.

[44] The same applies in respect of police disciplinary records, or any other third party records. The court should ensure that a production order is properly tailored to meet the exigencies of the case but do no more. As we have seen, likely relevance for disclosure purposes has a wide and generous connotation and includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence. In considering the ambit of the information that can assist in the trial, regard must be given to the particular issues in the case and to the governing rules of evidence and procedure. This does not mean that only material that would be admissible at trial should be produced. Material that would not, on its own, be admissible may nonetheless be of use to the defence, for example, in cross-examining a witness on matters of credibility or in pursuing other avenues of investigation. An *O'Connor* application must, however, lay a foundation for the relevance of the material sought, having regard to the issues in the case. In large part, this is the reason why such applications should be brought before the judge seized with the trial. Doing so allows production issues to be effectively disposed of by the judge and counsel who are sufficiently apprised of the issues in the case. Of course, production applications can be heard prior to the commencement of the trial, and the judge, when appropriate to do so, may enlist the assistance of counsel in determining the relevance of a particular record for the purposes of production.

[45] Ascertaining the true relevancy of records targeted for production may become particularly important when the information on the production application concerns police disciplinary records. The contentious nature of police work often leads to public complaints, some legitimate and others spurious. Police disciplinary proceedings may also relate to employment issues or other matters that have no bearing on the case against the accused. The risk in this context is that disclosure, and by extension trial proceedings, may be sidetracked by irrelevant allegations or findings of police misconduct. Disclosure is intended to assist an accused in making full answer and defence or in prosecuting an appeal, not turn criminal trials into a conglomeration of satellite hearings on collateral matters.

[46] Hence, to ensure that only relevant material is produced and that no unwarranted invasion of privacy interests occurs, the court may find it necessary to make a production order subject to redactions or other conditions. In addition, when just and appropriate to do so, the court may well impose restrictions on the dissemination of the information produced for purposes unrelated to the accused's full answer and defence or prosecution of an appeal: see, for example, recommendations 34 and 35 in the Martin Report (at p. 179) and *P. (D.) v. Wagg* (2004), 2004 CanLII 39048 (ON CA), 239 D.L.R. (4th) 501 (Ont. C.A.), at para. 46. Absent unusual circumstances, however, the crafting of a production order should not necessitate any detailed inquiry into the precise nature or extent of the privacy interest in question. The *O'Connor* hearing should remain focussed on the criminal proceeding at hand.

6. Bridging the Gap Between First Party Disclosure and Third Party Production

[47] As the preceding discussion makes clear, once the true relevance of the targeted records has been ascertained on an *O'Connor* application for production of third party records, the ultimate question of production is essentially governed by the same principles that apply to the disclosure of material in the possession of the Crown under *Stinchcombe*. To the accused, however, the distinction between these two regimes is significant. While the accused will receive automatic disclosure of relevant material that finds its way into the hands of the prosecuting Crown, accessing relevant material in the hands of third parties will often be more happenstance. To a certain extent, that is inevitable. Third parties are under no obligation to come forth with relevant information to assist the accused in his defence. However, the prosecuting Crown and the investigating police force are in a different position and can assist in bridging the gap between first party disclosure and third party production. I will deal firstly with the Crown.

6.1 *Crown Counsel's Duty to Inquire*

[48] As stated earlier, the suggestion that all state authorities constitute a single entity is untenable and unworkable. In order to fulfill its *Stinchcombe* disclosure obligation, the prosecuting Crown does not have to inquire of every department of the provincial government, every department of the federal government and every police force whether they are in possession of material relevant to the accused's case. However, this does not mean that, regardless of the circumstances, the Crown is simply a passive recipient of relevant information with no obligation of its own to seek out and obtain relevant material.

[49] The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. Ryan J.A. in *R. v. Arsenault* (1994), [1994 CanLII 5244 \(NB CA\)](#), 153 N.B.R. (2d) 81 (C.A.), aptly described the Crown's obligation to make reasonable inquiries of other Crown agencies or departments. He stated as follows:

When disclosure is demanded or requested, Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the prosecutor or the police there has been another Crown agency involved in the investigation. Relevancy cannot be left to be determined by the uninitiated. If Crown counsel is denied access to another agency's file, then this should be disclosed to the defence so that the defence may pursue whatever course is deemed to be in the best interests of the accused. This also applies to cases where the accused or defendant, as the case may be, is unrepresented [para. 15]

[50] The same duty to inquire applies when the Crown is informed of potentially relevant evidence pertaining to the credibility or reliability of the witnesses in a case. As the *amicus curiae* rightly states, “[t]he Crown and the defence are not adverse in interest in discovering the existence of an unreliable or unethical police officer” (factum, at para. 62). Doherty J.A. made the point forcefully in *R. v. Ahluwalia* (2000), 2000 CanLII 17011 (ON CA), 138 O.A.C. 154, commenting on the Crown’s failure to inquire further when confronted with the perjury of its own witness as follows (at paras. 71-72):

For reasons not shared with this court, the Crown does not appear to have regarded itself as under any obligation to get to the bottom of this matter. . . .

The Crown has obligations to the administration of justice that do not burden other litigants. Faced with its own witness’s perjury and the fact that the perjured evidence coincided with the incomplete disclosure that the Crown says it innocently passed to the defence, the Crown was obliged to take all reasonable steps to find out what had happened and to share the results of those inquiries with the defence. In my view, the Crown did not fulfill its obligations to the administration of justice by acknowledging the incomplete disclosure discovered by the defence, and after making limited inquiries, professing neither a responsibility for the incomplete disclosure nor an ability to provide any explanation for it. The Crown owed both the appellant and the court a fuller explanation than it chose to provide.

[51] Hence, by properly fulfilling its dual role as an advocate and officer of the court, Crown counsel can effectively bridge much of the gap between first party disclosure and third party production. I now turn to the police corollary duty to participate in the disclosure process.

6.2 *The Police’s Corollary Duty to Disclose Relevant Information*

[52] We have already seen that the police have a corollary duty to disclose to the prosecuting Crown all material pertaining to the investigation of an accused. This disclosure obligation accords with police codes of conduct enacted in many jurisdictions across the country. For example, under s. 2(1)(c)(vi) of the *Code of Conduct* found in [O. Reg. 123/98](#), Sch., enacted pursuant to the [Ontario Police Services Act](#), a police chief or other police officer commits neglect of duty if he or she “fails to report anything that he or she knows concerning a criminal or other charge, or fails to disclose any evidence that he or she, or any person within his or her knowledge, can give for or against any prisoner or defendant”. See also [Code of Professional Conduct Regulation](#), B.C. Reg. 205/98, s. 5(e); [Police Service Regulation](#), Alta. Reg. 356/90, s. 5(2)(h)(vii); *Code of ethics of Québec police officers*, (1990) 122 G.O. II, 1760, s. 7(2); and [Code of Professional Conduct Regulation — Police Act](#), N.B. Reg. 2007-81, s. 36(1)(d)(iii).

[53] While the obligation itself is firmly established, the difficulty lies in identifying the contours of relevance for the purposes of the police’s first party disclosure obligation. The particular question that this case exemplifies is whether information of misconduct by a police officer involved in the case against the accused should form part of the first party disclosure package provided to the Crown for its assessment of relevance according to the edicts of *Stinchcombe*. Obviously, the accused has no right to automatic disclosure of every aspect of a police officer’s employment history, or to police disciplinary matters with no realistic bearing on the case against him or her. However, where the disciplinary information is relevant, it should form part of the first party disclosure package, and its discovery should not be left to happenstance.

[54] When the police misconduct in question concerns the same incident that forms the subject-matter of the charge against the accused, the police duty to disclose information concerning police disciplinary action taken in respect of that misconduct is rather self-evident. To state an obvious example, if a police officer is charged under the applicable provincial legislation for excessive use of force in relation to the accused’s arrest, this information must be disclosed to the

Crown. Where the misconduct of a police witness is not directly related to the investigation against the accused, it may nonetheless be relevant to the accused's case, in which case it should also be disclosed. For example, no one would question that the criminal record for perjury of a civilian material witness would be of relevance to the accused and should form part of the first party disclosure package. In the same way, findings of police misconduct by a police officer involved in the case against the accused that may have a bearing on the case against an accused should be disclosed.

[55] The need for guidance in this area prompted a review commissioned by the Chief of the Toronto Police Service. The review was conducted by the Honourable George Ferguson, Q.C., and culminated in his January 2003 report entitled *Review and Recommendations Concerning Various Aspects of Police Misconduct*, vol. I (the "Ferguson Report"). The terms of reference included the mandate to review "when, in what manner and under what circumstances does the Police Service have an obligation to bring to the attention of the Crown, alleged or proven acts of misconduct of a police officer who will be a witness or was otherwise involved in an investigation that has led to a criminal proceeding" (p. 1).

[56] The Ferguson Report noted that the question of disclosure of such information was usually left to be determined in the context of an *O'Connor* application for third party production and that this often gave rise to a "Catch-22" problem, stating as follows (at p. 12):

Once into *O'Connor*, it is difficult, if not impossible, for the defence to meet the threshold required to access the records. Unless the officer is notorious or the defence personally knows details of the officer's files, the defence will be found to be on nothing more than a fishing expedition and access will be denied. A diligent officer-in-charge will not likely know the full employment history of each police witness, and, currently, is not required to make any inquiries. Short of a criminal

conviction for dishonesty, nothing is likely to be provided to the Crown for disclosure analysis. Even convictions for dishonesty may not always be revealed. This is clearly unsatisfactory.

[57] The Ferguson Report concluded that leaving the entire question of access to police disciplinary records to be determined under the *O'Connor* regime for third party production “is neither efficient nor justified” (p. 15). In order to assist in bridging the gap between first party disclosure and third party production, the Ferguson Report made a number of recommendations, including the automatic disclosure by the police upon request by the Crown of the following information regarding acts of misconduct by a member of the Toronto Police Service who may be a witness or who was otherwise involved in a case before the court (at p. 17):

- a. Any conviction or finding of guilt[t] under the *Canadian Criminal Code* or under the *Controlled Drugs and Substances Act* [for which a pardon has not been granted].
- b. Any outstanding charges under the *Canadian Criminal Code* or the *Controlled Drugs and Substances Act*.
- c. Any conviction or finding of guilt under any other federal or provincial statute.
- d. Any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor *Act*.
- e. Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

[58] The Ferguson Report recommended that upon receiving this information from police, the Crown act as “gate-keeper”, sorting out what parts of this material, if any, should be turned over to the defence in compliance with the Crown’s *Stinchcombe* obligation of disclosure. The Ferguson Report made the further recommendation that any concerned officer who was the subject of disciplinary records produced to the Crown be notified in writing and be given the opportunity to make submissions to the Crown.

[59] I agree that it is “neither efficient nor justified” to leave the entire question of access to police misconduct records to be determined in the context of the *O’Connor* regime for third party production. Indeed, as discussed earlier, the disclosure of relevant material, whether it be for or against an accused, is part of the police corollary duty to participate in the disclosure process. Where the information is obviously relevant to the accused’s case, it should form part of the first party disclosure package to the Crown *without prompting*. For example, as was the case here, if an officer comes under investigation for serious drug-related misconduct, it becomes incumbent upon the police force, in fulfilment of its corollary duty of disclosure to the Crown, to look into those criminal cases in which the officer is involved and to take appropriate action. Of course, not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused’s case. The officer may have played a peripheral role in the investigation, or the misconduct in question may have no realistic bearing on the credibility or reliability of the officer’s evidence. The kinds of information listed in the Ferguson Report can provide useful guidance on those types of matters in respect of which a police force may well be advised to seek the advice of Crown counsel.

[60] With respect to records concerning police disciplinary matters that do not fall within the scope of first party disclosure obligations, procedures such as those recommended in the Ferguson Report, tailored to suit the particular needs of the community in which they are implemented, can go a long way towards ensuring a more efficient streamlining of *O’Connor* applications for third party production. Trial courts seized with motions for disclosure under *Stinchcombe* or applications for third party production are well placed to make appropriate orders to foster the necessary cooperation between police, the Crown and defence counsel.

7. Disposition

[61] The appeal is allowed and the order in the court below is set aside. The application having become moot, the Court makes no further order.

Appeal allowed.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitor for the respondent Her Majesty the Queen: Public Prosecution Service of Canada, Halifax.

Solicitors for the respondent the Chief of Barrie Police Service, 3rd Party Record Holder: Caswell & Watson, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener Matthew Marshall: Gary R. Clewley, Toronto.

Solicitors for the intervener the Police Association of Ontario: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): McCarthy Tétrault, Toronto.

Solicitors for the amicus curiae: Henein & Associates, Toronto.

* Bastarache J. took no part in the judgment.

R. v. Stinchcombe, 1991 CanLII 45 (SCC), [1991] 3 SCR 326

Source:	Supreme Court of Canada
Date:	1991-11-07
File number:	21904
Other citations:	130 NR 277 — [1992] 1 WWR 97 — 8 WAC 161 — AZ-91111102 — 120 AR 161 — 83 Alta LR (2d) 193 — 68 CCC (3d) 1 — 8 CR (4th) 277 — 9 CR (4th) 277 — 14 WCB (2d) 266 — 18 CRR (2d) 210 — [1991] CarswellAlta 192 — EYB 1991-66887 — JE 91-1713 — [1991] SCJ No 83 (QL) — [1991] SJ No 83 (QL) — [1991] ACS no 83
Citation:	R. v. Stinchcombe, 1991 CanLII 45 (SCC), [1991] 3 SCR 326, < https://canlii.ca/t/1fsgp >, retrieved on 2026-03-23
Most recent unfavourable mention	Toronto (Police Services Board) (Re) , 2022 CanLII 3809 (ON IPC) [...] [61] With respect to Stinchcombe, which the appellant has provided in support of his argument, I find that Stinchcombe is not applicable to this appeal. [...]

R. v. Stinchcombe, [1991] 3 S.C.R. 326

William B. Stinchcombe

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Stinchcombe

File No.: 21904.

1991: May 2; 1991: November 7.

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

on appeal from the court of appeal for alberta

Criminal law -- Evidence -- Crown's obligation to make disclosure to defence -- Witness favourable to accused interviewed by police -- Crown not calling witness and refusing to produce statements obtained -- Whether Crown obliged to disclose statements.

The accused, a lawyer, was charged with breach of trust, theft and fraud. A former secretary of his was a Crown witness at the preliminary inquiry, where she gave evidence apparently favourable to the defence. After the preliminary inquiry but prior to trial, the witness was interviewed by an RCMP officer and a tape-recorded statement was taken. Later, during the course of the trial, the witness was again interviewed by a police officer and a written statement taken. Defence counsel was informed of the existence but not of the content of the statements. His requests for disclosure were refused. During the trial defence counsel learned conclusively that the witness would not be called by the Crown and sought an order that the witness be called or that the Crown disclose the contents of the statements to the defence. The trial judge dismissed the application. The trial proceeded and the accused was convicted of breach of trust and fraud. Conditional stays were entered with respect to the theft counts. The Court of Appeal affirmed the convictions without giving reasons.

Held: The appeal should be allowed and a new trial ordered.

The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. The obligation to

disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence. The absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. This privilege is reviewable, however, on the ground that it is not a reasonable limit on the right to make full answer and defence in a particular case.

Counsel for the accused must bring to the trial judge's attention at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. This will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. All statements obtained from persons who have provided relevant information to the authorities should be produced, even if they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes, all information in the prosecution's possession relating to any relevant evidence the person could give should be supplied.

Crown counsel was not justified in refusing disclosure here on the ground that the witness was not worthy of credit: whether the witness is credible is for the trial judge to determine after hearing the evidence. The trial judge ought to have examined the statements. Since the information withheld might have affected the outcome of the trial, the failure to disclose impaired the right to make full answer and defence. There should be a new trial at which the statements are produced.

Cases Cited

Referred to: *Cunliffe v. Law Society of British Columbia* (1984), [1984 CanLII 537 \(BC CA\)](#), 40 C.R. (3d) 67; *Savion v. The Queen* (1980), [1980 CanLII 2872 \(ON CA\)](#), 13 C.R. (3d) 259; *R. v. Bourget* (1987), [1987 CanLII 208 \(SK CA\)](#), 56 C.R. (3d) 97; *Boucher v. The Queen*, [1954 CanLII 3 \(SCC\)](#), [1955] S.C.R. 16; *Marks v. Beyfus* (1890), 25 Q.B.D. 494; *R. v. Scott*, [1990 CanLII 27 \(SCC\)](#), [1990] 3 S.C.R. 979; *Bisaillon v. Keable*, [1983 CanLII 26 \(SCC\)](#), [1983] 2 S.C.R. 60; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981 CanLII 33 \(SCC\)](#), [1981] 2 S.C.R. 494; *Dersch v. Canada (Attorney General)*, [1990 CanLII 3820 \(SCC\)](#), [1990] 2 S.C.R. 1505; *Lemay v. The King*, [1951 CanLII 27 \(SCC\)](#), [1952] 1 S.C.R. 232; *R. v. C. (M.H.)*, [1991 CanLII 94 \(SCC\)](#), [1991] 1 S.C.R. 763, aff'g (1988), [1988 CanLII 3283 \(BC CA\)](#), 46 C.C.C. (3d) 142; *Caccamo v. The Queen*, [1975 CanLII 11 \(SCC\)](#), [1976] 1 S.C.R. 786; *Piché v. The Queen*, [1970 CanLII 182 \(SCC\)](#), [1971] S.C.R. 23; *Rothman v. The Queen*, [1981 CanLII 23 \(SCC\)](#), [1981] 1 S.C.R. 640; *McInroy v. The Queen*, [1978 CanLII 175 \(SCC\)](#), [1979] 1 S.C.R. 588; *R. v. Mannion*, [1986 CanLII 31 \(SCC\)](#), [1986] 2 S.C.R. 272.

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[Canadian Charter of Rights and Freedoms](#), s. 7.

Criminal Code, R.S.C. 1970, c. C-34, ss. 294(a), 296, 338(1)(a).

Criminal Code, R.S.C., 1985, c. C-46, ss. 334(a), [336](#), [380\(1\)\(a\)](#), [482](#), [603](#).

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APPEAL from a judgment of the Alberta Court of Appeal affirming the judgment of Brennan J. sitting without a jury convicting the appellant of breach of trust and fraud. Appeal allowed.

William E. Code, Q.C., and John Kingman Phillips, for the appellant.

Daniel M. McDonald, Q.C., and Bruce R. Fraser, Q.C., for the respondent.

//Sopinka J.//

The judgment of the Court was delivered by

SOPINKA J. -- This appeal raises the issue of the Crown's obligation to make disclosure to the defence. A witness who gave evidence at the preliminary inquiry favourable to the accused was subsequently interviewed by agents for the Crown. Crown counsel decided not to call the witness and would not produce the statements obtained at the interview. The trial judge refused an application by the defence for disclosure on the ground that there was no obligation on the Crown to disclose the statements. The Court of Appeal affirmed the judgment at trial and the case is here with leave of this Court.

1. Facts

The appellant was a Calgary lawyer charged with appropriating certain financial instruments from a client, one Jack Abrams. The indictment charged thirteen counts of criminal breach of trust contrary to s. 296 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 336), thirteen counts of theft contrary to s. 294(a) (now s. 334(a)) of the *Code*, and one count of fraud contrary to s. 338(1)(a) (now s. 380(1)(a)) of the *Code*. The trial in the Alberta Court of Queen's Bench was before Brennan J. without a jury.

The Crown alleged that the appellant had wrongfully appropriated property which he held in trust for Abrams. The defence did not contest the receipt of funds by the appellant. The defence did contend, however, that despite Stinchcombe's formal status as trustee of the property, Abrams had in fact made Stinchcombe his business partner. Under this theory, Stinchcombe had acted as he was legally entitled to act. At issue therefore was the actual, as opposed to the formal, nature of the relationship between the two men.

Patricia Lineham is a former secretary of Mr. Stinchcombe. She was a Crown witness at the preliminary inquiry. There, she gave evidence which was, apparently, very favourable to the defence regarding the conduct of Abrams. The precise content of this testimony was not before the trial judge and is not in the record. Lineham was not listed on the indictment, but was subpoenaed by the Crown.

After the preliminary inquiry but prior to the trial, Lineham was interviewed by an RCMP officer. A tape-recorded statement was taken. Crown counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure was refused. Later, during the course of the trial, Lineham was again interviewed by a police officer and a written statement taken. Again, though defence counsel was advised of the existence of the statement, a request for disclosure was refused. Crown counsel also indicated that he would not be calling Lineham as she was not worthy of credit.

It was not until the third day of the trial that defence counsel learned conclusively that Lineham would not be called by the Crown. At this time, he moved before the trial judge for an order that (i) the Crown call the witness, or (ii) the Court call the witness, or (iii) the Crown disclose the contents of the statements to the defence. A review of the record makes it clear that defence counsel was pressing for access to, or production of, both the tape-recorded and written statements and was not pressing the alternative requests. In support of this motion, counsel for the defendant indicated that Ms. Lineham refused to speak to him or his staff when they attempted to interview her about the contents of the statements. Crown counsel did not provide any basis for resisting production other than to say that in his view the potential witness was not worthy of credit.

The trial judge dismissed the application. Brennan J. ruled that under the circumstances there was no obligation on the Crown to call the witness and that there was no obligation on the Crown to disclose the contents of the statements. The trial proceeded, and the accused was found guilty of all twenty-seven counts charged. A conditional stay was entered with respect to the thirteen theft counts. The Alberta Court of Appeal dismissed the appeal from conviction without issuing reasons. Leave to appeal to this Court was granted on the disclosure issue.

During argument before this Court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

2. Crown's Obligation to Disclose

The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject. See, for example, *Cunliffe v. Law Society of British Columbia* (1984), [1984 CanLII 537 \(BC CA\)](#), 40 C.R. (3d) 67 (B.C.C.A.); *Savion v. The Queen* (1980), [1980 CanLII 2872 \(ON CA\)](#), 13 C.R. (3d) 259 (Ont. C.A.); *R. v. Bourget* (1987), [1987 CanLII 208 \(SK CA\)](#), 56 C.R. (3d) 97 (Sask. C.A.). No case in this Court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 Working Paper") and a 1984 report titled *Disclosure by the Prosecution* (the "1984 Report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in [s. 603](#) of the *Criminal Code*, R.S.C., 1985, c. C-46, enacted in the 1953-54 overhaul of the *Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence (see 1974 Working Paper at pp. 29-31; 1984 Report at pp. 13-15; Marshall Commission Report, *infra*, Vol. 1, at pp. 242-44).

It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. The Queen*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16, Rand J. states, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.

Other grounds advanced by advocates of the absence of a general duty to disclose all relevant information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 Report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 Working Paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

In England, under the provisions of the *Criminal Justice Act 1967* (U.K.), 1967, c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: *Report of the Special Committee on Preliminary Hearings*, Bench and Bar Council of Ontario (1982), at pp. 12-15.

Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.); *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979), and any rules with respect to disclosure would be subject to this and other rules of privilege. With respect to witnesses, persons who have information that may be evidence favourable to the accused will have to have their identity disclosed sooner or later. Even the identity of an informer is subject to this fact of life by virtue of the "innocence exception" to the informer privilege rule (*Marks v. Beyfus*, *supra*, at pp. 498-99; *R. v. Scott*, *supra*, at p. 996; *Bisaillon v. Keable*, 1983 CanLII 26 (SCC), [1983] 2 S.C.R. 60, at p. 93; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, 1981 CanLII 33 (SCC), [1981] 2 S.C.R. 494). It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice. (See *Dersch v. Canada (Attorney General)*, 1990 CanLII 3820 (SCC), [1990] 2 S.C.R. 1505, at p. 1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1: *Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238). The Commission recommended an extensive regime of disclosure of which the key provisions are as follows (Vol. 1 at p. 243):

- 2(1)** *Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:*
- (a)** *to receive a copy of his criminal record;*
 - (b)** *to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;*
 - (c)** *to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;*
 - (d)** *to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;*
 - (e)** *to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;*

- (f) *to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;*
- (g) *to receive a copy of the criminal record of any proposed witness; and*
- (h) *to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.*

2(2) *The disclosure contemplated in subsection (1), paragraphs (d), (e) and (h) shall be provided by the Crown and may be limited only where, upon an inter partes application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.*

In my opinion there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in *Lemay v. The King*, [1951 CanLII 27 \(SCC\)](#), [1952] 1 S.C.R. 232, at p. 257:

I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise.... [Emphasis added.]

This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production to the defence is then the only way in which the injunction of Cartwright J. can be obeyed.

In *R. v. C. (M.H.)* (1988), [1988 CanLII 3283 \(BC CA\)](#), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155, McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it". This passage was cited with approval by McLachlin J. in her reasons on behalf of the Court ([1991 CanLII 94 \(SCC\)](#), [1991] 1 S.C.R. 763). She went on to add: "This Court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not" (p. 774).

As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events which may require an investigation to be re-opened and the Crown must have some discretion to delay disclosure in these circumstances.

The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to

make full answer and defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose all relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters.

Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1975 CanLII 11 \(SCC\)](#), [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

These are the general principles that govern the duty of the Crown to make disclosure to the defence. There are many details with respect to their application that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here. Although the basic principles of disclosure will apply across the country, the details

may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by s. 482 of the *Criminal Code* which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure.

The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the *Charter* may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this Court.

There are, however, two additional matters which require further elaboration of the general principles of disclosure outlined above. They are: (1) the timing of disclosure, and (2) what should be disclosed. Some detail with respect to these issues is essential if the duty to disclose is to be meaningful. Moreover, with respect to the second matter, resolution of the dispute over disclosure in this case requires a closer examination of the issue.

With respect to timing, I agree with the recommendation of the Law Reform Commission of Canada in both of its reports that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. It will be of great assistance to the accused to know what are the strengths and weaknesses of the Crown's case before committing on these issues. As I have pointed out above, the system will also profit from early disclosure as it will foster the resolution of many charges without trial, through increased numbers of withdrawals and pleas of guilty. The

obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. At this stage, the Crown's brief will often not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. The attempt to make this distinction in connection with the confession rule proved to be unworkable and was eventually discarded by this Court. See *Piché v. The Queen*, [1970 CanLII 182 \(SCC\)](#), [1971] S.C.R. 23, at p. 36; *Rothman v. The Queen*, [1981 CanLII 23 \(SCC\)](#), [1981] 1 S.C.R. 640, at p. 645. To re-introduce the distinction here would lead to interminable controversy at trial that should be avoided. The Crown must, therefore, disclose relevant material whether it is inculpatory or exculpatory.

A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a "will say" statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call. In its 1974 Working Paper, the Law Reform Commission of Canada recommended disclosure of not only the names, addresses and occupations of all "persons who have provided information to investigation or prosecution authorities" (p. 41), but the statements obtained or, if these did not exist,

"a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has been obtained..." (p. 41). In its 1984 Report, the Commission seemed to have changed its mind. It stated (at pp. 27-28):

With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

The Marshall Commission Report recommended disclosure of "any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness". Although not entirely clear, this recommendation appears to extend to anyone who has relevant information and who is either compellable or prepared to testify whether proposed to be called by the Crown or not.

This Court, in *R. v. C. (M.H.)*, *supra*, dealt with the failure to disclose either the identity or statement of a person who provided relevant information to the police but who was not called as a witness. McLachlin J., speaking for the Court, indicated that failure to disclose in such cases could impair the fairness of the trial.

I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the Commission in its 1984 Report persuasive. If the information is of no use

then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. Moreover, I do not understand the Commission's statement that "[t]heir statements are not evidence". That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called *viva voce*. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

3. Application to This Case

No request was made in this case for disclosure prior to pleading or electing the mode of trial and this issue does not, therefore, arise. A request for disclosure was made during the trial for the disclosure of two statements taken subsequent to the preliminary hearing. An application for disclosure was dismissed by the trial judge on the ground that there was no obligation on the Crown to disclose the statements.

Applying the above principles, I conclude that the following errors were committed:

- (1) Counsel for the Crown misconceived his obligation to disclose the statements;
- (2) The explanation for refusal that the witness was not worthy of credit was completely inadequate to support the exercise of this discretion on the ground of irrelevance. Whether the witness is credible is for the trial judge to determine after hearing the evidence;
- (3) The trial judge ought to have examined the statements. The suggestion that this would have prejudiced the trial judge is without merit. Trial judges are frequently apprised of evidence which is ruled inadmissible. One example is a confession that fails to meet

the test of voluntariness. No one would suggest that knowledge of such evidence prejudices the trial judge. We operate on the principle that a judge trained to screen out inadmissible evidence will disabuse himself or herself of such evidence;

(4)The trial judge erred in his statement of the duty to disclose on the part of the Crown.

It was submitted that the appellant was not deprived of the opportunity to make full answer and defence because he could have:

(a)interviewed the witness and obtained his own statement;

(b)called the witness, and if her evidence proved adverse, cross-examined on the basis of the preliminary hearing transcript.

With respect to (a), counsel for the appellant pointed out that the witness refused to be interviewed. In any event, even if such an interview took place, what the witness said on two prior occasions could be very material to the defence.

As for (b), counsel for the defence is entitled to know whether the witness he/she is calling will give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement. The latter usually creates an undesirable atmosphere at the trial and the most that can be achieved is to impeach or destroy the credibility of the witness. See *McInroy v. The Queen*, [1978 CanLII 175 \(SCC\)](#), [1979] 1 S.C.R. 588, and *R. v. Mannion*, [1986 CanLII 31 \(SCC\)](#), [1986] 2 S.C.R. 272, at pp. 277-78. Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence.

What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This in turn depends on the nature of the

information withheld and whether it might have affected the outcome. As McLachlin J. put it in *R. v. C. (M.H.)*, *supra*, at. p. 776:

Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.

In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and therefore we have no indication from the trial judge as to whether they were favourable or unfavourable. Examination of the statements, which were tendered as fresh evidence in this Court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence. In the circumstances, we must assume that non-production of the statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.

Accordingly, I would allow the appeal and direct a new trial at which the statements should be produced.

Appeal allowed.

Solicitors for the appellant: Code Hunter, Calgary.

Solicitor for the respondent: The Attorney General for Alberta, Calgary.

TAB 22

Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, 2002 SCC 13 (CanLII), [2002] 1 SCR 405

Source:	Supreme Court of Canada
Date:	2002-02-14
File number:	27722
Other citations:	245 NBR (2d) 299 — 209 DLR (4th) 564 — 282 NR 201 — 112 ACWS (3d) 57 — 636 APR 299 — AZ-50113240 — 17 CPC (5th) 1 — 91 CRR (2d) 1 — EYB 2002-27928 — JE 2002-351 — [2002] SCJ No 13 (QL) — [2002] ACS no 13
Citation:	Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, 2002 SCC 13 (CanLII), [2002] 1 SCR 405, < https://canlii.ca/t/51vb >, retrieved on 2026-03-23
Most recent unfavourable mention	Mancuso v. Canada (National Health and Welfare) , 2014 FC 708 (CanLII) [...] these allegations are not intended to ground independent causes of action, but are instead intended to indicate damages suffered as a result of the impugned provisions of the Act and Regulations, or state misconduct in relation to those instruments that could permit a damages claim despite the principles stated in Mackin . [...]

Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick, [2002] 1 S.C.R. 405, 2002 SCC 13

**Her Majesty The Queen in Right of the Province of
New Brunswick as represented by the Minister of Finance**

Appellant

Ian P. Mackin

Respondent

and between

**Her Majesty The Queen in Right of the Province of
New Brunswick as represented by the Minister of Finance**

Appellant

v.

Douglas E. Rice

Respondent

and

**The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General for Alberta,
the Canadian Judges Conference and
the Canadian Association of Provincial Court Judges**

Interveners

Indexed as: Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick

Neutral citation: 2002 SCC 13.

File No.: 27722.

2001: May 23; 2002: February 14.

Present: L’Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for new brunswick

Constitutional law – Judicial independence – Provincial courts – Supernumerary judges – Provincial legislation eliminating system of supernumerary judges and replacing it with panel of retired judges paid per diem – Whether legislation violates guarantees of judicial independence – [Canadian Charter of Rights and Freedoms](#), s. 11(d) – [Constitution Act, 1867](#), Preamble – [Act to Amend the Provincial Court Act](#), S.N.B. 1995, c. 6.

Constitutional law – Remedies – Damages – Provincial legislation eliminating system of supernumerary judges and replacing it with panel of retired judges paid per diem – Supernumerary judges successfully challenging constitutionality of legislation – Whether damages claim by supernumerary judges warranted – [Constitution Act, 1982](#), ss. 24(1), 52.

Costs – Solicitor-client costs awarded on appeal – Whether solicitor-client costs appropriate.

In 1995, the [New Brunswick Act to Amend the Provincial Court Act](#) (“Bill 7”) abolished the system of supernumerary judges and replaced it with a panel of retired judges paid on a *per diem* basis. Supernumerary judges, who were judges under the *Provincial Court Act*, received a salary and fringe benefits equivalent to those given to judges sitting full time. Although the *Provincial Court Act* was silent concerning the size of the reduction in workload, supernumerary judges were normally asked to take on only about 40 percent of the usual workload of a full-time judge. Supernumerary judges in office when Bill 7 came into force were required to choose between retiring or returning to sit full time before April 1, 1995. The change was made in the interest of efficiency and flexibility, and for economic and financial reasons. The respondent R began to sit as a supernumerary judge in 1993, but his workload was not significantly reduced between 1993 and his eventual retirement. When Bill 7 became law, he had to return to full-time judicial office. He retired in 1997 and asked to be placed on the panel of retired judges. Prior to the enactment of Bill 7, R had organized his financial and personal affairs in light of the conditions applying to supernumerary judges. The respondent M began to sit as a supernumerary judge in 1988. Until 1990, his workload was not appreciably reduced, but thereafter, the reorganization of

his judicial duties enabled him to spend several winters in Australia. M did not express his intention to retire before April 1, 1995, and was deemed to have resumed his duties as a full-time judge. The respondents instituted separate proceedings, successfully challenging the constitutionality of Bill 7 at trial and on appeal, arguing that it unjustifiably affected the tenure and financial security that form part of judicial independence. The respondents' claim for damages was rejected at trial. The Court of Appeal held that damages could be awarded and referred the question of the appropriate amount back to the trial judge. The respondents were awarded solicitor-client costs.

Held (Binnie and LeBel JJ. dissenting): The appeal should be allowed in part. Bill 7 is unconstitutional.

Per L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ.: Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. The general test for judicial independence is to ask whether a reasonable person fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status. This requires independence in fact and a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement. Judicial independence has individual and institutional dimensions, and three essential characteristics: financial security, security of tenure and administrative independence. The constitutional protection of judicial independence requires the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

The opportunity to sit as a supernumerary was not integral to the office of a judge and eliminating that opportunity was not a removal from office. The ability to perform 40 percent of the usual duties but not to work full time should be classified as an inability to perform the duties

of a judge. The elimination of the duties of supernumerary judges should be treated as a question relating to financial security. Individually, financial security requires that judges' salaries be provided for by law and that neither the executive nor the legislative branch arbitrarily encroach upon this right in a manner that affects the independence of the courts. Any measure taken by a government that affects any aspect of the remuneration conditions of judges will automatically trigger the application of the principles relating to the institutional dimension of financial security. In particular, governments have a constitutional duty to use an independent, effective and objective body for recommendations on salary reductions, increases or freezes for judges. If these recommendations are ignored, that decision must be justified, if necessary in a court of law, on the basis of a simple rationality test.

Bill 7 violates the institutional guarantees of judicial independence contained in s. 11(d) of the *Canadian Charter of Rights and Freedoms* and the Preamble to the *Constitution Act, 1867* and is therefore declared unconstitutional. The system of supernumerary judges constituted an undeniable economic benefit for judges of the Provincial Court appointed before Bill 7 came into force and for eventual candidates for the position of judge in the court. There is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit since both raise controversial questions of public policy and resource allocation and raise the possibility of financial manipulation. By failing to refer the question of the elimination of the office of supernumerary judge to an independent, effective and objective body, the New Brunswick government breached a fundamental duty. The lack of a grandfather clause in favour of the supernumerary judges in office and the judges of the Provincial Court appointed before Bill 7 came into force aggravates the violation.

Since the appellant did not adduce any evidence tending to show that Bill 7's constitutional shortcomings were justified under s. 1 of the *Charter*, Bill 7 must therefore be declared invalid even though the New Brunswick government was pursuing a perfectly legitimate purpose in trying to make certain changes to the organization of its judiciary. The declaration of invalidity applies to both the elimination of the office of supernumerary judge and its replacement

by the panel of judges. Except with respect to the respondents, the declaration is suspended for six months from the date of judgment. Although the directives issued by this Court in the *Provincial Court Judges Reference* did not acquire their full effect until September 18, 1998, the respondents instituted their proceedings before that decision was rendered. It would be unjust if they were not allowed to take advantage of the finding of unconstitutionality due to the sequence of events.

The respondents' claim for damages is dismissed. An action for damages brought under s. 24(1) of the *Charter* cannot normally be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*. In this case, the New Brunswick government did not display negligence, bad faith or wilful blindness with respect to its constitutional obligations. Nor was the Minister of Justice's failure to keep his promise to refer Bill 7 to the Law Amendments Committee an instance of bad faith that justified the damage awards.

The respondents are to have their costs throughout, on a party-and-party basis. Solicitor-client costs are not appropriate in this case.

Per Binnie and LeBel JJ. (dissenting): The Provincial Court judges in New Brunswick who elected supernumerary status did not enjoy a constitutional right to work only 40 percent of the time in exchange for 100 percent of the salary of a full-time judge.

The essential guarantees of judicial independence, including financial security, are intended for the benefit of the judged, not the judges.

Although the majority's statement of the broad principles of judicial independence was agreed with, the respondents' expectation of a reduced workload was neither spelled out in the Act nor otherwise put in a legally enforceable form. The workload varied dramatically from region to region and the bare concept of a "reduced" workload is too elastic to provide a manageable constitutional standard. The legislature was clearly not prepared to guarantee any fixed and

defined benefit, or indeed any benefit at all. The doctrine of judicial independence does not protect “understandings” about specific financial benefits that are pointedly not written into the governing legislation. As the Provincial Court judges were given no guarantee in the Act, the anticipated reduced workload attaching to supernumerary status formed no part of the constitutional guarantee of judicial independence. Supernumerary status was a wholly discretionary potential benefit voluntarily conferred on the judges by the legislature, and its repeal could not and did not undermine the Provincial Court’s institutional independence.

Even if the respondents could establish all of the elements of the administrative law doctrine of legitimate expectation, it would not be of assistance since the doctrine does not apply to a body exercising purely legislative functions. Nor can it operate to entitle the respondents to a substantive as opposed to procedural remedy. Furthermore the constitutional requirement of an independent, effective and objective process mandated by the *Provincial Court Judges Reference* was not elaborated by this Court until two years after the amendments in issue here.

Cases Cited

By Gonthier J.

Applied: *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; **referred to:** *Guimond v. Quebec (Attorney General)*, 1996 CanLII 175 (SCC), [1996] 3 S.C.R. 347; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56; *British Columbia (Provincial Court Judge) v. British Columbia* (1997), 1997 CanLII 4364 (BC SC), 40 B.C.L.R. (3d) 289; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1998 CanLII 833 (SCC), [1998] 1 S.C.R. 3; *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 2000 NFCA 46 (CanLII), 191 D.L.R. (4th) 225; *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R.

679; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947 CanLII 347 \(UK JCPC\)](#), [1947] A.C. 503; *Reference re Manitoba Language Rights*, [1985 CanLII 33 \(SCC\)](#), [1985] 1 S.C.R. 721; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1970 CanLII 1 \(SCC\)](#), [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1978 CanLII 21 \(SCC\)](#), [1979] 1 S.C.R. 42; *Crown Trust Co. v. The Queen in Right of Ontario* (1986), [1986 CanLII 2725 \(ON SC\)](#), 26 D.L.R. (4th) 41; *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 S.C.R. 3; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 S.C.R. 3.

By Binnie J. (dissenting)

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997 CanLII 317 \(SCC\)](#), [1997] 3 S.C.R. 3; *R. v. McCully*, N.B. Prov. Ct. (Moncton), February 13, 1996; *R. v. Woods* (1996), [1996 CanLII 18836 \(NB CA\)](#), 179 N.B.R. (2d) 153; *R. v. Lapointe*, [1997] N.B.J. No. 57 (QL); *R. v. Leblanc* (1997), [1997 CanLII 9554 \(NB CA\)](#), 190 N.B.R. (2d) 70; *Valente v. The Queen*, [1985 CanLII 25 \(SCC\)](#), [1985] 2 S.C.R. 673; *R. v. Lippé*, [1990 CanLII 18 \(SCC\)](#), [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986 CanLII 24 \(SCC\)](#), [1986] 2 S.C.R. 56; *Ridge v. Baldwin*, [1964] A.C. 40; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1978 CanLII 24 \(SCC\)](#), [1979] 1 S.C.R. 311; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990 CanLII 31 \(SCC\)](#), [1990] 3 S.C.R. 1170; *Reference re Canada Assistance Plan (B.C.)*, [1991 CanLII 74 \(SCC\)](#), [1991] 2 S.C.R. 525; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817.

Statutes and Regulations Cited

Act to Amend the Provincial Court Act, S.N.B. 1995, c. 6, ss. 1, 2, 3, 9.

Canadian Charter of Rights and Freedoms, ss. 1, [2](#), [7](#) to [14](#), [11\(d\)](#), [24](#).

Constitution Act, 1867, Preamble, ss. 91, 92, 92(14).

Constitution Act, 1982, ss. 35(1), [52](#).

Provincial Court Act, R.S.N.B. 1973, c. P-21 [am. 1987, c. 45], ss. 1 “judge”, 2(1), 3.1 [ad. 1996, c. 54, s. 1], 4.1 [am. 1988, c. 37, s. 1], 4.2, 6, 6.1 to 6.13, 8(1), 14(2), 22.01 *et seq.*

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Universal Declaration on the Independence of Justice, in Shimon Shetreet and Jules Deschênes, eds., *Judicial Independence: The Contemporary Debate*. Boston: Martinus Nijhoff Publishers, 1985, 447.

APPEAL from a judgment of the New Brunswick Court of Appeal (1999), 40 C.P.C. (4th) 107, 23 C.C.P.B. 1, [1999] N.B.J. No. 544 (QL), allowing the respondent Mackin’s appeal and dismissing the province’s cross-appeal from a judgment of the Court of Queen’s Bench (1998), [1998 CanLII 9800 \(NB QB\)](#), 202 N.B.R. (2d) 324, 516 A.P.R. 324, 18 C.C.P.B. 30, 21 C.P.C. (4th) 29, [1998] N.B.J. No. 267 (QL). Appeal allowed in part, Binnie and LeBel JJ. dissenting.

APPEAL from a judgment of the New Brunswick Court of Appeal (1999), [1999 CanLII 4752 \(NB CA\)](#), 235 N.B.R. (2d) 1, 607 A.P.R. 1, 181 D.L.R. (4th) 643, 39 C.P.C. (4th) 195, 22 C.C.P.B. 249, [1999] N.B.J. No. 543 (QL), allowing the respondent Rice’s appeal and dismissing the province’s cross-appeal from a judgment of the Court of Queen’s Bench, [1998] N.B.J. No. 266 (QL). Appeal allowed in part, Binnie and LeBel JJ. dissenting.

Brian A. Crane, Q.C., Bruce Judah, Q.C., and Ritu Gambhir, for the appellant.

J. Brent Melanson, for the respondent Mackin.

J. Gordon Petrie, Q.C., and *James M. Petrie*, for the respondent Rice.

Graham R. Garton, Q.C., and *Karen Cuddy*, for the intervener the Attorney General of Canada.

Lori Sterling and *Sean Hanley*, for the intervener the Attorney General for Ontario.

Monique Rousseau, for the intervener the Attorney General of Quebec.

Deborah Carlson, for the intervener the Attorney General of Manitoba.

George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, Q.C., for the intervener the Attorney General for Saskatchewan.

Robert C. Maybank, for the intervener the Attorney General for Alberta.

Leigh D. Crestohl, for the intervener the Canadian Judges Conference.

Robert D. Tonn, for the intervener the Canadian Association of Provincial Court Judges.

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

GONTHIER J. —

I. Introduction

1 This appeal primarily raises the issue of whether the abolition by the legislature of the position of supernumerary judge of the Provincial Court of New Brunswick contravenes the constitutional guarantees of judicial independence in s. 11(d) of the *Canadian Charter of Rights and Freedoms* and in the Preamble to the *Constitution Act, 1867*. The incidental issues that arise are whether the respondent judges should be awarded damages and whether costs should be ordered on a solicitor- client basis.

II. Facts

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2 The Provincial Court of New Brunswick was established in 1973 by the *Provincial Court Act*, R.S.N.B. 1973, c. P-21. Section 8(1) of the Act provides that “[e]ach judge is hereby constituted a court of record and, throughout the Province, has all the powers, authority, criminal jurisdiction and quasi-criminal jurisdiction vested in a police magistrate or in two or more justices of the peace sitting and acting together, under any law or statute in force in the Province”. It accordingly has substantial criminal jurisdiction. The court is also the youth court designated by the province for the purposes of the *Young Offenders Act*, R.S.C. 1985, c. Y-1. Section 6 of the *Provincial Court Act* provides that a “judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties”. Section 4.2 provides that a “judge shall retire at the age of 75 years”. Finally, s. 3.1 states that “[a] judge shall have the same protection and privileges as are conferred upon judges of The Court of Queen’s Bench of New Brunswick, for any act done or omitted in the execution of his or her duty”.

3 On January 1, 1988, the *Act to Amend the Provincial Court Act*, S.N.B. 1987, c. 45, the purpose of which was to create the office of supernumerary judge and to eliminate that of

deputy judge, came into force. A judge of the Provincial Court could thereby elect to sit as a supernumerary judge if he or she met the following conditions: (i) he or she had reached the age of 65 years and had accumulated 15 years of service; or (ii) he or she had reached the age of 60 years and had accumulated 25 years of service; or, finally, (iii) he or she had reached the age of 70 years and had accumulated 10 years of service. Thus, as the conditions of eligibility for the office of supernumerary judge fully reflected the conditions of eligibility for payment of a retirement pension equivalent to 60 percent of the full salary, an additional choice was given to the judges of the Provincial Court who satisfied these conditions. They could then: retire and receive their pension; continue to sit as a full-time judge; or sit as a supernumerary judge. [Section 4.1\(5\)](#) of the [Provincial Court Act](#) provided that a supernumerary judge was to remain available in order to perform the duties assigned to him or her “from time to time” by the Chief Judge. It was understood by everyone, however, that while a supernumerary judge of the Provincial Court received a salary and fringe benefits equivalent to those given to judges sitting full time, he or she was in practice asked to take on only about 40 percent of the usual workload of a full-time judge.

4 On April 1, 1995, ss. 1 through 8 of the *Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 (also called “Bill 7”), came into force. Section 2 provided for the straight abolition of the system of supernumerary judges and s. 3 provided for its replacement by a panel of retired judges sitting at the request of the Chief Judge or the Associate Chief Judge and paid on a *per diem* basis. Also, the supernumerary judges then in office were faced with a choice of retiring or beginning to sit full time again (s. 9(1)). They were required to give notice to the government of their decision before April 1, 1995. The legislation did not contain a so-called “grandfather” clause that would have allowed the supernumerary judges in office at that time as well as the other judges of the Provincial Court appointed before Bill 7 came into force to retain the privileges conferred upon them by law. According to the appellant, the government’s decision to abolish the position of supernumerary judge was made for reasons of efficiency and flexibility as well as for economic and financial reasons. Thus, in its plea, it stated that “[t]he repeal of the supernumerary provisions by Bill 7 was a legislative initiative undertaken in the context of overall public fiscal

restraint and a reasonable attempt to improve the utilization of resources and cost effectiveness in the administration of the Provincial Court”.

5 The respondent Judge Douglas E. Rice joined the provincial judiciary on August 16, 1971. On July 2, 1992, upon reaching the age of 65 years and after sitting for more than 15 years, he was entitled to retire and to receive his pension. Rather than doing so, he decided to exercise his right to sit as a supernumerary judge, which he did starting on April 30, 1993. On April 2, 1995, after Bill 7 became law, he was forced, against his will, to return to a full-time judicial office. He finally retired on October 15, 1997 and asked to be placed on the new panel of judges paid on a *per diem* basis starting on December 4 of that year. In his written submissions, Judge Rice mentioned that he had organized his financial and personal affairs in light of the conditions applying to his duties as a supernumerary judge.

6 The respondent Judge Ian P. Mackin joined the provincial judiciary on October 17, 1962. On October 17, 1987, upon reaching the age of 60 years and after accumulating more than 25 years of service, he acquired the right to receive his pension. Nevertheless, on August 15, 1988, he decided, like Judge Rice, to sit as a supernumerary judge. It appears that this reorganization of his judicial duties enabled him to plan the use of his time in such a way that he was able to spend several winters in Australia. Since he did not express his intentions following the enactment of Bill 7, Judge Mackin was deemed, in accordance with s. 9(1) of the Act, to have resumed his duties as a full-time judge. He still held this office as at the date of the hearing before this Court.

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7 Following the coming into force of Bill 7, the two respondents instituted separate proceedings in the New Brunswick courts. Judge Mackin officially informed the government of his intention to bring legal proceedings on April 25, 1995, while Judge Rice submitted his written pleadings on June 24, 1997. The respondents challenged the constitutionality of the legislation

abolishing the position of supernumerary judge, arguing that it affected the components of tenure and financial security that form part of judicial independence. Damages and payment of solicitor-client costs were also claimed. In this Court, both cases were joined and argued at the same time.

III. Judgments Under Appeal

A. *New Brunswick Court of Queen's Bench*

- (1) *Mackin v. New Brunswick (Minister of Finance)* (1998), 1998 CanLII 9800 (NB QB), 202 N.B.R. (2d) 324

8 Deschênes J. began by noting the three essential conditions (financial security, security of tenure and administrative independence) and the two dimensions (individual and institutional) of judicial independence as set out by this Court in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, and in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 (“*Provincial Court Judges Reference*”), in particular. He also mentioned that the judges, whether appointed before or after the creation of the position of supernumerary judge, had definitely developed certain expectations because of the existence of the position. Thus, they were able to plan their professional and financial future accordingly and the facts show that some of them acted in this way. He therefore concluded that, like their pension plan, the existence of the position of supernumerary judge constituted a genuine financial benefit for the judges of the Provincial Court.

9 On the other hand, he was of the opinion that the office of supernumerary judge also had elements that related to the condition of security of tenure, especially in the sense that a supernumerary judge continued to enjoy the same financial benefits as a full-time judge and was forced to take mandatory retirement at the age of 75. On the basis of the test developed in *Valente*, *supra*, at p. 698 — namely, that security of tenure requires “tenure . . . that is secure against

interference by the Executive or other appointing authority in a discretionary or arbitrary manner” —, Deschênes J. considered, however, that the legislative abolition of the position of supernumerary judge was not equivalent, strictly speaking, to a dismissal of the supernumerary judges then in office. Consequently, the individual dimension of the condition of security of tenure had not been infringed. However, he added that in terms of both security of tenure and financial security, the issue was institutional in nature rather than individual. Thus, it is not so much the content of the impugned legislation as the process surrounding its enactment that was constitutionally dubious.

10 Starting with the finding that the office of supernumerary judge constituted a financial benefit for the judges of the Provincial Court, Deschênes J. was of the view that the Legislative Assembly of New Brunswick should have submitted its decision to abolish this position to an independent, effective and objective commission in accordance with what was prescribed in the *Provincial Court Judges Reference*. In fact, the decision was political in nature in two respects. First, it was informed by classic objectives of general public policy: spending cuts and a more efficient administration of justice. It also raised the spectre of interference by the legislative branch in the independence of the judiciary by means of financial manipulation. As a result, approval by a commission became necessary in order to ensure that the judiciary would not let itself — or appear to let itself — be dragged onto the political stage and at the same time jeopardize its independence. In fact, if the situation were otherwise, a reasonable person informed of all the circumstances would conclude that there was an insufficient degree of independence.

11 Moreover, Deschênes J. was of the opinion that this violation of the constitutional guarantees of independence could not be justified under s. 1 of the *Charter*. Because the violation consisted of a failure to refer the matter to an independent, effective and objective commission, this failure itself must be demonstrably justified. The government merely raised a defence of the

reasonably justified nature of the legislation. Whether the legislation was justified or not, Deschênes J. felt that the amendment had been made arbitrarily without any real consultation with the judges affected. Finally, he mentioned that the lack of a grandfather clause was unfair to the judges of the Provincial Court generally, on the one hand, and even more unfair to those judges who sat as supernumeraries, on the other.

12 Consequently, Deschênes J. declared that s. 2 of the *Act to Amend the Provincial Court Act* was unconstitutional, ordered that the question of the abolition of the office of supernumerary judge be referred immediately to the existing salary commission and suspended the declaration of unconstitutionality until the commission had issued a report on the question.

13 On the other hand, Deschênes J. refused to award damages to Judge Mackin for the violation of judicial independence by the provincial legislature. First, he noted that [s. 24\(1\)](#) of the *Charter* did not apply because Judge Mackin had not been the victim of a violation or infringement of his rights or freedoms protected by the *Charter*. Second, the general rule of public law, as set out in *Guimond v. Quebec (Attorney General)*, [1996 CanLII 175 \(SCC\)](#), [1996] 3 S.C.R. 347, states that damages will not be awarded for the enactment of legislation that is subsequently declared to be unconstitutional, except in the event of bad faith or other wrongful conduct on the part of government institutions.

14 Finally, on the question of costs, Deschênes J. stated that notwithstanding the use of disputed means, Judge Mackin was advancing the legitimate cause of protecting the independence of the judiciary and that he had been partially vindicated in this regard. He accordingly ordered that he be reimbursed for his costs on a party-and-party basis.

(2) *Rice v. New Brunswick*, [1998] N.B.J. No. 226 (QL)

15 Deschênes J. applied the same reasoning to the situation of Judge Rice. He also rejected Judge Rice's argument to the effect that the legislation abolishing the office of supernumerary had been enacted for ulterior or wrongful reasons.

B. *New Brunswick Court of Appeal*

(1) *Rice v. New Brunswick* (1999), [1999 CanLII 4752 \(NB CA\)](#), 235

N.B.R. (2d) 1

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(a) *Ryan J.A.*

16 Ryan J.A. viewed the actions of the provincial government as a violation of the concept of judicial independence. He began by finding that the office of supernumerary judge was a genuinely separate judicial office as opposed to a mere status or position. He then expressed the view that the elimination of the position of supernumerary judge had violated both the condition of financial security and that of security of tenure.

17 According to Ryan J.A., financial security was violated in both its individual and institutional dimensions. With respect to judges who were performing supernumerary duties at the time, their financial security was affected in its individual dimension whereas in respect of the other judges of the Provincial Court, it was affected in its institutional dimension. He also concluded that there was in fact political interference as a result of financial manipulation. By contrast, he asserted that the guarantee of security of tenure was affected only in its individual

dimension because, for the supernumerary judges in office at that time, the abolition of their positions was equivalent to an arbitrary and premature removal.

18 Since there was a violation of financial security, Ryan J.A. agreed with the trial judge in stating that the case should at the very least have been submitted to an independent, effective and objective commission. However, given his further findings concerning the violation of the condition of security of tenure, he felt that a referral to the existing commission would not be sufficient and that the Act quite simply had to be declared invalid. In any event, he added that the jurisdiction of this commission — which was limited to examining salaries, pension, vacation and sick leave benefits (s. 22.03(1) of the *Provincial Court Act*) — did not extend to the question of the abolition of the position of supernumerary judge.

19 Moreover, Ryan J.A. felt that the legislation could not be justified under s. 1. First, he maintained that judicial independence went beyond the provisions of the *Charter* and that an attack on an institution that was so fundamental to the Canadian constitutional system was well and truly unjustifiable. He then referred to the arbitrary and unfair nature of the government's actions. Finally, he noted that the lack of a grandfather clause for the benefit of the supernumerary judges and the other judges of the Provincial Court precluded any claim that the violation of judicial independence was minimal.

20 Concerning the awarding of damages, Ryan J.A. noted that the case related to an exceptional situation involving a veritable attack by the legislative and executive branches against the judiciary. The government of the time could not have been oblivious to what it was doing and must have been aware of the effects its decision would have on the independence of the judiciary. He concluded accordingly that it was necessary to set aside the principle of qualified government immunity referred to in *Guimond, supra*. Consequently, neither negligence nor bad faith

necessarily had to be established. Furthermore, there was a direct causal link between the violation of the rights of judges and the harm sustained. Thus, damages could be awarded under s. 24(1) of the *Charter*, or because of the duty of mutual respect owed by the different branches of government to one another. In the alternative, Ryan J.A. considered that the failure of the then-Minister of Justice to keep the promise made to the provincial judges to refer the legislation eliminating the office of supernumerary judge to the Law Amendments Committee constituted sufficient evidence of bad faith justifying the award of damages. However, he decided to refer the question of determining the appropriate amount back to the trial judge.

21 Finally, Ryan J.A. ordered that Judge Rice be paid his legal costs on a solicitor-client basis.

(b) *Drapeau J.A.*

22 Drapeau J.A. concurred with Ryan J.A. He nevertheless made a number of comments of his own on the question of damages. He began by expressing his agreement with Ryan J.A. that evidence of bad faith was not required in order for damages to be awarded in this case. The individual dimension of judicial independence was at issue and both the public and the supernumerary judges personally bore the cost of the provincial government's decision unilaterally to abolish the office of supernumerary judge. He added that the legislation was enacted despite a clear awareness of its effects on the independence of the judiciary and on the supernumerary judges. He accordingly concurred with Ryan J.A. in finding that the traditional rules concerning the award of damages in constitutional proceedings should be set aside. Damages should be awarded not only to compensate the supernumerary judges but also to discourage any other attempt at legislative interference with judicial independence.

23 Daigle C.J.N.B. examined each of the first two conditions of judicial independence in order to determine whether they were violated by the enactment of Bill 7. His analysis focused first on the question of financial security. In his opinion, it was compromised in that the abolition of the office of supernumerary judge was likely to affect the judges' planning of the conditions for their retirement. Thus, although the situation did not involve a reduction as such in their net salary — since they retained the possibility of earning the equivalent of a full-time salary — the fact remained that the judges of the Provincial Court could legitimately rely on the existence of such a position in order to make certain plans of an economic and financial nature.

24 According to Daigle C.J.N.B., however, the guarantee of financial security was affected only in its institutional dimension. According to the principles set out in *Provincial Court Judges Reference*, *supra*, the Legislative Assembly of New Brunswick had a duty to refer the question of the elimination of the office of supernumerary judge to an independent, effective and objective commission. However, he noted that there was no evidence in the case to suggest that there might have been any attempt at economic interference on the part of the legislature at the expense of the judges of the Provincial Court.

25 Daigle C.J.N.B. was, moreover, of the view that the constitutional guarantees of security of tenure were not infringed since it was possible for the supernumerary judges to resume their duties full time. An analysis of the *Provincial Court Act* supported him in this conclusion. First, he noted that s. 1 of the Act defined “judge” as including both a judge and a supernumerary judge. He added that s. 6 provided that a judge should hold office during good behaviour and could be removed from office only for misconduct, neglect of duty or inability to perform his duties. He also noted that a judge did not have to retire in order to become supernumerary. Rather,

a supernumerary judge continued to exercise his duties as a judge of the Provincial Court until retiring. In short, Daigle C.J.N.B. found that there was no separate judicial office relating to the office of supernumerary judge. Consequently, the abolition of this position was of no consequence in terms of the security of tenure of the judges of the Provincial Court.

26 He was of the opinion, moreover, that the violation of the institutional guarantees of financial security was not justified under s. 1 of the *Charter*, since the government did not direct its argument to the legitimacy of its decision to ignore its duty to refer the question to an independent, effective and objective commission.

27 On the subject of damages, Daigle C.J.N.B. proceeded to apply the general rules governing the liability in tort of government institutions for enacting legislation that is subsequently declared unconstitutional. Thus, he was of the view that in such cases, damages would be awarded only in very rare instances, including where an act was passed in bad faith or for unworthy reasons. A bare allegation of unconstitutionality could not, on the other hand, justify an award of damages. In this case, not only was the refusal of the Minister of Justice to honour his promise to submit the legislative amendments to the Law Amendments Committee not alleged in the pleadings but, moreover, it does not support a finding of bad faith.

28 Daigle C.J.N.B. added that any relief under s. 24(1) of the *Charter* constituted a personal right that could be exercised only by a person whose fundamental rights had been violated. In this situation, only the institutional dimension of judicial independence was at issue. Furthermore, judicial independence exists for the benefit of the litigants and not for that of the judges. Finally, and in any event, he was of the opinion that a claim for damages could not succeed because the province enacted the legislation in good faith and in accordance with the

constitutional teachings of the time. In fact, when Bill 7 came into force, the decision in *Provincial Court Judges Reference*, *supra*, had not yet been rendered.

29 Because of the infringement of the institutional dimension of financial security, Daigle C.J.N.B. declared Bill 7 to be unconstitutional. However, he ordered a suspension of this declaration for a period of six months to allow the province to correct its approach. He refrained from referring the matter to the existing salary commission since the province could rectify the problem by other means.

30 Finally, he agreed with the trial judge's opinion that the award of costs as between solicitor and client was quite simply not appropriate in this case. As far as the appeal proceedings were concerned, since each party should, in his view, be successful in part, he would have ordered that they pay their own costs.

(2) *Mackin v. New Brunswick (Minister of Justice)* (1999), 40 C.P.C. (4th) 107

31 All three judges in the Court of Appeal adopted their reasoning in *Rice* for the decision in *Mackin*.

IV. Relevant Statutory Provisions

32 *Provincial Court Act*, R.S.N.B. 1973, c. P-21 (as of March 30, 1995)

4.1(1) A judge appointed under subsection 2(1) may elect to become a supernumerary judge upon meeting the requirements under this Act.

4.1(2) Where a judge appointed under subsection 2(1) intends to become supernumerary, the judge shall give notice to the Minister of election two months prior

to the effective date specified in the notice, being a day on which the judge will be eligible to so elect, and the judge shall, effective on that day, be deemed to have elected and given notice on that day.

4.1(3) Where a judge appointed under subsection 2(1) has notified the Minister of the judge's election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall upon the effective date hold the office of supernumerary judge and shall be paid the salary annexed to that office until the judge ceases to hold office.

4.1(4) A judge appointed under subsection 2(1) may elect to hold office as a supernumerary judge upon

(a) attaining the age of sixty-five years and having continued in judicial office for at least fifteen years,

(a.1) attaining the age of sixty years and having continued in judicial office for at least twenty-five years, or

(b) attaining the age of seventy years and having continued in judicial office for at least ten years.

4.1(5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

6. Subject to this Act, a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties.

An Act to Amend the Provincial Court Act, S.N.B. 1995, c. 6

1 Subsection 1(1) of the [Provincial Court Act](#), chapter P-21 of the Revised Statutes, 1973, is amended in the definition "judge" by striking out "and a supernumerary judge".

2 Section 4.1 of the Act is repealed.

9(1) A judge who is a supernumerary judge under the [Provincial Court Act](#) immediately before the commencement of this section shall elect, before April 1, 1995, whether to resume the duties of judicial office on a full-time basis or to retire.

9(2) An election by a judge under subsection (1) shall be in writing to the Minister of Justice and shall be effective as of April 1, 1995, if no date is specified in the election, or upon the date specified in the election, whichever is the earlier.

9(3) If a judge fails to make an election under subsection (1) or if the Minister of Justice fails to receive a notice in writing before April 1, 1995, from a judge pursuant to subsection (2), the judge shall be deemed to have resumed the duties of judicial office on a full-time basis in accordance with the [Provincial Court Act](#), effective April 1, 1995.

V. Issues

33 On December 12, 2000, the following constitutional questions were stated:

1. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, interfere with the judicial tenure and financial security of members of the Provincial Court and thereby violate in whole or in part the principle of judicial independence as guaranteed by:
 - (a) the Preamble of the *Constitution Act, 1867*, or
 - (b) s. 11(d) of the *Canadian Charter of Rights and Freedoms*?
2. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, and which was enacted without reference to an independent remuneration commission, thereby violate in whole or in part the principle of judicial independence as guaranteed by:
 - (a) the Preamble of the *Constitution Act, 1867*, or
 - (b) s. 11(d) of the *Canadian Charter of Rights and Freedoms*?
3. If the answer to question 1(b) or question 2(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the *Charter*?

VI. Analysis

A. *Constitutional Questions*

(1) Introduction: Judicial Independence

34 Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law.

Within the Canadian Constitution, this fundamental value has its source in s. 11(d) of the *Charter* and in the Preamble to the *Constitution Act, 1867*, which states that the Constitution of Canada shall be “similar in Principle to that of the United Kingdom”. It was in *Provincial Court Judges Reference, supra*, at paras. 82 *et seq.*, that this Court explained in detail the constitutional foundations and scope of judicial independence.

35 Generally speaking, the expanded role of the judge as an adjudicator of disputes, interpreter of the law and guardian of the Constitution requires that he or she be completely independent of any other entity in the performance of his or her judicial functions. Such a view of the concept of independence may be found in art. 2.02 of the *Universal Declaration on the Independence of Justice* (reproduced in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (1985), 447, at p. 450), which states:

Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
[Emphasis added.]

The adoption of a broad definition of judicial independence by this Court was confirmed, moreover, in *Provincial Court Judges Reference, supra*, at para. 130, where Lamer C.J., for the majority, stated the following:

Finally, although I have chosen to emphasize that judicial independence flows as a consequence of the separation of powers, because these appeals concern the proper constitutional relationship among the three branches of government in the context of judicial remuneration, I do not wish to overlook the fact that judicial independence

also operates to insulate the courts from interference by parties to litigation and the public generally: *Lippé, supra*, at pp. 152 *et seq.*, *per* Gonthier J. [Emphasis added.]

36 On the other hand, in order for a judge to remain as far as possible sheltered from pressure and interference from all sources, he or she “should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions” (S. Shetreet, “Judicial Independence: New Conceptual Dimensions and Contemporary Challenges”, in Shetreet and Deschênes, *op. cit.*, 590, at p. 599).

37 The concept of independence accordingly refers essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice. The legal standards governing judicial independence, which are the sources governing the creation and protection of the independent status of judges and the courts, serve to institutionalize this separation. Moreover, the Preamble to the *Constitution Act, 1867* and s. 11(d) of the *Charter* give them a fundamental status by placing them at the highest level of the legal hierarchy.

38 The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status (*Valente, supra*, at p. 689; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369). Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or

command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly “communicated” to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

39 As was explained in *Valente, supra*, at p. 687, and in the *Provincial Court Judges Reference, supra*, at paras. 118 *et seq.*, the independence of a particular court includes an individual dimension and an institutional dimension. The former relates especially to the person of the judge and involves his or her independence from any other entity, whereas the latter relates to the court to which the judge belongs and involves its independence from the executive and legislative branches of the government. The rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges — the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable — whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice.

40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente, supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general perception of the court’s independence. Moreover, these three

characteristics must also be seen to be protected. In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

41 This being the case, it remains for me to determine whether the elimination of the office of supernumerary judge in the Provincial Court of New Brunswick violates judicial independence by breaching one or more of its essential characteristics in either of its dimensions.

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(2) Elimination of the Office of Supernumerary Judge and Judicial Independence

(a) *Security of Tenure*

42 In *Valente, supra*, at p. 695-96, it was found that in its individual dimension, the security of tenure provided for provincial court judges in Canada generally required that they may not be dismissed by the executive before the age of retirement except for misconduct or disability, following a judicial inquiry. Similarly, in New Brunswick, s. 4.2 of the *Provincial Court Act* provides that a judge shall retire at the age of 75 and ss. 6.1 to 6.13 provide that a judicial inquiry shall be held in order to adjudicate on the merits of a recommendation that a judge be removed from office.

43 It was stated further that, in order for the individual dimension of security of tenure to be constitutionally protected, it was sufficient that a judge could be removed from office only for a reason relating to his or her capacity to perform his or her judicial duties (*Valente, supra*, at p. 697). Any arbitrary removal is accordingly prohibited. In this context, s. 6 of the *Provincial Court Act* seems to create adequate protection for judges of the Provincial Court of New Brunswick by

indicating that “a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties”.

44 In the first place, therefore, it is necessary to determine whether the elimination of the office of supernumerary judge constituted an arbitrary removal of the respondent judges from office. To this end, the nature of their office must be examined and defined on the basis of the relevant legislation.

45 In order to find that there was a removal from office, the judges in the majority in the Court of Appeal relied first on the proposition that the functions of the supernumerary judge constituted a genuine separate judicial office, as opposed to a mere status. Therefore, according to Ryan J.A., the characteristic of security of tenure would apply separately to this office and consequently, a supernumerary judge could not be removed from office otherwise than for a reason linked to his or her ability to perform the duties of that office and following a judicial inquiry. Since the respondents had their offices as supernumerary judges abolished by legislation with no reason given that related to their ability to perform their duties and without any form of inquiry, not only was there a removal from office but this removal was arbitrary and unconstitutional in nature.

46 With the greatest respect, it is my opinion that this reasoning is ill-founded to the extent that the interpretation of the relevant legislation as a whole does not support its essential premise. In my judgment, there was simply no removal from the judicial office held by the respondent judges in this case.

First, s. 1 of the *Provincial Court Act* defined “judge” as including both a judge and a supernumerary judge. This means that, in electing to become a supernumerary, a judge nevertheless remained a judge of the Provincial Court. This finding is supported by the fact that a judge did not previously have to retire in order to become supernumerary. Rather, the judge decided to exercise his or her duties as a judge of the Provincial Court under different terms until he or she retired. Finally, it must be borne in mind that s. 9(1) of Bill 7 gave the supernumerary judges the possibility of resuming their duties full time. Obviously, therefore, there simply was no separate office linked to the position of supernumerary judge. Essentially, this position merely involved a reorganization of the workload of a judge of the Provincial Court. Consequently, there never was a real removal from office in this case and Judges Mackin and Rice at all times retained their security of tenure as judges of the Provincial Court.

Moreover, it was suggested that the possibility of sitting as a supernumerary judge was an integral part of the office of Provincial Court judge so that the elimination of this position could affect its integrity. The security of tenure of all provincial judges appointed before Bill 7 came into force would therefore have been infringed since the conditions applying to their office would have been fundamentally altered. Here again, I cannot accept such an argument. It seems to me to be a clear exaggeration to suggest that the possibility that a judge of the Provincial Court can sit as a supernumerary is an integral part of his main office and that the elimination of this possibility is therefore equivalent to removal from office. As I noted earlier, I view the definition of the duties of a supernumerary judge as pertaining to the office of a judge of the Provincial Court and not to a separate judicial office. The question as to whether, in certain circumstances, the conditions applying to a particular judicial office can be changed to the point where they are equivalent to a removal from office does not therefore arise in this case.

Finally, it was argued that the elimination of the position of supernumerary judge was contrary to security of tenure in that a judge able to perform 40 percent of the usual duties but

unable to work full time could be forced to take early retirement. In my opinion, such a possibility should be classified as an inability to perform the duties of a Provincial Court judge rather than as a removal of that judge from office. Security of tenure within the meaning of the Constitution is therefore not affected. In short, the elimination of the duties of supernumerary judges affects first and foremost the definition of the duties of Provincial Court judges and must accordingly be treated as a question relating to the protection of financial security rather than security of tenure.

(b) *Financial Security*

(i) Overview

50 In *Valente, supra*, only the individual dimension of financial security was considered in connection with the determination of salaries by the executive branch. It was determined at that time that the constitutional requirements in this regard were limited to ensuring that the judges' salaries were provided for by law and that the executive could not arbitrarily encroach upon this right in a manner that affected the independence of the courts. In *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, it was confirmed that this obligation also applied to the legislative branch.

51 In the *Provincial Court Judges Reference, supra*, at para. 121, it was clearly indicated that the financial security of provincial court judges also had an institutional dimension, shaping the relationships between the judiciary, on the one hand, and the executive and legislative branches, on the other.

52 Although it is a creation of the legislature, the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the Constitution under s. 52 of the *Constitution Act, 1982*; provide relief for violations

of the *Charter* under s. 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 of the *Constitution Act, 1867*; and render decisions concerning the rights of the aboriginal peoples protected by s. 35(1) of the *Constitution Act, 1982*. In short, given the position occupied by the provincial courts within the Canadian legal system, the Constitution requires them to remain financially independent of the other political branches (*Provincial Court Judges Reference, supra*, at paras. 124-30).

53 We are here dealing with a situation in which the New Brunswick legislature decided to make changes in the organization of its judiciary by means of a statute applying to all the judges of the Provincial Court. Such an exercise of power affects interactions of a purely institutional nature between the legislative and judicial branches and is accordingly likely to be subject to the requirements of the institutional dimension of financial security. A violation of the institutional aspect of financial security will, furthermore, have a concrete impact on the financial security of all judges of the Provincial Court.

54 As was stated in *Provincial Court Judges Reference, supra*, at para. 131, each of the elements of financial independence at the institutional level results from the constitutional imperative that, as far as possible, the relationship between the judiciary and the other two branches of government should be depoliticized. This imperative makes it necessary for the judiciary to be protected against political interference from the other branches through financial manipulation and for it to be seen to be so protected. Furthermore, one must ensure that it does not become involved in political debates concerning the remuneration of persons paid out of public funds. In fact, the judge's role as a constitutional adjudicator requires that it be isolated therefrom and be seen to be so.

55 On the other hand, one must seek to enhance the impartiality of judges as well as the perception of such impartiality by minimizing their involvement in questions concerning their own remuneration while preventing the other branches of government from using their control of public funds in order to interfere with their adjudicative independence.

56 In the *Provincial Court Judges Reference*, *supra*, at paras. 133-35, three elements or principles were found to be essential to the institutional dimension of financial security.

57 First, the salaries of provincial court judges may generally be reduced, increased or frozen but in order to do this, governments must resort to a body (usually called a “salary commission”) that is independent, effective and objective, and that will make recommendations. The provincial governments have a constitutional duty to make use of this process. The existence of such a body makes it possible for the legislative or executive branch to determine the level of remuneration while allaying the possibility of interference by way of financial manipulation or the perception that such a possibility of interference exists. The recommendations of this commission are not binding on the executive or the legislature. However, they may not be ignored lightly. If a decision is made to ignore them, the decision must be justified, if necessary, in a court of law on the basis of a simple rationality test. Such a process accordingly promotes the impartiality of the judiciary and its appearance by ensuring that the financial security of judges will not be at the mercy of political meddling.

58 Further, any negotiation — in the sense of trade-offs — concerning the salaries of the judges between a member or representative of the judiciary, on the one hand, and a member or representative of the executive or legislative branch, on the other hand, is prohibited. Such negotiations are fundamentally inconsistent with the independence of the judiciary. First, they are inevitably political as a result of the intrinsic nature of the question of salaries paid from the public

purse. Second, the holding of such negotiations would undermine the perception of the independence of the judiciary since the jurisdiction of the provincial courts entails that the government is frequently a party to disputes before those courts and salary negotiations are likely to give rise to certain obvious fears concerning the independence of the judiciary arising from the attitude of the parties to these negotiations.

59 Finally, reductions in the salaries of judges must not result in lowering these below the minimum required by the office of judge. Public trust in the independence of the judiciary would be weakened if the salaries paid to judges were so low that they led people to think that the judges were vulnerable to political or other pressures through financial manipulation. In order to counter the possibility that government inaction could function as a means of financial manipulation because the salaries of judges in constant dollars would be allowed to decline as a result of inflation and also to counter the possibility that these salaries would fall below the minimum required to ensure the independence of the judiciary, the salary commission must convene when a specified period has passed since its last report was submitted in order to examine the adequacy of the judges' salaries in light of the cost of living and other relevant factors.

60 Thus, the need to ensure that the process is depoliticized imposes negative and positive obligations on the legislative and executive branches because not only must they refrain from using their financial powers to influence judges in the performance of their duties, but they must also actively protect the independence of the judiciary by enacting appropriate legislative and institutional instruments.

61 The *Provincial Court Judges Reference*, *supra*, at para. 136, also indicates that these principles apply to the pensions and other benefits given to judges. Hence, any measure taken by

government that affects any aspect of the remuneration conditions of judges will automatically trigger the application of the principles relating to the institutional dimension of financial security.

62 It is now necessary to examine whether the functions of supernumerary judges and their abolition have an impact on the financial security of judges of the Provincial Court.

(ii) Application to the Instant Case

1. *Does the Elimination of the Office of Supernumerary Judge Violate the Financial Security of the Judges of the Provincial Court?*

63 It appears that when it was created, the office of supernumerary judge was thought to provide a certain flexibility within the organization of the provincial judicial system. On the other hand, it enabled the government to benefit from the expertise of experienced judges while paying only the difference between a full salary and the pension that would in any event have been paid to a judge who had elected to retire. Hence, the conditions of eligibility for the office of supernumerary judge have always accurately reflected those of eligibility for a retirement pension. Moreover, these duties have already been described as creating a “useful bridge towards retirement” (M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), at p. 46 (emphasis added)).

64 For a judge of the Provincial Court of New Brunswick who had met certain conditions of age and seniority, the possibility of becoming a supernumerary judge was added to those of retiring and receiving a pension, on the one hand, and continuing to sit full time, on the other hand. Clearly, the only way to make such a position attractive was to offer conditions that were more advantageous than those linked to retirement or full-time duties.

Normally, a judge of the Provincial Court of New Brunswick who became a supernumerary judge enjoyed a substantial reduction in his or her workload while receiving a full salary. However, the *Provincial Court Act* was silent concerning the relative size of this reduction and, in s. 4.1(5), merely left this decision to the Chief Judge of the Court. In theory, therefore, this reduction could have been minimal or even non-existent. That was, in fact, what happened in the case of Judge Rice, who had to sit full time despite his supernumerary status because of the shortage of judges. However, if such a practice had been widespread, it would almost certainly have eliminated access to the office of supernumerary judge as a reasonable choice for a judge who met the conditions of eligibility. The government of New Brunswick would then have been deprived of the benefits of flexibility and expertise contemplated when it created this office. Consequently, I do not believe that it is possible to examine the nature of the office of supernumerary judge on the basis of such an abstract reading of s. 4.1(5) of the Act that we end up completely ignoring the factual and legal contexts in which this provision was enacted. Moreover, by its very wording, which indicates that a supernumerary judge “shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge” (emphasis added), the Act appears to suggest a reduced workload.

In my opinion, therefore, it is necessary to take into account the uncontradicted evidence showing that it was understood by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court. The retirement pension received by a judge of the Provincial Court was equivalent to 60 percent of the full salary. The reasoning behind this understanding was accordingly that it was logical for a judge who was eligible for a pension equivalent to 60 percent of his or her full salary to be given an opportunity to perform 40 percent of his or her former duties in return for a full salary.

In light of what has been said above, it is my view that the system of supernumerary judges constituted an undeniable economic benefit for all the judges of the Provincial Court appointed before Bill 7 came into force and for eventual candidates for the position of judge in the court. In other words, this type of benefit was certainly taken into consideration both by sitting judges and by candidates for the office of judge in planning their economic and financial affairs. Thus, it seems to me to be wrong to suggest that the abolition of the office of supernumerary judge did not violate the collective dimension of the financial security of the Provincial Court of New Brunswick. At the very least, this office provided a right to a potential benefit of a reduced workload, the extent of which was established by the Chief Judge, that is by judicial authority independent of the Executive or other government authority. Its abolition constituted a change in the conditions of office which were advantageous to the judges by denying them the option of being eligible for a less demanding workload to be determined in a manner respectful of the institutional independence of the court. This benefit was likely to be substantial, impacting the quality and style of life of judges in their latter years. The issue here is not whether this benefit is a sufficient guarantee of financial security or judicial independence, as was the issue in *Valente* to which my colleague Binnie J. refers, but whether the supernumerary status provided a substantial benefit pertaining to financial security likely to give rise to negotiation and politicization.

In my opinion, there is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit. Both give rise to the political aspects mentioned in the *Provincial Court Judges Reference*, *supra*, that is to say they raise controversial questions of public policy and resource allocation and raise the possibility of interference by the other branches of government in the independence of the judiciary by means of financial manipulation. Indeed, as my colleague Binnie J. states, supernumerary status was adopted in New Brunswick after lengthy discussions between the government and the Provincial Court judges. Thus, the elimination of the office of supernumerary judge violates the institutional dimension of the financial security of judges of the Provincial Court of New Brunswick. A similar conclusion was drawn, moreover, by Parrett J. in *British Columbia (Provincial Court Judge) v. British Columbia* (1997), 1997 CanLII 4364 (BC SC), 40 B.C.L.R. (3d) 289 (S.C.), at pp. 314-15.

In short, I consider that the opinion stated by this Court in the *Provincial Court Judges Reference*, *supra*, requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective body so that the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law. By failing to refer the question of the elimination of the office of supernumerary judge to such a body, the government of New Brunswick breached this fundamental duty. The lack of a grandfather clause in favour of the supernumerary judges in office and the judges of the Provincial Court appointed before Bill 7 came into force also aggravates this initial violation. Consequently, Bill 7 must be declared invalid.

However, the foregoing reasoning must not be interpreted as negating or ossifying the exercise by the provinces of their legislative jurisdiction under s. 92(14) of the *Constitution Act, 1867*. While the provincial legislative assemblies have exclusive jurisdiction over “[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction”, that jurisdiction must nevertheless be exercised in accordance with the structural principles of the Canadian Constitution, including the independence of the judiciary. In other words, the New Brunswick government was pursuing a perfectly legitimate purpose in trying to make certain changes to the organization of its judiciary for reasons of efficiency, flexibility and cost savings. In light of the impact of the elimination of the position of supernumerary judge on the financial security of Provincial Court judges, it should however have exercised its legislative jurisdiction while complying with the process of review by an independent, effective and objective body prescribed by the Constitution.

2. *Justification and Section 1 of the Charter*

71 As I indicated at the beginning of my analysis, judicial independence is protected by both the Preamble to the *Constitution Act, 1867* and s. 11(d) of the *Charter*. Thus, not only is it a right enjoyed by a party subject to the threat of criminal proceedings but it is also a fundamental element underlying the very operations of the administration of justice. In other words, judicial independence functions as a prerequisite for giving effect to a litigant's rights including the fundamental rights guaranteed in the *Charter*.

72 Given the vital role played by judicial independence within the Canadian constitutional structure, the standard application of s. 1 of the *Charter* could not alone justify an infringement of that independence. A more demanding onus lies on the government. Thus, in the *Provincial Court Judges Reference*, *supra*, at para. 137, it was indicated that the elements of the institutional dimension of financial security did not have to be followed in cases of dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy. In this case, it is clear that such circumstances did not exist in New Brunswick at the time when Bill 7 was passed. Moreover, no arguments were made by the appellant in this regard.

73 Since it had been decided in the *Provincial Court Judges Reference*, *supra*, to resolve the questions in dispute solely on the basis of s. 11(d) of the *Charter*, the question as to whether the violation of this provision could be justified under s. 1 was examined (paras. 277 *et seq.*). In this process, it was stated: (i) that the government had to adduce evidence to justify the violation; and (ii) that it was the fact that the independent, effective and objective process had been circumvented that had to be justified and not the content of the government measures. Although in

my opinion a s. 1 analysis alone is not adequate to resolve the question as to whether the violation is justified, these principles remain applicable to the more demanding analysis required by the fundamental nature of judicial independence. In this case, the appellant did not adduce any evidence tending to show that its constitutional shortcomings were justified. Furthermore, in my judgment, the lack of a grandfather clause in Bill 7 aggravates the violation of judicial independence.

3. *Appropriate Relief*

74 Some of the interveners suggested that the appellant did not breach its constitutional obligations set out in the *Provincial Court Judges Reference*, *supra*, simply because under the directives issued by this Court on the rehearing in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998 CanLII 833 \(SCC\)](#), [1998] 1 S.C.R. 3, these obligations did not acquire their full effect until September 18, 1998 while Bill 7 came into force on April 1, 1995.

75 It is true that in order to ensure continuity in the proper administration of justice, the Court decided in the rehearing of the *Provincial Court Judges Reference*, to suspend all aspects of the requirement relating to the judges' salary commission, including any reimbursement for past salary reductions for one year following the date of the judgment in the first reference (para. 18). This order was designed to permit the courts whose independence was at issue to function nevertheless, while the governments proceeded to establish and implement the process of review by a commission required by the first *Provincial Court Judges Reference*. According to the order, the requirement relating to the judges' salary commission applied for the future, effective September 18, 1998. Lamer C.J. added at para. 20:

I note that the prospectiveness of the judicial compensation requirement does not change the retroactivity of the declarations of invalidity made in this case. . . . In the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality. [Emphasis added.]

76 A similar solution is appropriate in this case. The respondents instituted their legal proceedings before the *Provincial Court of Judges Reference*, *supra*, was rendered. An injustice would be perpetuated if they were not allowed to take advantage of the finding of unconstitutionality in the same way as the parties to the *Provincial Court Judges Reference*, *supra*, solely on the basis of this sequence of events. As I indicated in the preceding paragraph, the suspension of the requirement for a commission was ordered solely on the basis of necessity, in order to permit the provincial courts to operate in the meantime in the absence of the required level of independence. However, it was certainly not a case of a blanket suspension of the constitutional obligations explained in the *Provincial Court Judges Reference*, *supra* (see *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 2000 NFCA 46 (CanLII), 191 D.L.R. (4th) 225 (Nfld. C.A.), at pp. 266-80 (*per* Green J.A.)). Also, in all fairness, I consider that the declaration of invalidity must benefit the respondents who are, for all practical purposes, in the same position as the successful parties in the *Provincial Court Judges Reference*, *supra*.

77 Moreover, this declaration applies to both the elimination of the office of supernumerary judge and its replacement by a new panel of part-time judges paid on a *per diem* basis since it is impossible for all practical purposes to dissociate both these aspects of Bill 7 (*Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, at pp. 710-11; *Attorney-General for Alberta v. Attorney-General for Canada*, 1947 CanLII 347 (UK JCPC), [1947] A.C. 503 (P.C.), at p. 518). However, in order to fill the legal vacuum that would be created by a simple declaration of invalidity, the declaration will initially be suspended *erga omnes* for a

period of six months to allow the government of New Brunswick to provide a solution that meets its constitutional obligations (*Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721). However, it is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers. It is also the responsibility of the government to decide whether the existing judges' salary commission established by ss. 22.01 *et seq.* of the *Provincial Court Act* may validly consider the question of the abolition of the office of supernumerary judge.

B. Other Questions

(1) Damages

78 According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, 1970 CanLII 1 (SCC), [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, 1978 CanLII 21 (SCC), [1979] 1 S.C.R. 42). In other words “[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action” (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:

In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation.

[Footnotes omitted.]

79

However, as I stated in *Guimond v. Quebec (Attorney General)*, *supra*, since the adoption of the [Charter](#), a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of “appropriate and just” remedy under [s. 24\(1\)](#) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the “established and indisputable” laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), [1986 CanLII 2725 \(ON SC\)](#), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter, supra*, at p. 720:

An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.
[Emphasis added.]

81 In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

82 Applying these principles to the situation before us, it is clear that the respondents are not entitled to damages merely because the enactment of Bill 7 was unconstitutional. On the other hand, I do not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers. Its knowledge of the unconstitutionality of eliminating the office of supernumerary judge has never been established. On the contrary, Bill 7 came into force on April 1, 1995, more than two years before this Court expressed its opinion in the *Provincial Court Judges Reference, supra*, which, it must be recognized, substantially altered the situation in terms of the institutional independence of the judiciary. Consequently, it may not reasonably be suggested that the government of New Brunswick displayed negligence, bad faith or wilful blindness with respect to its constitutional obligations at that time.

83 Furthermore, I cannot accept the statement of Ryan J.A. of the Court of Appeal that the failure of the Minister of Justice to keep his promise to refer Bill 7 to the Law Amendments Committee was an instance of bad faith that justified the awards of damages. Even if admitted to be true, such evidence is far from establishing a negligent or unreasonable attitude on the part of government. In fact, it has no probative value as to whether, in the circumstances, the legislation was enacted wrongly, for ulterior motives or with knowledge of its unconstitutionality.

84 The claim of the respondent judges for damages is accordingly dismissed.

(2) Costs

85 Although the appeal is allowed in part, the fact remains that the respondents are successful on the principal issue, namely the constitutional invalidity of the legislation in question. I would accordingly award their costs throughout.

86 At trial, the respondents were awarded party-and-party costs. In the Court of Appeal, this decision was reversed and it was decided that the government's conduct justified the award of solicitor-client costs. It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 S.C.R. 3, at p. 80).

87 Although judicial independence is a noble cause that deserves to be firmly defended, it is not appropriate in my opinion to grant such a form of costs to the respondents in this case. I would accordingly award them their costs on a party-and-party basis.

VII. Disposition

88 The appeal is allowed in part. The *Act to Amend the Provincial Court Act* (Bill 7) is declared unconstitutional because it violates the institutional guarantees of judicial independence contained in s. 11(d) of the *Charter* and the Preamble to the *Constitution Act, 1867*. Except with respect to the respondents, however, this declaration of unconstitutionality is suspended for a period of six months from the date of this judgment* to allow the government of New Brunswick to rectify the situation in accordance with its constitutional obligations as described in this decision and in the *Provincial Court Judges Reference, supra*. Accordingly, the constitutional questions are answered as follows:

Answer to question 1: Yes, with respect to financial security.

Answer to question 2: Yes.

Answer to question 3: No.

89 The respondents' claim for damages is dismissed.

90 However, since the respondents were successful on the main issue, they are entitled to their costs throughout.

The reasons of Binnie and LeBel JJ. were delivered by

91 BINNIE J. (dissenting) — I have had the benefit of reading the reasons of my colleague Gonthier J. I agree with his statement of the broad principles of judicial independence but, with respect, I do not agree that supernumerary status as defined in the [New Brunswick Provincial Court Act](#), R.S.N.B. 1973, c. P-21, constituted an economic benefit protected by the Constitution. The respondents’ expectation that they would work only 40 percent of the time for 100 percent of the pay of a full-time judge was neither spelled out in the Act nor otherwise put in a legally enforceable form.

92 My colleague notes “the uncontradicted evidence showing that it was understood by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court” (para. 66 (emphasis added)). I do not doubt it. It seems clear that it was thus understood by both judges and government officials. The question, however, is whether the doctrine of judicial independence protects “understandings” about specific financial benefits that are pointedly not written into the governing legislation.

93 My colleague says that judicial independence must be protected by “objective legal guarantees” (para. 38). I agree. What we have here, however, is neither objective nor a guarantee. As my colleague notes (para. 65) the repealed provision of the [New Brunswick Provincial Court Act](#) defined the workload of a supernumerary judge only in terms of being “available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge” (s. 4.1(5)). The problem is not simply that the extent of the discretionary benefit was not specified in the Act. The more fundamental problem is that, as I read it, the legislation *guaranteed* no benefit at all.

94

We are not dealing here with the broad unwritten principles of the Constitution. There is no general constitutional entitlement for judges to work 40 percent of the time for a 100 percent salary. What is at issue is the claim to a particular supernumerary benefit said to be voluntarily conferred by the legislature in the 1988 Act, and thereafter unconstitutionally withdrawn in 1995. The argument is that once conferred, a benefit becomes wrapped in constitutional protection and beyond legislative recall except in accordance with the independent, objective and effective procedure mandated by the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 (“*Provincial Court Judges Reference*”).

95

In this case, however, the New Brunswick legislature refused to make a reduced workload commitment in framing the supernumerary provisions of the 1988 amendments. (No one argues that such refusal was itself contrary to unwritten constitutional guarantees.) The omission of any guarantee of a reduced workload in the original 1988 amendments was plain for all to see from the outset. The legislature thereafter refused to make sufficient funds available to fund a number of new judicial appointments to permit the supernumerary scheme to work as the judges had anticipated. The budget allocation fell well short of the earlier expectations raised by government officials, but it was consistent with the legislature’s refusal throughout to provide any sort of a legislated guarantee of a reduced workload. The result was that, while a judge on supernumerary status was required by law to do whatever judicial duties were assigned by the Chief Judge, the Chief Judge was prevented by a shortage of judges from giving effect in most cases to the expectations of the judges who elected supernumerary status.

96

As the Provincial Court judges were given no guarantee in the Act, it follows that the anticipated reduced workload attaching to supernumerary status contended for by the respondents

formed no part of the constitutional guarantee of judicial independence of the court of which they were members. The repeal of a potential benefit voluntarily conferred by the legislature, that was wholly discretionary as to whether in practice it produced any benefit at all, could not and in my view did not undermine their institutional independence. I would therefore allow the appeal.

Facts

97 Supernumerary status was introduced in New Brunswick by the 1987 amendments to the Act, which came into force January 1, 1988. From then until its repeal seven years later, six Provincial Court judges elected supernumerary status. Their varied work histories illustrate the basic flaw in the respondents' legal argument, namely the absence of *any* guaranteed benefit — let alone a 40 percent workload benefit — attaching to supernumerary status under the legislative scheme.

98 The respondent, Judge Douglas Rice, elected supernumerary status on April 30, 1993 after more than 21 years on the bench. His workload was not reduced to 40 percent of what it had been. It seems not to have been reduced significantly between 1993 and his eventual retirement.

99 In the companion case the respondent, Judge Ian Mackin elected to become supernumerary on August 15, 1988 after 25 years on the bench. In the initial period his workload did not reduce appreciably either but thereafter he eased off, travelled extensively, and for at least five years prior to 1995 was able to winter for six months or so in Australia while drawing 100 percent of the salary of a Provincial Court judge on regular status.

100 Judge James D. Harper, one of the other judges who elected supernumerary status continued, like Judge Rice, more or less at full throttle. Some of the supernumerary judges he thought did “little or no work”, i.e., much less than a 40 percent workload. Others he thought worked “very hard indeed”. On November 7, 1994 Judge Harper wrote to Chief Judge Hazen Strange:

Naturally, I have been well aware that many of the supernumeraries had not been pulling their weight and were receiving full pay for little or no work. As you well know, however, there are at least two such Judges who work very hard indeed.

101 The uneven workload was caused by many factors, including both the receptiveness and/or professionalism of supernumerary judges and, more importantly, the severe resource constraints confronting the Provincial Court as a whole. There were only six supernumerary judges and, as stated, the government failed to appoint judges to replace at least two of them, namely Judge Rice and Judge Harper. As the Chief Judge explained in his testimony:

A. The most difficult administrative responsibility and the one that took the most time was assigning judges around the Province. At some stages we had more courts sitting on a given day, almost, than we had judges, and we had a number of satellite courts — I think at one stage 21 — I think we had at one stage 24 permanent courts and we only had something like 23 judges. So the most difficult part of my job, really, was to assign judges to courts so that they wouldn’t go empty.

Q. Okay.

A. And that was true for ten years.

102 The administrative troubles of the Chief Judge did not end on March 3, 1995, when royal assent was given to *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 repealing the provisions permitting supernumerary status. By law, each of the six incumbent judges on supernumerary status was required to elect by April 1, 1995 whether to retire or to work full-time as a member of the court. Each of them did so except the respondent Judge Mackin who refused to

elect one way or the other, apparently taking the view that to make an election would be to give the 1995 repeal undeserved credibility. In his view the repeal was unlawful, and on April 25, 1995, he gave notice to the Crown of his intention to challenge in court its constitutionality.

103 The following day, April 26, 1995, without waiting for his constitutional challenge to proceed, Judge Mackin entered a courtroom that was not in session in the provincial courthouse at Moncton and in the presence of a couple of Crown attorneys and other members of the bar declared that he would no longer “sit, hear and decide cases under the duress of these amendments”.

104 By letter dated May 17, 1995 he was ordered back to work by his Chief Judge. Judge Mackin declined to comply. In his view he could no longer be considered “independent” within the meaning of s. 11(d) of the *Canadian Charter of Rights and Freedoms*.

105 On June 16, 1995 Judge Mackin’s application for an injunction to restrain the Chief Judge from “assigning, designating or otherwise requiring [him] to perform Judicial . . . duties” was dismissed by Russell J. of the Court of Queen’s Bench.

106 The Chief Judge took the view that Judge Mackin’s constitutional objection had been overruled by a superior court, and that public confidence in the judiciary would suffer unless Judge Mackin accepted that legal result unless and until it was overturned by a higher court. Thus, on July 19, 1995, although he appeared to share Judge Mackin’s view of the invalidity of the legislation repealing supernumerary status, the Chief Judge wrote to Judge Mackin to say “I believe you have had sufficient time to study the decision by Justice RUSSELL”. He then reiterated his insistence that Judge Mackin return to work. Judge Mackin’s response was to

declare himself on sick leave. This was eventually supported by a one-sentence “report” from a Dr. Paul Doucet dated August 2, 1995 advising that Judge Mackin would not be returning to work for “an undetermined period of time because of medical reasons”. When asked by the Chief Judge for an explanation from Dr. Doucet of the “medical reasons”, Judge Mackin had his lawyers respond that it was “entirely possible” that the Chief Judge’s request for an explanation was in contravention of the provincial *Human Rights Act*. The legal basis for such a curious suggestion was not disclosed.

107 Eventually a pattern developed whereby Judge Mackin, when he worked at all, would go into court and frequently either adjourn matters for lengthy periods of time or enter a stay of proceedings. As Chief Judge Strange testified:

What was happening — there was one case, particularly — it was a rather terrible one where the alleged victim was a young person, a sexual assault — that was just put over for a month or two or three or four. Witnesses were showing up; the Crown was bringing witnesses in, sometimes from far away, sometimes from right there. It would just be adjourned, adjourned, adjourned, and it was making a farce of the situation; it wasn’t fair to the accused; it wasn’t fair to the prosecutors; it wasn’t fair to the witnesses, and simply nothing was going ahead in his court

108 On November 14, 1995, the Chief Judge obtained from the Court of Queen’s Bench a *mandamus* order requiring Judge Mackin “to hold sittings at the places and on the days designated by the Chief Judge of the Provincial Court of New Brunswick and to hear and determine cases properly brought before him during such sittings”. Judge Mackin’s appeal from this order was dismissed (with a variation in costs) on April 12, 1996.

109 In the meantime Judge Mackin had continued with his policy of granting a stay of proceedings to any accused who requested it. This had the effect of preventing the further

prosecution of some quite serious criminal charges. In *R. v. McCully* on February 13, 1996, for example, the following exchange took place in Judge Mackin's court:

[Crown Attorney]: . . . I wish the record to indicate clearly that the Crown was prepared to proceed. Our witnesses, who are present, we had nothing to give notice of any motion [i.e. for a stay of proceedings].

Court: Yeah, so the — this case is stayed due to the non-structural independence of the Provincial Court.

[Crown Attorney]: Might I presume, Your Honour, that in all cases in which you're going to be sitting, you'll be staying proceedings?

Court: If anybody requests it.

[Crown Attorney]: As long as someone makes the request?

Court: Yeah.

[Crown Attorney]: Okay.

Court: Well, that's my decision.

110 As regularly as Judge Mackin granted a stay of proceedings in these cases his decision was reversed by the New Brunswick Court of Appeal. On June 26, 1996 it reversed Judge Mackin in *R. v. Woods* (1996), [1996 CanLII 18836 \(NB CA\)](#), 179 N.B.R. (2d) 153. On February 12, 1997 he was again corrected in *R. v. Lapointe*, [1997] N.B.J. No. 57 (QL) (C.A.). On June 23, 1997 the Court of Appeal had to repeat again its disapproval of the entry of a stay of proceedings in similar circumstances in *R. v. Leblanc* (1997), [1997 CanLII 9554 \(NB CA\)](#), 190 N.B.R. (2d) 70.

111 On April 10, 1996, the New Brunswick Minister of Justice complained about Judge Mackin's conduct to the Judicial Council of New Brunswick. About a week later, on April 19, 1996, Judge Mackin retaliated with a letter to the provincial Solicitor General requesting that contempt proceedings be brought against the provincial Minister of Justice. The province eventually rejected Judge Mackin's demand based on an opinion from the Deputy Attorney General of Alberta.

112 On June 5, 1996 the Judicial Council took the view that it ought not to take action in Judge Mackin's case until the various court proceedings had been "finally dealt with" and concluded that "the present complaint is premature".

113 Those who were required to appear in Judge Mackin's court bore the brunt of the difficulties. A number of extracts from the testimony of Chief Judge Strange (who, as stated, continued to express support for the constitutional challenge itself) gives the flavour of the situation in which members of the public found themselves:

This was causing a terrible situation. We had witnesses showing up, sometimes on relatively serious matters, sometimes from a great distance, and lawyers showing up, prosecutors showing up and so on, and matters were simply being stayed or more likely adjourned over to a lengthy date. And it was reaching the stage where it was simply upsetting the whole court system down there.

. . .

[Judge Mackin's] going to the courtroom and he's adjourning cases in 90 percent of the time. I was getting calls constantly that he wouldn't do any cases. He would adjourn them, adjourn them, and this has continued right up until – well, as recently I know is last December [1997] when there were 112 charges adjourned to one afternoon on December 15th. I mean that was not conducive to putting cases properly through the court and it was not conducive to treating people properly.

114 In these circumstances, the Chief Judge and his colleagues ultimately decided not to ask Judge Mackin to take on cases of any importance, as the Chief Judge explained in evidence:

I didn't want, as Chief Judge, any big cases where victims would be humbled or hurt or witnesses would show up and be sent home. I didn't want anything like that going in there. We'd had enough of that and it was wrong.

115 The respondent Judge Douglas Rice carried his full work load through to the date of his retirement on October 15, 1997. No replacement judge was named until after his departure. Judge Harper died in office. No replacement judge was named until after his death. The respondent Judge Ian Mackin reached mandatory retirement age on April 7, 2000.

Analysis

116 Judicial independence is a cornerstone of constitutional government. Financial security is one of the essential conditions of judicial independence. Yet, unless these principles are interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts.

117 In *Valente v. The Queen*, [1985 CanLII 25 \(SCC\)](#), [1985] 2 S.C.R. 673, this Court made the fundamental point that the guarantee of judicial independence was for the benefit of the judged, not the judges. Its purpose was not only to ensure that justice is done in individual cases, but to ensure public confidence in the court system as a whole. Le Dain J. stated at p. 689:

Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

118 A similar note was struck by Lamer C.J. in *R. v. Lippé*, [1990 CanLII 18 \(SCC\)](#), [1991] 2 S.C.R. 114, at p. 139:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a “means” to this “end”. If judges could be perceived as “impartial” without judicial “independence”,

the requirement of “independence” would be unnecessary. However, judicial independence is critical to the public’s perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

It should be stated that neither Judge Rice nor Judge Mackin suggest that the 1995 repeal affected in any way their impartiality. Nor, I think can the repeal be said to have undermined their individual independence because their full salary and security of tenure were not affected. Their argument is that it undermined the *institutional* independence of the court of which they were members.

119 In the *Provincial Court Judges Reference*, *supra*, Lamer C.J. returned to the need for a purposive interpretation of the guarantee of judicial independence at para. 156 where he adopted this proposition:

Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive.

120 Lamer C.J. emphasized the point again at para. 193:

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is “for our sake, not for theirs”. . . .

121 The solution mandated in the *Provincial Court Judges Reference*, *supra*, was to erect an institutional barrier (an “independent, effective and objective process”) between the legislature and executive on the one hand and the judiciary on the other to deal with matters related to the judges’ financial security. The constitutional requirement was to “depoliticize” the relationship.

This appeal does not put in issue the merits of the solution. It does put in issue the boundaries of what may fairly be described as matters related to the guarantee of financial security.

122 The need for a purposive approach was acknowledged by the New Brunswick Court of Appeal in these cases, *per* Ryan J.A.:

The *Re Provincial Court Judges* case focused on the independence of the judiciary, a concept frequently misunderstood because its purpose is a protection to the public, not a benefit to judges. [Emphasis added.]

((1999), [1999 CanLII 4752 \(NB CA\)](#), 235 N.B.R. (2d) 1, at para. 25)

In light of the history of this litigation it would not be surprising if the witnesses and parties and members of the public in Judge Mackin’s court from 1995 onwards “misunderstood” the concept of judicial independence in so far as it is said to be for their benefit, and not for the benefit of the judges.

123 The legislature *could* have provided (but did not) that a supernumerary judge was obliged to work no more than 100 of the 251 court sitting days per year. In that event, I would have agreed with my colleague Gonthier J. that legislative repeal of such a significant fixed benefit without a prior review by an independent, effective and objective process (such as a remuneration commission) would be unconstitutional. Nothing in these reasons should be read as dissenting in any way from the process mandated in the *Provincial Court Judges Reference* to depoliticize the adjustment of judicial compensation.

124 My disagreement with my colleague is therefore quite narrow, and proceeds in the following steps:

- (i) the essentials of judicial independence, including financial security, necessarily reside in objective and enforceable guarantees established in the governing law;
- (ii) Provincial Court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured;
- (iii) Provincial Court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured;
- (iv) Provincial Court judges on supernumerary status were not guaranteed a 40 percent workload in exchange for full pay, or indeed any reduction in workload of an enforceable nature;
- (v) a constitutional rule that provided that any decrease or increase in an undefined judicial workload could only be initiated through a remuneration commission would be unworkable;
- (vi) the existence (or repeal) of discretionary benefits does not threaten judicial independence;
- (vii) the disappointed expectations of the Provincial Court judges, however understandable, do not justify a finding of unconstitutionality.

I propose to deal with each of these points in turn.

- (i) *The essentials of judicial independence, including financial security, necessarily reside in objective and enforceable guarantees established in the governing law.*

125 The bedrock of judicial independence, whether in relation to the individual judge or to the court of which he or she is a member, is the requirement of objective non-discretionary guarantees. Thus in *Valente*, Le Dain J. referred at p. 688 to the test adopted in that case by the Ontario Court of Appeal, namely whether the alleged deficiencies in “the status of [the judges of the Ontario Provincial Court] gave rise to a reasonable apprehension that the tribunal lacked the capacity to adjudicate in an independent manner”. Le Dain J. added, “[t]his I take to be more clearly a reference to the objective status or relationship of judicial independence, which in my opinion is the primary meaning to be given to the word ‘independent’ in s. 11(*d*)” (emphasis added). Thus, he concluded, “judicial independence is a status or relationship resting on objective conditions or guarantees” (p. 689).

126 The essential guarantees of judicial independence (both individual and constitutional) are security of tenure, financial security and administrative independence in relation to adjudicative matters.

127 For present purposes, the discussion in *Valente* of financial security is instructive. According to Le Dain J., the salaries of superior court judges, “fixed” in a federal statute pursuant to s. 100 of the *Constitution Act, 1867*, represent “the highest degree of constitutional guarantee of security of tenure and security of salary and pension” (p. 693), but this is not essential. While Ontario Provincial Court judges’ salaries were not “fixed” by legislation, they were guaranteed by regulation. “The essential point”, Le Dain J. said, “is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge” (p. 706).

128 The situation here is very different. There were no guarantees of reduced workload in the Act. As the respondent Judge Rice testified, “If the Chief Judge asked me to do something, I

did it”. The rule that security of tenure, financial security and administrative independence in relation to adjudicative matters must be guaranteed in the law in *explicit non-discretionary terms*, was endorsed in *Beauregard v. Canada*, [1986 CanLII 24 \(SCC\)](#), [1986] 2 S.C.R. 56, at p. 75, and *Lippé*, at p. 143. Thus, if a measure is essential to judicial independence it cannot be left up in the air as a matter of discretion.

129 In the *Provincial Court Judges Reference*, Lamer C.J. pointed out at para. 112 that “the objective guarantees define th[e] status” of independence (emphasis in original). In that case statutory provisions that lacked concrete guarantees were held insufficient to ensure judicial independence. Thus an Alberta statutory provision that said the government *may* set judicial salaries for provincial judges was declared unconstitutional even though a regulation subsequently made under the same Act made it mandatory (paras. 221-22). A Manitoba statutory provision withdrawing provincial court staff as a cost cutting measure on specific days (“Filmon Fridays”) was declared unconstitutional because the Court refused to “read down” the legislation to eliminate the objection. Lamer C.J. stated that “to read down the legislation to its proper [i.e. constitutional] scope would amount to reading in those objective conditions and guarantees” (para. 276). This, he said, was not permissible.

130 In this case we are asked to read specific guarantees of workload reduction into the *Provincial Court Act* in order that we can declare their repeal to be unconstitutional.

131 It is only by reading in such guarantees that repeal of the statutory provisions could be said to require recourse to a remuneration commission. If, as I believe, there is no guarantee in the legislation of workload reduction, there is nothing to repeal that could be said to entail one of the objective guarantees that “define” the status of judicial independence (*Provincial Court Judges Reference, supra*, at para. 112).

132 Perhaps the closest analogy to the case now before us is provided by one of the provisions struck down in *Valente, supra*. It authorized the reappointment of retired Ontario Provincial Court judges to sit “at pleasure” (p. 699). The evidence accepted by the Court was that by *tradition* these appointments were as secure as the tenure of regular Provincial Court judges who held office during good behaviour. The existence and strength of this tradition was accepted by the Ontario Court of Appeal as sufficient to guarantee judicial independence. Le Dain J. noted that “Howland C.J.O. placed considerable emphasis on the role of tradition as an objective condition or safeguard of judicial independence” (p. 699). Howland C.J.O. had cited, *inter alia*, P. W. Hogg, *Constitutional Law of Canada* (1977), at p. 120:

The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.

133 This Court disagreed. The “fine analysis of the language of the provisions” was thought to be very important indeed. Le Dain J., speaking for a unanimous Court, ruled that traditions and expectations, however strongly observed, “cannot supply essential conditions of independence for which specific provision of law is necessary” (p. 702 (emphasis added)). This is particularly the case where the terms of the law are at odds with the alleged expectation. The Ontario law provided, contrary to the alleged tradition, that retired judges would on reappointment hold office “at pleasure” (p. 699). Here the law simply provided that the judge on supernumerary status would be available to perform whatever judicial duties were assigned. To read a specific workload limitation into such a provision would be to amend the legislation.

134 In my view, with respect, there must be a specific provision of law to guarantee a judge full-time pay for part-time work if it is sought (as here) to make that guarantee part of the

bulwark of judicial independence.

135 The lesson from these cases is that traditions and expectations, however widely shared, do not constitute “objective conditions” for the purposes of defining the judicial independence required by s. 11(d) of the *Charter*. The Court cannot amend the legislation by reading in expectations, however widely shared (as in the anticipation of a 40 percent workload of supernumerary judges in New Brunswick) or expectation based on longstanding tradition (as in the tenure of post-retirement appointees to the Ontario provincial bench).

136 I do not underestimate the importance of the unwritten customs and traditions that support the institutional independence of the courts. I say only that a particular workload benefit, which never rose to the level of being specified let alone guaranteed in law, does not constitute part of the “objective guarantees” that define the status of judicial independence and which thereby attract constitutional protection.

137 If the legislative provision is so imprecise as not to be capable of constituting part of the guarantee of financial security (or, more broadly, of judicial independence), its existence is not essential to the constitutionality of the court, and its repeal is not therefore constitutionally prohibited.

(ii) *Provincial Court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured.*

138 In *Valente*, *Beauregard*, *Lippé*, and the *Provincial Court Judges Reference*, the Court established “the essential” guarantees of judicial independence. One of these is financial security. No objection is taken to the statutory guarantee of a fixed salary to Provincial Court judges on

regular status (s. 14(2)). The judges on supernumerary status were guaranteed the same salary by their inclusion in the definition of “judge” in s. 2(1) of the Act. When the respondents returned to regular status on April 1, 1995, there was no change in either the amount of their pay or its protected status.

(iii) *Provincial Court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured.*

139 The respondents Mackin and Rice continued to enjoy the same security of tenure as Provincial Court judges on regular status. As mentioned, they were included in the definition of “judge”. I agree with my colleague Gonthier J. (at para. 47) that their supernumerary status did not give rise to any special tenure. Those who elected to become supernumerary were not “appointed” or “re-appointed”. The original appointment continued in effect with the *potential* of a reduction in workload of an indeterminate amount at an indeterminate time. As the respondent Judge Rice wrote in his letter of February 17, 1993 to the Minister of Justice electing supernumerary status:

This election is not, in any way, to be considered as my resignation from my appointment as a Judge of the Provincial Court.

140 In the New Brunswick Court of Appeal, Ryan J.A. argued that the use of the word “office” in s. 4.1(3) implied a separate and distinct tenure that was wiped out by the 1995 amendments. It is true that the word “office” has a special connotation in law, but it is not associated with any particular security of tenure: *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), *per* Lord Reid, at p. 65. In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, 1978 CanLII 24 (SCC), [1979] 1 S.C.R. 311, the “office” holder was a probationary police constable whose tenure was at pleasure. If Ryan J.A. were correct that use of the word “office” connoted a distinct and separate tenure from that of the Provincial Court judges on regular status,

the result would have been an office without clear legislative definition. The holders of the allegedly distinct office of supernumerary judge would have lacked from the outset the objective guarantees of judicial independence. Such a judicial “office” would have been unconstitutional. As pointed out by Lamer C.J. in the extract from the *Provincial Court Judges Reference* previously cited at para. 39, it would not be for the Court to read into the word “office” the necessary guarantees of tenure to make up for the legislative deficiency.

(iv) *Provincial Court judges on supernumerary status were not guaranteed a 40 percent workload or any other reduction.*

141 Supernumerary status was adopted in New Brunswick in 1988 after lengthy discussions between the government and the Provincial Court judges which had commenced in about 1981.

142 The theory underlying the 40 percent workload expectation was that to be eligible for supernumerary status a Provincial Court judge must meet all the conditions for retirement except the desire to retire. If he or she elected to retire, the state would be required to pay a pension equivalent to 60 percent of the average of specified years of judicial earnings. There would be no further judicial work. If he or she elected supernumerary status, however, the judge could make up the 40 percent loss of income occasioned by retirement by continuing to work 40 percent of the time. This expectation of a greatly reduced workload was widely shared by Ministers, judges, civil servants and others in New Brunswick. But it was not written into the *Provincial Court Act*.

143 To be clear, the respondent Rice, as a Provincial Court judge with supernumerary status, was *not* a retired person with a part-time job. He was eligible to retire but he had elected not to. He was not drawing a pension “topped up” by 40 percent pay for 40 percent workload. He

was receiving a full-time salary and all the benefits of a judge on regular status. He continued to receive medical coverage. His life insurance continued to be subsidized to the extent (at the date of his retirement) of over \$2,000 per month. Any increase in annual salary would translate into a higher base on which his pension would eventually be calculated (albeit, as with judges on regular status, he was required to continue pension contributions in the interim). The respondent Mackin was in a similar position. In exchange for these benefits they continued to hold themselves available for work as assigned by the Chief Judge. In a province short on judicial resources, the assignments in some cases amounted more or less to full-time employment. If the assignments proved unexpectedly onerous, either one of them could have elected to retire on full pension at any time.

144 The key provision, as stated, is [s. 4.1\(5\)](#) of the *Provincial Court Act*, which said:

4.1(5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

145 If “full” workload for a Provincial Court judge is taken to be plus or minus 251 court days a year (which is the assumption on which the repealing legislation is based), 40 percent of that is plus or minus 100 days a year. The legislation establishing supernumerary status obviously could have specified a precise figure but just as obviously it did not do so. Instead the obligation was to do the judicial work assigned by the Chief Judge, whatever and whenever it might be.

146 My colleague Gonthier J., in para. 65, places emphasis on the words “time to time” in s. 4.1(5). It was not, of course, contemplated that the first assignment by the Chief Judge would necessarily be the last. It was to be expected that from “time to time” the assignments would change. In my view that phrase indicates a multiplicity of assignments, not a reduction in

workload. With respect, an *increase* in overall workload would be equally consistent with the statutory language (such as, for example, a transfer to a busier court).

147 When the respondent, Judge Rice, who at the time was a judge of over 20 years' experience, was considering whether to elect supernumerary status in 1992, he sought a number of clarifications from the Minister of Justice. He asked for information as follows:

(3) WORK ASSIGNMENTS. Supernumerary Judges are required to sit a minimum of 40% of working days each year, as assigned by the Chief Judge, the Associate Chief Judge, or a Judge designated for the purpose of assigning Judges in a Judicial District. [Emphasis in original.]

This was confirmed by the Minister in writing on March 16, 1992:

A supernumerary judge is required to sit the equivalent of a minimum of 40% of a full-time judge's work year. The Chief Judge, or the Associate Chief Judge, is responsible to assign sittings. [Emphasis added.]

148 Neither the respondent, Judge Rice, nor the Minister suggested that there existed a *maximum* workload short of 100 percent of the workload of a judge on regular status. Having regard to the varied work experiences of Judge Rice, Judge Harper and Judge Mackin, I do not think, with respect, that the evidence supports my colleague's conclusion, at para. 65, that "[n]ormally" a judge on supernumerary status "enjoyed a substantial reduction in his or her workload". The experience was too mixed to permit any generalization in that regard, in my opinion.

149 The assignment responsibility rested with the Chief Judge, but the reality was that he could only work within the resources the province provided. The respondents' position is, in truth,

not only that the 40 percent workload should be read into the Act, but that the province had a constitutional responsibility to provide enough judges to make the 40 percent workload achievable. This, with respect, is too much to “read into” a statute that simply says a judge is to do the work assigned by the Chief Judge.

- (v) *A constitutional rule that provided that any decrease or increase in an undefined judicial workload could only be initiated through a remuneration commission would be unworkable.*

150 The judgments on appeal state that the 1995 repeal of supernumerary status was unconstitutional because it did not receive prior review by an independent, effective and objective process (e.g. a remuneration commission). Quite apart from the fact the constitutional requirement of an independent, effective and objective process was not elaborated by this Court until the *Provincial Court Judges Reference* in 1997, two years after the amendments in issue here, I cannot accept this argument.

151 It is useful to reiterate that the respondents received the same salary after the repeal of the supernumerary status as they did beforehand.

152 In oral argument it was suggested that if a supernumerary judge were required to do more work for the same amount of money, his hourly rate, if it may be so conceived, was reduced. Instead of earning a full salary for a 40 percent workload he had to work a full year for the same amount of money. However, once the debate is properly focused on workload, and the so-called workload guarantee is related to the process mandated by the *Provincial Court Judges Reference*, the question arises as to how a remuneration commission would be supposed to give *prior* effective review to increases or decreases in judicial workload across the province.

153 The evidence shows that in 1990-91 each judge in the Provincial Court at Fredericton disposed of 2,714 cases a year. In Campbellton the equivalent per year was 1,775 cases and in St. John it was 2,729 cases. The busiest Provincial Court was Moncton where each of the judges disposed of about 5,335 cases per year. In each instance the Provincial Court judge on regular status received the same salary. If the statistics are to be believed, judges in different regions therefore had a very different workload and, because each earned the same salary, a very different “hourly” rate.

154 The Chief Judge testified that the statistics were simplistic and failed to take into account many factors, including the nature of the cases. I agree with his criticism, but even making a generous allowance for the crudity of the statistics, the workload variation is impressive. In these circumstances how many hours a year constitutes a 100 percent workload on which the 40 percent workload is to be calculated? Are we to take a provincial average or is a judge entitled to look at the historical average for his or her region? Or his or her personal history? This again provides unevenly moving targets. The statistics show that whereas the workload in Moncton was expected to grow by 17 percent in 1991-92, the increase in St. John was only 2 percent. In Campbellton the expected growth was 66 percent.

155 The constitutional requirement is for prior reference of a change in benefits to the remuneration commission. Unless the Legislature was prepared to fix a specific number of work days per year (and, as stated, 100 days would be 40 percent of a notional 251 days a year sat by Provincial Court judges on regular status), I do not understand how “workload” as an abstract statistic can be fixed in advance. The bare concept of a *reduced* workload is too elastic to provide a manageable standard. The legislature, as stated, was clearly not prepared to guarantee any fixed and defined benefit, or indeed any benefit at all.

The bottom line is that the 1995 New Brunswick legislation established a *potential* benefit of wholly indeterminate value. It offered the possibility of less work for the same amount of pay, but the possibility of achieving this expectation was always subject to the exigencies of each court location and the resources available to the Chief Judge to get done the judicial work that had to be done. The *Provincial Court Judges Reference* established the requirement of an independent, effective and objective process to deal with financial security. The salary of supernumerary judges was secure. Each supernumerary judge received full pay. An extension of the remuneration commission process to an undefined “reduced” workload is neither sensible nor required. Yet it is the repeal of the workload benefit supposedly guaranteed by supernumerary status that is said to be unconstitutional because the province did not first go through a remuneration commission process.

(vi) *The existence (or repeal) of discretionary benefits does not threaten judicial independence.*

The potential advantages of supernumerary status lay either in the discretion of the Chief Judge or his delegate who was responsible for assigning the work (or assigning a specific courtroom) to the supernumerary judge or, alternatively in the discretion of the provincial government in its overall budgetary allocation for the Provincial Court and its willingness to appoint new judges to replace supernumerary judges to help to deal with the expanding workload.

In my view the culprit here, if culprit there be, is the provincial government’s refusal to allocate adequate resources to the court. Chief Judge Strange was clearly willing to exercise his discretion to allow very significant workload reductions to supernumerary judges, but his priority was to staff the courts on a week-to-week basis, and the lack of adequate resources left him unable to accomplish both objectives. As between the public interest in seeing the courts operate on a full-time basis and the private interest of some of the judges on supernumerary status in realizing

their expected benefits, he chose correctly, and inevitably, the public interest. The issue, therefore, is really about the government's exercise of its discretion over the Provincial Court budget.

159 In *Valente* it was contended that government control over such discretionary matters as post-retirement reappointment, or leaves of absence with or without pay, or permission to engage in extra-judicial employment, violated judicial independence. This argument was rejected. Le Dain J. stated at p. 714:

While it may well be desirable that such discretionary benefits of advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(d) of the *Charter*. In so far as the subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

160 When a similar objection was raised in the *Provincial Court Judges Reference* in relation to the discretion of the Government of Prince Edward Island over judges' sabbatical leave, Lamer C.J. simply cited the above passage from *Valente* and added, "To my mind, the same reasoning applies here" (para. 207).

161 Even if one were to assume (as I do) that the variable benefits of supernumerary status were a function of the government's budget control rather than within the gift of the Chief Judge, I do not think either the existence of these benefits or their ultimate repeal in 1995 violated the "objective guarantees" of judicial independence. As noted by Lamer C.J. in the *Provincial Court Judges Reference* at para. 113, the question is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and other relevant facts, after viewing the matter realistically and practically, would conclude that the tribunal or court was

independent. In my view such persons would not regard the creation, continuation or ultimate repeal of the discretionary workload benefit associated with supernumerary status as compromising judicial independence. They would hold, I believe, a loftier view of their judges.

(vii) *The disappointed expectations of the Provincial Court judges, however understandable, do not justify a finding of unconstitutionality.*

162 In the end this appeal comes down to the fact that the respondents formed a quite legitimate expectation of a substantially reduced workload if they elected supernumerary status and their expectation was not honoured. A reduction to roughly 40 percent of a notional workload was permitted, but not required, by the *Provincial Court Act*. The evidence does not clearly source this expectation in the Minister's office (i.e., the Minister's letter talked about a minimum of 40 percent), but even if the respondents could establish all of the elements of the administrative law doctrine of legitimate expectation as set out in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, and *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, it would not assist the respondents' attack on the repealing legislation. As Sopinka J. pointed out in *Canada Assistance Plan*, at p. 558, the doctrine does not apply "to a body exercising purely legislative functions". Nor can it operate to entitle the respondents to a substantive as opposed to procedural remedy. In some ways the respondents' effort to use their disappointed expectations to attack the validity of the legislative amendments in this case parallels the unsuccessful effort of the Government of British Columbia to use expectations created by federal-provincial funding arrangements to attack the validity of amendments to the Canada Assistance Plan in that case. The attempt was rejected there and it should be rejected here as well.

In summary, the 1988 amendments to the *Provincial Court Act* enacted a form of supernumerary status that created expectations but not guarantees. Its repeal, as high-handed and offensive as it may have appeared to the respondents, did not undermine the judicial independence of the Provincial Court judges or the court of which they were members. The repeal was undertaken in a period of budgetary cuts which impacted all the residents of New Brunswick. Supernumerary benefits for judges competed with the closure of hospital beds and the reduction or elimination of crucial public expenditures in other areas. The New Brunswick legislature sought to change a system (which had so unevenly benefited Judge Rice, Judge Harper and Judge Mackin) to a pay-for-work system in which a retired judge who in fact works about 100 days a year (i.e., 40 percent of a notional 251 court days) while drawing a full pension (i.e., equivalent to 60 percent of a full salary) would receive “top up” *per diem* payments equivalent to the remaining 40 percent of the full salary. The new system, according to the evidence, was designed to allow judges on supernumerary status to get the same financial benefits as under the 1988-95 scheme but by means of a method of payment that tied rewards to actual work. It appears that all retired Provincial Court judges are eligible for *per diem* work if they want it. Work assignments are still made by the Chief Judge within an overall budget. Whether the new system is better or fairer than the old system is not for us to judge. The only question before us is whether the change is unconstitutional. In my view, for the reasons discussed, the repeal of the former system of supernumerary status, as much as the original enactment, was within the legislative competence of the Province of New Brunswick in relation to “[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts” under s. 92(14) of the *Constitution Act, 1867*.

Conclusion

I would allow the appeal with costs. I would therefore answer the first two constitutional questions in the negative and, in light of that conclusion, the third constitutional question does not arise.

Appeal allowed in part with costs, BINNIE and LEBEL JJ. dissenting.

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Solicitors for the respondent Rice: Stewart McKelvey Stirling Scales, Fredericton.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

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Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: The Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitors for the intervener the Canadian Judges Conference: Ogilvy Renault, Montréal.

Solicitors for the intervener the Canadian Association of Provincial Court Judges: Myers Weinberg, Winnipeg.

* On June 17, 2002, the period of suspension was extended to February 14, 2003. On January 24, 2003, the period of suspension was further extended to August 14, 2003.

TAB 23

McLean v. Bradley, 1878 CanLII 22 (SCC), 2 SCR 535

Source: Supreme Court of Canada
Date: 1878-06-04
Citation: McLean v. Bradley, 1878 CanLII 22 (SCC), 2 SCR 535,
<<https://canlii.ca/t/ggx6j>>, retrieved on 2026-03-23

Supreme Court of Canada
McLean v. Bradley (1878) 2 SCR 535
Date: 1878-06-04

Roderick McLean

Appellant

And

Benjamin Bradley

Respondent

1878: Feb. 6, 7; 1878: June 4.

Present:—Sir William Buell Richards, Knt., C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

The Chief Justice was absent when judgment was delivered.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Absent and absconding debtors Act of Nova Scotia, Ch. 97, Rev. St. of N. S.—Attachment—Demurrer—Conversion by Sheriff—Corporation, sale by—Justification under Order of Court—Seal.

One *H.* instituted proceedings against the *L. C. M. Company*, the officers of which resided in the *United States*, but which did business in *Nova Scotia*, and, on the 25th May, 1872, caused a Writ of Attachment to be issued out of the Supreme Court at *Amherst*, under the absent and absconding debtors Act of *Nova Scotia*,^[1] directed to the Appellant, the High Sheriff of the County of *Cumberland*. Under this Writ, the Appellant seized certain chattels, as being the chattels of the said Company. On the 12th November, 1872, an order was issued out of the said Court, directing the Appellant to sell, and the Appellant did sell said chattels as being of a perishable

nature. On the 11th December, 1874, a discontinuance was filed in the said cause by *H.* On the 30th May, 1876, the Respondent commenced an action against the Appellant for the conversion of the chattels in question, contending that the Company, having failed in its operations and being desirous of winding up its affairs, and being indebted to him, had sold and conveyed to him the said chattels by a certain memorandum of sale, dated July 5th, 1867, "signed on behalf of the Company," by one "*Hawley*, agent." To this memorandum a seal was affixed which did not purport to be the seal of the Company. The Appellant pleaded to the Declaration, that he did not convert; goods not Plaintiff's; not possessed; and also a special plea of justification, setting forth the proceedings by *H.*, and that he had seized and sold the goods as the goods of the Company, in obedience to the attachment and order issued in said proceedings. The Respondent replied, setting up the discontinuance.

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The Appellant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale. He also demurred, on the ground that being bound to obey the order of the Court, he could not be affected by the discontinuance. At the trial a verdict of \$500 damages was rendered for Respondent. The Appellant obtained a rule *nisi* to set aside verdict, and the rule and demurrer were argued together. The Court below refused to set aside the verdict and gave judgment for Plaintiff on the demurrer.

Held,—That the appeal should be allowed; that the plea of justification showed a sufficient answer to the declaration; that the replication was bad, and that the verdict must be set aside and judgment be for the Defendant on the demurrer.

Ritchie, J., dissented, on the ground that the seizing under the attachment, and not the sale, constituted the conversion; that there was sufficient evidence to show that the chattels in question had been transferred by the Company to Respondent, and that under Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*, the sale of the chattels did not require to be under the corporate seal of the Company.

Per *Strong*, J.: The sale, and not the seizure, was the conversion complained of, and to this the order of the Court was a sufficient answer. *Semble*, a mere taking of the goods of a third person under a *mesne* attachment against a Defendant to keep them *in medio* until the termination of the action is not a conversion.

Per *Henry*, J.: The order for sale would not have been a justification for the original levy on the goods, as well as for the sale, if they had been the property of the Respondent, but the evidence failed to show a sale by the Company to the Respondent. Such a sale would require to be under the corporate seal of the Company, and did not come within the meaning of Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia*.

This was an appeal to the Supreme Court of *Canada* from the judgment of the Supreme Court of *Nova Scotia*, giving judgment on demurrer in favour of the Plaintiff (Respondent), and discharging a rule *nisi*, granted to the Defendant (Appellant), to set aside the verdict for the Plaintiff.

The *Lawrence Coal Mining Company*, a body corporate,

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incorporated out of *Nova Scotia*, in the State of *Massachusetts*, in the *United States of America*, under the Joint Stock Companies Act of *Nova Scotia*, commenced coal mining operations in 1862 on a colliery property at or near river *Hebert*, in the County of *Cumberland*, in the Province of *Nova Scotia*, purchased from one *George Hibbard*, and continued to work the same until 1865, when the Company became hopelessly, insolvent. *Hibbard*, the former owner, who resided on the spot, continued from the outset to be a Director, and was the only resident Director in *Nova Scotia*, and was Managing Director from 1862 up to the spring of 1867, excepting only one season in 1864, and as such had charge of all the property of the Company. He also attended all the annual meetings of the Company held at *Boston*.

To enable the Company to carry on its operations, the Company, through *Hibbard* as Managing Director, obtained from *Bradley* a loan of \$10,000, for which *Hibbard*, as Managing Director, gave a note or notes and a warrant to confess to *Bradley*, the Respondent, on which judgment was entered up by *Bradley* for \$10,022.75, for principal and interest, on the 11th September, 1865. In 1866 the real and personal property was advertized for sale under Respondent's judgment, and the real estate was sold to him for \$3,975, leaving \$6,025 still due; the personal property was not sold, and remained on the premises until July, 1867, when *Hawley*, as agent of the Company, transferred it to Respondent, who, in consideration of the transfer, gave up notes and claims for about \$1,500. *Hawley*, at the same time, gave the following memorandum of sale (filed in the case as exhibit A):—

"RIVER HEBERT, CUMBERLAND COUNTY,

"NOVA SCOTIA, July 5th,
1867.

"Know all men by these presents, that *Benjamin*

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Bradley, of *Boston*, Commonwealth of *Massachusetts*, *United States of America*, has this day purchased through *T. R. Hawley*, authorized to sell the same, the following described property, with the exception of two horses previously sold by his representative, *Ezra C. Dillingham*.

"Signed on behalf of the Company by

"T. R. HAWLEY, Agent,
(Seal).

"Signed in behalf of *Benjamin Bradley*, the purchaser, by

"EZRA C. DILLINGHAM,
(Seal)."

 GEORGE MOFFAT, (Seal).

Witness: NATHAN J. HOEY, (Seal).,

His

JESSE E. HOEY, X (Seal).

Mark.

There was no seal to this document purporting to be the seal of the Company, nor had any resolution been passed by the shareholders authorizing a sale by *Hawley*, but at an adjourned meeting of the Company, held on the 26th February, 1866, it had been, on motion, voted that Messrs. *Hawley*, *W. G. Howe* and *Alden*, should be and were thereby authorized to sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms as in their judgment would be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of said Company, and if the amount of such sale exceeded the debts the balance to be paid *pro rata* among the stockholders.

From the date of the sale, *Bradley*, and others claiming under him as proprietors, employed an agent to take care of the property, and paid all taxes and expenses connected with it. The mem. of sale was delivered by *Hawley* to *Alden*, who acted as Secretary of the Company.

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No meetings of the Company were held subsequent to that of the 26th February, 1866, until December 30 and 31, 1874, when the Company, being still largely indebted to Respondent on his judgment, by a resolution unanimously adopted by the shareholders present, further resolved that all the interest of the Company in the mining lease of the Company be transferred to Respondent.

On the 25th May, 1872, *Hibbard*, who claimed \$1,760 from the Company, brought an action against the Company, and caused a writ of attachment to be issued out of the Supreme Court at *Amherst*, under the absent or absconding debtors Act of *Nova Scotia*^[2], directed to the Appellant, as High Sheriff of the County of *Cumberland*, requiring him to seize, and in obedience to the writ the Appellant did seize, certain chattels as being the chattels of the said Company.

On the 12th November, 1872, an order was issued out of the said Court, directing the Sheriff to sell the said chattels, as being of a perishable nature within the meaning of sec. 6, of the last mentioned Act; and they were sold by the Sheriff.

On the 11th December, 1874, a discontinuance of the cause "and all proceedings thereunder," was entered in the action brought by *Hibbard* against the Company.

On the 30th May, 1876, the Respondent, contending that the chattels in question were his property, commenced an action of trover against the Appellant, the Sheriff, for the conversion of the said chattels.

The Appellant pleaded to the declaration:—1st. That he did not convert. 2nd. That goods were not the property of the Plaintiff. 3rd. Not possessed. And 4th. A special plea of justification setting forth the proceedings by *Hibbard*, against the *Lawrence Coal Mining Company*,

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and that the Defendant, as Sheriff, under the said writ of attachment, and the said order made in such proceedings, seized and sold the chattels in question as and being the chattels of the Company.

The Plaintiff replied to the fourth plea, that after the proceedings aforesaid the said proceedings were discontinued.

The Defendant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale in the fourth plea mentioned.

He also demurred to the replication, on the ground that, being bound to act in obedience to the order of the Court, he could not be affected by a discontinuance of a suit under which property was sold.

The Plaintiff joined in demurrer.

The issues of fact were tried at *Amherst* on the 16th October, 1876, before the Chief Justice, Sir *William Young*, and a jury, when a verdict was rendered for the Respondent for five hundred dollars damages.

The Appellant obtained a rule *nisi* to set aside the verdict, and the said rule *nisi* and the demurrer were argued together.

The Court below, after argument, gave judgment refusing to set aside the verdict, and, on the 2nd April, 1877, a rule was made ordering that the rule *nisi* be discharged with costs, and that the Plaintiff have judgment of the demurrer with costs.

The Appellant, thereupon, appealed to the Supreme Court of *Canada*.

Mr. Gormully, for Appellant:—

The Respondent claims title to the chattels in question by a transfer or conveyance thereof from the *Lawrence Coal Mining Company*. If once admitted to be the property of the Company, they must so remain until divested. The principal question is whether

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there was an actual sale of the goods; whether exhibit A had the effect of transferring the chattels to *Bradley*; I contend it had not. That document must operate either as a contract or conveyance. If it operates as a contract, it must be regarded as a contract under seal, or as a simple contract. It is not binding on the Company, because it does not purport to bind them, and because the seal affixed is not the corporate seal of the Company, which was necessary, there having been evidence of the existence of one. Sec. 15, ch. 87, *Rev. Stat., N. S.*, 3rd series, only establishes as a rule of statute law what was formally a rule

of common law. It has been held that as to personalty a corporation could sell it, but whether they could do so, except under seal, is another question.

The Statute says: "Acts within the scope of their charter." This sale, purporting to convey all the property, and showing an intention to abandon the object for which the Company was incorporated, should have been under seal.

Hawley never was duly authorized. There never was a meeting respecting the sale, and no evidence of that concerted action which was necessary.

D'Arcy v. The Tamar, Kit Hill and Callington Railway Co. [3]; *Ridley v. Plymo Grinding Co.* [4]. There is no evidence that the Company delegated their power; and further, if they did delegate it, they had no right to do so. The last delegation of authority is to *Hawley, Howe and Alden*—and this was a power which must have been exercised by all three, and was not a power which could be delegated. The Respondent was bound to know what was being done. *Exparte Brown* [5].

The transaction was a fraudulent one as against the

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statute of *Elizabeth* [6], there was no change of possession, and this was a document which should have been registered under the statute.

The learned counsel then proceeded to argue that the learned judge who tried the action had improperly admitted evidence and had misdirected the jury; and that as to the demurrer, the Appellants fourth plea was good in law, and replication bad because it admits and does not sufficiently avoid the plea:

Mr. Halliburton, Q. C., for Respondent:—

The Company became indebted to *Bradley* for an advance of \$10,000. In 1865, they find themselves insolvent. *Hibbard*, from whom the Company purchased their mine, was the only director resident in *Nova Scotia*, and was the only person up to this date who had any benefit from the Company. He attended all the meetings and was familiar with all that was done. In 1865, meetings were called, but nothing was done, and at last *Bradley* enters up judgment and issues execution. He unwisely allowed the matter to stand over to save Sheriffs' fees, and a conveyance became necessary from, the Company. Five days after the sale of the personal property, *Hibbard* renders an account, showing \$25 due him. The Company set off against that the rent, and considered they had paid every body; they supposed all claims were paid both in *Canada* and the *United States*. The Company authorized *Hawley* to go to *Nova Scotia* to sell the property.

[RITCHIE, J.:—Will you show us from the evidence that he was authorized by the Company?]

There is no one at present claiming the property except *Bradley*. The Company did not claim it, nor any shareholder or director on behalf of the Company.

[THE CHIEF JUSTICE:—A question has been raised

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which seems important. This property was sold by order of the Court as perishable property. How can the Sheriff be held responsible for selling this specific property under

the order of the Court?]

I am prepared to show that the Sheriff, under the circumstances, was not justified in selling.

Where there is a seal, the seal must be presumed to be the seal of the Company. *Ontario Salt Co. v. Merchants Salt Co. (limited)*[\[7\]](#).

[RITCHIE, J.:—Where is the evidence that *Hawley* had any right to use the seal of the Company?]

It is to be presumed he had the right.

[RITCHIE, J.:—What evidence raises this presumption?]

The Company took this man's money, which was the consideration for the sale.

[RITCHIE, J.:—If you can show that this party was professing to act for the Company and entered into this sale, and afterwards the Company had known of the facts and received the money, you will have good evidence that the sale was the sale of the Company.]

In 1874 a general meeting of the Company was called, and it is to be presumed the Company ratified the action of Mr. *Hawley*. When proceedings have been manifestly illegal between a Company and an individual, and the Company choose to continue these dealings, that is a ratification by the Company of such dealings.

[HENRY, J.:—The difficulty seems to me to be that there were no meetings, and no Company.]

It is to be presumed all necessary by-laws were passed to continue the Company, and the meeting of 1874 was a ratification of what was done before.

The transfer purporting to be signed and sealed by *R. Hawley*, as their agent, was given to the Secretary of

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the Company, and was never repudiated by them, and *Bradley* continued thenceforth to be in undisputed possession of the property and paid taxes on it, and employed an agent to take charge of it.

Even though the Company could not contract directly except under seal, yet they could without the corporate seal appoint an agent, whose acts and contracts within the scope of his authority were binding on the Company. 3 *P. Wms.* 419. 1 *Fonb.*, 305; *Phil. Ed.*, n. o. *Abbott's Dig. of Law of Corporations*[\[8\]](#).

The sale was not *ultra vires*, but was a lawful means of making the most of the assets of the Company to discharge its liabilities. *Featherstonehaugh v. Lee Moor Porcelain Clay Co.*[\[9\]](#); *Burrell* on assignments, 36.

The promises and engagements of a Company may as well be implied from its acts and the acts of its agent as if it were an individual. *Abbott's Dig. of Law of Corporations*[\[10\]](#).

In a case like the present the law presumes *omnia rite acta* and, unless the contrary appears, that all necessary by-laws and resolutions have been passed necessary for the validity or ratification of the acts performed by the Company's agent. *Field on Corporations*[11].

The Company, after notice to it of sale by *Hawley*, did, by their acquiescence for so many years in the possession of Respondent of the personal property sold to him, by their accepting therefor notes, &c., to the amount of \$1,500, and by their unanimous vote in 1874 in further satisfaction of the balance due Respondent, that the lease of the mine should be transferred to him, ratify and confirm the sale of the personal property to Respondent by *Hawley*, as their agent; and it must be assumed that all necessary by-laws and resolutions had been passed and adopted to ratify and confirm the sale

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by *Hawley*, as agent of the Company. To enforce an executory contract against a corporation it may be necessary to show that it was by deed: but where the corporation has acted upon an *executed contract*, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. *Doe dem. Pennington v. Tanier*[12]; *Wilson v. Miers*[13]; *Royal British Bank v. Turquand*[14]; *Renter v. Electric Tel. Co.*[15]; *Australian Steam Navigation Co. v. Marzetti et al*[16]; *Crook v. Corporation of Seaford*[17]; *Buffalo and Lake Huron Railway Co. v. Whitehead* (in appeal)[18]; *Brewster v. The Canada Co.*[19]; *Mayor of Stafford v. Till*[20]; *Angel & Ames on Corporations*[21]; *Bigelow on Estoppel*[22].

If any question could be raised as to the power of the Company to sell, or the agency of *Hawley*, or as to the validity of the sale by him, or as to the ratification of such agency, or of such sale by the Company, it is settled by the provisions of the *Nova Scotian Act* respecting factors and agents. *Rev. Stat. Nova Scotia*, Fourth Series, App. 63, secs. 1—10.

The Respondent further contends that Appellant's plea of justification is bad in substance, for the following reasons:—

Because it appears by it that the attachment under the *Nova Scotian Act* respecting absent or absconding debtors, was issued against "a body corporate doing business in *Nova Scotia*," the said Act not extending to such a company, but only to companies "incorporated

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out of the Province and doing business by an agent within the Province." *Rev. Stat. Nova Scotia*, Fourth Series, ch. 97.

Because, even if sec. 6 of the said Act refers to such foreign companies doing business in *Nova Scotia*, it does not appear that the goods in question were exhibited to the Sheriff as the goods of the Company, nor does it appear that they were valued by two sworn appraisers, or that the amount of appraisal was endorsed on writ of attachment, or that the Sheriff levied on such part of the goods as would be sufficient to refund the sum so sworn to, &c.

Because, if sec. 7 is also applicable to such foreign companies, it does not appear that notice of such assessment was given to the agent of the Company, or that the three days were allowed him to find security; nor does it appear that the prothonotary had any

power to issue the order for sale in consequence of the absence of a judge. *Rex. v. Croke*^[23].

Because the plea of justification does not show that the Sheriff has made a return of the writ of attachment, without which he cannot be allowed to justify in such a case. Rev. Stat. Third Series, ch. 40, s. 13. *Rowland v. Veale*^[24]; *Cheaseley v. Barnes*^[25]; *Freeman v. Bluett*^[26]; *Williams v. Babbitt*^[27]; also, American cases cited in 2 *Greenleaf on Ev.*, 597.

And Respondent further contends:—That as it is only service of summons on the agent of a foreign company doing business in the Province by an agent, which the statute says "gives jurisdiction to the Court," and as it appears that the summons was served on the agent of Respondent, and not of the company, the Court had no jurisdiction, and the writ of attachment and order

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for sale, and all proceedings thereunder, were null and void; that a Court of law has in itself no inherent power or right to order perishable goods seized under attachment to be sold, *La Rochelle v. Piche et al*^[28]; and that sec. 6 and 7 of Absent or Absconding Debtors Act does not extend to foreign companies doing business in the Province by an agent, and the Court has no power to order a sale of their property under the said Act, and that all proceedings for a sale of such property are therefore null and void. "When the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against the above mentioned parties without any regard to the precept or process, and in this case it is not necessary to obey one who is not judge of the cause." *Broom*, L. M. 90, *Taylor v. Clemson*^[29]. *Factum a judice, quod ad officium jure non pertinet, ratum non est*. "A plea of justification by a constable acting under the warrant of a justice will accordingly be bad, if it does not show that the justice had jurisdiction over the subject matter upon which it is granted." *Taylor v. Clemson*^[30]; *Broom's Prac.*^[31]; *Broom*, L. M.^[32].

As to evidence necessary in support of defence, see *Crocker on Sheriffs*^[33].

Mr. Gormully in reply:—

RITCHIE, J.:—

This was an action brought against the Sheriff of the County of *Cumberland* for converting to his own use Plaintiff's goods. Defendant, as such Sheriff, levied on these goods under an attachment. There is a provision in the Act under which these goods were seized, giving

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power to the Court to order perishable goods to be sold^[34]. The Court did in this case order the goods to be sold, and they were sold, and after such sale all the proceedings under the attachment appears to have been discontinued. If the Sheriff had properly taken the goods in the first instance, and if they were legally in his hands, and he sold them under the order of the Court, I think that order would protect him; but, in this case, in my opinion, the conversion of the goods took place when the Sheriff levied on them. The

evidence shows the goods originally belonged to the *St. Lawrence Coal Mining Company*, the officers of which were domiciled in *New York*. The Company appears to have failed in its operations, and all their property in *Nova Scotia* was disposed of, except that now in question, and all debts in that Province, except \$28, appear to have been settled, leaving a large debt due to the Plaintiff, who had been connected with the Company, and for which he held the promissory notes of the Company. The Supreme Court of *Nova Scotia* held there was evidence of a sale of these goods; and there appears to me to have been ample evidence for the consideration of the jury of a *bonâ fide* sale, for a valuable consideration, by the officers of the Company to the Plaintiff, for the purpose of discharging the lawful indebtedness of the Company. I think this was within the legislative power given to incorporated companies under ch. 53, sec. 15, *N. S. Acts*, which makes acts performed within the scope of their charter, or acts creating them, valid, notwithstanding they may not be done under, or authenticated by, the seal of the Company, if such an authentication was needed, but which, I think, was, in this case, wholly unnecessary^[35].

The Company having in the due course of its business

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become indebted to the Plaintiff, I can see no reason why it might not as well pay that liability by a sale and delivery of personal property to their creditor in discharge thereof, as by handing him the amount in money, or selling the property to third parties, and handing over the proceeds to the creditor.

With reference to the conversion, I think the very circumstance of Defendant's levying on the goods, and subsequently selling them, was a clear conversion. There was not, it is true, evidence that the goods were on the levy moved, but it is clear the Sheriff did levy on them, and it is equally clear that the Court ordered the goods, thus in his hands and under his control, to be sold, as being in his possession under the levy, and that they were so sold.

The definition of a conversion, as given by the editor of *Bacon's* abridgment "Trover" (B), is this:—

The action being founded upon a conjunct right of property and possession, any act of the Defendant which negatives or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the Defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of Plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."

I think when a Sheriff levies on property he does take possession of it, as against the party, and does convert it. If he exercises control in defiance of the party who had the

right, there is a conversion, and he may be sued for the conversion, and, as said by Alderson, B., in *Fouldes v. Willoughby*^[36],

For this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion.

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I think the Plaintiff's right of action did not commence at the time of the sale, but so soon as the Sheriff levied upon the goods, and so exercised a claim and dominion over them adverse to the Plaintiff and inconsistent with his general right of dominion.

Under these circumstances, I think the Plaintiff has made out his case, viz.: that the Company, by its officers, was competent to sell the goods in question, that there was evidence to establish the sale of the goods to the Plaintiff, and of a conversion by the Defendant. I state this with hesitancy, only because the views of my learned brethren are at variance with the conclusion at which I have arrived.

STRONG, J.:—

The conversion complained of by the declaration was the sale, not the seizure or taking of the goods. The 4th plea justifies the sale under the order of the Court, and avers that to have been the act complained of in the declaration. The Plaintiff is therefore confined to the sale as the conversion for which he sues. If he wanted to insist on the taking as constituting a conversion he should have new assigned. I should doubt, however, if a mere taking of the goods of a third person under a mesne attachment against a Defendant, to keep them *in medio* until the termination of the action, is a conversion. A conversion is defined to be a taking of chattels with an intent to deprive the Plaintiff of his property in them, or with an intent to destroy them or change their nature. Taking under a mesne attachment does not, like taking under a writ of *feri facias* with intent to sell, imply any such intention. But, be that as it may, the conversion here must, on the pleadings, be taken to be the sale. Now, this sale was under an order of the Court, and was the act of the Court, not the act of the

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Sheriff. It was not the case of a writ of execution or attachment being placed in the Sheriff's hands against the goods of A, and a seizure under it of the goods of B, which the exigency of the writ did not warrant; but these specific goods being already in the Sheriff's hands, having been seized under the attachment, the Court orders them to be sold. The Sheriff is, therefore, protected by the order for sale. The issue, it is true, on this line of pleading, is narrowed to this: Was the discontinuance after or before the sale? It appears

that the sale took place on the 7th November, 1866, and that there was no discontinuance until December 11th, 1874. The issue on the rejoinder to the replication to the plea of justification ought, therefore, to have been found for the Defendant. But it was proper to consider, whether the plea did disclose a good justification, since there would be no use in granting a new trial if in point of law the Sheriff could not justify. As regards the other point argued, there can, in my judgment, be no doubt that the Company was one to which the Rev. Stats. p. 8, (4th Series), ch. 97, was applicable. I am, therefore, of opinion that the verdict ought to have been set aside with costs, and a new trial ordered.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

The points to be decided in this case are in an action of trover, brought by the Respondent against the Appellant, who, as Sheriff of the County of *Cumberland*, sold certain chattel property claimed by the Respondent to belong to him to recover its value.

To the charge of conversion in the Respondent's writ the Appellant pleaded:—

1st. That he did not convert to his own use the Plaintiff's goods, as in the writ alleged.

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2nd. That the goods were not the property of the Plaintiff.

3rd. That the Plaintiff was not possessed, nor was he entitled to the possession of the said goods.

And by a fourth plea, he justifies the taking of the goods, as and being the goods of the *Lawrence Coal Mining Company*, under a writ of attachment at the suit of one *George Hibbard*, against the said *Lawrence Coal Mining Company*, directed to him as Sheriff of the County of *Cumberland*; and the subsequent sale thereof under an order issued by the Supreme Court and signed by *A. S. Blenkhorn*, Esquire, Prothonotary of the said Court at *Amherst* in the said County of *Cumberland*, whereby he was ordered and required, amongst other things, as such Sheriff, as aforesaid, to put up and sell the said goods at public auction to respond the judgment which might be obtained. The Plaintiff replied to the latter plea:—

That after the proceedings in the plea mentioned, taken by the said *George Hibbard*, the suit instituted by the said *George Hibbard* against the *Lawrence Coal Mining Company* was discontinued by him, and the attachment and all proceeding thereunder were thereby abandoned; which said discontinuance is on the files of this honorable court.

To that replication the Appellant rejoined, first, that the said cause was not discontinued, and second:—

That the said discontinuance was not filed until after the goods in said writ mentioned were sold under the order in his said plea mentioned, and the proceeds applied as therein mentioned.

On the trial of the issues of fact, leave was given to the Appellant to demur to the replication of the Respondent, which he did, and therein says that the Plaintiff's replication is bad in substance, inasmuch as the Sheriff is justified by his writ of attachment and order for sale, and was bound to execute it:—

That the act of the Plaintiff in the cause under which the attachment was made, in discontinuing the cause after the Sheriff had sold the property in question, cannot and does not affect his justification, as pleaded.

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Marginal note on the demurrer:—

Matter of law to be argued—that the Sheriff, being bound to act in obedience to the order of the Court, cannot be affected by a discontinuance of a suit under which property was sold.

Joinder in demurrer by Respondent. Under the charge of the learned Chief Justice of *Nova Scotia*, before whom the cause was tried in October, 1876, the jury found a verdict for the Plaintiff for \$500, and a rule *nisi* was granted to set it aside on the following grounds:—

- 1st. That the verdict was against law and evidence.
- 2nd. That the learned Chief Justice misdirected the jury.
- 3rd. That evidence was improperly received.
- 4th. That evidence was improperly rejected, and
- 5th. That there was no sufficient evidence of the conversion of the goods.

This rule and the demurrer were argued before the whole Court at *Halifax*, and by a majority of the Court the rule *nisi* was discharged with costs, and a judgment on the demurrer given in favor of the Respondent.

In the majority judgment, the fourth plea is pronounced bad, and a doubt expressed as to the sufficiency of the replication to it. Hence the judgment on the demurrer. The appeal to this Court is from that judgment on all the points, both as to the facts and the law.

I will first deal with the demurrer. I would not question the correctness of the judgment if the fourth plea is defective, but I don't think it is.

To decide that point, we must first consider the nature of the position held by the Appellant when he received the order for the sale of the goods. He had previously levied on the

goods under the attachment, but had not removed them. Section 6, ch. 97 of the *Revised Statutes of Nova Scotia*, entitled: "Of suits against absent and absconding debtors," provides that:—

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Where the goods consist of stock, or are shown by affidavit to be of a perishable nature, and the agent shall not, within three days after notice of the appraisement, give security for their value, a judge, or a prothonotary of the county, in his absence, may, at his discretion, cause the same to be sold at public auction, and the proceeds thereof shall be retained by the Sheriff, or paid into Court, to respond the judgment.

The prothonotary of the county made an order under the provisions of that section, and directed to the Sheriff, to sell the said goods under the terms thereof.

On receipt of that order it was the Sheriff's duty to execute it. He could have been compelled by legal and summary means to do it, and would also be answerable to the Plaintiff in that suit for any resulting loss or damage to the goods, in case he eventually obtained judgment. So far, therefore, as the conversion *by the sale*, the order to sell the specific goods would be a complete justification and the plea to that extent is a sufficient answer.

If the plea admitted the goods were the property of the Plaintiff it would have been bad; but, on the contrary, it alleges them to have been, when levied upon, the goods of the *Lawrence Coal Mining Company*, and that, with the other allegations contained in it, forms a perfect answer to the writ; and, as a whole, is consequently a good plea. The Respondent virtually says:— they were not the Plaintiff's goods, but those of the *Lawrence Coal Mining Company*, and I, as Sheriff, levied upon them under the attachment, and subsequently sold them.

A special plea of justification is only necessary where goods of one party are taken out of the possession of another, and is only necessary as a justification for interfering with the possession. If goods are not taken out of the possession of the Plaintiff the right is tried by a simple denial of ownership. The justification in this case would only be necessary in case the goods in

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question, were, when taken, in contemplation of law, in the possession of the Respondent.

The replication to the plea is bad, for the simple reason that the Respondent could not, by any possibility, be affected by any subsequent act of the Plaintiff in regard to the

discontinuance of the suit. I think, therefore, the judgment on the demurrer must be in favor of the Appellant.

Under that ruling the judgment on the facts submitted to the jury should also be for him, if the order for sale would be a justification to the officer for the original levy on the goods, as well as for the sale, even had they been the property of the Respondent; but, as it is not, the result must be affected by the question as to the ownership of the goods when the levy was made. If, then, they were not the Respondent's, he cannot recover; but the whole case, as far as the rule *nisi* for a new trial goes, depends altogether on the settlement of that question. The property, as admitted by both parties, was that of the *Lawrence Coal Mining Company* up to the date of the transfer claimed by the Respondent. Did he, then, obtain the property in the goods by the document signed by "*J. W. Hawley*, agent." If not, he had no property in them. In determining that point we must see if, in the first place, *Hawley* had sufficient authority to divest the Company of the ownership. The alleged transfer is signed by him on the 5th of July, 1867. He, the Respondent, and others were appointed Directors of the Company on the 18th of January, 1865, *for one year* from that date. No subsequent appointment of Directors was ever made, and there is no provision to be found anywhere, as far as the evidence goes, as is sometimes the case in respect of public officers, that the Directors should hold office till others were appointed in their place. There may have been such a provision in the

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by-laws of the Company, but evidence of it is wanting. On the 18th of January, 1866, the Directors ceased to be so; and, as such, could not collectively or individually bind the Company. Resolutions of the stockholders were passed in April and December, 1865, authorizing certain Directors named, to sell on certain conditions the real and personal property of the Company; but *Hawley* was not one of them. On the 26th of February, 1866, at a meeting of the stockholders, a resolution was passed authorizing Messrs. *Hawley, W. G. Howe and Alden*:—

To sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms, as in *their* judgment will be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of the said Company, and if the amount of such sale exceeds the debts, the balance to be paid *pro rata* among the stockholders.

No one will pretend for a moment that *Hawley* alone had power to make the sale to the Respondent, which the document signed by him purports to have been made. The delegated power by the Company was to *three*, and the *three* were to exercise *their judgment* in regard to it; and besides, none of them, nor the three together, had power to give any portion of the property *in payment of any particular debt*. It was to be sold for cash, and that paid into the hands of the Treasurer. The Respondent was himself a

Director; and was quite aware, no doubt, of the nature of the authority given to *Hawley*, *Howe* and *Alden*, and is concluded thereby. There is no evidence of any ratification of the sale by the Company. In fact, there was but one meeting of the Company after that of February, 1866, and that was in 1874, which appears to have been called for the purpose of authorizing a transfer of the lease of the mines to the Respondent, which was done; and that only.

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Some oral evidence was offered of the authority of *Hawley* to sell the personal property; but it was objected to and cannot be received for the obvious reason that no meeting had ever considered the subject. In the absence, then, of legitimate evidence, and when considering, too, that if any Directors existed at the time of the transfer, the Respondent was one, and could not become a purchaser through a sale by the Directors' he having with them a fiduciary authority to sell, if any such existed, I must say I can see no authority for the transfer to bind the Company, even if it had been made in the name of the Company and under its seal.

The instrument in question does not purport to be a transfer by the Company. It contains no words making a transfer. It only says baldly that the Respondent *has purchased* through *T. R. Hawley*, authorized to sell the same, the property mentioned in the schedule. A mere naked purchase, without evidence of any consideration given, or any delivery of the property, will not pass it. I cannot think the instrument of any more value than a letter to some person would have been, containing the same substance. It does not say who owned the property, or by whom he was authorized to sell it, and it is signed by "*T. R. Hawley*, agent." Agent of whom? It discloses no consideration or terms for the purchase. No consideration is shown either by, or *dehors*, the instrument by any one present at the alleged purchase. I will not say a *written* transfer was absolutely necessary, but I am of opinion the document *per se* is insufficient to make it. There is no other evidence of it; for neither of the parties to the transfer, *Hawley* and *Dillingham*, or any of the witnesses to it, or any other person present, was examined; and there is, therefore, no legal evidence of it. *Alden's* hearsay evidence upon this point, objected to at the trial, cannot be received.

The Respondent, in his evidence, says:—

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Alden, *Dillingham*, *Hawley* and *Wentworth*, were all creditors of the Company, and were the four interested with me in the transfer of the personal property—

under his honorary obligation. Thus, then, was *Hawley* undertaking to act as the agent of the Company to convey, with the assistance of *Dillingham*, the property of the Company to the Respondent for his, *Hawley's*, *Dillingham's* and *Wentworth's* benefit. Surely the

Company, at any time, could repudiate such a transfer; and, if void, as against the Company, it must be so as against a creditor of the Company, as *Hibbard* appears to have been.

And, now, in conclusion, as to the seal. I have carefully examined all the authorities, and have had no difficulty in arriving at the conclusion that, in the absence of statutory enactment, the contract in question could only be valid under the seal of the Company.

By the registry of the articles of association in evidence, this Company was incorporated, not as a trading company, but:—

For the special purpose of opening and working mines and veins, or deposits of coal and oils in the River *Hebert* Settlement, * * * and the exporting and making sale thereof, and of constructing and operating railways, tramways, or plank roads, necessary for transporting the said coal, when mined, to tide water, and for the purpose of constructing piers, docks and buildings necessary for carrying on said business, and of doing all other business which may be lawfully undertaken and connected therewith.

This is not, then, a "trading" Company, and therefore rules as to buying and selling stocks in trade will not apply to it.

The "selling" contemplated by this Company was to be of coal and oil, not the houses, buildings, or plant. The intention was to keep the latter as means to enable the Company to carry out the intentions of the charter.

The intention is clear and obvious, and I cannot strain words declaring, as do those of section 15, chap. 53 of the *Revised Statutes of Nova Scotia*, that:—

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The acts of incorporated companies performed within the scope of their charters, or acts creating them, shall be valid, notwithstanding they may not be done under, or authenticated by the seal of such corporations,

to mean that a company may, without seal, sell and dispose of their whole property, and thereby wind up the company. Such a power is certainly, to my mind, not given by the section just quoted; for that section clearly has reference, as to this Company, to acts done "in the opening and working mines, &c." and the exporting and making sale of "coal and oil, &c." It, in fact, only applies to a *going* Company, and cannot be applied to the expiring flicker, or final sale of the houses, plant, &c., of a bankrupt company. For the reasons given, I think, the rule for the discharge of the rule *nisi* herein should itself be discharged and the said rule *nisi* made absolute with costs.

Appeal allowed with costs, and new trial ordered with costs in the Court below.

Solicitor for Appellant: Charles T. Townshend.

- [1] Ch. 97 Revised Statutes of Nova Scotia, 4th Series.
- [2] Rev. Stat. *Nova Scotia*, 4th series, ch. 97.
- [3] L. R. 2 Ex. 158.
- [4] 2 Ex. 711.
- [5] 19 Beay. 97.
- [6] Twyne's case 1 Coke 80; 1 Sm. L. C. 1.
- [7] 18 Grant 555; Rev. Stat. Nova Scotia, 3rd. series, ch. 87, s. 1.
- [8] Pp. 5 and 6.
- [9] 35 L. J. N. S. 84.
- [10] 578, S. 96-8, 579 S. 100-5.
- [11] P. 287 & 296.
- [12] 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49.
- [13] 10 C. B. N.S. 367.
- [14] 6 E. & B. 331.
- [15] 6 E. & B. 347.
- [16] 24 L. J. Exch. 273.
- [17] L. R. 6. ch. App. 554.
- [18] 8 Grant 157.
- [19] 4 Grant 443.
- [20] 4 Bing. 75.
- [21] P. 172.
- [22] 477, 447 N. 2.
- [23] 1 Cowp. 30.
- [24] 1 Cowp. 20.
- [25] 10 East 81.
- [26] 1 Salk. 409, Ld. Ray. 633.
- [27] 14 Gray 141.
- [28] 1 L. C. Jur. 158.
- [29] 2 Q. B. 1034.
- [30] 2 Q. B. 1031.
- [31] 667 et seq.
- [32] 95, 96.
- [33] P. 867.
- [34] Sec. 6, ch. 97 Rev. Stats. N. S., 4th Series.
- [35] 8 M. & W. 548.
- [36] Ch. 97 Revised Statutes of Nova Scotia, 4th Series.

TAB 24

R. v. Myers, 2019 SCC 18 (CanLII), [2019] 2 SCR 105

Source: Supreme Court of Canada
Date: 2019-03-28
File number: 37869
Other citations: 438 DLR (4th) 60 — 375 CCC (3d) 293 — 53 CR (7th) 1 — [2019] SCJ No 18 (QL)
Citation: R. v. Myers, 2019 SCC 18 (CanLII), [2019] 2 SCR 105, <<https://canlii.ca/t/hzd02>>, retrieved on 2026-03-23



SUPREME COURT OF CANADA

CITATION: R. v. Myers, 2019 SCC 18, [2019] 2 S.C.R. 105

APPEAL HEARD: October 18, 2018
JUDGMENT RENDERED: March 28, 2019
DOCKET: 37869

BETWEEN:

Corey Lee James Myers
Appellant

and

Her Majesty The Queen
Respondent

- and -

Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Wagner C.J. (Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ. concurring)
(paras. 1 to 68)

R. v. Myers, 2019 SCC 18, [2019] 2 S.C.R. 105

Corey Lee James Myers

Appellant

v.

Her Majesty The Queen

Respondent

and

**Attorney General of Ontario and
Canadian Civil Liberties Association**

Interveners

Indexed as: R. v. Myers

2019 SCC 18

File No.: 37869.

2018: October 18; 2019: March 28.

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

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

Criminal law — Interim release — Detention review — Accused denied interim release pending trial — Detention status confirmed by judge conducting review under s. 525 of Criminal Code — Proper approach to detention review hearing under s. 525 of Criminal Code — Criminal Code, R.S.C. 1985, c. C-46, s. 525.

On January 4, 2016, M was arrested and charged with several firearm offences. He sought bail for the first time in respect of these charges on November 9, 2016, but his application was dismissed, as the judge was not satisfied that any terms of release would adequately address the risk that M would, if released, commit other offences or interfere with the administration of justice. Later that month, M sought a review of his detention order under s. 520 of the *Criminal Code*, which was denied on the basis that the judge saw no significant change that would justify releasing M. In March 2017, Crown counsel asked the defence whether M wished to pursue a 90-day bail review under s. 525 of the *Criminal Code*. Given the existence of competing lines of authority, the British Columbia Supreme Court heard submissions from both parties on the correct approach to the review under s. 525. It concluded that the correct test at a s. 525 hearing involves a two-step process: the accused must first convince the reviewing judge either that there has been an unreasonable delay in the proceedings on the Crown's part or that the passage of time has had a material impact on the initial basis for detaining the accused, and, if either of these thresholds is met, the judge must then determine whether the detention of the accused remains justified within the meaning of s. 515(10) of the *Criminal Code*. Because of the formulation of the test, M made no submissions and his detention order was confirmed.

M pled guilty on January 29, 2018 to reduced charges and was sentenced to 30 months' imprisonment. Since M is no longer in pre-trial custody, his appeal to the Court is moot; however, as guidance is needed to establish the correct approach to a detention review hearing under s. 525 of the *Criminal Code*, the Court exercised its discretion to hear the appeal on the merits.

Held: The appeal should be allowed.

In this case, the Court must apply the principles of statutory interpretation to determine the correct approach to a detention review under s. 525, and to explain the place of such a review within the larger context of pre-trial custody in Canada. In Canadian law, the pre-trial release of accused persons is the cardinal rule and detention, the exception. Yet practices vary widely in terms of when s. 525 detention review hearings happen, whether they are mandatory, what factors are considered and which test is applied.

The purpose of the s. 525 hearing is to prevent accused persons from languishing in pre-trial custody and to ensure a prompt trial. Parliament sought to achieve this purpose by subjecting lengthy pre-trial detentions to judicial oversight at set points in time, by affording an opportunity to have a judge consider whether the continued detention of an accused person is justified, and by conferring on the judge a discretion to expedite the trial of an individual in pre-trial detention. The right not to be denied reasonable bail without just cause, which is enshrined in s. 11(e) of the *Canadian Charter of Rights and Freedoms*, operates as a key organizing principle of Part XVI of the *Criminal Code*. Release is favoured at the earliest reasonable opportunity and on the least onerous grounds. The experience of pre-trial detention can have serious detrimental impacts on an accused person's ability to raise a defence. It also comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods. Parliament intended s. 525 to operate as a safeguard. This section imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified, and establishes a discretionary mechanism designed to prevent unreasonable delay and to expedite the trials of individuals in remand.

The correct approach to the s. 525 detention review is as follows. First, the jailer has an obligation to apply for the detention review hearing immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503 of the *Criminal Code*. Where there is an intervening detention order under s. 520, 521 or 524 of the *Criminal Code* following the initial appearance of the accused and before the end of the 90-day period, the 90-day period begins again. Accused persons who have not had a full bail hearing are also entitled to a review under s. 525, since the fundamental purpose of s. 525 is to afford an opportunity to have a judge scrutinize the detention itself, and these individuals should not be denied that safeguard. Upon receiving the application from the jailer, the judge must fix a date and give notice for the hearing. The s. 525 hearing is an automatic procedure, and the mandatory obligations to make the application and to fix a date lie with the jailer and the judge respectively. Form letters that place the burden on the accused to pursue a s. 525 hearing are inconsistent with the law. The hearing must be held at the earliest opportunity. At the hearing, the reviewing judge may refer to the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review hearings, and should show respect for any findings of fact made by the first-level decision maker if there is no cause to interfere with them. Both parties are also entitled to make submissions on the basis of any additional credible or trustworthy information which is relevant or material to the judge's analysis, and pre-existing material is subject to the criteria of due diligence and relevance.

At the hearing, unreasonable delay is not a threshold that must be met before the detention of the accused is reviewed. Parliament did not intend to restrict the court's ability to review the detention of an accused at a s. 525 hearing to situations in which there has already been an unreasonable delay. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s. 515(10), which sets out three possible grounds on which the detention of an accused in custody may be justified: where it is necessary in order to ensure the attendance of the accused in court; where it is necessary for the protection or safety of the public; and where it is necessary in order to maintain public confidence in the administration of justice. In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the

impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order, if one was made. If there was no initial bail hearing, the s. 525 judge is responsible for conducting one, taking into account the time the accused has already spent in pre-trial custody. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is — or is not — justified. Finally, the judge should make use of his or her discretion under ss. 525(9) and 526 to give directions for expediting the trial and related proceedings where it is appropriate to do so. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused persons who are subject to lengthy pre-trial detention.

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By Wagner C.J.

Referred to: *R. v. Antic*, [2017 SCC 27](#), [2017] 1 S.C.R. 509; *R. v. Oland*, [2017 SCC 17](#), [2017] 1 S.C.R. 250; *R. v. St-Cloud*, [2015 SCC 27](#), [2015] 2 S.C.R. 328; *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#), [1989] 1 S.C.R. 342; *R. v. Gill*, [2005 CanLII 22214](#); *R. v. Kissoon*, [2006 CanLII 40493](#); *R. v. Jerace*, [2012 BCSC 2007](#); *R. v. Whiteside*, [2016 BCSC 131](#); *R. v. Elmi*, [2016 BCSC 376](#); *R. v. Russell*, 2016 NLTD(G) 208, 34 C.R. (7th) 262; *R. v. Cheeseman*, 2017 NLTD(G) 114; *R. v. Thorsteinson*, [2006 MBQB 184](#), 206 Man. R. (2d) 188; *R. v. Sawrenko*, [2008 YKSC 27](#); *R. v. Sarkozi*, [2010 BCSC 1410](#); *R. v. McCormack*, [2014 ONSC 7123](#); *R. v. Vandewater*, [2014 BCSC 2502](#); *R. v. Haleta*, [2015 BCSC 850](#); *R. v. Goudreau*, [2015 BCSC 1227](#); *R. v. Piazza*, [2015 QCCS 707](#); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, [2002 SCC 42](#), [2002] 2 S.C.R. 559; *R. v. Morales*, [1992 CanLII 53 \(SCC\)](#), [1992] 3 S.C.R. 711; *R. v. Bray* (1983), [1983 CanLII 1981 \(ON CA\)](#), 40 O.R. (2d) 766; *R. v. Jordan*, [2016 SCC 27](#), [2016] 1 S.C.R. 631; *Fraser Regional Correctional Centre v. Canada (Attorney General)*, [1993 CanLII 354](#); *R. v. Pearson*, [1992 CanLII 52 \(SCC\)](#), [1992] 3 S.C.R. 665; *R. v. Anoussis*, [2008 QCCQ 8100](#), 242 C.C.C. (3d) 113; *R. v. Summers*, [2014 SCC 26](#), [2014] 1 S.C.R. 575; *R. v. Hall*, [2002 SCC 64](#), [2002] 3 S.C.R. 309; *Ell v. Alberta*, [2003 SCC 35](#), [2003] 1 S.C.R. 857; *R. v. Acera*, [2017 ABQB 470](#); *R. v. Saulnier*, [2012](#)

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APPEAL from a decision of the British Columbia Supreme Court (Riley J.), [2017 BCSC 1717](#), [2017] B.C.J. No. (QL), 2017 CarswellBC 2798 (WL Can.), confirming the accused's detention status. Appeal allowed.

Justin Vladimir Myers, Lawrence D. Myers, Q.C., and Zack Myers, for the appellant.

John R. W. Caldwell and Nicholas Reithmeier, for the respondent.

Joan Barrett and Jessica Smith Joy, for the intervener the Attorney General of Ontario.

Christine Mainville, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Overview

[1] The right to liberty and the presumption of innocence are fundamental tenets of our criminal justice system. In the pre-trial context, release — at the earliest opportunity and in the least onerous manner — is the default presumption in Canadian criminal law. Pre-trial detention is the exception, not the rule.

[2] And yet there are a significant number of individuals in remand custody at any given time in Canada. In some cases, accused persons are detained in provincial jails for the entire length of the pre-trial process, which can amount to hundreds of days in custody. This appeal concerns those individuals, and their right to what has become known as the “90-day detention review” under [s. 525](#) of the [Criminal Code](#), R.S.C. 1985, c. C-46 (“Cr. C.”).

[3] This Court has addressed issues related to bail and detention on several occasions in recent years. In *R. v. Antic*, [2017 SCC 27](#), [2017] 1 S.C.R. 509, it clarified the ladder principle in the law of bail and the framework for authorizing release under s. 515 *Cr. C.* In *R. v. Oland*, [2017 SCC 17](#), [2017] 1 S.C.R. 250, the Court addressed the issues of release pending appeal under s. 679 *Cr. C.* and the review under s. 680 *Cr. C.* In *R. v. St-Cloud*, [2015 SCC 27](#), [2015] 2 S.C.R. 328, it considered the test for detention under s. 515(10)(c) and bail review under ss. 520 and 521 *Cr. C.*

[4] In the case at bar, the Court is asked to determine the correct approach to a detention review under s. 525 *Cr. C.*, and to explain the place of such a review within the larger context of pre-trial custody in Canada. For the reasons that follow, I find that Parliament intended s. 525 to operate as a safeguard. This section imposes an independent responsibility on the reviewing judge to consider whether the continued detention of the accused is justified, and establishes a discretionary mechanism designed to prevent unreasonable delay and to expedite the trials of individuals in remand. Given that Mr. Myers' appeal is moot, I would simply allow the appeal and make no further order.

II. Background

A. Arrest and Prior Charges

[5] On January 4, 2016, Mr. Myers was arrested following a high-speed car chase involving gunfire in Surrey and Delta, British Columbia. He was charged with a number of offences, including intentionally discharging a restricted or prohibited firearm; occupying a motor vehicle knowing that there was a firearm in the vehicle; using a firearm in committing an indictable offence; possessing a restricted or prohibited firearm; and possessing a weapon and/or ammunition contrary to a lifetime firearms ban.

[6] Mr. Myers was already on bail for unrelated break and enter charges when he was arrested. He had various prior convictions, was on probation, and was under multiple court-ordered

prohibitions against possessing firearms and ammunition. He was also the subject of a Canada-wide warrant for charges that had been laid in Alberta in 2015.

[7] At the time of his arrest, Mr. Myers consented to detention without a bail hearing. About 4 months later, he pled guilty to the outstanding break and enter charges and was sentenced to 14 months incarceration. His release date in relation to those offences would have been in October 2016, taking time served into account. As of October 2016, Mr. Myers was no longer detained on any matter other than the new charges related to his arrest on January 4.

B. *Ruling on the Judicial Interim Release Application (Sudeyko Prov. Ct. J.)*

[8] Mr. Myers sought bail for the first time in respect of those charges on November 9, 2016. He was in a reverse onus position at the bail hearing: s. 515(6) *Cr. C.* The judge considered the relative strength of the Crown's case, Mr. Myers' criminal record and, to a lesser extent, his other outstanding charges. The judge noted that Mr. Myers had a history of failing to follow court orders, and of then committing other offences. Defence counsel had submitted that Mr. Myers, who was only 26, had an opiate addiction and that it was the root cause of his criminal history. The defence proposed that Mr. Myers therefore be released into a residential drug treatment facility, and suggested cash bail, a daily reporting requirement, an ankle bracelet and electronic monitoring as additional conditions. However, the judge was not satisfied that any terms of release would adequately address the risk that Mr. Myers would, if released, commit other offences or interfere with the administration of justice. He therefore dismissed the application and ordered that Mr. Myers be detained on the basis of the ground set out in s. 515(10)(b).

C. *Ruling on the Section 520 Detention Review (Sudeyko Prov. Ct. J.)*

[9] At the preliminary inquiry on November 24, 2016, it was revealed that the Crown's key witness was no longer willing to testify and that the Crown would need to seek admission of his police statement at trial instead. Counsel for Mr. Myers immediately sought a review of Mr. Myers' detention under s. 520 on the basis of this new weakness in the Crown's case. That review

application was denied on the basis that the judge saw no significant change that would justify releasing Mr. Myers at that time.

D. *Decision of the Supreme Court of British Columbia (Riley J.), 2017 BCSC 1717*

[10] In a letter dated March 14, 2017, Crown counsel asked the defence whether Mr. Myers wished to pursue a bail review under s. 525. In the resulting hearing on July 21 of that year, given the existence of competing lines of authority, Riley J. of the British Columbia Supreme Court heard submissions from both parties on the correct approach to take under s. 525. His reasons for judgment were released on September 27, 2017.

[11] Riley J. concluded that the correct test at a s. 525 hearing involves a two-step process. He found that the accused must first convince the reviewing judge either that there has been an unreasonable delay in the proceedings on the Crown's part *or* that the passage of time has had a material impact on the initial basis for detaining the accused. If either of these thresholds is met, the judge must then determine whether the detention of the accused remains justified within the meaning of s. 515(10).

[12] The review proceeded on October 5, 2017. Because of the formulation of the test, Mr. Myers made no submissions and his detention order was confirmed.

E. *Mootness*

[13] Mr. Myers filed his application for leave to appeal while he was still in pre-trial custody. However, he pled guilty on January 29, 2018 to one count of occupying a motor vehicle knowing there was a firearm in it under s. 94(1) *Cr. C.*, and one count of possessing ammunition contrary to a prohibition under s. 117.01(1) *Cr. C.* The Crown entered a stay of proceedings on all the remaining counts on the indictment, and Mr. Myers was sentenced to 30 months' imprisonment. As he is no longer in pre-trial custody, the appeal is moot.

[14] This Court recognized in *Oland* that bail-related matters are inherently “evasive of appellate review” owing to their temporary nature: para. 17. Despite the fact that pre-trial detention is governed by federal law, there has been a widespread, and systemic, divergence in the approaches taken to 90-day detention reviews by courts across Canada. All the parties have made submissions to the effect that guidance from this Court is needed in order to determine which of these competing approaches should apply and to establish clarity in the law. The Court has therefore exercised its discretion to hear the appeal on the merits: see *Borowski v. Canada (Attorney General)*, [1989 CanLII 123 \(SCC\)](#), [1989] 1 S.C.R. 342, at pp. 358-63.

III. Issue

[15] This appeal raises a single question: What is the correct approach to a detention review hearing under s. 525 *Cr. C.*?

IV. Analysis

A. Two Competing Approaches to Section 525

[16] The parties suggest that the choice before this Court is between two competing approaches to s. 525 hearings. According to the first approach, unreasonable delay in getting the case to trial is a threshold condition. In the absence of an unreasonable delay, the judge at a s. 525 hearing cannot ask whether the detention remains necessary on the basis of the grounds set out in s. 515(10): see, e.g., *R. v. Gill*, [2005 CanLII 22214](#) (Ont. S.C.J.); *R. v. Kissoon*, [2006 CanLII 40493](#) (Ont. S.C.J.); *R. v. Jerace*, [2012 BCSC 2007](#); *R. v. Whiteside*, [2016 BCSC 131](#); *R. v. Elmi*, [2016 BCSC 376](#); *R. v. Russell*, 2016 NLTD(G) 208, 34 C.R. (7th) 262; *R. v. Cheeseman*, 2017 NLTD(G) 114.

[17] Under the alternative approach, unreasonable delay is not a threshold condition. Instead, the judge at a s. 525 hearing simply considers whether the continued detention of the accused is necessary on the basis of s. 515(10), and unreasonable delay is one possible factor in

that analysis: see, e.g., *R. v. Thorsteinson*, 2006 MBQB 184, 206 Man. R. (2d) 188; *R. v. Sawrenko*, 2008 YKSC 27; *R. v. Sarkozi*, 2010 BCSC 1410; *R. v. McCormack*, 2014 ONSC 7123; *R. v. Vandewater*, 2014 BCSC 2502; *R. v. Haleta*, 2015 BCSC 850; *R. v. Goudreau*, 2015 BCSC 1227; *R. v. Piazza*, 2015 QCCS 707.

[18] Whether or not unreasonable delay operates as a threshold condition is clearly of fundamental importance to this appeal. However, this case requires the Court to do more than simply choose one approach or the other. Like *Antic*, it concerns a provision of federal law that has been applied inconsistently across the country: paras. 6 and 65-66. Practices vary widely from place to place in terms of when s. 525 hearings happen, whether they are mandatory, what factors are considered and which test is applied. It is up to this Court to apply the principles of statutory interpretation in order to resolve this issue.

[19] The modern approach to statutory interpretation requires the Court to read the words of s. 525, “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. When Parliament adopted s. 525, its purpose was clear and unambiguous. A straightforward reading of the provision, viewed properly in its legislative context, is the one which best supports that purpose.

[20] For reference purposes, s. 525 is reproduced in its entirety in the attached Appendix together with ss. 515(10) and 526. While I will generally be referring to the “90-day” review, these reasons apply with equal force, and with any necessary modifications, to the “30-day review”, that is, they apply regardless of whether the accused is being prosecuted in proceedings by way of indictment or by way of summary conviction: s. 525(1).

B. *Parliament’s Intent and the Bail Reform Act*

[21] Section 525 *Cr. C.* was first introduced in the 1972 *Bail Reform Act*, S.C. 1970-71-72, c. 37. In a speech at second reading in the House of Commons, then Justice Minister John N. Turner summarized the purposes of the Act as follows:

The objectives of this bill are fourfold: First, to avoid unnecessary pre-trial arrest and detention; second, to ensure that in cases where arrest with or without warrant has taken place, the person accused, whatever his means, is not unnecessarily held in custody until his trial; third, to ensure an early trial for those who have been detained in custody pending trial; fourth, to provide statutory guidelines for decision making in this part of the criminal law process relating to arrest and bail and thereby preclude the possibility of “discretionary injustice”.

(*House of Commons Debates*, vol. III, 3rd Sess., 28th Parl., February 5, 1971, at p. 3116)

[22] This Court has recognized that Parliament’s overarching vision of the *Bail Reform Act* was the creation of “a liberal and enlightened system of pre-trial release” in which accused individuals would normally be granted bail: *R. v. Morales*, [1992 CanLII 53 \(SCC\)](#), [1992] 3 S.C.R. 711, at p. 725, quoting *R. v. Bray* (1983), [1983 CanLII 1981 \(ON CA\)](#), 40 O.R. (2d) 766 (C.A.), at p. 769; *Antic*, at para. 29. The purpose of that Act, which was influenced by both the academic work of Professor Martin L. Friedland and the findings of the Ouimet Report, as delivered by the Canadian Committee on Corrections examining the law on bail, was to reform a system that many experts saw as punitive, arbitrary, and inconsistent with the presumption of innocence: M. L. Friedland, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates’ Courts* (1965); Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections* (1969). There was also particular concern regarding the relationship between prolonged pre-trial detentions and induced guilty pleas. In Minister Turner’s words:

. . . there is an indication that those who are held under pre-trial detention will have, on the basis of statistics, a lesser opportunity for an acquittal and, certainly, they will have less of an opportunity to present a reasonable defence and assemble the evidence necessary for that defence. I think that we cannot ignore, either, Mr. Speaker, the high incidence of guilty pleas by persons who are detained and kept in custody under pre-trial detention. [p. 3115]

[23] The third purpose of the *Bail Reform Act* as articulated by Minister Turner — to ensure an early trial for those who have been detained in custody — is of specific relevance to this appeal. It is a longstanding principle of our criminal justice system that individuals in pre-trial custody should be given a certain priority in scheduling trials. This general guiding premise has not been displaced by *R. v. Jordan*, [2016 SCC 27](#), [2016] 1 S.C.R. 631. Sections 525(9) and 526, which confer on the reviewing judge a discretion to give directions for expediting the trial of and any proceedings in relation to an accused, continue to operate as a reflection of that principle. In discussing these provisions, Minister Turner stated specifically:

[T]here are important new proposals in the bill which provide that where an accused does not achieve bail after an arrest, there are methods for expediting his trial The provisions of the bill also ensure that where an accused is being held in custody pending his trial, or pending an appeal of his conviction, the situation must be reviewed by the courts within set periods of time, and directions may be given by the courts for getting the case on to trial. . . . [p. 3117]

[24] Regardless of which test is applied, courts across Canada share an overarching consensus that the purpose of the s. 525 hearing is to prevent accused persons from languishing in pre-trial custody and to ensure a prompt trial: see, e.g., *Fraser Regional Correctional Centre v. Canada (Attorney General)*, [1993 CanLII 354](#) (B.C.S.C.), at pp. 2-3; *Gill*, at para. [3](#); *Sawrenko*, at para. [26](#) (CanLII); *Sarkozi*, at paras. [8-11](#) (CanLII); *Haleta*, at paras. [8-10](#). It is, moreover, clear that Parliament sought to achieve this purpose by subjecting lengthy pre-trial detentions to judicial oversight at set points in time, by affording an opportunity to have a judge consider whether the continued detention of an accused person is justified, and by conferring on the judge a discretion to expedite the trial of an individual in pre-trial detention.

C. *Current Context of Pre-trial Detention in Canada*

[25] Today, the right not to be denied reasonable bail without just cause, which is enshrined in [s. 11\(e\)](#) of the *Canadian Charter of Rights and Freedoms*, operates as a key organizing principle of Part XVI of the *Criminal Code*: *R. v. Pearson*, [1992 CanLII 52 \(SCC\)](#), [1992] 3 S.C.R. 665, at p. 691. This right has also been affirmed repeatedly by this Court, most recently in *St-*

Cloud, in which the Court held that “in Canadian law, the release of accused persons is the cardinal rule and detention, the exception” (para. 70 (emphasis added)), and in *Antic*, in which it stated that “release is favoured at the earliest reasonable opportunity and . . . on the least onerous grounds”: para. 29, quoting *R. v. Anoussis*, 2008 QCCQ 8100, 242 C.C.C. (3d) 113, at para. 23.

[26] Nonetheless, on any given day in Canada, nearly half of the individuals in provincial jails are accused persons in pre-trial custody: Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017* (June 2018), at p. 7; Statistics Canada, *Trends in the use of remand in Canada, 2004/2005 to 2014/2015* (January 2017). In 2016-2017, approximately 7 percent of those in remand were still in custody after 3 months, and some spent upwards of 12 or even 24 months awaiting trial in detention: Statistics Canada, *Table 35-10-0024-01 — Adult releases from correctional services by sex and aggregate time served* (online). It must be said that the conditions faced by such individuals are often dire. Overcrowding and lockdowns are frequent features of this environment, as is limited access to recreation, health care and basic programming: *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at paras. 2 and 28; Canadian Civil Liberties Association and Education Trust, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention*, by A. Deshman and N. Myers (2014) (online). Moreover, as is the case elsewhere in our criminal justice system, Indigenous individuals are overrepresented in the remand population, accounting for approximately one quarter of all adult admissions: Statistics Canada, *Trends in the use of remand in Canada, 2004/2005 to 2014/2015*.

[27] As this Court has recognized, the experience of pre-trial detention can have serious detrimental impacts on an accused person’s ability to raise a defence: see *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 59. It also comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods: Friedland, at p. 172; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at para. 24; *Antic*, at para. 66. The high cost of pre-trial detention was recognized at the time the *Bail Reform Act* was before Parliament: *House of Commons Debates*, at p. 3115. The issue remains just as relevant today.

[28] In the sections that follow, I will outline the correct approach to the s. 525 detention review, beginning with the application for the hearing. However, it is necessary to first dispose of the argument that a threshold condition of unreasonable delay must be met in order for the judge to review the detention itself.

(1) Unreasonable Delay Is Not a Threshold Requirement for Reviewing the Detention

[29] Parliament did not intend to restrict the court's ability to review the detention of an accused at a s. 525 hearing to situations in which there has been an unreasonable delay. In this case, the Crown relies almost exclusively on the heading under which s. 525 appears ("Review of Detention where Trial Delayed") to support an argument that Parliament did intend to do so. In the Crown's view, although the passage of 90 days might have been synonymous with "unreasonable delay" in 1972, this is no longer the case. The Crown suggests that Parliament has simply failed to amend the legislation in order to reflect the modern life cycle of a trial, and that s. 525 hearings were only ever intended to be held in exceptional circumstances involving unreasonable delay.

[30] In line with this view, some courts have developed a test to the effect that unreasonable delay is a precondition to reviewing the detention of the accused at a s. 525 hearing: see, e.g., *Jerace*, at paras. 8-12 (CanLII). The Crown submits that the result of this interpretation of s. 525 is that the detention of the accused should rarely be scrutinized, because there will rarely have been an unreasonable delay when the 90-day mark is reached. The Attorney General of Ontario argues that the correct approach is one according to which the judge does not schedule a hearing at all unless he or she is satisfied that there has been an unreasonable delay.

[31] With respect, the view that the judge *must* consider unreasonable delay but that the operative word for reviewing the detention of the accused is only "*may*" represents precisely the opposite of what the provision says:

525 (1) . . . the person having the custody of the accused shall, forthwith on the expiration of those ninety or thirty days, as the case may be, apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody.

. . .

(3) On the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.

(4) If, following the hearing described in subsection (1), the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released

[32] In short, it is perfectly clear from the section that at the hearing, the judge *must* consider whether the continued detention of the accused is justified, and *may* consider whether there has been an unreasonable delay: s. 525(1) and s. 525(3) *Cr. C.*; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 11. Notably, the heading itself refers only to the trial being “delayed”, and *not* to an “unreasonable delay”, which suggests that Parliament simply intended the word “delayed” to refer to situations in which “the trial has not commenced” before the prescribed time. As well, the use of the word “any” in s. 525(3) makes it clear that there may or may *not* have been an unreasonable delay before the s. 525 hearing. Simply put, it is an error of law to treat unreasonable delay as a precondition for a review of the continued detention of the accused.

[33] There is no principled basis for this Court to “read in” a more restrictive test. It does not frustrate Parliament’s purpose to take the provision at face value, nor does it result in absurdity, waste or redundancy to do so. As the intervener Canadian Civil Liberties Association reminds us, “[t]oday, as before, three months is a long time for a person who is presumed innocent to be held in jail awaiting trial”: I.F., at para. 1. The Crown argues that this timeline is no longer realistic given the increased length and complexity of modern criminal trials. But even if that were true, the appropriate solution would be for Parliament to modify these clearly expressed requirements, not for this Court to read in a threshold that was never intended and that the words of the provision do not support. Circumstances that favour the release of the accused, issues related to unreasonable delay, or the need for a court to intervene to expedite the trial will not always have arisen when the 90-day mark is reached. Instead, 90 days following the last detention order against the accused is simply the point at which Parliament has specified that a judge must determine whether the

continued detention of the accused is justified. The impact of the passage of time generally (and of unreasonable delay specifically) may be properly considered in the judge's analysis at that time.

(2) Jailer's Obligation to Apply for a Hearing

[34] Subsection 525(1) makes it clear that the obligation to apply to a judge for a hearing lies with the person having the custody of the accused. In some provinces, this obligation is fulfilled by the prosecution rather than the correctional facility ("the jailer") itself.

[35] In proceedings by way of summary conviction, the obligation to make an application is triggered at the 30-day mark: s. 525(1)(b) *Cr. C.* For indictable offences, as in Mr. Myers' case, the relevant time is 90 days: s. 525(1)(a) *Cr. C.* The precise timing is made somewhat unclear by the use of the word "forthwith" in s. 525(1), which provides that the application must be made "forthwith on the expiration of those ninety . . . days". The French version of the same passage connotes immediacy — "*dès l'expiration de ces quatre-vingt-dix jours*" — and indicates more clearly that the obligation to make the application arises as soon as the 90-day period has expired. I would therefore take the provision to mean that the application must be made immediately upon the expiration of 90 days following (i) the date on which the accused was taken before a justice under s. 503, or (ii) the later of the date on which the accused was taken into custody and the date of a detention order under s. 520, 521 or 524.

[36] I would pause to note that it has been suggested that an accused person could apply for a s. 520 review at some point before the end of the 90-day period only to have a s. 525 hearing held just weeks or days later, which would be wasteful or redundant: G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 8-51 to 8-55. While this may have been an issue before amendments made to s. 525 in 1997 introduced a reference to s. 520 into s. 525(1)(a)(ii), it is no longer of concern: *Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 61(1). Section 525(1)(a)(ii) now indicates that the 90-day period is determined in relation to any order made pursuant to s. 521, 524 or 520.

[37] The rule is therefore as follows: the person having custody of the accused must ordinarily apply to the judge immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503: s. 525(1)(a)(i) *Cr. C.* Where, however, a new detention order is made against the accused — or a decision is made to continue an existing order — under s. 520, 521 or 524 after the initial appearance of the accused under s. 503, the result of s. 525(1)(a)(ii) is that the 90-day period will effectively begin again. By way of example, if an accused person is taken before a justice under s. 503 and detained in custody on day 1, then applies to a judge for a review of that decision under s. 520 on day 50 and the detention is confirmed, the jailer's obligation to make the application will not arise until 140 days following the day on which the accused person was first detained in custody. In addition to conforming to the words of s. 525(1), this interpretation minimizes the risk of redundancy, addresses any concerns related to the scarcity of judicial resources and limits the applicability of s. 525 to situations in which the accused has actually been in custody for a long period without judicial oversight.

[38] In *R. v. Acera*, [2017 ABQB 470](#), Veit J. suggested that at least one correctional facility appeared to be systematically failing to meet its obligation under the *Criminal Code* to apply for s. 525 hearings, sometimes by a margin of several months: paras. 10-17 and Appendix A (CanLII). The deadlines imposed by Parliament for an application under s. 525 are known to and foreseeable by all involved, including the correctional facility, the Crown and the court. It may well be that administrative reforms are required in order to ensure that s. 525 applications are made on time every time, for every eligible accused person. Delays in routine bail and detention matters are a manifestation of the culture of complacency denounced by this Court in *Jordan*, and must be addressed.

(3) Judge's Obligation to Fix a Date and Hold the Hearing

[39] Upon receiving the application from the jailer, the judge must fix a date and give notice for the hearing: s. 525(2) *Cr. C.* How much time the judge has after receiving the application before the date must be fixed is not specified. In fixing a date, the judge does not have a statutory discretion to refrain from holding the hearing until there has been an unreasonable delay or until

she or he believes that the test for the release of the accused will be met. For a judge to do so would have the effect of creating a threshold condition for the hearing where it is plain that none exists in the language of s. 525. Moreover, such a practice could easily result in longer periods of unnecessary pre-trial detention than there would have been had the accused simply appeared before the judge at a properly conducted review hearing at the time Parliament intended. Thus, in order for the s. 525 hearing to fulfill its purpose of meaningfully safeguarding the accused person's liberty, the jailer must make the application within the appropriate time limit, and the court must fix the date of the hearing without delay. And upon receiving the application from the jailer, the judge must schedule the hearing for the first available date.

[40] On the hearing date, the Crown and the accused must appear before the judge. In oral argument in this Court, it was suggested that the judge could then routinely exercise his or her discretion to adjourn the s. 525 hearing until a later time. With respect, I disagree with this position. I am prepared to accept that occasionally, and in limited circumstances, an adjournment could be compatible with the purpose of s. 525 and with Parliament's intent. However, as with the process of fixing a date for the hearing, it would be improper to adjourn merely because the judge does not believe that a full review of the detention would result in the release of the accused or because an unreasonable delay has not yet occurred.

[41] That being said, an adjournment should not be precluded where it clearly serves the interests of justice and the underlying purposes of the provision. For example — without limiting the foregoing — where a key piece of information is missing or a key event is pending, it would be entirely appropriate for the judge to adjourn the hearing until such time as the detention of the accused can be meaningfully assessed. The reviewing judge's exercise of this supervisory authority must ultimately be guided by the overarching purpose of the provision, which is to prevent an accused person from languishing in pre-trial custody and to ensure a prompt trial by subjecting lengthy detentions to judicial oversight. As a result, adjournments must always be used in a manner that safeguards and is consistent with the right of the accused to a prompt and thorough review of his or her detention when the 90-day mark is reached. Reviewing judges must rely on good sense

and experience in order to ensure that adjournments enhance rather than undermine the purpose of the s. 525 detention review.

(a) *Application of Section 525 Where There Has Been No Initial Hearing*

[42] There may be some instances in which an accused person has not had a full provincial court bail hearing that resulted in a detention order, but remains in custody after 90 days. This would primarily be the case for individuals in a reverse onus position who have consented to remand, but it could also arise in other narrow circumstances. There is some disagreement over whether such an individual is entitled to a s. 525 hearing: see, e.g., *Sarkozi*, at para. 32; *R. v. Saulnier*, 2012 NSSC 45, 314 N.S.R. (2d) 203, at paras. 10-11; *R. v. Burgar*, 2003 BCCA 426, 186 B.C.A.C. 15, at para. 10.

[43] In my view, there is no principled basis for holding that individuals in this situation are not entitled to a hearing under s. 525. In theory, every accused person in custody will have been “taken before a justice under section 503” within the meaning of s. 525(1) and is therefore entitled to a hearing under s. 525. More to the point, the fundamental purpose of s. 525 is to afford an opportunity to have a judge scrutinize the detention itself, and individuals who find themselves in these exceptional circumstances should not be denied that safeguard. I would echo the view that those who, for whatever reason, do not contest their initial detention “should not be punished for doing so, by depriving them of the potential benefits of s. 525 hearings, especially where their liberty and constitutional right to a trial within ‘a reasonable time’ is implicated”: *Saulnier*, at para. 10.

(b) *No Request Is Required for the Hearing to Take Place*

[44] It is clear from the *Criminal Code* that the s. 525 hearing is an automatic procedure. The mandatory obligations to make the application and to fix a date lie with the jailer and the judge, respectively. In this case, the Crown sent defence counsel a letter in which it invited him to reply in order “to advise whether [Mr. Myers] wishes to pursue a bail review at this time, and if so,

to arrange a mutually convenient date”: Appellant’s Condensed Book, Tab 8. Form letters which place the burden on the accused to pursue a s. 525 hearing are inconsistent with the law. Such letters may disproportionately confuse or discourage unrepresented individuals, who are in particular need of the judicial oversight Parliament intended to ensure when it enacted s. 525. There may be circumstances in which an accused person, fully informed of his or her rights and the purpose of the provision, will decline what is intended to be an automatic hearing under s. 525. However, the words, the context and the purpose of the provision do not support an interpretation to the effect that s. 525 hearings are an “opt-in” affair.

(4) Overarching Question at the Hearing

[45] The overarching question at the s. 525 hearing is clear from the words of the provision. Section 525(1) explicitly states that the judge’s role is “to determine whether or not the accused should be released from custody”. Section 525(3) provides that the judge may, “in deciding whether or not the accused should be released from custody”, take any unreasonable delay into consideration. Section 525(4) instructs the judge to order the accused person’s release if the judge “is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10)”.

[46] The question that the judge must answer at a s. 525 hearing is therefore as follows: *Is the continued detention of the accused in custody justified within the meaning of s. 515(10)?* Section 515(10) sets out three possible grounds on which the detention of an accused in custody may be justified: where it is necessary in order to ensure the attendance of the accused in court; where it is necessary for the protection or safety of the public; and where it is necessary in order to maintain public confidence in the administration of justice.

(5) Nature of the Detention Review

[47] The question in the s. 525 review — whether the continued detention of the accused is justified — is somewhat different in nature than the question at the initial bail hearing or in a

review under s. 520 or 521. While ss. 520 and 521 exist for the purpose of reviewing a prior order, a review under s. 525 is more properly characterized as a review of the detention itself. Yet there is no indication that Parliament intended the judge presiding a s. 525 detention review hearing to reconduct the original bail hearing in its entirety simply because 90 days have elapsed. Mr. Myers himself concedes as much: he argues only that a s. 525 hearing requires a “multi-factorial analysis”: A.F., at para. 89. This means that the judge at the s. 525 hearing should in his or her analysis show respect for any findings of fact made by the first-level decision maker if there is no cause to interfere with them. Similarly, any balancing exercise or weighing of factors conducted by the initial bail judge must be reviewed in light of the time that has already elapsed and any other relevant considerations, as will be discussed below.

(6) Material Available to the Judge

[48] Section 525 offers little guidance on the record available to the judge at the hearing. However, as Veale J. pointed out in *Sawrenko*, at para. 31, s. 525(8) serves to incorporate ss. 517 to 519, with any necessary modifications. Under s. 518(1), the prosecutor may show the circumstances of the alleged offence and the judge has a wide discretion to make inquiries, as well as to receive and consider any evidence “considered credible or trustworthy” in the circumstances of the case. The judge at the s. 525 hearing is therefore free to make inquiries about the case, as well as to rely upon the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review.

[49] Furthermore, both parties are entitled to make submissions on the basis of any additional “credible or trustworthy” information which is relevant or material to the judge’s analysis. The admissibility of any material that existed at the time of the initial bail hearing but was not presented at that point should also be governed by the criteria of due diligence and relevance discussed in *St-Cloud*, at paras. 130-35. In the context of a s. 525 review, the judge must be particularly attentive to any new evidence or material change in the circumstances of the accused and to its impact on the question whether his or her continued detention in custody is justified. For example, the period of pre-trial detention may have afforded the accused person time to make

arrangements for a suitable surety, develop a comprehensive release plan or take other steps that would negate the initial basis for his or her detention under s. 515(10).

(7) Impact of the Passage of Time and Unreasonable Delay

[50] In determining whether the detention remains justified under s. 515(10), the judge should also consider whether the time that has already elapsed has had — or the anticipated passage of time will have — an impact on the appropriateness or proportionality of the detention. In particular, it is necessary to be sensitive to whether the continued detention of the accused person could erode public confidence in the administration of justice: see, e.g., *McCormack*, at para. 29 (CanLII).

[51] This is ultimately a question of proportionality. In some cases, the passage of time will have no impact on the necessity of continued detention. In other cases, it may be a very strong indicator that the accused should be released, with or without conditions. Reviewing judges must be particularly alert to the possibility that the amount of time spent by an accused in detention has approximated or even exceeded the sentence he or she would realistically serve if convicted: see, e.g., *Sawrenko*, at para. 43. The assessment must be informed by the need to reduce the risk of induced guilty pleas, which are profoundly detrimental to the integrity of the criminal justice system. As was noted in *R. v. White*, 2010 ONSC 3164, “public confidence in the administration of justice, and in particular in the judicial interim release regime, would be substantially eroded by pre-trial incarceration of presumptively innocent individuals to the equivalency or beyond the term of what would be a fit sentence if [they were] convicted”: para. 10 (CanLII).

[52] Determining, for the purposes of this analysis, the sentence the accused would potentially receive is not an exact science, nor does it require an exhaustive inquiry. However, the judge’s analysis should account for the circumstances of the case that were known at the time of the hearing and reflect the relevant sentencing principles: *St-Cloud*, at para. 65.

[53] In other circumstances, accounting for the elapsed time or anticipated passage of time may require a more nuanced analysis of its impact on the three grounds which justify detention under s. 515(10). In *St-Cloud*, the Court indicated that a lengthy delay between the hearing and the eventual trial may be considered in determining whether detention is necessary to maintain confidence in the administration of justice, which is the tertiary ground: para. 71. In this sense, the analysis is not only retrospective, but also forward-looking. For example, let us consider a scenario in which an individual is detained on the basis of s. 515(10)(c), and at the time of the first detention order his trial is only two months away. If the trial date is then rescheduled for a date two years later and remains many months away at the time of s. 525 hearing, the continued detention of the accused may no longer be proportionate, or necessary, for the purposes of this third ground: see also *R. v. Whyte*, 2014 ONCA 268, 119 O.R. (3d) 305, at paras. 39-43; *Piazza*, at paras. 71-81 (CanLII). In an appropriate case, it may also be possible for the judge to conclude that a hypothetical risk in relation to the primary or secondary ground is simply outweighed by the certain cost of the accused person's loss of liberty or of a loss of public confidence in the administration of justice.

[54] As part of this analysis, the judge may consider whether either party has been responsible for any *unreasonable* delay in the trial of the charge: s. 525(3) *Cr. C.* If an unreasonable delay in getting the case to trial can be attributed to one of the parties, that factor will be relevant in determining whether the continued detention of the accused is proportionate or appropriate. Thus, if the accused appears to have engineered an unreasonable delay in his or her own trial, the basis for making a release order will clearly be weaker, but if the Crown is responsible for an unreasonable delay, this will weigh in favour of release. While the term "unreasonable delay" in s. 525 clearly cannot have the same meaning as it does in the context of s. 11(b) of the *Charter*, the two can be seen to be conceptually related. That being said, not every delay in getting a matter to trial will be unreasonable, and the accused does not have a right to be at any particular point in the process when the 90-day mark is reached. The judge must therefore rely on his or her judgment and experience in determining what impact, if any, the passage of time and an unreasonable delay should have on the continued detention of the accused.

[55] Finally, there may be cases in which it is necessary for the reviewing judge to scrutinize the rationale offered for the original detention order against the accused. While any previous bail decisions will be relevant and will likely inform the proceedings, reviewing judges must be careful not to simply “rubber-stamp” such decisions. As I noted above, s. 525 creates an independent safeguard function that is particularly important for unrepresented individuals, who may not have had the means, the capacity or the awareness to apply for a s. 520 review but are now appearing before a judge at a s. 525 hearing. For example, if when the accused appears at the s. 525 hearing it becomes clear that the initial bail judge made an error of law — perhaps by failing to apply the bail principles enunciated by this Court in *Antic*, at para. 67, — and that this resulted in an unnecessary detention, it would be wasteful to tell the accused at that point to make a separate application for a different review process under s. 520. The need to revisit an initial detention order will not arise in every case, and in the absence of a basis for judicial intervention, there is no need for a s. 525 hearing to become a protracted or formal proceeding. However, the judge must be alive to these issues when they arise, and must be prepared to respond to them appropriately.

(9) Hearing Where There Has Been No Initial Bail Decision

[56] Since s. 525 calls upon the judge to review the detention itself, the existence of an initial decision is not required in order to achieve the core objective of a s. 525 review. As I mentioned above, there may be certain anomalous situations in which an accused person who appears before a judge under s. 525 did not undergo a full initial bail hearing at the time of his or her arrest. To give proper effect to s. 525 in such situations, the judge is required to conduct the full bail hearing “from the ground up” in accordance with the ladder principle articulated in *Antic*, taking into account the time the accused has already spent in pre-trial custody. I wish to mention here that it has been suggested that allowing a full bail hearing to proceed before a superior court judge at the s. 525 stage would encourage “judge shopping” or would afford the accused some kind of procedural advantage that would for him or her justify spending three months in custody. In my view, this argument strains credulity. To quote O’Neill J. in *McCormack*, “I am not at all sure that many jailed accused would ever resort to paying the 90 day price for that strategy”: para. 26.

(10) Discretion to Give Directions for Expediting the Trial and Proceedings

[57] Section 525(9) affords the judge a discretion to give directions for expediting the trial of the accused at a s. 525 hearing, and s. 526 confers a more general authority on judges and justices acting under Part XVI of the *Criminal Code* to give directions for expediting any proceedings in respect of the accused. For these provisions to operate as meaningful safeguards against unreasonable delay and excessively long pre-trial detention, all stakeholders — including the prosecution, defence counsel and the courts — must take an active role in ensuring the timely progress of the trial.

[58] First, s. 525 hearings take on a heightened importance in the post-*Jordan* era, because they afford an opportunity to have a reviewing judge evaluate the progress of the trial at an early stage. If the judge believes that the case is at a point at which an unreasonable delay prohibited by s. 11(b) of the *Charter* is likely to result, he or she should consider giving directions for expediting the trial under ss. 525(9) and 526 as a preventative measure.

[59] However, s. 525 must be understood as more than just a “*Jordan* check-up”. Individuals in pre-trial detention, who are presumed innocent, bear a particularly high cost in terms of loss of liberty while awaiting their day in court. The judge should always determine whether the case presents an appropriate occasion to exercise his or her discretion to give directions for expediting the trial and related proceedings under ss. 525(9) and 526. Also, a judge who finds that the continued detention of the accused is justified on the basis of the grounds set out in s. 515(10) must look ahead to ensure that the accused will not be in a “time served” position before the prospective trial date.

[60] In deciding whether to give directions under s. 525(9) or 526, the reviewing judge must consider all the circumstances of the case and any relevant submissions by the parties. Relevant factors could include the relative complexity of the case, the involvement of co-accused individuals, the completeness of disclosure, problems related to evidence, the presence of any exceptional circumstances and the typical delay in getting comparable matters to trial in the

jurisdiction in question. The analysis should be forward-looking. It should also be realistic, as the purpose of s. 525 is not to provide a pretext for judicial micro-management. Usually, the case will be proceeding at an acceptable pace and no directions from the court will be required. However, there may sometimes be a need, for example, to review the state of the Crown's disclosure to the defence, resolve an outstanding procedural issue or inquire into whether an earlier trial date can be secured. In these circumstances, a considered, principled and proactive intervention of a reviewing judge can have a real impact on the fairness and efficiency of the criminal justice process, and meaningfully safeguard the liberty interests of the accused.

(11) Right of the Accused to Know the Case to Meet

[61] Finally, I would note that in oral argument, the Attorney General of Ontario remarked that at s. 525 hearings in that province, “[m]ost of the time the accused do not understand why they are there, most of the time they are unrepresented and it simply gets dismissed”: transcript, at p. 92. This can hardly be what Parliament intended in enacting s. 525. There is no question that accused persons have a right to understand the purpose of the hearing, regardless of whether they are represented by counsel. All participants in our criminal justice system bear a fundamental responsibility for ensuring that this is the case. In reality, the individuals who are at the greatest risk of languishing in custody are those who are unrepresented. Where an accused is fully informed and supported by counsel, a s. 525 hearing may be a brief formality or may be waived altogether. However where the state has not provided for some form of legal assistance and the rights of an unrepresented individual are concerned, the judge must take even greater care to safeguard the liberty of the accused in order to maintain public confidence in the justice system.

(12) Summary of the Correct Approach

[62] I would summarize the correct approach to a detention review under s. 525 as follows. First, the jailer has an obligation to apply for the hearing immediately upon the expiration of 90 days following the day on which the accused was initially taken before a justice under s. 503. Where there is an intervening detention order under s. 520, 521 or 524 following the initial

appearance of the accused and before the end of the 90-day period, the 90-day period begins again. Accused persons who have not had a full bail hearing are nonetheless entitled to one under s. 525. Upon receiving the application from the jailer, the judge must fix a date and give notice for the hearing. The hearing must be held at the earliest opportunity. In his or her analysis, the judge may refer to the transcript, exhibits and reasons from any initial judicial interim release hearing and from any subsequent review hearings. Both parties are also entitled to make submissions on the basis of any additional “credible or trustworthy” information which is relevant or material to the judge’s analysis, and pre-existing material is subject to the criteria of due diligence and relevance discussed in *St-Cloud*, at paras. 130-35.

[63] At the hearing, unreasonable delay is not a threshold that must be met before reviewing the detention of the accused. The overarching question is only whether the continued detention of the accused in custody is justified within the meaning of s. 515(10). In determining whether the detention of the accused is still justified, the reviewing judge may consider any new evidence or change in the circumstances of the accused, the impact of the passage of time and any unreasonable delay on the proportionality of the detention, and the rationale offered for the original detention order, if one was made. If there was no initial bail hearing, the s. 525 judge is responsible for conducting one, taking into account the time the accused has already spent in pre-trial custody. Ultimately, s. 525 requires a reviewing judge to provide accused persons with reasons why their continued detention is — or is not — justified. Finally, the judge should make use of his or her discretion under ss. 525(9) and 526 to give directions for expediting the trial and related proceedings where it is appropriate to do so. Directions should be given with a view to mitigating the risk of unconstitutional delay and expediting the trials of accused persons who are subject to lengthy pre-trial detention.

V. Application

[64] I will not carry out the full exercise of applying the foregoing principles to the facts of this case, given that the appeal is moot and the accused has pled guilty. I will, however, make three brief observations.

[65] First, the 90-day period applicable to Mr. Myers' s. 525 hearing should have begun on November 24, 2016, which was the date of his s. 520 review. At that point, his sentence for the unrelated break and enter charges had been served, and he was not detained on any other matter: ruling on judicial interim release application, at para. 34. However, counsel for Mr. Myers was not contacted with regard to a s. 525 hearing until 110 days later (on March 14, 2017): Appellant's Condensed Book, Tab 8. The hearing itself did not take place until October 5, 2017, over 300 days after Mr. Myers' s. 520 review. While it is true that this case is exceptional in that Riley J. was asked to give a preliminary ruling on s. 525, the fact remains that Mr. Myers waited a very long time for the hearing to occur. I would reiterate that when an accused is not required to be detained in custody in respect of any other matter for 90 days following a review under s. 520, the application for the hearing must be made immediately upon the expiration of 90 days, and the judge has an obligation to schedule that hearing without delay.

[66] Second, I would note that the parties faced various barriers in fixing a date for trial. Dates were offered in March, June, October and November 2017. Counsel for Mr. Myers submits that he offered to re-arrange his caseload to accommodate more dates and proposed to make considerable admissions based on the preliminary inquiry evidence in order to shorten the trial. He also applied unsuccessfully for severance of Mr. Myers from his co-accused, Mr. Richardson. Despite these efforts, a trial that was initially scheduled for late 2016 was ultimately set for March 2018, 4 months before the presumptive 30-month ceiling: *Jordan*, at para. 5. While this type of scheduling challenge is not uncommon, the delays were, as the Crown concedes, unfortunate. Nevertheless, scheduling issues caused by the fact that the Crown was proceeding jointly against Mr. Myers and Mr. Richardson appeared to have been a more significant factor in the delays than unreasonable behaviour on the part of either the Crown or the accused. It is possible that directions given under s. 525(9) or 526 could have prevented or mitigated the delays.

[67] Third, Mr. Myers was detained exclusively on the basis of the second ground under s. 515(10), despite the fact that he had a release plan involving a closely supervised treatment facility to address his substance abuse problems and multiple proposals to address the concern that he posed a risk to the public. It was within the bail judge's discretion to determine whether the release

strategies presented by counsel addressed the risk that if released from custody, Mr. Myers would commit a criminal offence or interfere with the administration of justice within the meaning of s. 515(10)(b). That being said, judges and justices presiding over bail hearings should always give very careful consideration to release plans that involve supervised treatment for individuals with substance abuse and mental health issues. Release into treatment with appropriate conditions will often adequately address any risk raised under s. 515(10), and such a strategy is a less onerous alternative than provincial remand. It may also substantially address the root causes of the accused person's alleged criminal behaviour and reduce the likelihood of future criminal conduct. In accordance with the principles articulated in *Antic*, we must not lose sight of the fact that pre-trial detention is a measure of last resort.

VI. Disposition

[68] As the case is moot, I would simply allow the appeal and make no further order.

APPENDIX

Criminal Code, R.S.C. 1985, c. C-46

Justification for detention in custody

515 (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Review of Detention where Trial Delayed

Time for application to judge

525 (1) Where an accused who has been charged with an offence other than an offence listed in section 469 and who is not required to be detained in custody in respect of any other matter is being detained in custody pending his trial for that offence and the trial has not commenced

(a) in the case of an indictable offence, within ninety days from

(i) the day on which the accused was taken before a justice under section 503, or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision, or

(b) in the case of an offence for which the accused is being prosecuted in proceedings by way of summary conviction, within thirty days from

(i) the day on which the accused was taken before a justice under subsection 503(1), or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, or a decision has been made with respect to a review under section 520, the later of the day on which the accused was taken into custody under that order and the day of the decision,

the person having the custody of the accused shall, forthwith on the expiration of those ninety or thirty days, as the case may be, apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody.

Notice of hearing

(2) On receiving an application under subsection (1), the judge shall

(a) fix a date for the hearing described in subsection (1) to be held in the jurisdiction

(i) where the accused is in custody, or

(ii) where the trial is to take place; and

(b) direct that notice of the hearing be given to such persons, including the prosecutor and the accused, and in such manner as the judge may specify.

Matters to be considered on hearing

(3) On the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.

Order

(4) If, following the hearing described in subsection (1), the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsection 515(4) as the judge considers desirable.

Warrant of judge for arrest

(5) Where a judge having jurisdiction in the province where an order under subsection (4) for the release of an accused has been made is satisfied that there are reasonable grounds to believe that the accused

(a) has contravened or is about to contravene the undertaking or recognizance on which he has been released, or

(b) has, after his release from custody on his undertaking or recognizance, committed an indictable offence,

he may issue a warrant for the arrest of the accused.

Arrest without warrant by peace officer

(6) Notwithstanding anything in this Act, a peace officer who believes on reasonable grounds that an accused who has been released from custody under subsection (4)

(a) has contravened or is about to contravene the undertaking or recognizance on which he has been released, or

(b) has, after his release from custody on his undertaking or recognizance, committed an indictable offence,

may arrest the accused without warrant and take him or cause him to be taken before a judge having jurisdiction in the province where the order for his release was made.

Hearing and order

(7) A judge before whom an accused is taken pursuant to a warrant issued under subsection (5) or pursuant to subsection (6) may, where the accused shows cause why his detention in custody is not justified within the meaning of subsection 515(10), order that the accused be released on his giving an undertaking or entering into a recognizance

escribed in any of paragraphs 515(2)(a) to (e) with such conditions, described in subsection 515(4), as the judge considers desirable.

Provisions applicable to proceedings

(8) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of any proceedings under this section.

Directions for expediting trial

(9) Where an accused is before a judge under any of the provisions of this section, the judge may give directions for expediting the trial of the accused.

Directions for expediting proceedings

526 Subject to subsection 525(9), a court, judge or justice before which or whom an accused appears pursuant to this Part may give directions for expediting any proceedings in respect of the accused.

Appeal allowed.

Solicitors for the appellant: Myers Karp Patey & Allingham, Vancouver.

Solicitor for the respondent: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Henein Hutchison, Toronto.

TAB 25

R. v. Nixon, 2011 SCC 34 (CanLII), [2011] 2 SCR 566

Source:	Supreme Court of Canada
Date:	2011-06-24
File number:	33476
Other citations:	335 DLR (4th) 565 — 417 NR 274 — [2011] 7 WWR 429 — [2011] EXP 2036 — 2 Sask R 566 — 41 Alta LR (5th) 221 — 502 AR 18 — 271 CCC (3d) 36 — 85 CR (6th) 1 — 237 CRR (2d) 333 — 95 WCB (2d) 754 — EYB 2011-192222 — JE 2011-1113 — [2011] SCJ No 34 (QL) — 13 MVR (6th) 1
Citation:	R. v. Nixon, 2011 SCC 34 (CanLII), [2011] 2 SCR 566, < https://canlii.ca/t/flzgm >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v. Fuller , 2020 ONSC 180 (CanLII) [...] [23] This case is therefore distinguishable from Nixon . [...]



SUPREME COURT OF CANADA

CITATION: R. v. Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566

DATE: 20110624

DOCKET: 33476

BETWEEN:

Olga Maria Nixon

Appellant

and

Her Majesty The Queen

Respondent

- and -

**Attorney General of Ontario, Attorney General of Manitoba,
Attorney General of British Columbia,**

**Criminal Trial Lawyers' Association and
Criminal Lawyers' Association (Ontario)**
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: Charron J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring)
(paras. 1 to 71)

R. v. Nixon, 2011 SCC 34, [2011] 2 S.C.R. 566

Olga Maria Nixon

Appellant

v.

Her Majesty The Queen

Respondent

and

**Attorney General of Ontario,
Attorney General of Manitoba,
Attorney General of British Columbia,
Criminal Trial Lawyers' Association and
Criminal Lawyers' Association (Ontario)**

Interveners

Indexed as: R. v. Nixon

2011 SCC 34

File No.: 33476.

2010: December 15; 2011: June 24.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Accused charged with dangerous driving causing death, dangerous driving causing bodily harm and parallel charges for impaired driving — Crown and accused entering into plea agreement — Crown subsequently repudiating plea agreement — Whether repudiation amounting to breach of accused's s. 7 Charter rights — Canadian Charter of Rights and Freedoms, s. 7.

Criminal law — Plea agreement — Repudiation — Accused charged with dangerous driving causing death, dangerous driving causing bodily harm and parallel charges for impaired driving — Crown and accused entering into plea agreement — Crown subsequently repudiating plea agreement — Whether act of repudiation matter of tactics or conduct before court or matter of prosecutorial discretion — Whether act of repudiation reviewable on grounds of abuse of process.

The accused drove her motor home through an intersection and struck another vehicle, killing a husband and wife and injuring their young son. She was charged with several *Criminal Code* offences, including dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges for impaired driving. Counsel initially entered into a plea agreement according to which the accused would plead guilty to a charge of careless driving under the provincial *Traffic Safety Act* with a joint sentence recommendation for an \$1,800 fine in return for which the Crown agreed to withdraw the *Criminal Code* charges. When the Acting Assistant Deputy Minister of the Criminal Justice Division of the Office of the Attorney General saw the proposed resolution, he initiated an inquiry which led him to conclude that Crown counsel's assessment of the strength of the case was flawed. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. Crown counsel was thus instructed to withdraw the plea agreement and to proceed to trial. In response, the accused brought a s. 7 *Charter* application alleging abuse of process and seeking a court direction requiring the Crown to complete the plea agreement. The application

judge held that negotiations between counsel after charges are laid are matters of tactics or conduct which are subject to review by the court, and that the repudiation of the plea agreement, in this case, was not justified. He concluded that the accused's s. 7 *Charter* right to security of the person had been breached and he directed the Crown to proceed with the agreement. The Court of Appeal allowed the Crown's appeal, finding that the repudiation of a plea agreement is a matter of prosecutorial discretion not reviewable by the courts, subject to the doctrine of abuse of process.

Held: The appeal should be dismissed.

The crucial importance of the distinction between prosecutorial discretion reviewable only for abuse of process and matters of tactics or conduct before the court governed by the inherent jurisdiction of the criminal trial court to control its own process was fully canvassed and explained in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. The Crown's decision in this case to resile from the plea agreement and to continue the prosecution clearly constituted an act of prosecutorial discretion subject to the principles set out in *Krieger*: it is only reviewable for abuse of process. Prosecutorial discretion is not spent with the decision to initiate the proceedings, nor does it terminate with a plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued, and if so, in respect of what charges.

There are two categories of abuse of process under s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process. While s. 24(1) of the *Charter* allows for a wide range of remedies, this does not mean that abuse of process can be made out by demonstrating a lesser degree of harm, either to the accused's fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.

The repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process. The more difficult question in this appeal is how the initial exercise of prosecutorial discretion — Crown counsel’s offer to resolve the matter on the basis of a plea to a lesser charge — should figure in the analysis regarding abuse of process. A plea agreement should not be regarded as a contractual undertaking. Vitiating factors, such as mistake, misrepresentation or fraud, which usually inform a private party’s right to resile from a bargain, do not fully capture the public interest considerations which are at play. However, the analogy can usefully underscore the utmost importance of honouring the agreement. The situations in which the Crown can properly repudiate a plea agreement are, and must remain, very rare. Moreover, the reasonably defensible test applied by the application judge to Crown counsel’s decision to enter into a plea agreement is not the appropriate measure to determine whether there is an abuse of process. Indeed, it is the circumstances surrounding the repudiation of a plea agreement which should be reviewed to determine whether that decision amounts to an abuse of process. Reviewing for “reasonableness” a decision made in the exercise of prosecutorial discretion runs contrary to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions as well as the principles set out in *Krieger*.

Given that acts of prosecutorial discretion are generally beyond the reach of the court, there is good reason to impose a threshold burden on the applicant who alleges abuse of process. A court should not embark on an inquiry into the reasons behind the exercise of prosecutorial discretion without a proper evidentiary foundation. However, evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. The ultimate burden of proving abuse of process, however, remains on the applicant.

In this case, the Crown’s repudiation conduct cannot be considered so unfair or oppressive to the accused, or so tainted by bad faith or improper motive, that to allow the Crown to

now proceed on the dangerous driving *Criminal Code* charges would tarnish the integrity of the judicial system and thus constitute an abuse of process. Indeed, the Acting Assistant Deputy Minister, in good faith, determined that Crown counsel's assessment of the strength of the evidence was erroneous and, on that basis, having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. This can hardly be regarded as evidence of misconduct. Finally, the accused was returned to the position she was in at the conclusion of the preliminary hearing before the plea agreement was entered into and thus suffered no prejudice as a result of the repudiation.

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Applied: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; **disapproved:** *R. v. M. (R.)* (2006), 2006 CanLII 32999 (ON SC), 83 O.R. (3d) 349; **referred to:** *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128; *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411; *R. v. Keyowski*, 1988 CanLII 74 (SCC), [1988] 1 S.C.R. 657; *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659; *Canada (Minister of Citizenship and Immigration) v. Tobias*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343.

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APPEAL from a judgment of the Alberta Court of Appeal (Côté, Paperny and Slatter JJ.A.), 2009 ABCA 269, 8 Alta. L.R. (5th) 384, 464 A.R. 1, 246 C.C.C. (3d) 149, 195 C.R.R. (2d) 352, [2009] 10 W.W.R. 641, 82 M.V.R. (5th) 191, [2009] A.J. No. 871 (QL), 2009 CarswellAlta 1221, setting aside an order of Ayotte Prov. Ct. J., 2008 ABPC 20, 89 Alta. L.R. (4th) 156, 445 A.R. 111, 233 C.C.C. (3d) 539, [2008] 8 W.W.R. 740, 61 M.V.R. (5th) 287, [2008] A.J. No. 129 (QL), 2008 CarswellAlta 162, directing the Crown to honour the plea agreement. Appeal dismissed.

Marvin R. Bloos, Q.C., for the appellant.

Goran Tomljanovic, Q.C., and *Christine Rideout*, for the respondent.

Michal Fairburn and *Frank Au*, for the intervener the Attorney General of Ontario.

Ami Kotler, for the intervener the Attorney General of Manitoba.

M. Joyce DeWitt-Van Oosten, Q.C., for the intervener the Attorney General of British Columbia.

D’Arcy DePoe, for the intervener the Criminal Trial Lawyers’ Association.

Marie Henein, Matthew Gourlay and *Lou Strezos*, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of the Court was delivered by

CHARRON J. —

1. Introduction

[1] The question on this appeal is whether the trial judge erred in concluding that the Crown’s repudiation of a plea agreement was an abuse of process in breach of the appellant’s rights

under [s. 7](#) of the *Canadian Charter of Rights and Freedoms*. More specifically, the courts below were divided on the appropriate standard against which to measure the repudiation conduct.

[2] The application judge held that the repudiation of a plea agreement is a matter of conduct or tactics which is subject to the usual control of the criminal trial court ([2008 ABPC 20](#), 89 Alta. L.R. (4th) 156). In the case at bar, the repudiation of the plea agreement by the Assistant Deputy Minister of the Criminal Justice Division was not justified, as Crown counsel's decision to enter into a plea agreement was "reasonably defensible". Thus, he concluded that the repudiation of the plea agreement was an abuse of process in breach of the accused's [s. 7](#) security and liberty interests and directed the Crown to honour the agreement. The appellant subsequently pleaded guilty to a lesser offence and was acquitted on the more serious charges.

[3] The Alberta Court of Appeal overturned the application judge's decision, holding that the repudiation of a plea agreement is a matter of prosecutorial discretion, reviewable only for abuse of process ([2009 ABCA 269](#), 8 Alta. L.R. (5th) 384). It held that the application judge erred in testing Crown counsel's decision against a "reasonably defensible" standard. Rather, he should have reviewed the circumstances surrounding the subsequent decision to repudiate. The relevant inquiry for abuse of process under [s. 7](#) of the *Charter* is whether there is conduct which either causes prejudice to the accused by rendering the trial unfair, or affects the integrity of the justice system itself. In the absence of prejudice which renders the trial unfair, there must be proof of "prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate" (para. 49). Applying this test, the Court of Appeal found no evidence to support a finding of abuse of process in the circumstances of this case. The application judge's order, the resulting plea and the acquittals were set aside, and a new trial was ordered.

[4] The appellant, Olga Maria Nixon, appeals to this Court.

[5] For the reasons that follow, I agree with the Court of Appeal that the application judge applied the incorrect test for abuse of process. I also agree that there is no basis for finding

that the appellant's s. 7 rights were breached in the circumstances of this case. I would dismiss the appeal.

2. The Proceedings Below

[6] The appellant, Ms. Nixon, was charged with several *Criminal Code*, R.S.C. 1985, c. C-46, offences, including dangerous driving causing death, dangerous driving causing bodily harm, and parallel charges for impaired driving. The charges arose as a result of a motor vehicle accident which occurred on September 2, 2006. The Crown alleged that Ms. Nixon drove her motor home through an intersection without stopping and struck another vehicle, killing a husband and wife and injuring their young son. A roadside screening test was administered at the scene, followed by breath samples which resulted in readings of 200 mg of alcohol in 100 mL of blood. Expert extrapolation concluded that Ms. Nixon's blood alcohol level would have been between 225 and 250 mg per 100 mL at the time of the accident.

[7] Given that Ms. Nixon elected trial by judge and jury, the matter proceeded to a preliminary inquiry on March 1, 2007. Crown counsel who had carriage of the case at the time had concerns about some of the evidence, in particular the admissibility of the breathalyzer results and the probative value of the eyewitness evidence that a motor home had been seen driving erratically some time before the accident. Based on his assessment, Crown counsel did not adduce the breath sample results at the preliminary hearing, although he specifically reserved the right to call this evidence at trial. He also informed the presiding judge that the Crown would not be seeking a committal on any charge other than the dangerous driving counts. Ms. Nixon consented to a committal order on the dangerous driving charges.

[8] Following the preliminary inquiry, additional discussions were held between counsel during the first weeks of May 2007 regarding a plea to a charge of careless driving under the *Traffic Safety Act*, R.S.A. 2000, c. T-6, with a joint sentence recommendation for a \$1,800 fine. Counsel ultimately entered into a written agreement to that effect on May 22, and Ms. Nixon re-elected her mode of trial in anticipation of entering a guilty plea to the lesser charge on June 5.

[9] Before making the offer for a plea resolution, Crown counsel had discussed the matter in general terms with some of his colleagues in the Crown's office, including his immediate supervisor who reluctantly agreed with the terms of the proposed agreement. Due to the sensitive nature of the case, a report was also prepared for senior officials in the justice department. When the Acting Assistant Deputy Minister ("ADM") of the Criminal Justice Division of the office of the Attorney General saw the report and the proposed resolution scheduled to be perfected a few days later, he became concerned and initiated an inquiry. This in turn prompted an adjournment of the June 5 date to June 26. The defence was not informed of the reason for the adjournment at the time.

[10] The ADM obtained additional legal opinions about the merits of the Nixon prosecution and about the repudiation of plea agreements. Based on the results of this research, the ADM concluded that Crown counsel's assessment of the strength of the case was flawed as he had failed to consider the totality of the evidence. In his view, a plea to careless driving in the circumstances was contrary to the interests of justice and would bring the administration of justice into disrepute. The ADM also concluded that Ms. Nixon could be restored without prejudice to the position she had been in prior to entering into the plea agreement. Thus, it was resolved that the decision by Crown counsel at the preliminary hearing not to proceed on the impaired driving counts would be maintained. However, the ADM instructed Crown counsel to withdraw the May 22 resolution agreement and to proceed to trial on the dangerous driving charges in accordance with the committal order.

[11] In response to this turn of events, Ms. Nixon brought an application under [s. 7](#) of the [Charter](#), alleging abuse of process and seeking a court direction requiring the Crown to complete the agreement. Ayotte Prov. Ct. J. of the Provincial Court of Alberta embarked on an inquiry into the matter, at the conclusion of which he reserved judgment. At the outset of his written reasons, the application judge noted that the Attorney General has the ultimate power to initiate, conduct and terminate prosecutions, as affirmed by this Court in *Krieger v. Law Society of Alberta*, [2002 SCC 65](#), [2002] 3 S.C.R. 372. He also acknowledged that the courts will rarely interfere with the exercise of prosecutorial discretion. In his view, however, "when that discretion is exercised in

favour of proceeding, the matter becomes subject to the processes and procedures sanctioned by the court” (para. 12). Thus, he held that negotiations between counsel after charges are laid were matters of tactics or conduct which were subject to review by the court.

[12] The application judge then discussed the standard against which to measure the Crown’s conduct. He concluded that the Crown’s ability to repudiate a plea agreement is akin to the discretion of a trial judge to reject a joint submission on sentence: the determinative test was whether the plea agreement was “reasonably defensible”. Before delving into that issue, however, the application judge dealt with Ms. Nixon’s concern that the decision to repudiate was motivated by political considerations. After reviewing the relevant evidence, he concluded that “there is absolutely no evidence” of political interference (para. 22) and “nothing to suggest that [the ADM’s] action was taken in bad faith or to accommodate a real or perceived political stance of his Minister of Justice” (para. 25).

[13] The application judge emphasized that the relevant test is whether the plea agreement was “reasonably defensible”. In his view, if the Crown is to justify its course of action to repudiate the agreement, then it must do more than establish that others would have reached a different conclusion. In the case at bar, he concluded that the repudiation of the plea agreement was not justified, as Crown counsel’s assessment of the case was “reasonably defensible”. The application judge held further that where the court is satisfied that the original bargain, if honoured, would not be contrary to the public interest and would not bring the administration of justice into disrepute, it is irrelevant whether the accused suffered prejudice. He added that if he were required to find prejudice, he would do so here. In his view, Ms. Nixon was prejudiced because defence counsel was led to believe that the evidence of breath samples would not be adduced at trial and, consequently, did not explore that issue at the preliminary hearing.

[14] The application judge concluded that Ms. Nixon’s s. 7 right to security of the person was breached and, by way of remedy, he directed the Crown to proceed with the agreement before another judge. Ms. Nixon subsequently pleaded guilty to the offence of careless driving, was sentenced to a fine of \$1,800, and was acquitted of the *Criminal Code* offences.

[15] The Crown appealed the acquittals. The Court of Appeal of Alberta allowed the appeal, holding that the application judge erred in law by finding that Ms. Nixon’s [s. 7 Charter](#) rights were violated. Paperny J.A. (Côté and Slatter JJ.A. concurring) found that the application judge used the wrong test to distinguish between matters that fall within the scope of prosecutorial discretion and those more properly characterized as a prosecutor’s tactics and conduct before the court. The line cannot be artificially drawn at the courtroom door. Paperny J.A. stated: “Rather, the relevant inquiry is whether the impugned decision falls within the core of the prosecutor’s discretion: is it a decision as to whether a prosecution should be brought, continued or ceased, and if so, what it should be for?” (para. 32). Here, the decision to continue the prosecution is a matter of prosecutorial discretion which is not reviewable by the courts, subject to the doctrine of abuse of process.

[16] Paperny J.A. held that the application judge further erred in finding that a plea agreement can only be repudiated if the original decision is unreasonable or not “reasonably defensible”. Instead of reviewing the initial decision of Crown counsel, he should have reviewed the circumstances surrounding the ADM’s decision to repudiate the plea agreement to determine whether that decision amounted to an abuse of process. The relevant inquiry under [s. 7 of the Charter](#) is whether there is conduct which either causes prejudice to the accused by rendering the trial unfair, or affects the integrity of the justice system itself. As she put it, “Due regard to the constitutional role occupied by the Crown demands a deferential standard of review” (para. 49). Absent prejudice which renders the trial unfair, there must be proof of “prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate” (para. 49). Applying this test, Paperny J.A. concluded that there was no evidence to support a finding of abuse of process in the circumstances of this case. The acquittals were set aside and a new trial was ordered on the dangerous driving charges.

[17] Ms. Nixon appeals to this Court.

3. Analysis

3.1 *The Scope of Prosecutorial Discretion*

[18] Much of the debate between the parties in this Court was centred on whether the Crown's repudiation of a plea agreement is a matter of "prosecutorial discretion" reviewable only for abuse of process, or a matter of "tactics or conduct before the court" governed by the inherent jurisdiction of the criminal trial court to control its own process. The crucial importance of this distinction was fully canvassed and explained in *Krieger*.

[19] In *Krieger*, the Law Society of Alberta claimed that it had jurisdiction over all members of the profession within the province, including those employed by the Attorney General of Alberta. Thus, it purported to investigate an allegation of bad faith or dishonesty against Crown counsel in connection with a failure to disclose relevant information to the accused as required by law. The Attorney General and *Krieger*, who was Crown counsel, challenged the Law Society's jurisdiction, arguing that decisions made by an agent of the Attorney General in the conduct of a prosecution were immune from review under the doctrine of prosecutorial discretion.

[20] Iacobucci and Major JJ., writing for the Court, reviewed the nature and development of the Attorney General's office in Canada and affirmed the independence of the office as "a constitutional principle in this country" (para. 30). The Court explained that the principle of independence requires that the Attorney General "act independently of partisan concerns when supervising prosecutorial decisions" and how it "finds further form in the principle that courts will not interfere with his exercise of executive authority, as reflected in the prosecutorial decision-making process" (paras. 30 and 31). The Court stressed the fundamental importance of the principle of independence in these terms (at para 32):

The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution. Subject to the abuse of process doctrine, supervising one litigant's decision-making process — rather than the conduct of litigants before the court — is beyond the legitimate reach of the court. . . . The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict. [Emphasis added.]

[21] The Court ultimately concluded, however, that the Law Society retained jurisdiction over Krieger's alleged misconduct, as it was a matter that fell outside the scope of the doctrine. In explaining the proper contours of prosecutorial discretion, the Court drew the distinction between acts of prosecutorial discretion, and tactics or conduct. This distinction is now at the heart of the division in this appeal. Iacobucci and Major JJ. explained the difference as follows:

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

...

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 1975 CanLII 1357 (NB CA), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 1989 CanLII 4780 (SK CA), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [First emphasis added; second and third emphases in original; paras. 43 and 46-47.]

3.2 *Submissions of the Parties*

[22] On the one hand, Ms. Nixon submits that the Court of Appeal erred when it concluded that the Crown's decision to renege on its agreement with the defence was an aspect of its traditional, constitutionally protected, core discretionary powers. She contends that the Crown's decision to resile from the agreement constitutes a reversal in tactic subject to broader review.

Given that Crown counsel's offer had been accepted by the defence, the resulting plea agreement is akin to a contractual undertaking. A bargain is a bargain, it is argued. Absent some vitiating flaw in the negotiating process, such as mistake, misrepresentation or fraud, the Crown should be held strictly to its word. It is not necessary for the applicant to show that she has been prejudiced, or to establish independent acts of "bad faith" or "flagrant impropriety". Unless the Crown can satisfy the court that implementing the plea agreement would itself bring the administration of justice into disrepute, the repudiation of a valid plea agreement, in and of itself, constitutes an abuse of process. In short, Ms. Nixon argues that the application judge adopted the correct approach and urges the Court to restore his decision.

[23] The intervener Criminal Trial Lawyers' Association ("CTLA") supports Ms. Nixon's argument that the Crown's promise to enter into a plea agreement is an undertaking "like any other given by a lawyer". It argues that the undertaking "must be strictly and scrupulously fulfilled" and that an abuse of process need not be shown before the agreement may be summarily enforced by a court (Factum of the CTLA, at para. 2).

[24] The Criminal Lawyers' Association (Ontario) ("CLA") also supports Ms. Nixon's position that the repudiation of a plea agreement does not fall within "core" Crown discretion identified in *Krieger*. Thus, the CLA submits that judicial review of a repudiation decision is warranted even in the absence of "flagrant impropriety" or bad faith. Rather, the test for allowing Crown repudiation of a plea agreement should be essentially the same as the test applied for allowing a sentencing judge to reject a joint submission: would the proposed resolution bring the administration of justice into disrepute? The CLA submits that "[r]epudiation is an abuse of process unless the Crown discharges its onus of demonstrating that the contemplated agreement would have brought the administration of justice into disrepute and the accused can be restored to his or her initial position" (Factum of the CLA, at para. 1 (emphasis in original)).

[25] On the other hand, the respondent, the Attorney General of Alberta, takes the position that both the plea agreement and the repudiation are acts that fall within the scope of the doctrine of prosecutorial discretion. As such, neither is open to review or supervision by the courts, except

through an allegation of abuse of process. The respondent argues that the test advocated by Ms. Nixon and by the supporting interveners does not meet the high threshold for proving abuse of process. Abuse of process that involves core prosecutorial discretion requires proof of bad faith or flagrant impropriety by the Crown. Here, there was no evidence of any such conduct by the Crown officials in their review and repudiation of the plea agreement. Nor did Ms. Nixon suffer any prejudice as a result of the repudiation, given that she was restored to the position she was in at the conclusion of the preliminary inquiry, before the plea agreement was struck. Therefore, the Court of Appeal rightly concluded that there was no basis for finding a breach of her s. 7 rights.

[26] Attorneys General from three provinces intervened in support of the respondent's position. In particular, they submit that the approach adopted by the application judge runs afoul with the principle of independence affirmed in *Krieger*. The Attorney General of Ontario submits that this Court's decision in *Krieger* has been misinterpreted by lower courts. It asks this Court to confirm that *Krieger* was never intended to narrow the area of protected prosecutorial discretion, or to create a schism in threshold tests for finding an abuse of process depending on whether a decision is considered "core" or "non-core". All acts of prosecutorial discretion are immune from judicial supervision, subject only to the same high threshold for abuse of process.

[27] Along the same lines, the Attorney General of British Columbia ("AGBC") emphasizes the importance of criminal trial courts not proceeding with a review of prosecutorial discretion in the absence of a "threshold determination" that the inquiry is warranted. In the absence of evidence of irremediable impairment to the fair trial interests of the accused, a criminal trial court should only proceed with an application for relief challenging prosecutorial discretion under the residual category of abuse of process if there is an evidentiary record capable of supporting the claim. This approach helps to avoid scenarios such as the case at bar, where the trial judge engaged in a full examination of the reasons behind the decision to renege on the plea agreement, even though there was nothing to suggest that the decision was motivated by improper considerations, or was made in bad faith.

[28] Finally, the Attorney General of Manitoba (“AGM”) intervenes to underscore the importance of the Attorney General’s supervisory role over the exercise of prosecutorial discretion. Acknowledging that the repudiation of plea agreements is and should be rare, it argues that “when the Attorney General, or a senior delegate, makes a *bona fide* decision to overturn a plea agreement that he or she determines is contrary to the public interest, that decision is part of the proper and usual institutional checks and balances necessary for the justice system to function properly” (Factum of the AGM, at para. 3).

3.3 *The Plea Agreement and Its Repudiation Are Acts of Prosecutorial Discretion*

[29] None of the participants in this appeal disputes that Crown counsel’s decision to resolve the proceedings by accepting a plea to a lesser offence falls within the scope of prosecutorial discretion as defined in *Krieger*. To the extent that the application judge’s analysis suggests that anything occurring after the charges are laid falls outside the scope of prosecutorial discretion, it cannot be sustained. If the line were to be drawn at the point seemingly chosen by the application judge, namely “when [the] discretion is exercised in favour of proceeding” (para. 12), Crown counsel’s decision to enter into a plea agreement would itself be subject to review by the court as a matter of conduct or tactic without regard to the principles of judicial restraint set out in *Krieger*. As noted by Paperny J.A., to artificially draw the line at the courtroom door “effectively neuters some of the primary purposes of prosecutorial discretion, to resolve cases by accepting pleas to lesser charges and to discontinue prosecutions” (para. 32).

[30] In my view, the question of whether the ADM’s decision to repudiate the plea agreement is an act of prosecutorial discretion, although disputed in this appeal, is just as easily resolved. As aptly put by Paperny J.A., in determining whether any impugned decision falls within the core of prosecutorial discretion, it is useful to ask: “. . . is it a decision as to whether a prosecution should be brought, continued or ceased, and if so, what it should be for?” (para. 32). Applying this test, she held that the ADM’s decision to repudiate the plea agreement “fell squarely within the core elements of prosecutorial discretion” (para. 33). I agree. In my respectful view, it is difficult to see how the ADM’s decision could otherwise be characterized. The ADM effectively decided that the prosecution against Ms. Nixon should be continued and that it should be for the

Criminal Code offences of dangerous driving, not for the traffic infraction of careless driving. Clearly, the ADM's decision to repudiate the plea agreement also constitutes an act of prosecutorial discretion. Prosecutorial discretion was not spent with the decision to initiate the proceedings, nor did it terminate with the plea agreement. So long as the proceedings are ongoing, the Crown may be required to make further decisions about whether the prosecution should be continued and, if so, in respect of what charges.

[31] Thus, it follows that the Crown's ultimate decision to resile from the plea agreement and to continue the prosecution is subject to the principles set out in *Krieger*: it is *only* subject to judicial review for abuse of process.

[32] The more difficult question in this appeal is how the initial exercise of prosecutorial discretion — Crown counsel's offer to resolve the matter on the basis of a plea to a lesser charge — should figure in the analysis regarding abuse of process. As outlined earlier, the parties and interveners present very divergent views on how this question should be answered. Before dealing with these arguments, I will review the law on abuse of process.

3.4 *The Doctrine of Abuse of Process*

[33] Until this Court's decision in *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128, there was much controversy about whether a court had the power to stay validly instituted criminal proceedings for abuse of process. The inherent jurisdiction of a superior court to control its own process by staying abusive proceedings had long been recognized in Canada. However, it remained uncertain whether criminal courts had the discretion to stay proceedings for abuse of process, or whether this was a power reserved for the Attorney General under s. 508 (now s. 579) of the *Criminal Code* (pp. 131-32).

[34] *Jewitt* put an end to the uncertainty by recognizing that a trial court judge had a "residual discretion" to stay proceedings to remedy abuse of process. The Court held that the common law doctrine could be applied in narrow circumstances "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's

sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (pp. 136-37).

[35] Initially, the common law doctrine of abuse of process was viewed as analytically distinct from *Charter* considerations since its focus was more on maintaining confidence in the integrity of the judicial system than on protecting individual rights. The common law and *Charter* analyses were also kept separate because of the different burdens of proof to successfully make out an abuse of process claim under the two regimes. For an applicant to establish a violation under the *Charter*, the burden of proof was the balance of probabilities standard. For an applicant to successfully invoke the court's common law power to stay proceedings for abuse of process, the burden of proof was the more onerous "clearest of cases" standard.

[36] Ten years later in *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, the Court noted that there was much overlap between the *Charter* and the common law doctrine of abuse of process, as the latter had found application in circumstances involving state conduct touching upon both "the integrity of the judicial system and the fairness of the individual accused's trial" (para. 73). Consequently, L'Heureux-Dubé J., writing for a unanimous Court on this point, held that the two regimes should be merged under s. 7 of the *Charter*. Depending on the circumstances, different *Charter* guarantees may be engaged by the alleged abuse of process and thus some claims may be better addressed by reference to the specific procedural guarantee. For example, "where the accused claims that the Crown's conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b)" (para. 73). The Court identified two categories of abuse of process which would be caught by s. 7 of the *Charter*: (1) prosecutorial conduct affecting the fairness of the trial; and (2) prosecutorial conduct that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (para. 73).

[37] The Court held further that there was no practical utility in maintaining two distinct analytic regimes based on the different burdens of proof. Even if a violation of s. 7 is proved on a balance of probabilities, the court would still have to determine the appropriate remedy under s.

24(1) of the *Charter* and the “clearest of cases” burden would still apply to justify the remedy of a judicial stay of proceedings (para. 69). The Court made clear, however, that the fusion of common law and *Charter* claims of abuse of process under s. 7 of the *Charter* does not alter “the essential balancing character of abuse of process”. L’Heureux-Dubé J. explained as follows (at para. 69):

Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the “clearest of cases” threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges’ hands a scalpel instead of an axe — a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. . . . I see no reason why such balancing cannot be performed equally, if not more, effectively under the *Charter*, both in terms of defining violations and in terms of selecting the appropriate remedy to perceived violations. [Emphasis added.]

[38] Thus, in defining what constitutes a *violation*, it is important to recall what kind of harm the common law doctrine of abuse of process was intended to address and, in turn, why this degree of harm called for a stay of proceedings as the *appropriate remedy*. In other words, while s. 24(1) of the *Charter* allows for a wide range of remedies, this does not mean that abuse of process can be made out by demonstrating a lesser degree of harm, either to the accused’s fair trial interests or to the integrity of the justice system. Achieving the appropriate balance between societal and individual concerns defines the essential character of abuse of process.

[39] Under the first category of cases, the concern is about the fairness of the accused’s trial. Establishing prejudice of the requisite degree is key to meeting the test; proof of prosecutorial misconduct, while relevant, is not a prerequisite: *R. v. Keyowski*, 1988 CanLII 74 (SCC), [1988] 1 S.C.R. 657. In *Keyowski*, the accused’s first two trials ended with the jury failing to agree on a verdict; his third trial was stayed by the trial judge for abuse of process. The narrow issue on appeal was whether a series of trials could, in and of itself, constitute an abuse of process, or whether it was necessary for the accused to show prosecutorial misconduct.

[40] The Court reiterated that the test for abuse of process was whether “compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency”, or where the proceedings are “oppressive or vexatious” (pp. 658-59, quoting from *Jewitt*, at pp. 136-37). While the Court concluded that the Crown’s exercise of discretion to proceed with a third trial did not constitute an abuse of process in the circumstances of the case, the Court held that the test could be made out in the absence of prosecutorial discretion. Wilson J. explained as follows (at p. 659):

To define “oppressive” as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. In this case, for example, where there is no suggestion of misconduct, such a definition would prevent any limit being placed on the number of trials that could take place. Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown’s exercise of its discretion to re-lay the indictment amounts to an abuse of process.

[41] Under the residual category of cases, prejudice to the accused’s interests, although relevant, is not determinative. Of course, in most cases, the accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases is better conceptualized as an act tending to undermine society’s expectations of fairness in the administration of justice. This essential balancing character of abuse of process under the residual category of cases was well captured by the words of L’Heureux-Dubé J. in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659. She stated the following:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits (see *Jewitt*, *supra*, at p. 148), but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure “that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society” (*Rothman v. The Queen*, 1981 CanLII 23 (SCC), [1981] 1 S.C.R. 640, at p. 689, *per* Lamer J.) It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added; p. 1667.]

[42] The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice" (*Regan*, at para. 54, citing *O'Connor*, at para. 75).

[43] Before applying this framework of analysis to this case, I will address some of the arguments advanced in this appeal on how the plea agreement should impact the analysis of abuse of process.

3.5 *The Contractual Undertaking Analogy*

[44] As stated earlier, it is argued that a plea agreement should be regarded as a contractual undertaking and enforced just as any other lawyers' undertaking. This argument cannot be sustained. It completely ignores the public dimension of a plea agreement. Indeed, contrary to Ms. Nixon's contention, the Law Society of Alberta specifically recognizes in the comment to Rule 27 of its *Code of Professional Conduct* that "[a]n agreement between the prosecution and defence regarding the plea to be entered is not considered a usual lawyers' undertaking due to the policy considerations involved" (updated 2009 (online)). Vitiating factors, such as mistake, misrepresentation or fraud, which usually inform a private party's right to resile from a bargain, do not fully capture the public interest considerations which are at play in any decision to repudiate a plea agreement.

[45] A plea agreement cannot be summarily enforced by the court as any other lawyers' undertaking, as Ms. Nixon contends. It is also wrong to suggest that repudiation, in and of itself, warrants a judicial remedy even in the absence of prejudice (as the application judge concluded, at para. 55), or in the absence of conduct amounting to an abuse of process. This argument is founded on the erroneous premise that the decision to repudiate a plea agreement falls outside the scope of

prosecutorial discretion and, as such, is not subject to the constitutional principles set out in *Krieger*.

[46] However, to the extent that the lawyers' undertaking analogy underscores the importance of honouring plea agreements, it can usefully contribute to the analysis. Indeed, in the oft-quoted Ontario *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) (the "*Martin Committee Report*"), the Committee found resolution agreements in criminal proceedings to be "in the nature of undertakings". The duty of counsel to honour resolution agreements was regarded as "a particular example of the duties of integrity and responsibility" that lie "at the heart of counsel's professional obligations". Honouring resolution agreements was not only "ethically imperative", but also a "practical necessity", as these agreements "dispose of the great bulk of the contentious issues that come before the criminal courts in Ontario" (commentary to Recommendation 53, at pp. 312-13 of the *Martin Committee Report*).

[47] In light of this practical necessity, the *binding effect* of plea agreements is a matter of utmost importance to the administration of justice. It goes without saying that plea resolutions help to resolve the vast majority of criminal cases in Canada and, in doing so, contribute to a fair and efficient criminal justice system.

[48] Of course, there may be instances where different Crown counsel will invariably disagree about the appropriate plea agreement in a particular case. Given the number of complex factors that must be weighed over the course of plea resolution discussions, this reality is unsurprising. However, the vital importance of upholding such agreements means that, in those instances where there is disagreement, the Crown may simply have to live with the initial decision that has been made. To hold otherwise would mean that defence lawyers would no longer have confidence in the finality of negotiated agreements reached with front-line Crown counsel, with whom they work on a daily basis. Further, if agreements arrived at over the course of resolution discussions cannot be relied upon by the accused, the benefits that resolutions produce for *both* the accused and the administration of justice cannot be achieved. As a result, I reiterate that the

situations in which the Crown can properly repudiate a resolution agreement are, and must remain, very rare.

[49] All Attorneys General who have participated in this appeal agree that a plea agreement should only be repudiated in exceptional and rare circumstances. However, the lawyers' undertaking analogy can only go so far on the question that occupies us. The analogy can usefully underscore the importance of honouring plea agreements, but it cannot inform the standard against which any repudiation conduct is to be measured. The *Martin Committee Report* made this clear in the same commentary quoted above, stating the following:

Thus, it is plain that resolution agreements must not undermine the integrity of the court, or otherwise bring the administration of justice into disrepute. While the sanctity of agreements entered into is an important principle of the administration of justice, Crown counsel's primary duty is to the integrity of the system. Accordingly, in the rare cases where these two values clash, the latter must prevail. [p. 314]

As a result, the argument that a plea agreement can simply be characterized as a contractual undertaking must fail.

3.6 *The Reasonably Defensible Test*

[50] This Court was also urged, as was the application judge, "to equate the ability of the Attorney General to resile from a plea agreement to the ability of a trial judge to reject a joint submission on sentence since both are predicated on the concept of bringing the administration of justice into disrepute" (trial decision, at para. 17). The Crown advanced this argument in first instance but subsequently resiled from this position. The application judge accepted this argument and, based on his review of the appellate jurisprudence on joint submissions, crafted the "reasonably defensible test" as the appropriate measure to determine whether there had been an abuse of process in this case. The central question became whether Crown counsel's plea agreement was "reasonably defensible". Having determined that it was, and without further considering the circumstances surrounding the ADM's decision to repudiate, the application judge concluded that the repudiation of the plea agreement amounted to an abuse of process.

[51] The Court of Appeal held that the application judge erred in multiple ways by adopting this approach. I agree with Paperny J.A.'s analysis on this point. As she noted, the application judge's mistaken approach not only had the effect of reversing the onus of proof, his "selected framework for analysis caused him to ask the wrong question". Instead of reviewing Crown counsel's decision to enter into the plea agreement to see if it was defensible, he should have reviewed the circumstances surrounding the repudiation to determine whether *that* decision amounted to an abuse of process (para. 45).

[52] The selected framework of analysis also occasioned a more fundamental error. The application judge's assessment of a decision made in the exercise of prosecutorial discretion for "reasonableness" runs contrary to the principles set out in *Krieger*. Paperny J.A. reiterated these principles, and explained that it is not the role of the court to look behind a prosecutor's discretionary decision to see if it is justified or reasonable in itself (paras. 46-49). By straying into the arena and second-guessing the decision, the reviewing court effectively becomes a supervising prosecutor and risks losing its independence and impartiality. Due regard to the constitutionally separate role of the Attorney General in the initiation and pursuit of criminal prosecutions puts such decisions "beyond the legitimate reach of the court" (*Krieger*, at para. 32). Thus, the court does not assess the reasonableness or correctness of the decision itself; it only looks behind the decision for "proof of the requisite prosecutorial misconduct, improper motive or bad faith in the approach, circumstances or ultimate decision to repudiate" (Court of Appeal decision, at para. 49).

[53] Quite apart from this fundamental difficulty with the reasonably defensible test, I would add that, conceptually, the analogy to the trial judge's rejection of a joint submission on sentencing is not particularly helpful in determining the standard against which to measure the repudiation conduct. The sentencing judge who is faced with a joint submission is engaged in a qualitatively different process than the prosecutorial authority faced with the decision of whether or not to resile from a plea agreement. The role of the sentencing judge is to impose a fit sentence, that is, one that "fits" the circumstances of the offence and of the offender as presented to the court. When there is a trial, these circumstances are largely defined by the findings of the court based on the evidence adduced at trial and at the sentence hearing. When the accused pleads guilty,

the circumstances of the offence and of the offender are generally determined on the basis of agreed facts. This is particularly so if the plea of guilty is entered pursuant to a resolution agreement. All contentious issues will usually have been ironed out between the Crown and the defence prior to the plea. Counsel certainly have an ethical obligation not to mislead the court about those circumstances, but the fact remains that the judge is presented with the *end product* of the plea negotiations, not with the entire set of circumstances or considerations that went into the mix. By contrast, the prosecuting authority who is faced with the decision whether to honour or to resile from a plea agreement must consider the entirety of circumstances, including the public interest, in proceeding to trial. Thus, sentencing principles relating to joint submissions cannot usefully be transposed in this context.

[54] I now turn to the circumstances of this case.

4. Application of the Doctrine of Abuse of Process to This Case

[55] Although it is not entirely clear, Ms. Nixon's claim of abuse of process does not appear to be grounded in an alleged prejudice to her fair trial interests. She certainly alleges that she was prejudiced in various ways by the course of events, but most of the alleged prejudice has nothing to do with trial fairness.

[56] First, she describes in an affidavit the emotional and psychological trauma she suffered following the incident and laying of the criminal charges, and then explains how she suffered increased anxiety as a result of the Crown's change of position. There is no reason to doubt that Ms. Nixon was affected by the course of events as she describes in her affidavit. However, this has no bearing on the fairness of her trial.

[57] In addition, Ms. Nixon relies on the application judge's finding that she was prejudiced because her counsel was led to believe that the evidence of breath samples would not be adduced at trial and, consequently, did not explore that issue at the preliminary hearing. I agree with the Court of Appeal that this finding constitutes a palpable and overriding error, as Crown counsel at the preliminary hearing specifically reserved the right to call the evidence at trial. In any

event, as Paperny J.A. rightly noted, there is no obligation on the Crown to present all of its evidence at the preliminary hearing and the evidence can still be tested at trial (para. 51).

[58] Finally, Ms. Nixon argues that, if the criminal charges were to proceed to trial, “the giving up of her right to silence would seriously compromise and diminish her defence because of her admission of identity as the driver and that she drove her vehicle carelessly”. She argues further that those admissions would “also restrict the ability of her present counsel to defend her, perhaps ultimately affecting her right to her choice of counsel” (A.F., at para. 139). I see no merit to this argument. The plea agreement was repudiated before Ms. Nixon entered her plea to the reduced charge. Further, the judgment of the Court of Appeal sets aside not only the application judge’s order, but also the resulting plea. Finally, the alleged effect on her counsel’s ability to defend her is entirely speculative.

[59] The question, therefore, is whether this case falls in the residual category of cases identified in *O’Connor*. Did the repudiation of the plea agreement, based on all of the circumstances, amount to an abuse of process? In other words, was the Crown’s repudiation conduct so unfair or oppressive to Ms. Nixon, or so tainted by bad faith or improper motive, that to allow the Crown to now proceed on the dangerous driving *Criminal Code* charges would tarnish the integrity of the judicial system?

[60] Before discussing the merits of the application, I want to address an important preliminary issue. As stated earlier, the AGBC intervened in this case to emphasize the importance of criminal trial courts not proceeding with a review of prosecutorial discretion in the absence of a “threshold determination” that the inquiry is warranted. I agree that a court should not embark on an inquiry into the reasons behind an act of prosecutorial discretion without a proper evidentiary foundation. However, it is my view that evidence that a plea agreement has been entered into and subsequently reneged by the Crown meets the requisite threshold. I will explain.

[61] As the AGBC rightly points out, mandating a preliminary determination on the utility of a *Charter*-based inquiry is not new: *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343. Similar

thresholds are also imposed in other areas of the criminal law, they are not an anomaly. Threshold requirements may be imposed for pragmatic reasons alone. As this Court observed in *Pires* (at para. 35):

For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.

[62] Quite apart from any such pragmatic considerations, there is good reason to impose a threshold burden on the applicant who alleges that an act of prosecutorial discretion constitutes an abuse of process. Given that such decisions are generally beyond the reach of the court, it is not sufficient to launch an inquiry for an applicant to make a bare allegation of abuse of process. For example, it would not suffice for an applicant to allege abuse of process based on the fact that the Crown decided to pursue the charges against him but withdrew similar charges against a co-accused. Without more, there would be no basis for the court to look behind the exercise of prosecutorial discretion.

[63] However, the repudiation of a plea agreement is not just a bare allegation. It is evidence that the Crown has gone back on its word. As everyone agrees, it is of crucial importance to the proper and fair administration of criminal justice that plea agreements be honoured. The repudiation of a plea agreement is a rare and exceptional event. In my view, evidence that a plea agreement was entered into with the Crown, and subsequently reneged by the Crown, provides the requisite evidentiary threshold to embark on a review of the decision for abuse of process. Further, to the extent that the Crown is the only party who is privy to the information, the evidentiary burden shifts to the Crown to enlighten the court on the circumstances and reasons behind its decision to resile from the agreement. That is, the Crown must explain why and how it made the decision not to honour the plea agreement. The ultimate burden of proving abuse of process remains on the applicant and, as discussed earlier, the test is a stringent one. However, if the Crown provides little or no explanation to the court, this factor should weigh heavily in favour of the applicant in successfully making out an abuse of process claim.

[64] This approach is consistent with the principles set out in *Krieger*. Acts of prosecutorial discretion are not immune from judicial review. Rather, they are subject to judicial review for abuse of process. Depending on the circumstances, the repudiation of a plea agreement may well constitute an abuse of process, either because it results in trial unfairness or meets the narrow residual category of abuse that undermines the integrity of the judicial process. In applying the *Krieger* standard to the repudiation of plea agreements, the principles set out in these reasons, notably at paras. 46-48, on the importance of honouring resolution agreements must be kept in mind. Consider, for example, if the repudiation was made arbitrarily, without inquiry into the circumstances leading to the plea agreement, and without regard to any resulting prejudice to the accused. Alternatively, consider if there was evidence of a systemic problem in a particular jurisdiction where Crown counsel regularly and summarily overruled the preceding Crown counsel's exercise of discretion whenever they disagreed with the terms of the agreed upon plea resolution. In my view, an application judge may well be persuaded in such circumstances that the Crown acted in bad faith or with flagrant impropriety to a degree sufficient to constitute an abuse of process.

[65] Thus, it is my view that a threshold showing must be made before the court embarks on a judicial review of an exercise of prosecutorial discretion. Evidence of repudiation meets that threshold.

[66] In this case, I agree with the Court of Appeal that there is no evidence to support a finding of abuse of process. While the application judge asked the wrong question and applied the wrong test for abuse of process, he did inquire into the considerations that informed the decision to repudiate, the process adopted, and the conduct of all Crown actors who were involved. In rejecting Ms. Nixon's claim that the ADM's decision was made for an improper motive, he concluded that "there is absolutely no evidence" of political interference (para. 22) and "nothing to suggest that [the ADM's] action was taken in bad faith or to accommodate a real or perceived political stance of his Minister of Justice" (para. 25). There was also nothing improper in the considerations that informed the ADM's decision to resile from the agreement. The application judge described these considerations as follows (at para. 26):

Those who influenced [the ADM's] decision to repudiate the resolution agreement took exception to a pair of [Crown counsel's] conclusions: first, that the analyses of the breath samples provided by Ms. Nixon would be inadmissible at trial and second, that the evidence of Ryan Galloway, who had earlier observed erratic driving by a van with the same licence plate as hers, was too remote in the circumstances to be relevant to the prosecution. In view of those two mistakes, the Assistant Deputy Minister was persuaded that any agreement which permitted Ms. Nixon to escape *Criminal Code* convictions was contrary to the public interest, especially considering that two people had died and another had been orphaned as the result of her driving. He therefore concluded that to honour it would bring the administration of justice into disrepute. [Emphasis added.]

[67] The application judge erred by summarily dismissing the ADM's considered opinion on the ground that the Crown had to show more than "establish that other, even more senior counsel, have reached a different conclusion" than Crown counsel did (para. 27). On this point, the application judge adopted the reasoning of Hill J. in *R. v. M. (R.)* (2006), 2006 CanLII 32999 (ON SC), 83 O.R. (3d) 349 (S.C.J.). However, the approach adopted in *M. (R.)* is based on the erroneous view that "the act of *repudiation* is not an exercise of core prosecutorial discretion" (*M. (R.)*, at para. 65 (emphasis in original)). Hill J. was thus of the view that, while the plea agreement is not reviewable subject only to abuse of process, the repudiation is governed by the inherent jurisdiction of the court to control its own process (para. 62).

[68] As discussed earlier, the ADM's decision to resile from the plea agreement falls within the scope of prosecutorial discretion. In the absence of any prosecutorial misconduct, improper motive or bad faith in the approach, circumstances, or ultimate decision to repudiate, the decision to proceed with the prosecution is the Crown's alone to make. Reasonable counsel may indeed, and often do, differ on whether a particular disposition is in the public interest in the circumstances of the case. The ADM, in good faith, determined that Crown counsel's assessment of the strength of the evidence was erroneous and, on that basis, having regard to the seriousness of the offences, concluded that it would not be in the public interest to terminate the prosecution on the criminal charges. This can hardly be regarded as evidence of misconduct.

[69] This does not mean that plea agreements can be overturned on a whim. The method by which the decision was reached can itself reveal misconduct of a sufficient degree to amount to

abuse of process. But that is not what occurred here. The act of repudiation was indeed a rare and exceptional occurrence. The evidence revealed that there have been only two prior occurrences in Alberta, “one in the 1980s and one within the year prior to the trial in this matter” (Court of Appeal decision, at para. 48). There was also no evidence of abusive conduct in the process leading to the decision to repudiate. I agree with the analysis of Paperny J.A. in this regard (at para. 50):

Further, this is not a case where the repudiation was done “unfairly” or when the discretion of the Attorney General was exercised “irrationally, unreasonably or oppressively”. The ADM carefully reviewed the evidence that was the subject of concern and relied on legal opinions and took guidance from the Ontario Attorney General’s policy to instruct himself on the relevant considerations. Having satisfied himself that the original view of the trial prosecutor was incorrect and that the resulting plea resolution agreement would bring the administration of justice into disrepute, he acted expeditiously in communicating the decision to withdraw the plea resolution agreement to the respondent. He also considered possible prejudice to the respondent and concluded that there would be no such prejudice. The ADM’s conduct, viewed in its totality, cannot be characterized as unfair, unreasonable, oppressive or irrational. The high threshold to find abuse of process has not been met here.

[70] Finally, Ms. Nixon was returned to the position she was in at the conclusion of the preliminary hearing before the plea agreement was entered into. There is no merit to the contention that she suffered prejudice as a result of the repudiation.

5. Disposition

[71] For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: Beresh Cunningham Aloneissi O’Neill Hurley, Edmonton.

Solicitor for the respondent: Attorney General of Alberta, Calgary.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Criminal Trial Lawyers' Association: Fleming DePoe Lieslar, Edmonton.

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TAB 26

R. v. Potvin, 1993 CanLII 113 (SCC), [1993] 2 SCR 880

Source:	Supreme Court of Canada
Date:	1993-08-12
File number:	23110
Other citations:	105 DLR (4th) 214 — 155 NR 241 — 66 OAC 81 — AZ-93111091 — 23 CR (4th) 10 — 83 CCC (3d) 97 — 16 CRR (2d) 260 — 20 WCB (2d) 196 — [1993] CarswellOnt 112 — JE 93-1439 — [1993] SCJ No 63 (QL) — [1993] ACS no 63
Citation:	R. v. Potvin, 1993 CanLII 113 (SCC), [1993] 2 SCR 880, < https://canlii.ca/t/1fs21 >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v. Richard , 2017 MBQB 11 (CanLII) [...] [29] Defence counsel argues that the law as set out in Potvin is not applicable on the particular facts of this case because of the unique reasons that necessitated the appeal. [...] [30] I add that even if I were to have found that Potvin is not applicable in the particular circumstances of this case, that is, that s. 11(b) is to be considered in connection with the appellate delay, this appeal was conducted expeditiously and did not involve unreasonable delay. [...]

R. v. Potvin, [1993] 2 S.C.R. 880

Richard Potvin *Appellant*

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Potvin

File No.: 23110.

Judgment rendered orally: 1993: June 7.

Reasons for judgment rendered: 1993: August 12.

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

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Trial within a reasonable time -- Twenty-six month pre-trial delay including delays to accommodate defence and Crown -- Stay of proceedings granted -- Eighteen month appellate delay from granting of stay -- Whether pre-trial delay offending s. 11(b) of the Charter -- Whether s. 11(b) applicable to appellate delay -- Whether s. 7 (abuse of process) applicable to appellate delay -- Canadian Charter of Rights and Freedoms, ss. 7, 11(b).

Criminal law -- Constitutional law -- Charter of Rights -- Trial within a reasonable time -- Twenty-six month pre-trial delay including delays to accommodate defence and Crown -- Stay of proceedings granted -- Eighteen month appellate delay from granting of stay -- Whether pre-trial delay offending s. 11(b) of the Charter -- Whether s. 11(b) applicable to appellate delay -- Whether s. 7 (abuse of process) applicable to appellate delay -- Canadian Charter of Rights and Freedoms, ss. 7, 11(b).

The appellant was charged with criminal negligence causing death in an information sworn on September 15, 1988. He was released from custody on an undertaking. A series of lengthy delays occurred (in part to accommodate counsel for both the Crown and the defence) with respect to matters preliminary to a trial and a trial date was finally set at December 3, 1990. Appellant applied on that

date for and was granted a stay of proceedings under s. 24(1) of the *Charter* on the ground that the right to trial within a reasonable time in s. 11(b) of the *Charter* had been infringed. The Attorney General appealed against the stay of proceedings on December 24, 1990 and the hearing for the appeal was set for April 24, 1992. The Court of Appeal allowed the appeal on June 22, 1992, and set aside the stay and remitted the matter for trial on an expedited basis. The issues before this Court were whether the delay preceding the end of the trial was so unreasonable as to offend the provisions of s. 11(b) of the *Charter* and whether s. 11(b) applied to the delay in respect of the appellate proceedings.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: The appeal based on pre-trial delay was dismissed for the reasons given by Osborne J.A.

Section 11(b) does not apply to delay in respect of an appeal from conviction by the accused or from an acquittal or stay by the Crown. There is no distinction in this regard between an acquittal after trial and a judicial stay.

The term "[a]ny person charged" under s. 11 does not, as a general rule, include an accused person who is party to an appeal. A particular subsection in s. 11 may, however, apply to appeal proceedings as an exception to the general rule if its purpose and language support this conclusion. Section 11(b), however, has been interpreted as applying only to the consequences of delay flowing from a formal charge and does not extend to the consequences of delay at large. Short of a formal charge, similar consequences proceeding from other aspects of governmental activity in the criminal process do not trigger the protection of the provision.

After an acquittal and before the service of a notice of appeal, the person acquitted is not a person charged because there is no proceeding which seeks to charge the person acquitted. Upon the appeal's being filed there is a possibility that the acquittal will be set aside and the charge will be revived. The plight of the acquitted person is that of one against whom governmental action is

directed which may result in a charge. In this respect the former accused is like the suspect against whom an investigation has been completed and charges are contemplated awaiting a decision by the prosecutor. There is even less reason to extend the protection of s. 11(b) to a convicted person who appeals because the appeal is not governmental action.

The conclusion that the words "[a]ny person charged" in s. 11(b) limit the operation of the subsection to the trial process is supported by the use of the word "tried". If the subsection were to apply to final adjudication as well, more apt wording would have been used.

Section 11(b) is not spent when there is an adjudication relating to a charge is appealed. If on the appeal the judgment is set aside and the matter is remitted for trial, the accused reverts to the status of a person charged.

The criminal appellant or respondent is not without a remedy when delay of appeal proceedings affects the fairness of the trial. The court's power to remedy an abuse of process, enshrined as a principle of fundamental justice in s. 7, is simply applied to delay. The criminal appeal rules and provisions of the *Criminal Code* also afford a litigant in a criminal appeal a range of remedies to eliminate any substantial delay on the part of the adversary.

The appropriate forum for a remedy under s. 7 of the *Charter* is the court in which the delay occurred. It is in the best position to assess the consequences of the delay. If a further appeal lies from the first appellate court, the issue of delay can be reviewed in the second appellate court along with the consequences of additional delay resulting from the second appeal. This Court does not favour issues being raised for the first time in an appeal to this Court.

Per Lamer C.J. and McLachlin and Major JJ.: "[C]harged with an offence" indicates a person subject to the power of the criminal process. Until the person is finally released from the jeopardy of the criminal process by a final resolution of the "charges", the person remains, for the purposes of s. 11(b), a person charged with an offence.

Many of the rights enumerated in s. 11 are restricted to the early stages of the criminal process. But others, such as s. 11(*h*) and 11(*g*), clearly apply after a verdict. Since s. 11 is directed to ensuring fairness at all stages of the criminal process, it cannot be concluded that s. 11(*b*) must necessarily be confined to the pre-stay, pre-verdict phase.

The rights which s. 11(*b*) seeks to protect are all engaged in the period between a verdict or a stay and the final disposition of the criminal charges. The language and context of the subsection indicate that it is not confined to the pre-stay or pre-verdict period of the criminal process. The fact that the restriction of the interest which s. 11(*b*) protects must result from an actual charge does not lead to the conclusion that s. 11(*b*) does not apply to post-stay or post-verdict appellate delay. If "[a]ny person charged" is read as being synonymous with "a person who is the subject of the criminal process", s. 11(*b*) would apply even after a verdict. The appeal proceedings result from an actual charge and are dependant upon it for their validity. A person facing the prospect of a new trial as a result of the appellate process, whether the original verdict was an acquittal, conviction or stay, can become subject to unfairness caused by delay.

In light of its objects, s. 11(*b*) applies to delays after the entry of a stay or a verdict. A complex two-principle scheme for assessing delay in the criminal process is not necessary in a practical sense because the same general principles can and should apply throughout, even though they may impact differently depending on the particulars and the stage of the delay. Interlocutory, trial and appellate proceedings may be so intertwined that it makes little sense to attempt to apply different legal rules according to the stage of the process.

The principles applicable under s. 11(*b*) are: (1) the length of the delay; (2) waiver, if any, of parts of the delay; (3) the reasons for the delay; and (4) prejudice to the subject of the criminal process. These principles are broad and flexible enough to apply at the post-stay, post-verdict stage of the criminal process.

The many different circumstances which may prevail at the post-verdict, post-stay stage require a flexible approach to remedies. The *Charter* empowers the court to grant such remedies as

may be just in all the circumstances. Factors such as the length and nature of the delay, the seriousness of the offence, the nature of the injury suffered by the accused and any prejudice caused to the accused's defence inherent in the delay should be considered in selecting a remedy.

The choice of forum for the remedy should be flexible. The proceedings would be unnecessarily truncated and complicated if only courts of first instance could deal with pre-stay, pre-verdict delay and courts of second instance with appellate delay.

Per La Forest J.: [Section 11\(b\)](#) of the *Charter* does not apply to appellate delay. Given the interrelationship between ss. 7 and 11(b), s. 7 may in certain contexts provide residual protection to the interests that the s. 11(b) right is designed to protect that goes beyond the specific protection it provides. Those interests are also entitled to protection at the appellate level but subject to the special considerations specific to the appellate process and in consequence the choice of an appropriate remedy. In particular, a stay should not be used as often as the appropriate remedy for appellate delay as for trial delay. The views of McLachlin J. on these matters and on the appropriate court for considering delay were generally shared. However, her concerns about a bifurcated system were not agreed with. Weight may be given to pre-appeal delay at the appellate level and a consideration of appellate delay can figure in the equation when complaints about delay are raised at trial following appellate review. Sections 7 and 11(b) are not mutually exclusive. The *Charter* is an organic instrument.

Cases Cited

By Sopinka J.

Referred to: *R. v. Morin*, [1992 CanLII 89 \(SCC\)](#), [1992] 1 S.C.R. 771; *R. v. Stensrud*, [1989 CanLII 9 \(SCC\)](#), [1989] 2 S.C.R. 1115; *R. v. Lyons*, [1987 CanLII 25 \(SCC\)](#), [1987] 2 S.C.R. 309; *R. v. Conway*, [1989 CanLII 66 \(SCC\)](#), [1989] 1 S.C.R. 1659; *R. v. Kalanj*, [1989 CanLII 63 \(SCC\)](#), [1989] 1 S.C.R. 1594; *R. v. L. (W.K.)*, [1991 CanLII 54 \(SCC\)](#), [1991] 1 S.C.R. 1091; *R. v. CIP Inc.*, [1992 CanLII 95 \(SCC\)](#), [1992] 1 S.C.R. 843; Eur. Court H. R., *Wemhoff* case, judgment of 27

june 1968, Series A No. 7; *United States v. Loud Hawk*, 474 U.S. 302 (1986); *Simmons v. Reynolds*, 898 F.2d 865 (1990); *United States v. Antoine*, 906 F.2d 1379 (1990); *United States v. Kimmons*, 917 F.2d 1011 (1990); *Burkett v. Cunningham*, 826 F.2d 1208 (1987); *DeLancy v. Caldwell*, 741 F.2d 1246 (1984); *United States v. Johnson*, 732 F.2d 379 (1984); *United States v. Pratt*, 645 F.2d 89 (1981); *Rheuark v. Shaw*, 628 F.2d 297 (1980), *certiorari* denied 450 U.S. 931 (1981); *Roque v. Puerto Rico*, 558 F.2d 606 (1976); *People v. Cousart*, 444 N.E.2d 971 (1982); *Amato v. The Queen*, [1982 CanLII 31 \(SCC\)](#), [1982] 2 S.C.R. 418; *R. v. Jewitt*, [1985 CanLII 47 \(SCC\)](#), [1985] 2 S.C.R. 128; *R. v. Young* (1984), [1984 CanLII 2145 \(ON CA\)](#), 40 C.R. (3d) 289; *R. v. Keyowski*, [1988 CanLII 74 \(SCC\)](#), [1988] 1 S.C.R. 657; *R. v. Gallagher*, [1993] 2 S.C.R. 000.

By McLachlin J.

Referred to: *R. v. Rahey*, [1987 CanLII 52 \(SCC\)](#), [1987] 1 S.C.R. 588; *R. v. Kalanj*, [1989 CanLII 63 \(SCC\)](#), [1989] 1 S.C.R. 1594; *R. v. Morin*, [1992 CanLII 89 \(SCC\)](#), [1992] 1 S.C.R. 771; *R. v. Jewitt*, [1985 CanLII 47 \(SCC\)](#), [1985] 2 S.C.R. 128; *R. v. Keyowski*, [1988 CanLII 74 \(SCC\)](#), [1988] 1 S.C.R. 657, *aff'd* (1986), [1986 CanLII 157 \(SK CA\)](#), 49 Sask. R. 64; *R. v. Mack*, [1988 CanLII 24 \(SCC\)](#), [1988] 2 S.C.R. 903.

By La Forest J.

Referred to: Eur. Court H. R., *Wemhoff* case, judgment of 27 june 1968, Series A No. 7; *R. v. Rahey*, [1987 CanLII 52 \(SCC\)](#), [1987] 1 S.C.R. 588; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990 CanLII 135 \(SCC\)](#), [1990] 1 S.C.R. 425.

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Canadian Charter of Rights and Freedoms, ss. 7, [11\(a\)](#), (b), (c), (e), (f), (g), (h), (i), [24\(1\)](#).

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Morgan, Donna C. "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of the [Charter](#)" (1986), 29 *Crim. Law Q.* 15.

APPEAL from a judgment of the Ontario Court of Appeal (1992), [1992 CanLII 12815 \(ON CA\)](#), 74 C.C.C. (3d) 111, 56 O.A.C. 139, allowing an appeal from a judgment of Stortini J. staying a charge. Appeal dismissed.

Brian H. Greenspan and Sharon E. Lavine, for the appellant.

David Butt, for the respondent.

//McLachlin J.//

The reasons of Lamer C.J. and McLachlin and Major were delivered by

MCLACHLIN J. -- I have read the reasons of my colleague, Justice Sopinka, and must respectfully dissent from his views on how appellate delay is treated under the [Canadian Charter of Rights and Freedoms](#).

My colleague concludes that the criminal process must be divided into distinct phases for the purpose of assessing whether an accused person has been denied the right to have criminal proceedings against him dispatched without undue delay. The first phase, if I understand his reasons, is the period between the laying of charges and the entry of a verdict or stay of proceedings. This is assessed under [s. 11\(b\)](#) of the [Charter](#) which guarantees the right to be tried within a reasonable time. The next stage lies between the entry of a verdict or stay, and the resolution of appeals from the verdict or stay. Delay in this stage is to be assessed under quite different principles -- s. 7 abuse of

process. However, that is not the end of the story. If the result of the appeal is an order for a trial (in the case of a stay) or for a new trial (in the case of a verdict), the clock is wound back. My colleague does not specify precisely what he means by this. One possibility is that the entire analysis, including the period of appellate delay, would be assessed under s. 11(b). The other possibility is that different segments of the process leading to the ordered trial, would be analyzed under different sections of the *Charter*: s. 11(b) up to the stay or verdict; s. 7 abuse of process from then to the order for a trial; and s. 11(b) once again after that order is made.

My colleague concedes that the objects and purposes of s. 11(b) -- to protect the right to security of the person, the right to liberty and the right to a fair trial -- on their face apply to post-stay and post-verdict appellate delay. He argues, however, that the complicated scenario he proposes is necessitated by the wording and textual context of s. 11(b); by prior decisions of this Court; and by the fact that the entry of a stay or verdict radically changes the interests at stake. In my view, none of these considerations withstands close scrutiny. Until the person charged is released from the prospect of further trials and proceedings by a final resolution of the matter, s. 11(b) and the principles which have been enunciated under it are applicable. To be sure, the factors considered under s. 11(b) may have different weight depending on the circumstances, and different considerations may fall to be considered where appellate proceedings are at issue. Furthermore, the remedies may vary, depending on the stage of the criminal process where one is. But these factors can and should, in my view, all be assessed under the single test imposed by s. 11(b) of the *Charter*.

The Wording and Context

I turn first to the wording and context of s. 11(b). My colleague argues that the phrases "charged with an offence" and "to be tried" suggest that s. 11(b) applies only to the time of trial. I respectfully disagree. "[C]harged with an offence", should, in my view, be read as indicating a person who is subject to the power of the criminal process. Until the person is finally released from the jeopardy of the criminal process by a final resolution of the "charges" against him or her, the person remains, for the purposes of s. 11(b), a person charged with an offence. This position is consistent

with the comments of Lamer J., as he then was, in *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, at pp. 610-11:

... s. 11(b) protects against an overlong subjection to a pending criminal case and aims to relieve against the stress and anxiety which continue until the outcome of the case is final. . . . The computation [of the delay] cannot end as of the moment the trial begins, but rather must continue until the end of the saga, all of which must be within a reasonable time.

The narrower reading of "charge" contended for by my colleague, Sopinka J., produces a scenario of waning and waxing charges. My colleague argues that a stay or verdict ends the charge. But he is then forced to assert that a subsequent order for a trial or new trial "revives" the charge, which has presumably lain dormant even though it has supposedly disappeared. At the verdict after the trial, the charge once more wanes, only to be revived yet again if an appeal court orders yet further trial proceedings. The accused is subject to one criminal process, throughout which his freedom is in jeopardy. Yet the law would tell him that he is charged only part of the time, depending in which particular part of the process he is.

The interpretation my colleague suggests for the phrase "to be tried" is similarly problematic. My colleague asserts that a person's s. 11(b) right to be tried within a reasonable time expires with the entry of a stay. Yet this may occur before the person has ever had a trial. If the stay is set aside on appeal and the accused ordered to stand trial, he or she has no right to complain in the face of egregious Crown delay occurring at the appellate stage that his or her right to be tried within a reasonable time has been breached, even though he or she has never stood trial. The case of an order for a new trial after acquittal is similarly problematic. The first trial is declared invalid. In effect, the accused has not had a proper trial. A new trial is ordered. Notwithstanding that the accused has not enjoyed the right which the *Charter* expressly gives him or her -- the right to a proper trial within a reasonable time -- he or she would be precluded by the interpretation my colleague suggests of claiming an infringement of s. 11(b) on the basis of unreasonable appellate delay, and confined to the much narrower remedy of s. 7 abuse of process. This cannot, in my view, have been what the framers of the *Charter* intended.

Nor does the textual context of s. 11(b) dictate the interpretation for which my colleague contends. It is true that many of the rights enumerated in s. 11 are restricted to the early stages of the criminal process. But others, such as s. 11(h) and 11(g), clearly apply after a verdict. So it does not follow, with respect, that "[i]f '[a]ny person charged' in s. 11(b) necessarily includes the accused as a party to an appeal then the same conclusion would have to apply to the other subsections of the section," as my colleague concludes at p. 000. Since s. 11 is directed to ensuring fairness at all stages of the criminal process, it cannot be concluded that s. 11(b) must necessarily be confined to the pre-stay, pre-verdict phase.

My colleague argues that because s. 11(b) has been held not to apply to pre-charge delay (*R. v. Kalanj*, 1989 CanLII 63 (SCC), [1989] 1 S.C.R. 1594), it cannot be held to apply to appellate delay. He concludes, at p. 000, that "s. 11(b) does not apply unless the restriction of the interests which the subsection protects results from an actual charge." With this I agree. But I do not agree that this leads to the conclusion that s. 11(b) does not apply to post-stay or post-verdict appellate delay. If "[a]ny person charged" is read as synonymous to "a person who is the subject of the criminal process", as I suggest, it follows that s. 11(b) would apply even after a verdict. The appeal proceedings clearly result from an actual charge; indeed, they are dependant upon it for their validity.

The Interests At Stake

My colleague, Sopinka J., argues that consideration of the rights protected by s. 11(b) leads to the conclusion that it does not apply to post-stay or post-verdict appellate proceedings.

The rights protected by s. 11(b), as noted earlier are the right to security of the person, the right to liberty, and the right to a fair trial: *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771. My colleague considers first the case of an appeal from an acquittal. He concludes, at p. 000, that during this period "[n]o proceeding is on foot which seeks to charge the person acquitted", and states that the "plight of the acquitted person is that of one against whom governmental action is directed which may result in a charge." With respect, this diminishes the seriousness of the position of the acquitted person facing an appeal. Before a charge is laid, the suspect does not, generally speaking,

suffer the stigma of criminal proceedings. The same cannot be said of an accused who is the subject of a post-acquittal appeal. He or she has in fact been charged. The law continues to require him or her to defend him- or herself against the charges. He or she must hire lawyers and plead before judges. While he or she has been acquitted, the prosecution continues to aver publicly that the acquittal is invalid. And he or she faces the distinct possibility of an order overturning the acquittal and entering a conviction or directing a new trial, a prospect which is not a speculative possibility but a real danger. The anxiety which an accused who has been acquitted faces while awaiting the possibility of a second trial must be considerable. In all these respects, the situation of an accused on an appeal from an acquittal is much closer to the situation of an accused awaiting trial than to a person who has not been charged. I respectfully cannot agree with my colleague's conclusion, at p. 000, that "[i]t would be incongruous to extend protection to the acquitted accused pending appeal and not to the suspect awaiting a charge. . . ."

The situation of a convicted person who appeals, while less sympathetic than that of the acquitted person who faces an appeal, nevertheless engages the concerns to which s. 11(b) is directed. In the narrow vernacular of trial procedure, the charges against the accused have been resolved. But they have not disappeared. The accused may succeed in showing that the trial was unfair or invalid, and that the apparent resolution of the charges by the conviction was void. Finally, he or she hopes, he or she will get the trial he or she was entitled to in the first place. It would be cold comfort to tell him or her that the intervening delay in obtaining that trial does not fall under s. 11(b) and stands to be remedied, if at all, under the more restrictive application of abuse of process doctrine under s. 7.

The position of a person facing an appeal from a stay of proceedings is no better. My colleague argues that a stay is indistinguishable from an acquittal. If so, I would respond that like a person acquitted, the person against whom proceedings are stayed faces a jeopardy which engages s. 11(b). But I doubt that a stay and an acquittal can be so simply equated. Dickson C.J., speaking for the Court warned against such an assumption in *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128, at p. 148:

We are concerned here with a stay of proceedings because of an abuse of process by the Crown. While a stay of proceedings of this nature will have the same result as an

acquittal and will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*, its assimilation to an acquittal should only be for purposes of enabling an appeal by the Crown. Otherwise, the two concepts are not equated. The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction. No consideration of the merits -- that is whether the accused is guilty independently of a consideration of the conduct of the Crown -- is required to justify a stay.

In one salient respect, the person facing an appeal from a stay is in greater jeopardy than a person who has been acquitted or convicted. He or she has never had any trial. No witnesses have been called, no evidence committed to public record. The risk of not being able to bring forward a valid defence when the trial is finally held may be greater than where one trial, however unfair, has been held.

In short, the rights which s. 11(b) seeks to protect are all engaged in the period between a verdict or a stay and the final disposition of the criminal charges. Security of the person and the right to liberty are engaged. The acquitted person, having been found not guilty, faces the prospect of conviction and incarceration. The person against whom a stay has been entered faces the same possibility. The convicted person, if the appeal succeeds and the conviction is found to be invalid, can equally argue that the law's delay in arriving at that conclusion has deprived him or her of his or her liberty and security of the person during the appellate interval. The right to a fair trial is engaged as well. In all three situations, the acquittal, conviction and stay, the subject of the criminal proceedings faces the prospect of a new trial, whose fairness may be jeopardized by excessive delay.

The narrow remedy proposed by my colleague for post-stay, post-verdict delay would not, with respect, provide a remedy capable of meeting these concerns. He concludes that s. 7 applies where the delay is so long that it constitutes abuse of process. The accused would be entitled to a remedy only where he or she could show that a new trial would be so unfair as to amount to an abuse of the court's process. I have several problems with this conclusion.

I note parenthetically that this conclusion begs the question which Wilson J. left open in *R. v. Keyowski*, 1988 CanLII 74 (SCC), [1988] 1 S.C.R. 657, at p. 661, of the relationship between s. 7 and the doctrine of abuse of process. Accepting, for purposes of argument, however, Sopinka J.'s

conclusion that only post-stay or post-verdict delay which constitute abuse of process can be remedied under s. 7, it presents the following difficulties.

The abuse of process doctrine is a narrow doctrine which has only on rare occasions provided a remedy to accused persons caught overlong in the meshes of the criminal process. Its primary aim is not the rights of the accused person, but the repute of the system of justice. As Lamer J., as he then was, put it in *R. v. Mack*, [1988 CanLII 24 \(SCC\)](#), [1988] 2 S.C.R. 903, at p. 942, in treating entrapment as abuse of process:

The issuance of the stay obviously benefits the accused but the Court is primarily concerned with a larger issue: the maintenance of public confidence in the legal and judicial process. In this way, the benefit to the accused is really a derivative one.

Moreover, it has repeatedly been held that the doctrine of abuse of process should be applied only in the clearest of cases: *R. v. Keyowski*, *supra*, at pp. 659-60. This has been taken to impose a higher standard of proof than would face an accused relying on a breach of rights under the *Charter*: see Bayda C.J. in *R. v. Keyowski* (1986), [1986 CanLII 157 \(SK CA\)](#), 49 Sask. R. 64 (C.A.). Without definitively ruling on that question, the fact remains that abuse of process has seldom, in its long history, served as a remedy for delay in the criminal process. It has been stringently and sparingly applied. As one author puts it: "while abuse of process has frequently been argued and its availability increasingly acknowledged, a remedy for the accused has not readily been forthcoming": Morgan, "Controlling Prosecutorial Powers -- Judicial Review, Abuse of Process and Section 7 of the Charter" (1986), 29 *Crim. Law Q.* 15, at p. 38. To hold that the only remedy for delay in the criminal process after the entry of a stay or acquittal is abuse of process would be to create an anomaly in the law. The rights engaged and the jeopardy experienced are similar before and after the stay or verdict. Yet before the stay or verdict one has a full and easily accessed remedy; after, one has only a narrow and circumscribed hope.

Acceptance of my colleague's conclusion that [s. 11\(b\)](#) of the *Charter* does not apply to post-stay or post-verdict delay leaves two possible options for remedying such delay under the *Charter*. The first is that post-stay and post-verdict delay are held to be remediable under common

law doctrine of abuse of process under s. 7. This is the route chosen by Sopinka J. It is, I have respectfully suggested, too narrow to provide an adequate or just remedy for many of the circumstances which may result from post-stay, post-verdict delay. The alternative might be to seek a distinct and broader remedy for such delay under s. 7 of the *Charter*. But such an approach should be undertaken only if the *Charter* provision expressly aimed at delay in the criminal process is inapplicable or inappropriate; the law should not be complicated unnecessarily. I have argued thus far that s. 11(b) by its wording and objects is not inapplicable to post-stay, post-verdict delay. I turn now to the appropriateness from a practical point of view of treating such a delay under s. 11(b) of the *Charter*.

Applying Section 11(b) to Post-Stay, Post-Verdict Appellate Delay

I have concluded that not only does the language and context of s. 11(b) not mandate that it be confined to the pre-stay, pre-verdict period of the criminal process, but also the objects and goals underlying s. 11(b) suggest that it does apply to delays after the entry of a stay or a verdict. In this section, I argue that there is no need from a practical point of view to adopt a complex two-principle scheme for assessing delay in the criminal process; the same general principles can and should apply throughout, even though they may impact differently depending on the particular considerations which arise at different stages. The reality of the judicial process is that interlocutory, trial and appellate proceedings may be so intertwined in a given case that it makes little sense to attempt to apply different legal rules according to the stage one is at.

The principles applicable under s. 11(b) have been enunciated in *R. v. Morin, supra*. They are: (1) the length of the delay; (2) waiver, if any, of parts of the delay; (3) the reasons for the delay; and (4) prejudice to the subject of the criminal process. In my view, these principles are broad and flexible enough to apply at the post-stay, post-verdict stage of the criminal process.

The length of the delay must always be taken into account in determining its reasonableness, whether it be trial delay or appellate delay. It may be less easy to set a "normal" yardstick in appellate delay, given the need for deliberation and discussion between members of the

panel. But as for delay before verdict or stay, some delays will clearly be within a normal time period, some will clearly be egregious, barring explanations, and some, the most difficult to assess, will lie between the two extremes.

Waiver applies equally to delay before a stay and verdict and delay after a stay and verdict.

The reasons for the delay may be similar before and after a stay or a verdict. Overloaded judicial systems, poor organization, negligence, foot-dragging by the accused -- these and more may play a role at all stages of the judicial process. But the reasons for appellate delay include some which do not figure, or do not figure as importantly, at lower levels. In addition to reaching the just result in the case before it, an appellate court has a duty to settle and articulate principles of law which transcend the needs of the particular case. This may require more preparation, more research, more elaborate reasons and more discussion and debate among members of the appellate tribunal, and as a consequence, more time. The fact that a number of people with different views may be involved in the decision may add to the length of time required to settle the appeal finally. In some cases, counsel may need more time to prepare for a case given the complexity of the issues involved. For example, interveners are often involved at the appellate stage. The proper development of the law is an important goal which must be pursued, even at the expense of some additional delay in the case. This must be taken into account in considering the reasons for the delay.

The final factor set out in *Morin*, prejudice to the accused, is relevant both before, and after, a stay or a verdict has been ordered. What is protected at all stages is the accused's right to a fair and timely criminal process. As seen above, stigma, anxiety and restrictions on liberty may adversely affect the subject of the proceedings after a stay or verdict, just as before. Similarly, the subject's opportunity to present a full defence at a post-appeal trial may be adversely affected by post-verdict or post-stay delay. The impact of these adverse effects on the accused must be put in the balance in determining whether the delay complained of was reasonable.

This brings me to the matter of remedy. This Court has held in cases of pre-verdict, non-appellate delay, that a stay of proceedings is the minimum and generally appropriate remedy: *R. v.*

Rahey, supra, at p. 614. However, where a verdict has been entered, a stay may not be appropriate. For example, a stay of proceedings would be useless to a convicted person complaining of appellate delay; indeed, it would deny him or her a just remedy by preventing him or her from proceeding with his or her appeal. The nearest alternative to a stay of proceedings, quashing the conviction, might seem inappropriate given that one would be releasing, not a person presumed to be innocent as at the pre-trial stage, but a convicted felon who has not served his or her sentence. To release a convicted killer into society, for example, without having served his or her sentence, solely because the appeal he or she chose to bring took more time than reasonable, would be to grant a remedy which far outstrips the wrong and which overlooks the important societal interest in the safety and security of members of the public. Confronted with these alternatives, a judge finding unreasonable delay in such a case might wish instead to make a different order. He or she might order that the appeal be expedited, for example. Nor would I rule out other remedies such as damages to compensate for loss of liberty or mental suffering, although I would leave the question of what remedies may be appropriate for resolution on a case-by-case basis.

The many different circumstances which may prevail at the post-verdict, post-stay stage require a flexible approach to remedies. In some cases stays of proceedings may be appropriate. In other cases, other remedies will necessarily arise for consideration. The *Charter* empowers the court to grant such remedies as may be just in all the circumstances. In selecting a remedy, the judge should bear in mind such factors as the length and nature of the delay, the seriousness of the offence, the nature of the injury suffered by the accused and any prejudice caused to the accused's defence by the delay: see La Forest J. in *R.v. Rahey, supra*, at p. 648.

I would be flexible as to the forum for the remedy. If it appears to the Court of Appeal that the accused's rights have been violated by excessive pre-verdict and appellate delay, for example, that court should be able to deal with both types of delay without sending the new issue of appellate delay back to a judge of first instance. On the other hand, the subject of a criminal process should not be prevented from applying to a judge of first instance with respect of any delay, including appellate delay. The practical reality, as noted earlier, is that pre-stay, pre-verdict delay and appellate delay are often intertwined and impact upon each other. To say that only courts of first instance can deal with

the former and only courts of second instance can deal with the latter would be to unnecessarily truncate and complicate the proceedings.

Application to this Case

Applying s. 11(b) to this case, I conclude with my colleague Sopinka J. that unreasonable delay has not been established. As to the pre-stay delay, while the time period was long, much of it can be explained by a series of interlocutory proceedings which were necessary given the complexity of the case. There were thus good reasons for much of the delay. Waiver is not a factor. As for prejudice, I agree with the Court of Appeal below that the prejudice that may be inferred was minimal.

Nor, in my view, was the post-stay appellate delay unreasonable in this case. The greatest delay in this period was a gap between June 21, 1991, when the appeal book was served and January 15, 1992, when the respondent scheduled the hearing. Thereafter the appeal proceeded with reasonable dispatch, given certain problems with the unavailability of appellant's counsel for the first hearing date. However, there is no suggestion that the appellant was prejudiced by any of this delay, or that he wanted things to move faster. Presumably, he was content to let the stay stand as long as possible. In these circumstances, unreasonable delay in the post-stay period is not made out. I note that the Court of Appeal ordered an accelerated trial, aimed at avoiding any further delay.

I would dismiss the appeal.

//La Forest J.//

The following are the reasons delivered by

LA FOREST J. -- I agree with Justice Sopinka that s. 11(b) of the *Canadian Charter of Rights and Freedoms* does not apply to appellate delay. I find support for this in the French version of the *Charter* and in the European Court of Human Rights judgment in the *Wemhoff* case, judgment of 27 June 1968, Series A No. 7, cited by my colleague; see my reasons in *R. v. Rahey*, 1987 CanLII 52

([SCC](#)), [1987] 1 S.C.R. 588, at pp. 632-33. However, I am of the view, given the interrelationship between ss. 7 and 11(b), that s. 7 may in certain contexts provide residual protection to the interests the right under s. 11(b) is designed to protect that goes beyond the specific protection it provides; see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990 CanLII 135 \(SCC\)](#), [1990] 1 S.C.R. 425. Accordingly, those interests are also entitled to protection at the appellate level but subject to the special considerations specific to the appellate process and in consequence the choice of an appropriate remedy. In particular, a stay should not as often be used as the appropriate remedy for appellate delay as for trial delay. On these matters, it will be obvious that I generally share the views of Justice McLachlin. I also agree with her regarding the appropriate court for considering delay.

I should say, however, that I do not share her concerns about a bifurcated system. In considering delay at the appellate level, I do not see why weight should not be given to pre-appeal delay, or why a consideration of appellate delay could not figure in the equation when complaints about delay are raised at trial following appellate review. Sections 7 and 11(b) are not mutually exclusive. The *Charter* is an organic instrument.

I agree that there was no unreasonable delay in this case and I would accordingly dismiss the appeal.

//Sopinka J.//

The judgment of L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci was delivered by

SOPINKA J. -- This appeal concerns the application of the constitutional guarantee to be tried within a reasonable time contained in [s. 11\(b\)](#) of the *Canadian Charter of Rights and Freedoms*. The important question of law to be resolved is whether s. 11(b) applies to appellate proceedings.

Facts

The appellant was charged with criminal negligence causing death in an information sworn on September 15, 1988. He was released from custody on an undertaking, and on consent, the matter was adjourned to October 25, 1988. At that time, counsel for the appellant (not Mr. Greenspan who was counsel before this Court and at the Court of Appeal) advised the Provincial Court judge that the investigation was ongoing and that a disclosure brief was not available. At the suggestion of Crown counsel, the matter was adjourned to November 8, 1988. On November 8, an agent for counsel for the appellant requested an adjournment to permit defence counsel to arrange a pre-trial, and the matter was accordingly adjourned to December 6, 1988.

On December 6, 1988, the charge was further adjourned to January 31, 1989 for a pre-trial. Counsel for the appellant estimated that the preliminary hearing would require five days and that it was likely that a great deal of scientific evidence would be called at that time. Crown counsel requested that the pre-trial judge be permitted to read the Crown brief prior to the pre-trial. The court approved this request as consistent with the "usual practice." Trial counsel for the appellant consented to the request but advised the court that all of the Crown's scientific reports were not yet available and that this evidence was crucial to the resolution of the case. He also indicated that the pre-trial judge would likely require two days to read the Crown brief. Both counsel agreed to January 31, 1989 as a date for the pre-trial conference.

The pre-trial conference was held on January 31, 1989. It was conducted in the pre-trial judge's chambers and no transcript is available. However, court resumed once the pre-trial had been completed, and counsel for the Crown and defence spoke to the provincial judge about setting a date for trial or for a preliminary hearing. The judge indicated that five days would be required for a preliminary and suggested September or October 1989, subject to counsel's availability. Because the appellant was not present in court on this date, the matter was adjourned to February 7, 1989 to set the trial date.

On February 7, 1989 counsel for the appellant advised the court that he would be calling eight or nine witnesses, in addition to the seven witnesses to be called by the Crown and that he was prepared to set a date for the first week of October, 1989. October 2, 1989 through October 6, 1989 were set for the trial or preliminary hearing. Counsel for the appellant declined to elect a trial or preliminary hearing for that date because he did not have all the material, which suggests that some, but not full, disclosure had been made. On February 14, 1989, the appellant appeared in court and the week of October 2 to 6 was confirmed.

On October 2, 1989 the appellant elected to be tried by a court composed of judge and jury and the preliminary hearing commenced. On October 5, 1989, the appellant was committed for trial and re-elected to be tried by judge alone.

The indictment was signed on October 20, 1989. On November 7, 1989, the appellant first appeared in the District Court assignment court. At that time the transcript of the preliminary hearing had not been completed. It was completed on November 14, 1989. On November 7, both counsel agreed that a pre-trial would be worthwhile, and the court suggested December 13, 1989 as a date for the pre-trial. However, counsel for the appellant was not available on that date, and therefore January 17, 1990 was selected.

On January 17, 1990, Crown counsel was unable to attend the pre-trial conference due to a conflicting commitment, and the pre-trial was adjourned. The date of February 6, 1990 was chosen as the date upon which a new pre-trial date would be set. On that date, May 2, 1990 was chosen as a date for the pre-trial. There is no transcript or other evidence to explain why May 2 was selected. Further, while a secretary at the firm representing the appellant, Kelly Annet, stated in her affidavit that she had been informed that Crown counsel advised the court that he wished to have a pre-trial conference, the affidavit of the Crown indicates that Crown counsel does not recall whether he wished to have a pre-trial conference.

The pre-trial conference was held on May 2, 1990. The issues were discussed and the matter was adjourned to June 5, 1990 to set a date for trial.

At assignment court on June 5, 1990, defence counsel indicated to the court that the trial would likely last ten days and that an out-of-town judge was required. According to counsel for the appellant, an out-of-town judge was necessary because all the judges in the jurisdiction knew the family of the deceased. It is agreed that, in the circumstances, this request was reasonable. The trial co-ordinator made it clear that the trial date would be set and that a judge from outside Sudbury would then be found to preside at the trial. The date of December 3, 1990 was suggested as an appropriate date, but defence counsel expressed a preference for a January 1991 date as he had other commitments in December. At defence counsel's suggestion, the matter was adjourned to July 3, 1990 in order for counsel to make appropriate arrangements about a date.

During June, 1990, counsel for the appellant and respondent met with Loukidelis J. in chambers and agreed to the dates of December 3 to 10 for the trial. The affidavit of Greg Rodgers, Assistant Crown Attorney, states that "[i]f the matter was shorter and could be heard by a local Judge a trial date could have been obtained within 3 months". On July 3, 1990, it was decided that the trial would proceed on December 3, 1990.

On December 3, 1990, the appellant applied for a stay of proceedings under [s. 24\(1\)](#) of the *Charter*, arguing that his right to be tried within a reasonable time had been infringed. In the alternative, he sought an order excluding the evidence of a certain witness on the grounds of late disclosure. On December 4, 1990, the trial judge stayed the proceedings on the grounds that the right to trial within a reasonable time in [s. 11\(b\)](#) of the *Charter* had been infringed.

As the respondent noted in its factum, no motion to adduce fresh evidence regarding appellate delay was made at the Court of Appeal or before this Court, and no affidavit evidence regarding this period has been adduced. There is accordingly no evidence before this Court regarding delay during the appellate period, but for the purposes of setting out the time frame, the following dates from the factum of the appellant are accepted as fact. On December 24, 1990, the Attorney General appealed against the stay of proceedings. The transcript of the argument and the judgment were served on counsel for the appellant on February 13, 1991, and on June 21, 1991, the appeal book

was served. On January 15, 1992, the respondent scheduled the hearing, suggesting that the appeal proceed on March 13, 1992. Due to the unavailability of counsel for the appellant on that date, counsel for the respondent proposed various dates commencing April 6, 1992, at which point April 24, 1992 was set as the earliest available date. The appeal was heard in the Court of Appeal for Ontario on April 24 during which the issue of appellate delay was raised. On June 22, 1992, the Court of Appeal allowed the appeal, set aside the stay and remitted the matter for trial on an expedited basis. On July 30, 1992, the appellant filed his Notice of Appeal in this Court.

Judgments Below

Ontario Court of Justice -- General Division, Stortini J.

Stortini J. held that the appellant's s. 11(b) rights had been violated. He noted that the total delay in this case was two years and two and a half months from the first appearance to trial, and that four months passed from the accused's arrest to the holding of the pre-trial conference. This latter delay was mostly due to the then-existing system which sought to accommodate counsel in arranging for pre-trial conferences and could not be attributed solely to the prosecutor or to systemic or institutional delay. He considered the argument that the delay was reasonable given the complexities of the case in terms of scientific evidence, the number of witnesses, the length of the preliminary hearing and trial, and the fact that an out-of-town judge was required. Noting that complex cases would justify longer delays than would simple cases, he stated, nonetheless, that lack of institutional resources should not constitute an acceptable excuse for unreasonable delays. He concluded that the delay was unreasonable as it was too long and that the explanations for the delay were either non-existent or insufficient to justify the delay.

Ontario Court of Appeal (1992), [1992 CanLII 12815 \(ON CA\)](#), 74 C.C.C. (3d) 111 (Morden A.C.J.O and Osborne and Weiler JJ.A.)

Osborne J.A., writing for the court, held that the appeal should be allowed. After identifying waiver as a critical issue in the case, Osborne J.A. focused on two periods: the seven and

one-half month period preceding the preliminary hearing, which began on October 2, 1989 and the six-month period preceding the trial which began on December 3, 1990. The court concluded that "waver in the entire period from January 31, 1989 to October 2, 1989, has not been established." The court did find that the respondent waived his right to complain of one month of the delay between December 13, 1989 and January 17, 1990 because he expressed a preference for January 17, 1990 rather than the scheduled date of December 13, 1989. The court did not find, however, that the respondent waived his right to complain of the six-month delay between June 1990 and December 1990, although counsel for the appellant did agree to the December trial date. Although there was no evidence before the court with respect to alternative trial dates, Osborne J.A. concluded that the December 3 date was likely the first date available for a ten-day trial.

With respect to the reasons for the delay, the Court of Appeal concluded that the four-month period from the appellant's arrest to the pre-trial conference was attributable to delay inherent in the nature of the case, including some intake delay. Some two months of delay between committal and the first date for the pre-trial was also held to be inherent delay. Osborne J.A. was of the view that neither the Crown nor the accused could be said to be responsible for much of the delay, except that it was Crown counsel's scheduling problems which required the pre-trial to be adjourned from January 17, 1990 to May 2, 1990. The two periods from February 7, 1989 (when the preliminary hearing date was set) to October 2, 1989 (when the preliminary hearing commenced) and from June 5, 1990 (when the trial date was set) to December 3, 1990 (when the trial was to begin) were held to be systemic delay, although it was noted that the lengthy court times necessary justified a longer delay than would be acceptable in a simpler case.

With respect to the issue of prejudice, Osborne J.A. agreed with the trial judge that the respondent suffered no actual or special prejudice as a result of the delay from the time the information was sworn in September, 1988 to the time his trial commenced in December, 1990.

To determine whether the delay was unreasonable, the Court of Appeal weighed the explanation for the delay and prejudice to the accused to determine whether the appellant's constitutional right to be tried within a reasonable time had been breached. Osborne J.A. noted that

this Court had held in *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771, that, although prejudice is only one factor to be taken into account in the balancing process, a conclusion that prejudice was absent or that it was minimal is significant. The rationale for the pre-eminent position given to prejudice was held to be consistent for the purposes of s. 11(b) -- to protect the rights of the accused and the dual societal interest in seeing an accused treated humanely and fairly and in seeing those accused of crimes be brought to trial.

Weighing all the factors, Osborne J.A. found that the delay was not unreasonable. He concluded that the prejudice that may be inferred was minimal, and that there was nothing on the record to suggest that the respondent ever sought an earlier date for the pre-trials, the preliminary hearing or the trial. While noting that "there may be a fine line between acceptance of the inevitability of the pace of proceedings and contentment with the speed of the process", Osborne J.A. held that the guidelines set out in *Morin* do not establish a limitation period and that a balancing of all aspects of the delay in this case led to the conclusion that the delay was not unreasonable.

Osborne J.A. therefore ordered that the appeal should be allowed, the stay set aside and remitted the matter for trial, on an expedited basis.

The Issues

There are two issues: (1) was the delay preceding the end of the trial unreasonable so as to offend the provisions of s. 11(b) of the *Charter*; and (2) does s. 11(b) apply to the delay in respect of the appellate proceedings?

Pre-trial Delay

The facts relating to this issue were reviewed in detail in relation to the principles expressed by this Court in *R. v. Morin*, *supra*, by Osborne J.A. in the Court of Appeal. Bearing in mind the approach to review of appellate judgments in respect of the application of s. 11(b) adopted

by this Court in *R. v. Stensrud*, 1989 CanLII 9 (SCC), [1989] 2 S.C.R. 1115, I would adopt the conclusions and reasons of Osborne J.A. and dismiss this ground of appeal.

Appellate Delay

This issue was raised in the Court of Appeal but was not dealt with. I have concluded that s. 11(b) does not apply to delay in respect of an appeal from conviction by the accused nor an appeal from an acquittal by the Crown. Moreover, in my opinion, there is no distinction in this regard between an acquittal after trial and a judicial stay.

Section 11 of the *Charter* is to be interpreted in a manner that harmonizes as much as possible all of its subsections. In *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 353, La Forest J., for the majority, stated:

As I observed in *Canada v. Schmidt*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500, the phrase "Any person charged with an offence" in the opening words of the section must be given a constant meaning that harmonizes with the various paragraphs of the section. It seems clear to me that for the purposes of s. 11 it would be quite inappropriate to conclude that a convicted person is charged with an offence when confronted with a Part XXI application. How can it be said that the right to the presumption of innocence until proven guilty (s. 11(d)) and the right to bail (s. 11(e)), for example, could have any application in the context of the unique post-conviction proceeding mandated by Part XXI? [Emphasis in original.]

Many of the rights found in s. 11 cannot apply to appeals and are restricted to the pre-trial or trial process. If "[a]ny person charged" in s. 11(b) necessarily includes the accused as a party to an appeal then the same conclusion would have to apply to the other subsections of the section. An examination of the various subsections shows s. 11(a), (c), (f) and (i) clearly do not apply to appeals. Section 11(e) could not apply to an appellant who has been acquitted and other subsections are primarily concerned with what occurs at trial although exceptionally they might have some application on appeal.

I conclude from the foregoing that as a general rule "[a]ny person charged" under s. 11 does not include an accused person who is party to an appeal. A particular subsection may apply to

appeal proceedings as an exception to the general rule if its purpose and language support this conclusion. After considering the purpose and language of s. 11(b), I have concluded that the interpretation that gives effect to both of these elements and best harmonizes the other subsections is that the subsection applies to the pre-trial period and the trial process but not to appellate proceedings. While I am uncomfortably aware that I expressed a different view in my dissenting reasons in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, I have come to this conclusion in light of the considerable additional judicial experience of this Court in the application of s. 11(b) since the judgment in *Conway*. In particular, I refer to the judgment in *R. v. Kalanj*, 1989 CanLII 63 (SCC), [1989] 1 S.C.R. 1594, and cases that followed it as to the purpose of s. 11(b).

The general objects and purposes of s. 11(b) were recently re-stated in *R. v. Morin*, *supra*, as follows at p. 786:

The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.

The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

If these purposes and objects were embodied in s. 11(b) without restriction, it would be difficult to argue that the section had no application to appeals. The section has, however, been interpreted in a manner that does not extend its protection of these interests against the consequences of delay at large, but only from the consequences of delay flowing from a formal charge. Short of a formal charge, similar consequences proceeding from other aspects of governmental activity in the criminal process do not trigger the protection of the provision. Accordingly, in *Kalanj*, *supra*, this Court dealt with a situation in which the accused were arrested after a lengthy investigation. On the day of the arrest the accused were fingerprinted and released but were advised not to leave town, that they would be charged and that a summons would issue. More than eight months later charges were laid. This Court was invited to hold that, because of the involvement of the interests that underlie s. 11(b), it should extend to the pre-charge delay. The invasion of the interests protected by s. 11 in the broad sense could certainly be equated to the consequences of a charge. The stigma and anxiety

resulting from arrest and fingerprinting would exceed the consequences flowing from laying of a charge followed by a summons. The restraint on liberty was the equivalent to that which occurs when a charge is laid and the accused is released on bail. The pre-trial delay has the same effect on the freshness of the evidence as post-charge delay. Nonetheless, this Court held that the accused were not persons charged until a formal charge was laid and that s. 11(b) did not apply. This judgment has been applied to rule out review of pre-charge delay unless the accused can establish a breach under s. 7. See *R. v. L. (W.K.)*, [1991 CanLII 54 \(SCC\)](#), [1991] 1 S.C.R. 1091.

It follows from *Kalanj* that s. 11(b) does not apply unless the restriction of the interests which the subsection protects results from an actual charge. Circumstances which produce the same consequences do not qualify for the protection of this provision unless those consequences proceed from a formal charge. The question which is in issue in this appeal is whether the consequences of delay resulting from an appeal from acquittal or conviction are distinguishable from pre-charge delay and can be attributed to the existence of a formal charge.

Clearly, during the period after an acquittal and the service of a notice of appeal, the person acquitted is not a person charged. No proceeding is on foot which seeks to charge the person acquitted. Upon the appeal's being filed there is a possibility, the strength of which will vary with each case, that the acquittal will be set aside and the charge will be revived. The plight of the acquitted person is that of one against whom governmental action is directed which may result in a charge. In this respect the former accused is like the suspect against whom an investigation has been completed and charges are contemplated awaiting a decision by the prosecutor. Indeed the acquitted accused is somewhat more removed from the prospect of being subject to a charge than the suspect. In the former case, no charge can be revived until the acquittal is set aside by reason of an error of law that a court determines with a reasonable degree of certainty affected the decision at trial. In the latter case, all that stands between the suspect and a charge is the *ex parte* decision of the prosecutor. It would be incongruous to extend protection to the acquitted accused pending appeal and not to the suspect awaiting a charge who knows he or she is awaiting the decision of the prosecutor.

There is even less reason to extend the protection of s. 11(b) to a convicted person who appeals. The appeal itself is not governmental action. In *R. v. CIP Inc.*, 1992 CanLII 95 (SCC), [1992] 1 S.C.R. 843, Stevenson J. stated for the Court, at pp. 864-65:

We are reviewing the decision that was made on November 1, 1988. The delay after that motion was granted is appellate delay. The bulk of that delay is attributable to the appellant's decision to pursue appeals. The appellant invoked the processes of which it now complains and must accept the burdens inherent in full appellate review. There is no evidence or argument to support a finding that some extraordinary factor lengthened that review process.

The delay due to some extraordinary factor referred to by Stevenson J. would not be attributed to the fact that the accused was a person charged but rather to the conviction. A convicted person is not a person charged. See *Lyons, supra*, at p. 353. The effect of such an extraordinary factor would fall to be assessed under s. 7 in light of its impact on the fairness of the proceedings.

This discussion has focused on the interpretation of the words "[a]ny person charged" in s. 11(b) in the context of the purpose of the subsection. The conclusion that those words limit the operation of the subsection to the trial process is supported by the use of the word "tried". It would seem that if it was intended that the subsection apply not only to the trial but also to final adjudication, more apt wording would have been employed. This is illustrated by the decision of the European Court of Human Rights, *Wemhoff* case, judgment of 27 June 1968, Series A No. 7. The court dealt with two sections of the Convention: s. 5(3) and s. 6(1). The former provided that "[e]veryone ... shall be entitled to a trial within a reasonable time. . ." while the latter provided that "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing . . .". The court held that the former section extended only to the trial while the latter extended to the final determination even if this was on appeal. No doubt this language was before the framers of the *Charter*, and the selection of the more limiting term is significant.

This does not mean that when there is an adjudication relating to a charge which is appealed, s. 11(b) is spent. If on the appeal the judgment is set aside and the matter is remitted for trial, the accused reverts to the status of a person charged. As stated by D.H. Doherty (now a justice of the Court of Appeal for Ontario) in "More Flesh on the Bones: The Continued Judicial

Interpretation of s. 11(b) of the [Canadian Charter of Rights and Freedoms](#)" (1984), Canadian Bar Association - Ontario; Annual Institute on Continuing Legal Education, at p. 9:

Section 11(b) does not appear to operate at the appellate stage. Section 11(b) guarantees a trial within a reasonable time, not a final determination of the matter at an appellate level within that time. If, however, a new trial is ordered on appeal, or some other order is made directing the continuation of the trial proceedings, the constitutional clock should be rewound at the time of the order by the appellate court.

A similar conclusion was reached by the Supreme Court of the United States. In *United States v. Loud Hawk*, 474 U.S. 302 (1986), it was argued that the speedy trial guarantee in the 6th Amendment applied to an appeal by the government from a dismissal of charges prior to a trial on the merits by reason of excessive delay in prosecuting the charges. The court stated, at pp. 311-12:

During much of the litigation, respondents were neither under indictment nor subject to bail. Further judicial proceedings would have been necessary to subject respondents to any actual restraints As we stated in *MacDonald*: "(W)ith no charges outstanding, personal liberty is certainly not impaired to the same degree as it is after arrest while charges are pending. After the charges against him have been dismissed, 'a citizen suffers no restraints on his liberty and is (no longer) the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer'." . . .

Respondents argue that the speedy trial guarantee should apply to this period because the Government's desire to prosecute them was a matter of public record. Public suspicion, however, is not sufficient to justify the delay in favour of a defendant's speedy trial claim. We find that after the District Court dismissed the indictment against respondents and after respondents were freed without restraint, they were "in the same position as any other subject of a criminal investigation" The Speedy Trial Clause does not purport to protect a defendant from all effects flowing from a delay before trial. The Clause does not, for example, limit the length of a preindictment criminal investigation even though "the (suspect's) knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life." [Emphasis added.]

The American courts do not appear to resort to judicial stays but rather dismiss the charges with or without prejudice. The former is the equivalent to a judicial stay and the charges cannot be relaid unless the order dismissing charges is overturned on appeal. The latter allows the charges to be relaid without further judicial action. While the speedy trial provisions of the 6th Amendment apply to appeals from interlocutory orders which do not dismiss the charges, the remedy for appellate delay when charges are dismissed with prejudice lies in the due process guarantee in the 14th Amendment. See: *Simmons v. Reynolds*, 898 F.2d 865 (2nd Cir. 1990), at p. 868; *United States v. Antoine*, 906 F.2d 1379 (9th Cir. 1990), at p. 1382; *United States v. Kimmons*, 917 F.2d 1011 (7th Cir. 1990), at pp.

1013-15; *Burkett v. Cunningham*, 826 F.2d 1208 (3rd Cir. 1987), at p. 1221; *DeLancy v. Caldwell*, 741 F.2d 1246 (10th Cir. 1984), at p. 1248; *United States v. Johnson*, 732 F.2d 379 (4th Cir. 1984), at pp. 381-83; *United States v. Pratt*, 645 F.2d 89 (1st Cir. 1981); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), at pp. 300-4 *certiorari* denied 450 U.S. 931 (1981); *Roque v. Puerto Rico*, 558 F.2d 606 (1st Cir. 1976); *People v. Cousart*, 444 N.E.2d 971 (N.Y. 1982).

The conclusion I have reached applies to appeals from acquittals and convictions. Furthermore, I see no valid reason to distinguish between an acquittal on the merits and a judicial stay. In light of the interest protected under s. 11(b), the differences between an acquittal and a judicial stay are purely technical. In both cases the accused can plead *autrefois acquit* and no proceedings may be brought in respect of the same charge unless the acquittal or stay is set aside on appeal. No restraints can be placed on the liberty of the former accused pending appeal. There is no basis on which to assume that the theoretical existence of a charge that has been stayed carries any greater stigma or causes greater anxiety to the respondent in an appeal from a judicial stay than an appeal from acquittal. Certainly there is no evidence on this point. I doubt that the public understands the difference. An unpopular acquittal generates as much public indignation as a stay. The degree of anxiety is dictated more by the strength of the grounds of appeal than by the form of the verdict. These observations were neatly summed up by Estey J. in *Amato v. The Queen*, 1982 CanLII 31 (SCC), [1982] 2 S.C.R. 418, at p. 457:

While the charge may be said to hang over the head of the accused, this is a wholly theoretical observation because there is no forum for its further processing.

The Application of Section 7

This conclusion does not leave the criminal appellant or respondent without a remedy when delay of appeal proceedings affects the fairness of the trial. While s. 11(b) does not apply, s. 7 may in appropriate circumstances afford a remedy. In *R. v. L. (W.K.)*, *supra*, this Court held that, in respect of pre-charge delay, if the particular circumstances of the case indicated that the fairness of the trial had been affected by the delay, s. 7 can be resorted to. This is simply the application to delay of the court's power to remedy an abuse of process which is enshrined in s. 7 as a principle of

fundamental justice. The general principle was expressed in *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128, at pp. 136-37. Dickson C.J. adopted the following passage from the judgment of Dubin J.A. (as he then was) in *R. v. Young* (1984), 1984 CanLII 2145 (ON CA), 40 C.R. (3d) 289, at p. 329:

... there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.

This test has been reaffirmed in *R. v. Keyowski*, 1988 CanLII 74 (SCC), [1988] 1 S.C.R. 657.

In addition to s. 7, the criminal appeal rules and provisions of the *Criminal Code* afford a litigant in a criminal appeal a range of remedies at virtually every stage of the appellate proceeding. This enables a party interested in a timely disposition of the appeal to eliminate any substantial delay on the part of the adversary. As for systemic delay, resort can be had to s. 7 in the cases in which real prejudice is occasioned.

This raises the issue of the appropriate forum for a remedy pursuant to s. 7 with respect to appellate delay. In *R. v. Gallagher*, [1993] 2 S.C.R. 000, counsel for the respondent submitted that an appellate court should not decide matters of first instance which may require factual determinations. While neither solution is perfect I am of the opinion that the appropriate forum is the court in which the delay occurred. That court is in the best position to assess the consequences of delay. Moreover, this approach avoids the necessity of a referral back of the issue to a trial court whenever a serious case of delay is made out. In addition, it avoids the awkwardness inherent in a lower court's passing upon proceedings in a higher court which the latter must then review. While, generally matters of first instance are not decided in an appellate court the nature of the issues and the material in support would not be radically different from the issues and material in other motions which an appellate court is called upon to decide. If a further appeal lies from the first appellate court, the issue of delay can be reviewed in the second appellate court along with the consequences of additional delay resulting from the second appeal. As with other issues in appeal, this Court does not favour issues being raised for the first time in an appeal to this Court.

Application to this case

No evidence was offered nor was any attempt made in this appeal to show that any real prejudice resulted from the appellate delay. Counsel for the appellant quite properly conceded that no breach of s. 7 could be made out and I find none. The appeal is therefore dismissed.

Appeal dismissed.

Solicitors for the appellant: Greenspan, Humphrey, Toronto.

Solicitor for the respondent: Attorney General for Ontario, Toronto.

TAB 27

TAB 28

R. v. Regan, 2002 SCC 12 (CanLII), [2002] 1 SCR 297

Source:	Supreme Court of Canada
Date:	2002-02-14
File number:	27541
Other citations:	209 DLR (4th) 41 — 282 NR 1 — 201 NSR (2d) 63 — 629 APR 63 — AZ-50113241 — 161 CCC (3d) 97 — 49 CR (5th) 1 — 52 WCB (2d) 150 — 91 CRR (2d) 51 — [2002] CarswellNS 61 — JE 2002-377 — [2002] SCJ No 14 (QL) — [2002] ACS no 14
Citation:	R. v. Regan, 2002 SCC 12 (CanLII), [2002] 1 SCR 297, < https://canlii.ca/t/51v8 >, retrieved on 2026-03-23

R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12

Gerald Augustine Regan

Appellant

v.

Her Majesty The Queen

Respondent

and

**The Attorney General of Canada,
the Attorney General of Quebec and
the Attorney General for New Brunswick**

Intervenors

Indexed as: R. v. Regan

Neutral citation: 2002 SCC 12.

File No.: 27541.

2001: March 15; 2002: February 14.

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

on appeal from the court of appeal for nova scotia

Criminal law – Remedies – Abuse of process – Stay of proceedings – Accused charged with sex-related offences – Police identifying accused as suspect before charges laid – Crown engaging in “judge shopping” and conducting pre-charge interviews of complainants – Trial judge staying some of charges – Court of Appeal overturning stay – Whether conduct of Crown and police amounted to abuse of process – Whether partial stay of proceedings warranted – Whether Court of Appeal entitled to interfere with trial judge’s decision to grant partial stay.

During the police investigation into allegations that the accused, a former Premier of Nova Scotia, had committed numerous sexual offences against a variety of young women who had worked for or with him, a police officer confirmed to a reporter that the accused was under investigation, in violation of police policy to remain silent about individual suspects until charges are laid. At the conclusion of the investigation, a report was submitted to the Director of Public Prosecutions (“DPP”) requesting his opinion about the laying of charges. The DPP recommended that charges should be laid involving four of the eight Nova Scotia-based complainants who were willing to testify. He chose the incidents which involved the most serious physical violations. He also recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. The police did not agree with the DPP’s charging recommendation, being of the view that a more complete picture of the allegations against the

accused should be put before the court. After the Crown joined police in re-interviewing most of the original complainants, 19 counts for sex-related offences were laid against the accused. One year after the preliminary inquiry, the Crown decided to prefer a direct indictment setting out 18 counts of sex-related offences, including one new charge (count 16).

After the DPP's written recommendation, one of the Crown Attorneys met with police. At that recorded meeting, she suggested that it would not be "advisable" for charges to be brought before a particular judge, because she thought he might be a political appointment of the same party as the accused. Instead, she said she would "keep monitoring the court docket to see who is sitting when and what would be in our best interest". Police and Crown also agreed to re-interview a number of the complainants.

Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the accused sought a stay of all of the charges. At trial, a partial stay – 9 of the 18 counts – was granted. One of the charges stayed was count 16, which was similar in fact to an incident alleged to have occurred in Alberta, and the trial judge was suspicious that the Crown's eagerness to put the Alberta facts before a Nova Scotia court motivated the Crown to lay this new, similar, Nova Scotia-based charge. The Court of Appeal, in a majority decision, allowed the Crown's appeal and set aside the stays of the nine counts.

Held (Iacobucci, Major, Binnie and Arbour JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Bastarache and LeBel JJ.: A stay of proceedings will only be granted as a remedy for an abuse of process in the "clearest of cases". Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met: (1) the prejudice caused by the abuse in question will be manifested, perpetuated or

aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice. The first criterion is critically important, and reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. While most cases of abuse of process will cause prejudice by rendering the trial unfair, under [s. 7](#) of the [Canadian Charter of Rights and Freedoms](#) a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system. When dealing with an abuse which falls into the residual category, a stay of proceedings is generally speaking only appropriate when the abuse is likely to continue or be carried forward. Only in exceptional, relatively very rare cases will the past misconduct be so egregious that the mere fact of going forward in the light of it will be offensive. Where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay, a third criterion is considered: the interests that would be served by the granting of a stay of proceedings are balanced against the interest that society has in having a final decision on the merits.

The judge shopping in this case was offensive. Judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process. The trial judge quite properly was seriously troubled by this evidence. He nevertheless was mindful that this single comment was not acted upon, and did not find it determinative in his ultimate conclusion that the process against the accused had been abusive to the point of necessitating a stay of proceedings.

Wide-ranging pre-charge Crown interviews are not, *per se*, an abuse of process. While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. In some Canadian jurisdictions, pre-charge interviews by the Crown are a regular, even common practice. In these jurisdictions at least, it appears that public policy is served by the practice, and potentially harmful and arbitrary results are avoided by the refusal to draw a hard line at the decision to lay charges, before which Crown counsel may not interview complainants. The pre-charge interviews in this

case were done in accordance with the common practice of some other provinces, a practice more wide-ranging than the narrow, exceptional to rare practice the trial judge described. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by the DPP that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid.

The trial judge was correct in his finding that the police error in releasing the accused's name as a suspect well in advance of any charges does not rise to the level of egregious abuse. While the police policy that the identity of suspects may be released only after charges have been laid is laudable, and a breach of it should not be condoned, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the process was truly public. Moreover, the prejudice experienced by the accused as a result of this early leak — humiliation and stress — cannot be attributed to this police error alone. The serious remedy of a stay of proceedings is not an appropriate method to denounce or punish past police conduct of this nature.

The trial judge erred in finding an abusive or improper purpose behind the laying of count 16. The trial judge's erroneous finding of a loss of Crown objectivity influenced this holding. If the trial judge had not started from the premise that the Crown had lost its objectivity, there would have been no justification for the trial judge to find the similarity between count 16 and the Alberta incident as the primary motivation for count 16, virtually ignoring the reasonable and probable grounds for laying count 16 in its own right.

There was no abuse of process in this case. The cumulative effect of the judge shopping, pre-charge Crown interviews, the improper police announcement, and the addition of count 16 in the direct indictment, while troubling in some respects, does not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an

abuse, did not have an ongoing effect on the accused which would jeopardize the fairness of his trial.

The trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The trial judge misconceived the governing test for a stay of proceedings. Instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focussed his attention only on the final balancing exercise. The abuse found by the trial judge should be and was addressed by remedies other than a stay. Moreover, even if the trial judge had found an ongoing abuse which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. In his balancing analysis, the trial judge omitted some significant issues relevant to the public interest. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there is evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse. In omitting to consider any of these issues which favour proceeding with charges, the trial judge's discretion was not fully exercised and therefore cannot stand.

The decision to grant a stay is a discretionary one, which should not be lightly interfered with. However, where the trial judge made some palpable and overriding error which affected his assessment of the facts, the decision based on these facts may be reversed. Here, the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. He was in error when he ruled that "pre-charge Crown interviewing in this country is . . . non-existent to rare". As well, the trial judge implied that the loss of Crown objectivity was abusive because it meant that the accused ultimately faced more charges, but no evidence can be

found to support this deduction. The trial judge also misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

Per Iacobucci, Major, Binnie and Arbour JJ. (dissenting): The trial judge found as a fact that there was no independent and objective review by the Crown prosecutors in this case. The absence of the usual and proper checks and balances would, he thought, shock the conscience of the community. He cited a number of concerns that reflected this institutional failure, but his listing of the symptoms should not be mistaken for his important and central finding of fact that the accused had been denied his constitutional right to a fair pre-trial procedure. No reason has been shown to set aside this critical finding of fact. The conclusion that well-informed people may reasonably take from the continued prosecution of what the former Director of Public Prosecutions described as “minor” allegations 24 to 34 years after the events are said to have taken place is that the accused is being pursued not so much for what he has done as for who he is. Such a perception undermines public confidence in the impartiality and integrity of the criminal justice system.

The courts are very slow to second-guess the exercise of prosecutorial discretion and do so only in narrow circumstances, but these extensive discretionary powers must be exercised with objectivity and dispassion. Here, the failure of the proper and usual institutional checks and balances prevented the objective review of charges laid by the police that, because of their staleness, relatively minor nature (compared with those that did go to trial) and the potentially light sentences even if convicted, would likely have been stopped if an objective review had taken place.

The preferral of a direct indictment by the Attorney General did not “cleanse” the prior errors of judgment of the Crown attorneys. It was motivated by an understandable desire to bring to an end a preliminary inquiry that had lasted almost a year, and cannot be taken as having belatedly supplied the objective and dispassionate review of the original charging decision that, in the trial judge’s view, had never taken place. A stay of proceedings was appropriate in this case.

The absence of the proper checks and balances between police and prosecutor led to an increase in the number of charges laid against the accused. The trial judge concluded that the Crown's loss of objectivity and improper motive will be "manifested, perpetuated or aggravated" through the continued prosecution of the charges to which these abuses of process gave rise. If the trial itself would not have occurred but for the abusive conduct, then the trial itself necessarily perpetuates the abuse. The only way to halt this continued prejudice to the accused is a stay of proceedings.

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By LeBel J.

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By Binnie J. (dissenting)

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[1952] 1 S.C.R. 232; *R. v. Stinchcombe*, [1991 CanLII 45 \(SCC\)](#), [1991] 3 S.C.R. 326; *Elsom v. Elsom*, [1989 CanLII 100 \(SCC\)](#), [1989] 1 S.C.R. 1367; *R. v. Carosella*, [1997 CanLII 402 \(SCC\)](#), [1997] 1 S.C.R. 80; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 S.C.R. 3; *R. v. Van der Peet*, [1996 CanLII 216 \(SCC\)](#), [1996] 2 S.C.R. 507; *R. v. Bain*, [1992 CanLII 111 \(SCC\)](#), [1992] 1 S.C.R. 91; *Nelles v. Ontario*, [1989 CanLII 77 \(SCC\)](#), [1989] 2 S.C.R. 170; *R. v. Chamandy* (1934), [1934 CanLII 130 \(ON CA\)](#), 61 C.C.C. 224; *R. v. G.D.B.*, [2000] 1 S.C.R. 520, [2000 SCC 22](#); *Re B.C. Motor Vehicle Act*, [1985 CanLII 81 \(SCC\)](#), [1985] 2 S.C.R. 486; *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411; *In re Sproule* (1886), [1886 CanLII 51 \(SCC\)](#), 12 S.C.R. 140; *R. v. Jewitt*, [1985 CanLII 47 \(SCC\)](#), [1985] 2 S.C.R. 128; *R. v. Beare*, [1988 CanLII 126 \(SCC\)](#), [1988] 2 S.C.R. 387; *R. v. Power*, [1994 CanLII 126 \(SCC\)](#), [1994] 1 S.C.R. 601; *Smythe v. The Queen*, [1971 CanLII 831 \(SCC\)](#), [1971] S.C.R. 680; *R. v. T. (V.)*, [1992 CanLII 88 \(SCC\)](#), [1992] 1 S.C.R. 749; *R. v. Lyons*, [1987 CanLII 25 \(SCC\)](#), [1987] 2 S.C.R. 309; *R. v. Keyowski*, [1988 CanLII 74 \(SCC\)](#), [1988] 1 S.C.R. 657; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391; *R. v. Sweitzer*, [1982 CanLII 23 \(SCC\)](#), [1982] 1 S.C.R. 949; *R. v. B. (C.R.)*, [1990 CanLII 142 \(SCC\)](#), [1990] 1 S.C.R. 717; *R. v. Osborn*, [1970 CanLII 22 \(SCC\)](#), [1971] S.C.R. 184; *Rourke v. The Queen*, [1977 CanLII 191 \(SCC\)](#), [1978] 1 S.C.R. 1021; *R. v. Conway*, [1989 CanLII 66 \(SCC\)](#), [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990 CanLII 27 \(SCC\)](#), [1990] 3 S.C.R. 979.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (1999), [1999 NSCA 165 \(CanLII\)](#), 179 N.S.R. (2d) 45, 137 C.C.C. (3d) 449, 28 C.R. (5th) 1, [1999] N.S.J. No. 293 (QL), allowing the Crown's appeal from a decision of the Nova Scotia Supreme Court (1998), [1998 CanLII 14078 \(NS SC\)](#), 21 C.R. (5th) 366, 58 C.R.R. (2d) 283, [1998] N.S.J. No. 128 (QL). Appeal dismissed, Iacobucci, Major, Binnie and Arbour JJ. dissenting.

Edward L. Greenspan, Q.C., and *Marie Henein*, for the appellant.

Robert Morrison, Q.C., and *Heather Leonoff, Q.C.*, for the respondent.

Robert J. Frater and *Silvie Kovacevich*, for the intervener the Attorney General of Canada.

Mario Tremblay, for the intervener the Attorney General of Quebec.

John J. Walsh, for the intervener the Attorney General for New Brunswick.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Bastarache and LeBel JJ. was delivered by

LEBEL J. –

I. Introduction

1 This case brought before the Court allegations of prosecutorial misdeeds, allegations of sexual interference and the harsh light of publicity surrounding the man at the centre, Nova Scotia's former Premier, Gerald Regan. The appellant Regan was ultimately charged with 18 counts of rape, attempted rape, indecent assault and unlawful confinement involving 13 women. He has already faced trial on eight of these counts, involving three women, for which he was acquitted. At the time of this hearing, one charge involving a fourth woman was still awaiting trial. The remaining charges were stayed by the trial judge because of Regan's claim that the Crown prosecutor was out to get him. The Court of Appeal overturned the stay. The Crown, itself, has since stayed two of the charges, and seven counts of sexual assault against Regan are currently pending.

2 The issue before this Court is whether the Crown and the police did indeed overstep their authority in the proceedings of this case, and if so, whether that abuse of the criminal justice process was so egregious as to warrant a stay of the proceedings. The ultimate question, as far as the appellant Regan is concerned, is whether or not he must return to trial to face the remaining charges of sex-related offences. Thus, the decision to uphold a stay of proceedings is a very serious one, which prevents, forever, the possibility of bringing charges of criminal behaviour before a judge and jury. In this case, the

evidence does not disclose any serious abuse of process, or taint of the justice system, that would warrant such a drastic measure. I would dismiss Regan's appeal.

II. Facts

A. *Overview*

3 On March 15, 1995, Gerald Regan, by that time a former Premier of Nova Scotia, was charged with a long list of sexual offences, against a variety of women who had worked for or with him, dating back to the 1950s. The stories of alleged abuse had taken a long and winding path before finally surfacing. First, a CBC journalist spoke to a number of women who told of abusive acts they had allegedly suffered at the hands of the appellant. But that journalist did not broadcast the story. Several years later, while doing some research of his own, an avowed political foe of the appellant uncovered the information from the aborted news report. This informant took the stories to the police in July of 1993, and in September, an RCMP task force launched an investigation. During the investigation, a police officer responded to a reporter's request to confirm or deny that the appellant was under investigation. The police confirmed — a public admission which was in violation of police policy to remain silent about individual suspects until charges are laid. More than 300 interviews later, and 18 months after the story first broke about the Regan investigation, charges were laid.

B. *The Charges*

4 The decision to lay charges also has a convoluted history. At the conclusion of the police investigation, a report dated March 30, 1994 was submitted to the province's

then Director of Public Prosecutions (“DPP”), John Pearson, with a request for his opinion about the laying of charges. The report identified 22 women complainants. Among them were six women who had been Regan’s babysitters, one who had been his housekeeper, a political intern, a legislative page, a secretary, and a political reporter. The women were all young at the time of the alleged assaults, ranging in age from 14 to 24 years. One woman alleged she was raped when she was 14, two others alleged attempted rape. The other incidents involved sexual touching, exposure and kissing. The police report categorized the charges this way:

- three complainants who “may have been victims of sexual impropriety”, but in the opinion of the police were not victims of criminal acts (although the acts showed a “*modus operandi*”);
- six complainants who the police believed were victims of criminal offences, but who were “not willing to testify in a court of law”;
- four complainants who were considered victims of criminal offences, but who did not want to testify as complainants, and were only willing to “co-operate by providing similar fact evidence at trial”;
- and nine complainants of criminal acts who were willing to testify as complainants. Of these nine, one of them alleged the attack had occurred in Calgary, Alberta.

5 DPP Pearson responded to police by letter dated June 28, 1994, that he and two other prosecutors had reviewed the file. One of those was Susan Potts, then Senior Crown Attorney in charge of sexual assault prosecutions. Pearson recommended that charges should be laid involving four of the eight Nova Scotia-based complainants who were willing to testify. He chose the incidents which involved the most serious physical

violations, including rape, attempted rape, and the one case where it was alleged the appellant had exposed his penis.

6 In the other four local cases of willing complainants, DPP Pearson recommended that the police not proceed with charges. These cases involved many similar accounts of the appellant trying to grope and “French kiss” the victim. DPP Pearson explained that although these acts would have been against the law at the time, “the allegations are minor in nature, especially when placed in the context of societal values at the time”, and the “staleness” of the offences outweighed their “gravity”. He thought that the minor charges could be sanctioned by proceeding against the more major ones, and he feared that otherwise the prosecution might appear to be a “persecution”.

7 In addition, DPP Pearson advised that “the case against Regan would be significantly enhanced if some of the more recent incidents were proceeded with”. He recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. He made no recommendation about the complainants who had apparently been victims of criminal behaviour, but were only willing to give similar fact evidence. Finally, DPP Pearson recommended that the police contact Alberta authorities with regard to the Calgary-based incident. He advised the police that “you are not obliged to accept our opinion and that the final charging decision rests with you. We are also cognizant of the duties and responsibilities of Crown Counsel to consider whether or not it is appropriate to proceed with charges once they have been laid.” He suggested that police investigators “meet with [Crown counsel] Susan Potts to finalize the wording of any charge [the police] decide to proceed with”.

The police did not agree with DPP Pearson's charging recommendation. They were of the view that a more complete picture of the allegations against the appellant should be put before the court. Chief Superintendent Falkingham testified:

. . . over the several years I saw a pattern and an MO that Mr. Regan sexually assaulted, in my view, a number of young teenagers. . . . The MO was with babysitters, the MO was with – when he had an opportunity to be alone with a young girl, and I felt that that was all building into a large picture which indicated to me that there was a continuing criminal offence in my mind, together – as a global investigation.

. . .

My view is the matter of charges had to involve the large number of complainants and as a result of them – the continued offences over the years. . . .

9 After the Crown joined police in re-interviewing most of the original complainants, 16 counts for sex-related offences, involving 11 women, were laid against the appellant on March 15, 1995. On May 30, 1995, a revised information was sworn, which added two new complainants and three new counts, for a total of 19 counts related to 13 women.

10 The matter proceeded to a preliminary hearing in April 1996. One year later, the Crown decided to prefer a direct indictment. In that final charging decision, one complainant was dropped, a new one was added (count 16), and the charges concerning a third were amended to drop one count, bringing the final tally to 18 counts of sex-related offences, involving 13 women, laid against the appellant.

C. Crown Conduct

11 After DPP Pearson’s written recommendations, Crown Potts met with police on July 15, 1994. At that recorded meeting, Crown Potts suggested that it would not be “advisable” that charges be brought before a particular judge, because she thought he would have political ties to the appellant. Instead, she said she would “keep monitoring the court docket to see who is sitting when and what would be in our best interest” – an exercise commonly known as “judge shopping”.

12 At the same meeting, Potts requested to read all the investigation reports, because “this would give her a clear picture of what was actually going on”. Notes of a meeting on January 17, 1995, attended by the RCMP Chief Superintendent on the case, confirmed that Potts had by then re-read “the evidence and the victims’ statements”. Police and Crown then agreed that six complainants reluctant to testify “have to be re-interviewed”. In the end, police and Crown counsel together re-interviewed many of the original 22 complainants, as well as five new women who came forward after the Pearson letter.

13 The purpose of the re-interviews was “[f]irstly and primarily, to provide information about the Court process to potential complainants so that they could make an informed decision as to their involvement in these proceedings; and secondly, to make assessments of credibility about these witnesses, including their capacity for recall and general demeanor issues, and to prepare for a preliminary inquiry”. (Trial submissions of the Crown, Appellant’s Record, p. 1089)

14 The re-interviews included 16 of the original 22 complainants: four of the six reluctant witnesses whom DPP Pearson had recommended should be re-approached; three of the four women only willing, at first, to give similar fact evidence; three of the four complainants for whom Pearson had recommended laying charges (the fourth refused to

proceed further); all four willing complainants whom the police wanted to charge but for whom DPP Pearson had recommended that no charge be laid; the complainant in the Alberta-based incident; and one of the three complainants for whom, at first, it was thought there was no criminal offence.

15 Crown Potts was removed from the prosecution of this case by the time the preliminary inquiry began in April 1996. Crown Adrian Reid stepped in as lead counsel at the preliminary inquiry and trial. Crown Reid became involved with the case in December 1995 after charges were laid.

16 Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the appellant sought a global stay of all of the charges. At trial, a partial stay – 9 of the 18 counts – was granted.

III. Judicial History

A. *Nova Scotia Supreme Court* (1998), [1998 CanLII 14078 \(NS SC\)](#), 21 C.R. (5th) 366

17 Michael MacDonald A.C.J. identified that the appellant was not claiming an abuse of process which had tainted the fairness of the trial, and was therefore seeking relief under the so-called residual category of procedural abuse, which will warrant a stay of proceedings. MacDonald A.C.J. noted, however, that the remedy of a stay remains reserved for only the clearest of cases, where it is the only remedy available to counter the effects of the abuse (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391).

18 MacDonald A.C.J. adopted the test for a stay articulated in *Tobiass*, at para. 90, where the Court held that in order to grant a stay, two criteria must be satisfied: (1) that the prejudice will be manifested, perpetuated or aggravated through the conduct of the trial or by its outcome, and (2) that no other remedy is reasonably capable of removing the prejudice flowing from the abuse. The Court added a third factor which should be considered in cases where it remains unclear whether the abuse is sufficient to warrant the stay. It requires courts to engage in a weighing of the societal interests involved. Courts must then “balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern” (*Tobiass*, at para. 92). MacDonald A.C.J. acknowledged that this third criterion would play a significant part in his analysis. In approaching the issue, MacDonald A.C.J. noted that he had to weigh the cumulative effect of any alleged wrongdoing. He was also mindful that abuse of process need not be driven by evidence of *mala fides* to warrant a stay, although such evidence was certainly relevant.

19 MacDonald A.C.J. reviewed the respective roles of the police and of the Crown and noted that while performing independent tasks, they must work well together. A strict separation of their functions, however, creates a safeguard against misconduct by either one. This system of checks and balances is achieved by drawing a clear line between the investigation of charges, and their prosecution. He held that police in Nova Scotia are “exclusively responsible for the investigation of crime and deciding what if any charges are to be laid. . . . Here, the Crown’s role is limited to simply providing legal advice; advice which is not binding on the police” (paras. 63 and 65). In contrast, the Crown must function as “a quasi judicial minister of justice who must also serve as advocate” (para. 67).

20 The appellant submitted a list of allegations of police and Crown misconduct, including the premature formation of a police task force to investigate allegations against Regan, and questionable investigative techniques and arrest procedures. MacDonald A.C.J. concluded that these actions had little impact on the appellant. He did consider that the premature confirmation of Regan as a suspect in the police investigation was clearly wrong, as it contravened express police policy. He was troubled by this serious error in judgment.

21 MacDonald A.C.J. then reviewed the allegations of Crown misconduct. He found clear evidence of Crown Potts' blatant attempt at judge shopping, and found this offensive and most troubling. For MacDonald A.C.J., this gave the appearance of a Crown Attorney who was attempting to secure a conviction at all costs. He concluded that Potts' behaviour had the effect of tainting her entire involvement in the process.

22 The pre-charge Crown interviews of complainants were, however, the most contentious issue before MacDonald A.C.J. Crown counsel, particularly Ms. Potts, became heavily involved with pre-charge interviewing. He found that the practice of pre-charge Crown interviewing in this country is not entirely rejected, but where used, its scope is narrow. MacDonald A.C.J. observed that in the provinces like New Brunswick, where pre-charge Crown interviews are done, they serve only as a screen to protect a suspect from the humiliation of being charged, if charges are later dropped or stayed. In this case, he found that the purpose for at least some of the pre-charge Crown interviews was to have reluctant complainants change their minds and come forward to lay charges. MacDonald A.C.J. held that protection of the appellant was never a factor motivating the Crown's pre-charge interviews.

23 As a result, MacDonald A.C.J. found that this process had an impact on the number of charges that were ultimately laid. He held that the Crown was integrally immersed in the decision-making about charges. Cooperation led to consensus and this collaboration homogenized the process which then became a joint charging decision. The Crown had lost its objectivity: the effect was to deny the appellant a hard, objective second look at the charging decision, which is fundamental to the role of the Crown. In MacDonald A.C.J.'s view (at para. 124),

[i]t is impossible to retain the requisite level of objectivity by conducting lengthy (and no doubt emotional) pre-charge interviews with the complainants. Human nature just will not allow it. By doing so you hear first hand only one side of the story. How can you then objectively review the process which includes a consideration of the rights of the applicant?

Nevertheless, MacDonald A.C.J. found that the Crown did not get involved in the investigation, and apart from Crown Potts' inexcusable comment about judge shopping, all other Crown counsel involved in the case were well-intentioned throughout the process, yet they simply lost perspective during the charging procedure.

24 MacDonald A.C.J. found that the Crown had not acted in bad faith when preferring the direct indictment. The preliminary inquiry was very lengthy. If the Crown had been ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

25 When viewing his concerns cumulatively, about judge shopping, the Crown's pre-charge interviews and to a lesser extent, the RCMP's premature confirmation that

Regan was under investigation, in total this was not one of those clearest of cases of procedural abuse that demanded a global stay of all the charges. Instead, on a case-by-case review, he decided that for the nine charges concerning the most serious allegations there was a strong societal interest in proceeding with the prosecution.

26 However, for the less serious charges, MacDonald A.C.J. pointed out that the Pearson Report was detailed and comprehensive and spoke volumes about what the Crown originally thought was fair to the appellant. The Crown should not be seen to significantly change its position without valid reason. He held that the Crown did change its position: the direct indictment proceeded with charges involving at least four and arguably six complainants who were initially on Mr. Pearson's recommended list to exclude. He concluded that the Pearson recommendations should be given significant deference. He followed the Pearson charging recommendation and also applied its criteria to charges which post-dated the Pearson report. In the end, MacDonald A.C.J. concluded by staying the remaining 9 of the 18 counts before him.

27 MacDonald A.C.J. added a final comment about count 16, which was among those he stayed. He held that the Crown had been motivated by an improper purpose in proceeding with this charge, which was first laid as part of the direct indictment. Count 16 was similar in fact to the incident alleged to have occurred in Alberta. The Alberta allegation could not be pursued in Nova Scotia. MacDonald A.C.J. was suspicious that the Crown's eagerness to put the Alberta facts before a Nova Scotia court motivated the Crown to lay this new, similar, Nova Scotia-based charge. MacDonald A.C.J. considered this an improper purpose which irretrievably tainted this count.

1. Cromwell J.A. (Roscoe J.A. concurring)

28 Cromwell J.A., for a majority of the Court of Appeal, found two significant errors in the trial judge's reasoning. First, the trial judge erred in law by not asking himself whether the continuation of the prosecution of the charges would manifest, perpetuate or aggravate the prejudice caused by the Crown's failure to properly exercise its discretion at the charging stage. Second, the trial judge also erred by treating a judicial stay of proceedings as a remedy for past misconduct.

29 The narrow, residual category of abuse of process applied in this case, because the trial judge had rejected all the appellant's arguments that he could not receive a fair trial. Cromwell J.A. observed that there must be exceptional circumstances here to warrant the granting of a stay, as "[o]nly in rare and unusual circumstances could holding a fair trial, of itself, be damaging to the integrity of the judicial process" (para. 108).

30 Cromwell J.A. recounted the three-step analysis for this residual category (*Tobiass, supra*). At the first step, the accused must show that there has been misconduct, or circumstances which have arisen apart from misconduct, which render the continuation of the prosecution damaging to the integrity of the judicial process. At the second step, the court must balance the integrity of the judicial process against the societal interest in the prosecution of alleged crimes. This is done by considering whether the prejudice caused by the abuse will be manifested, perpetuated or aggravated by the continuation of the prosecution. If so, then the court considers whether another remedy, short of a stay, is reasonably capable of removing the prejudice. Only if the abuse is ongoing, and no other remedy is tenable, does the balance favour a judicial stay.

31 Further analysing the elements of the second stage, Cromwell J.A. emphasized that the remedy of a stay is prospective rather than retroactive: “a stay of proceedings is not approached as a remedy to redress a wrong that has already been done, but rather as a remedy to prevent further damage to the integrity of the judicial process in the future caused by the continuation of the prosecution” (para. 116). The ongoing harm might be repeated in the future, or might plague the process in the sense that the misconduct is so egregious that the mere going forward with the proceedings is offensive. To these examples in the case law, Cromwell J.A. added a third possibility of ongoing prejudice. This would occur in cases where “the conduct has the effect of setting the prosecution on a fundamentally different path than it would otherwise have followed” (para. 118).

32 The third step in the analysis is only undertaken if, after completing the analysis at the first two stages, it is still unclear whether a stay is required. The third stage reconsiders the balance between society’s interest in proceeding, and the interests served by granting the stay. At this stage, however, the emphasis is on whether the misconduct, on its own, is so egregious that a stay is warranted. Cromwell J.A. pointed out that in theory, such cases might exist, but in practice, it is unlikely that such egregious behaviour would not meet the criterion of ongoing harm at step two. Thus Cromwell J.A. concluded that to grant the remedy of a stay, evidence of ongoing harm from the abuse will almost always be key.

33 Cromwell J.A. noted that abuse of process cases are dependent on their facts. The trial judge made specific findings of misconduct on four matters: the premature announcement of Regan as a suspect, the judge-shopping comment, the Crown’s loss of

objectivity at the charging stage, and a fourth specific finding relating to count 16, the so-called similar fact count. Cromwell J.A. went on to outline what the trial judge had specifically not found, including: the Crown was not improperly involved in the investigation; the police did not act wrongly in laying the charges; the Crown had not acted with *mala fides* or with an improper purpose when preferring the direct indictment; the Crown's loss of objectivity did not extend beyond the charging stage; and the Crown did not encourage the police to lay more charges nor did the Crown disregard police freedom and independence to make a decision on charges.

34 Generally, the trial judge appeared to leave out any direct consideration of the second step in the stay inquiry. There was no finding by the trial judge of a likelihood of future or ongoing misconduct, nor did he find that the cumulative abuse was so egregious, in itself, that a stay was required. Cromwell J.A. added: "However, he appears to have thought that the loss of objectivity had ongoing impact because it may have resulted in more charges proceeding than would have been prosecuted had objectivity been retained" (para. 131). Nevertheless, the trial judge expressly stated that the abuse was not serious enough to warrant a global stay. Furthermore, the trial judge gave no explicit consideration to whether another remedy was capable of removing the prejudice.

35 Cromwell J.A. proceeded to analyze each of the trial judge's findings of abuse. First was the misconduct found in the laying of count 16, the similar fact count. The trial judge concluded that count 16 was added to the direct indictment because of an improper motive. Cromwell J.A. found that this finding was contradicted by the judge's other findings that, aside from Ms. Potts, no Crown had acted improperly or with bad faith, and their perspective was lost only at the charging stage, "the time around which the first charges were laid in March of 1995" (para. 129) (not at the direct indictment, when count 16 was added). There was nothing inherently objectionable in the Crown considering

questions of the admissibility of evidence and its impact on the prospects of conviction when deciding to proceed with charges. Cromwell J.A. concluded the evidence surrounding count 16 disclosed no abuse, and thus failed step one of the stay analysis. The trial judge had erred in ordering a stay of count 16.

36 Next Cromwell J.A. dealt with the finding of the loss of Crown objectivity. The trial judge had reached two independent conclusions: at the charging stage, the Crown had lost its objectivity, and at the direct indictment stage, the Crown decision was proper. Cromwell J.A. found these two holdings could not stand together. If the Crown's discretion to prefer the direct indictment was properly exercised, it must be taken to have been exercised with proper regard to the public interest. This was consistent with the trial judge's finding that the Crown's loss of objectivity was confined to the charging stage. Cromwell J.A. also noted that virtually all of the specific findings of misconduct related exclusively or primarily to Ms. Potts. Her involvement in the matter ended at the time of the preliminary inquiry and before the direct indictment was preferred. Cromwell J.A. found that the trial judge erred in generalizing about misconduct by the Crown, given the narrowness of the specific conclusions that the loss of objectivity was at the charging stage, and misconduct was attributed only to Crown Potts.

37 Cromwell J.A. disagreed with the trial judge's finding that collaboration between the Crown and the police in the charging decision is wrong. He found no basis in law for such a conclusion. Provided that the independence and distinct roles of the police and the Crown are respected and that no improper purpose is being pursued, it is desirable for the Crown and police to avoid unnecessary disagreements about whether charges should proceed.

38 The trial judge had reasoned that human nature makes it impossible for the Crown to maintain objectivity if they interview witnesses pre-charge. Cromwell J.A. rejected this. If it were so, the Crown could never conduct witness interviews, pre- or post-charge, and still remain objective. Cromwell J.A. concluded instead that “[t]he obligation to be fair-minded is ongoing” (para. 158). There was nothing “inherently insidious” about the Crown’s pre-charge interviews in this case, and Cromwell J.A. proceeded on the narrower ground identified by the trial judge that the Crown’s pre-charge interviews were conducted without objectivity because they were not done “for the purpose of reviewing whether the charges should proceed in the public interest” (para. 163). In other words, the Crown did something more than charge screening in this case. However, Cromwell J.A. added that neither the trial judge nor he found anything wrong with the Crown encouraging, by ethical means, reluctant complainants to come forward, especially in cases of sexual assault, because those victims’ confidence in the justice system is especially low.

39 Cromwell J.A. noted that the loss of Crown objectivity constituted the central concern regarding abuse of process in this case. The improper police announcement, and the judge-shopping comment appeared to be incidental to the decision to stay the nine charges. As a result, Cromwell J.A. did not deal with these issues at any great length.

40 Turning to the test for a stay of proceedings, Cromwell J.A. was of the view that the trial judge erred fundamentally at step two of this analysis because he focussed on the abuse rather than on the future harm to the integrity of the justice system. The trial judge did not find that the prejudice flowing from the abuse would be manifested, perpetuated or aggravated by the trial, nor did he turn his mind to any acceptable remedy short of a stay. However, the trial judge’s reasons were consistent with a conclusion that Regan was facing more charges than he might have been, if the Crown had not lost its

objectivity. In this sense the abuse may have had ongoing effects. But granting a stay on this basis overlooked the proper preferring of the direct indictment.

41 Cromwell J.A. concluded that the trial judge erred in law by relying so heavily on the Pearson recommendation as a guide to his decision to stay some of the charges. The trial judge's approach intended to restore Regan to the position he would have enjoyed but for the Crown's subsequent loss of objectivity. This was wrong, as it was a retroactive cure for past misdeeds, instead of a prospective consideration of whether the abuse was ongoing, and what remedy would be best to address it. The Pearson letter had not crystallized the Crown's position on the charging decision — it was merely advice in response to police questions, and it did not even deal with three new charges, from five new complainants who surfaced after the Pearson letter.

42 Furthermore, the trial judge had not expressly considered the issue of whether another remedy was capable of removing the prejudice. Cromwell J.A. was of the view that this criterion could be satisfied without the need for a stay in this case. Crown Potts' removal from the case and the proper preferring of the direct indictment accrued to provide sufficient remedies to any past misconduct, and to prevent any future harm to the integrity of the judicial process.

43 From the errors committed in the stay inquiry, Cromwell J.A. concluded that the trial judge must have been unsure about the necessity of a stay at the completion of step two, and proceeded on to the balancing exercise at step three, on a case-by-case basis. In contrast, Cromwell J.A. ruled that the inevitable conclusion was that neither of the two criteria at the second stage of the test for a stay of proceedings was satisfied. However, if he was in error and it was necessary to go on to the third stage, Cromwell J.A. thought the

trial judge erred in failing to properly consider all of the interests affected by the cases he stayed. It is impossible to do the required balancing of interests if only one side of the scale is considered. The trial judge had considered Regan's interest in granting the stay, but did not consider the societal interests in proceeding. Cromwell J.A. was especially sensitive to the fact that three of the stayed counts involved teenagers, employed as babysitters or a housekeeper by the appellant, and he opined that, in such situations, the integrity of the justice system might be harmed by not proceeding to trial. In the result, he allowed the appeal and set aside the stays of all nine counts.

2. Freeman J.A. (dissenting)

44 Freeman J.A. found that this case turned on the need for police and the Crown to observe the demarcation line between their functions, particularly at the pre-charge stage. The trial judge had found that the police decision to charge and the Crown decision to prosecute the charge had been scrambled together, or homogenized. As a result, neither police nor Crown was able to discharge their constitutional role of protecting the accused and the public perception of the administration of justice. Freeman J.A. reviewed the trial judge's decision and found no fault with the careful manner in which the trial judge instructed himself respecting the role of the police and of the Crown.

45 A trial judge has superior familiarity with the context of a case. This is an important reason for an appeal court to show the trial decision deference. Freeman J.A. observed that the trial judge was shocked by the judge-shopping incident and even more so by the Crown's assumption of the police role in conducting pre-charge interviews to encourage witnesses to pursue charges. The trial judge had also noted the context in which this had all occurred. Following the tragedy of the wrongful imprisonment of Donald Marshall, Jr., the criminal justice system in Nova Scotia was criticized for treating

prominent people more favourably. The appellant argued that Regan was the victim of a backlash, specifically that the authorities in this case overreacted by singling him out for special, unfavourable treatment. Freeman J.A. agreed that any citizen knowledgeable of the principles and facts involved would be equally shocked.

46 Freeman J.A. was of the view that the trial judge had correctly applied the legal principles to determine that the appellant had been denied a dispassionate review of the charging decision, by an objective Crown. The result was that the accused faced a multiplicity of charges which had been determined without taking societal interests, including those of decency and fair play, into account. The trial judge had properly found this one of the clearest of cases to warrant a stay of some of the charges. A reduction in the number of charges by pruning out the less serious ones, and by accommodating society's interest by proceeding with the more serious criminal charges of rape and attempted rape, was not only the obvious remedy, but the only effective one. In conclusion, Freeman J.A. found that the trial judge had not misdirected himself and his decision was not so clearly wrong as to amount to an injustice.

IV. Legislation

47 *Canadian Charter of Rights and Freedoms*

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

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Criminal Code, R.S.C. 1985, c. C-46

577. In any prosecution,

(a) where a preliminary inquiry has not been held, an indictment shall not be preferred, or

(b) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid

before any court without,

(c) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or

(d) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.

V. Issues

48 1. Did the conduct of the Crown and police amount to an abuse of process under [s. 7](#) of the *Canadian Charter of Rights and Freedoms*?

2. Was a partial stay of proceedings warranted?

3. Was the Court of Appeal entitled to interfere with the trial court's decision to grant a partial stay?

VI. Analysis

A. *Abuse of Process*

49 In the *Charter* era, the seminal discussion of abuse of process is found in *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411. The doctrine of abuse of process had been traditionally concerned with protecting society's interest in a fair process. However, in *O'Connor*, L'Heureux-Dubé J., writing for a unanimous Court on this issue

(Lamer C.J. and Sopinka and Major JJ. dissenting on the application of law to the facts), subsumed the common law doctrine abuse of process into the principles of the *Charter* in the following terms, at para. 63:

[I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused.

L'Heureux-Dubé J. also acknowledged the existence of a residual category of abuse of process in which the individual's right to a fair trial is not implicated. She described this category, which is invoked in the present appeal, as follows in *O'Connor*, at para. 73:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

50 L'Heureux-Dubé J. thus held that now, when the courts are asked to consider whether the judicial process has been abused, the analysis under the common law and the *Charter* will dovetail (see *O'Connor*, at para. 71). In this manner, while it acknowledged that the focus of the *Charter* had traditionally been the protection of individual right, the *O'Connor* decision reflected and accommodated the earlier concepts of abuse of process, described at common law as proceedings “unfair to the point that they are contrary to the interest of justice” (*R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601, at p. 616), and as “oppressive treatment” (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R.

1659, at p. 1667). In an earlier judgment, McLachlin J. (as she then was) expressed it this way:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively.

(*R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, at p. 1007)

51 Under the *Charter*, the violation of specific fair trial rights may also constitute an abuse of process, as will a breach of the more general right to fundamental justice (see *O'Connor*, at para. 73).

52 Finally, this Court's most recent consideration of the concept of abuse of process arose in the administrative context. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, it was held that a 30-month delay in processing a sexual harassment complaint through the British Columbia human rights system was not an abuse of process causing unfairness to the alleged harasser. For the majority, Bastarache J. came to this decision on the basis that abuse of process has a necessary causal element: the abuse "must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (para. 133). In *Blencoe's* case, it was held that the humiliation, job loss and clinical depression which he suffered did not flow primarily from the delay, but from the complaint itself, and the publicity surrounding it (*Blencoe*, at para. 133; see also *United States of America v. Cobb*, [2001] 1 S.C.R. 587, 2001 SCC 19).

B. Stay of Proceedings

53 A stay of proceedings is only one remedy to an abuse of process, but the most drastic one: “that ultimate remedy”, as this Court in *Tobiass, supra*, at para. 86, called it. It is ultimate in the sense that it is final. Charges that are stayed may never be prosecuted; an alleged victim will never get his or her day in court; society will never have the matter resolved by a trier of fact. For these reasons, a stay is reserved for only those cases of abuse where a very high threshold is met: “the threshold for obtaining a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the ‘clearest of cases’” (*O’Connor, supra*, at para. 68).

54 Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice. [*O’Connor*, at para. 75]

The Court’s judgment in *Tobiass*, at para. 91, emphasized that the first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.

55 As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the *Charter*, however, a small residual category of

abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (*O'Connor*, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: “[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings” (*Tobiass*, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in “exceptional”, “relatively very rare” cases will the past misconduct be “so egregious that the mere fact of going forward in the light of it will be offensive” (*Tobiass*, at para. 91).

56 Any likelihood of abuse which will continue to manifest itself if the proceedings continue then must be considered in relation to possible remedies less drastic than a stay. Once it is determined that the abuse will continue to plague the judicial process, and that no remedy other than a stay can rectify the problem, a judge may exercise her or his discretion to grant a stay.

57 Finally, however, this Court in *Tobiass* instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: “it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits”. In these cases, “an egregious act of misconduct could [never] be overtaken by some passing public concern [although] . . . a compelling societal interest in having a full hearing could tip the scales in favour of proceeding” (*Tobiass*, at para. 92).

C. *Application to the Case at Bar*

1. Abuse of Process

58 In the case at bar, the trial judge was concerned with the cumulative effect of three elements of the proceedings brought against the appellant: “These include judge shopping; the Crown’s pre-charge interviews, and to a lesser extent, the R.C.M.P.’s premature press release confirming the investigation” (para. 132). In addition to these events early in the proceedings, the trial judge found that the one count added to the direct indictment (count 16) was laid for an improper purpose.

(a) *Judge Shopping*

59 It is important to understand exactly what the Crown said and did in relation to judge shopping. There is direct evidence that the Senior Crown Attorney assigned to this case during the police investigation said in a meeting with police that the laying of charges should be delayed to avoid bringing them before a particular judge, whom she feared might be sympathetic to the accused. This impropriety was exacerbated by her comment that she would monitor the court docket, looking for a different judge who would be more sympathetic to the laying of charges against the accused. There is no evidence that the comment was made more than once, and no evidence that it was acted upon. Nevertheless, it was said to police involved in the case, and set a tone of overzealous and unfair pursuit of a prosecution against the accused.

60 This Court has adverted to the impropriety of trying to influence the outcome of a proceeding by trying to “select” the judge. Where it appeared that the Crown had

abandoned a case before one judge to avoid an unfavourable ruling, and then reinstated charges at a new trial before a new judge, McLachlin J. was quick to point out the affront to the integrity of the system (*Scott, supra*, at pp. 1008-9):

The concern with “judge-shopping” arises from the use of the stay to avoid the consequences of an unfavourable ruling. Normally, Crown counsel faced with an unfavourable ruling is expected to accept it. The remedy is by way of appeal. . . .

Such conduct also raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused.

61 The judge shopping in this case was equally offensive. It illustrated another inequality between the Crown and defence, in that only the Crown has the power to influence which judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process. The trial judge quite properly was seriously troubled by this evidence. He nevertheless was mindful that this single comment was not acted upon, and did not find it determinative in his ultimate conclusion that the process against the accused had been abusive to the point of necessitating a stay of proceedings.

(b) *The Police/Crown Relationship*

62 The appellant contends that a bright line must be drawn at the stage where charges are laid, in order to keep the functions of the police separate from those of the

prosecutors. This separation, he argues, is the only way to maintain the Crown's crucial objectivity when reviewing the appropriateness of charges. The trial judge adopted this approach in assessing the administration of justice now practised in Nova Scotia. Citing various studies on the police/Crown relationship, MacDonald A.C.J. identified the police role as limited to pure investigation pre-charge, and the subsequent decision of whether to lay a charge. This reserves for the Crown the role of "Minister of Justice", in the sense that the Crown must be both ardent prosecutor once charges have been laid, and objective defender of the general public interest in determining whether to prosecute the charges recommended by police. Recognizing that in practice the police and Crown must still work together, MacDonald A.C.J. nevertheless emphasized that "the need for co-operation should never interfere [with] their individual autonomy" (para. 72).

63 The trial judge determined that the practice of Crown pre-charge interviewing in this country is "non-existent to rare", and is only done for the benefit of the accused, that is for the purpose of screening out frivolous or unsupportable charges: "[o]n the occasions when it is performed, it serves as a screen designed to protect an accused from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed" (para. 117). Any other pre-charge contact with witnesses would unavoidably undermine the Crown's objectivity – MacDonald A.C.J. reasoned that human nature would prevent the Crown from considering any interest other than that of the witness. The trial judge concluded that in this case, every charge laid subsequent to a Crown interview was suspect, and only DPP Pearson's paper-based assessment of the charges was objective.

64 The question before this Court is whether the Crown's objectivity is necessarily compromised if Crown counsel conduct pre-charge interviews of witnesses without the single, express intention of screening out charges before they are laid. In

essence, this Court has been asked to consider whether, at law, Crown prosecutors must be prevented from engaging in wide-ranging pre-charge interviews in order to maintain their essential function as “Ministers of Justice”. First, it is my view that different provinces have answered this question differently, and that the trial judge erred in his evaluation of the standard practice across the country on this issue. Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained.

65 The seminal concept of the Crown as “Minister of Justice” is expressed by this Court’s judgment in *Boucher v. The Queen*, 1954 CanLII 3 (SCC), [1955] S.C.R.16, in which Rand J. explained, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

The issue before the Court in *Boucher*, *inter alia*, was whether the Crown counsel’s personal opinion about the guilt of the accused was improper. It was so found. The exposition of the facts in *Boucher* helps to draw the distinction between Crown involvement with the case, pre-charge, and whether that inevitably leads to a loss of the Crown’s necessary objectivity (at p. 27, *per* Locke J.):

The [Crown’s] statements were calculated to impress upon the jury the asserted fact that, before the accused had been arrested, the Crown, with its experts, had made a thorough investigation and was satisfied that he was guilty beyond a reasonable doubt. Introduced into the record in this manner, there could be no cross-examination to test their accuracy.

The Crown prosecutor, having improperly informed the jury that there had been an investigation by the Crown which satisfied the authorities that the accused was guilty, thus assured them on his own belief in his guilt and employed language calculated to inflame their feelings against him. [Emphasis added.]

Based on the underlined sections, it appears that the Crown was involved in the investigation, before the arrest, thus presumably pre-charge. Yet this alone was not troublesome to the Court. Instead, it was the subsequent Crown's personal conclusion drawn from this investigation, namely that the accused was guilty, which was then put before the jury in the manner of evidence, which the Court found inappropriate. This action revealed that the Crown had lost his objective stance as a Minister of Justice in the process. The example, I believe, helps to differentiate between the fact of pre-charge involvement by the Crown, and the loss of objectivity which may result.

66 The need for a separation between police and Crown functions has been reiterated in reports inquiring into miscarriages of justice which have sent innocent men to jail in Canada. The *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1, *Findings and Recommendations* (1989) ("Marshall Report") speaks of the Crown's duty this way: "In addition to being accountable to the Attorney General for the performance of their duties, Crown prosecutors are accountable to the courts and the public. In that sense, the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition" (pp. 227-28). The Marshall Report emphasizes that this role must remain distinct from (while still cooperative with) that of the police (at p. 232):

We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function -- that of investigation and law enforcement -- is distinct

from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.

67 I note that investigation is not synonymous with interviewing for the purposes at issue in this appeal. The trial judge made a clear ruling that the Crown did not engage in “investigation” in this case. The distinct line appears to be that police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges. (See testimony of Philip Stenning, Appellant’s Record, at p. 975.) The Nova Scotia Solicitor General’s Directive on Laying of Charges (1990), which responded to the Marshall inquiry, states:

All Police Departments must implement the following protocol for the resolution of disputes between police and Crown over the laying of criminal charges:

- (i) no charge shall be laid, contrary to the advice of a Crown Prosecutor, until discussion concerning the matter has taken place between the Police Department and the Crown Prosecutor;
- (ii) if there is no resolution of the disagreement at that level, the matter must be referred to a senior police official of the department, who will discuss the matter with the Regional Crown Prosecutor;
- (iii) if, following such discussion, the police remain of the view that a charge is warranted, the charge shall be laid.

68 The protocol encourages a police and Crown joint assessment pre-charge: there is nothing in these recommendations that indicates that the separation between police and Crown functions must be implemented by preventing Crown contact with potential witnesses pre-charge. Therefore, while the Marshall Report speaks of a distinct line between police and Crown functions, it is one that may be drawn conceptually and figuratively, through conscious practice, rather than literally by the act of laying charges.

The appellant also drew the Court's attention to the 1998 Report of the Commission on Proceedings Involving Guy Paul Morin, which inquired into another recent instance of wrongful conviction, after which Morin spent several years in jail, before his innocence was recognized. This inquiry focussed on the Crown's failure of objectivity throughout the process as a result of too close contact between the Crown counsel and police. Justice Kaufman, who wrote the report, concluded that, at the root of the problems in the Morin case there had been a failure by the Crown prosecutor to assess objectively the reliability of evidence, before charges were laid (vol. 2, at pp. 909, 911 and 1069-70):

The bottom line is this: [the Crown] failed to *objectively* assess the reliability of evidence which favoured the prosecution. It is difficult to determine the precise extent to which each of the prosecutors appreciated just how unreliable some of the evidence tendered was. . . .

The prosecutors showed little or no introspection about these contaminating influences upon witnesses for two reasons: one, the evidence favoured the prosecution; this coloured their objectivity; two, their relationship with the police which, at times, blinded them, and prevented them from objectively and accurately assessing the reliability of the police officers who testified for the prosecution. . . .

It is also understandable that this belief [of Morin's guilt] would affect the prosecutors' assessment of their own evidence and the evidence tendered by the defence. Their failing was that this belief so pervaded their thinking that they were unable, at times, to objectively view the evidence, and incapable at times to be at all introspective about the very serious reliability problems with a number of their own witnesses. As I have said earlier, their relationship with the police, at times, blinded them to the very serious reliability problems with their own officers. [Emphasis in original.]

The parties agree in the present case that Crown objectivity and the separation of Crown from police functions are elements of the judicial process which must be safeguarded. What the Morin inquiry shows is that objectivity can be lost without the Crown's involvement in pre-charge interviews, and that this loss of objectivity in fact did occur, in part, as a result of post-charge Crown interviews. It does not mean that the

absence of pre-charge interviews would be, of itself, a guarantee of fair process or that the restrained use of such interviews may not be consistent with a separation of Crown and police functions.

(c) *Other Jurisdictions*

71 While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. This Court has already recognized that some variation in provincial practices in the administration of the criminal law is to be expected and allowed in certain circumstances. In *R. v. S. (S.)*, 1990 CanLII 65 (SCC), [1990] 2 S.C.R. 254, Dickson C.J. observed, at pp. 289-90:

It is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal system. In fact, in the context of the administration of the criminal law, differential application is constitutionally fostered by ss. 91(27) and 92(14) of the *Constitution Act, 1867*. The area of criminal law and its application is one in which the balancing of national interests and local concerns has been accomplished by a constitutional structure that both permits and encourages federal-provincial cooperation. A brief review of Canadian constitutional history clearly demonstrates that diversity in the criminal law, in terms of provincial application, has been recognized consistently as a means of furthering the values of federalism. Differential application arises from a recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities.

An examination of the practices in several Canadian provinces illustrates that different jurisdictions have approached the issue of Crown pre-charge interviews in different ways.

(i) New Brunswick

72 At trial, several witnesses gave evidence about the system of criminal prosecutions in the province of New Brunswick. Glendon Abbott, Director of Public Prosecutions for the province, was one. He described that part of the Crown's function as to

provide advice to policing authorities. We in the Province of New Brunswick, at least, exercise a pre-charge screening function. The Attorney General has set out a threshold for charging and we review police files that are brought to us for that purpose, to make a decision on charging. And we exercise the prosecutorial duties to advance the case through the legal system. . . . The short form of the test [to determine whether a prosecution should proceed] is to be satisfied that there is a reasonable prospect of conviction.

73 Mr. Abbott also gave evidence about his understanding of New Brunswick's written policy on initiating prosecutions: "In my view, yes, implicitly it does speak to [Crown pre-charge interviews] and contemplates pre-charge contact with potential witnesses." The policy states:

In making a decision as to sufficiency of evidence, the Crown prosecutor considers such factors as the availability and admissibility of evidence, the credibility of witnesses, and their likely impression on a judge or jury, the admissibility of any confessions, the reliability and admissibility of any identification, and generally will draw on experience to evaluate how strong the case is likely to be when presented in court. In addition, there are public interest factors that may be taken into account.

(New Brunswick Criteria for Prosecutions, Appellant's Record, at pp. 519-520)

Mr. Abbott testified that based on this policy,

in some cases . . . the prosecutor and myself from my own experience would want to interview some of the witnesses [pre-charge]. Not in every case, but in some cases. . . .

Over approximately 23 or so years I've been with public prosecutions, this is not an uncommon practice. . . .

I think as a category of offenses or alleged offenses, where there are allegations of sexual assault, this is more common.

Such Crown pre-charge interviews are conducted to assess credibility and weight of the complainant's evidence, for both youthful witnesses, and adults, and to inform potential witnesses of the legal process, while also testing their resolve to pursue the matter. Mr. Abbott acknowledged that as a result of his pre-charge interviews, "there were cases where it aided [him] in drawing a conclusion that there was a reasonable prospect of conviction and – well, not equally, but in many cases where there wasn't a reasonable prospect of conviction". He concluded, "I don't feel that interviewing the witness prior to the approval or not or approval [*sic*] of charges affects my ability to discharge my duty impartially."

74 Regional Crown Prosecutor for the rural Miramichi district of New Brunswick, Fred Ferguson, testified that he too does pre-charge interviewing, about once a year. In his experience, such interviewing is done for young witnesses, historic sex assault allegations, and "where there's been a question of motive" to prosecute. He said that time and manpower have made it difficult to do more pre-charge interviews.

(ii) Quebec

75 The intervener Attorney General of Quebec made submissions before this Court that it is not unusual in that province for Crown counsel to interview witnesses pre-charge: [TRANSLATION] "[T]he intervener maintains that there is nothing heretical in a representative of the Attorney General meeting with or even questioning witnesses, including victims, before charges are laid" (Intervener's factum, at para. 3). In fact, pre-

charge screening has been a “systematic” practice in Quebec for more than 30 years (Intervener’s factum, at para. 4).

76 The system of Crown pre-charge screening in Quebec is much like that in New Brunswick, and was instituted to improve the administration of justice. In particular, the practice is done for a number of reasons:

[TRANSLATION] The prosecutor’s decision to authorize the laying of criminal charges presupposes that the conduct complained of constitutes an offence in law, that there are reasonable grounds to believe that the person under investigation is the perpetrator, that it is legally possible to prove it, and that it is appropriate to prosecute. In exercising prosecutorial discretion, the prosecutor must take into account various policy and social considerations. [Intervener’s factum, at para. 14]

As almost all of the expert witnesses at trial testified, Crown pre-charge interviewing is especially useful in cases of sexual assault allegations. The Quebec experience further supports this:

[TRANSLATION] Generally, the goals are to understand better the victim’s reluctance to lodge a complaint or to testify, to reassure him or her and to create an atmosphere of trust, in order better to assess the witness’s credibility if necessary or to get the witness to relate accurately the circumstances of the offence to the court or, in some cases, simply to explain the proceedings to the victim, including the examination and cross-examination, so that he or she is better prepared to face an experience that is very painful for a number of people. [Intervener’s factum, at para. 36]

In fact, Quebec’s Justice Minister has instructed that contact between sexual assault complainants and Crown counsel should occur at the beginning of the process of laying charges, and in cases of minors (under the age of 18) who make such complaints, pre-charge meetings with the Crown are

mandatory. According to the *Manuel de directives aux substituts du procureur général* (rev. 1997), Directive No. INF-1, at para. 5, with certain exceptions, [TRANSLATION] “[t]he prosecutor must meet with the child before authorizing the laying of an information”. (See also ministère de la Justice du Québec, *Crimes à caractère sexuel: Guide du poursuivant* (2000), at pp. 13 and 27.)

(iii) British Columbia

77 Several of the witnesses and interveners remarked that British Columbia also uses a system of pre-charge screening, similar to New Brunswick and Quebec. In British Columbia, Crown counsel must approve charges before the police can lay them, and this Crown approval may require witness interviews, pre-charge. The Crown charge screening function is intended to accomplish the same variety of systemic benefits as in New Brunswick, Quebec, and even Ontario (see below). A 1990 study by the Law Reform Commission of Canada, which looked at the role of Crown counsel in the criminal justice system, remarked that the pre-charge screening/interviewing procedures used in New Brunswick, Quebec and British Columbia work well (Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), Working Paper 62, at pp. 74-75).

(iv) Ontario

78 Michael Code, a witness for the appellant, described the most restrictive role for Crown pre-charge involvement, which he said is the practice in Ontario. According to Mr. Code, a former Assistant Deputy Attorney General — Criminal Law of the province, two dangers arise from pre-charge interviewing by the Crown. First, it can undermine the independence of police in deciding which charges to lay, and second, it can strip the Crown of its necessary objectivity in assessing whether to proceed with the charges laid by police.

(I note here that the trial judge in this case made no finding that the police decision to lay charges was improper. Therefore, only the second concern will be further developed.)

79 To avoid these perversions of our system of police/Crown independence, Mr. Code was of the opinion that Crown counsel should not interview witnesses until after police have laid the charge, and after the Crown has decided to prosecute it. He testified that among the 10 very senior prosecutors he knows, they personally never conduct pre-charge interviews, have never heard of anyone else doing it, and think it is wrong, and inconsistent with their role as Crown counsel.

80 Despite Mr. Code's position, another witness from Ontario, Chief Crown Attorney for Ottawa-Carleton, Andrejs Berzins, testified that some pre-charge Crown interviewing is done in Ontario. Mr. Berzins has done one or two such pre-charge interviews every year.

81 Brian Gover, another expert witness from Ontario, confirmed this practice: "I regard it as an unusual event for a Crown counsel to interview a potential witness at a pre-charge stage. But, nonetheless, it's my view that Crown practice in Ontario is sufficiently flexible to accommodate that occurring." (Appellant's Record, p. 696) He added (at p. 717):

. . . it's important that Crown counsel have paramount in his or her mind the role of the Crown as distinguished from the role of the police. It's essential that the Crown not engage in pre-charge evidence-gathering. But, as I said, there will be circumstances in which it is appropriate for the Crown to engage in a process of confirming in his or her own mind that the evidence attributed to a witness would, in fact, be given by that

witness as part of the determination of whether reasonable grounds exist and whether there's a reasonable likelihood of conviction.

82 Therefore, even in Ontario, it cannot be said that Crown pre-charge interviews are non-existent, and in Quebec, New Brunswick and British Columbia they are common, and regularly conducted in sexual assault cases, especially when historic incidents or young complainants are involved.

(d) *Policy Considerations*

83 A lesson underscored by the report on the Morin case and the events which led to its tragic outcome is that the appellant's proposed "quick fix" to maintain Crown objectivity, by preventing Crown interviews pre-charge, is both misguided, and potentially harmful – because pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings.

84 It is quite clear that there are many public policy reasons for which Crown counsel in some jurisdictions conduct witness interviews, pre-charge. Mr. Abbott and Mr. Gover both testified about efficiencies which are gained by pre-charge screening which protect the repute of the justice system, not only the personal interests of the accused. Complainants also benefit from a single decision to proceed with or avoid laying charges, rather than having to deal with the stress and publicity of a charge and then face the appearance that they have made a spurious accusation if the charge is later withdrawn. In addition, all of the expert witnesses with knowledge of the Crown practice of pre-charge interviewing told of the interests it serves in assessing witness credibility, demeanour and

resolve, especially in sexual assault cases. Such pre-charge interviews are even more important when charges are “historic” or when complainants are young.

85 The evidence in this case also exposes the systemic concerns that sexual assault complainants often have. The RCMP report about the Regan investigation is very telling in this regard:

In some cases, those strongly suspected of being a victim, would not discuss the incident with the investigators, leaving the member with the feeling that the incident had taken place however they preferred not to disclose. . . . [some] who were willing to confirm that an offence was committed. . . . are not in a position to become involved in any court process because of . . . the fear of repercussions. . . .

The fact that the suspect, in some cases being the Premier of the Province or in other cases, a high-profile person within the community, coupled with the victim’s fear and what the public reaction would be, especially in the 1950 ’s, ‘60 ’s and ‘70 ’s, is certainly reason to understand why victims failed to disclose.

(Investigation Report, March 30, 1994, Appellant’s Record, at pp. 1068-69)

Complainants may worry of retribution from the alleged assailant, and from their own families and community. They may also fear being “re-victimized” by the court system. They may not feel comfortable making complaints to police, or feel reassured by police regarding confidentiality, or the process in general. The extensive record of discussion between witnesses, police and Crown (see for example: continuation report, Respondent’s Record, at pp. 716-18) here shows that, in some cases where police failed to assuage the concerns of some complainants, Crown counsel were successful. The interests of justice are not only served by screening out fruitless complaints but also served by encouraging proper charges to go forward, and by signalling to the larger society that complainants can bring sexual assault charges to the courts without further undue trauma, and that where charges are properly laid, they will be prosecuted.

86 Finally, quite apart from the specific aspects of sexual assault allegations, other examples abound of situations where the interests of justice may be served by the

Crown conducting pre-charge interviews. For example: the protection of *Charter* rights during an investigation, cases involving jailhouse informants, and cases which have a statutory requirement for Crown consent to the laying of charges.

(e) *The Impact of the Trial Judge's Approach to Policy Issues*

87 It is also important that the justice system not be and not appear arbitrary. The trial judge explained the “crucial issue” before him as a narrow one: “It involves firstly, the Crown’s determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid” (para. 121). But the determination of the appropriateness of Crown influence on the charging decision based on when Crown interviews are conducted reveals a certain arbitrariness. In the case at bar, the trial judge found abuse because the Crown interviewed complainants before charges were laid. The trial judge found that this extinguished the Crown’s objectivity, and he implied that, as a result, more charges were laid than if objectivity had been retained. Yet, if the Crown had waited until after charges were laid to re-interview those complainants who initially had refused to come forward, it would still have been open to the Crown to recommend to police that these additional charges should be laid. It would have remained within police discretion to add charges based on that Crown advice. In fact, the May 30 amendment to the information did add new charges in relation to a new complainant. Yet, again, in the direct indictment, a new complainant was added and other charges were amended or dropped. The conclusion to be drawn from what could have happened and did happen is that the process is a fluid one. The expectation is that both the police and the Crown will act according to their distinct roles in the process, investigating allegations of criminal behaviour, and assessing the public interest in prosecuting, respectively. The exercise of these roles does not seem to be clearly or predictably altered by whether the formal act of the laying of charges has occurred.

The trial judge's more formalistic view might have negative policy consequences. MacDonald A.C.J. said: "The Crown emphasizes the fact that they always interview complainants post-charge in any event. . . . That, with respect, misses the point. The charging decision is crucial. It determines who the complainants will be" (para. 125). This approach, however, does not account for the fact, recognized by the expert witnesses, that in some cases, especially involving sexual assault, complainants may need information from the Crown to properly understand the process in order to decide whether to press charges. In the trial judge's scenario, this could never happen, because Crown counsel would only ever interview complainants who were already pressing charges.

There is another negative implication of arbitrarily drawing a hard line at the decision to lay charges. As Rand J. made clear in *Boucher, supra*, commitment to the case, belief in the allegations, and the desire to see justice done are not incompatible with objectivity and fairness. Objectivity requires that a rational assessment of facts be brought to bear in making decisions relating to the case. Awareness of one's strong feelings about a case can and should be kept in mind, as a check against tunnel vision. The danger with the trial judge's approach, that of drawing a bright line between pre- and post-charge interviews, is that it risks giving the false impression that remaining personally detached from complainants before charges are laid is the best (or the only necessary) effort to protect objectivity. So how does the Crown protect objectivity after the charge is laid? As all parties accept, objectivity and fairness is an ongoing responsibility of the Crown, at every stage of the process. The Court of Appeal, respondent and interveners point out that if subjectivity is the inevitable consequence of contact between the Crown and complainant, then even post-charge interviews are problematic because they would undermine Crown objectivity for every decision after these interviews have taken place.

90 Finally, the trial judge’s concern about human nature must be addressed. The trial judge held that personal interaction in the form of interviews between the Crown and potential complainants inherently threatens the Crown’s ability to be objective, because it is an inevitable fact of human nature that the Crown will become subjectively involved with the facts of the case. In the result, the trial judge found that a bright line should be drawn between pre- and post-charge interviews by the Crown. Yet he also ruled that pre-charge Crown interviews are quite proper for the limited purpose of charge screening, to spare the potential accused from the unnecessary embarrassment and harm to reputation that comes with a criminal charge. This begs the question, however, of how a Crown in such proper pre-charge interviews would be able to overcome the natural impulse to favour the complainants, in order to reach the objective conclusion to recommend against laying charges.

91 Summing up, the evidence shows that in some Canadian jurisdictions, pre-charge interviews by the Crown are a regular, even common practice. In these jurisdictions at least, it appears that public policy is served by the practice, and potentially harmful and arbitrary results are avoided by the refusal to draw a hard line at the decision to lay charges, before which Crown counsel may not interview complainants. Viewed in this context, I cannot conclude that wide-ranging pre-charge Crown interviews, *per se*, are an abuse of process.

(f) *Police Conduct*

92 The trial judge found that the police were “clearly wrong” (para. 86) when they released Regan’s name as a suspect, well in advance of any charges. This was in contravention of the express policy of law enforcement agencies that the identity of

suspects may be released only after charges have been laid. However, MacDonald A.C.J. added that this lapse was not done in bad faith, and the judge himself further indicated that this police error influenced his finding of abuse of process “to a lesser extent” (para. 132).

93 This policy was adopted, no doubt, to protect the privacy and other interests of individuals who are merely questioned about a crime, with nothing more. There is no question that such a policy is laudable, and a breach of it should not be condoned. However, other evidence on the record indicates that after this one misstep, the police exercised greater caution in preventing further information leaks until the process was truly public. For example, when the police delivered their investigation report to DPP Pearson, the letter included

a control sheet asking that all persons who have control or access to please sign and date, to establish continuity. Throughout this investigation, the media has been diligent and persistent in obtaining information and for this reason security must remain a priority. I have implemented controls within the R.C.M. Police to limit access. I have not allowed any R.C.M. Police documents, pertaining to this investigation, to be disseminated outside this Headquarters, Halifax Sub Division and the Task Force investigators. Therefore, I am now asking that the same restriction occur within your office and this information be carefully protected.

(Letter from Chief Superintendent Falkingham to DPP Pearson, May 19, 1994)

In addition, the police acceded to Regan’s request to hold the arraignment outside Halifax, to try to avoid a media frenzy. In my view, this supports the finding of no bad faith.

94 I would add that following the dictum in *Blencoe*, the prejudice experienced by the appellant as a result of this early leak – humiliation and stress – cannot be attributed to this police error alone. This impact on Regan was a certainty no matter when his name was finally released in connection with these charges, and there is no question that there was sufficient evidence and subjective belief for the police to ultimately lay at least some of the charges. Furthermore, there is no evidence to suggest that the premature

announcement had any effect on the separate question of whether the Crown properly proceeded with the charges. While the media may have been clamouring for information, it does not follow that this put pressure on the authorities to lay any particular number of charges, or any charges at all, for that matter.

95 For these reasons, I think the trial judge was correct in his finding that this police error either alone or in combination with the Crown conduct discussed above does not rise to the level of egregious abuse. The serious remedy of a stay of proceedings is not an appropriate method to denounce or punish past police conduct of this nature.

(g) *Count 16*

96 This count involved a woman who alleged that when she was a 24-year-old political reporter, she was pushed onto a hotel room bed and groped during an interview with then-Premier Regan. At the time of DPP Pearson’s assessment of the allegations, this complainant was only willing to be a similar fact witness. Pearson suggested that she be re-interviewed. After a re-interview with police and Crown, this witness decided to press charges.

97 The trial judge was “unsettled” by the laying of this charge because it was factually similar to the Alberta-based incident. From this, MacDonald A.C.J. concluded: “The Crown therefore felt it needed [to lay count 16] so that [the Alberta complainant’s] ‘story could be told’. . . . Yet the Crown’s goal as I see it was to have the jury hear and (presumably act upon) the [complaint of the Alberta woman], a similar fact witness” (paras. 157-58).

98 The trial judge did, however, recognize the validity of count 16 in its own right: “I realize that the Crown nonetheless considers [count 16] to be worthy of prosecuting. Yet I do not find this to be their primary motive” (para. 159). The reason the Crown’s motive was improper, in MacDonald A.C.J.’s view, was because of his finding of the Crown’s loss of objectivity: “When the Crown interviews pre-charge a certain amount of objectivity is lost. The Crown’s critical review of the charge list is gone. Perhaps if the Crown had not been so involved with interviewing witnesses pre-charge, they may have seen all this in a different light” (para. 160).

99 As I have already discussed, I find that the trial judge’s finding of a loss of Crown objectivity cannot be supported by the evidence. This erroneous reading of the facts influenced the holding on count 16. If the trial judge had not started from the premise that the Crown had lost its objectivity, there would have been no justification for the trial judge to find the similarity between count 16 and the Alberta incident as the primary motivation for count 16, virtually ignoring the reasonable and probable grounds for laying count 16 in its own right. Furthermore, as Cromwell J.A. observed, in other respects the trial judge held that there was no improper purpose or *mala fides* underlying the preferral of the direct indictment. The trial judge found a loss of Crown objectivity only at the first charging decision, nearly a year before the direct indictment. Moreover, Cromwell J.A. pointed out, “[t]here is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges” (para. 140). For these reasons I find the trial judge erred in finding an abusive or improper purpose behind the laying of count 16.

(h) *Cumulative Effect of Police and Crown Conduct*

In assessing the cumulative effect of this evidence of Crown and police misconduct, the trial judge concluded that Crown Potts' objectivity was hopelessly lost, and her influence on the case set other well-meaning Crown counsel astray. The trial judge seemed reinforced in this decision because in addition to Potts' judge-shopping comment, he was troubled by "Ms. Potts' perplexing desire to interview all potential complainants" (para. 100).

On close review of the evidence, however, the Crown's intention to re-interview complainants does not seem perplexing at all. Police were of the opinion that a pattern of criminal behaviour emerged from a view of the full picture of the allegations. They disagreed with DPP Pearson's recommendation to lay charges in respect of only four complainants. Police were urging further review and Crown Potts undertook to read the voluminous, detailed investigation reports (which ultimately took her some six months).

In the course of that review, Crown Potts indicated that re-interviews would be appropriate, according to notes taken by Staff Sergeant Fraser: "Reports being reviewed by Potts. Interested in meeting with victims" (Fraser notes, August 17 and 18, 1994, Respondent's Record, at p. 501; see also Investigation Report, August 22, 1994, Respondent's Record, at p. 498). These re-interviews were done after DPP Pearson had already advised that the case which proceeded would be strengthened if the unwilling complainants with the more recent allegations would change their mind and come forward. Furthermore, DPP Pearson specifically recommended that six of the unwilling complainants should be interviewed, albeit by police. The police attended with the Crown at these re-interviews and appeared to agree that the joint interviews should be done: "It is now the investigators and the Crown's belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds" (Police Transit Slip, January 17, 1995, Appellant's

Record, at p. 1084). Finally, the expert testimony of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning indicated that in a case such as this, it would be very likely that in other provinces, some Crown counsel would interview complainants pre-charge: the allegations of sexual assault were historic, the alleged victims were young at the time of the incidents, the alleged perpetrator was high profile and the case was made further controversial by the involvement of the suspect's political enemy. In this context, I fail to see why a thorough re-interview of complainants by the Crown was perplexing, where the Crown would have wanted to assess first-hand the possible charges versus similar fact evidence, and to ensure that complainants fully understood the judicial process before deciding whether to press charges.

103 From this process, the trial judge seemed to infer that the appellant ended up facing more charges than he otherwise would have. Yet I do not see how re-interviewing the complainants for whom DPP Pearson had already recommended charges could have led to more charges in those cases. In the case of the unwilling and similar fact complainants, Pearson had made no charging recommendation. He did, however, generally recommend that some witnesses be re-approached, and that more recent allegations would strengthen the overall case. As some of these complainants decided to press charges, I do not understand why it was inappropriate to reassess the other cases, even where Pearson had initially recommended against laying charges. And of course, during this process, five new complainants surfaced. It is not known to what extent their allegations cast a new light or raised new questions in relation to the earlier list of complainants. In the end, it appears to me that the police had virtually made their charging decision – they wanted to lay charges in respect of the complete picture. The Crown's interviews appear to have provided a basis on which to make their own charging decision – which was also based on an assessment of the full, revised picture. The re-interviews were done to promote many of the policy reasons discussed above: to fully inform potential complainants of the process, to assess their evidence and credibility, for efficiency in the administration of justice, and for the

sake of the appearance of decisive action, taken in an already highly public and controversial case. Finally, as the Pearson charging recommendation was clearly preliminary, it is impossible to know whether, as a result of the Crown interviews, the appellant ended up facing more charges.

104 In summary, it is my view that there was no abuse of process in this case. The pre-charge interviews were done in accordance with the common practice of some other provinces, a practice more wide-ranging than the narrow, exceptional to rare practice the trial judge described. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by DPP Pearson that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid. I conclude that, based on the evidence of judge shopping, pre-charge Crown interviews, the improper police announcement, and the addition of count 16 in the direct indictment, the cumulative effect of these actions, while troubling in some respects, does not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an abuse, did not have an ongoing effect on the accused, which would jeopardize the fairness of his trial. On that basis, I must now turn to the central issue decided by the Court of Appeal, namely the decision to lift the stay of proceedings ordered by the trial judge.

2. Stay of Proceedings

105 Having found an abuse of process under s. 7 of the *Charter* but ruled that it would not affect trial fairness, the trial judge recognized this put the case in the narrow residual category of abuse where a stay may be granted only in exceptional cases.

However, the trial judge misconceived the governing test for a stay of proceedings as outlined in *Tobiass*. At this stage of the analysis, instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focussed his attention only on the final balancing exercise (at paras. 58-59):

This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar.

In summary, to justify a stay I must ask myself: Are the alleged wrongdoings so unfair to the applicant or so offensive to society so as to render a stay the only reasonable remedy? Is this one of those “*clearest of cases*” or, on the other hand, are there societal interests compelling enough to tip the scales in favour of proceeding? [Emphasis in original.]

106 This error was further emphasized when the judge turned his mind to the facts of the abuse of process, as he saw them (at para. 133):

. . . the cumulative effect of these actions would not shock the community’s sense of fair play and decency so as to warrant a stay of all charges outright. It is not one of those “*clearest of cases*” that demands a global stay. Some of these charges involve very serious allegations that by their very nature present a strong societal interest to have prosecuted through a full and fair hearing. As was explained in *Tobiass, supra*, I find that this “*compelling societal interest . . . tips the scales in favour of proceeding*” with at least some of these charges. [Emphasis in original.]

107 There was no discussion in the trial judge’s reasons of any ongoing impact of the abuse he found. As discussed earlier, the embarrassment to the appellant of the

premature police announcement was overtaken by the charges which would have been laid in any event. Therefore there was no continuing prejudice from this misconduct. One must also remember that the humiliation flowing from properly laid charges, while unpleasant, is not an abuse of process. As for the trial judge's concern for loss of Crown objectivity, there was no evidence that this was in any way affected by the police misbehaviour. It was also discussed above that the evidence cannot support the inference that Crown pre-interviews or any loss of Crown objectivity inevitably led to the appellant facing more charges. It should be noted that DPP Pearson and the police had expressed a desire to re-interview all but three of the complainants, and that, since then, these three never pressed any charges. Therefore this conduct, even if abusive, cannot be said to be manifested or perpetuated if the process continues. The judge-shopping comment was restricted to one Crown counsel, on one occasion, without further action. In addition, that Crown counsel has long since left the prosecution of this case. Finally, there was simply nothing improper about the inclusion of count 16 in the direct indictment. To speak of ongoing abuse where none was ever apparent makes no sense. All told, even if this conduct did amount to abuse, it falls at the low end of the spectrum of seriousness, and is not significant enough that proceeding in its wake would, in and of itself, shock the community's sense of fairness and decency.

108 Thus, the trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The abuse that was found by the trial judge could be and was addressed by remedies other than a stay. Crown Potts was removed from the prosecution. A Crown not involved with the earlier stages of the case became lead counsel for the prosecution. The police instituted strict measures to maintain confidentiality of the investigation. And ultimately, there was a detailed review of the charges, signed by a new Director of Public Prosecutions when the direct indictment was preferred.

(a) *The Direct Indictment*

109 For the purposes of assessing any ongoing or lingering effects of the abuse of process found by the trial judge, the majority of the Court of Appeal relied heavily on the direct indictment as evidence of a fresh, objective review of the charges. Cromwell J.A. noted that the trial judge’s finding of abuse was at “the charging stage”, that is, when the information was sworn on May 30, 1995. The trial judge also found no impropriety in the Crown’s decision to prefer the direct indictment. Cromwell J.A. therefore reasoned that even if Crown Potts’ involvement in the process, and more generally the Crown’s participation in pre-charge interviews, had tainted the process, by the time of the direct indictment, Crown Potts was no longer on the case, and the direct indictment itself amounted to a remedy which cleansed any earlier abuse.

110 Section 577 of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that the Attorney General or his or her Deputy give personal consent in writing to prefer a direct indictment. It is predictable that there will be variation from office to office and province to province on the actual procedure involved to meet this requirement. I think it is fair to assume, however, that the case at bar would not have been treated as any garden variety, *pro forma* approval of a direct indictment. As Freeman J.A. (dissenting) pointed out, from the outset, this prosecution had been “extraordinary and controversial” (para. 4) as a result of “[t]he prominence of the accused and the high level of media interest in the case” (para. 5).

111 Not only would this sensitive context likely have drawn the close attention of the Attorney General of Nova Scotia (or his or her delegate), but there is direct evidence that the Crown paid close attention to the actual charges contained in the direct indictment. First, one complainant listed on the May 30, 1995 information was completely dropped from the direct indictment. Second, one count under s. 138(2) of the *Criminal Code*, S.C.

1953-54, c. 51, was dropped from the charges in relation to a second complainant. Third, a count in relation to an entirely new complainant was added to the direct indictment. Furthermore, these changes were ultimately approved by Jerry Pitzul, a new Director of Public Prosecutions, who was not involved in the Pearson review, and was not the acting DPP immediately after Pearson left the post.

112 Finally, there is evidence of objectivity at the stage when the Crown was preparing the direct indictment. Two witnesses were interviewed by the Crown a second time in April 1997. In one case, the woman was included as an unwilling witness on the original list that went to DPP Pearson. At this final meeting, she expressed an interest in pressing charges against Regan, but the Crown decided not to include her in the direct indictment. In the other case, the woman had come forward after the Pearson recommendation with another, similar allegation against the accused. At that time, and at the time of the direct indictment, she was unwilling to get involved in the proceedings, and no charge was laid.

(b) Balancing a Stay Against Proceeding to Trial

113 Even if one assumes that by applying the proper test the trial judge had found an ongoing abuse which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. Indeed, that prompted the trial judge's charge-by-charge balancing analysis. Yet in his balancing analysis, the trial judge omitted some significant issues relevant to the public interest.

The trial judge “afforded significant deference” (para. 141) to the Pearson charging recommendation when reaching his conclusion about staying half of the total charges. In fact, the decision to proceed with charges relating to only four complainants directly reflected DPP Pearson’s advice. The trial judge explained that he was so highly influenced by Pearson’s position because “the Crown should not be seen to significantly change its position without valid reason” (para. 135). The trial judge, however, did not seem to consider the inconclusive nature of the Pearson recommendation. First, the Pearson letter advised that the case would be strengthened if more complainants with more recent allegations were willing to come forward. Second, the Pearson letter specifically recommended that four complainants be re-interviewed. Police did re-interview those women, and others, accompanied by a Crown counsel. As a result, more women came forward, willing to lay charges. This constituted a valid reason to alter the original opinion regarding charges. Finally, the letter indicated that it was entirely within police discretion to accept or ignore the Pearson recommendation, and it was also open to the Crown to reconsider which charges to proceed with, following the police charging decision. These qualifications all signify a Crown recommendation which anticipated the possibility of change -- not one which was etched in stone. As a result of new complainants surfacing, of further interviews, and ongoing consideration of the charges by both police and the Crown, a charging decision was made which included the Pearson recommendation as well as additional charges. There was no reason to assume that the Pearson view of the matter was the Crown’s final or most appropriate view.

The trial judge’s differentiation between the charges he stayed and those he did not also reflected DPP Pearson’s view of the “seriousness” of the alleged offences. As discussed above, the Pearson view emphasized physical invasiveness and overlooked the complainants’ age, and their socially subordinate and relatively powerless positions in relation to the accused. The Pearson view also reflected the notion of social acceptance (as opposed to illegality) of the alleged crimes some 30 to 40 years ago. Charges brought

before a modern court should not be trapped in a social time warp. Once it is determined that past behaviour was an apparent violation of the contemporary law, then the benefit of current social mores should be brought to bear in assessing the advisability of pursuing charges. This approach is especially significant when sexual assault charges are at issue. This Court has recognized the disadvantage that women victims have suffered as a result of stereotypes in society and the justice system. (See, for example, *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577; *O'Connor*, *supra*; *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330; *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668; *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46.) Without revisiting the thoughtful consideration of those judgments in the current case, it suffices to say that those gains would amount to nothing if modern charges of sexual assault for historic acts are viewed with blinkers and through a looking glass that sees an old stereotypic view rather than an enlightened one. It is not for this Court to judge the Crown's assessment of social interests in proceeding with historic sexual assault charges. It is, however, appropriate for this Court to review lower court decisions according to the standards of modern jurisprudence. Furthermore, when exercising their discretion to grant a stay, courts are bound to consider all significant factors, a requirement by which the Crown is not bound when making its charging decisions. It was not sufficient for the trial judge to merely follow the course set by DPP Pearson.

116 There are many societal interests engaged by this case, which the trial judge failed to factor into the balance. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there is evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse. In

omitting to consider any of these issues which favour proceeding with charges, the trial judge's discretion was not fully exercised and therefore cannot stand.

D. *Standard of Review*

117 The decision to grant a stay is a discretionary one, which should not be lightly interfered with: “an appellate court will be justified in intervening in a trial judge’s exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice” (*Tobiass, supra*, at para. 87; *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367, at p. 1375). Furthermore, where a trial judge exercises her or his discretion, that decision cannot be replaced simply because the appellate court has a different assessment of the facts (*Stein v. The Ship “Kathy K”*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802; see also *R. v. Oickle*, [2000] 2 S.C.R. 3, 2000 SCC 38; *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507).

118 This does not mean, however, that the trial judge is completely insulated from review. It is settled law that where the “trial judge made some palpable and overriding error which affected his assessment of the facts”, the decision based on these facts may be reversed (*Kathy K*, at p. 808). In the present case, I find that the trial judge made palpable and overriding factual errors which set his assessment of the facts askew. I also find that he misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

1. Error of Fact

I find that the trial judge's characterization of the scope of pre-charge interviewing done across the country was narrower than the expert evidence indicates. The trial judge concluded (at para. 117):

Based upon my review of all of the above expert evidence, it seems to me that the scope of pre-charge Crown interviewing in this country is a very narrow one. It ranges from non-existent to rare. On the occasions when it is performed, it serves as a screen designed to protect an accused from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed.

He characterized the practice of pre-charge interviewing conducted by Crowns in New Brunswick, Quebec and British Columbia as "Crown pre-charge screening" (para. 120). By this, MacDonald A.C.J. meant that the only acceptable form of Crown pre-charge meetings with complainants occurs when the Crown is motivated solely by a desire to benefit the accused by screening out frivolous or unsustainable charges. The evidence of Glendon Abbott, Fred Ferguson, Andrejs Berzins and Philip Stenning clearly contradicts this. Pre-charge interviews in New Brunswick are done for a variety of policy reasons, only one of which is the protection of the potential accused. Furthermore, even in Ontario where the practice of Crown pre-charge interviewing is the most circumscribed, it does occur on a regular basis. The trial judge, with respect, was therefore in error when he ruled that "pre-charge Crown interviewing in this country is . . . non-existent to rare" (para. 117). The evidence before him disclosed that Crown pre-charge interviews range from a regularly although infrequently exercised practice in Ontario, to a commonly practised procedure in New Brunswick. While the practice is not used in every case, it appears that it is typically used in cases of sexual assault, especially when allegations are historic, the complainant is young, or there is some other reason for specific concern about the strength of the evidence. This palpable error of fact had significant ramifications on the trial judge's reasoning. Based on his erroneous view, he found the Crown's conduct in this case at variance with standard practice across the country and therefore improper. From this impropriety he deduced a loss of objectivity in the

Crown's decision to proceed with charges, and from that finding, he concluded that there was an abuse of process, where the other examples of police and Crown misconduct alone would not have risen to the level of procedural abuse where a stay might be warranted.

120 In addition, I find a second factual error in the trial judge's reasoning. Without ever explicitly stating it, the trial judge implies that the loss of objectivity was abusive because it meant that the appellant ultimately faced more charges. No evidence can be found to support this deduction. The recommendations of DPP Pearson were clearly given as part of a charging decision still in flux. Pearson stated that the police were not bound to follow his advice, nor was the Crown bound to proceed with any charges which the police decided to lay. Pearson expressly recommended that some complainants be reinterviewed and he suggested that more charges would strengthen the case. Finally, he could not have anticipated that five new complainants would come forward, subsequent to his charging recommendation (three of whom ultimately accepted that the Crown proceed with charges). All of these facts point to the conclusion that the Pearson recommendation to proceed with charges related to four complainants was an interim one, and that it would be impossible to know whether the process which followed the Pearson recommendation resulted in the appellant facing more charges – more charges in relation to what? However, this erroneous factual finding was a palpable error which served as a springboard for the trial judge to find an abuse of process, and to launch into the case-by-case assessment of which charges should be stayed. At any rate, it could not have been inappropriate to lay additional charges if they had an adequate factual foundation and probable cause could be ascertained.

2. Error of Law

121 In addition, the trial judge misdirected himself on the test for granting a stay. By incorrectly emphasizing the balancing stage, weighing the interests flowing from a stay against the public interest in proceeding, he skipped over the key assessment of whether the abuse (as he so found it) would be manifested, perpetuated or aggravated in the proceedings if they continued. He also ignored the step of the analysis which requires that other remedies be considered.

122 I agree with the Court of Appeal that if the trial judge had properly applied the law, he would have concluded that the abuse that he had identified was not ongoing, and that indeed, the remedies of removing Crown Potts from the prosecution and of recognizing, in the circumstances of this case, the direct indictment as a fresh, objective review of the charges put an end to any lingering doubt that the appellant was continuing to face a prosecution that was abusive, vexatious, oppressive or in any way an affront to decency and fair play.

123 Finally, if after having properly undertaken this analysis, the trial judge had still been in doubt as to whether a stay of proceedings was the proper remedy for the abuse of process he found, the balancing exercise which he ultimately undertook was also erroneous. The *Tobiass* test instructs that in such circumstances, the benefits of a stay must be considered in relation to the benefits of continuing the process. An egregious act of misconduct can overtake some passing public concern, but, in other circumstances, a compelling societal interest in proceeding can tip the scales against granting a stay. By the trial judge's own assessment, the case of abuse before him was not egregious enough to warrant a global stay of all the charges. Yet this less serious example of abuse was not fully weighed against the compelling societal interests in signalling that allegations of sexual abuse of young, vulnerable girls and women will be heard, in encouraging all sexual assault complainants to trust the system and come forward, and in protecting the repute of a system

of justice that is sensitive to these allegations of crime and the difficulties faced by the complainants who make them. If the societal factors had been fully weighed, the balancing exercise would have led to the conclusion that not one of these allegations was among the clearest of cases where a stay of proceedings was appropriate.

VII. Conclusion

124 As Freeman J.A., dissenting, put it: “On the hearing of the application for the stays, it was incumbent on the appellant to establish not only that he was entitled to a duty of objectivity on the part of the Crown in making its prosecuting decision, but that the duty was infringed so seriously that only a stay of proceedings could remedy the harm.” There is no question, and the Crown readily concedes, that the principles of fairness and fundamental justice entitle an accused to a duty of objectivity exercised by the Crown in deciding to prosecute. However, even if the trial judge was correct in finding an abuse of process, when the facts at bar are correctly understood, and when the proper test for granting a stay of proceedings is applied, the appellant fails to establish that the Crown’s duty of objectivity was infringed so seriously, either by the police, Crown Potts, or the Crown’s involvement in pre-charge interviews, that only a stay can remedy the harm.

125 For these reasons I would dismiss the appeal.

The reasons of Iacobucci, Major, Binnie and Arbour JJ. were delivered by

126 BINNIE J. (dissenting) — This is an appeal from the discretionary order of Michael MacDonald A.C.J., who stayed the prosecution of nine charges of indecent assault against the appellant while permitting nine more serious charges to proceed. It was his view, after an 18-day hearing, that Crown prosecutors had manifested such a lack of

objectivity in seeking the conviction of a prominent politician “at all costs” as to taint the integrity of the administration of justice in Nova Scotia. We ought to defer to his factual conclusions, in my opinion.

127 In the two most serious situations, which were allowed to proceed, the appellant was charged with rape (and attempted rape) and unlawful confinement. In a third situation, which also went to trial, he was charged with exposing his penis to a babysitter while grabbing her hand when driving her home. These charges involved teenage girls, one barely 14 years of age, about half the appellant’s age at the time.

128 A Nova Scotia jury subsequently acquitted the appellant of all eight charges that have thus far gone to trial. One charge of indecent assault is outstanding.

129 The trial judge was favourably impressed by the opinion of the then Director of Public Prosecutions in Nova Scotia, Mr. John Pearson, when advising the RCMP in 1994 prior to the commencement of any proceedings. Mr. Pearson concluded that while the more serious charges should proceed against the appellant, the prosecution of the less serious charges (that are now 24 to 34 years old) “may be seen as ‘persecution’ in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered”. While Mr. Pearson did not say so, it appears he viewed the “lesser” incidents as matters that might have proceeded at the earlier time on summary conviction, in which case the applicable limitation period would have been six months.

The appellant claims that because of strong criticism of the Nova Scotia prosecutors' service in the case of Donald Marshall who served 11 years in jail for a crime he did not commit, and the controversies related to prosecutions arising out of the Westray mining disaster (discussed in part in *R. v. Curragh Inc.*, [1997 CanLII 381 \(SCC\)](#), [1997] 1 S.C.R. 537), the prosecutors failed in this case to perform their constitutional role as a check and balance on police power. In their determination not to be seen to be favouring the appellant, a former Premier of Nova Scotia, they leaned over backwards and denied him the "hard objective second look (at the charging decision)" ((1998), [1998 CanLII 14078 \(NS SC\)](#), 21 C.R. (5th) 366, at para. 122) to which every citizen, of whatever rank or station, is entitled. In the trial judge's view the prosecutors, far from acting as a counterbalance to the police team, effectively became part of it.

Since obtaining a favourable decision from the Nova Scotia Court of Appeal the Crown has, on its own motion, stayed two of the nine charges on which it obtained a green light to proceed.

The remaining seven charges that were the subject of the stay involve allegations of sexual assault consisting of unwanted kissing, "French kissing", groping, fondling or similar acts between 1968 and 1978 with different complainants who, at the time, came into contact with the appellant as babysitters, a legislative page, a housekeeper, a hotel dishwasher and a news reporter. The complainants' ages varied from 14 to 24 years old. The trial judge acknowledged that all charges of sexual assault are serious. Nevertheless, he concluded that the Crown's failure to act objectively in this case amounted to an abuse of process. The policy concerns raised by the then Director of Public Prosecutions were never subsequently properly addressed, as they ought to have been, in the trial judge's view.

133 As the charges themselves were the direct product of the abuse, the logical remedy was to stay their further prosecution. No lesser remedy would eliminate the root of the abuse. The trial judge found the prosecution of the additional nine charges to arise out of a fundamentally unfair procedure and to be among the “clearest of cases” calling for a stay of proceedings.

134 In my view, the trial judge instructed himself properly on the law and there is no reversible error in his application of the law to the facts. His decision ought not to have been reversed by the majority judgment of the Nova Scotia Court of Appeal (Freeman J.A. dissenting). That court, in my view, simply substituted their own divided opinion on issues that were given to the trial judge to decide. I would allow the appeal.

I. Abuse of Process

135 Everyone in this country, however prominent or obscure, is entitled to the equal protection of the law. As a politician of some prominence, the appellant was not entitled to be treated any better than other individuals, but nor should he have been treated worse. An important element of the protection of the law is that where the Crown Attorneys are involved they stand independent both of the police and of persons suspected of crimes to determine in a fair and even-handed way whether and how charges laid by the police should proceed.

136 The appellant says that the Crown cannot point to any other instances where it was sought to prosecute a comparable series of 24- to 34-year-old allegations of sexual touching, serious as those allegations are, and his counsel draws the conclusion that if the

appellant had remained in obscurity as a sometime lawyer and sports announcer, Nova Scotia would not now be expending its considerable resources to obtain his conviction. The Crown Attorney's office, in his view, is not standing up as they should to the powerful pressures of the media and an aroused public opinion.

137 I agree with the trial judge as a matter of law that the Crown prosecutors must retain objectivity in their review of charges laid by the police, or their pre-charge involvement, and retain both the substance and appearance of even-handed independence from the police investigative role. This is the Crown Attorney's "Minister of Justice" function and its high standards are amply supported in the cases: *Boucher v. The Queen*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16; *Lemay v. The King*, 1951 CanLII 27 (SCC), [1952] 1 S.C.R. 232, at p. 257, and *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, at p. 341. In *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (1990), Working Paper 62, the Law Reform Commission of Canada rightly observed that "prominent people, such as politicians . . . should be treated neither preferentially nor more harshly than others. If proceedings would not have been commenced against an ordinary individual, they ought also not to be commenced against the prominent individual" (p. 80).

138 The trial judge found as a fact that there was no independent and objective review by the Crown prosecutors in this case. The absence of the usual and proper checks and balances would, he thought, shock the conscience of the community. He cited a number of concerns that reflected this institutional failure (including premature disclosure of the investigation, improper Crown involvement in the charging decisions, laying a charge to bootstrap otherwise inadmissible similar fact evidence, and judge shopping), but his listing of the symptoms should not be mistaken for his important and central finding of fact that the appellant had been denied his constitutional right to a fair pre-trial procedure.

A. Standard of Review

139 I agree with my colleague LeBel J. that the standard of review of the trial judge's decision to grant a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* was authoritatively stated by Gonthier J. in *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367, at p. 1375, as follows: "[A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice"; see also *R. v. Carosella*, 1997 CanLII 402 (SCC), [1997] 1 S.C.R. 80, at para. 48.

140 We should also keep in mind the well-established rule mentioned by La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at p. 76:

The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way.

B. Review of Findings of Fact

141 An appellate court should give appropriate deference to the findings of fact of a trial judge, who in this case heard nine days of evidence and nine days of legal argument. The relevant cases are gathered together in *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 S.C.R. 507, where Lamer C.J. concluded, at para. 81:

It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses.

. . .

I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses

142 For the reasons that follow, it is my view that the critical findings of fact of the trial judge in this case compel the issuance of a stay of proceedings.

C. Approach of the Court of Appeal

143 I agree with Cromwell J.A. in the Nova Scotia Court of Appeal ((1999), [1999 NSCA 165 \(CanLII\)](#), 179 N.S.R. (2d) 45) that the crux of the trial judge's reasoning was that as a result of the abuse of process which the trial judge found to exist, the appellant is facing charges that otherwise would never have been laid, or if laid would not have been prosecuted. (The excessive charges, to be specific, are the nine charges which are the subject of the stay.)

144 Cromwell J.A. put it this way at para. 128:

Although the judge does not explicitly say so, it appears that he found that the respondent, as a result of the loss of objectivity, may have been facing many more charges than he would have had appropriate objectivity been retained. With respect to Count 16, the judge found that it was prosecuted for an improper motive.

145 On the other hand, with respect, I do not agree with the overall approach of the majority judgment of Cromwell J.A. when it takes the symptoms of institutional failure identified by the trial judge and (as I interpret his opinion) addresses each symptom in isolation from the others with a view to demonstrating that what was done was not necessarily and in all cases wrong. I think, with respect, this approach is incorrect. Quite apart from the trial judge's emphasis on the *cumulative* effect of the various elements of the conduct complained of, the majority opinion mistakes the symptoms for the diagnosis. The trial judge's concern was not so much at the level of the individual symptoms as it was with the failure in this case of the institutional checks and balances. The failure prevented the objective review of charges laid by the police that, because of their staleness, relatively minor nature (compared with those that did go to trial) and the potentially light sentences even if convicted, would likely have been stopped if an objective review had taken place.

146 As stated, these broader concerns found expression in the report of the then Director of Public Prosecutions for Nova Scotia, Mr. John Pearson, dated June 28, 1994. The trial judge accepted, of course, that Mr. Pearson's opinion was not binding upon the police or on subsequent prosecutors (and certainly not on the court). Still, it represented a bench mark of objectivity and even-handedness that he thought ought to have continued to guide consideration of both the charges Mr. Pearson considered and the others that followed. Mr. Pearson made the following observations about the potential charges that he recommended against proceeding with:

The Other Complainants

Concerning the other four complainants . . . it is our opinion that these allegations should not be proceeded with by way of criminal charges. We have concluded that acts contemplated by the indecent assault section of the *Criminal Code* of the day were present in these cases. However, consideration of the following public interest factors tips the scale in favour of not proceeding with these matters as criminal charges:

- i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in [the] incident [involving one complainant] where her father, upon learning of the facts, demanded an apology from the accused);
- ii) the “staleness” of the offences when compared with their gravity;
- iii) the prosecution of these charges may be seen as “persecution” in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;
- iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and
- v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding.

147 The charges that were stayed by the trial judge were described by Freeman J.A., dissenting, as *historic* counts (at para. 20):

Each count alleges a single impulsive act, an isolated incident without repetition, follow-up, or persistency on the part of the respondent. The most recent of the stayed counts was almost 20 years old at the time of the trial, and some were more than 30. None of the complainants had come forward to initiate contact with police. The director of public prosecutions who evaluated the police case before the charging decision was made, and before the Crown’s objectivity had been compromised, had recommended against proceeding with historic counts of this nature.

148 The conclusion that well-informed people may reasonably take from the continued prosecution of what Mr. Pearson described as “minor” allegations 24 to 34 years after the events are said to have taken place is that the appellant is being pursued not so much for what he has done as for who he is. Such a perception undermines public confidence in the impartiality and integrity of the criminal justice system, in my opinion.

D. *Law Governing Abuse of Process*

149 There is no doubt that the prosecutorial misconduct found by the trial judge would not prevent the accused from receiving a fair trial on all charges. The appellant's complaints in that regard were all properly rejected.

150 The issues relevant to the "abuse of process" claim in this case are:

- (i) the extent to which an objective and even-handed Crown Attorney is essential to the checks and balances at the stages of the criminal justice system in which he or she is involved, and
- (ii) whether preferring a direct indictment and the holding of a subsequent fair trial cures the omission of an essential check and balance in the laying of the charges.

1. The Importance of Checks and Balances

151 It is clear that Crown Attorneys perform an essential "Minister of Justice" role at all stages of their work. Their role in considering or carrying forward a prosecution is of the highest importance for the integrity of our criminal justice system, and was perhaps most famously described by Rand J. in *Boucher, supra*, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to

its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Many other statements of the highest authority can be found to the same effect. In *Stinchcombe*, *supra*, Sopinka J. for the Court stated as follows, at p. 341:

The tradition of Crown counsel in this country in carrying out their role as “ministers of justice” and not as adversaries has generally been very high.

152 In *R. v. Bain*, [1992 CanLII 111 \(SCC\)](#), [1992] 1 S.C.R. 91, Gonthier J. for himself, McLachlin and Iacobucci JJ., dissenting on other grounds, stated at p. 118:

The single-minded pursuit of convictions cannot be compatible with the responsibilities of Crown prosecutors.

153 In *Nelles v. Ontario*, [1989 CanLII 77 \(SCC\)](#), [1989] 2 S.C.R. 170, Lamer J. (as he then was) for himself, Dickson C.J. and Wilson J., stated at p. 191:

Traditionally the Crown Attorney has been described as a “minister of justice” and “ought to regard himself as part of the Court rather than as an advocate”.

154 See also *Lemay*, *supra*, *per* Cartwright J., dissenting on other grounds, at p. 257: “[T]he sole object of the proceedings is to make certain that justice should be done”.

155 The “Minister of Justice” responsibility is not confined to the courtroom and attaches to the Crown Attorney in all dealings in relation to an accused person whether before or after charges are laid. It is a responsibility “that should be conducted without feeling or animus on the part of the prosecution” (*R. v. Chamandy* (1934), 1934 CanLII 130 (ON CA), 61 C.C.C. 224 (Ont. C.A.), *per* Riddell J.A., at p. 227).

156 These statements suggest at least three related but somewhat distinct components to the “Minister of Justice” concept. The first is objectivity, that is to say, the duty to deal dispassionately with the facts as they are, uncoloured by subjective emotions or prejudices. The second is independence from other interests that may have a bearing on the prosecution, including the police and the defence. The third, related to the first, is lack of animus – either negative or positive – towards the suspect or accused. The Crown Attorney is expected to act in an even-handed way.

157 In *R. v. G.D.B.*, [2000] 1 S.C.R. 520, 2000 SCC 22, at para. 24, we held that “the right to effective assistance of counsel” in the criminal justice system reflects a principle of fundamental justice within the meaning of s. 7 of the *Charter*. The duty of a Crown Attorney to respect his or her “Minister of Justice” obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometimes overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system and easily satisfies the criteria first established in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 513:

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

158 These requirements set a high standard. The courts rightly presume, such are the high traditions of the prosecutorial service in this country, that they are met in the thousands of decisions taken every day that so vitally impact the lives of those who find themselves in trouble – rightly or wrongly – with the law. Unfounded or trivial allegations will be given short shrift. In this case, however, the trial judge found that the departure from the expected standard was neither unfounded nor trivial. The extent of the departure was deeply troubling. The trial judge has much experience in the practicalities of criminal prosecutions. We are thus confronted in this case with a very exceptional set of facts.

159 The police investigate. Their task is to assemble evidence and, assessing it as dispassionately as they can, determine whether in their view it provides reasonable and probable grounds to lay charges. The prosecutors provide the initial checks and balances to the power of the police. As the late Mr. Justice Arthur Martin observed in his *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) ("Martin Report"), at p. 117, "[a]s ministers of justice, their ultimate task is to see that the public interest is served, in so far as it can be, through the use, or non-use, of the criminal courts" (emphasis added). Further (at pp. 117-18):

Discharging these responsibilities, therefore, inevitably requires Crown counsel to take into account many factors, discussed above, that may not necessarily have to be considered by even the most conscientious and responsible police officer preparing to swear an information charging someone with a criminal offence.

160 The Crown prosecutor thus stands as a buffer between the police and the citizen. As the Martin Report emphasized, at p. 39:

. . . separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly. [Emphasis added.]

161 The appellant was as much entitled to this “level of independent review” as any other suspect. The trial judge concluded that the distinct roles of the Crown Attorney and the police became blurred and “homogenized”. In the result, the appellant was deprived of the institutional protection to which he was, and is, entitled. This is how the trial judge put this crucial finding of fact (at para. 122):

The Crown states that it was not involved in the investigation and I accept this. However it is clear to me that the Crown was integrally immersed in the decision-making process as it applied to the laying of charges. In so doing it became heavily involved with interviewing potential complainants. Unlike Mr. Pearson, they did not critically review a police report. Instead they collaborated fully with the police to create what in essence became a joint charging decision. Cooperation led to consensus, but only at the expense of the process which became homogenized. Thus the applicant was denied that hard objective second look (at the charging decision) which is so fundamental to the role of the Crown. [Emphasis added.]

162 These are findings of fact for which there was ample evidence.

163 No reason has been shown, in my view, for any interference in these findings of fact either by the Nova Scotia Court of Appeal or by this Court.

2. The “Residual Category” of the Law on Abuse of Process

164 The jurisprudence is clear that a fair trial cannot always cure an earlier default that taints the integrity of the justice system. In *R. v. O’Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, it was said at para. 73 that there is a

residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

165 The common law had developed a doctrine of abuse of process long before the *Charter*. In Canada it is sometimes traced to *In re Sproule* (1886), 1886 CanLII 51 (SCC), 12 S.C.R. 140. A rationale of the common law doctrine was adopted in *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128, in terms that are pertinent here, at p. 136:

Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.) at p. 1354:

Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

E. Prosecutorial Discretion

166 The trial judge in this case was careful not to understate or diminish the broad scope traditionally and properly afforded to prosecutorial discretion. Courts are very slow to second-guess the exercise of that discretion and do so only in narrow circumstances. In *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, for example, the Court noted that a system which did not confer a broad discretion on law enforcement and prosecutorial authorities would be unworkable, *per* La Forest J., at p. 410:

Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

See also: *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601; *Smythe v. The Queen*, 1971 CanLII 831 (SCC), [1971] S.C.R. 680, at p. 686; *R. v. T. (V.)*, 1992 CanLII 88 (SCC), [1992] 1 S.C.R. 749; and *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 348.

167 Still, the corollary to these extensive discretionary powers is that they must be exercised with objectivity and dispassion. This principle has found its way into the Canadian Bar Association's *Code of Professional Conduct* (1988); see chapter IX, "The Lawyer as Advocate", s. 9 (Duties of Prosecutor):

The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.

168 Because the exercise of prosecutorial discretion is, within broad limits, effectively non-reviewable by the courts, it is all the more imperative that the discretion be exercised in a fair and objective way. Where objectivity is shown to be lacking, corrective action may be necessary (as here) to protect what *O'Connor* referred to as “the integrity” of the criminal justice system.

169 Wilson J., in *R. v. Keyowski*, [1988 CanLII 74 \(SCC\)](#), [1988] 1 S.C.R. 657, developed the notion that abuse of process in this regard does *not* require a demonstration of prosecutorial bad faith. She wrote that courts should look at all relevant factors. “To define ‘oppressive’ as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine. . . . Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account . . .” (p. 659).

170 In the present case, the overriding concern was the failure of the proper and usual institutional checks and balances.

171 The fact that *O'Connor* brought together the two streams of jurisprudence relating to abuse of power – the common law with its emphasis on the integrity of the criminal justice system and the [Charter](#) with its emphasis on individual rights – did not diminish judicial preoccupation with the integrity of the process. It was fairly observed in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997 CanLII 322 \(SCC\)](#), [1997] 3 S.C.R. 391, that cases of abuse of process that do *not* involve fair trial rights or

other individual rights and freedoms can be expected to be few in number. This is because despite the fact that errors are made, the institutional *integrity* of our system of justice is rarely called into question successfully.

172 In my view, the Crown did not demonstrate that in finding an abuse of process in this case the trial judge either misdirected himself or that “his decision is so clearly wrong as to amount to an injustice” (*Elsom, supra*, at p. 1375).

173 I agree with Freeman J.A. in dissent when he said, at para. 5, that:

The prominence of the accused and the high level of media interest in the case called for a disciplined and dispassionate approach by the Crown to ensure a perception that Mr. Regan was treated as even-handedly as any citizen has a right to expect. Instead the trial judge identified a number of lapses of judgment indicative of over-zealousness by the police and the Crown, three of which figured in his decision to stay what were considered to be lesser charges to preserve the reputation of the administration of justice.

174 As Freeman J.A. points out, the specific lapses were considered “indicative” (not exhaustive) of over-zealousness.

F. *Addressing the Symptoms*

175 Much of the reasons for judgment of the majority in the Nova Scotia Court of Appeal is devoted to pointing out what the trial judge did *not* find, or alleged inconsistencies in what he *did* find. In my view, with respect, the reasons of the trial judge

read as a whole by a mind willing to understand are consistent and coherent. As stated, I disagree with the effort to divide his reasons into airtight compartments and then isolate and attack the compartments one by one. Nevertheless, I proceed with a consideration of the symptoms listed by the trial judge and addressed by the Court of Appeal in the order in which they arose in the earlier judgments.

1. Police Misconduct

176 The trial judge rejected almost all of the appellant's allegations of misconduct against the police, including the allegedly "premature" formation of a task force to investigate rumours and journalistic speculation about the appellant's behaviour, allegedly questionable investigative techniques, missing evidence and arrest procedures. He was nevertheless "troubled" by the "serious error in judgment" (para. 87) by the police in confirming that the appellant was under investigation before any of the complainants had been interviewed let alone charges laid. This was contrary to the express direction of the provincial Solicitor General's Department dated February 6, 1990:

3. No police official shall disclose the fact of a police investigation, other than on a need-to-know basis within the Police Department, so as to maintain confidentiality and secrecy respecting the identity of a person who is the subject of an investigation.

The disclosure was not a slip. The trial judge found that the police officer checked with his superior officer before making the disclosure and issued the disclosure in the form of a press release. The effect, as pointed out by Freeman J.A., was that "[t]he story made national headlines some 17 months before charges were laid" (para. 24).

177 The majority judgment of the Nova Scotia Court of Appeal considered this event to be largely irrelevant to the issues under appeal because it relates to the police, not the prosecutors. I disagree. What this incident should have indicated to the Crown Attorney's office was that the police perceived themselves to be under a great deal of public pressure and that a "hard objective second look" at any charges ultimately laid would be of the highest importance to the fair and even-handed administration of justice. It is in such situations that the system of checks and balances is most severely tested.

2. Conduct of the Crown Prosecutors

178 There were three aspects, in particular, of the conduct of the prosecutors that indicated to the trial judge that the system of checks and balances did not operate in this case.

(a) *Judge Shopping*

179 The first aspect was the apparent willingness of the Senior Crown Attorney on the case, Ms. Susan Potts, to manipulate the court system to advantage the prosecution. This emerged in the RCMP minute of a meeting on July 15, 1994 between the Crown Attorney and RCMP investigators where she advocated judge shopping, i.e., using the Crown's scheduling privilege to get the case before a judge of its own choosing, a practice which undermines both the reality and the appearance of the impartial administration of justice. The RCMP minute reads:

There was some discussion in regards to where charges are laid and an appearance by Regan in court. [Crown counsel] Potts said that Judge Randall is sitting in Sept and it

is not advisable to bring the matter before him – political appointment (Liberals). Oct may be the appropriate month. Potts is to keep monitoring the court docket to see who is sitting when and what would be in our best interest. [Emphasis added.]

180 The trial judge considered the note important because of what it revealed, namely that the Senior Crown Attorney with day-to-day responsibilities for the case had identified herself with the police point of view, and was “attempting to secure a conviction at all costs”. The trial judge wrote (at para. 101):

This entry represents a blatant attempt at judge shopping, pure and simple. It is offensive and most troubling. The reference to avoiding a particular judge is one distressing thing, the flagrant attempt at “*monitoring the court docket to see who is sitting when and what would be in our best interest*” [emphasis added by MacDonald A.C.J.] is even more disturbing. This gives the appearance of a Crown Attorney who is attempting to secure a conviction at all costs. [Emphasis added.]

181 The Nova Scotia Court of Appeal pointed out that eventually Ms. Potts left the case in 1996. This is true, but the trial judge was concerned about the absence of an objective view at the time the charges were laid, at which point (for example, the critical meeting with the RCMP on January 17, 1995) Ms. Potts was very much the heart and sinews of the prosecution team. The Crown says that the “judge shopping” comment was neither repeated nor acted on. We do not know this. The appellant attempted to subpoena Ms. Potts to testify at the abuse of process hearing but it seems that her appearance was successfully blocked by Crown objections.

(b) *Joining Forces with the Police*

182 A few years before the investigation in this case, the prosecutorial branch in Nova Scotia was severely shaken by the findings of the *Royal Commission on the Donald Marshall, Jr., Prosecution*, vol. 1, *Findings and Recommendations* (1989) (the “Marshall Report”). In the course of inquiring into the wrongful conviction of Mr. Marshall, the Royal Commission found instances of political interference in charging decisions and differential treatment as between prominent citizens and the disadvantaged. The Marshall Report therefore recommended that the problems historically experienced in Nova Scotia be addressed by maintaining a “distinct line” between the police and the Crown law office (at p. 232):

We recognize that cooperative and effective consultation between the police and the Crown is also essential to the proper administration of justice. But under our system, the policing function – that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice. [Emphasis added.]

183 The accepted practice in Nova Scotia in the 1994-95 time period (i.e., the “local custom”) was set out in a report submitted to the Minister of Justice for Nova Scotia concerning the status of the Public Prosecution Service in 1994, in which Professors Ghiz and Archibald of Dalhousie Law School stated as follows:

In some Canadian jurisdictions, and in Nova Scotia prior to the Marshall Inquiry, prosecutors claimed the authority to direct the police in their general investigative duties (as well prior to as after the laying of charges), and sometimes purported to have the authority to order the police not to lay charges in specific cases. Pursuant to recommendations 36 and 37 of the Marshall Inquiry, as adopted by the Attorney General and the then Solicitor General, there is now a clearer understanding of the importance of separating the policing and prosecution functions. Fundamentally, one might say the police have the right to investigate and lay charges unimpeded by Crown Prosecutors, while Prosecutors have the right to stop charges once laid. However, there is often a need for both pre-charge and post-charge consultation since the normal scenario is a cooperative rather than antagonistic relationship between Crowns and

police, both of whom share common goals in the administration of criminal justice. The nature of this advice sought by police and given by Crowns is usually limited as to the appropriateness of a specific charge under the *Criminal Code* or the interpretation of a *Criminal Code* section, but the advice may also extend to whether or not certain evidence that has been gathered would be sufficient to sustain a case in court. [Emphasis in original.]

(J. A. Ghiz and B. P. Archibald, *Independence, Accountability and Management in the Nova Scotia Public Prosecution Service: A Review and Evaluation* (1994), at pp. 41-42)

184 In my view, the Nova Scotia Court of Appeal did not meet the trial judge's point when it attempted to show that pre-charge involvement of Crown Attorneys with the police varies somewhat from province to province and cannot be regarded as in all circumstances and for all purposes objectionable. I agree that the test is a principled test (i.e., have objectivity and independence been maintained?) rather than mechanical (e.g., did the interview take place pre-charge or post-charge?), and that in principle the charging decision does not represent a "bright line" prior to which the involvement of a Crown Attorney is presumptively suspect.

185 Moreover, I agree with my colleague LeBel J., at para. 83, that:

. . . pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings. [Emphasis in original.]

186 The trial judge's concern was a principled concern. He deplored what he found to be the absence of independence and objectivity on the part of Ms. Potts and her colleagues in the Crown office working on this case. Those who engaged in the pre-charge

interviews had acquired, for whatever reason, tunnel vision under the pressures of a high profile investigation of a politically prominent individual.

187 The trial judge was not opposed to the pre-charge involvement of the Crown. He had no trouble, for example, with the pre-charge involvement of Mr. Pearson, the Director of Public Prosecutions. He stated his concern more narrowly (at para. 121):

The crucial issue before me is a more narrow one. It involves firstly, the Crown's determination to interview complainants pre-charge and secondly, the impact of that process on the number and types of charges that were ultimately laid. [Emphasis added.]

188 Some of the trial judge's observations on the dangers of interviewing complainants pre-charge may have gone beyond the "narrow" issue he had identified for himself. I do not, for example, think he should be taken to say that pre-charge interviews *necessarily* give rise to a loss of objectivity. Not only did he endorse pre-charge interviews for certain limited purposes but he was dealing with a loss of objectivity that pre-dated even the initial Crown interviews. Ms. Potts made the judge-shopping comment on July 15, 1994, but she did not begin her interviews of the complainants until over four months later, on November 17, 1994.

189 Taking his reasons as a whole, the trial judge appeared to accept (as I do) the correctness of the evidence of Dr. Philip Stenning, which the trial judge summarized as follows (at paras. 115-16):

Dr. Philip Stenning was arguably the Crown's most qualified expert. He has dedicated his entire academic career to studying the role of the Crown and has

published extensively on this topic. Like Mr. Gover, he feels it would be an oversimplification to decree that a prosecutor should never interview pre-charge. Everything must be placed in context he feels, and local customs must be acknowledged and respected. Despite what might be stated in the *Martin* and *Marshall Reports*, he feels there is still room for the Crown to interview pre-charge in appropriate circumstances.

. . . [He] does concede that such occasions would be rare.

190 The specific problems here, therefore, were breach of what Dr. Stenning termed a “local custom” of maintaining a distinct division of responsibilities that was perhaps more emphasized in Nova Scotia than elsewhere due to well-publicized problems with the Crown Attorney’s office over the preceding ten years or so, and the problematic motive for the breach. As to the former, the trial judge’s concern was not with cross-Canada variations but whether or not the Crown Attorneys in Nova Scotia observed the local rules that had been put in place following the Marshall Report. Their willingness to ignore the “distinct line” between their role and that of the police, accepted by Nova Scotia following the Marshall Report, showed a zeal for the laying of more charges that “homogenized” what were supposed to be distinct and separate functions. Instead of the police laying charges and the Crown providing a “hard objective second look”, the Crown had subordinated itself and become a supporting actor in the initial charging decision, which the trial judge described as a “joint . . . decision”. As to motive, the trial judge recognized several legitimate reasons to interview a complainant pre-charge, for example, to prevent an accused “from going through the embarrassment (humiliation) of being charged only to later have the charges dropped or stayed” (para. 117), rapport building to encourage informed willingness to participate, or assessing victim credibility. He said (at para. 118):

The Crown in the case at bar has given its reasons for interviewing precharge. They include “rapport building” and assessing victim credibility. Yet, despite these stated intentions, it is clear according to one R.C.M.P. file reviewer that the purpose for

at least some of these pre-charge Crown interviews was to have reluctant complainants change their minds and come forward. [Emphasis added.]

191 The purpose here, apparently, was not to “build rapport” with complainants who were worried about the court process, which would be a perfectly acceptable reason for a pre-charge interview. The trial judge saw the Crown involvement in “changing their minds” as simply another aspect of the Crown’s joining the police team rather than exercising a “level of independent review”. In this respect, he quoted (at para. 118) a contemporaneous RCMP internal note dated January 17, 1995, which recorded:

It is now the investigators and the Crown’s belief that if these persons could be re-interviewed with both the Crown Prosecutor and police investigator present there would be a greater chance of them changing their minds. [Emphasis added.]

This was to further the police strategy of a “broadly based prosecution”, as it was described by counsel for the Crown in this Court. In my view, the trial judge was correct in his criticism. If the charges were examined and approved one by one, the Crown might wind up with a “broadly based prosecution”, but the Crown ought not to start out with the objective of a broadly based prosecution and then *afterwards* look to approve individual charges to make it happen. This is what the trial judge criticized (at para. 123):

The Crown’s role in response is to objectively assess the case globally. As ministers of justice they are to dispassionately protect the process which includes protecting the rights of the applicant. In this case the Crown did not review the investigators’ charging decision. They became part of it. They interviewed all potential complainants. Their involvement became subjective by nature. Like the police, it is understandable that they would have strong feelings. Not surprisingly and as Mr. Reid confirmed, they eventually came to see the case the same way the police saw it. That

would be fine if their review was totally objective; as was Mr. Pearson's. It becomes problematic when what was to be a review becomes a joint endeavour and a joint decision. That I believe is what happened in the case at bar.

192 On this point, Freeman J.A., dissenting, made the following comment, with which I agree (at para. 67):

While expert opinions varied as to the rare circumstances in which pre-charge interviews may be engaged in by the Crown without imperiling Crown objectivity, there was agreement that Crown objectivity itself was an essential component of Canadian justice. If such a value exists then it must have a home within the system, and there must be remedies for lapses.

In my opinion, such a value exists and its home is in [s. 7](#) of the *Charter*.

193 The Crown's effort to lay the responsibility for all this on the head of Ms. Susan Potts is unconvincing. As mentioned, when the defence attempted to subpoena Ms. Potts to testify about the extent and depth of alleged loss of objectivity among the prosecutors, the Crown resisted and she never had the opportunity to explain her conduct to the court. I do not say the Crown's objections to her testimony were either unfounded or unreasonable. I say only that the Crown cannot draw a self-serving conclusion from this unfortunate situation when the critical evidence went unheard because of the Crown's objection.

(c) *Count 16*

194 This count related to a 24-year-old news reporter who says that in 1976 she was forcibly fondled by the appellant in a hotel room while being pushed onto a bed. She was unwilling to become involved as a complainant. The police wanted count 16 before the court because it would enable them to lead “similar fact” evidence of a more significant incident in Alberta in 1990. The police apparently thought this 1990 incident would add credibility to their “broadly based prosecution” strategy by making the series of charges appear less stale and more up to date. This strategy was reflected in Staff Sergeant Fraser’s internal RCMP report of December 9, 1994:

The investigation surfaced many victims and charges to be laid should reflect the whole picture. The report, dated 94-06-28, from the Public Prosecution Service [the Pearson opinion] recommended that charges be laid in respect to four victims. This in effect shows that the subject was active in his early years however the investigation surfaced evidence to support the fact that the offenses continued throughout the period 1960-1990. For this reason, it was requested by C/Supt. FALKINGHAM that Crown review the evidence and consider laying charges in all instances so that the gravity of the subject’s actions be properly presented to give the full picture.

195 The obstacle to this “full picture” strategy is that the only complainant more recent than 1978 was the Alberta allegation that could not be prosecuted in Nova Scotia. The Crown therefore decided to prosecute count 16 as a gateway to introduce the Alberta evidence, thereby extending by 12 years “the full picture”.

196 The majority judgment of the Nova Scotia Court of Appeal considered count 16 to be valid in its own right, and the trial judge’s condemnation of the police strategy to be misconceived. Cromwell J.A. writes, at para. 140:

There is nothing inherently objectionable in the Crown considering questions of the admissibility of evidence and their impact on the prospects of conviction when deciding to proceed with charges.

I agree, but that is not the point taken by the trial judge. His concern with count 16, as was his concern with the judge-shopping comment and the pre-charge interviews, was the Crown's apparent inability or unwillingness to assert its independence from the police strategies. On count 16 the trial judge said (at para. 158):

Yet the Crown's goal as I see it was to have the jury hear and (presumably act upon) the complaint of A.R.S., a similar fact witness. Similar fact evidence is only admissible if relevant to proving the listed charge. You cannot lay a charge in order to get similar fact evidence in. Such a concept would be totally contrary to the very essence of this exclusionary rule.

197 In my view, the trial judge's concern was quite appropriate. Similar fact evidence is generally inadmissible but will be permitted where its probative value exceeds its prejudicial effect: *R. v. Sweitzer*, [1982 CanLII 23 \(SCC\)](#), [1982] 1 S.C.R. 949, at p. 952, and *R. v. B. (C.R.)*, [1990 CanLII 142 \(SCC\)](#), [1990] 1 S.C.R. 717, at p. 735. The trial judge concluded that count 16 was to be used as a vehicle to get otherwise inadmissible evidence before the jury to extend and perhaps distort "the full picture". Whether or not a conviction was entered on count 16 was, according to the trial judge's finding of fact, of secondary importance to the police and the Crown. This was a reversal of the natural and proper order of considerations, and showed to his satisfaction that over-zealousness by the Crown was still operating more than a year after Ms. Potts left the case.

(d) *Preferring the Direct Indictment*

198 The majority decision of the Nova Scotia Court of Appeal concluded that even if proper procedures were not followed in the laying of the charges in 1995 (and the subsequently added charges), the omission was cured by the preferral of the direct indictment on April 10, 1997. In this respect, Cromwell J.A. in a number of passages interprets the trial judge’s decision as saying the “discretion to prefer a direct indictment, some two years after the initial charges were laid, was properly exercised” (para. 105 (emphasis added); see also paras. 143 and 173). The “cleansing effect” of the direct indictment is endorsed by my colleague LeBel J. at para. 109.

199 I think the so-called “cleansing effect” of a direct indictment is overstated. While s. 577(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, requires “the personal consent in writing of the Attorney General or Deputy Attorney General”, the purpose of this provision is to engage the responsibility of senior officials, not necessarily to compel their sustained and undivided attention to the nuts and bolts of a prosecution. Under our notions of ministerial responsibility, much is done on the basis of the signature of a Minister or Deputy Minister that he or she could not possibly have reviewed in any detail. They rely (and it is expected that they rely) on advice from their officials. In this case, the officials were the very people whose conduct the appellant complains about.

200 The extracts of the record before us, which are restricted to factual matters relevant to the legal issues, exceed 1200 pages in length. I do not say that the Attorney General or his Deputy did not master the file, but I would require more evidence than we have been given before accepting as realistic the conclusion that they did so to the point of “cleansing” the failures in the system of checks and balances that had occurred earlier. This is particularly so when the real explanation for the direct indictment is perfectly clear. The direct indictment was recommended to the Attorney General because the preliminary hearing had run the better part of a year and showed no signs of an early conclusion.

201 In any event, I view the trial judge's finding on this point somewhat differently than did the Nova Scotia Court of Appeal majority. What the trial judge said, in fact (at para. 131), is that he was

not convinced that the Crown acted *mala fides* in its decision. The preliminary inquiry was very lengthy. If the Crown was so ill-motivated, it could have preferred the direct indictment at the outset or at least sooner than it did.

202 A finding of *mala fides* or bad faith is not, of course, a condition precedent to finding an abuse of process: *Keyowski, supra*, at p. 659. The trial judge found that the Crown had not acted in bad faith to shut down a preliminary inquiry that had already run from April 9, 1996 to February 25, 1997. His comment about *mala fides* did not address and was not intended to address the appellant's much broader complaint of a failure by the Crown, for whatever reason, to review in an objective and even-handed way the appropriateness of the "minor" charges that Mr. Pearson had earlier rejected, and charges in the same category laid subsequently, in light of all the factors touching on the public interest. As to the direct indictment issue, I agree with Freeman J.A. in dissent (at para. 15):

Whether the decision was fixable at that stage [i.e., of the direct indictment] is not the issue. Justice MacDonald did not find it had been fixed.

203 In light of the trial judge's conclusion that the charging process was fundamentally flawed, and the fact that he eventually entered a stay against nine of the lesser charges, it is apparent that while he did not regard the direct indictment that cut short

the preliminary inquiry as tainted with *mala fides* on that account, he nevertheless concluded that in limited respects it was inappropriate. He specifically so found in relation to count 16, which was not laid until the direct indictment, i.e., long after Ms. Potts had left the prosecution team.

204 The direct indictment in this case was not a cleanser. At best it was a missed opportunity.

205 I would not want to leave this branch of the case without repeating the apposite observations of McLachlin J. (as she then was) and Major J. in *Curragh, supra*. Although written in dissent, they are sentiments with which no member of the Court would disagree (at para. 120):

[I]t is especially where pursuit of truth is righteous that we must guard against overreaching on the part of those charged with the authority to investigate and prosecute crimes. We cannot be tolerant of abusive conduct and dispose of due process, however serious the crimes charged. High profile trials, by their nature, attract strong public emotions. In our society the Crown is charged with the duty to ensure that every accused person is treated with fairness. . . . When the Crown allows its actions to be influenced by public pressure the essential fairness and legitimacy of our system is lost. We sink to the level of a mob looking for a tree.

206 I would uphold in this case the trial judge's conclusion that the nine charges that he stayed represented, in all the circumstances, an abuse of process.

II. Stay of Proceedings

207 Demonstration of an abuse of process does not, of course, lead to an automatic stay of proceedings.

208 This is particularly true where, as here, the trial judge concluded that notwithstanding the passage of time and the difficulty of getting to the bottom of momentary events that happened 24 to 34 years ago, the appellant's fair trial interests have not been prejudiced by the conduct found to amount to an abuse of process.

209 The inherent power of a superior court to stay proceedings that are an abuse of power was recognized in Canada in the nineteenth century, called into question in *R. v. Osborn*, [1970 CanLII 22 \(SCC\)](#), [1971] S.C.R. 184, and *Rourke v. The Queen*, [1977 CanLII 191 \(SCC\)](#), [1978] 1 S.C.R. 1021, but affirmed again with *Jewitt*, *supra*. In *Rourke*, Pigeon J., for the majority, concluded, consistent with earlier statements in *Osborn*, that "I cannot admit of any general discretionary power in courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive" (p. 1043), while also stating that "[i]f there is the power", it "should only be exercised in the most exceptional circumstances" (p. 1044).

210 The controversy over whether the discretion to stay for abuse of process was an option that had been completely foreclosed in Canada remained in doubt until *Jewitt*, *supra*, where Dickson C.J., for a unanimous Court, affirmed the availability of a stay of proceedings to remedy an abuse of process and *Osborn* and *Rourke* were read narrowly. This Court affirmed the existence of the residual discretion of a trial judge to stay proceedings where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to

prevent the abuse of a court's process through oppressive or vexatious proceedings" (pp. 136-37). Further, he added, the power can be exercised only in the "clearest of cases".

211 In *Jewitt*, Dickson C.J. alluded briefly to the concern about the defendant receiving a procedural windfall of sorts. "The stay of proceedings for abuse of process is given as a substitute for an acquittal because, while on the merits the accused may not deserve an acquittal, the Crown by its abuse of process is disentitled to a conviction" (p. 148). That concern was more fully developed, along with an elaboration of the abuse of process doctrine, in *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667, by L'Heureux-Dubé J. for the majority:

Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry on with the prosecution of the charge. The prosecution is set aside, not on the merits . . . , but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society". . . . It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

See also *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, *per* McLachlin J., at pp. 1007-8.

212 The residual category of cases where a stay of proceedings is available notwithstanding the fact the abuse of process found to exist does not affect the fairness of

the trial (or impair the more specific procedural rights in the *Charter*) was further elaborated in *O'Connor, supra, per L'Heureux-Dubé J.*, at para. 73:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

213 In *Tobiass, supra*, at para. 89, the Court characterizes the residual category as a “small one” and observes that fairness of the trial will occupy the “vast majority” of the cases. I do not treat that observation as deprecating the importance of the residual category. As previously suggested, it merely reflects the fact that on the whole our system of criminal justice functions justly. The cases where a stay of proceedings is required on this account are rare, not because of judicial *fiat* to limit their numbers but because the system works. The institutional checks and balances are observed.

214 *Tobiass* notes that a stay of proceedings is not intended to redress a past wrong but to prevent the perpetuation of a wrong that will continue to trouble the parties and community in the future. The mere fact of “shabby treatment” of an individual in the past does not satisfy the criterion (at para. 96):

A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then

probably the best way to describe a stay is as a specific deterrent – a remedy aimed at preventing the perpetuation or aggravation of a particular abuse.

215 Accordingly, in a unanimous pronouncement on the subject, this Court in *Tobiass* laid down a two-part analysis for considering the grant of a stay of proceedings (at para. 90):

If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.

To which a potential third step was added at para. 92:

After considering these two requirements, the court may still find it necessary to consider a third factor. As L’Heureux-Dubé J. has written, “where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings”. . . . We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits.

216 In my view, with respect, the criteria laid down in these cases, and recited by the trial judge in his reasons for judgment, are amply fulfilled by the findings of fact in this case.

217 The absence of the proper checks and balances between police and prosecutor in this case led to an increase in the number of charges laid against the appellant. The trial judge's reasons can be read in no other way. Cromwell J.A. noted, at paras. 168-69, that the trial judge's

reasons are consistent with a conclusion that the respondent may have been facing more charges than he would have been had Crown objectivity been retained at "the charging stage". In other words, had objectivity been retained, some of the charges laid by the police might have been stayed by the Crown. If this is correct, the loss of objectivity found by the judge could be taken to have ongoing effects in the sense that it may have put the prosecution on a fundamentally different path than it would otherwise have followed. The judge sought to remedy the loss of objectivity by staying counts which he thought Mr. Pearson would not have proceeded with had he remained in office.

In my respectful view, this analysis overlooks the proper preferring of the direct indictment.

218 I have already discussed my disagreement with Cromwell J.A.'s interpretation of the trial judge's treatment of the direct indictment.

219 It is clear to me, applying the first stage of the *Tobiass* test, that the trial judge concluded that the Crown's loss of objectivity and improper motive will be "manifested, perpetuated or aggravated" through the continued prosecution of the charges to which these abuses of process gave rise (*Tobiass*, at para. 90). If the trial itself would not have occurred but for the abusive conduct, then the trial itself necessarily perpetuates the abuse.

220 Secondly, the only way to halt this continued prejudice to the appellant is by bringing a halt to the charges going forward to trial, i.e., a stay of proceedings.

221 The trial judge’s analysis of these first two elements in the *Tobiass* analysis draws support, I think, from the scholarly article that initially formulated these elements of the test (see *O’Connor, supra*, at para. 75):

Where the abuse has caused no prejudice to the fairness of the trial itself, a stay will be appropriate where:

the abuse is in the very fact that a charge was laid, and the abuse in question or the prejudice it has caused is so significant relative to the seriousness of the offence that it is more important to the interests of justice that the court redress the abuse, than try the offence on its merits [Emphasis added.]

(D. M. Paciocco, “The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept” (1991), 15 *Crim. L.J.* 315, at p. 350)

222 In this case, “the seriousness” of the offences was characterized as relatively “minor” and the importance which may be attached to their prosecution therefore does not outweigh the prejudice in this case to the integrity of the administration of justice.

223 The majority opinion in the Nova Scotia Court of Appeal largely rested on the view that the trial judge had failed to consider whether the continuation of the prosecution would “manifest, perpetuate or aggravate the prejudice” (para. 101). The trial judge cited that specific aspect of the test at para. 56 of his reasons and in my opinion he applied it and, given his findings of fact, he came to the right conclusion.

224 The *Tobiass* case, I note parenthetically, was decided on very different facts. Neither the original charges nor the conduct of the prosecutors assigned to the case were criticized. A meeting took place between the Chief Justice of the Federal Court and a senior member of the Justice Department (neither of whom had any direct role in *Tobiass*

or its companion cases). At the meeting, *Tobiass* and its companion cases, amongst other cases of alleged war crimes, were referred to in terms of alleged scheduling delays. Defence counsel were not made aware of the meeting until after it had occurred. This Court found a serious breach of fairness had occurred, but the prejudice could be eliminated by ensuring that the participants in the meeting at issue had no further participation whatsoever in the case. No such limited remedy is possible in this case. So long as the charges stand, the prejudice will persist.

225 Finally, at the third stage of the *Tobiass* test, the court is to consider (if it still has any uncertainty) the balance between any harm to the justice system that would result from taking the charges to trial as against the public interest in having these charges disposed of on their merits. As mentioned, the balancing process was described by L'Heureux-Dubé J. in *Conway, supra*, at p. 1667:

. . . where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

226 This was expressly noted by the trial judge in this case, who said: “This balancing act, so common to almost everything we do as judges, will play a significant role in my analysis in the case at bar” (para. 58).

227 The key to the trial judge’s “balance” was his view that despite the existence of allegations which, if believed, would constitute the offences charged, the group of charges stayed were less serious than those he allowed to proceed, and had never been objectively reviewed in light of what the Martin Report described as factors “that may not

necessarily have to be considered by even the most conscientious and responsible police officer” (p. 118).

228 Society, like the Crown Attorney, has no specific interest in “winning or losing” but it does have an interest in placing the relevant facts before a court for determination on their merits. This factor militates against a stay, but in this case it is a factor that is overwhelmed by competing considerations.

229 The trial judge was clearly of the same view as the former Director of Public Prosecutions, Mr. John Pearson, who said that while on the one hand “acts contemplated by the indecent assault section of the *Criminal Code* of the day were present in these cases”, nevertheless, on the other side of the ledger, “consideration of the following public interest factors tips the scale in favour of not proceeding” (emphasis added) with the “minor” charges. For ease of reference, I repeat Mr. Pearson’s public interest factors which the trial judge adopted:

- i) the allegations are minor in nature, especially when placed in the context of societal values at the time (this fact is best illustrated in the [C.E.R.] incident where her father, upon learning of the facts, demanded an apology from the accused);
- ii) the “staleness” of the offences when compared with their gravity;
- iii) the prosecution of these charges may be seen as “persecution” in light of the facts, the staleness of the offences and the relatively insignificant sentence, which could be anticipated if convictions were entered;
- iv) other alternatives are available to sanction this behaviour, i.e. the prosecution of the more serious charges; and
- v) the maintenance of public confidence in the administration of justice can be sustained without these four charges proceeding. [Emphasis added.]

The Pearson report was clearly not binding on the Crown or upon Mr. Pearson's successors, and the trial judge never suggested that it was. What he did suggest is that the factors put in the balance by Mr. Pearson were logical and pertinent. It was open to the trial judge to adopt the Pearson criteria as his own, and he did so. As I read his judgment, he concluded, that in light of his decision to send the appellant to trial on the nine more serious charges (eight of which, as stated, have now resulted in the appellant's acquittal), the prosecution of additional charges of a relatively minor nature that allegedly took place 24 to 34 years ago, and which if successful would carry a "relatively insignificant sentence", did not outweigh the public interest in vindicating the importance of the role played by objective and independent Crown prosecutors.

The trial judge thought that in this way an appropriate balance had been struck between the public interest in having *all* charges dealt with on their merits against the public interest in having *all* charges stayed to show the court's determination to ensure the continued vigour of checks and balances in the criminal justice system. Whether or not this Court would draw the line precisely where the trial judge drew it is beside the point. After hearing evidence and argument for 18 days, he properly instructed himself on the law, carefully reviewed the facts, and made no palpable or overriding error in the inferences and conclusions that he reached.

III. Conclusion

I would therefore allow the appeal.

Appeal dismissed, IACOBUCCI, MAJOR, BINNIE and ARBOUR JJ. dissenting.

Solicitors for the appellant: Greenspan, Henein & White, Toronto.

Solicitor for the respondent: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Quebec.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Miramichi.

TAB 29

Re Residential Tenancies Act, 1981 CanLII 24 (SCC), [1981] 1 SCR 714

Source:	Supreme Court of Canada
Date:	1981-05-28
Other citations:	123 DLR (3d) 554 — 37 NR 158 — [1981] CarswellOnt 623 — JE 81-567 — [1981] SCJ No 57 (QL)
Citation:	Re Residential Tenancies Act, 1981 CanLII 24 (SCC), [1981] 1 SCR 714, < https://canlii.ca/t/1mjl9 >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v. Morrow , 1999 ABCA 182 (CanLII) [...] Therefore, this case is distinguishable from both Reference re Residential Tenancies Act , and Reference re Proposed Legislation Concerning Leased Premises and Tenancy Agreements. [...]

Supreme Court of Canada
Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714
Date: 1981-05-28

In the Matter of a Reference to the Court of Appeal pursuant to *The Constitutional Questions Act*, R.S.O. 1970, Chapter 79, by Order in Council No. 2089/79, respecting *The Residential Tenancies Act, 1979*

1980: November 25, 26; 1981: May 28.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Estey, McIntyre and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law—Courts—Landlords and tenants—Provincial commission empowered to evict tenants and to enforce obligations of landlords and tenants—Whether or not grant of powers to Commission ultra vires—The Residential Tenancies Act, 1979, 1979 (Ont.), c. 78—British North America Act, R.S.C 1970, s. 96.

The Ontario Legislature enacted *The Residential Tenancies Act, 1979*, to come into effect on proclamation. The Act contained a legislative code to govern landlords and tenants and established the Residential Tenancy Commission to oversee and enforce the newly enunciated rights and

obligations. The Executive Council, responding to questions concerning the authority of the Legislature to make orders evicting tenants from residential premises and to require landlords and tenants to comply with obligations imposed under the Act, referred two questions dealing with those issues to the Ontario Court of Appeal. That Court concluded that it was not within the legislative authority of Ontario to make eviction orders and compliance orders as provided in *The Residential Tenancies Act, 1979*. This Court was only concerned with the constitutional validity of two powers, the subject matter of the reference, and not with the soundness of the overall legislative scheme.

Held: The appeal should be dismissed.

Royal Commission Reports and Reports of Parliamentary Committees made prior to the passing of a statute were admissible to show the factual context and purpose of the legislation. The practice adopted in the *Anti-Inflation Reference* of giving timely directions establishing the extraneous materials to be admitted should be followed. Material relevant to the issues before the Court and not inherently unreliable or offending against public policy should be admissible, subject to

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the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction.

Section 96 of the *British North America Act* limited provincial competence to make appointments to a tribunal exercising s. 96 judicial powers and implicitly limited provincial competence to endow a provincial tribunal with such powers. That section, however, could no longer be construed as a bar to a province seeking to vest an administrative tribunal with ancillary “judicial” powers formerly exercised by s. 96 courts, subject to the qualification that the judicial function not be isolated from the rest of the administrative structure of the legislation.

The test was to be formulated in three steps. The first involved consideration, in light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The matter ended there if the power was not broadly conformable to the jurisdiction formerly exercised by s. 96 courts. If, however, the power were identical or analogous to a power exercised by a s. 96 court at Confederation it became necessary to proceed to step two. The second step involved consideration of the function within its institutional setting to determine whether the function was still “judicial”. The subject matter rather than the apparatus of adjudication was determinative and only if the power could still be characterized as judicial was it necessary to proceed to the third step—a review of the tribunal’s function as a whole in order to appraise the impugned function in its entire institutional context. A provincial scheme was only invalid where the adjudicative function was a sole or central function of the tribunal so that it could be said to be operating like a s. 96 court.

Applying step one the Court found that the powers conferred on the Commission were in broad conformity with those historically exercised by the s. 96 courts before and after Confederation. The argument that the power to order eviction had been conferred before Confederation on County Court judges as *persona designata*, and that that power and by analogy the power to make orders of compliance were therefore outside the superior or county court structure, went too far. The jurisdiction over overholding tenants in pre-Confederation legislation was merely a modification of the traditional jurisdiction on ejection exercised by the superior courts. The County Court judges acting under the over-holding tenants provisions were acting *qua* judge rather than as *persona designata*. The submission that the Commission’s jurisdiction was analogous to that exercis-

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able by courts of summary jurisdiction rather than by s. 96 courts was misconceived. Provinces could not avoid the limitations of s. 96 by taking a function of a s. 96 court, simplifying procedural matters, and then transferring the jurisdiction to a non s. 96 tribunal.

Proceeding to step two the Court found that the impugned power to order eviction or compliance, viewed in its institutional setting, remained essentially a “judicial power” exercised in all cases in the context of a *lis* between parties. The Commission in deciding contractual and property rights as between individual landlords and tenants also determined rights other than those relating to land and property. Each case involved analysis of law, an application of law to the facts, and a judicial decision and subsequent order.

The third step examined the inter-relationship between the impugned “judicial” powers and other powers under the Act. The central function of the Commission was the resolution of disputes, in the final form by a judicial form of hearing between landlords and tenants. The Commission’s other functions were either ancillary to this central function, or were separate and distinct from it and bore no relation to it. There was no broad legislative scheme to subsume the Commission’s judicial functions. The whole of s. 96 court’s jurisdiction in a certain area, however limited, was transferred to provincially appointed officials.

Walker’s Case (1587), 76 E.R. 676; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*, 1971 CanLII 135 (SCC), [1971] S.C.R. 689; *Attorney General of Canada v. Reader’s Digest Association (Canada) Ltd.*, 1961 CanLII 84 (SCC), [1961] S.C.R. 775; *Home Oil Distributors, Limited v. Attorney General of British Columbia*, 1940 CanLII 46 (SCC), [1940] S.C.R. 444; *Attorney-General for British Columbia v. Attorney General for Canada*, 1937 CanLII 365 (UK JCPC), [1937] A.C. 368; *Ladore and Others v. Bennett and Others*, 1939 CanLII 270 (UK JCPC), [1939] A.C. 468; *Reference re Eskimos*, 1939 CanLII 22 (SCC), [1939] S.C.R. 104; *Swait v. Board of Trustees of Maritime Transportation Unions* (1966), 1966 CanLII 513 (QC CA), 61 D.L.R. (2d) 317; *Reference re Anti-Inflation Act*, 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373; *Attorney-General for Alberta v. Attorney-General for Canada and Others*, 1938 CanLII 251 (UK JCPC), [1939] A.C. 117; *Letang v. Cooper*, [1965] 1 Q.B. 232; *Pillai v. Mudanayake and Others*, [1953] A.C. 514; *Edwards and Others v. Attorney-General for Canada and Others*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124; *Laidlaw v. The Municipality of Metropolitan Toronto*, 1978 CanLII 32 (SCC), [1978] 2 S.C.R. 736; *Re Apogee*

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Investments Ltd. and Saber (1978), 1978 CanLII 1314 (ON SC), 21 O.R. (2d) 663; *Re Blok-Glowczynski et al and Stanga et al.* (1978), 1978 CanLII 1736 (ON SC), 22 O.R. (2d) 376; *Toronto Corporation v. York Corporation*, 1938 CanLII 252 (UK JCPC), [1938] A.C. 415; *Reference re Adoption Act and Other Acts*, 1938 CanLII 2 (SCC), [1938] S.C.R. 398; *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited*, 1948 CanLII 266 (UK JCPC), [1949] A.C. 134; *Tomko v. Labour Relations Board (Nova Scotia) et al.*, 1975 CanLII 183 (SCC), [1977] 1 S.C.R. 112; *The Corporation of the City of Mississauga v. The Regional Municipality of Peel et al*, 1979 CanLII 37 (SCC), [1979] 2 S.C.R. 244; *Attorney General of Quebec et al v. Farrah*, 1978 CanLII 195 (SCC), [1978] 2 S.C.R. 638; *Re Pepita and Doukas* (1979), 1979 CanLII 757 (BC CA), 101 D.L.R. (3d) 577; *Dupont et al v. Inglis et al*, 1958 CanLII 8 (SCC), [1958] S.C.R. 535; *Pong v. Quong and Chong*, 1927 CanLII 2 (SCC), [1927] S.C.R. 271; *Pajelle Investments Ltd. v. Herbold and Herbold*, 1975 CanLII 32 (SCC), [1976] 2 S.C.R. 520; *Herman et al v. Deputy Attorney General of Canada*, 1978 CanLII 177 (SCC), [1979] 1 S.C.R. 729; *Ross v. The York, Newcastle & Berwick Railway Company* (1849), 18 L.J.Q.B. 199; *R. v. McIntosh* (1869), 1869 CanLII 57 (NB SC), 12 N.B.R. 372; *Reference Re Proposed Legislation Concerning Leased Premises and Tenancy Agreements* (1978), 1978 ALTASCAD 264 (CanLII), 89 D.L.R. (3d) 460, referred to; *Reference Re Validity of Wartime Leasehold Regulations*, 1950 CanLII 27 (SCC), [1950] S.C.R. 124, not followed.

APPEAL from a decision of the Court of Appeal for Ontario^[1], finding the grant of certain powers *ultra vires* the Ontario Legislature. Appeal dismissed.

Supporting the legislation:

D.W. Mundell, Q.C., John Cavarzan, Q.C., and Lorraine E. Weinrib, for the Attorney General of Ontario.

William J. Atkinson, Henri Brun and Jean-François Jobin, for the intervener the Attorney General of Quebec.

Reinhold M. Endres and Linda Garber, for the intervener the Attorney General of Nova Scotia.

E. Robert A. Edwards, for the intervener the Attorney General of British Columbia.

Brian F. Squair, for the intervener the Attorney General of Manitoba.

D.A. McKillop, for the intervener the Attorney General of Saskatchewan.

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William Henkel, Q.C., for the intervener the Attorney General of Alberta.

Opposing the legislation:

John J. Robinette, Q.C., and Peter Atkinson.

T.B. Smith, Q.C., and J.M. Mabbutt, for the intervener the Attorney General of Canada.

Ian Scott, Q.C., and Mary Hogan, for the intervener Federation of Metro Tenants Association et al.

J.H. Melnitzer, for the intervener London Property Management Association et al.

Lawrence Greenspon, on his own behalf.

The judgment of the Court was delivered by

DICKSON J.—The resolution of disputes between landlords and tenants has long been a central preoccupation of the common law courts. As early as 1587, Lord Coke observed that the law of landlord and tenant was vital since, “for the most part, every man is a lessor or a lessee”. (*Walker’s Case*^[2] at p. 680.)

Within the past few years the Province of Ontario, in common with a number of other provinces, has enacted legislation to redress what was perceived to be an imbalance, in favour of landlords, in the landlord and tenant relationship. On June 21, 1979, the Legislative Assembly of Ontario enacted *The Residential Tenancies Act, 1979*, 1979 (Ont.), c. 78, to come into effect on proclamation. The Act contains a detailed legislative code to govern landlords and tenants and establishes a tribunal, bearing the name the Residential Tenancy Commission, to oversee and enforce the newly enunciated rights and obligations. Questions having been raised as to the authority of the Legislative Assembly of Ontario to empower the Commission to make orders

evicting tenants from residential premises and to require landlords and tenants to comply with obligations imposed under the Act, the Executive Council of the Province, pursuant to s. 1 of *The Constitution-*

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al *Questions Act*, R.S.O. 1970, c. 79, referred the following questions to the Court of Appeal of Ontario for hearing and consideration:

1. Is it within the legislative authority of the Legislative Assembly of Ontario to empower the Residential Tenancy Commission to make an order evicting a tenant as provided in *The Residential Tenancies Act, 1979*?
2. Is it within the legislative authority of the Legislative Assembly of Ontario as provided in *The Residential Tenancies Act, 1979* to empower the Residential Tenancy Commission to make orders requiring landlords and tenants to comply with obligations imposed under that Act?

The Court of Appeal delivered a careful and scholarly unanimous judgment in which each of these questions was answered in the negative. The court concluded it was not within the legislative authority of Ontario to empower the Residential Tenancy Commission to make eviction orders and compliance orders as provided in *The Residential Tenancies Act, 1979*. The importance of the issue is reflected in the fact that five judges of the court, including the Chief Justice and Associate Chief Justice, sat on the appeal.

The Attorney General of Ontario appealed to this Court as of right, under s. 37 of the *Supreme Court Act*, R.S.C. 1970, c. S-19, as amended. The Attorneys General of Quebec, Nova Scotia, British Columbia, Manitoba, Saskatchewan and Alberta intervened to support the validity of the legislation. Mr. John J. Robinette, Q.C., was invited by the Court of Appeal of Ontario, when the matter came before that court, to argue against the validity of the provisions that were the subject of the reference. Mr. Robinette assisted this Court in like manner during argument of the present appeal.

The Attorney General of Canada intervened to oppose the legislation as did a number of property management associations. The legislation also came under attack from independent community-based legal service clinics and from the Federation of Metro Tenants Association. The Federation is an “umbrella” organization for Metropolitan Toronto, composed of nearly one hundred affiliat-

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ed tenant associations and some individual tenant members who support and participate in the work of organizing tenants and lobbying in their interests. Owners and tenants alike made common cause in assailing the impugned provisions.

It should be noted that the Court is concerned in this appeal only with the constitutional validity of two powers, the subject matter of the reference, and not with the soundness of the overall

legislative scheme or the wisdom of the Legislative Assembly in enacting it. The general subject matter of landlord and tenant rights and obligations is unquestionably within provincial legislative competence and no part of *The Residential Tenancies Act, 1979*, other than those sections empowering the Commission to issue compliance orders and eviction orders, is in issue.

I

In advance of the hearing before the Ontario Court of Appeal, the Attorney General of Ontario filed with the court the 1968 report of the Ontario Law Reform Commission entitled “Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies”; the 1972 report of the Commission on Part IV of *The Landlord and Tenant Act*; the 1976 report of the Commission entitled “Report on Landlord and Tenant Law”; and a Green Paper published in 1978 by the Ministry of Consumer and Commercial Relations entitled “Policy Options for Continuing Tenant Protection”. In the Court of Appeal, a question was raised as to whether, and the extent to which, this material was properly before the court. Although there was some argument, it was not pressed to the point where the Court of Appeal felt called upon to rule on it. The court was content to receive the material for whatever assistance it might afford as “background”, and to leave its relevance and weight until the conclusion of the submissions advanced during the hearing. In the outcome the Court of Appeal was persuaded that little, if anything, turned on the reception of this material.

The same four documents were before us, and it seems appropriate at this time to rule whether

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properly so. There is little authority to guide decision.

Professors Whyte and Lederman correctly point out in chapter 4 of their work on *Canadian Constitutional Law* that a classification process is at the heart of judicial determination of the distribution or limitation of primary legislative powers. That process joins logic with social fact, value decisions and the authority of precedents. A court faces particular difficulty in a constitutional reference when only the bare bones of the statute arrive for consideration. The Chief Justice of this Court made this point in the “chicken and egg” reference, *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association*^[3]. There is normally a dearth of relevant facts from which to draw logical inferences, determine social impact, make value decisions and select governing precedents. As Whyte and Lederman note, p. 229, “...the challenge of *ultra vires* raises a need for evidence of facts of social context and legislative effect...”

In my view a court may, in a proper case, require to be informed as to what the effect of the legislation will be. The object or purpose of the Act in question may also call for consideration though, generally speaking, speeches made in the Legislature at the time of enactment of the measure are inadmissible as having little evidential weight.

It now seems reasonably clear that Royal Commission Reports and the Reports of Parliamentary committees made prior to the passing of a statute are admissible to show the factual context and purpose of the legislation although Cartwright J., as he then was, said in *Attorney General of Canada. v. Reader's Digest Association (Canada) Ltd.*^[4], that the general rule is that if objected to they should be excluded. If the reports are relevant it is not entirely clear why they should be excluded upon objection of one of the parties.

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In *Home Oil Distributors, Limited v. Attorney-General of British Columbia*^[5], Kerwin J., with the concurrence of Rinfret J., took into consideration a report of a Commission under the circumstances there existing, for showing what was in the mind of Parliament. The same course was adopted by the Privy Council in *Attorney-General for British Columbia v. Attorney-General for Canada*^[6] and in *Ladore and Others v. Bennett and Others*^[7]. In *Reference re Eskimos*^[8], in preliminary proceedings, this Court appointed the Registrar to hold hearings and take evidence as to whether Eskimos were "Indians" within the meaning of the *B.N.A. Act*. In *Swait v. Board of Trustees of Maritime Transportation Unions*^[9], the Quebec Court of Queen's Bench, Appeal Side, admitted the Norris Report on Disruption of Shipping in the Great Lakes for the purpose of establishing the facts upon which Parliament based the purpose and object of an Act passed essentially to put an end to a danger threatening the national interest.

Although admittedly a far different case from the present, in *Reference re Anti-Inflation Act*^[10], this Court admitted extrinsic evidence relating to the then prevailing level of inflation, including the White Paper tabled in the House by the Minister of Finance. I think it can be taken from the conduct of the the *Anti-Inflation Reference* and the use of extrinsic materials by the members of the Court in that case that the exclusionary rule expressed in *obiter* by Rinfret C.J. in *Reference Re Validity of Wartime Leasehold Regulations*^[11], can no longer be taken as a correct statement of the law. We should be loathe, it seems to me, to enunciate any inflexible rule governing the admissibility of extrinsic materials in constitutional references. The effect of such a rule might well be to exclude logically relevant and highly probative evidence. It is preferable, I think, to follow the practice adopted in the *Anti-Inflation Reference* and give timely directions establishing the evidence

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or extraneous materials to be admitted to serve the ends of the Court in the particular reference.

Generally speaking, for the purpose of constitutional characterization of an act we should not deny ourselves such assistance as Royal Commission reports or Law Reform Commission reports underlying and forming the basis of the legislation under study, may afford. The weight to be given such reports is, of course, an entirely different matter. They may carry great, little, or no weight,

but at least they should, in my view, generally be admitted as an aid in determining the social and economic conditions under which the Act was enacted. See *Attorney-General for Alberta v. Attorney-General for Canada and Others*^[12] (Alberta Bank Taxation case). The mischief at which the act was directed, the background against which the legislation was enacted and institutional framework in which the act is to operate are all logically relevant. See *Letang v. Cooper*^[13], at p. 240 and *Pillai v. Mudanayake and Others*^[14], at p. 528.

A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a “living tree”, in the expressive words of Lord Sankey in *Edwards and Others v. Attorney-General for Canada and Others*^[15]. Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction. See *Laidlaw v. The Municipality of Metropolitan Toronto*^[16] at p. 743 and generally, Strayer, *Judicial Review of Legislation in Canada* (1968), c. 6; Hogg, “Proof of Facts in Constitutional Cases” (1976), 26 U. of T.L.J. 386; Buglass, “The Use of

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Extrinsic Evidence and the Anti-Inflation Act Reference” (1977), 9 Ottawa L. Rev. 183.

II

In 1964, the Legislature of Ontario enacted *The Ontario Law Reform Commission Act*, 1964 (Ont.), c. 78, R.S.O. 1970, c. 321, establishing the Ontario Law Reform Commission. The Commission was to inquire into and consider any matter relating to reform of the law having regard to the statute law, the common law and judicial decisions. On December 10, 1968, the Law Reform Commission submitted to the Attorney General of Ontario an Interim Report on Landlord and Tenant Law applicable to Residential Tenancies in which the Commission recommended substantial changes in matters of substantive law governing the relations of landlord and tenant relating to residential tenancies. Following thereon *The Landlord and Tenant Act*, 1968-69 (Ont.), c. 58, was enacted. This Act added a new Part IV entitled “Residential Tenancies” to *The Landlord and Tenant Act*. Part IV contained provisions on most of the matters recommended by the Law Reform Commission and some additional matters. Section 106(1) provided:

106. (1) Unless a tenant has vacated or abandoned rented premises, the landlord shall not regain possession of the premises on the grounds he is entitled to possession except under the authority of a writ of possession obtained under section 105 or under Part III.

Thus the landlord’s right of self-help, through direct repossession, was abolished. It became necessary for a landlord to bring proceedings by way of writ to recover possession except in cases where the tenant had given it up. The Act also provided for the establishment of Landlord and

Tenant Advisory Bureaux by the councils of municipalities to receive complaints and mediate disputes between landlords and tenants.

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The reform in the law of landlord and tenant in 1968-69 preserved the constitutional authority of s. 96 courts to terminate tenancies, issue writs of possession, and enforce compliance.

In 1972 the Law Reform Commission reported upon a review which the Commission had made, at the request of the Attorney General, on certain provisions of the new Part IV of *The Landlord and Tenant Act* applying to residential tenancies. The Commission made a number of recommendations directed at shortening the time for taking steps in the proceedings for eviction and providing for the entry by the clerk of the court of default judgments where a landlord's application for a writ of possession was not contested. *The Landlord and Tenant Amendment Act, 1972*, 1972 (Ont.), c. 123, was enacted amending the procedure for applying for writs of possession and providing for default proceedings in the manner recommended by the Law Reform Commission.

In 1975 the Legislature of Ontario introduced *The Residential Premises Rent Review Act, 1975*, 1975 (Ont.), c. 12, to establish rent control. The ability of the province to administer a rent review system, of course, in no way encroached on the traditional jurisdiction of the s. 96 courts to order termination, eviction and compliance. A companion Act, 1975, (Ont.), c. 13, amended *The Landlord and Tenant Act* to make substantial changes in the substantive law of landlord and tenant. This latter Act established security of tenure for tenants by providing for automatic renewal of tenancy agreements upon expiration of the term, unless the agreement had been lawfully terminated in accordance with the Act. A tenant might terminate it by agreement or by giving notice in the form and at the time prescribed by the statute. A landlord might terminate only for specified causes and at specified times. The rules for proceedings by the county or district judge were relaxed and simplified. The powers of these judges were expanded to cover most of the issues that might arise between a landlord and a tenant, including power to declare a tenancy agreement terminated.

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After the 1975 statutes were passed the courts continued to exercise the functions traditionally performed by s. 96 courts since Confederation, and to the present time, to order termination of leases, make eviction orders and compel compliance with the provisions of a lease of residential premises. See, as examples, *Re Apogee Investments Ltd. and Saber*^[17] and *Re Blok-Glowczynski et al. and Stanga et al.*^[18]

On February 10, 1978 a Government Green Paper was released relating to policy options for continuing tenant protection. The Green Paper made reference to the very large number of Ontario citizens whose lives are governed in part by the law of landlord and tenant. From 1961 to 1971 the number of tenants grew by 70 per cent from 483,500 to 825,000. It was estimated that there were

more than one million rental households in Ontario constituting about 36 per cent of all households.

A reading of the Green Paper would suggest that at least three factors led to the establishment of the Residential Tenancy Commission. First, the legislature had removed the landlord's traditional right to employ 'self-help' remedies (*i.e.* repossession) and now required a landlord to apply for an order of eviction. It was felt that the demands of this "new business" would clog an already overburdened court system. A specialized Commission was seen as a convenient method for ensuring prompt and efficient resolution of landlord-tenant disputes. A second major factor was the belief that the regular court system was too formal in structure for the resolution of landlord and tenant disputes; that such disputes could best be adjudicated in an informal, summary proceeding before a tribunal where individual complainants would feel less inhibited in presenting their own cases. Third, the Green Paper saw the creation of a Tenancy Commission as a convenient method of consolidating functions which had previously been performed by different organizations. The new tribunal would be a centralized body which could provide authoritative advice to landlords and ten-

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ants. By combining administrative functions with judicial functions, the tribunal would be able to offer a wider range of remedies to individuals than the regular court system. The Paper noted that while many had hailed the development of tenancy boards and tribunals as an effective means of realizing the rights embodied in the residential tenancy legislation, others had pointed out that such "rough justice" might run counter to well-established principles of procedure. The Green Paper recommended a "mediation-adjudication" approach under which authority to mediate would be combined with jurisdiction to adjudicate a dispute. In this approach, an official would listen to both sides of the case and attempt to guide the parties toward a mutually agreeable solution. If agreement could not be reached, the official would convene a hearing with the parties present, hear evidence and arrive at a determination according to the law. The decision would be legally enforceable.

The Residential Tenancies Act was enacted to implement the recommendations of the Green Paper. As I have said, the Act set up a new tribunal, the Residential Tenancy Commission, to oversee and enforce the obligations of landlords and tenants in Ontario. The tribunal is given wide-ranging powers and functions. Some of these are purely administrative in nature, for example, the Commission is charged with the obligation of informing members of the public as to their rights under the legislation. But by far the most significant role to be played is in the resolution of disputes between landlords and tenants. The mechanism for dispute resolution is triggered 'upon application' by either the landlord or the tenant. In one or two circumstances the process is put in motion by application by a third party—*e.g.* a neighbouring tenant.

The Residential Tenancies Act is not directed solely to low rental housing. It applies to every residential tenancy, including the most expensive housing, and leases of great value, and any length of term, in city or country.

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III

As Professor Hogg has noted in his work on *Constitutional Law of Canada* (1977), p. 129, there is no general “separation of powers” in the *British North America Act, 1867*. Our Constitution does not separate the legislative, executive, and judicial functions and insist that each branch of government exercise only its own function. Thus it is clear that the Legislature of Ontario may confer non-judicial functions on the courts of Ontario and, subject to s. 96 of the *B.N.A. Act*, which lies at the heart of the present appeal, confer judicial functions on a body which is not a court.

Under s. 92(14) of the *B.N.A. Act* the provincial legislatures have the legislative power in relation to the administration of justice in the province. This is a wide power but subject to subtraction of ss. 96 to 100 in favour of the federal authority. Under s. 96 the Governor General has the sole power to appoint the judges of the Superior, District and County Courts in each province. Under s. 97 the judges who are to be appointed to the Superior, District and County Courts are to be selected from the respective bars of each province. Under s. 100 the Parliament of Canada is obliged to fix and provide for their salaries. Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation. It is plain that what was sought to be achieved through this compromise, and the intended effect of s. 96, would be destroyed if a province could pass legislation creating a tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts. What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined. Section 96 has thus come to be regarded as limiting provincial competence to make appointments to a tribunal exercising s. 96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.

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IV

The belief that any function which in 1867 had been vested in a s. 96 court must forever remain in that court reached its apogee in the judgment of Lord Atkin in *Toronto Corporation v. York Corporation*^[19]. Describing s. 96 as one of the “three principal pillars in the temple of justice... not to be undermined”, Lord Atkin held that the Ontario Municipal Board could not validly receive “judicial authority”. At the same time, he held that the Municipal Board was in ‘pith and substance’ an administrative body, and the impugned ‘judicial functions’ were severable from the administrative powers given to the Board under its enabling legislation. There was no analysis of the inter-relationship between the judicial and administrative features of the legislative scheme; the

assumption was that any attempt to confer a s. 96 function on a provincially-appointed tribunal was *ultra vires* the legislature.

This sweeping interpretation of s. 96, with its accompanying restrictive view of provincial legislative authority under s. 92, was limited almost immediately by the judgment of this Court in the *Reference re Adoption Act and Other Acts*^[20]. Chief Justice Duff held that the jurisdiction of inferior courts was not “fixed forever as it stood at the date of Confederation”. On his view, it was quite possible to remove jurisdiction from a Superior Court and vest it in a court of summary jurisdiction. The question which must be asked was whether “the jurisdiction conferred upon magistrates under these statutes broadly conform[s] to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96”. In the *Adoption Reference*, Duff C.J. looked to the historical practice in England and concluded that the jurisdiction conferred on magistrates under the legislation before the Court in the *Reference* was analogous to the jurisdiction under the English *Poor Laws*, a jurisdiction which had belonged to courts of summary nature rather

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than to Superior Courts. On this basis, the legislation was upheld. The *Adoption Reference* represented a liberalization of the view of s. 96 adopted by the Privy Council in *Toronto v. York*, at least in the context of a transfer of jurisdiction from a Superior Court to an inferior Court.

The same process of liberalization, this time in the context of a transfer of jurisdiction from a Superior Court to an administrative tribunal, was initiated by the Privy Council in *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited*^[21]. Lord Simonds proposed a two-fold test. The first limb of the test is to ask whether the board or tribunal exercises “judicial power”. Lord Simonds did not propose a ‘final’ answer to the definition of “judicial power”, but he suggested that,

...the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. [p. 149]

If the answer to the initial question as to “judicial power” is in the negative, then that concludes the matter in favour of the provincial board. If, however, the power is in fact a judicial power, then it becomes necessary to ask a second question: in the exercise of that power, is the tribunal analogous to a superior, district or county court?

This formulation represented a subtle modification of the test proposed by Duff C.J. in the *Adoption Reference*. Duff C.J. had suggested it was necessary to determine whether the impugned jurisdiction was more analogous to a summary type of jurisdiction exercised at the time of

Confederation rather than to a jurisdiction traditionally exercised by s. 96 courts. The formulation of Duff C.J. froze the provincial jurisdiction to that of summary courts. Lord Simonds in *John East*

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suggested that it was not absolutely necessary to consider whether there was a true analogy between the impugned jurisdiction and the jurisdiction of summary courts; it would be sufficient, for constitutional purposes, to establish that the power or jurisdiction was not one traditionally falling within s. 96. Lord Simonds makes this clear in the following passage:

At this stage their Lordships reach the conclusion that the jurisdiction exercisable by the board is not such as to constitute it a court within s. 96 of the British North America Act. They do not think it necessary to consider whether it is a jurisdiction more nearly analogous to that exercised at the time of confederation by justices of the peace—a matter to which much argument was directed—nor would they pursue the comparison with the jurisdiction of the Workmen’s Compensation Board, which was also pressed on them by counsel. It is sufficient to say that it is not, in their opinion, analogous to that of a superior, district or county court, [p. 152]

In *John East*, the Privy Council did not find it necessary to give any final answer to the initial question, namely, whether the power in issue was ‘judicial’. The case was resolved solely on the ground that, in exercising the power, the tribunal was not analogous to a superior, county or district court.

It is apparent that *John East* represented a break with the line of jurisprudence developed in *Toronto v. York*. The approach of *Toronto v. York*, in which the sole issue was whether the tribunal was being clothed with a s. 96 ‘judicial power’, had been effectively, though not expressly, repudiated.

In *Tomko v. Labour Relations Board (Nova Scotia) et al.*^[22], the issue was the validity of the Nova Scotia Labour Relations Board’s authority to issue a “cease and desist” order. It was argued that this jurisdiction was analogous to the jurisdiction of s. 96 courts to issue mandatory injunctions to halt illegal activity. The Chief Justice, speaking for eight members of the Court, held that this

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consideration was not conclusive, since “...it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears and is exercisable under the provincial legislation”. A consideration of the ‘institutional setting’ indicated that the power to make cease and desist orders was merely one aspect of a broad legislative scheme for the peaceful regulation of collective bargaining, an area which the courts had not entered. Thus, the Labour Board had been validly clothed with the power impugned.

The recent decision of this Court, *The Corporation of the City of Mississauga v. The Regional Municipality of Peel et al.*^[23], is, in the words of the Chief Justice in that case, “...a prime

illustration of the proposition laid down in *Tomko*". In *Mississauga*, the Ontario Municipal Board had been given certain powers to resolve disputes over assets between amalgamating municipalities. Noting that *Toronto v. York* must be viewed with 'considerable qualification', it was stated that the power to adjudicate was merely one "...incident ...in the over-all picture of the general restructuring of the municipalities in which the Municipal Board is given an important part to play..." Viewed in their "institutional setting, the 'judicial powers' to determine rights and liabilities under provincial legislation had been validly granted to the Municipal Board".

I do not think it can be doubted that the courts have applied an increasingly broad test of constitutional validity in upholding the establishment of administrative tribunals within provincial jurisdiction. In general terms it may be said that it is now open to the provinces to invest administrative bodies with 'judicial functions' as part of a broader policy scheme. There will still be situations, however, as in *Attorney General of Quebec et al. v. Farrah*^[24], where a s. 96 'judicial function' is isolated from the rest of the administrative structure of

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the relevant legislation. In *Farrah*, a Transport Tribunal was given appellate jurisdiction over the Quebec Transport Commission. The Tribunal performed no function other than deciding questions of law. Since this function was normally performed by s. 96 courts and divorced from the broader institutional framework of the Act, the impugned sections were held to be unconstitutional. Subject to this type of situation, s. 96 can no longer be construed as a bar to a province seeking to vest an administrative tribunal with ancillary 'judicial' powers formerly exercised by s. 96 courts.

The teaching of *John East*, *Tomko*, and *Mississauga* is that one must look to the 'institutional setting' in order to determine whether a particular power or jurisdiction can validly be conferred on a provincial body. But these cases are merely the starting point, rather than the conclusion, of the inquiry in the present case. As the British Columbia Court of Appeal noted in its consideration of s. 96 in *Re Pepita and Doukas*^[25], at p. 582.

...it is notable that no general tests are offered or established in the *Tomko* judgment for the characterization of the function, the characterization of the institutional arrangements, and the examination of their interrelationship. Instead the judgment continues with a consideration of the particular function in its context...

The Privy Council in *John East* suggested that the application of s. 96 required a determination as to whether or not the powers being exercised were judicial or administrative and if judicial, whether or not the administrative body was "broadly analogous" to a Superior, District or County Court. *Tomko* added a further dimension. An administrative tribunal may be clothed with power formerly exercised by s. 96 courts, so long as that power is merely an adjunct of, or ancillary to, a broader administrative or regulatory structure. If, however, the impugned power forms a dominant aspect of the function of the tribunal, such that the tribunal

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itself must be considered to be acting ‘like a court’, then the conferral of the power is *ultra vires*.

The jurisprudence since *John East* leads one to conclude that the test must now be formulated in three steps. The first involves consideration, in the light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The question here is whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation. This temporary segregation, or isolation, of the impugned power is not for the purpose of turning back the clock and restoring *Toronto v. York* as the governing authority, an approach deplored in *Mississauga*. It is rather the first step in a three step process.

If the historical inquiry leads to the conclusion that the power or jurisdiction is not broadly conformable to jurisdiction formerly exercised by s. 96 courts, that is the end of the matter. As Rand J. noted in *Dupont et al v. Inglis et al.*^[26], “Judicial power not of that type, [*i.e.* that exercised by s. 96 courts at Confederation] such as that exercised by inferior courts, can be conferred on a provincial tribunal whatever its primary character” (p. 542). If, however, the historical evidence indicates that the impugned power is identical or analogous to a power exercised by s. 96 courts at Confederation, then one must proceed to the second step of the inquiry.

Step two involves consideration of the function within its institutional setting to determine whether the function itself is different when viewed in that setting. In particular, can the function still be considered to be a ‘judicial’ function? In addressing the issue, it is important to keep in mind the further statement by Rand J. in *Dupont v. Inglis* that “...it is the subject-matter rather than the

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apparatus of adjudication that is determinative”. Thus the question of whether any particular function is ‘judicial’ is not to be determined simply on the basis of procedural trappings. The primary issue is the nature of the question which the tribunal is called upon to decide. Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a manner consistent with fairness and impartiality, then, normally, it is acting in a ‘judicial capacity’. To borrow the terminology of Professor Ronald Dworkin, the judicial task involves questions of ‘principle’, that is, consideration of the competing rights of individuals or groups. This can be contrasted with questions of ‘policy’ involving competing views of the collective good of the community as a whole. (See Dworkin, *Taking Rights Seriously* (Duckworth, 1977) pp. 82-90.)

If, after examining the institutional context, it becomes apparent that the power is not being exercised as a “judicial power” then the inquiry need go no further for the power, within its institutional context, no longer conforms to a power or jurisdiction exercisable by a s. 96 court and the provincial scheme is valid. On the other hand, if the power or jurisdiction is exercised in a judicial manner, then it becomes necessary to proceed to the third and final step in the analysis and

review the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. The phrase—'it is not the detached jurisdiction or power alone that is to be considered but rather its setting in the institutional arrangements in which it appears'—is the central core of the judgment in *Tomko*. It is no longer sufficient simply to examine the particular power or function of a tribunal and ask whether this power or function was once exercised by s. 96 courts. This would be examining the power or function in a 'detached' manner, contrary to the reasoning in *Tomko*. What must be considered is the 'context' in which this power is exercised. *Tomko* leads to the following result: it is possible for administrative tribunals to exercise powers and jurisdiction which once were exercised by the s. 96

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courts. It will all depend on the context of the exercise of the power. It may be that the impugned 'judicial powers' are merely subsidiary or ancillary to general administrative functions assigned to the tribunal (*John East; Tomko*) or the powers may be necessarily incidental to the achievement of a broader policy goal of the legislature (*Mississauga*). In such a situation, the grant of judicial power to provincial appointees is valid. The scheme is only invalid when the adjudicative function is a sole or central function of the tribunal (*Farrah*) so that the tribunal can be said to be operating 'like a s. 96 court'.

The matter was well expressed in the Ontario Court of Appeal:

Where judicial powers are conferred by a provincial Legislature on a provincially constituted and appointed tribunal, the fact that the tribunal may not be curial in its essential functions but rather an administrative tribunal entrusted with the making of decisions that are primarily of an administrative nature will not, of itself, insulate the judicial powers from a finding that the legislation conferring them is, to that extent, invalid. Whether such a finding may be escaped will tend to depend on whether the judicial powers are seen to be merely incidents of, or adjuncts to, a scheme for the administration of a matter that is otherwise within provincial legislative competence, albeit that as incidents of or adjuncts to the scheme they may be necessary for its effective functioning...

V

Step one, the historical inquiry. The Residential Tenancy Commission is given a broad range of powers under the Act: in this reference, as I have noted, we are concerned with only two, power to make an eviction order and power to make a 'compliance' order. These powers recur constantly throughout the Act; there are nineteen separate provisions which empower the Commission to make an eviction order and seventeen separate provisions empowering the Commission to make a compliance order. Illustrations of the former are found in s. 36(2)(c) (eviction for non-payment of rent); s. 38(3)(d) (eviction for interference with

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safety or enjoyment of landlord or other tenants); s. 41(2)(c) (eviction for carrying on of illegal activity); and s. 51(1) (eviction where landlord requires premises for own use or for sale).

Illustrations of the latter power are found in s. 28(4)(a) (landlord may be ordered to comply with obligation to repair); s. 29(2)(a) (obligation to supply vital services); s. 37(2)(a) (tenant to repair damage wilfully or negligently caused by him). In contrast, the impugned power in *Tomko* to issue “cease and desist” orders was found in one subs., 49(2), forming part of a legislative scheme of some 103 sections.

Section 84(1) of *The Residential Tenancies Act*, subject to certain exceptions, gives the Commission “exclusive jurisdiction to examine into, hear and determine all matters and questions arising under this Act and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Commission”. Section 116(1) permits the filing of a Commission order evicting a tenant in the County or District Court and states that such order once filed: “has the same force and effect and all proceedings may be taken on it, as if it were an order of that court, and the clerk of the court shall issue a writ of possession”.

The Ontario Court of Appeal held that the power to order eviction was analogous to the traditional power of the courts to order the ejectment of a tenant, while the power to order compliance was analogous to the power of the courts to award damages or specific performance or to grant injunctive relief. This finding was not challenged on the hearing of this appeal. The Attorney General for Ontario conceded that the powers given to the Residential Tenancy Commission “... are not merely analogous to those [pre-1867] powers but are the same powers”.

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We start therefore with the proposition that the power to order eviction in the 1979 Act is broadly conformable to pre-1867 jurisdiction in ejectment, and the power to order compliance is broadly conformable to the pre-1867 jurisdiction to award damages or specific performance. It is true that the Tenancy Commission ordering an eviction in 1981 would look to different considerations than a court ordering an ejectment in 1867, the rules surrounding the granting of these remedies having altered somewhat since 1867, but mere alteration in rules cannot change the substance of things or prevent the drawing of analogies. In an ejectment in 1867 a landlord was asserting a right of re-entry to his property and was seeking the removal of a tenant from his land. These remain the essentials of an eviction application by a landlord in 1981. Similarly, a landlord seeking an injunction against a tenant in pre-Confederation times is in substantially the same position as a modern landlord seeking compliance under the Act.

The question whether the powers or jurisdiction conferred by the statute are analogous to, in broad conformity with, the kind of powers or jurisdiction historically exercised by the superior, county or district courts admits of only one answer—yes.

It is clear, as appears from the judgment of the Court of Appeal, that prior to 1867 in Upper Canada the only tribunals which could make ejectment orders were the Court of Queen’s Bench, the Court of Common Pleas, and the County Court in limited situations, and that only the Court of Chancery could make orders of specific performance or issue mandatory or prohibitory injunction

orders. The settlement of disputes between landlords and tenants, including the termination of tenancies and eviction of tenants, has thus always been within the exclusive jurisdiction of the Superior, District and County Court judges both before and after Confederation.

The Attorney General advances two submissions for the purpose of refuting this conclusion:

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1. The power to order eviction of overholding tenants was conferred on County Court judges as *persona designata*, outside the structure of the Superior or County Courts. Thus this power was recognized as not exclusively a power of the Superior, District or County Courts within the intendment of section 96. By analogy, the power to make orders of compliance is not a power exclusively within the jurisdiction of such Superior, District or County Courts.

2. Even if jurisdiction over landlord and tenant matters was exercised by s. 96 courts in 1867, the jurisdiction conferred on the Residential Tenancy Commission is analogous to “a type of jurisdiction generally exerciseable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of section 96”.

The Attorney General offers a number of authorities in support of his first submission, including two decisions of this Court, which establish, it is argued, that the jurisdiction of county judges with respect to overholding tenants was exercised as *persona designata*. The first case cited, *Pong v. Quong and Chong*^[27], does not really assist appellant. In *Pong* a County Court judge acting under the Overholding Tenants legislation had dealt with a number of collateral matters as to the relationship between two tenants. On appeal, the Court noted that, “It is perfectly manifest that he [the County Judge] had no jurisdiction to do so—no jurisdiction subject to appeal; that he could entertain such collateral matter only either as *persona designata* or as arbitrator”. From the context it is clear that this comment was directed to the judge’s possible status as a *persona designata* by the consent of the parties and not under *The Landlord and Tenant Act*.

In the more recent case of *Pajelle Investments Limited v. Herbold and Herbold*^[28], this Court was concerned with the interpretation of *The Landlord and Tenant Act*, R.S.O. 1970, c. 236, and the powers of a judge under that Act. Mr. Justice Spence, opening his judgment, and without elabo-

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ration, said “The matter came on for hearing before His Honour Judge MacRae acting as a *persona designata* under the provisions of *The Landlord and Tenant Act*”. A passing reference of this nature cannot be considered to be conclusive, particularly in light of the recent extensive consideration of the concept of *persona designata* by this Court, in a case in which *persona designata* was directly in issue, *Herman et al. v. Deputy Attorney General of Canada*^[29]. In *Herman*, the issue was whether a Superior Court judge acting under s. 232 of the *Income Tax Act* 1970-71-72 (Can.), c. 63, did so *qua* judge or as ‘*persona designata*’. Noting that the concept of *persona designata* is “little better than a trap for the unwary” and that there is a need for a “greater

element of certainty in the application of the notion of *persona designata*” the Court laid down the following general proposition:

Prima facie, Parliament should be taken to intend a judge to act *qua* judge whenever by statute it grants powers to a judge. He who alleges that a judge is acting in the special capacity of *persona designata* must find in the specific legislation provisions which clearly evidence a contrary intention on the part of Parliament. The test to be applied in considering whether such a contrary intention appears in the relevant statute can be cast in the form of a question: is the judge exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the court of which he is a member?

Applying this test, the Court in *Herman* held that a Superior Court judge deciding a question of solicitor-client privilege under the *Income Tax Act* did so *qua* judge and not as *persona designata*.

The Court of Appeal in the instant case applied the test in *Herman*, concluding that the County Court judges were acting *qua* judge under the overholding tenants provisions. The Court was fortified by the fact that the concept of *persona designata* as applied to judicial powers was not coined until 1849, in *Ross v. The York, Newcastle*

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& *Berwick Railway Company*^[30] and it was not until 1869 that the principle was applied in Canada: *R. v. McIntosh*^[31]. With respect, I agree with the Court of Appeal. The jurisdiction over overholding tenants contained in the 1864 Act was merely a modification of the traditional jurisdiction in ejectment exercised by the Superior Courts.

In any event, as was pointed out in argument, the *persona designata* argument could not be applicable to the jurisdiction of the Supreme Court of Ontario to make orders requiring landlords and tenants to comply with obligations under leases. The point was also made that whether or not the County Court judge was acting as *persona designata* in eviction proceedings, the power he exercised was broadly analogous to that of the Superior Court and accordingly, even if the powers of the Commission are seen in terms of powers of pre-1867 County Court judges acting as *persona designata*, they nonetheless remain broadly analogous to those of pre-1867 Superior Courts. Accordingly the first submission of the Attorney General for Ontario on this point must be rejected.

The second submission, as I understand it, relies on the reasoning elaborated by Chief Justice Duff in the *Reference re Adoption Act (supra)*. This Court held that the jurisdiction of the inferior courts could be enlarged, both as to subject matter and as to pecuniary limits, as long as the new jurisdiction “broadly conform[ed] to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96”. It is urged that the powers conferred on the Residential Tenancy Commission conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction. As to the question of subject

matter, the appellant relies on the form and language in which the statute is enacted. The statute contains non-technical language and its application involves questions of fact or involves the exercise of discre-

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tionary factual judgments expressed in ordinary language. It is submitted that no significant jurisprudential questions are involved. As to pecuniary limits, the Residential Tenancy Commission is empowered to make an order for the payment of money only where the amount claimed does not exceed \$3,000. The suggestion seems to be that, since the Residential Tenancy Commission proceeds in a summary manner under a statute drafted in ‘layman’s’ language, its jurisdiction is, for constitutional purposes, analogous to the jurisdiction of a summary court. This submission misconceives the import of the reasoning in the *Adoption Reference*. Provinces cannot avoid the limitations of s. 96 simply by taking a traditional s. 96 function, simplifying procedural matters, and then transferring the jurisdiction to a non-section-96 tribunal. If this could be done, s. 96 would be stripped of all force and effect.

Even putting aside these assumptions, the argument of the appellant on this point cannot be accepted. As to the question of subject matter, I have noted that the Act applies to leases of any value and any term. Moreover, the \$3,000 limitation on jurisdiction only applies when a sum of money is being claimed; in all other cases, there will be no pecuniary limit. Thus a landlord may incur costs far in excess of \$3,000 in order to ‘comply’ with the Act or with an order of the Commission. As to the submission that the Commission will simply be deciding questions of fact, I would adopt the following comments made by the Court of Appeal:

Clearly, more will be involved than the finding of facts, and the ascertainment of their “real substance”, on the basis of which the next step to be taken will usually be apparent. The law will need to be interpreted in accordance with the accepted rules of law for that purpose, and the proper law will need to be applied, including, where relevant, the proper principles of contract, tort, and real and personal property law, notwithstanding the statutory “codification” earlier mentioned. In at least some cases the issue of the legality or illegality of activities carried on by tenants will arise, and in many cases assessments will have to be made of compensation for loss or injury of various kinds. In the making of orders for the evictions of tenants and requiring compliance with obligations imposed under the legislation, the task

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of the Commission will be of basically the same complexity and degree of difficulty as the task which has hitherto engaged the attention of the Courts in this Province.

The second submission of the Attorney General for Ontario also fails.

VI

We pass now to the second step of the inquiry, to consideration of the impugned powers within their institutional setting. Is the power to order eviction or compliance when so viewed still a

‘judicial power’? I have already indicated that the hallmark of a judicial power is a *lis* between parties in which a tribunal is called upon to apply a recognized body of rules in a manner consistent with fairness and impartiality. The adjudication deals primarily with the rights of the parties to the dispute, rather than considerations of the collective good of the community as a whole.

With very few exceptions, the Residential Tenancy Commission is not free to intervene of its own motion in disputes between landlords and tenants. Virtually all of the provisions of the Act require that either a landlord or a tenant apply to the Commission before any action be taken. Moreover, the power to order eviction or compliance will, in all case, be exercised in the context of a *lis* between parties. This is so even where a third party may invoke the Commission’s intervention. Under s. 29, for example, a Public Utility may notify the Commission that its service has been or is likely to be stopped, and the Commission may intervene. But s. 29 goes on to provide that the Commission shall determine whether a particular landlord is breaching his obligation to supply vital services to his tenants. Thus there will clearly be a *lis* between parties and an issue to be resolved.

When confronted with a *lis*, the task of the Commission will be to determine the respective rights and obligations of the parties according to the terms of the legislation. The Commission does not have an untrammelled discretion to ‘set matters right’. The powers which it may invoke and the remedies which it may award are circum-

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scribed by the terms of the Act. At no point is the individual’s right at law surrendered for the benefit of a common group or policy. The Commission deals exclusively with matters of contract and land law as they arise between landlords and tenants.

It is true that the Commission is given a certain degree of discretion when performing its adjudicative function. Under s. 93(1) for example, the Commission is instructed to decide “upon the real merits and justice of the case”; s. 93(2) provides that the Commission “shall ascertain the real substance of all transactions and activities...”; s. 110(3) states that the Commission “may include in any order terms and conditions it considers proper in all the circumstances”. Yet such terminology is certainly not foreign to courts within the purview of s. 96. The County Court under *The Landlord and Tenant Act* has the power to “make such further or other order as the judge considers appropriate” (s. 96); to make an order “granting relief against forfeiture on such terms and conditions as the judge may decide” (s. 106(1)), and to “refuse to grant the application [for possession] unless he is satisfied, having regard to all the circumstances, that it would be unfair to do so”. (s. 107(2)).

The Commission has authority to hear and determine disputes in accordance with rules of law, and by the authority of the law. It authorizes actions for which application is made. It has the power to impose penalties and sanctions and to award remedies for the infringement of rights. Disobedience

of an order of the Commission is a penal offence. The Commission decides contractual and property rights between individual landlords and tenants and in so doing determines not only the right to land and property, but also other rights. In each case, there is an analysis of the law, an application of the applicable law to the particular facts, and then a judicial decision and a consequent order. It is difficult to conceive that when so acting the Commission acts otherwise than as a curial tribunal. In substance the tribunal is exer-

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cising judicial powers roughly in the same way as they are exercised by the courts.

Section 105 is also important. It provides that *The Statutory Powers Procedure Act, 1971*, applies to proceedings by the Commission in the exercise of a statutory power of decision. That Act assures the right to counsel, the right to call and examine witnesses and present argument and the right to conduct cross-examination of witnesses. *The Statutory Powers Procedure Act, 1971*, also requires that the tribunal give its final decision and order in writing and shall give reasons in writing if requested by a party. The Commission, at the hearing, is required to question the parties who are in attendance at the hearing and any witnesses with a view to determining the truth concerning the matters in dispute. Apart from this inquisitorial feature, there is little to distinguish the hearing from a hearing conducted by a Superior Court. An appeal lies to the Commission from the decision or order of a Commissioner and a further appeal from the Commission on a question of law, to the Supreme Court of Ontario.

I conclude that the impugned powers, when viewed in their institutional setting, remain essentially ‘judicial powers’.

VII

We now face the most difficult aspect of this appeal—an examination of the inter-relationship between the Commission’s impugned ‘judicial powers’ and the other powers and jurisdiction conferred under the Act.

Prior to 1979, three broad functions were exercised by three separate bodies. The function of giving advice, mediating and educating was handled by the Landlord and Tenant Advisory Bureaux. The function of administering rent review was handled by the Residential Premises Rent Review Board. The function of adjudicating disputes between landlords and tenants was handled by s. 96 courts. The 1979 Act effected relatively minor changes in the substantive law of

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landlord and tenant. The primary change introduced in 1979 was to transfer the separate and distinct functions of the Advisory Bureaux, the Rent Review Board and the courts to the Residential Tenancy Commission.

The Attorney General for Ontario argues that the Commission is essentially an administrative body charged with “supervising and regulating” the relationship of landlord and tenant in the Province of Ontario. The function of adjudicating disputes, it is contended, is merely a subsidiary or ancillary aspect of the Commission’s role.

The Attorney General must look to s. 81, defining the powers of the Commission to sustain his argument of an overall supervisory and regulatory role in the field of landlord and tenant relations. Section 81 lends little support to the argument. It reads:

81. The Commission shall,

- (a) perform the duties assigned to it by or under this Act and shall administer this Act and the regulations;
- (b) periodically review this Act and the regulations and recommend from time to time amendments or revisions thereof;
- (c) advise and assist the public on all residential tenancy matters including referral where appropriate to social services and public housing agencies;
- (d) take an active role in ensuring that landlords and tenants are aware of the benefits and obligations established by this Act;
- (e) periodically prepare and publish a summary of significant decisions of the Commission and the reasons therefor.

It appears upon reading the Act as a whole that the central function of the Commission is that of resolving disputes, in the final resort by a judicial form of hearing between landlords and tenants. The bulk of the Act is taken up with defining the rights and obligations of landlords and tenants and with prescribing a method for resolving disputes over those obligations. Dispute resolution is achieved through application to the Commission. It is true that the Commission is granted the power to mediate the dispute before it is obliged to hold a

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hearing, but the Commission will ordinarily have no right or duty to act as mediator unless invited to do so by one of the parties. If one party does not wish to settle, then a judicial hearing must be held and a judgment rendered. The other functions of the Commission are either ancillary to this function (*i.e.* the power to recommend policy or to advise the parties) or are separate and distinct from this core power, and bear no relation to it (*i.e.* the power over rent review).

There is no broad legislative scheme as there was in *Mississauga, supra*, to subsume the judicial functions of the Commission. It was argued that the powers vested in the Residential Tenancy Commission were merely incidental or ancillary to the policy of “security of tenure” for tenants. This submission is unconvincing. The primary purpose and effect of the 1979 Act was to transfer jurisdiction over a large and important body of law, affecting landlords and tenants of one million

rental units, from the s. 96 courts where it has been administered since Confederation to a provincially appointed tribunal.

Here the chief role of the Commission is not to administer a policy or to carry out an administrative function. Its primary role is to adjudicate. The administrative features of the legislation can be characterized as ancillary to the main adjudicative function. The power of the Commission to mediate disputes is aimed at the speedy resolution of differences between the parties. So too is the informal nature of the proceedings. The goal of these provisions is to enable the Commission to ‘process’ controversies in an expeditious manner. As such, they are merely incidental to the main purpose of the legislation.

In the case at bar, as the Court of Appeal observed, powers until now exercised by the courts have simply been transferred to the Commission as the “chosen vehicle for their exercise”. In the instant case the impugned powers are the nuclear core around which other powers and functions are collected. In *Tomko* the tribunal was composed of persons familiar with labour relations matters and

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presumably better able than the courts to weigh the interests involved and to assess the implications of cease and desist orders upon the parties. In the present case the Act imposes no particular qualifications or experience as essential to appointment to the Commission. There is no requirement of legal training or occupational experience for any member of the Commission and the process of selection is not based on any bipartite or tripartite principle. The Commission is in no way a specialized agency. In the instant case the whole of a s. 96 court’s jurisdiction in a certain area, however limited, has been transferred to provincially appointed officials. The provincial legislature has sought to withdraw historically entrenched and important judicial functions from the superior court and vest them in one of its own tribunals. Although the legislature may undoubtedly contract, as well as enlarge, court jurisdiction it cannot lift wholesale from the superior courts and bestow on a tribunal of its own making the resolution of disputes theretofore handled by superior courts in respect of rights and obligations in the nature of eviction orders and orders for compliance with contractual mandates.

The Residential Tenancy Commission is charged with the function of interpreting contracts and enforcing contractual rights through the exercise of the impugned powers. The Commission is to be empowered to do what a superior court has always done. It is clearly a Superior Court *quoad* those powers. The statutory provisions conferring those powers are therefore invalid. In *Farrah* the jurisdiction which the statute sought to transfer was, in the words of Pigeon J. at pp. 656-7 “precisely the same as that which was previously exercised by the Quebec Court of Appeal”. In the present case the jurisdiction sought to be transferred is precisely the same as that which was previously, and is presently, exercised by the courts.

The Attorney General of Ontario in a supplementary factum submitted that the test implicit in the *Tomko* case may be expressed in this way: where the Legislature enacts legislation that in its

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“pith and substance” establishes a scheme of substantive law and a scheme for its administration to meet some real social problem within its legislative competence, the Legislature may, as an integral part of the scheme for administration of the statute, confer s. 96 court powers on a non-section-96 tribunal (whether a specialized tribunal or a non-section-96 court) if the conferring of such powers is rationally justifiable or functionally appropriate as part of the scheme. In such case, the statute is characterized as a whole as being in pith and substance in relation to the provincial legislative subject matter. The contention seems to be that if the legislature sets up a social agency to meet a social problem, as seen by the legislature, then that determines the validity of a conferral of s. 96 judicial power upon the agency. If the legislation is not aimed at evasion, it cannot be attacked. Such a contention goes too far and is not supported on the authorities.

Implicit throughout the argument advanced on behalf of the Attorney General of Ontario is the assumption that the court system is too formal, too cumbersome, too expensive and therefore unable to respond properly to the social needs which *The Residential Tenancies Act* is intended to meet. All statutes respond to social needs. The courts are not unfamiliar with equity and the concepts of fairness, justice, convenience, reasonableness. Since the enactment in 1976 of the legislation assuring “security of tenure” the County Court judges of Ontario have been dealing with matters arising out of that legislation, apparently with reasonable despatch, as both landlords and tenants in the present proceedings have spoken clearly against transfer of jurisdiction in respect of eviction and compliance orders from the courts to a special commission. It is perhaps also of interest that there is no suggestion in the material filed with us that the Law Reform Commission favoured removal from the courts of the historic functions performed for over one hundred years by the courts.

I am neither unaware of, nor unsympathetic to, the arguments advanced in support of a view that s. 96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial

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administrative tribunals. Yet, however worthy the policy objectives, it must be recognized that we, as a Court, are not given the freedom to choose whether the problem is such that provincial, rather than federal, authority should deal with it. We must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it has been judicially interpreted in the past. If the impugned power is violative of s. 96 it must be struck down.

I conclude by noting that two provincial Courts of Appeal, in addition to the Ontario Court of Appeal, have had occasion recently to consider provincial power to vest jurisdiction over landlord and tenant matters in a specialized tribunal. The Alberta Court of Appeal in *Reference Re Proposed*

Legislation Concerning Leased Premises and Tenancy Agreements^[32] decided that a province could not authorize a provincially appointed tribunal to grant orders for possession to a landlord or to grant orders for specific performance of a tenancy agreement. The difficulty facing the Court, as Morrow J.A. noted in his reasons, was that the questions were referred to the court without any accompanying institutional setting. Accordingly, the reasons of the Court of Appeal must of necessity be of limited application for future cases. The British Columbia Court of Appeal, in *Re Pepita and Doukas, supra*, held that legislation empowering a ‘rentalsman’ to make an order for possession was *intra vires* the province. The Ontario Court of Appeal, in its judgment in the instant case, elaborated a number of distinctions between the Ontario and British Columbia legislation; these distinctions, it was said, justified the different conclusions reached by the two courts. While noting that such distinctions are indeed possible, this Court need not, on this occasion, express any opinion as to the validity of the British Columbia legislation.

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In the result, I would dismiss the appeal, and answer in the negative the constitutional questions which have been posed by the Executive Council of the Province of Ontario. No question of costs arises.

Appeal dismissed.

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[1] (1980), 1980 CanLII 58 (ON CA), 26 O.R. (2d) 609; (1980), 105 D.L.R. (3d) 193.

[2] (1587), 76 E.R. 676.

[3] 1971 CanLII 135 (SCC), [1971] S.C.R. 689.

[4] 1961 CanLII 84 (SCC), [1961] S.C.R. 775.

[5] 1940 CanLII 46 (SCC), [1940] S.C.R. 444.

[6] 1937 CanLII 365 (UK JCPC), [1937] A.C. 368.

[7] 1939 CanLII 270 (UK JCPC), [1939] A.C. 468.

[8] 1939 CanLII 22 (SCC), [1939] S.C.R. 104.

[9] (1966), 1966 CanLII 513 (QC CA), 61 D.L.R. (2d) 317.

[10] 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373.

[11] 1950 CanLII 27 (SCC), [1950] S.C.R. 124.

[12] 1938 CanLII 251 (UK JCPC), [1939] A.C. 117.

[13] [1965] 1 Q.B. 232.

[14] [1953] A.C. 514.

[15] 1929 CanLII 438 (UK JCPC), [1930] A.C. 124.

[16] 1978 CanLII 32 (SCC), [1978] 2 S.C.R. 736.

[17] (1978), 1978 CanLII 1314 (ON SC), 21 O.R. (2d) 663.

[18] (1978), 1978 CanLII 1736 (ON SC), 22 O.R. (2d) 376.

[19] 1938 CanLII 252 (UK JCPC), [1938] A.C. 415.

[20] 1938 CanLII 2 (SCC), [1938] S.C.R. 398.

[21] 1948 CanLII 266 (UK JCPC), [1949] A.C. 134.

[22] 1975 CanLII 183 (SCC), [1977] 1 S.C.R. 112.

[23] 1979 CanLII 37 (SCC), [1979] 2 S.C.R. 244.

[24] 1978 CanLII 195 (SCC), [1978] 2 S.C.R. 638.

[25] (1979), 1979 CanLII 757 (BC CA), 101 D.L.R. (3d) 577.

[26] 1958 CanLII 8 (SCC), [1958] S.C.R. 535.

[27] 1927 CanLII 2 (SCC), [1927] S.C.R. 271.

[28] 1975 CanLII 32 (SCC), [1976] 2 S.C.R. 520.

[29] 1978 CanLII 177 (SCC), [1979] 1 S.C.R. 729.

[30] (1849), 18 L.J.Q.B. 199.

[31] (1869), 1869 CanLII 57 (NB SC), 12 N.B.R. 372.

[32] (1978), 1978 ALTASCAD 264 (CanLII), 89 D.L.R. (3d) 460.

TAB 30

Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] SCR 121

Source:	Supreme Court of Canada
Date:	1959-01-27
Other citations:	16 DLR (2d) 689 — [1959] SCJ No 1 (QL) — [1959] ACS no 1
Citation:	Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] SCR 121, < https://canlii.ca/t/22wmw >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v. Cheticamp Fisheries Co-operative Ltd. , 1995 NSCA 24 (CanLII) [...] In my opinion, Roncarelli is distinguishable particularly in that the abuse there was flagrant, not connected with the purposes for which the powers were given and done with the specific intent of harming the plaintiff. [...]

Supreme Court of Canada
Roncarelli v. Duplessis, [1959] S.C.R. 121
Date: 1959-01-27

FRANK RONCARELLI (*Plaintiff*)

APPELLANT;

AND

THE HONOURABLE MAURICE DUPLESSIS (*Defendant*)

RESPONDENT

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

Crown-Officers of the Crown-Powers and responsibilities-Prime Minister and Attorney-General-Quebec Liquor Commission-Cancellation of licence to sell liquor-T7rhether made at instigation of Prime Minister and Attorney-General-The Alcoholic Liquor Act, R.S.Q.

1941, c. 255-The Attorney-General's Department Act, R.S.Q. 1941, c. 46-The Executive Power Act, R.S.Q. 1941, c. 7.

Licences-Cancellation-Motives of cancellation---Done on instigation of Prime Minister and Attorney-General-Whether liability in damages-Whether notice under art. 88 of the Code of Civil Procedure required.

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The plaintiff, the proprietor of a restaurant in Montreal and the holder of a licence to sell intoxicating liquor, sued the defendant personally for damages arising out of the cancellation of his licence by the Quebec Liquor Commission. He alleged that the licence had been arbitrarily cancelled at the instigation of the defendant who, without legal powers in the matter, had given orders to the Commission to cancel it before its expiration. This was done, it was alleged, to punish the plaintiff, a member of the Witnesses of Jehovah, because he had acted as bailsmen for a large number of members of his sect charged with the violation of municipal by-laws in connection with the distribution of literature. The trial judge gave judgment for the plaintiff for part of the damages claimed. The defendant appealed and the plaintiff, seeking an increase in the amount of damages, cross-appealed. The Court of Appeal dismissed the action and the cross-appeal.

Held (Taschereau, Cartwright and Fauteux JJ. dissenting) : The action should be maintained and the amount awarded at trial should be increased by \$25,000. By wrongfully and without legal justification causing the cancellation of the permit, the defendant became liable for damages under art. 1053 of the *Civil Code*.

Per Kerwin C.J.: The trial judge correctly decided that the defendant ordered the Commission to cancel the licence, and no satisfactory reason has been advanced for the Court of Appeal setting aside that finding of fact.

Per Kerwin C.J. and Locke and Martland JJ.: There was ample evidence to sustain the finding of the trial judge that the cancellation of the permit was the result of an order given by the defendant to the manager of the Commission. There was, therefore, a relationship of cause and effect between the defendant's acts and the cancellation of the permit.

The defendant was not acting in the exercise of any of his official powers. There was no authority in the *Attorney-General's Department Act*, the *Executive Power Act*, or the *Alcoholic Liquor Act* enabling the defendant to direct the cancellation of a permit under the *Alcoholic Liquor Act*. The intent and purpose of that Act placed complete control over the liquor traffic in the hands of an independent commission.

Cancellation of a permit by the Commission, at the request or upon the direction of a third party, as was done in this case, was not a proper and valid exercise of the powers conferred upon the Commission by s. 35 of the Act.

The defendant was not entitled to the protection provided by art. 88 of the *Code of Civil Procedure* since what he did was not "done by him in the exercise of his functions". To interfere with the administration of the Commission by causing the cancellation of a liquor permit was entirely outside his legal functions. It involved the exercise of powers which in law he did not possess at all. His position was not altered by the fact that he thought it was his right and duty to act as he did.

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Per Rand J.: To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is beyond the scope of the discretion conferred upon the Commission by the *Alcoholic Liquor Act*. What was done here was not competent to the Commission and *a fortiori* to the government or the defendant. The act of the defendant, through the instrumentality of the Commission, brought about a breach of an implied public statutory duty toward the plaintiff. There was no immunity in the defendant from an action for damages. He was under no duty in relation to the plaintiff and his act was an intrusion upon the functions of a statutory body. His liability was, therefore, engaged. There can be no question of good faith when an act is done with an improper intent and for a purpose alien to the very statute under which the act is purported to be done. There was no need for giving a notice of action as required by art. 88 of the *Code of Civil Procedure*, as the act done by the defendant was quite beyond the scope of any function or duty committed to him so far so that it was one done exclusively in a private capacity however much, in fact, the influence of public office and power may have carried over into it.

Per Abbott J.: The cancellation of the licence was made solely because of the plaintiff's association with the Witnesses of Jehovah and with the object and purpose of preventing him from continuing to furnish bail for members of that sect. This cancellation was made with the express authorization and upon the order of the defendant. In purporting to authorize and instruct the Commission to cancel the licence the defendant was acting, as he was bound to know, without any legal authority whatsoever. A public officer is responsible for acts done by him without legal justification. The defendant was not entitled to avail himself of the exceptional provision of art. 88 of the *Code of Civil Procedure* since the act complained of was not "done by him in the exercise of his functions" but was an act done when he had gone outside his functions to perform it. Before a public officer can be held to be acting "in the exercise of his functions" within the meaning of art. 88, it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform.

Per Taschereau J., dissenting: The action cannot succeed because -the plaintiff did not give the notice required by art. 88 of the *Code of Civil Procedure* to the defendant who was a public officer performing his functions. The failure to fulfil this condition precedent was a total bar to the claim. That failure may be raised by exception to the form or in the written plea to the action, and the words "no judgment may be rendered" indicate that the Court may raise the point *proprio motu*. Even if what was said by the defendant affected

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the decision taken by the Commission, the defendant remained, nevertheless, a public officer acting in the performance of his duties. He was surely a public officer, and it is clear that he did not act in his personal quality. It was as legal adviser of the Commission and also as a public officer entrusted with the task of preventing disorders and as protector of the peace in the province, that he was consulted. It was the Attorney-General, acting in the performance of his functions, who was required to give his directives to a govern-mental branch. It is a fallacious principle to hold that an error, committed by a public officer in doing an act connected with the object of his functions, strips that act of its official character and that its author must then be considered as having acted outside the scope of his duties.

Per Cartwright J., dissenting: The loss suffered by the plaintiff was *damnum sine injuria*. Whether the defendant directed or merely approved the cancellation of the licence, he cannot be answerable in damages since the act of the Commission in

cancelling the licence was not an actionable wrong. The Courts below have found, on ample evidence, that the defendant and the manager of the Commission acted throughout in the honest belief that they were fulfilling their duty to the province. On the true construction of the *Alcoholic Liquor Act*, the Legislature, except in certain specified circumstances which are not present in the case at bar, has not laid down any rules as to the grounds on which the Commission may decide to cancel a permit; that decision is committed to the unfettered discretion of the Commission and its function in making the decision is administrative and not judicial or quasi-judicial. Consequently, the Commission was not bound to give the plaintiff an opportunity to be heard and the Court cannot be called upon to determine whether there existed sufficient grounds for its decision. Even if the function of the Commission was quasi-judicial and its order should be set aside for failure to hear the plaintiff, it is doubtful whether any action for damages would lie.

Per Fauteux J., dissenting : The right to exercise the discretion with respect to the cancellation of the permit, which under the *Alcoholic Liquor Act* was exclusively that of the Commission, was abdicated by it in favour of the defendant when he made the decision executed by the Commission. The cancellation being illegal, imputable to the defendant, and damageable for the plaintiff, the latter was entitled to succeed on an action under art. 1053 of the *Civil Code*.

As the notice required by art. 88 of the *Code of Civil Procedure* was not given, the action, however, could not be maintained. The failure to give notice, when it should be given, imports nullity and limits the very jurisdiction of the Court. In the present case, the defendant was entitled to the notice since the illegality reproached was committed "in the exercise of his functions". The meaning of this expression in art. 88 was not subject to the limitations attending expressions

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more or less identical appearing in art. 1054 of the *Civil Code*. The latter article deals with responsibility whereas art. 88 deals with procedure. Article 88 has its source in s. 8 of *An Act for the Protection of Justices of the Peace*, Cons. Stat. L.C., c. 101, which provided that the officer "shall be entitled" to the protection of the statute although "he has exceeded his powers or jurisdiction, and has acted clearly contrary to law". That section peremptorily establishes that, in *pari materia*, a public officer was not considered as having ceased to act within the exercise of his functions by the sole fact that the act committed by him might constitute an abuse of power or excess of jurisdiction, or even a violation of the law. An illegality is assumed under art. 88. The jurisprudence of the province, which has been settled for many years, is to the effect that the incidence of good or bad faith has no bearing on the right to the notice.

The illegality committed by the defendant did not amount to an offence known under the penal law or a delict under art. 1053 of the *Civil Code*. He did not use his functions to commit this illegality. He did not commit it on the occasion of his functions, but committed it because of his functions. His good faith has not been doubted, and on this fact there was a concurrent finding in the Courts below.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec^[1], reversing a judgment of Mackinnon J. Appeals allowed, Taschereau, Cartwright and Fauteux JJ. dissenting.

F. R. Scott and A. L. Stein, for the plaintiff, appellant.

L. E. Beaulieu, Q.C., and L. Tremblay, Q.C., for the defendant, respondent.

THE CHIEF JUSTICE :- No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal Side[2]) setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel the appellant's licence. A reading of the testimony of the respondent and of the person constituting the commission at the relevant time satisfies me that the trial judge correctly decided the point. As to the other questions, I agree with Mr. Justice Martland.

The appeals should be allowed with costs here and below and judgment directed to be entered for the appellant against the respondent in the sum of \$33,123.53 with interest from the date of the judgment of the Superior Court, together with the costs of the action.

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TASCHEREAU J. (*dissenting*) :-L'intimé est Premier Ministre et Procureur Général de la province de Québec, et il occupait ces hautes fonctions dans le temps où les faits qui ont donné naissance à ce litige se sont passés.

L'appelant, un restaurateur de la Cité de Montréal, et porteur d'un permis de la Commission des Liqueurs pour la vente des spiritueux, lui a réclamé personnellement devant la Cour supérieure la somme de \$118,741 en dom-mages. Il a allégué dans son action qu'il est licencié depuis de nombreuses années, qu'il a toujours respecté les lois de la Province se rapportant à la vente des liqueurs alcooliques, que son restaurant avait une excellente réputation, et jouissait de la faveur d'une clientèle nombreuse et recherchée.

Il a allégué en outre qu'il faisait et fait encore partie de la secte religieuse des "Témoins de Jéhovah", et que parce qu'il se serait rendu caution pour quelque 390 de ses coreligionnaires, traduits devant les tribunaux correctionnels de Montréal et accusés de distribution de littérature, sans permis, l'intimé serait illégalement intervenu auprès du gérant de la Commission pour lui faire perdre son permis, qui d'ailleurs lui a été enlevé le 4 décembre 1946. Ce serait comme résultat de l'intervention injustifiée de l'intimé que l'appelant aurait été privé de son permis, et aurait ainsi souffert les dommages considérables qu'il réclame.

La Cour supérieure a maintenu l'action jusqu'à concurrence de \$8,123.53, et la Cour du banc de la reine[3], M. le Juge Rinfret étant dissident, aurait pour divers motifs maintenu l'appel et rejeté l'action.

L'intimé a soulevé plusieurs moyens à l'encontre de cette réclamation, mais je n'en examinerai qu'un seul, car je crois qu'il est suffisant pour disposer du présent appel. Le *Code de procédure civile* de la province de Québec contient la disposition suivante:

Art. 88 C.P.-Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.

Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

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Le défaut de donner cet avis peut être invoqué par le défendeur, soit au moyen d'une exception à la forme ou soit par plaidoyer au fond. *Charland v. Kay*^[4]; *Corporation de la Paroisse de St-David v. Paquet*^[5]; *Houde v. Benoit*^[6].

Les termes mêmes employés par le législateur dans l'art. 88 C.P.C., "*nul jugement ne peut être rendu*" contre le défendeur, indiquent aussi que la Cour a le devoir de soulever d'office ce moyen, si le défendeur omet ou néglige de le faire par exception à la forme, ou dans son plaidoyer écrit. La signification de cet avis à un *officier public, remplissant des devoirs publics*, est une condition préalable, essentielle à la réussite d'une procédure judiciaire. S'il n'est pas donné, les tribunaux ne peuvent prononcer aucune condamnation en dommages. Or, dans le cas présent, il est admis qu'aucun avis n'a été donné.

Mais, c'est la prétention de l'appelant que l'intimé ne peut se prévaloir de ce moyen qui est une fin de non recevoir, car, les conseils ou avis qu'il aurait donnés et qui auraient été la cause déterminante de la perte de son permis, ne l'ont pas été en raison d'un acte posé par lui *dans l'exercice de ses fonctions*.

La preuve révèle que l'appelant était bien licencié de la Commission des Liqueurs depuis de nombreuses années, que la tenue de son restaurant était irréprochable, et que dans le cours du mois de décembre de l'année 1946, alors qu'il était toujours porteur de son permis, celui-ci lui a été enlevé parce qu'il se rendait caution pour plusieurs centaines de ses coreligionnaires, distributeurs de littérature que l'on croyait séditeuse.

C'était avant le jugement de cette Cour dans la cause de *Boucher v. Le Roi*^[7], alors que la conviction était profondément ancrée parmi la population, que les "Témoins de Jéhovah" étaient des perturbateurs de la paix publique, des sources constantes de trouble et de désordre dans la Province. On jugeait leur mouvement dangereux, susceptible de soulever une partie de la population contre l'autre, et de provoquer de sérieuses agitations. On parlait même de conspiration séditeuse, et ce n'est sûrement pas sans

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cause raisonnable, car cette opinion fut plus tard unanime-ment confirmée par cinq juges de la Cour du Banc de la Reine dans l'affaire *Boucher v. Le Roi*^[8], et également par quatre juges dissidents devant cette Cour (*Boucher v. Le Roi* cité *supra*),

M. Archambault, alors gérant général de la Commission des Liqueurs, soupçonnait fortement que le "Frank Roncarelli" qui par ses cautionnements aidait financièrement ce mouvement qu'il croyait subversif, était détenteur d'un permis de restaurateur pour la vente de liqueurs alcooliques. Il pensait évidemment qu'il ne convenait pas que les bénéfices que Roncarelli retirait de son permis de la Commission, soient utilisés à servir la cause d'agitateurs religieux, dont les enseignements et les méthodes venaient en conflit avec les croyances populaires. Il en informa l'intimé, procureur général, qui en cette qualité est l'aviseur légal officiel de la province pour toutes les affaires juridiques.

Au cours d'une première conversation téléphonique, M. Archambault suggéra à l'intimé que le permis de Roncarelli lui soit enlevé, ce que d'ailleurs il avait personnellement le droit de faire, en vertu de l'art. 35 de la *Loi des Liqueurs*, qui est ainsi rédigé:

35.-La Commission peut à sa *discrétion* annuler un permis en tout temps.

Or, comme l'exécutif de la Commission des Liqueurs ne se compose que d'un gérant général qui était M. Archambault, cette discrétion reposait entièrement sur lui.

L'intimé lui suggéra la prudence, et lui proposa de s'en-quérir avec certitude si le Roncarelli, détenteur de permis, était bien le même Roncarelli qui prodiguait ses cautionnements d'une façon si généreuse. Après enquête, l'affirmative ayant été établie, M. Archambault communiqua de nouveau avec l'intimé, et voici ce que nous dit M. Archambault dans son témoignage au sujet de ces conversations:

Q. Maintenant, ce jour-là, où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. *Certainement*, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, *et de mon intention d'annuler le privilège*, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de

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la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai appelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé,

il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

Voici maintenant la version de l'intimé :

Probablement, à la suite du rapport que l'indicateur Y-3 a fait, le rapport qui est produit, M. le Juge Archambault m'a téléphoné et m'a dit: 'on est sûr, c'est cette personne-là.' Et comme dans l'intervalle j'avais étudié le problème et parcouru les statuts depuis l'institution de la Commission des Liqueurs et tous les amendements qui avaient eu lieu, et j'avais consulté, j'en suis arrivé à la conclusion qu'en mou âme et conscience, mon impérieux devoir c'était d'approuver la suggestion très au point du Juge et d'autoriser la cancellation d'un privilège que cet homme-là ne méritait pas, à mon sens, et dont il n'était pas digne.

Et:

Après avoir mûrement délibéré et conscient et sûr de faire mon devoir, j'ai dit à M. Archambault que j'approuvais sa suggestion d'annuler le permis, d'annuler le privilège.

Et, plus loin :

... j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fût digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

... et lorsque le Juge Archambault m'a dit, après vérification, que c'était la même personne, j'ai dit: 'Vous avez raison, ôtez le permis, ôtez le privilège.'

Quand on demande à l'intimé s'il a donné un ordre à M. Archambault, voici ce qu'il dit:

Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé.

Que le permis ait été enlevé à Roncarelli comme con-séquence de la seule décision de M. Archambault, ce qu'il avait le droit de faire à sa discrétion, ou que cette discrétion ait été influencée par les paroles de l'intimé, n'a pas je crois d'effet décisif dans la détermination de la présente cause. Je demeure convaincu que même si les paroles de l'intimé. ont pu avoir quelque influence sur la décision qui a été prise, ce dernier demeurerait quand même un *officier public, agissant dans l'exercice de ses fonctions*, et qu'il était essentiel de lui donner l'avis requis par l'art. 88 C.P.C. L'absence de cet avis interdit aux tribunaux de prononcer aucune condamnation.

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L'intimé est sûrement un *officier public*, et il me semble clair qu'il n'a pas agi *en sa qualité personnelle*. C'est bien comme aviseur légal de la Commission des Liqueurs, et aussi comme *officier public* chargé de la prévention des troubles, et gardien de la paix dans la province, qu'il a été consulté. C'est le Procureur Général, agissant dans l'exercice de ses

fonctions, qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur. Vide : *Loi concernant le Département du Procureur Général*, R.S.Q. 1941, c. 46, art. 3, *Loi des liqueurs alcooliques*, S.R.Q. 1941, c. 255, art 138.

'Certains, à tort ou à raison, peuvent croire que l'intimé se soit trompé, en pensant qu'il devait, pour le maintien de la paix publique et la suppression de troubles existants, et qui menaçaient de se propager davantage, conseiller l'enlèvement du permis de l'appelant. Pour ma part, je ne puis admettre le fallacieux principe qu'une erreur commise par un *officier public*, en posant un acte qui se rattache cependant à l'objet de son mandat, enlève à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans *l'exécution de ses fonctions*.

Parce que l'appelant ne s'est pas conformé aux exigences de l'art. 88 C.P.C., en ne donnant pas l'avis requis à l'intimé qui est un *officier public*, *agissant dans l'exercice de ses fonctions*, je crois que l'action ne peut réussir. Le défaut de remplir cette condition préalable, constitue une fin de non recevoir, qui me dispense d'examiner les autres aspects de cette cause.

Je crois donc que l'appel principal, de même que l'appel logé pour faire augmenter le montant accordé par le juge de première instance, doivent être rejetés avec dépens de toutes les Cours.

The judgment of Rand and Judson JJ. was delivered by

RAND J. :-The material facts from which my conclusion is drawn are these. The appellant was the proprietor of a restaurant in a busy section of Montreal which in 1946 through its transmission to him from his father had been continuously licensed for the sale of liquor for approximately 34 years; he is of good education and repute and the restaurant was of a superior class. On December 4 of that year, while his application for annual renewal was

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before the Liquor Commission, the existing license was cancelled and his application for renewal rejected, to which was added a declaration by the respondent that no future license would ever issue to him. These primary facts took place in the following circumstances.

For some years the appellant had been an adherent of a rather militant 'Christian religious sect known as the Witnesses of Jehovah. Their ideology condemns the established church institutions and stresses the absolute and exclusive personal relation of the individual to the Deity without human intermediation or intervention.

The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as "The Watch Tower" and "Awake", sold at a small price.

In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to the religious beliefs and feelings of the Roman Catholic population. Large scale arrests were made of young men and women, by whom the publications mentioned were being held out for sale, under local by-laws requiring a licence for peddling any kind of wares. Altogether almost one thousand of such charges were laid. The penalty involved in Montreal, where most of the arrests took place, was a fine of \$40, and as the Witnesses disputed liability, bail was in all cases resorted to.

The appellant, being a person of some means, was accepted by the Recorder's Court as bail without question, and up to November 12, 1946, he had gone security in about 380 cases, some of the accused being involved in repeated offences. Up to this time there had been no suggestion of impropriety; the security of the appellant was taken as so satisfactory that at times, to avoid delay when he was absent from the city, recognizances were signed by him in blank and kept ready for completion by

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the Court officials. The reason for the accumulation of charges was the doubt that they could be sustained in law. Apparently the legal officers of Montreal, acting in concert with those of the Province, had come to an agreement with the attorney for the Witnesses to have a test case proceeded with. Pending that, however, there was no stoppage of the sale of the tracts and this became the annoying circumstance that produced the volume of proceedings.

On or about November 12 it was decided to require bail in cash for Witnesses so arrested and the sum set ranged from \$100 to \$300. No such bail was furnished by the appellant; his connection with giving security ended with this change of practice; and in the result, all of the charges in relation to which he had become surety were dismissed.

At no time did he take any part in the distribution of the tracts: he was an adherent of the group but nothing more. It was shown that he had leased to another member premises in Sherbrooke which were used as a hall for carrying on religious meetings: but it is unnecessary to do more than mention that fact to reject it as having no bearing on the issues raised. Beyond the giving of bail and being an adherent, the appellant is free from

any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence.

The mounting resistance that stopped the surety bail sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of the appellant. Admittedly an adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. Following discussions between the then Mr. Archambault, as the personality of the Liquor Commission, and the chief prosecuting officer in Montreal, the former, on or about November 21, telephoned to the respondent, advised him of those facts, and queried what should be done. Mr. Duplessis answered that the matter was serious and that the identity of the

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person furnishing bail and the liquor licensee should be put beyond doubt. A few days later, that identity being established through a private investigator, Mr. Archambault again communicated with the respondent and, as a result of what passed between them, the licence, as of December 4, 1946, was revoked.

In the meantime, about November 25, 1946, a blasting answer had come from the Witnesses. In an issue of one of the periodicals, under the heading "Quebec's Burning Hate", was a searing denunciation of what was alleged to be the savage persecution of Christian believers. Immediately instructions were sent out from the department of the Attorney-General ordering the confiscation of the issue and proceedings were taken against one Boucher charging him with publication of a seditious libel.

It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

The complementary state of things is equally free from doubt. From the evidence of Mr. Duplessis and Mr. Archambault alone, it appears that the action taken by the latter as the general manager and sole member of the Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bringing to a halt the activities of the Witnesses, to punish the appellant for the part he had played not only by revoking the existing licence but in declaring him barred from one "forever", and to warn others that they similarly would be stripped of provincial "privileges"

if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. The respondent felt that action to be his duty, something which his conscience demanded of him; and as representing the provincial government his decision became automatically that of Mr. Archambault and the Commission. The following excerpts of evidence make this clear:

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M. DUPLESSIS :

R... . Au mois de novembre 1946, M. Edouard Archambault, qui était alors le gérant général de la Commission des Liqueurs m'a appelé à Québec, téléphone longue distance de Montréal, et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la Police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec. De fait, Votre Seigneurie, un permis est un privilège, ce n'est pas un droit. L'article 35 de la Loi des Liqueurs alcooliques, paragraphe 1, a été édicté en 1921 par le statut II, Geo. V, chap. 24, qui déclare ceci:

"La Commission peut, à sa discrétion annuler le permis en tout temps."

* * *

"Je vais m'en informer et je vous le dirai." J'ai dit au Juge : "Dans l'intervalle, je vais examiner la question avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir ce que devrai faire." Quelques jours après, et pendant cet intervalle j'ai étudié le problème, j'ai étudié des dossiers, comme Procureur Général et comme Premier Ministre, quelques jours après le Juge Archambault, M. Edouard Archambault, m'a téléphoné pour me dire qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis. Je lui ai dit: "Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là, le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait."

* * *

J'ai dit: "Il y a peut-être de pauvres personnes, de bonne foi, plus riches d'idéal que d'esprit, de jugement, ces personnes-là sont probable-ment à la merci de quelques-uns qui les exploitent, je vais donner une entrevue pour attirer l'attention de tout le monde sur l'article 69 du Code Criminel, qui déclare que les complices sont responsables au même titre que la personne qui a commis l'offense."

* *

D. Vous n'avez pas reçu d'autres documents, c'est seulement les communications téléphoniques de M. le Juge Archambault?

R. Oui, certainement, un message du Juge Archambault, un autre téléphone au Juge Archambault, des examens de la situation, on en a même parlé au Conseil des Ministres, j'ai discuté le cas, j'ai consulté

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des officiers en loi et en mon âme et conscience j'ai fait mon devoir comme Procureur Général, j'ai fait la seule chose qui s'imposait, si c'était à recommencer je ferais pareil.

D. Monsieur le Premier Ministre, le 8 février 1947, dans le journal *La Presse*, paraissait un article intitulé: "Roncarelli subit un second refus". Le sous-titre de cet article se lit comme suit: "L'honorable M. Duplessis refuse au restaurateur, protecteur des Témoins de Jéhovah, la permission de poursuivre la Commission des Liqueurs." Vous trouverez, monsieur le Premier Ministre, presque à la fin de ce rapport, les mots suivants:

"C'est moi-même, à titre de Procureur Général, et de responsable de l'ordre dans cette province, qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis référant à Roncarelli."

Je vous demande, monsieur le Premier Ministre, si c'est un. rapport exact de vos paroles à cette conférence de presse?

R. Ce que j'ai dit lors de la conférence de presse, c'est ce que je viens de déclarer. Je ne connaissais pas Roncarelli, je ne savais pas que Roncarelli avait un permis, ... lorsqu'il a attiré mon attention sur la situation absolument anormale d'un homme bénéficiant d'un privilège de la province, et multipliant les actes de nature à paralyser les tribunaux de la province et la police municipale de Montréal, c'est là que j'ai approuvé sa suggestion et que j'ai dit, comme Procureur général ...

LA COUR:-C'est une autre question que l'on vous pose, Monsieur le Premier Ministre. Voulez-vous relire la question. (La demande précédente est alors relue.)

R. Ce que j'ai dit à la presse, c'est ce que je viens de dire tout à l'heure. L'article tel que produit n'est pas conforme textuellement à ce que j'ai dit. Ce que j'ai dit, ce que je répète, c'est que le Juge Archambault, gérant de la Commission des Liqueurs m'a mis au fait d'une situation que j'ignorais et comme Procureur Général, pour accomplir mon devoir, j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fut digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

* *

D. Les mots que je viens de vous lire tout à l'heure, c'est censé être textuellement les mots que vous avez donnés, parce que c'est précédé d'une indication d'un

rapport textuel:

"Nous n'avons fait qu'exercer en ce faisant un droit formel et incontestable, nous avons rempli un impérieux devoir. Le permis de Roncarelli a été annulé non pas temporairement mais bien pour toujours."

LE TÉMOIN:- Si j'ai dit cela?

L'AVOCAT :- Oui.

R. Oui. Le permis de Roncarelli a été annulé pour ce temps-là et pour toujours. Je l'ai dit et je considérais que c'était mon devoir et en mon âme et conscience j'aurais manqué à mon devoir si je ne l'avais pas fait.

D. Avec ces renseignements additionnels diriez-vous que les mots: "C'est moi-même, à titre de Procureur Général et de responsable de l'ordre dans cette province qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis." Diriez-vous que c'est exact?

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R. J'ai dit tout à l'heure ce qui en était. J'ai eu un téléphone de M. Archambault me mettant au courant de certains faits que j'ignorais au sujet de Roncarelli. Vérification, identification pour voir si c'était bien la même personne, étude, réflexion, consultation et décision d'approuver la suggestion du gérant de la Commission des Liqueurs d'annuler le privilège de Roncarelli.

* * *

LA COUR:

D. M. Stein veut savoir si vous avez donné un ordre à M. Archambault?

R. Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé. Le juge Archambault m'a mis au courant d'un fait que je ne connaissais pas, je ne connaissais pas les faits, c'est lui qui m'a mis au courant des faits. Je ne sais pas comment on peut appeler ça, quand le Procureur Général, qui est à la tête d'un département, parle à un officier, même à un officier supérieur, et qu'il émet une opinion, ce n'est pas directement un ordre, c'en est un sans l'être. Mais c'est à la suggestion du Juge Archambault, après qu'il eut porté à ma connaissance des faits que j'ignorais, que la décision a été prise.

* * *

D. Monsieur le Premier Ministre, excusez-moi si je répète encore la question, mais il me semble que vous n'avez pas répondu à la question que j'ai posée. Il paraît, non

seulement dans ce journal, mais aussi dans d'autres journaux, et cela est répété exactement dans les même paroles, dans le *Montreal Star*, en anglais, dans la *Gazette*, en anglais, dans *Le Canada*, en français et aussi dans *La Patrie*, en français, textuellement les mêmes mots: "C'est moi-même, à titre de Procureur Général, chargé d'assurer le respect de l'ordre et le respect des citoyens paisibles qui ai donné à la Commission des Liqueurs, l'ordre d'annuler le permis." Je vous demande si c'est possible que vous ayez employé presque exactement ces mots en discutant l'affaire avec les journalistes, ce jour-là?

R. Lorsque les journalistes viennent au bureau pour avoir des entrevues, des fois les entrevues durent une demi-heure, des fois une heure, des fois une heure et demie; quels sont les termes exacts qui sont employés, on ne peut pas se souvenir exactement des termes. Mais la vérité vraie c'est ce que j'ai dit tout à l'heure, et c'est cela que j'ai dit aux journalistes, comme Premier Ministre et comme Procureur Général, je prends la responsabilité. Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rappelle pas des expressions exactes, mais ce sont les faits.

* * *

D. Référant à l'article contenue dans la *Gazette* du 5 décembre, c'est-à-dire le jour suivant l'annulation du permis, vous trouvez là les mots en anglais :

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"In statement to the press yesterday, the Premier recalled that: 'Two weeks ago, I pointed out that the Provincial Government had the firm intention to take the most rigorous and efficient measures possible to get rid of those who under the names of Witnesses of Jehovah, distribute circulars which in my opinion, are not only injurious for Quebec and its population, but which are of a very libellous and seditious character. The propaganda of the Witnesses of Jehovah cannot be tolerated and there are more than 400 of them now before the courts in Montreal, Quebec, Three Rivers and other centers.'

'A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.'"

D. Je vous demande, monsieur le Premier Ministre, si ce sont les paroles presque exactes ou exactes que vous avez dites à la conférence de presse?

R. Que j'ai dit ici: "A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice." Je l'ai dit et je con-sidère que c'est vrai.

* *

M. ARCHAMBAULT:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. 'Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

In these circumstances, when the *de facto* power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? This calls for an examination of the statutory provisions governing the issue, renewal and revocation of liquor licences and the scope of authority entrusted by law to the Attorney-General and the government in relation to the administration of the Act.

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The liquor law is contained in R.S.Q. 1941, c. 255, entitled *An Act Respecting Alcoholic Liquor*. A Commission is created as a corporation, the only member of which is the general manager. By s. 5

The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of Manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor

Commission. R.S. 1925, c. 37, s. 5; 1 Ed. VII (2), c. 14, es. 1 and 5; 1 Geo. VI, c. 22, es. 1 and 5.

The entire staff for carrying out the duties of the Commission are appointed by the general manager-here Mr. Archambault-who fixes salaries and assigns functions, the Lieutenant-Governor in Council reserving the right of approval of the salaries. Besides the general operation of buying and selling liquor throughout the province and doing all things necessary to that end, the Commission is authorized by s. 9 (e) to "grant, refuse or cancel permits for the sale of alcoholic liquors or other permits in regard thereto and to transfer the permit of any person deceased". By s. 12 suits against the general manager for acts done in the exercise of his duties require the authority of the Chief Justice of the province, and the Commission can be sued only with the consent of the Attorney-General. Every officer of the Commission is declared to be a public officer and by R.S.Q. 1941, c. 10, s. 2, holds office during pleasure. By s. 19 the Commission shall pay over to the Provincial Treasurer any moneys which the latter considers available and by s. 20 the Commission is to account to the Provincial Treasurer for its receipts, disbursements, assets and liabilities. Sections 30 and 32 provide for the issue of permits to sell; they are to be granted to individuals only, in their own names; by s. 34 the Commission "may refuse to grant any permit"; subs. (2) provides for permits in special cases of municipalities where prohibition of sale is revoked in whole or part by by-law; subs. (3) restricts or refuses the grant of permits in certain cities the Council of which so requests; but it is provided that

... If the fying of such by-law takes place after the Commission has granted a permit in such city or town, the Commission shall be unable to give effect to the request before the first of May next after the date of fying.

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Subsection (4) deals with a refusal to issue permits in small cities unless requested by a by-law, approved by a majority vote of the electors. By subs. (6) special power is given the Commission to grant permits to hotels in summer resorts for five months only notwithstanding that requests under subss. (2) and (4) are not made. Section 35 prescribes the expiration of every permit on April 30 of each year. Dealing with cancellation, the section provides that the "Commission may cancel any permit at its discretion". Besides the loss of the privilege and without the necessity of legal proceedings, cancellation entails loss of fees paid to obtain it and confiscation of the liquor in the possession of the holder and the receptacles containing it. If the cancellation is not followed by prosecution for an offence under the Act, compensation is provided for certain items of the forfeiture. Subsection (5) requires the Commission to cancel any permit made use of on behalf of a person other than the holder; s. 36 requires cancellation in specified cases. The sale of liquor is, by s. 42, forbidden to various persons. Section 148 places upon the Attorney-General the duty of

1 .Assuring the observance of this 'Act and of the 'Alcoholic Liquor Possession and Transportation 'Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;

2. Conducting the suits or prosecutions for infringements of this Act or of the said Alcoholic Liquor Possession and Transportation 'Act. R.S. 1925, c. 37, s. 78a; 24 Geo. V, c. 17, s. 17.

The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony", and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual necessity [sic] to a superior class

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restaurant but also its identification with the business carried on. The provisions for assignment of the permit are to this most pertinent and they were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any

purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the 'Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

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To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent: *McGillivray v. Kimber*^[9]. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in *McGillivray*, there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there

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is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a, fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas*^[10], and under art. 1053 of the *Civil Code*. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned.

It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to

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that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

I mention, in order to make clear that it has not been overlooked, the decision of the House of Lords in *Allen v. Flood*^[11], in which the principle was laid down that an act of an individual otherwise not actionable does not become so because of the motive or reason

for doing it, even maliciously to injure, as distinguished from an act done by two or more persons. No contention was made in the present case based on agreed action by the respondent and Mr. Archambault. In *Allen v. Flood*, the actor was a labour leader and the victims non-union workmen who were lawfully dismissed by their employer to avoid a strike involving no breach of contract or law. Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In *Allen v. Flood* there were no such elements.

Nor is it necessary to examine the question whether on the basis of an improper revocation the appellant could have compelled the issue of a new permit or whether the purported revocation was a void act. The revocation was *de facto*, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

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Mr. Scott argued further that even if the revocation were within the scope of discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally a fault. The proposition generalized is this: where, by a statute restricting the ordinary activities of citizens, a privilege is conferred by an administrative body, the continuance of that enjoyment is to be free from the influence of third persons on that body for the purpose only of injuring the privilege holder. It is the application to such a privilege of the proposition urged but rejected in *Allen v. Flood* in the case of a private employment. The grounds of distinction between the two cases have been pointed out; but for the reasons given consideration of this ground is unnecessary and I express no opinion for or against it.

A subsidiary defence was that notice of action had not been given as required by art. 88 C.C.P. This provides generally that, without such notice, no public officer or person fulfilling any public function or duty is liable in damages "by reason of any act done by him in the exercise of his functions". Was the act here, then, done by the respondent in the course of that exercise? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it. It would be only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in direct conflict with fundamental postulates of our provincial as well as dominion government;

and in the actual circumstances there is not a shadow of justification for it in the statutory language.

The damages suffered involved the vocation of the appellant within the province. Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of

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its broad features; and in the best consideration I can give to them, the damages should be fixed at the sum of \$25,000 plus that allowed by the trial court.

I would therefore allow the appeals, set aside the judgment of the Court of Queen's Bench and restore the judgment at trial modified by increasing the damages to the sum of \$33,123.53. The appellant should have his costs in the Court of Queen's Bench and in this Court.

The judgment of Locke and Martland JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the 'Court of Queen's Bench, Appeal Side, for the Province of Quebec^[12], District of Montreal, rendered on April 12, 1956, overruling the judgment of the Superior Court rendered on May 2, 1951, under the terms of which the appellant had been awarded damages in the sum of \$8,123.53 and costs.

The appellant had appealed from the judgment of the Superior Court in respect of the amount of damages awarded. This appeal was dismissed.

The facts which give rise to this appeal are as follows:

The appellant, on December 4, 1946, was the owner of a restaurant and café situated at 1429 Crescent Street in the City of Montreal. At that time he was the holder of a liquor permit, no. 68, granted to him on May 1, 1946, pursuant to the provisions of the *Alcoholic Liquor Act* of the Province of Quebec and which permitted the sale of alcoholic liquors in the restaurant and café. The permit was valid until April 30, 1947, subject to possible cancellation by the Quebec Liquor Commission (hereinafter sometimes referred to as "the Commission") in accordance with the provisions of s. 35 of that Act. The business operated by the appellant had been founded by his father in the year 1912 and it had been continuously licensed until December 4, 1946. The evidence is that prior to that date the appellant had complied with the requirements of the *Alcoholic Liquor Act* and had conducted a high-class restaurant business.

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The appellant was an adherent of the Witnesses of Jehovah. From some time in 1944 until November 12, 1946, he had, on numerous occasions, given security for Witnesses of Jehovah who had been prosecuted under City of Montreal By-laws numbered 270 and 1643 for minor offences of distributing, peddling and canvassing without a licence. The maximum penalty for these offences was a fine of \$40 and costs, or imprisonment for 60 days. The total number of bonds furnished by the appellant was 390. These security bonds were accepted by the City attorney and the Recorder of the City of Montreal without remuneration to the appellant. None of the accused who had been bonded ever defaulted. Subsequently the appellant was released from these bonds at his own request and new security was furnished by others.

As a result of a change of procedure in the Recorder's Court in Montreal by the Attorney in Chief of that Court, the appellant was not accepted as a bondsman in any cases before that Court after November 12, 1946.

Up to November 12, 1946, the security bonds furnished by the appellant were accepted without question. These bonds were based upon the value of the appellant's immovable property containing the restaurant. The appellant did not give any security in any criminal case involving a charge of sedition.

About the 24th or 25th of November 1946 the pamphlet "Quebec's Burning Hate" began to be distributed in the Province of Quebec by the Witnesses of Jehovah. The Chief Crown Prosecutor in Montreal, then Mtre. Oscar Gagnon, K.C., decided that the distribution of this pamphlet should be prevented. There is no evidence that the appellant was at any time a distributor of this pamphlet and his restaurant and café in Montreal was not used for the distribution or storage of these pamphlets by himself or by anyone else. The appellant had ceased to be a bonds-man before the distribution of this pamphlet in the Province of Quebec had commenced.

On November 25, 1946, a number of pamphlets was seized in a building in the City of Sherbrooke owned by the appellant and leased from him, as a place of worship, by Witnesses of Jehovah under the control of the local

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minister Mr. Raymond Browning. There is no evidence that the appellant was in any way responsible for the activities of this congregation, or that he knew that the pamphlet "Quebec's Burning Hate" was in those premises.]

In the course of his inquiries about the distribution of this pamphlet, Mr. Gagnon learned that the appellant had been giving bail in a large number of cases in the Recorder's Court and also that he was the holder of the liquor permit for his restaurant. These facts were brought by Mr. Gagnon to the attention of Mr. Edouard Archambault, then Chair-man of

the Quebec Liquor Commission and subsequently Chief Judge of the Court of Sessions of the Peace. Mr. Archambault then interviewed Recorder Paquette, who informed him that the appellant held a licence from the Quebec Liquor Commission; that he was furnishing bail in a large number of cases of infractions of municipal by-laws; that these were so numerous that a great part of the police of Montreal had been taken from their duties as a consequence and that his Court was congested by the large number of cases pending before it.

Subsequent to the receipt of this information, Mr Archambault communicated by telephone with the respondent. The discussion which took place on that occasion and on the occasion of a subsequent telephone call will be reviewed later. Following the two telephone conversations between Mr. Archambault and the respondent, Mr Archambault, as manager of the Quebec Liquor Commission, issued an order for the cancellation of the appellant's permit with-out any prior notice to the appellant. All the liquor in the possession of the appellant on his restaurant premises was seized and was taken into the custody of the Commission.

The appellant carried on his restaurant business without a liquor licence for a period of approximately six months, after which, finding that the business could not be thus operated profitably, he closed it down and later effected a sale of the premises.

The appellant commenced action against the respondent on June 3, 1947, claiming damages in the total sum of \$118,741. He alleged that the respondent, without legal or statutory authority, had caused the cancellation of his liquor permit as an act of reprisal because of his having

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acted as surety or bondsman for the Witnesses of Jehovah in connection with the charges above mentioned. He alleged that the permit had been arbitrarily and unlawfully cancelled and that, as a result, he had sustained the damages claimed.

By his defence the respondent alleged that the Witnesses of Jehovah, in the years 1945 and 1946, had, with the consent and encouragement of the appellant, organized a propaganda campaign in the Province of Quebec, and particularly in the City of Montreal, where they had distributed pamphlets of a seditious character. The respondent referred to the fact that the appellant had acted as surety for a number of persons under arrest and thus permitted them to repeat their offences and to continue their campaign. He alleged that in his capacity as Attorney-General of the Province of Quebec, after becoming cognizant of the conduct of the appellant and of the fact that he held a permit issued by the Quebec Liquor Commission, he had decided, after careful reflection, that it was contrary to public order to permit the appellant to enjoy the benefit of the privileges of this permit and that he, the respondent, had recommended to the manager of the Quebec

Liquor Commission the cancellation of that permit. It was alleged that the permit did not give any right, but constituted a privilege available only during the pleasure of the Commission. He alleged that in the matter he had acted in his quality of Prime Minister and Attorney-General of the Province of Quebec and, accordingly, could not incur any personal responsibility. He further pleaded the provisions of art. 88 of the *Code of Civil Procedure* and alleged that he had not received notice of the action as required by the provisions of that article.

The case came on for trial in the Superior Court before MacKinnon J., who made findings of fact and reached conclusions in law as follows:

1. that the respondent gave an order to the manager of the Commission, Mr. Archambault, to cancel the appellant's permit and that it was the respondent's order which was the determining factor in relation to the cancellation of that permit;

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2. that the Commission had acted arbitrarily when it cancelled the permit and had disregarded the rules of reason and justice;
3. that the respondent had failed to show that, in law, he had any authority to interfere with the administration of the Commission, or to order it to cancel a permit;
4. that the respondent was not entitled to receive notice of the action pursuant to art. 88 of the *Code of Civil Procedure* because his acts which were complained of were not done in the exercise of his functions.

Damages were awarded in the total amount of \$8,123.53.

From this judgment the respondent appealed. The appellant cross-appealed in respect of the matter of damages, asking for an award in an increased amount.

The respondent's appeal on the issue of liability was allowed and the appellant's appeal was dismissed. Rinfret J. dissented in respect of the allowance of the respondent's appeal.

Various reasons were given for the allowance of the appeal by the majority of the Court^[13]. They may be summarized as follows:

Bissonnette J. reached the conclusion that, upon the evidence, the decision to cancel the permit had been made by Mr. Archambault before taking the respondent's advice. He also held that, according to the strict interpretation of the *Alcoholic Liquor Act*, the Commission was not obliged to justify before any Court the wisdom of its acts in cancelling a liquor permit.

Pratte J. allowed the appeal of the respondent on the first ground advanced by Bissonnette J., finding that there was no relationship of cause and effect as between the acts of the respondent and the cancellation of the permit because Mr. Archambault had already made his decision to cancel before consulting with the respondent.

Casey J. was of the same view with respect to this point. He also held that, although the discretion of the Commission to cancel a permit should not be exercised

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arbitrarily or capriciously, no individual has an inherent right to engage in the business regulated by the Act and the continuance of a permit was conditional upon the holder being of good moral character and a suitable person to exercise that privilege. In his view the chairman of the Commission had reasonable grounds for believing that the Witnesses of Jehovah were engaged in a campaign of libel and sedition and that the appellant, an active member of the sect, was participating in the group's activities. His -view was that, in the light of this, the Commission could properly cancel the permit.

Martineau J., like the other majority judges in the Court, found that there was no relationship of cause and effect as between what the respondent had done and the cancellation of the permit, also holding that Mr. Archambault had decided to cancel it before communicating with the respondent. He was also of the view that a Minister of the Crown is not liable if, in the exercise of powers granted to him by law, he makes an erroneous decision upon reliable information. He also held that, while the Commission's discretion to cancel a permit was not absolute and had to be exercised in good faith, the discretion is not quasi-judicial but "quasi-illimited" and only restricted by the good faith of its officers. He was of the opinion that the good faith of both the respondent and Mr. Archambault could not be doubted. He found that no order to cancel the permit had been given by the respondent to Mr. Archambault. He also held that, even if an order had been given and had been the determining factor in procuring the cancellation of the permit, there would be no liability upon the respondent, in view of the appellant's participation in the propaganda of the Witnesses of Jehovah.

Rinfret J., who dissented and who would have dismissed the respondent's appeal, in general agreed with the conclusions reached by the trial judge.

In view of the foregoing, it appears that there are four main points which require to be considered in the present appeal, which are as follows:

- 1 Was there a relationship of cause and effect as between the respondent's acts and the cancellation of the appellant's permit?

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2. If there was such a relationship, were the acts of the respondent justifiable on the ground that he acted in good faith in the exercise of his official functions as Attorney-General and Prime Minister of the Province of Quebec?

3. Was the cancellation of the appellant's permit a lawful act of the Commission, acting within the scope of its powers as defined in the *Alcoholic Liquor Act*?

4. Was the respondent entitled to the protection provided by art. 88 of the *Code of Civil Procedure*?

It is proposed to consider each of these points in the above sequence.

With respect to the first point, after reviewing the evidence, I am satisfied that there was ample evidence to sustain the finding of the trial judge that the cancellation of the appellant's permit was the result of instructions given by the respondent to the manager of the Commission. Two telephone calls were made by Mr. Archambault to the respondent. According to the evidence of the respondent, Mr. Archambault telephoned him in November 1946 "et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec."

In reply the respondent says that he said to Mr. Archambault:

C'est une chose très grave, êtes-vous sûr qu'il s'agit de Roncarelli qui a un permis de la Commission des Liqueurs?

Mr. Archambault then replied that he would inform himself and would communicate with the respondent.

Some time after the first telephone conversation, and apparently about November 30 or December 1, 1946, Mr. Archambault again telephoned the respondent to say:

qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder, qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis.

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To this the respondent replied:

Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là le Gouvernement de Québec ne

pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait.

The respondent further says that he told Mr. Archambault :

Vous avez raison, ôtez le permis, ôtez le privilège.

In February 1947 the respondent, in an interview with the press, stated that the appellant's permit had been cancelled on orders from him. His statement on this point appeared in a news dispatch to the Canadian Press from its Quebec correspondent:

It was I, as Attorney-General of the Province charged with the protection of good order, who gave the order to annul Frank Roncarelli's permit.

Mr. Duplessis said:

By so doing, not only have we exercised a right but we have fulfilled an imperious duty. The permit was cancelled not temporarily but definitely and for always.

It seems to me that the only reason Mr. Archambault could have had for telephoning the respondent in the first place, after his receipt of the information given by Mr. Gagnon and Recorder Paquette, was to obtain the respondent's direction as to what should be done. I find it difficult to accept the proposition that there was no relationship of cause and effect as between what the respondent said to Mr. Archambault and the cancellation of the permit. While it is true that in his evidence Mr. Archambault states that he had decided to cancel the permit on the day he received the written report from his secret agent Y3, dated November 30, 1946 (which was subsequent to the first telephone conversation), he goes on to say:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler

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le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait - y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, 1à, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

I conclude from this evidence that any "decision" of Mr. Archambault's was at most tentative and would only be made effective if he received direction from the respondent to carry it out. I would doubt that, if the respondent had advised against the cancellation of the permit, Mr. Archambault's decision would have been implemented.

The respondent appears to have shared this view because in his evidence he states as follows:

Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et, c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rapelle pas des expressions exactes, mais ce sont les faits.

I, therefore, agree with the learned trial judge that the cancellation of the appellant's permit was the result of an order given by the respondent.

The second point for consideration is as to whether the respondent's acts were justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister of the Province of Quebec.

In support of his contention that the respondent had so acted, we were referred by his counsel to the following statutory provisions:

THE ATTORNEY-GENERAL'S DEPARTMENT ACT, R.S.Q. 1941, c. 46

* * *

3. The 'Attorney-General is the official legal adviser of the Lieutenant-Governor, and the legal member of the Executive Council of the Province of Quebec.

4. The duties of the Attorney-General are the following:

1. To see that the administration of public affairs is in accordance with the law;

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2. To exercise a general superintendence over all matters connected with the administration of justice in the Province.

5. The function and powers of the Attorney-General are the following:

1. He has the functions and powers which belong to the office of 'Attorney-General of England, respectively, by law or usage, insofar as the, same are applicable to this Province, and also the functions and powers, which, up to the

Union, belonged to such offices in the late Province of Canada, and which, under the provisions of the British North 'America Act, 1867, are within the powers of the Government of this Province;

2. He advises the heads of the several departments of the Government of the Province upon all matters of law concerning such departments, or arising in the administration thereof;

* * *

7. He is charged with superintending the administration or the execution, as the case may be, of the laws respecting police.

THE EXECUTIVE POWER ACT, R.S.Q. 1941, c. 7

* * *

5. The Lieutenant-Governor may appoint, under the Great Seal, from among the members of the Executive Council, the following officials, who shall remain in office during pleasure :

1. A Prime Minister who shall, ex-officio, be president of the Council.

THE ALCOHOLIC LIQUOR ACT, R.S.Q. 1941, c. 255

DIVISION XII

INVESTIGATION AND PROSECUTION OF OFFENCES

148. The Attorney-General shall be charged with:

1. Assuring the observance of this act and of the 'Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;

2. Conducting the suits or prosecutions for infringements of this act or of the said Alcoholic Liquor Possession and Transportation Act.

I do not find, in any of these provisions, authority to enable the respondent, either as Attorney-General or Prime Minister, to direct the cancellation of a permit under the *Alcoholic Liquor Act*. On the contrary, the intent and purpose of that Act appears to be to place the complete control over the liquor traffic in Quebec in the hands of an independent commission. The only function of the Attorney-General under that statute is in relation to the assuring of the observance of its provisions. There is no evidence of any breach of that Act by the appellant.

However, it is further argued on behalf of the respondent that, as Attorney-General, in order to suppress or to prevent crimes and offences, "He may do so by instituting legal proceedings; he may do so by other methods." This amounts to a contention that he is free to use any methods he chooses; that, on suspicion of participation in what he thinks would be an offence, he may sentence a citizen to economic ruin without trial. This seems to me to be a very dangerous proposition and one which is completely alien to the legal concepts applicable to the administration of public office in Quebec, as well as in the other provinces of Canada.

In my view, the respondent was not acting in the exercise of any official powers which he possessed in doing what he did in this matter.

The third point to be considered is as to whether the appellant's permit was lawfully cancelled by the Commission under the provisions of the *Alcoholic Liquor Act*. Section 35 of that Act makes provision for the cancellation of a permit in the following terms :

35. 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th of 'April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

It is contended by the respondent, and with considerable force, that this provision gives to the Commission an unqualified administrative discretion as to the cancellation of a permit issued pursuant to that Act. Such a discretion, it is contended, is not subject to any review in the Courts.

The appellant contends that the Commission's statutory discretion is not absolute and is subject to legal restraint. He cites the statement of the law by Lord Halsbury in *Sharp v. Wakefield*^[14]:

An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case*; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

That was a case dealing with the discretionary powers of the licensing justices to refuse renewal of a licence for the sale of intoxicating liquors. This statement of the law was

approved by Lord Greene M.R. in *Minister of National Revenue v. Wrights' Canadian Ropes, Limited*^[15].

The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.

With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing, in view of the judgment of Lord Radcliffe in *Nakkuda Ali v. Jayaratne*^[16]. However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the *Alcoholic Liquor Act*.

Furthermore, it should be borne in mind that the right of cancellation of a permit under that Act is a substantial power conferred upon what the statute contemplated as an independent commission. That power must be exercised solely by that corporation. It must not and cannot be exercised by any one else. The principle involved is stated by the Earl of Selborne in the following passage in his judgment in *Spackman v. Plumstead Board of Works*^[17]:

No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of

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some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

While the Earl of Selborne is here discussing the rules applicable to a quasi-judicial tribunal, that portion of his statement which requires such a tribunal to act honestly and impartially and not under the dictation of some other person or persons is, I think, equally applicable to the performance of an administrative function.

The same principle was applied in respect of the performance of an administrative function by Chief Justice Greenshields in *Jaillard v. City of Montreal*^[18].

In the present case it is my view, for the reasons already given, that the power was not, in fact, exercised by the Commission, but was exercised by the respondent, acting through the manager of the 'Commission. Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission by s. 35 of the Act. The Commission cannot abdicate its own functions and powers and act upon such direction.

Finally, there is the question as to the giving of notice of the action by the appellant to the respondent pursuant to art. 88 of the *Code of Civil Procedure*, which reads as follows :

ACTIONS AGAINST PUBLIC OFFICERS

88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.

Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

The contention of the respondent is that, as Attorney-General, he was a public official whose function was to maintain law and order in the Province; that he acted as he did in the intended exercise of that function and that

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he is not deprived of the protection afforded by the article because he had exceeded the powers which, in law, he possessed.

The issue is as to whether those acts were "done by him in the exercise of his functions." For the reasons already given in dealing with the second of the four points under discussion, I do not think that it was a function either of the Prime Minister or of the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.

Is the position altered by the fact that apparently he thought it was his right and duty to act as he did? I do not think that it is. The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those functions, but must be determined according to law. The respondent apparently assumed that he was justified in using any means he thought fit to deal with the situation which confronted him. In my view, when he deliberately elected to use

means which were entirely outside his powers and were unlawful, he did not act in the exercise of his functions as a public official.

The principle which should be applied is stated by Lopes J. in *Agnew v. Jobson*^[19]. That was an action for assault against a justice of the peace who had ordered a medical examination of the person of the plaintiff. There was no legal authority to make such an order, but it was admitted that the defendant bona fide believed that he had the authority to do that which he did. The defendant relied on absence of notice of the action as required by 11 & 12 Vic., c. 44. Section 8 of that Act provided that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office" unless within six calendar months of the act complained of. Section 9, the one relied on by the defendant, provided that "no such action shall be commenced against any such justice" until a month after notice of action. Lopes J.

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held that "such justice" in s. 9 referred to a justice in execution of his *office* in s. 8. He held that s. 9 did not provide a defence to the defendant in these words (p. 68) :

I am of opinion that the defendant Jobson is not entitled to notice of action. There was a total absence of any authority to do the act, and although he acted bona fide, believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such a belief might be based on.

Similarly here there was nothing on which the respondent could found the belief that he was entitled to deprive the appellant of his liquor permit.

On the issue of liability, I have, for the foregoing reasons, reached the conclusion that the respondent, by acts not justifiable in law, wrongfully caused the cancellation of the appellant's permit and thus cause damage to the appellant. The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justification, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the *Civil Code*.

I now turn to the matter of damages.

The learned trial judge awarded damages to the appellant in the sum of \$8,123.53, made up of \$1,123.53 for loss of value of liquor seized by the Commission, \$6,000 for loss of profits from the restaurant from December 4, 1946, the date of the cancellation of the permit, to May 1, 1947, the date when the permit would normally have expired, and \$1,000 for damages to his personal reputation. No objection is taken by the appellant in respect of these awards, but he contends that he is also entitled to compensation under certain other heads of damage in respect of which no award was made by the learned trial judge. These are in respect of damage to the good will and reputation of his

business, loss of property rights in his permit and loss of future profits for a period of at least one year from May 1, 1947. Damages in respect of these items were not allowed by the learned trial judge because of the fact that the appellant's permit was "only a temporary asset."

The appellant contends that, although his permit was not permanent, yet, in the light of the long history of his restaurant and the continuous renewals of the permit previously, he had a reasonable expectation of renewal in

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the future, had not the cancellation been effected in December 1946. He contends that the value of the good will of his business was substantially damaged by that cancellation.

His position on this point is supported by the reasoning of Duff J. (as he then was) in *McGillivray v. Kimber*^[20]. That was an action claiming damages for the wrongful cancellation of the appellant's pilot's licence by the Sydney Pilotage Authority. At p. 163 he says:

The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., *Mogul S.S. Co. v. McGregor*, 23 Q.B.D. 598.

The statement by Bowen L.J. to which he refers appears at p. 613 of the report and is also of significance in relation to the appellant's right of action in this case. It is as follows:

Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's properly or trade, is actionable if done without just cause or excuse.

The evidence establishes that there was a substantial reduction in the value of the good will of the appellant's restaurant business as a result of what occurred, apart from the matter of any loss which might have resulted on the sale of the physical assets. It is difficult to assess this loss and there is not a great deal of evidence to assist in so doing. The appellant did file, as exhibits, income tax returns for the three years prior to 1946, which showed in those years a total net income from the business of \$23,578.88. The profit-making possibilities of the business are certainly an item to be considered in determining the value of the good will.

However, in all the circumstances, the amount of these damages must be determined in a somewhat arbitrary fashion. I consider that \$25,000 should be allowed as damages for

the diminution of the value of the good will and for the loss of future profits.

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I would allow both appeals, with costs here and below, and order the respondent to pay to the appellant damages in the total amount of \$33,123.53, with interest from the date of the judgment in the Superior Court, and costs.

CARTWRIGHT J. (*dissenting*) :-This appeal is from two judgments of the Court of Queen's Bench (Appeal Side) for the Province of Quebec^[21], of which the first allowed an appeal from a judgment of MacKinnon J. and dismissed the appellant's action, and the second dismissed a cross-appeal asking that the damages awarded by the learned trial judge be increased.

The respondent is, and was at all relevant times, the Prime Minister and Attorney-General of the Province of Quebec.

The appellant on December 4, 1946, was the owner of an immovable property, known as 1429 Crescent Street in the City of Montreal, where he had for many years successfully carried on the business of a restaurant and cafe. He was the holder of liquor permit no. 68 granted to him on May 1, 1946, for the sale of alcoholic liquors in his restaurant and cafe pursuant to the provisions of the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, hereinafter referred to as "the Act". This permit would normally have expired on April 30, 1947. The business carried on by the appellant had been founded by his father in 1912 and had been licensed uninterruptedly from that time until 1946. Prior to December 4, 1946, the appellant had complied with all the requirements of the Act and had carried on his restaurant business in conformity with the laws of the Province.

The appellant was at all relevant times a member of a sect known as "The Witnesses of Jehovah" and from some time in 1944 up to November 12, 1946, had on about 390 occasions, acted as bailsmen for numbers of his co-religionists prosecuted under by-laws of the City of Montreal for distributing literature without a licence. None of those for whom he acted as bailsmen defaulted in appearance, and all of them were ultimately discharged upon the by-laws under which they were charged being held to be invalid.

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About the 24th or 25th of November 1946 members of the sect commenced distributing copies of ,a circular entitled "Quebec's burning hate for God and 'Christ and Freedom is the shame of all Canada". Copies of this circular are printed in the record, the English version being exhibit D7 and the French version exhibit D11. The then senior Crown Prosecutor in Montreal, Mtre Oscar Gagnon, formed the opinion that the circular was a seditious libel and that its distribution should be prevented. It results from the judgment of this Court in *Boucher v. The King*^[22] that the learned Crown Prosecutor was in error in

forming the opinion that the circular could be regarded as seditious. It, however, can hardly be denied that it was couched in terms which would outrage the feelings of the great majority of the inhabitants of the Province of Quebec; and the same may be said of a number of other documents circulated by the sect, copies of which form part of the record in the case at bar.

The evidence does not show that the appellant took part in the distribution of any of the circulars mentioned or that he was a leader or chief of the sect. He did not act as bailman for any member of the sect charged in connection with the distribution of the circular, "Quebec's burning hate".

On November 25, 1946, pamphlets, including copies of "Quebec's burning hate" were seized in a building in the City of Sherbrooke owned by the appellant and leased by him to a congregation of Witnesses of Jehovah as a "Kingdom Hall" or place of worship. The appellant was not aware that the pamphlets were in this building.

From his investigations and the reports which he received M. Gagnon concluded that the distribution of the pamphlets "convergeait autour de M. Roncarelli ou de personnes qui étaient près de lui" and he so informed M. Edouard Archambault, the manager of the Quebec Liquor Commission. It may well be that M. Gagnon reached the conclusion mentioned on insufficient evidence. M. Gagnon also informed M. Archambault that the appellant had acted as bailman for a great number of Witnesses of Jehovah.

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On receiving this information from M. Gagnon, M. Archambault read the circular, "Quebec's burning hate" and had a conversation with M. Paquette, the Recorder-in-Chief at Montreal, who confirmed the statements as to the appellant furnishing bail.

At this point M. Archambault formed the opinion that he should cancel the permit held by the appellant, but before taking any action he telephoned the respondent at Quebec, told him what information he had received and that he proposed cancelling the permit. The respondent told him to be careful to make sure that the Roncarelli who had furnished bail was in fact the appellant. M. Archambault satisfied himself as to this through the report of an agent "Y3", in whom he had confidence, and thereupon, according to his uncontradicted evidence, decided to cancel the permit. The reasons which brought him to this decision were stated by him as follows:

D. Alors, à ce moment-là, vous aviez déjà décidé d'enlever cette licence?

R. Oui.

D. Vous basant, je suppose, sur les rapports que vous aviez déjà reçus de monsieur Oscar Gagnon et du recorder-en-chef Paquette que monsieur Roncarelli avait fourni

des cautionnements?

R. Oui; et, à part de cela, de la littérature que j'avais lue.

D. Et le pamphlet auquel vous avez référé: "Quebec's Burning Hate"?

R. Oui, monsieur.

M. Archambault then telephoned the respondent. The substance of the two telephone conversations between M. Archambault and the respondent is summarized by the former as follows:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

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The evidence of the respondent is also that the suggestion of cancelling the permit was made by M. Archambault, and there is no evidence to the contrary.

There has been a difference of opinion in the Courts below as to whether what was said by the respondent to M. Archambault amounted to an order to cancel or merely to an "approbation énergique" of a decision already made. I do not find it necessary to choose between these conflicting views as I propose to assume for the purposes of this appeal that what was said by the respondent was so far a determining factor in the cancellation of the permit as to render him liable for the damages caused thereby to the appellant if the cancellation was an actionable wrong giving rise to a right of action for damages.

All of the Judges in the Courts below who have dealt with that aspect of the matter have concluded that the respondent acted throughout in the honest belief that he was fulfilling his duty to the Province, and this conclusion is supported by the evidence.

The opinion of M. Archambault and of the respondent appears to have been that a permit to sell liquor under the Act is a privilege in the gift of the Province which ought not to be given to, or allowed to continue to be enjoyed by, one who was actively supporting members of a group of persons who were engaged in a concerted campaign to vilify the Province and were persistently acting in contravention of existing by-laws. Once it is found, as I think it must be on the evidence, that this opinion was honestly entertained, I have reached the conclusion, for reasons that will appear, that the Court cannot inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit.

The permit was cancelled on December 4, 1946, with-out any prior notice to the appellant and without his being given any opportunity to show cause why it ought not to be cancelled. It is clear that the appellant suffered substantial financial loss as a result of the cancellation.

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In determining whether the cancellation of the permit in these circumstances was an actionable wrong on the part of the commission or of M. Archambault, its manager, it is necessary to consider the relevant provisions of the Act. These appear to me to be as follows:

S.5 A Commission is by this act created under the name of "The Quebec Liquor Commission", or "Commission des liqueurs de Québec", and shall constitute a corporation, vested with all the rights and powers belonging generally to corporations.

The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission.

* * *

S.9 The function, duties and powers of the Commission shall be the following:

* * *

To control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of this act;

To grant, refuse, or cancel permits for the sale of alcoholic liquor or other permits in regard thereto, and to transfer the permit of any person deceased;

* * *

S.32 No permit shall be granted other than to an individual, and in his personal name.

The application for a permit may be made only by a British subject, must be signed by the applicant before witnesses, and must give his surname, Christian names, age, occupation, nationality and domicile, the kind of permit required and the place where it will be used, and must be accompanied by the amount of the duties payable upon the application for the permit. The applicant must furnish all additional information which the Commission may deem expedient to ask for.

If the permit is to be used for the benefit of a partnership or corporation, the application therefore must likewise be accompanied by a declaration to that effect, and duly signed by such partnership or corporation. In such case, the partnership or corporation shall be responsible for any fine and costs, to which the holder of the permit may be condemned; and the amount thereof may be recovered before any court having jurisdiction, without prejudice to imprisonment, if any.

'All applications for permits must be addressed to the Commission before the 10th of January in each year, to take effect on the 1st of May in the same year.

* * *

S.34 1. The Commission may refuse to grant any permit.

2. The Commission must refuse to grant any permit for the sale of alcoholic liquor in any municipality where a prohibition by-law is in force.

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'Subsections 2 to. 6 of s. 34 enumerate special cases in which the 'Commission must refuse a permit.

S.35 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th day of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

2. Saving the provisions of subsection 4 of this section, the cancellation of a permit shall entail the loss of the privilege conferred by such permit, and of the duties paid to obtain it, and the seizure and confiscation by the Commission of the alcoholic

liquor found in the possession of the holder thereof, and the receptacles containing it, without any judicial proceedings being required for such confiscation.

The cancellation of a permit shall be served by a bailiff leaving a duplicate of such order of cancellation, signed by three members of the Commission, with the holder of such permit or with any other reasonable person at his domicile or place of business.

The cancellation shall take effect as soon as the order is served.

* * *

S.35 4. If the cancellation of the permit be not preceded or followed by a conviction for any offence under this act committed by the holder of such permit while it was in force, the Commission shall remit to such holder.

Such part of the duties which such person has paid upon the granting of such permit, proportionate to the number of full calendar months still to run up to the 1st of May following;

The proceeds of every sale by the Commission, after the seizure and confiscation thereof, of beer having an alcoholic content of not more than four per cent, in weight, less ten per cent of such proceeds;

The value, as determined by the Commission, of the other alcoholic liquor seized and confiscated, less ten per cent of such value.

5. Save in the case where a permit is granted to an individual on behalf of a partnership or corporation, in accordance with section 32, the Commission must cancel every permit made use of on behalf of any person other than the holder.

S.36 The Commission must cancel a permit:

Upon the production of a final condemnation, rendered against the permit-holder, his agent or employee, for selling, in the establishment, alcoholic liquor manufactured illegally or purchased in violation of this act;

Upon the production of three final condemnations rendered against the permit-holder for violation of this act;

If it appears that the permit-holder has, without the Commission's authorization, transferred, sold, pledged, or otherwise alienated the rights conferred by the permit.

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down

any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial. The submission of counsel for the respondent, made in the following words, appears to me to be well founded:

Under the Statute, no one has a pre-existing right to obtain a permit, and the permit being granted under the condition that it may be cancelled at any time, and no cause of cancellation being mentioned and no form of procedure being indicated, the cancellation is a discretionary decision of a purely administrative character.

I accept as an accurate statement of the distinction between a judicial and an administrative tribunal that adopted by Masten J.A. in giving the judgment of the Court of Appeal for Ontario in *re Ashby et al*¹[\[23\]](#)

The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 106, 107 and 108:

"A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.

In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.

Leeds (Corp.) v. Ryder (1907) 'A.C. 420, at 423, 424, per Lord Lore-burn L.C.; *Shell Co. of Australia v. Federal Commissioner of Taxation* (1931) 'A.C. 275, at 295; *Boulter v. Kent JJ.*, (1897) 'A.C. 556, at 564.

'A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself.'

In *re Ashby* the Court found that the statute there under consideration set up certain fixed standards and prescribed conditions on which persons might have their certificates revoked by the board, and accordingly held its function to be quasi-judicial; in the case at bar, on the contrary, no standards or conditions are indicated and I am forced to conclude that the Legislature intended the commission "to be a law unto itself".

If I am right in the view that in cancelling the permit M. Archambault was performing an administrative act in the exercise of an unfettered discretion given to him by the statute it would seem to follow that he was not bound to give the appellant an opportunity to be heard before deciding to cancel and that the Court cannot be called upon to determine whether there existed sufficient grounds for his decision. If authority is needed for this conclusion it may be found in the judgment of the Judicial Committee, delivered by Lord Radcliffe, in *Nakkuda Ali v. M. P. De S. Jayaratne*[\[24\]](#) and in the reasons of my brother Martland in *Calgary Power Limited et al v. Copithorne*[\[25\]](#). The wisdom and desirability of conferring such a power upon an official without specifying the grounds upon which it is to be exercised are matters for the consideration of the Legislature not of the Court.

If, contrary to my conclusion, the function of the commission was quasi-judicial, it may well be that its decision to cancel the permit would be set aside by the Court for failure to observe the rules as to how such tribunals must proceed which are laid down in many authorities and are compendiously stated in the following passage in the judgment of the Earl of Selborne in *Spackman v. Plumstead Board of Works*[\[26\]](#):

No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by

law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

But even if it were assumed that the function of the commission was quasi-judicial and that its order cancelling the permit should be set aside for failure to observe the rules summarized in the passage quoted, I would be far from satisfied that any action for damages would lie.

If that question arose for decision it would be necessary to consider the judgments delivered in this Court in *McGillivray v. Kimber*[\[27\]](#), the cases cited in Halsbury, 2nd ed.,

vol. 26, pp. 284 and 285,, in support of the following statement:

Persons exercising such quasi-judicial powers ... in the absence of fraud, collusion, or malice, are not liable to any civil action at the suit of any person aggrieved by their decisions ...

and the judgment of Wilmot C.J., concurred in by Gould J. and Blackstone J., in *Bassett v. Godschall*[\[28\]](#):

The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licences for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B.R. I cannot think a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly and maliciously injures or oppresses the King's subjects, under colour of his office, and contrary to law: but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a licence, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

For the above reasons I have reached the conclusion that the heavy financial loss undoubtedly suffered by the appellant was *damnum sine injuria*. The whole loss flowed directly from the cancellation of the permit which was an act of the commission authorized by law. I have formed this opinion entirely apart from any special statutory protection afforded to the commission or to its, manager M. Archambault, as, for example, by s. 12 of the Act.

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The case of *James v. Cowan*[\[29\]](#), relied upon by counsel for the appellant as supporting the existence of a right of action for damages seems to me to be clearly distinguishable. In that case the right of action asserted was for damages for the wrongful taking of the plaintiff's goods. The only justification put forward was an order held to be *ultra vires* and therefore void. It may be mentioned in passing that if, contrary to my view, the decision of the commission in the case at bar was made in the exercise of a judicial function, its failure to follow a rule of natural justice would appear to render the order voidable but not void; *Dimes v. Grand Junction Canal Proprietors*[\[30\]](#).

Having concluded that the act of the commission in cancelling the permit was not an actionable wrong, it appears to me to follow that the respondent cannot be answerable in damages for directing or approving, as the case may be, the doing of that act.

As it was put by Bissonnette J.[\[31\]](#):

D'où il découle, en saine logique, que si dans l'exercice de son pouvoir discrétionnaire, il (M. 'Archambault) ne commettait ni faute, ni illégalité, personne n'est justifié à chercher à atteindre, au delà, de sa personne, un conseiller, voire un chef ou supérieur politique, pour le motif que sans la faute du premier, celle qu'on veut imputer au second ne peut exister.

On this branch of the matter, I should perhaps mention that there is, in the record, no room for any suggestion that the respondent coerced an unwilling Commission into making a decision contrary to the view of the latter as to what that decision should be.

For the above reasons it is my opinion that the appeal fails and it becomes unnecessary for me to consider the alternative defence as to lack of notice of action, based upon art. 88 of the *Code of Civil Procedure* or the question of the quantum of damages.

The appeal, as to both of the judgments of the Court of Queen's Bench, should be dismissed with costs.

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FAUTEUX J. (*dissenting*) :-L'appelant se pourvoit à l'en-contre de deux décisions majoritaires de la Cour du banc de la reine^[32], dont la première infirme un jugement de la Cour supérieure condamnant l'intimé à lui payer une somme de \$8,123.53 à titre de dommages-intérêts, et dont la seconde rejette l'appel logé par lui-même pour faire augmenter le quantum des dommages ainsi accordés.

Les faits donnant lieu à ce litige se situent dans le cadre des activités poursuivies dans la province de Québec, au cours particulièrement des années 1944, 1945 et 1946, par la secte des Témoins de Jéhovah. Ces activités prenaient forme d'assemblées, de distribution de circulaires, de pamphlets et de livres, et de sollicitation, dans les rues et à domicile. Dirigée ouvertement contre les pratiques des religions professées dans la province et, plus particulière-ment, de la religion catholique, les enseignements de cette secte étaient diffusés dans un langage manifestement, sinon délibérément, insultant et, par suite, provoquèrent dans les cités et les villages où ils étaient propagés, des troubles à la paix publique. Il y eut bris d'assemblées, assauts de personnes et dommages à la propriété. De plus, et partageant l'opinion généralement acceptée que cette campagne provocatrice était l'oeuvre de la licence et non de la liberté sous la loi, plusieurs autorités civiles refusaient d'accorder la protection recherchée par les membres de la secte ou adoptaient des moyens pour paralyser ces activités considérées comme une menace à la paix publique. L'intimé, comme Procureur Général, eut en son ministère, où des plaintes nombreuses affluèrent, tous les échos de cette situation. Devant les tribunaux, actions ou poursuites se multiplièrent. A Montréal, les arrestations pour distribution de littérature, sans permis, atteignirent et dépassèrent plusieurs centaines. Devant la Cour du Recorder, où furent traduits ceux qu'on accusait de violer le règlement municipal, on plaidait l'invalidité ou l'inapplication du règle-ment et attendant le prononcé d'un tribunal

supérieur sur le bien-fondé de ces prétentions, on ajournait les causes. C'était l'appelant, l'un des membres de la secte, qui, dans la plupart de ces arrestations, à Montréal, fournissait le cautionnement garantissant la comparution des accusés. Une entente était même intervenue entre lui et les avocats

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chargés des poursuites, suivant laquelle on le considérait en quelque sorte comme la caution officielle des membres de la secte. L'appelant continua d'agir comme caution jusqu'au 12 novembre 1946 alors que les autorités de la Cour du Recorder, s'inquiétant de la congestion du rôle des causes résultant de la progressive multiplication des arrestations, aussi bien que du fait que le temps de nombre de constables était absorbé par ces enquêtes et ces poursuites, au préjudice de leurs autres devoirs, tentèrent de décourager les activités de la secte en exigeant des cautionnements en argent et plus substantiels, soit de \$100 à \$300.

Deux semaines après cette décision, apparut dans la province une nouvelle publication de la secte, intitulée: "La haine ardente du Québec pour Dieu, le Christ et la liberté." Ce livre, publié en français, en anglais et en ukrainien, étant, dans les termes les plus provocateurs, une attaque dirigée particulièrement contre les pratiques religieuses de la majorité de la population et contre l'administration de la justice dans la province, fut soumis par la police à la considération de l'avocat en chef de la Couronne, A. Mont réal, Me Gagnon, c.r., lequel émit l'opinion que cette publication constituait, au sens de la loi criminelle, un libelle séditieux.

Ajoutons immédiatement que le mérite de cette opinion fut par la suite judiciairement considéré avec le résultat qui suit. Un certain Aimé Boucher, distributeur de ce livre dans le district judiciaire de St-Joseph de Beauce, fut accusé sous les articles 133, 134 et 318 du *Code Criminel* et fut trouvé coupable par un jury dont le verdict fut confirmé par une décision majoritaire de la Cour du banc du roi en appel[33]. Sur un pourvoi subséquent devant cinq des membres de cette Cour, une majorité, trouvant justifiés les griefs fondés sur l'adresse du juge au procès, mais étant d'opinion qu'il était loisible à un jury légalement dirigé de juger cette publication séditeuse, ordonna un nouveau procès. Sur une seconde audition du même appel, -cette fois devant les neuf Juges de cette Cour[34]- ces vues furent partagées par

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quatre des membres de cette Cour. Les cinq autres, d'autre part, acquittèrent l'accusé, en déclarant en substance, suivant le sommaire fidèle du jugé, qu'en droit:

Neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious

unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

En somme, la majorité écarta, comme étant la loi en la matière, la définition de l'intention séditionnelle, donnée à la page 94 de la 8^e édition de Stephen's Digest of Criminal Law, dans la mesure où cette définition différait de la loi telle que précisée au sommaire ci-dessus. *Boucher v. His Majesty the King*^[35]. Ainsi appert-il que l'opinion émise par le représentant du Procureur Général à Montréal lors de l'apparition de ce livre en fin de 1946, fut par la suite partagée par une majorité de tous les juges qui eurent à considérer la question mais rejetée par ce qui constitue, depuis 1951, le jugement de cette Cour sur la question.

Ayant donc formé l'opinion que cette publication constituait un libelle séditionnel, M^o Gagnon participa à l'enquête faite pour en rechercher les distributeurs et les traduire en justice. Vers le même temps, la police saisissait en la cité de Sherbrooke, un nombre considérable de pamphlets, livres, y compris le livre en question, dans un établissement appartenant à l'appelant et par lui loué aux membres de la secte. Un examen de la situation et du rôle joué par l'appelant dans les procédures mues devant la Cour du Recorder à Montréal, amena M^o Gagnon à conclure à sa participation dans la distribution. Apprenant, en la même occasion, que ce dernier était propriétaire d'un restaurant et détenteur de permis de la Commission des Liqueurs pour y vendre des spiritueux, il communiqua les faits ci-dessus à M. Archambault, alors gérant général de la Commission des Liqueurs. Après avoir conféré avec le recorder en chef de la cité de Montréal et M^o Gagnon, M. Archambault téléphona au Procureur Général pour lui faire part de ces agissements des membres de la secte, et de l'appelant en particulier, et de son intention d'annuler le permis en faveur de l'appelant. L'intimé demanda à M. Archambault de bien s'assurer que le détenteur du permis était bien la même personne qui, au dire de M. Archambault, "multipliait les cautionnements à la Cour du Recorder de façon désordonnée, contribuait à désorganiser les activités de la

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police et à congestionner les tribunaux". Et l'intimé ajouta: -"Dans l'intervalle, je vais examiner les questions avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir à ce que je devrai faire." M. Archambault vérifia l'identité de l'appelant et, de son côté, le Procureur Général étudia le problème, la *Loi de la Commission des Liqueurs* et ses amendements, discuta de la question au Conseil des Ministres et avec des officiers en loi de son ministère. Quelques jours plus tard, M. Archambault téléphona au Procureur Général confirmant l'identité du détenteur de permis et, témoigne M. Archambault, "là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder".

A la suite de cette conversation téléphonique, le permis fut annulé et tous les spiritueux du restaurant furent confisqués. En raison de la perte d'opérations résultant de l'absence de permis, l'appelant, quelques mois plus tard, vendait ce restaurant, licencié pour vente de spiritueux depuis nombre d'années et exploité par son père, d'abord, et lui, par la suite. C'est alors que l'appelant institua la pré-sente action en dommages contre l'intimé personnellement, invoquant en substance que, dans les circonstances, le fait de cette annulation constituait, suivant les dispositions de l'art. 1053 du *Code Civil*, un fait dommageable, illicite et imputable à l'intimé et, dès lors, donnant droit à réparation.

En défense, et en outre des moyens plaidés sur le mérite de l'action, l'intimé invoqua spécifiquement le défaut de l'appelant de s'être conformé aux prescriptions de l'art. 88 du *Code de procédure civile*, lequel conditionne impérativement l'exercice du droit d'action contre un officier public à la signification d'un avis d'au moins un mois avant l'émission de l'assignation.

Après considération attentive de la question et pour les motifs donnés ci-après, je suis arrivé à la conclusion que ce moyen est bien fondé. Il convient de dire, cependant, que n'eût été ce défaut de l'appelant, j'aurais, au mérite, conclu au bien-fondé de son action et ce, pour des raisons qu'il suffit, dans les circonstances, de résumer comme suit. Personne ne met en doute que le fait invoqué au soutien de l'action en dommages, c'est-à-dire l'annulation du permis, ait constitué un fait dommageable pour l'appelant. De

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plus, et suivant la preuve au dossier, il est manifeste que ce fait est imputable, et exclusivement imputable, à l'intimé. Sans doute, lorsque le gérant général de la Commission des Liqueurs téléphona au Procureur Général pour le mettre au courant des faits ci-dessus, il lui indiqua au même temps son intention d'annuler le permis. Il y a loin, cependant, de l'indication d'une intention à la réalisation de cette intention; et à la vérité, dès cette première conversation télé-phonique, c'est le Procureur Général qui prit l'entière responsabilité. Tel que déjà indiqué, il demanda à M. Archambault de vérifier l'identité de personne, l'avisant que, pendant ce temps-là, il étudierait le problème et verrait ce que lui devait faire. C'est d'ailleurs précisément pour décider de l'action à prendre qu'il examina la loi et discuta de l'affaire au 'Conseil des Ministres et avec ses officiers en loi. Lorsque, subséquemment, M. Archambault le rappela pour lui affirmer qu'il s'agissait de la même personne, "c'est là", dit le gérant général, que le Procureur Général "m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder". Le Juge de la Cour supérieure et tous les Juges de la Cour d'Appel n'ont jeté, et je crois avec raison, aucun doute sur la bonne foi du Procureur Général, pas plus qu'on n'en saurait avoir sur celle du gérant général de la Commission des Liqueurs. Ni l'un ni l'autre n'ont agi malicieusement. Mais, en témoignant que l'intimé l'avait autorisé, lui avait donné son consentement, son approbation, sa permission et son ordre de procéder, le gérant

général de la 'Commission a bien indiqué, à mon avis, que, dans un esprit de subordination, il avait, dès la première conversation téléphonique, abdiqué, en faveur du Procureur Général s'en chargeant, le droit d'exercer la discrétion, qu'à l'exclusion de tous autres, il avait suivant l'esprit de la *Loi des Liqueurs Alcooliques*. Il a exécuté, mais non rendu, une décision arrêtée par le Procureur Général. D'ailleurs, ce dernier ne s'en est pas caché; il s'en est ouvert au public par la voix des journaux. En prenant lui-même cette décision, comme Premier Ministre et Procureur Général, il s'est arrogé un droit que lui nie virtuellement la *Loi des Liqueurs Alcooliques*; il a commis une illégalité. Dans l'espèce, l'annulation du permis est exclusivement imputable à l'intimé et précisément pour

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cette raison, constitue, dans les circonstances, un acte illicite donnant droit à l'appelant d'obtenir réparation pour les dommages lui en résultant.

L'article 88 du *Code de procédure civile*.-Cet article se lit comme suit :

Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui, à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.

Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Vu la forme prohibitive de la disposition et la règle de droit édictée en l'art. 14 du *Code Civil*, le défaut de donner cet avis, lorsqu'il y a lieu de ce faire, emporte nullité. Cette règle de droit est ainsi exprimée :

14. Les lois prohibitives emportent nullité, quoiqu'elle n'y soit pas prononcée.

De plus, et en raison de la prescription que "...nul verdict ou jugement ne peut être rendu ...", ce défaut limite la juridiction même du tribunal. Aussi bien, non seulement, comme il a été reconnu au jugement de première instance, ce défaut peut-il être soulevé dans les plaidoiries, mais la Cour elle-même doit agir *proprio motu* et se conformer à la prescription.

En l'espèce, il est admis qu'aucun avis ne fut donné au Procureur Général. L'intimé a plaidé spécifiquement ce moyen dans sa défense et il l'a invoqué tant en Cour supérieure et en Cour d'Appel que devant cette Cour. Le juge au procès en disposa dans les termes suivants, dont les soulignés sont siens :

Defendant is not entitled to avail himself of this exceptional provision as the acts complained of were not "done by him in the exercise of his functions", but they were acts performed by him when he had gone outside his functions to perform them. They were not acts "in the exercise of" but "on the occasion of public duties". Defendant was outside his functions in the acts complained of.

En Cour d'Appel[36], seul le Juge dissident, M. le Juge Rinfret, se prononce sur la question. S'inspirant, je crois, de l'interprétation donnée par la jurisprudence à l'expression "dans

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l'exécution de ses fonctions", apparaissant à l'art. 1054 C.C. et plus particulièrement du critère indiqué dans *Plumb v. Cobden Flour Mills*[37], il prononce d'abord comme suit, sur le mérite même de l'action:

L'action du défendeur, on l'a vu, ne peut pas être classifiée parmi les actes permis, par les statuts, au procureur général, ni au premier ministre; elle ne peut pas être considérée comme ayant été faite dans l'exercice ou dans l'exécution de ses fonctions comme telles; elle entre dans la catégorie des actes prohibés, des actes commis hors les limites des fonctions, et comme telle, elle engendre la responsabilité personnelle.

puis, précisant que l'art. 88 C.P.C. pose comme condition que le défendeur soit poursuivi "à raison d'un acte par lui fait dans l'exercice de ses fonctions", déclare que l'art. 88 n'a pas d'application en l'espèce.

Les juges de la majorité ont référé à ce moyen sans cependant s'y arrêter vu que dans leur opinion l'action, de toutes façons, était mal fondée.

D'où l'on voit que le droit de l'intimé à l'avis dépend uniquement, dans la présente cause, de la question de savoir si l'acte reproché a été fait par lui "dans l'exercice de ses fonctions" au sens qu'il faut donner à ces expressions dans le contexte de l'art. 88 'C.P.C., et suivant l'esprit et la fin véritables de cet article.

L'article 1054 C.C. prescrit que les maîtres et les commettants sont responsables du dommage causé par leurs domestiques ou ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés*. On est dès lors porté à donner aux expressions, plus ou moins identiques, apparaissant à l'art. 88 C.P.C., le même sens que donne la jurisprudence sur l'art. 1054 'C.C. La règle d'interprétation visant la similarité des expressions n'établit qu'une présomption; cette présomption étant que les expressions similaires ont le même sens lorsqu'elles se trouvent,-ce qui n'est pas le cas en l'espèce,- dans une même loi. On accorde, d'ailleurs, peu de poids à cette présomption. Max-well,

On Interpretation of Statutes, 9^e ed., p. 322 *et seq.* Les considérations présidant à l'établissement, la fin et la portée de l'art. 88 C.P.C., d'une part, et de l'art. 1054 C.C., d'autre part, sont totalement différentes. Sanctionnant la doctrine *Respondeat superior*, l'art. 1054 C.C. établit la responsabilité du commettant pour l'acte de son préposé, ce dernier étant considéré le continuateur de la personne juridique du

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premier. L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction. Les motifs apportés par la jurisprudence pour limiter le champ de l'exercice des fonctions, quant à la responsabilité édictée en l'art. 1054 C.C., sont étrangers à ceux conduisant la Législature à donner, quant à la procédure seulement, une protection aux *officiers* publics. Aussi bien, et en toute déférence, je ne crois pas que la portée de cette protection soit assujettie aux limitations de la responsabilité frappant les dispositions de l'art. 1054 C.C. L'article 8 du c.101 des Statuts Refondus du Bas Canada, loi-source de l'art. 88 C.P.C., établit péremptoirement à mon avis que, *in pari materia*, un officier public n'est pas tenu comme ayant cessé d'agir dans l'exercice de ses fonctions du seul fait que l'acte reproché constitue un excès de pouvoir, ou de juridiction, ou une violation à la loi. La version française de cette loi n'étant pas en disponibilité, je cite de la version anglaise qu'on trouve dans *Consolidated Statutes, Lower Canada*, 1860, l'art. 8 :

Protection to extend
to the magistrate only etc.,
and in what cases to him.

The privileges and protection given by this Act, shall be given to such justice, officer or other person acting as aforesaid, only, and to no other person or persons whatever, and any such justice, officer and other person shall be entitled to such protection and privileges in all cases where he has acted *bona fide* in the execution of his duty, although in such act done, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

L'article 88 C.P.C. assume que ceux au bénéfice desquels il est établi se sont rendus coupables d'une illégalité pour laquelle ils doivent répondre. Tout doute qu'on pourrait avoir sur le point est dissipé par le texte même de l'art. 429 C.P.C. lequel, pourvoyant à un changement de venue dans le cas du procès d'un officier public, édicte :

429. Dans toute poursuite en dommages contre un officier public, à *raison de quelque illégalité dans l'exécution de ses fonctions*, le juge peut ordonner que le procès ait lieu dans un autre district, s'il est démontré que la cause ne peut être instruite avec impartialité dans le district où l'action a été portée.

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On doit donc se garder d'associer au droit à l'avis toute idée de justification pour l'acte reproché ou de déduire du seul fait que l'officier public doive au mérite d'être tenu personnellement responsable, qu'il ait perdu tout droit à l'avis. Dans *Beattey v. Kozak*^[38], où la nécessité d'éviter cette confusion se présentait, une semblable observation est faite par notre collègue M. le Juge Rand. Il faut ajouter, cependant, que cette décision n'est d'aucune autre assistance sur la question qui nous intéresse; le litige portait, en droit, sur l'interprétation d'une loi différente et fut décidé en donnant effet à la jurisprudence d'un droit également différent sur l'incidence, en la matière, du rôle de la bonne foi.

L'incidence du rôle de la bonne foi de l'officier public dans la commission d'un acte reproché, en ce qui concerne la portée de l'art. 88 C.F.C., et non en ce qui a trait au mérite de l'action, a fait, dans la province de Québec, depuis le jour où la disposition fut établie par l'art. 22 du *Code de procédure civile* de 1867, dont les termes sont reproduits à l'art. 88 du Code de 1897, l'objet d'un conflit dans la jurisprudence. Suivant certains jugements, la bonne foi conditionnait le droit à l'avis et dès que la déclaration contenait une allégation de mauvaise foi, le défendeur se voyait privé du droit d'invoquer le défaut de l'avis, même si, au mérite, la preuve, révélant que cette allégation était mal fondée, on devait alors rejeter l'action parce que l'avis n'avait pas été donné. Suivant d'autres jugements, on tenait le droit à l'avis absolu dans tous les cas. La bonne foi, disait-on, en s'appuyant sur le principe sanctionné par l'art. 2202 C.C., est toujours présumée et cette présomption ne peut être écartée par une simple allégation mais par une preuve de mauvaise foi. On jugeait qu'une simple allégation aux plaidoiries ne pouvait virtuellement abroger le droit au bénéfice de l'art. 88. Considérant que cet article conditionnait l'exercice même du droit d'action, on décidait que ce droit d'action devait être nié *ab initio* et non à la fin du procès. Ce conflit n'existe plus. Depuis plus de vingt-cinq ans, la Cour d'Appel y a mis fin en décidant que l'incidence de la bonne ou de la mauvaise foi n'a aucune portée sur le droit à l'avis et que, dans tous les cas, il doit être donné. Acceptant les arguments déjà exprimés en ce sens, la Cour d'Appel s'est particulièrement basée sur la source

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historique de cette disposition et sur la modification qui y fut apportée lors et par suite de son insertion au *Code de procédure civile*. Les sources de l'article sont indiquées dans *Dame Chaput v. Crépeau*^[39] par M. le Juge Bruneau et les modifications faites à la situation antérieure par l'insertion de l'article dans le Code, afin d'en généraliser l'appli-

cation à tous les officiers publics, sont indiquées dans cette jurisprudence définitivement arrêtée par la Cour d'Appel dans *Charland v. Kay*^[40]; *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres*^[41] et *Houde v. Benoît*^[42].

En somme, et comme le note M. le Juge Hall dans *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres*, *supra*, l'art. 22 du *Code de procédure* de 1867, prédécesseur de l'art. 88 du *Code* de 1897, a sa source dans la *Loi pour la protection des juges de paix*, c.101 des *Status Refondus* du Bas 'Canada. Le premier article de cette loi prescrivait l'avis d'action, alors que dans les autres dispositions, d'autres privilèges étaient établis, y compris celui fixant la prescription à six mois. L'article 8 conditionnait le droit aux privilèges y accordés, à la bonne foi. Lors de la confection du *Code de procédure*, la disposition ayant trait à l'avis fut extraite de la loi pour devenir l'art. 22 du *Code de procédure* et être déclarée applicable à tous les officiers publics. Dans le procédé, cependant, on laissa la disposition touchant la bonne foi dans la *Loi pour la protection des juges de paix* et on évita de l'inclure dans l'art. 22 C.P.C. comme condition de l'opération de cet article. D'autres considérations, tel, par exemple, le changement apporté par la Législature, le 4 août 1929, à l'art. 195 C.P.C. par la Loi 19 George V, c. 81, ayant pour effet de prohiber toute ordonnance de preuve avant faire droit qui jusqu'alors réservait au mérite les questions soulevées par l'inscription en droit, militent en faveur de ces vues. C'est ce changement, je crois, qui a provoqué l'occasion amenant la Cour d'Appel à fixer définitivement la jurisprudence. Les motifs déjà mentionnés suffisent pour partager les vues exprimées par la Cour d'Appel dans les causes précitées et pour conclure, comme M. le Juge Dorion dans *Charland v. Kay*, *supra*, qu'il faut s'en tenir au texte de la loi et lui donner son effet.

En assumant l'exercice d'un pouvoir discrétionnaire conféré au gérant général par la loi, l'intimé a commis une illégalité mais aucune offense connue de la loi pénale et aucun délit au sens de l'art. 1053 'C.C. Il a fait ce qu'il n'avait pas le droit de faire, fermement et sincèrement con-vaincu, a-t-il affirmé sous serment, que non seulement il en avait le droit, mais qu'il y était tenu pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalité. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions. Sa bonne foi n'a pas été mise en doute, et sur ce fait, les Juges de la Cour d'Appel, qui ont considéré la question, sont d'accord avec le Juge de première instance. Suivant les décisions considérées par cette Cour dans *Beatty v. Kozak*, *supra*, on retient, sous un droit différent de celui de la province de Québec, l'incidence de la bonne foi lorsque celle-ci se fonde sur l'erreur de fait, ou sur l'erreur de fait et de droit à la fois, sinon uniquement sur l'erreur de droit, pour décider du caractère exculpatoire de l'illégalité commise, voire même du droit à l'avis. Exclusivement compétente à légiférer

sur la procédure civile, la Législature de Québec, par l'art. 88 C.P.C., n'a pas voulu assujettir le droit à l'avis d'action à l'incidence de la bonne ou de la mauvaise foi. Dans les circonstances de cette cause, je suis d'opinion que l'illégalité commise par l'intimé l'a été dans l'exercice de ses fonctions et que, de plus, ce serait faire indirectement ce que l'art. 88 C.P.C. ne permet pas, suivant l'interprétation de la Cour d'Appel, que de s'appuyer sur la bonne ou la mauvaise foi, que ce soit au sens vulgaire ou technique du mot, pour conclure que l'intimé est sorti de l'exercice de ses fonctions, au sens qu'ont ces expressions dans l'art. 88 C.P.C., et qu'il ait perdu le droit à l'avis d'action.

Pour ces raisons, l'appelant aurait dû être débouté de son action. Je renverrais les appels avec dépens.

ABBOTT J.:—In his action appellant claimed from respondent the sum of \$118,741 as damages alleged to have been sustained as a result of the cancellation of a licence 'or permit for the sale of alcoholic liquors held by appellant.

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The action was maintained by the learned trial judge to the extent of \$8,123.53. From that judgment two appeals were taken, one by respondent asking that the action be dismissed in its entirety, the other by appellant asking that the amount allowed as damages be increased by an amount of \$90,000. The Court of Queen's Bench^[43] allowed the respondent's appeal, Rinfret J. dissenting, and dismissed the action. The appeal taken by appellant to increase the amount of the trial judgment was dismissed unanimously. The present appeals are from those two judgments.

The facts are these. On December 4, 1946, appellant was conducting a restaurant business in the City of Montreal, a business which he and his father and mother before him had been carrying on continuously for some thirty-four years prior to that date. The restaurant had been licensed for the sale of alcoholic beverages throughout the entire period.

In 1946 and for many years prior thereto, persons operating establishments of this kind and selling alcoholic beverages had been required to obtain a licence or permit under the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255. Unless granted for a shorter period, these were annual licences and expired on April 30 in each year. Moreover, s. 35, subs. 1., of the Act provides as follows:

The Commission may cancel any permit at its discretion.

The Commission referred to is the "Quebec Liquor Commission" established as a corporation under the Act in question and, generally speaking, it has been entrusted by

the Legislature with the responsibility of directing and administering the provincial monopoly of the sale and distribution of alcoholic beverages.

On December 4, 1946, without previous notice to the appellant, his licence to sell alcoholic beverages was cancelled by the Quebec Liquor Commission, and at about 2 p.m. on that date the stock of liquor on his premises was seized and removed. The licence was not restored and after operating for some months without such a licence, in 1947 appellant sold the restaurant and the building in which it was located.

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Appellant learned from press reports either in the after-noon of December 4 or early the following day, that his licence had been cancelled and the stock of liquor seized because he was an adherent of a religious sect or group known as the Witnesses of Jehovah. It soon became clear from statements made by the respondent to the press and confirmed by him at the trial as having been made by him, that the cancellation of the licence had been made because of the appellant's association with the sect in question and in order to prevent him from continuing to furnish bail for members of that sect summoned before the Recorder's Court on charges of contravening certain city by-laws respecting the distribution of printed material.

It might be added here that in December 1946 and for some time prior thereto the Witnesses of Jehovah appear to have been carrying on in the Montreal district and elsewhere in the Province of Quebec, an active campaign of meetings and the distribution of printed pamphlets and other like material of an offensive character to a great many people of most religious beliefs, and I have no doubt that at that time many people believed this material to be seditious.

The evidence is referred to in detail in the Courts below and I do not propose to do so here. I am satisfied from a consideration of this evidence : First : that the cancellation of the appellant's licence was made for the sole reason which I have mentioned and with the object and purpose to which I have referred; Second: that such cancellation was made with the express authorization and upon the order of the respondent; Third: that the determining cause of the cancellation was that order, and that the manager of the Quebec Liquor Commission would not have cancelled the licence without the order and authorization given by the respondent.

There can be no question as to the first point. It was conceded by respondent in his evidence at the trial and by his counsel at the hearing before us. As to the second and third points, I share the view of the learned trial judge and of Rinfret J. that both were clearly established.

The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question had no connection whatever with his obligations as the

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holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without any legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the *Alcoholic Liquor Act*, and the powers and responsibilities of the manager of the Quebec Liquor Commission are confined to the administration and enforcement of the provisions of the said Act. This may be one explanation of the latter's decision to consult the respondent before taking the action which he did to cancel appellant's licence.

At all events a careful reading of the evidence and a consideration of the surrounding circumstances has convinced me that without having received the authorization, direction, order, or "approbation énérgique" of the respondent -however one chooses to describe it- the manager of the Quebec Liquor Commission would not have cancelled the licence.

The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly, I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification. I content myself with quoting the well known passage from Dicey's "Law of the Constitution", 9th ed., p. 193, where he says

... every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

In the instant case, the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission although as Attorney-General of the Province the Commission and its officers could of course consult him for legal opinions and legal advice. The Commission is not a department of government in the

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accepted sense of that term. Under the *Alcoholic Liquor Act* the Commission is an independent body with corporate status and with the powers and responsibilities

conferred upon it by the Legislature. The Attorney-General is given no power under the said Act to intervene in the administration of the affairs of the Commission nor does the *Attorney-General's Department Act*, R.S.Q. 1941, c. 46, confer any such authority upon him.

I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority. I have no doubt also that respondent knew and was bound to know as Attorney-General that neither as Premier of the province nor as Attorney-General was he authorized in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorization to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.

It follows, therefore, that in purporting to authorize and instruct the manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority.

The respondent is therefore liable under art. 1053 of the *Civil Code* for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority.

Respondent also contended that appellant's action must fail because no notice of such action was given under art. 88 of the *Code of Civil Procedure*, which reads as follows:

88. No public *officer* or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action had been given him at least one month before the issue of the writ of summons.

Such notice must be in writing; it must state the grounds of the action, and name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

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None of the learned judges constituting the majority in the Court of Queen's Bench has given as a reason for dismissing appellant's action, the failure to give such notice. The learned trial judge and Rinfret J. held that respondent is not entitled to avail himself of this exceptional provision since the act complained of was not "done by him in the exercise of his functions" but was an act done by him when he had gone outside his functions to perform it. I am in agreement with their views and there is little I need add to what they

have said on this point. In this connection, however, reference may usefully be made to the decision of the Court of Appeal in *Lachance v. Casault*^[44]. In that case a bailiff had attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the articles seized, as called for by the order of the Court requiring the guardian to give up possession to the seizing creditor. When the bailiff's action was resisted by the guardian as being unauthorized, the bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of art. 88 C.C.P., he was not entitled to notice under the said article since at the time the act complained of was committed, he was not "dans l'exercice légal de ses fonctions".

In my opinion before a public officer can be held to be acting "in the exercise of his functions", within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform; *Asselin v. Davidson*^[45]. In the instant case, as I have said, in my view the respondent was bound to know that the act complained of was beyond his legal authority.

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I now deal with the second appeal asking that the amount awarded to appellant by the trial judge be increased by an amount of \$90,000. This amount is claimed under three heads, namely :

Damages to goodwill and reputation of business \$50,000

Loss of property rights in liquor permit \$15,000

Loss of profits for a period of one year, May 1st, 1947 to May 1st, 1948 \$25,000

90,000\$

The licence to sell alcoholic beverages was, of course, only an annual licence subject to revocation at any time and the renewal of which might have been properly refused for a variety of reasons. Nevertheless, in my view, appellant could reasonably expect that so long as he continued to observe the provisions of the *Alcoholic Liquor Act* his licence would be renewed from year to year, as in fact it had been for many years past.

There can be no doubt that cancellation of appellant's licence without legal justification resulted in a substantial reduction in the value of the goodwill and profit making possibilities of the restaurant business carried on by him at 1429 Crescent St., Montreal, and in a pecuniary loss to him for which in my opinion he is entitled to recover damages from respondent.

The restaurant business is probably no less hazardous than most other businesses, and damages of this sort are obviously difficult to assess, the amount being of necessity a more or less arbitrary one. The learned trial judge awarded appellant the sum of \$6,000 as loss of profits for the period from December 4, 1946, to May 1, 1947, the date on which the licence would have expired, and this would appear to be supported by the evidence. I have reached the conclusion that the amount awarded to the appellant by the learned trial judge should be increased by an amount of \$25,000, as damages for diminution in the value of the goodwill of the business and for loss of future profits.

In the result, therefore, I would allow both appeals with costs here and below, and modify the judgment at the trial by increasing the amount of the damages to \$33,123.53 with interest from the date of the judgment, in the Superior Court.

[ScanLII Collection]

[1] [1956] Que. Q.B. 447.

[2] [1956] Que. Q.B. 447.

[3] [1956] Que. Q.B. 447.

[4] (1933), 54 Que. K.B. 377.

[5] (1937), 62 Que. K.B. 140.

[6] [1943] Que. K.B. 713.

[7] [1950 CanLII 2 \(SCC\)](#), [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

[8] [1949] Que. K.B. 238.

[9] (1915), [1915 CanLII 608 \(SCC\)](#), 52 S.C.R. 146, 26 D.L.R. 164.

[10] 98 E.R. 1021

[11] [1898] A.C. 1.

[12] [1956] Que. Q.B. 447.

[13] [1956] Que. Q.B. 447.

[14] [1891] A.C. 173 at 179.

[15] [1946 CanLII 345 \(UK JCPC\)](#), [1947] A.C. 109 at 122. 2

[16] [1950 CanLII 497 \(UK JCPC\)](#), [1951] A.C. 66. 3

[17] (1885), 10 'App. Cas. 229 at 240.

[18] (1934), 72 Que. S.C. 112.

[19] (1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.

[20] (1915), [1915 CanLII 608 \(SCC\)](#), 52 S.C.R. 146, 26 D.L.R. 164.

[21] [1956] Que. Q.B. 447.

[23] [1934 CanLII 87 \(ON CA\)](#), [1934] O.R. 421 at 428, 3 D.L.R. 565, 62 C.C.C. 132.

[24] [1950 CanLII 497 \(UK JCPC\)](#), [1951] A.C. 66.

[25] [1958 CanLII 73 \(SCC\)](#), [1959] S.C.R. 24, 16 D.L.R. (2d) 241. 8

[26] (1885), 10 'App. Cas. 229 at 240

[27] (1915), [1915 CanLII 608 \(SCC\)](#), 52 S.C.R. 146, 26 D.L.R. 164. 2
[28] (1770), 3 Wils. 121 at 123, 95 E.R. 967.
[29] [1932] 'A.C. 542.
[30] (1852), 3 H.L. Cas. 759, 10 E.R. 301.
[31] [1956] Que. Q.B. 447 at 457.
[32] [1956] Que, Q.B. 447.
[33] [1949] Que. K .B. 238.
[34] [1950 CanLII 2 \(SCC\)](#), [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.
[35] [1950 CanLII 2 \(SCC\)](#), [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.
[36] [1956] Que. Q.B. 447.
[37] [1914] A.C. 62
[38] [1958 CanLII 35 \(SCC\)](#), [1958] S.C.R. 177 at 188, 13 D.L.R. (2d) 1, 120 C.C.C. 1.
[39] (1917), 57 Que. S.C. 443
[40] (1937), 62 Que. K.B. 143
[41] (1933), 50 Que. K.B. 377
[42] [1943] Que. K.B. 713.
[43] [1956] Que. Q.B. 447.
[44] (1902), 12 Que. K.B. 179 at 202.
[45] (1914), 23 Que. K.B. 274 at 280

TAB 31

R. v. S.G.T., 2010 SCC 20 (CanLII), [2010] 1 SCR 688

Source: Supreme Court of Canada
Date: 2010-05-27
File number: 32890
Other citations: 319 DLR (4th) 1 — 402 NR 24 — [2010] 6 WWR 583 —
[2010] EXP 1783 — 350 Sask R 14 — 255 CCC (3d) 1 —
74 CR (6th) 217 — 211 CRR (2d) 222 —
EYB 2010-174479 — JE 2010-977 —
[2010] SCJ No 20 (QL) — [2010] ACS no 20
Citation: R. v. S.G.T., 2010 SCC 20 (CanLII), [2010] 1 SCR 688,
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SUPREME COURT OF CANADA

CITATION: R. v. S.G.T., 2010 SCC 20, [2010] 1 S.C.R. 688

DATE: 20100527

DOCKET: 32890

BETWEEN:

Her Majesty The Queen
Appellant
and
S.G.T.
Respondent

CORAM: McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: Charron J. (McLachlin C.J. and Deschamps, Abella and Rothstein JJ. concurring)
(paras. 1 to 40)

DISSENTING REASONS: Fish J. (Binnie J. concurring)
(paras. 41 to 89)

R. v. S.G.T., 2010 SCC 20, [2010] 1 S.C.R. 688

Her Majesty The Queen

Appellant

v.

S.G.T.

Respondent

Indexed as: R. v. S.G.T.

2010 SCC 20

File No.: 32890.

2009: November 18; 2010: May 27.

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Evidence — Admissibility — Confessions rule — Derived confessions rule — Accused's stepdaughter telling school counsellor that accused had touched her in sexually inappropriate manner — Accused apologizing to his stepdaughter in statement to police — Accused charged with sexual assault — Accused subsequently sending e-mail to former wife consenting to her travelling abroad with children — E-mail including second apology to stepdaughter — Trial judge ruling after voir dire that statement to police was inadmissible because police officer had offered inducement by implying that accused would not be charged if he apologized — Contents of e-mail, admitted in evidence without voir dire and without objection

from defence counsel, playing crucial role in trial judge's decision to convict accused — Whether trial judge erred by failing to conduct voir dire, on his own motion, to determine admissibility of e-mail — Whether e-mail inadmissible under confessions or derived confessions rules — Whether former wife can be considered a "person in authority" under confessions rule.

A complained to her school counsellor that the accused, her stepfather, had touched her in a sexually inappropriate manner on three occasions during the time she spent at his home. The accused was interviewed by the police on May 27, 2004 and, at the conclusion of the interview, he wrote out an apology to A on the police statement form. The accused was subsequently charged with the offence of sexual assault on June 30, 2004. On July 5, in an e-mail to his former wife, the accused consented to A and his son's travelling abroad with her. In that e-mail, he apologized to A a second time. At trial, the accused's May 27 confession to the police was ruled inadmissible, on the basis that the police officer had offered an inducement by implying that the accused would not be charged if he apologized. A and her mother testified for the Crown. The mother gave evidence about the July 5 e-mail and, when asked by the trial judge, defence counsel said that he did not object to the e-mail being admitted in evidence. No *voir dire* was conducted. The accused testified in his defence, denying that he had sexually assaulted A and indicating that the apology in the e-mail was related to an incident when he had allowed A and some of her friends to share alcoholic "coolers". Credibility was the main issue at trial and the contents of the e-mail played a crucial role in the trial judge's decision. He disbelieved the accused's explanation and convicted him. The Court of Appeal set aside the conviction and ordered a new trial, concluding that the trial judge had erred by failing to conduct a *voir dire*, on his own motion, to determine the admissibility of the e-mail.

Held (Binnie and Fish JJ. dissenting): The appeal should be allowed and the order for a new trial set aside. The case should be remitted to the Court of Appeal to consider the accused's remaining grounds of appeal.

Per McLachlin C.J. and Deschamps, Abella, Charron and Rothstein JJ.: The Court of Appeal erred in faulting the trial judge for not embarking on a *voir dire* in respect of the e-mail, based on the evidence in the actual trial record.

When statements are made by an accused to ordinary persons, they are presumptively admissible, as admissions by an opposing party, without the necessity of a *voir dire*. It is only where the accused makes a statement to a “person in authority” that the Crown bears the onus of proving the voluntariness of the statement as a prerequisite to its admission, under the confessions rule. To be considered a person in authority, the accused must believe that the recipient of the statement can control or influence the proceedings against him or her, and that belief must be reasonable. The accused must provide an evidential basis for claiming that the receiver of a statement is a person in authority. In this case, the trial judge did not err by failing to hold a *voir dire* on the question whether A’s mother was a person in authority. The accused did not raise the issue at trial and there is no evidence that A’s mother had any control over the accused’s prosecution or that she was operating on behalf of the investigating authorities. Nothing on the record indicated to the trial judge that she may have been anything other than an ordinary witness in the proceedings.

The “derived confessions rule” serves to exclude statements which, despite not appearing to be involuntary when considered alone, are sufficiently connected to an earlier involuntary confession as to be rendered involuntary and hence inadmissible. It is not necessary, nor would it be appropriate on this record, to decide whether the derived confessions rule extends to admissions made to ordinary persons. It suffices to assume that, given an appropriate evidentiary basis connecting the police inducement and the later e-mail, it would at least be arguable that the subsequent statement could be excluded, if not on the basis of the common law derived confessions rule, perhaps on a *Charter* basis. The defence, however, neither raised the argument concerning the derived confessions rule at trial nor brought a *Charter* application seeking the exclusion of the e-mail. In deciding whether there was clear evidence which ought to

have triggered the need for the trial judge to raise the issue on his own motion, an appellate court must consider the question from the perspective of the trial judge at the time the decision was made. Here, the most significant circumstance is that defence counsel consented to the admission of the e-mail. In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel, and there was no basis, in this case, to conclude that the trial judge ought to have interfered with the decision of counsel. On the facts, it is difficult to find evidence of a connection between the two statements which should have alerted the trial judge to the need to conduct a *voir dire* and to question the wisdom of counsel. The initial apology was made on May 27, 2004, while the e-mail was sent over five weeks later on July 5. The inducement held out by the police, as found by the trial judge on the *voir dire*, was the suggestion that the accused might not be charged if he apologized. However, by the time the accused sent the e-mail, he had been charged notwithstanding his apology in the police statement. It is therefore far from obvious on what basis the inducement could still have been operative in the accused's mind. Additionally, the two statements were made to different persons in entirely different circumstances. Finally, as the accused's later testimony in the trial revealed, it was his contention that the apology in the e-mail concerned a completely unrelated incident. Given that the accused's own version was contrary to any theory of a potential connection between the e-mail and the earlier confession, it is difficult to see on what basis counsel's consent to the admissibility of the e-mail could be faulted.

Per Binnie and Fish JJ. (dissenting): The Court of Appeal's judgment should be affirmed. The trial judge had in the record before him a clear indication that the accused's second "apology" might be a "derived confession" and was legally bound to himself determine its admissibility. His failure to make any independent determination as to the admissibility of the impugned statement is necessarily fatal to the accused's conviction because, according to the trial judge himself, the impugned statement was critical to his conclusion that the accused was guilty as charged.

The derived confessions rule excludes statements that, while not inadmissible when considered in isolation, are excluded because of their temporal or causal connection to another statement found by the court to be inadmissible. The question is whether the tainting features that disqualified the first confession continue to be present or the fact that the first statement was made was a substantial factor contributing to the making of the second statement. Where the evidence raises a concern in this regard, the sufficiency of the required connection must be determined by the trial judge on a *voir dire*. An objection by counsel is not required to trigger the judge's obligation to conduct the *voir dire*.

In this case, there was ample evidence on the record to alert the trial judge to the need for a *voir dire*. During his interrogation, the accused was repeatedly and emphatically urged to apologize to A, and was told that her complaints were “not a big deal” and were “extremely minor”. One officer told the accused an entirely fictional story according to which the officer had himself been arrested for slapping his son, but the matter was resolved once the officer apologized. The officer said the Crown would decide whether to proceed with the charges or simply look at counselling instead, and that the most important thing they looked at was an apology. The accused was told that if he simply apologized the matter might not proceed, and the officer promised to stick with the accused throughout the matter.

The judge had already excluded the initial statement or “apology” written by the accused during the police interrogation, and was thus familiar with the inducements that had provoked it. The e-mail was strikingly similar to the excluded statement. Moreover, whether the Crown would proceed with the charges remained a live issue when it was sent. The improper inducements present when the inadmissible statement was given to the police — notably, the promise of leniency in exchange for a showing of remorse in the form of an apology — were still operative. In these circumstances, cumulatively considered, the connection between the two statements was apparent from the record and should have alerted the trial judge to the need for a *voir dire*.

The Crown contends that the “person in authority” requirement for exclusion under the confessions rule applies to derived confessions as well. This Court has previously excluded a statement as a derived confession without determining whether it was made to a person in authority, so it cannot be said that a derived confession will only be excluded if it is made to a person in authority. The purpose of the derived confessions rule — to exclude statements that are tainted by their connection to a prior inadmissible statement — would be frustrated if they were excluded only when made to a person in authority. If the statement is prompted by the same police conduct that resulted in exclusion of the earlier confession, or if it discloses the contents of the earlier statement made to authorities, it is a product of the inadmissible confession and is itself inadmissible on that ground alone.

Cases Cited

By Charron J.

Applied: *R. v. Hodgson*, [1998 CanLII 798 \(SCC\)](#), [1998] 2 S.C.R. 449; **referred to:** *Palmer v. The Queen*, [1979 CanLII 8 \(SCC\)](#), [1980] 1 S.C.R. 759; *R. v. A.B.* (1986), [1986 CanLII 4624 \(ON CA\)](#), 50 C.R. (3d) 247; *R. v. Trenholme* (1920), 30 B.R. 232; *R. v. Wells*, [1998 CanLII 799 \(SCC\)](#), [1998] 2 S.C.R. 517; *R. v. I. (L.R.) and T. (E.)*, [1993 CanLII 51 \(SCC\)](#), [1993] 4 S.C.R. 504; *R. v. G. (B.)*, [1999 CanLII 690 \(SCC\)](#), [1999] 2 S.C.R. 475; *R. v. Lomage* (1991), [1991 CanLII 7228 \(ON CA\)](#), 2 O.R. (3d) 621; *R. v. G.D.B.*, [2000 SCC 22](#), [2000] 1 S.C.R. 520; *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002 SCC 61](#), [2002] 3 S.C.R. 209.

By Fish J. (dissenting)

R. v. I. (L.R.) and T. (E.), [1993 CanLII 51 \(SCC\)](#), [1993] 4 S.C.R. 504; *Ibrahim v. The King*, [1914] A.C. 599; *R. v. G. (B.)*, [1999 CanLII 690 \(SCC\)](#), [1999] 2 S.C.R. 475.

Statutes and Regulations Cited

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Jackson, Smith and Wilkinson JJ.A.), [2008 SKCA 119](#), 237 C.C.C. (3d) 55, 61 C.R. (6th) 302, 314 Sask. R. 44, 435 W.A.C. 44, [2008] 11 W.W.R. 1, [2008] S.J. No. 572 (QL), 2008 CarswellSask 600, setting aside the accused's conviction entered by Scheibel J., [2006 SKQB 234](#), [2006] S.J. No. 393 (QL), 2006 CarswellSask 373, and ordering a new trial. Appeal allowed, Binnie and Fish JJ. dissenting.

W. Dean Sinclair, for the appellant.

Aaron A. Fox, Q.C., and *Angela M. Ottenbreit*, for the respondent.

The judgment of McLachlin C.J. and Deschamps, Abella, Charron and Rothstein JJ. was delivered by

CHARRON J. —

1. Introduction

[1] Following his trial by judge alone, the respondent S.G.T. was convicted of sexually assaulting his stepdaughter. The Saskatchewan Court of Appeal set aside the conviction and ordered a new trial. In its view, the trial judge had erred by failing to conduct a *voir dire*, on

his own motion, to determine the admissibility of an e-mail sent by the accused to his estranged wife, the mother of the complainant. The Crown appeals to this Court with leave.

[2] In my respectful view, the trial judge committed no error in admitting and relying upon the evidence concerning the e-mail. I would therefore allow the appeal, quash the order directing a new trial and, as requested by the Crown, remit the case back to the Court of Appeal to consider the respondent's remaining grounds of appeal.

2. The Facts and the Proceedings Below

[3] The facts and judicial findings can be stated briefly.

[4] The complainant A was born in 1989. She was approximately 11 to 14 years old when the events complained of are alleged to have occurred, and 17 at the time of trial.

[5] S.G.T. met the complainant's mother in 1995. The couple were married in 1996, and had a son, B, in 1997. S.G.T. subsequently adopted A. The couple separated in 2000, agreeing to a joint parenting arrangement according to which the two children would stay with their father two days a week, alternate weekends and one month during the summer. A stayed with her father under this arrangement until 2003 when she claimed she was uncomfortable staying at his place and would only go there if she was with her friends. A complained to her friend about her father's inappropriate sexual behaviour and eventually to her mother in the spring of 2003. Although A's mother contacted the police, she did not follow through when asked to call back, and nothing further was done about the situation at the time.

[6] About a year later, in May 2004, A told her guidance counsellor at school about her father's actions and the police were called. A complained that S.G.T. touched her in a sexually inappropriate manner on three occasions during the time she spent at his home. These incidents form the subject matter of the charge against him.

[7] S.G.T. agreed to be interviewed by the police on May 27, 2004. At the conclusion of the interview with the police, S.G.T. wrote out an apology to A on the police statement form. This apology was ruled inadmissible at trial, on the basis that the police officer had offered an inducement by implying that S.G.T. would not be charged if he apologized. More will be said later about the trial judge's findings on the *voir dire*.

[8] S.G.T. was charged with the offence of sexual assault on June 30, 2004.

[9] By this time, A's mother had made arrangements to travel to California with A and B on July 6, 2004, to visit her parents. However, in order to travel with A and B, A's mother required, pursuant to their arrangement, S.G.T.'s consent. A's mother sent S.G.T. a number of e-mails in an effort to obtain his consent. He finally responded on July 5, 2004, with the following e-mail:

Relax. When have I ever not done something you've requested for the kids. I'm busy too. I have the letter and it's notarized [sic]. I thought long and hard about keeping [B] back so I could spend this month with him in case I end up going to fucking jail on the 28th, but I wouldn't do that to him. I hope you realize that I will never be able to coach [B] or travel outside Canada for a holiday with him or work. I may loose [sic] my job because of this. I don't care about you, but I very much hope that this will make [A] get and feel better. I am so, so sorry if I caused her emotional pain. I have to live with the fact that I lost someone I cared for deeply over my stupididty [sic]. And now I have to deal with [the] fact that I stand to loose [sic] everything I worked so hard for. I'm sure this makes you happy. You better hope for your sake you never make a mistake bringing up [B].

You can pick the letter up out of my mailbox, I have a commitment I have to be at tonight. Make sure [B] calls me at least once a week, I showed him how to dial collect.

[10] S.G.T.'s trial began on May 8, 2006. Credibility was the main issue in the trial. In addition to the complainant's testimony, two items of evidence emanating from the accused figured prominently in the Crown's case: his confession to the police, which included the written apology to A; and the e-mail he sent to A's mother.

[11] At the commencement of the trial, a *voir dire* was held regarding the statement to the police. The accused did not testify on the *voir dire*. Based on the evidence adduced on the *voir dire*, the trial judge held that "the officer, on several occasions, left the impression to the accused that this was not a significant matter, that it was extremely minor, that the accused would not lose his job, that all that was necessary was an apology" (Appellant's Record, at p. 68). He concluded that the officer "appears to imply that [the accused] may not be charged if he apologizes", and "[i]n so doing the officer held out hope of advantage to the accused" (*ibid.*). The trial judge ruled the statement involuntary and, consequently, inadmissible. The evidence on the *voir dire* was not admitted on the trial proper.

[12] The Crown then called two witnesses: A and her mother. During the course of her testimony, the mother gave evidence about her e-mail correspondence with the accused, including his response on July 5, 2004. When asked by the trial judge whether the defence objected to the filing of the e-mails as an exhibit in the trial, counsel for S.G.T. responded "No". Nor was any objection raised concerning the mother's testimony about the July 5th e-mail.

[13] S.G.T. testified in his defence. He denied sexually assaulting his stepdaughter. With respect to the apology in the e-mail, he explained that it had nothing to do with the allegations of sexual assault. His words of regret for any emotional pain he may have caused A were in reference, rather, to an incident when he had allowed the young complainant and some of her friends to share two alcoholic “coolers”, an incident that had caused grief with some of the young girls’ parents.

[14] The contents of the e-mail ultimately played a crucial role in the trial judge’s verdict against the accused. The trial judge disbelieved S.G.T.’s explanation. Since S.G.T. also spoke in the e-mail of the possibility of going to jail and never being able to coach his son or travel outside Canada, the “only possible interpretation” was that the e-mail was “a confession of guilt and one of remorse” in respect of the sexual assaults, which, in turn, confirmed the testimony given by the complainant ([2006 SKQB 234 \(CanLII\)](#), at paras. 34-35). The trial judge convicted S.G.T. of sexual assault as charged.

[15] On appeal from conviction and sentence before the Saskatchewan Court of Appeal, S.G.T. raised several grounds, including that “the learned trial judge erred in placing excessive weight on the evidence of [the e-mail] in finding [that he] had a ‘guilty mind’”. He also brought an application to introduce fresh evidence. Among other things, he stated in his affidavit filed in support of the application that he had lied about the e-mail at trial, and that he had given his evidence at the suggestion of his counsel. He explained that he included an apology in the e-mail because he had been told by the police in his interview “that all that was needed to resolve the matter was a form of apology” (Appellant’s Record, at p. 103). He therefore hoped “that the charge would not proceed as promised by the police” (*ibid.*). In response to S.G.T.’s fresh evidence application, trial counsel filed an affidavit denying ever having “suggested in any way, shape or form that [his] client tell anything but the absolute truth” (*ibid.*, at p. 112) and confirming that S.G.T.’s explanation for the e-mail had always been that offered in his testimony.

[16] The Court of Appeal did not find it necessary to dispose of S.G.T.'s application to admit fresh evidence (2008 SKCA 119, 237 C.C.C. (3d) 55, at para. 109). It allowed the appeal against conviction on the sole ground that the trial judge had erred by failing to conduct a *voir dire*, on his own motion, to determine the admissibility of the e-mail. The court was of the view that there were three "exclusionary rules or limiting principles that might have been invoked to exclude the e-mail from evidence, or weaken, or neutralize its impact": the confessions rule, provided that the mother could be brought within the characterization of a person in authority; the trial judge's inherent jurisdiction to exclude prejudicial evidence outweighing its probative value; and the derived confessions rule (para. 97). While not faulting trial counsel or the trial judge for not anticipating "every conceivable argument that hindsight and leisurely reflection can serve to devise or construct", given these concerns about the e-mail and the "decisive influence on the result", the court saw no viable alternative other than setting aside the conviction and ordering a new trial (para. 108).

3. Analysis

[17] It is plain from the summary that precedes that the Court of Appeal's concerns about the apology contained in the e-mail can only find root in the theory that the accused would have sent the e-mail as a result of the inducement offered by the police officer some five weeks earlier when, as the trial judge found, the officer appeared to imply that the accused would not be charged if he apologized for the sexual improprieties. The notion that the evidence could potentially be excluded on this theory gives rise to a number of legal questions which I will discuss in a moment. However, the more fundamental difficulty S.G.T. faces in this Court is that, without his fresh evidence poured in the record, there is no evidentiary basis to support the defence theory. Indeed the theory that there is some connection between the inadmissible confession and the e-mail runs counter to S.G.T.'s own evidence and defence at trial that the contents of the e-mail had *nothing* to do with the allegations of sexual assault.

[18] Having regard to the criteria for the admission of fresh evidence established in *Palmer v. The Queen*, [1979 CanLII 8 \(SCC\)](#), [1980] 1 S.C.R. 759, S.G.T. faced a rather significant hurdle on his fresh evidence application before the Court of Appeal. However, the Court of Appeal disposed of the appeal on the basis of this potential connection between the inadmissible confession and the e-mail without finding it necessary to rule on the fresh evidence application, and S.G.T. did not renew the application in this Court. This appeal therefore turns, not on whether S.G.T.'s different version of events should be admitted in evidence, but rather on whether the Court of Appeal was correct to fault the trial judge for not embarking on a *voir dire* in respect of the e-mail, based on the evidence in the *actual* trial record.

[19] As stated earlier, the Court of Appeal expressed the view that there were three exclusionary rules or limiting principles that might have been invoked in respect of the e-mail, one of which being the trial judge's inherent jurisdiction to exclude prejudicial evidence outweighing its probative value. However, the court did not elaborate on how the court's inherent jurisdiction might have come into play and, in responding to the Crown's appeal before this Court, S.G.T., rightly so in my view, did not rely on this principle. Therefore, I will deal solely with the common law rules relating to the admissibility of confessions and the obligations of the trial judge.

[20] The distinction between an admission and a confession is apposite here. Under the rules of evidence, statements made by an accused are admissions by an opposing party and, as such, fall into an exception to the hearsay rule. They are admissible for the truth of their contents. When statements are made by an accused to ordinary persons, such as friends or family members, they are presumptively admissible without the necessity of a *voir dire*. It is only where the accused makes a statement to a "person in authority", that the Crown bears the onus of proving the

voluntariness of the statement as a prerequisite to its admission. This, of course, is the confessions rule.

[21] The Court affirmed in *R. v. Hodgson*, [1998 CanLII 798 \(SCC\)](#), [1998] 2 S.C.R. 449, that the “person in authority” requirement is an integral component of the confessions rule and reviewed in considerable detail the law on persons in authority, including the trial judge’s obligation to hold a *voir dire*. I will briefly reiterate those principles to the extent that they apply here.

[22] A person in authority is typically a person who is “formally engaged in the arrest, detention, examination or prosecution of the accused”: *Hodgson*, at para. 32. Importantly, there is no category of persons who are automatically considered persons in authority solely by virtue of their status. The question as to who should be considered as a person in authority is determined according to the viewpoint of the accused. To be considered a person in authority, the accused must believe that the recipient of the statement can control or influence the proceedings against him or her, and that belief must be reasonable. Because the evidence necessary to establish whether or not an individual is a person in authority lies primarily with the accused, the person in authority requirement places an evidential burden on the accused. While the Crown bears the burden of proving the voluntariness of a confession beyond a reasonable doubt, the accused must provide an evidential basis for claiming that the receiver of a statement is a person in authority.

[23] As noted in *Hodgson*, “[i]n the vast majority of cases, the accused will meet this evidential burden by showing [his or her] knowledge of the relationship between the receiver of the statement and the police or prosecuting authorities” (para. 38). Thus, where the receiver of the statement is an obvious state actor, such as a police officer, the fact that the person’s status was known to the accused at the time the statement was made will suffice to meet the evidentiary

burden. Whenever the evidence makes clear that a *voir dire* into admissibility is required, the trial judge must conduct one even if none is requested unless, of course, the defence waives the requirement and consents to the statement's admission. When the receiver of the statement is not a typical or obvious person in authority, it usually falls on the accused, in keeping with the evidential burden, to raise the issue and request a *voir dire*.

[24] In this case, the recipient of the e-mail, A's mother, was not a conventional person in authority. Further, S.G.T. did not raise the issue at trial. While A's mother may, as a parent of a minor complainant in a criminal trial, be a person in authority, her status alone is not sufficient to render her a person in authority: see *R. v. A.B.* (1986), [1986 CanLII 4624 \(ON CA\)](#), 50 C.R. (3d) 247 (Ont. C.A.), at pp. 257-59; *Hodgson*, at para. 36. In those cases where parents have been held to be persons in authority, there has generally been some type of interaction between the parents and the police. For example, in *R. v. Trenholme* (1920), 30 B.R. 232, the victim's father was held to be person in authority on the basis that he actually "laid the charge" and "had authority and control over the prosecution against the accused" (pp. 249 and 243). More recently, in *R. v. Wells*, [1998 CanLII 799 \(SCC\)](#), [1998] 2 S.C.R. 517, this Court held that a *voir dire* was required into whether a parent was a person in authority where the parent had previously spoken to the police about his intention to trick the accused into making a statement. It was on that basis that *Wells* was one of those "rare cases" where a *voir dire* was required for an individual who was not a clear person in authority (para. 16). By contrast, in *Hodgson*, the mere fact that the parents of a young girl confronted the accused about sexually assaulting their daughter did not serve to turn them into persons in authority. The Court emphasized in *Hodgson* that only rarely will the need for a *voir dire* be triggered in such circumstances. Moreover, what needs to be shown before the trial judge will be required to hold a *voir dire* on his or her own motion bears repeating here:

Status or personal authority alone will not as a general rule provide evidence from which it can be inferred that the receiver of a confession is, in the eyes of the accused, a person in authority. Rather, in order to demonstrate the need for a *voir dire*, the

evidence must show that the receiver of the statement was closely associated with the authorities prior to obtaining the statement, and that there was as well a close connection in time between the contact with the authorities and its receipt. The evidence must suggest that the receiver was acting in concert with the police or prosecutorial authorities, or as their agent, or as part of their team. Only in these circumstances will the trial judge be obliged to hold a *voir dire* of his or her own motion on the person in authority issue, subject to waiver of the *voir dire* by counsel for the accused. [para. 47]

[25] The question then becomes whether clear evidence existed in the record which should have alerted the trial judge to the need for a *voir dire*. The relevant circumstances are the following.

[26] S.G.T. did not testify that he believed that A's mother could influence or control the proceedings. Even if he had testified to that effect, any subjective belief has to be reasonably based in fact. There is no evidence that A's mother had any control over the prosecution of S.G.T., or that she was operating on behalf of the investigating authorities. Rather, the record suggests quite the contrary. While A's mother called the police after A disclosed the incidents to her in 2003, she was told to call back later, as the relevant department was not open at that time. She never called back, as she was concerned about the effect that any complaint might have on her son, B. The police only began investigating S.G.T. in 2004 after A disclosed the matter to authorities at her school (Appellant's Record, at p. 80). In these circumstances, there was nothing on the record to indicate to the trial judge that A's mother may have been anything other than an ordinary witness in the proceedings. I therefore conclude that the trial judge did not err by failing to hold a *voir dire* on the question whether A's mother was a person in authority.

[27] As stated earlier, the Court of Appeal also identified the “derived confessions rule” as another potential field of inquiry into the admissibility of the e-mail. As I read his reasons, it is on this ground that Fish J. would uphold the order for a new trial. Again here, S.G.T. did not raise this argument at trial. Before considering the record on this point to determine whether the trial judge ought to have raised the issue on his own motion, I will briefly recall the rule.

[28] The leading case on the derived confessions rule is *R. v. I. (L.R.) and T. (E.)*, 1993 CanLII 51 (SCC), [1993] 4 S.C.R. 504. In brief, the derived confessions rule serves to exclude statements which, despite not appearing to be involuntary when considered alone, are sufficiently connected to an earlier involuntary confession as to be rendered involuntary and hence inadmissible. For example, in that case, a young offender was charged with second degree murder and gave an inculpatory statement to the police. The next day, after meeting with his lawyer, the accused came to the police, wishing to modify the statement that he had given the previous day. The trial judge excluded the first statement but admitted the second, and the accused was convicted by a jury. The accused appealed the conviction on the basis that the second statement should not have been admitted. His appeal was ultimately successful in this Court.

[29] In outlining the principles applicable to derived confessions, the Court articulated a contextual and fact-based approach to determining whether a subsequent statement is sufficiently connected to a prior, inadmissible confession to also be excluded. In assessing the degree of connection, the Court outlined a number of factors to be considered, including “the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances” (p. 526). The Court then held:

In applying these factors, a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement. [p. 526]

The Court was clear in adding that “[n]o general rule excluded subsequent statements on the ground that they were tainted irrespective of the degree of connection to the initial admissible statement” (p. 526).

[30] It is plain from the above principles that the “derived confessions rule” emanates from the common law confessions rule. As such, like its parent, it is clear that it applies to secondary *confessions*, that is, statements made to a person in authority that are sufficiently connected to a previous involuntary confession to be deemed also involuntary. Whether the derived confessions rule also applies in respect of subsequent admissions made to persons not in authority, however, is not so clear.

[31] S.G.T. claims that this Court’s decision in *R. v. G. (B.)*, [1999 CanLII 690 \(SCC\)](#), [1999] 2 S.C.R. 475, stands for the proposition that a second statement need not be made to a person in authority in order to be excluded, but rather that a second statement will be excluded in any case where there is a sufficient connection between the two statements. The Court of Appeal below also placed much reliance on *G. (B.)*. However, the interpretation that S.G.T. urges this Court to accept remains an open question. The majority in *G. (B.)* expressly declined to address this point, instead excluding the second statement (made to a psychiatrist) on the basis that it would be impossible to admit the second statement without also indirectly admitting the first statement, as the second statement at issue in that case actually contained the first, inadmissible statement (paras. 22 and 24). Moreover, the dissent in *G. (B.)*, written by McLachlin J. (as she then was), with L’Heureux-Dubé and Gonthier JJ. concurring, explicitly rejected the contention

that a second statement need not be made to a person in authority in order to be rendered inadmissible under this rule (para. 61).

[32] I respectfully disagree with Fish J. that “[a]s a matter of principle and logic” it is clear that “derived confessions need not be made to a person in authority in order to be found inadmissible” (para. 85). As a matter of principle, this broad assertion ignores the distinction between confessions and admissions discussed earlier. As for logic, much will depend on the facts of the particular case. Logic may have compelled the conclusion reached in *G. (B.)* where the later statement, which actually contained the earlier tainted confession given to the police, was made to a psychiatrist during the course of a court-ordered examination into his mental condition. It may not be so compelling in a case where, for example, the accused repeats the contents of the tainted confession to a personal friend who has no connection to the prosecution.

[33] It is not necessary, nor would it be appropriate on this record, to decide whether the derived confessions rule extends to admissions made to ordinary persons. It suffices for our purposes to assume that, given an appropriate evidentiary basis connecting the police inducement and the later e-mail, it would at least be arguable that the subsequent statement could be excluded, if not on the basis of the common law derived confessions rule, perhaps on a *Charter* basis. The distinction between the two possible bases for exclusion remains important as the application of the common law “derived confessions rule” would result in the automatic exclusion of the tainted statement, whereas under the *Canadian Charter of Rights and Freedoms* the question of exclusion would fall to be determined under s. 24(2). However, the defence did not raise the argument concerning the derived confessions rule at trial, nor did S.G.T. bring a *Charter* application seeking the exclusion of the e-mail. For example, it would have been an opportune time to raise the argument during the course of the *voir dire* into the admissibility of the police confession if the defence contended that there was some connection between the police confession and the e-mail. Again, no issue was raised when the trial judge specifically asked whether the defence contested

the admissibility of the e-mail at the time the evidence was presented. Quite to the contrary, in answer to the trial judge's inquiry, the defence expressly *consented* to its admission.

[34] I am not unmindful of the fact that S.G.T. raised the question of competency of counsel before the Court of Appeal and that the court did not dispose of this ground of appeal. It is noteworthy for our purposes, however, that in specifying the grounds in support of his allegation of inadequate representation in his Notice of Appeal, S.G.T. made a number of specific allegations about the alleged inadequacies of his counsel but made no mention of counsel's consent to the admission of the e-mail. The only ground of appeal relating to the e-mail was an allegation that the "trial judge erred in placing excessive weight" on this item of evidence.

[35] More importantly, in deciding whether there was clear evidence that ought to have triggered the need for the trial judge to raise the issue on his own motion, an appellate court must consider the question from the perspective of the trial judge at the time the decision was made.

[36] Here, the most significant circumstance is that the defence consented to the admission of the evidence. In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel: see generally *R. v. Lomage* (1991), 1991 CanLII 7228 (ON CA), 2 O.R. (3d) 621 (C.A.), at pp. 629-30. There is a "strong presumption" that defence counsel are competent in advancing the interests of their clients: see *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 27; *Hodgson*, at para. 99. Moreover, counsel will generally be in a better position to assess the wisdom, in light of their overall trial strategy, of a particular tactical decision than is the trial judge. By contrast, trial judges are expected to be impartial arbiters of the dispute before them; the more a trial judge second-guesses or overrides the decisions of counsel, the greater is the risk that the trial judge will, in either

appearance or reality, cease being a neutral arbiter and instead become an advocate for one party. For these reasons, this Court has previously held that the burden to raise evidentiary issues properly rests on the shoulders of counsel: *Hodgson*, at para. 98.

[37] The corollary of the preceding is that trial judges should seldom take it upon themselves, let alone be required, to second-guess the tactical decisions of counsel. Of course, trial judges are still required to “make sure that [the trial] remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice”: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 68. However, reviewing the record from the perspective of the trial judge and taking into account the factors from *I. (L.R.)* which were discussed above, I find no basis to conclude that the trial judge ought to have interfered with the decision of counsel to consent to the admission of the evidence. The relevant features of the record are the following.

[38] On the facts, it is difficult to find evidence of a connection between the two statements which should have alerted the trial judge to the need to conduct a *voir dire* and to question the wisdom of counsel. In terms of the time span between the statements, the initial apology was made on May 27, 2004, while the e-mail was sent over five weeks later on July 5, 2004. The inducement held out by the police, as found by the trial judge on the *voir dire*, was the suggestion that S.G.T. may not be charged if he apologized. However, by the time S.G.T. sent the e-mail, he had been charged notwithstanding his apology in the police statement. It is therefore far from obvious on what basis the inducement could still be operative in the accused’s mind. Additionally, there was no advertence to the previous inadmissible statement in the e-mail to A’s mother. Finally, the two statements were made to different persons in entirely different circumstances. The first statement was made to a police officer in the context of a custodial interrogation, while the second was made to A’s mother in an e-mail exchange relating to A’s

mother's attempt to secure S.G.T.'s permission to allow A and B to travel to California with her. But, more importantly, as the accused's later testimony in the trial revealed, it was his contention that the apology in the e-mail concerned a completely *unrelated* incident. This exemplifies why trial judges should generally defer to the tactical decisions of counsel who generally know more about the case. Given that the accused's own version was contrary to any theory of a potential connection between the e-mail and the earlier confession, it is difficult to see on what basis counsel's consent to the admissibility of the e-mail could be faulted.

[39] Based on this record, with respect, it is my view that the Court of Appeal erred in overturning the conviction on the basis that it did.

4. Conclusion

[40] For these reasons, I would allow the appeal and set aside the order for a new trial. As requested by both parties, I would remit this case to the Court of Appeal to consider S.G.T.'s remaining grounds of appeal.

The reasons of Binnie and Fish JJ. were delivered by

FISH J. (dissenting) —

I

[41] This appeal is the third chapter in a tale of two statements — closely related in subject matter, purpose and time. Both statements bear a striking resemblance as well to a fable conceived and disingenuously recounted to the respondent by a police interrogator as a “personal

experience” of his own. The interrogator’s contrived “confidence” amounted, unmistakably, to an implied promise of leniency in exchange for a contrite admission of guilt. There is no dispute that the purpose and effect of this stratagem was to induce the respondent to make an incriminating statement in the form of an apology to the complainant.

[42] Pursuant to a *voir dire*, the trial judge excluded the first of the two statements on the ground that it had been rendered involuntary by the police officer’s improper inducement. The trial judge’s conclusion in this regard is not challenged on this appeal by the Crown. Nor was it challenged in the Court of Appeal.

[43] The second statement was admitted without a *voir dire* and the respondent was ultimately convicted (2006 SKQB 234 (CanLII)).

[44] The Saskatchewan Court of Appeal set aside the respondent’s conviction and ordered a new trial (2008 SKCA 119, 237 C.C.C. (3d) 55). Hence this third chapter of the saga — an appeal by the Crown urging us to reinstate the respondent’s conviction at trial.

[45] Unlike Justice Charron, and with the greatest of respect, I would affirm the unanimous judgment of the Court of Appeal.

[46] I agree with the Court of Appeal that the trial judge was legally bound to himself determine the admissibility of the respondent’s second “apology”. It was tendered by the Crown as an incriminating statement by the accused. And the trial judge then had in the record before him a clear indication that this second “apology” might be a “derived confession”, inadmissible on account of its close connection to the statement he had earlier excluded.

[47] The holding of a *voir dire* for this purpose was not subject to, or conditional upon, an objection by defence counsel: Its necessity was made apparent by the material already on the record when the Crown tendered the statement.

[48] I hasten to add that we are not concerned in this case with a mere matter of form. An informal *voir dire* will often suffice to determine whether a statement attributed to the accused ought to be admitted in evidence. Here, however, the trial judge made *no inquiry at all*.

[49] And the total failure of the trial judge to make any independent determination as to the admissibility of the impugned statement is necessarily fatal to the respondent's conviction: According to the trial judge himself, the impugned statement was critical to the trial judge's conclusion that the respondent was guilty as charged.

II

[50] The respondent, S.G.T., was married to A.T. from 1996 until 2000. Their son B was born in 1997. A.T. also had a daughter from a prior relationship, A, whom S.G.T. adopted in 2000.

[51] Shortly thereafter, the couple separated. The split was acrimonious. For the next three years, the children spent two nights each week, every other weekend, and one month in the summer at S.G.T.'s house. A was 11 to 14 years old during that period.

[52] In 2003, A told her mother she was uncomfortable spending the night at S.G.T.'s house. When asked by A.T., she stated that S.G.T. had sexually assaulted her. A.T. phoned the police, but did not call back when she was asked to do so. No further action was taken until the following year when A told a school counsellor about the claimed assault. The counsellor contacted the police, who launched an investigation.

[53] On May 27, 2004, S.G.T. was interviewed by a police officer. During the interview, he was repeatedly told that the matter was “not a big deal” and “extremely minor”. The police officer said that if he apologized it might not proceed any further, and that the biggest factor the Crown looked at was remorse.

[54] One officer told S.G.T. a fabricated story according to which the officer had himself been arrested for slapping his son while on vacation in the United States. In this entirely fictional story, the matter was resolved once the officer apologized.

[55] We do not have the audio or video tapes of S.G.T.'s interrogation. With the benefit of those tapes, the Court of Appeal summarized the relevant facts this way:

On May 27, 2004, the appellant agreed to be interviewed by a police officer regarding the allegations. During a two-hour interview, the officer repeatedly and emphatically urged the appellant to apologize to [A] all the while saying that [A]'s complaints were “not a big deal”, not a “heinous act” and amounted to a “very insignificant contact”, or something “extremely minor”. The officer said it was not unlike smacking a child in public, and illustrated the point by recounting how he had been arrested for slapping his own child while on a holiday in the United States. The officer told the appellant the child welfare authorities had even become involved, but he had taken responsibility for his behaviour, apologized, and all had been forgiven. The story was entirely fabricated.

The officer explained to the appellant that the Crown would look at all the facts and ask whether it was in the public interest to proceed with the charges, or simply look at some kind of counselling instead. The most important thing they looked at was an apology, and if the appellant just apologized the matter might not proceed. He said he wasn't trying to hang the appellant, he just wanted closure for the victim. When the appellant expressed concern for the consequences, the officer assured him he would not lose his son, and he would not lose his job, and that the biggest factor the Crown looked at was remorse. When the appellant thought he should consult with someone, the officer said only dishonest people needed lawyers. The officer gave his word he would stick with the appellant throughout the matter. The appellant then wrote out a form of apology to [A]. [Emphasis added; paras. 15-16.]

[56] The officer's ruse achieved its intended purpose. Believing the officer's invented account of his own arrest to be true, S.G.T. wrote out the suggested apology. Approximately four weeks later, he was charged with sexual assault.

[57] Five days after the charges were laid, and about three weeks before S.G.T.'s first court appearance, he sent the following e-mail to A.T. in response to her requests for his permission to take the children to California to visit A.T.'s parents:

Relax. When have I ever not done something you've requested for the kids. I'm busy too. I have the letter and it's notarized [sic]. I thought long and hard about keeping [B] back so I could spend this month with him in case I end up going to fucking jail on the 28th, but I wouldn't do that to him. I hope you realize that I will never be able to coach [B] or travel outside Canada for a holiday with him or work. I may lose [sic] my job because of this. I don't care about you, but I very much hope that this will make [A] get and feel better. I am so, so sorry if I caused her emotional pain. I have to live with the fact that I lost someone I cared for deeply over my stupidity [sic]. And now I have to deal with [the] fact that I stand to lose [sic] everything I worked so hard for. I'm sure this makes you happy. You better hope for your sake you never make a mistake bringing up [B].

You can pick the letter up out of my mailbox, I have a commitment I have to be at tonight. Make sure [B] calls me at least once a week, I showed him how to dial collect.

S.G.T. was not represented by counsel when he wrote the e-mail.

[58] S.G.T. was tried in the Court of Queen's Bench for Saskatchewan before a judge sitting alone. At trial, Scheibel J. conducted a *voir dire* regarding the apology S.G.T. had written out under the officer's direction during his interrogation. Understandably, Justice Scheibel found that the apology had been improperly induced by the interrogating officer. He concluded that the Crown had failed to prove its voluntariness, as required by law. Justice Scheibel therefore excluded the apology. As mentioned earlier, the Crown did not attack this finding in the Court of Appeal.

[59] A.T., A, and S.G.T. all testified at trial. During the direct examination of A.T., the Crown asked her to identify and describe the e-mail from S.G.T. The Crown then sought to have the e-mail admitted in evidence. Defence counsel, asked by the trial judge whether there was "any objection", replied "No, My Lord." The e-mail, in effect a second "apology", was held admissible on this basis, without any inquiry or consideration regarding its connection to the previously excluded "apology".

[60] In his reasons convicting S.G.T., Justice Scheibel found that the case turned on credibility and that the e-mail had been crucial to his conclusion that S.G.T. was not credible.

[61] As I have already mentioned, the Saskatchewan Court of Appeal allowed S.G.T.'s appeal. Wilkinson J.A., writing for a unanimous court, held that the trial judge had erred in law by failing to hold a *voir dire* to determine the admissibility of the e-mail. She found that there was sufficient reason to believe that the e-mail was a tainted statement, or "derived confession", causally connected to the earlier inadmissible statement, and that a *voir dire* was therefore mandatory.

[62] Wilkinson J.A. rejected the Crown's submission that there was an insufficient connection between the two statements, since the only proper way to test that submission on its merits was by conducting a *voir dire* — which the trial judge had failed to do.

III

[63] The confessions rule serves to exclude involuntary statements made to persons in authority. The derived confessions rule is a corollary of the confessions rule. It excludes statements that are so closely connected to inadmissible confessions as to be “tainted” by association and, for that reason, inadmissible as well.

[64] The derived confessions rule thus excludes statements that, while not inadmissible when considered in isolation, are excluded because of their temporal or causal connection to another statement found by the court to be inadmissible. This occurs whenever “either the tainting features which disqualified the first confession continued to be present or . . . the fact that the first statement was made was a substantial factor contributing to the making of the second statement”: *R. v. I. (L.R.) and T. (E.)*, [1993 CanLII 51 \(SCC\)](#), [1993] 4 S.C.R. 504, at p. 526.

[65] The question is a contextual one, aimed at determining the degree of connection between the two statements. In *I. (L.R.)*, the Court identified as relevant factors “the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances” (p. 526).

[66] In short, derived confessions are inadmissible not because they are themselves involuntary statements made or given to a person in authority, within the meaning of *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), and its progeny, but because they are “tainted”, or contaminated, by *another inadmissible statement*. The governing principle was well and succinctly put this way by Bastarache J., speaking for the majority in *R. v. G. (B.)*, 1999 CanLII 690 (SCC), [1999] 2 S.C.R. 475, at para. 23:

Ultimately, what matters is that the court is satisfied that the degree of connection between the two statements is sufficient for the second to have been contaminated by the first.

And the sufficiency of the required connection must be determined by the trial judge on a *voir dire*.

[67] Our concern here is with the admissibility of an e-mail found by the trial judge to be incriminating. Defence counsel did not request a *voir dire*. Quite properly, the trial judge recognized that no such request was essential.

[68] The trial judge appears to have recognized as well that the admissibility of the e-mail was open to question in view of the circumstances in which it was sent: He would not otherwise have thought it necessary to inquire whether defence counsel *objected to its admission*. Unfortunately, instead of proceeding with the required *voir dire*, the trial judge admitted the e-mail upon asking defence counsel whether there was “any objection”, and receiving a negative reply.

[69] Counsel can, of course, make admissions of fact that provide a sufficient evidentiary basis for the judicial determination that is the object of a *voir dire*. As a matter of principle, however, judicial determinations cannot be delegated to counsel. Thus, while admissions of fact may render unnecessary the calling of evidence, the legal effect of that evidence is for the judge alone to determine.

[70] I nonetheless accept, for present purposes only, that counsel can admit the voluntariness of a statement and even concede its admissibility in appropriate circumstances — for example, where that would be the judge’s inevitable finding on a *voir dire*.

[71] But that is not our case. Counsel made no admissions of fact concerning the admissibility of the tendered statement. Nor did he expressly concede its admissibility as a matter of law.

[72] And no such determination was made by the trial judge either.

IV

[73] Justice Charron would reverse the decision of the Court of Appeal and reinstate the respondent’s conviction on two grounds: First, because defence counsel did not object to admission of the e-mail; second, because my colleague sees no obvious connection between the e-mail and the earlier inadmissible statement to police. I respectfully disagree with my colleague on both grounds.

[74] With regard to the first ground, I repeat here what I stated earlier: As a matter of law, no objection was required. Where there is reason for concern about a statement tendered by the Crown, on account of its close connection with an earlier statement found on a *voir dire* to be inadmissible, the admissibility of the second statement also falls to be decided on a *voir dire*.

[75] This was made clear in *G. (B.)*, which likewise concerned a derived confession, in that case made to a psychiatrist. Speaking for six members of the Court, Bastarache J. noted that defence counsel had “accepted” the psychiatrist’s report containing the incriminating statement in issue and did not object to the Crown’s use of the report on its cross-examination of the accused (para. 48). Justice Bastarache then stated:

The law on the question is clear. Despite s. 672.21(2) and (3) [of the *Criminal Code*, which deal with “protected statements”], it had to be determined whether the protected statement was admissible in light of its degree of connection with the prior confession which was found to be inadmissible. This degree of connection can only be assessed during a voir dire, which was accordingly mandatory (see [*Erven v. The Queen*, 1978 CanLII 19 (SCC), [1979] 1 S.C.R. 926]). By this I do not mean that there must be a *voir dire* on the voluntariness of the protected statement in every case; once again, this is a question that will have to be determined in another case. I am merely confirming that there must be a *voir dire* where, as here, the issue of whether the admission was derived from a prior inadmissible confession arises.

Whether the possibility of waiving the *voir dire* or consenting to the use of the protected statement is based on s. 672.21(2) or whether it has a more general foundation (see in this regard *R. v. Dietrich* (1970), 1970 CanLII 377 (ON CA), 1 C.C.C. (2d) 49 (Ont. C.A.)), it is well established that “[s]ilence or mere lack of objection does not constitute a lawful waiver” (see *Park v. The Queen*, 1981 CanLII 56 (SCC), [1981] 2 S.C.R. 64, at p. 74). In the circumstances, the Crown cannot argue that the situation was otherwise. [Emphasis added; paras. 50-51.]

[76] In *G. (B.)*, moreover, the Crown had alleged waiver by the accused of his right to a *voir dire*; in this case, the Crown, understandably, did not allege waiver either in the Court of

Appeal or in this Court.

[77] I turn now to the second ground relied on by Justice Charron in concluding as she does. In my colleague's view, there was no obvious connection between S.G.T.'s e-mail to his former spouse and his earlier inadmissible statement to police.

[78] On the contrary, and with respect, I believe there was ample evidence on the record to alert the trial judge to the need for a *voir dire*. The judge had already excluded the initial confession written by S.G.T. during the police interrogation, and was thus familiar with the inducements that had provoked it.

[79] The e-mail was strikingly similar to the excluded statement. In both instances, S.G.T. apologizes and expresses regret "if I caused [A] emotional pain", and hopes his apology and expression of regret "will make [A] get and feel better" (I quote here from his e-mail).

[80] The *timing* of the e-mail should have raised red flags as well. The e-mail was written and sent by S.G.T. shortly before his first appearance in court. In the officer's fabricated story about his own arrest, he "explained to the appellant that the Crown would look at all the facts and ask whether it was in the public interest to proceed with the charges" (Court of Appeal, at para. 16 (emphasis added)). Here, the apology was made after the charges were laid but before the first court appearance, when it remained a live issue whether the Crown would proceed with "some kind of counselling instead" (*ibid.*) And it must be remembered in this regard that the police officer had "[given] his word he would stick with the appellant throughout the matter" (*ibid.*).

[81] Moreover, the improper inducements present when the inadmissible statement was given to the police — notably, the promise of leniency in exchange for a showing of remorse — were still operative. It was long ago recognized that promises of this type have a more enduring effect than threats: F. Kaufman, *The Admissibility of Confessions* (3rd ed. 1979), at p. 146. Nothing had intervened to neutralize its effect on the respondent. And no new evidence had subsequently been discovered, nor had S.G.T. retained counsel in the interval between the statements.

[82] In these circumstances, cumulatively considered, the connection between the two statements was apparent from the record and should have alerted the trial judge to the need for a *voir dire* to determine whether “the degree of connection between the two statements [was] sufficient for the second to have been contaminated by the first” (*G. (B.)*, at para. 23).

[83] The Crown submits in response that clear evidence of a connection does not suffice to trigger the trial judge’s obligation to hold a *voir dire*, and this for two reasons. The first centres on the “person in authority” requirement for exclusion under the confessions rule. The Crown contends that this requirement applies to derived confessions as well.

[84] *G. (B.)* hardly supports this view. In that case, the derived confession was made to a psychiatrist and the Court, in holding that a *voir dire* was required, found it unnecessary to determine whether the psychiatrist was a person in authority:

The second statement is inadmissible because the first confession contaminated it. Therefore, it is not necessary to decide whether the second statement is a confession made to a person in authority in the present case. [Emphasis added; para. 22.]

If a statement can be excluded as a derived confession without determining whether it was made to a person in authority, it surely cannot be said that a derived confession will only be excluded if it is made to a person in authority. On the contrary, the Court in *G. (B.)* found the second statement inadmissible *whether or not the psychiatrist to whom it was made was a person in authority*. The statement was excluded on the sole ground that it was “contaminated” by the earlier confession. In this sense, “contamination” will be established “where there is a sufficient connection between the two statements” (*G. (B.)*, at para. 22). See, to the same effect, *I. (L.R.)*, at pp. 521-22. Nothing in *G. (B.)* limits this principle to derived confessions that explicitly repeat an earlier confession found to be inadmissible.

[85] As a matter of principle and logic, it seems clear to me that derived confessions need not be made to a person in authority in order to be found inadmissible. The purpose of the rule — to exclude statements with a sufficient connection to a prior inadmissible statement — would be frustrated if such a requirement were strictly enforced. Whether or not the subsequent statement was made to an authority figure, if it is prompted by the same police conduct that resulted in the earlier confession, or if it discloses the contents of the earlier statement made to authorities, it is a product of the inadmissible confession and *is itself inadmissible on that ground alone*. Of course, whether the statement is made to police will be a relevant factor in determining whether the required connection between the two statements has been made out.

[86] Second, the Crown relies on the fact that the defence offered a different explanation for the e-mail at trial. At trial, it was contended that the apology referred to an unrelated incident in which S.G.T. had allowed A and her friends to drink wine coolers at a sleepover. In this Court, the Crown relied on the wine cooler explanation to argue that there was no need for a *voir dire* on the admissibility of the e-mail.

[87] I find the Crown's submission regarding these varying explanations unconvincing on its face, and would in any event reject it as a backward-looking justification for the trial judge's failure to determine the admissibility of the apology at the relevant time — when it was tendered as part of the prosecution's case against the respondent.

[88] The Crown cannot now rely on what the trial judge could not then have known — evidence later adduced by the defence — to retroactively validate the judge's failure to hold a *voir dire* when the record before him required him to do so.

V

[89] For all of these reasons, as stated at the outset, I would dismiss the appeal and affirm the judgment of the Saskatchewan Court of Appeal quashing the respondent's conviction and ordering a new trial.

Appeal allowed, BINNIE and FISH JJ. dissenting.

Solicitor for the appellant: Ministry of Justice and Attorney General, Regina.

Solicitors for the respondent: McDougall Gauley, Regina.

TAB 32

TAB 33

R. v. Storrey, 1990 CanLII 125 (SCC), [1990] 1 SCR 241

Source:	Supreme Court of Canada
Date:	1990-02-15
File number:	19725
Other citations:	105 NR 81 — 37 OAC 161 — AZ-90111018 — 53 CCC (3d) 316 — 75 CR (3d) 1 — 47 CRR 210 — 9 WCB (2d) 570 — [1990] CarswellOnt 78 — EYB 1990-67522 — JE 90-372 — [1990] SCJ No 12 (QL) — [1990] ACS no 12
Citation:	R. v. Storrey, 1990 CanLII 125 (SCC), [1990] 1 SCR 241, < https://canlii.ca/t/1fsxl >, retrieved on 2026-03-23

R. v. Storrey, [1990] 1 S.C.R. 241

Ronald Percy Storrey *Appellant*

v.

Her Majesty The Queen *Respondent*

indexed as: r. v. storrey

File No.: 19725.

1989: November 3; 1990: February 15.

Present: Lamer, Wilson, La Forest, Sopinka, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for ontario

Constitutional law -- [Charter of Rights](#) -- Arbitrary detention or imprisonment -- Accused arrested for aggravated assault and detained 18 hours before charge laid -- Accused kept in custody for the purposes of conducting an identification parade -- Whether accused's arrest lawful -- Whether accused arbitrarily detained -- [Canadian Charter of Rights and Freedoms, s. 9](#) -- Criminal Code, R.S.C. 1970, c. C-34, ss. 450(1), 454(1).

Three Americans returning to Michigan were cut off by another vehicle as they approached the border near Windsor and were forced to stop. The driver and passenger of this vehicle got out and came over to the Americans' car. The driver punched one of the Americans while his passenger slashed all three of them with a knife. The victims gave to the police a general description of the assailants and of their vehicle -- a blue Ford, possibly a Thunderbird manufactured during the years 1973 to 1975. Two of the victims were later brought to the police station and, after reviewing some 800 photographs, selected 4 or 5 pictures of men who "looked like" the assailant with the knife. Significantly they both chose the photograph of one Darryl Cameron. Following an investigation, the police eliminated Cameron as a suspect. But the investigating officer's searches revealed that the appellant had been stopped on numerous occasions driving a 1973 blue Thunderbird, that he closely resembled Cameron and that he had a criminal record which included crimes of violence. A police bulletin was issued for his arrest on the charge of aggravated assault. The appellant was found six days later and arrested at 7:25 p.m. He was charged the next day at 1:44 p.m. The officer stated that the 18-hour delay in laying the formal charge was occasioned by the need to bring the victims to Windsor in order to conduct the identification parade which was the only method of identification available. At the line-up, the victims identified the appellant as their assailant. The police also found the ownership for a 1973 blue Thunderbird in the appellant's residence.

At trial, the judge found that the investigating officer had reasonable and probable grounds for the arrest but that the arrest was unlawful because it did not meet the criteria of [s. 450\(2\)](#) of the [Criminal Code](#). He concluded that the arrest was arbitrary and in violation of [s. 9](#) of the [Canadian Charter of](#)

Rights and Freedoms and ordered a stay of proceedings. The Court of Appeal allowed the Crown's appeal and ordered a new trial. This appeal is to determine whether the appellant's arrest and detention violated s. 9 of the *Charter*.

Held: The appeal should be dismissed.

The appellant's arrest was lawful and proper. Section 450(1) of the *Code* is applicable to this case and not s. 450(2). Section 450(1) requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest. In this case, the trial judge's finding that the investigating officer had reasonable and probable grounds to make the arrest was amply supported by the evidence. The reasonable grounds could be justified subjectively as well as objectively.

An arrest which is lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest. Here, the police had reasonable and probable grounds to arrest the appellant and there was nothing improper about their intention to continue the investigation. Neither that intention nor the continued investigation made the arrest unlawful.

The appellant's detention for 18 hours before the charge was laid, primarily for the purpose of furthering the police investigation, did not constitute an arbitrary detention. The identification parade was the fairest means as well as the sole practical means of identification. Since the appellant was arrested in the evening, it is unlikely that the victims, who lived outside the jurisdiction, could be found and brought to the line-up before the next morning. The appellant was brought before a justice of the peace and charged immediately after the line-up. In these circumstances, the delay was not unreasonable and offended neither s. 454(1) of the *Code* nor s. 9 of the *Charter*.

Cases Cited

Distinguished: *R. v. Duguay, Murphy and Sevigny* (1985), 1985 CanLII 112 (ON CA), 18 C.C.C. (3d) 289, aff'd on other grounds, 1989 CanLII 110 (SCC), [1989] 1 S.C.R. 93; **referred to:** *Dumbell v. Roberts*, [1944] 1 All E.R. 326; *R. v. Brown* (1987), 1987 CanLII 136 (NS CA), 33 C.C.C. (3d) 54; *Liversidge v. Anderson*, [1942] A.C. 206; *R. v. Dedman* (1981), 1981 CanLII 1631 (ON CA), 32 O.R. (2d) 641; *Dallison v. Caffery*, 1906 CanLII 168 (MB KB), [1964] 3 W.L.R. 385; *Holgate-Mohammed v. Duke*, [1984] 1 S.C.R. 437; *R. v. Koszulap* (1974), 1974 CanLII 1461 (ON CA), 27 C.R.N.S. 226; *R. v. Precourt* (1976), 1976 CanLII 692 (ON CA), 39 C.C.C. (2d) 311; *Ralph v. Pepersack*, 335 F.2d 128 (1964).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 9, 24(1).

Criminal Code, R.S.C. 1970, c. C-34, ss. 450(1) [rep. & sub. c. 2 (2nd Supp.), s. 5], (2) [*idem*], 454(1) [*idem*; am. 1974-75-76, c. 93, s. 46(1)], 483 [am. 1972, c. 13, s. 40; am. 1974-75-76, c. 93, s. 62].

APPEAL from a judgment of the Ontario Court of Appeal rendered January 17, 1986 allowing the Crown's appeal from a judgment of Cusinato Co. Ct. J. and ordering a new trial. Appeal dismissed.

Andrew Z. Kerekes, for the appellant.

Dana L. Venner, for the respondent.

//Cory J.//

The judgment of the Court was delivered by

Cory J. -- At issue on this appeal is whether the arrest and detention of the appellant Storrey constituted a breach of the provisions of s. 9 of the *Canadian Charter of Rights and Freedoms*.

I. Factual Background

On July 26, 1983 three Americans were driving back to their homes in the State of Michigan. As they approached the International Bridge in Windsor, Ontario, another vehicle suddenly cut them off and forced them to stop. The driver and passenger of this vehicle got out and came over to the Americans' car. The driver punched one of the Americans while his passenger slashed all three of them with a knife. The injuries of one were serious enough to require hospitalization. The assailants then departed before they could be apprehended.

The two less seriously injured victims were taken to the police station shortly after the incident and reviewed some 800 photographs. From these they chose 4 or 5 "look-alikes". Significantly they both chose the photograph of one Darryl Cameron as "looking like" the assailant with the knife. All three of the victims gave a general description of the attackers that was similar. This enabled the police artist to make a composite drawing of the assailants. The victims also described the car used by their attackers as being a Ford, possibly a Thunderbird, blue in colour and manufactured during the years 1973 to 1975.

The ensuing investigation was rightly described by the trial judge as good police work. The officer in charge of the investigation, Detective- Sergeant Larkin, drove the victims about the City of Windsor after the incident. At that time the victims identified the car used by their attackers as a Thunderbird. Larkin then issued a police bulletin which contained a general description of the assailants and the car they used.

Larkin investigated the activities of Cameron whose picture had been identified by two of the victims. He learned that Cameron had not even been in the jurisdiction at the time of the assault. The officer then turned to the "persons investigated" file kept by the Windsor police. He undertook this review in order to locate and trace vehicles similar to that described by the victims, as he knew that a 1973 to 1975 blue Thunderbird was, if not a rare vehicle, certainly not a common one in the City of Windsor. As a result of his searches Larkin discovered that the appellant Storrey had been stopped on

a number of occasions driving a 1973 blue Thunderbird. He then obtained a photo of Storrey from the files and compared it to the photo of Cameron. Larkin testified that the photos indicated that the two men were so similar that in his words they could have been brothers or twins. In addition, he found that the appellant had a criminal record which included crimes of violence.

As a result of these investigations, Larkin concluded that he had reasonable and probable grounds for the arrest of the appellant. He issued a bulletin for the arrest of Storrey on August 4. It was not easy to find the appellant. It was not until August 10 at 7:25 p.m. that he was arrested. However, the appellant was not formally charged and brought before a Justice of the Peace until shortly after 1:44 p.m. the next day, a little over eighteen hours from the time of his arrest. While the appellant was in custody, the police obtained a search warrant for his residence and found there the ownership for a 1973 blue Thunderbird car. When Storrey was asked where the car was he replied that he had "sorta" sold the car since he "didn't want it near him".

Larkin frankly stated that the delay in laying the formal charge resulted from his desire to have the victims attend at the police station to witness a line-up to see if they could identify the appellant. He explained that it was difficult to locate the victims because they were in another jurisdiction at some distance from the police station. Furthermore, in his view a police line-up was the only method of identification that was available to see if the victims could identify Storrey. Clearly, it was difficult to find Storrey as exemplified by the week that passed from the issuing of the bulletin to the time of his arrest. A less intrusive method of identification, such as attendance by the witnesses at the appellant's place of work, was thus unavailable.

At the line-up the victims identified the appellant as their assailant. Larkin readily conceded that if Storrey had not been identified at that time he would have been released. Indeed, Keith Girard, who was known to be an associate of the appellant, had also been arrested and had participated in the line-up. He was not identified and was released. It should be noted as well that there has been no suggestion that the police acted in bad faith at any time during the course of their investigation and arrest of the appellant.

II. The Decision on the *Voir Dire*

At trial it was contended that the arrest and detention of the appellant contravened the right guaranteed to him by s. 9 of the *Charter*. That section provides that: "Everyone has the right not to be arbitrarily detained or imprisoned". The trial judge then conducted a *voir dire* to determine whether there had been a breach of s. 9 of the *Charter*. Unfortunately, the reasons he gave at the conclusion of the proceeding indicate some confusion on his part. The appellant was arrested without a warrant on a charge of aggravated assault. Therefore, the basis for his arrest is to be found within s. 450(1) (now s. 495(1)) of the *Criminal Code*, R.S.C. 1970, c. C-34. That section provides that a peace officer may arrest without a warrant a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence. Nevertheless, the trial judge stated that the arrest was unlawful because it did not comply with the requirements of s. 450(2) of the *Criminal Code*. That section was inapplicable in this case. It only applies to an offence which is either a summary conviction offence, a hybrid offence or an indictable offence listed in s. 483 (now s. 553) of the *Code*, which list does not include aggravated assault. Sections 450(1) and 450(2) read as follows:

450. (1) A peace officer may arrest without warrant

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

(2) A peace officer shall not arrest a person without warrant for

- (a) an indictable offence mentioned in section 483,
 - (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
 - (c) an offence punishable on summary conviction,
- in any case where
- (d) he has reasonable and probable grounds to believe that the public interest, having regard to all the circumstances including the need to
 - (i) establish the identity of the person,
 - (ii) secure or preserve evidence of or relating to the offence, or

- (iii) prevent the continuation or repetition of the offence or the commission of another offence, may be satisfied without so arresting the person, and
- (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend in court in order to be dealt with according to law.

It can be seen that the requirements for an arrest without warrant are stricter in the circumstances provided for by s. 450(2).

The error made by the trial judge regarding s. 450 was serious enough in itself to question the validity of the ruling. However, there are still further indications of confusion. Early in his reasons, the trial judge stated that while Larkin undoubtedly had reasonable and probable grounds "in his own mind" for an arrest, the purpose of the arrest was strictly "as a further investigative tool to confirm or deny the suspicions of Detective-Sergeant Larkin". But later on, the trial judge appeared to make a clear finding of fact that Larkin objectively had a sufficient basis for making the arrest when he stated that "Detective-Sergeant Larkin had reasonable and probable grounds, based on the evidence he accumulated" to make the arrest, and that the only reason the arrest was unlawful was that it did not meet the criteria of s. 450(2). It was for this reason (the failure to meet the requirements of s. 450(2)) that the trial judge determined that the arrest was arbitrary and therefore in violation of [s. 9](#) of the *Charter*. He went on to find that the appropriate remedy under [s. 24\(1\)](#) of the *Charter* was a stay of proceedings.

Court of Appeal

The Court of Appeal of Ontario, in unanimous reasons, concluded that the trial judge was in error. It held that there were reasonable and probable grounds for the arrest, that the detention was neither undue nor arbitrary and directed a new trial.

III. Were There Reasonable and Probable Grounds for Arresting the Appellant?

In order to determine whether the appellant was arbitrarily detained or imprisoned in this case, it is necessary to first review the authority under which Detective-Sergeant Larkin was acting when the arrest was made. The relevant provisions of the *Code* are ss. 450(1) and 454(1) (now ss. 495(1) and 503(1)). These sections read as follows:

450. (1) A peace officer may arrest without warrant

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

454. (1) A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 449(3) shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law, namely:

- (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and
- (b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,

unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,

- (c) the peace officer or officer in charge releases the person under any other provision of this Part, or
- (d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (3) or otherwise conditionally or unconditionally, and so releases him.

Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more

important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), [1987 CanLII 136 \(NS CA\)](#), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

In summary then, the [Criminal Code](#) requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the

arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

In the case at bar, the trial judge specifically stated that "Larkin had reasonable and probable grounds" to make the arrest. In my view there was ample evidence on which the trial judge could very properly make that finding. The reasonable grounds could be based subjectively on the testimony of Larkin and objectively upon the cumulative effect of the following items; (a) the possession and ownership by Storrey of a 1973 blue Thunderbird, which was a relatively unusual and uncommon car and was the type of car used in the infraction; (b) the fact that he had been stopped by the police on several occasions driving that car; (c) his past record of violence; (d) the fact that two of the victims picked out a picture of Cameron as someone who looked like their assailant; and (e) the remarkable resemblance of Storrey to Cameron. These factors taken together clearly were sufficient in their cumulative effect to constitute reasonable and probable grounds for Larkin to arrest the appellant. The Court of Appeal was correct in coming to the conclusion that this was indeed the finding of the trial judge on this issue and that he was correct in making that finding.

It should be noted, as well, that there is nothing to indicate that there was anything in the circumstances of the arrest which would make it suspect on any other ground. That is to say, there is no indication that the arrest was made because a police officer was biased towards a person of a different race, nationality or colour, or that there was a personal enmity between a police officer directed towards the person arrested. These factors, if established, might have the effect of rendering invalid an otherwise lawful arrest. However, the arrest of the appellant was in every respect lawful and proper.

It must next be seen whether the appellant could be detained after his arrest so that the police could continue their investigation.

Did the Professed Intention of the Police to Continue the Investigation After the Arrest Invalidate It?

It is the appellant's position that because the arrest was made in order to put the appellant in a line-up, it was improper. Reliance was placed on the majority decision of the Ontario Court of Appeal in *R. v. Duguay, Murphy and Sevigny* (1985), [1985 CanLII 112 \(ON CA\)](#), 18 C.C.C. (3d) 289, affirmed on other grounds, [1989 CanLII 110 \(SCC\)](#), [1989] 1 S.C.R. 93. In that case, MacKinnon A.C.J.O. at p. 297, quoted Martin J.A. in *R. v. Dedman* (1981), [1981 CanLII 1631 \(ON CA\)](#), 32 O.R. (2d) 641, at p. 653, wherein he stated:

. . . a police officer has no right to detain a person for questioning or for further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to police officers as to anyone else. Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless, of course, the officer arrests him on a specific charge or arrests him pursuant to s. 450 of the *Code*

MacKinnon A.C.J.O. used this quote to support his position that an arrest which is made solely to assist in the investigation is an arrest made for an "improper purpose".

In my view, the judgment of MacKinnon A.C.J.O. must be considered in the context of the case itself. The facts in the *Duguay* decision were far different from those in the case at bar. In the *Duguay* case, on the night before the theft of his property the victim saw three young men drinking beer at the house next door. They exhibited an interest in his activities and in particular inquired, as he was putting his dog in the garage, whether the victim always put his dog in the garage. That night when the victim came home he discovered the theft of his belongings. The next morning he told his neighbour of the theft and about the incident of the night before. The neighbour advised him that he knew who the three young men were. The neighbour called the young men and asked them to his house. When they arrived the police arrested the young men and some time later obtained a confession from them that they had committed the theft.

It is important to note that the neighbour did not state and did not know that the three men committed the robbery. The only information the neighbour possessed was that of the identity of the three men the victim had seen drinking beer the night before. There was absolutely no evidence connecting the three accused with the crime. It came as no surprise that the trial judge found that there was no basis for the police statement that they had reasonable and probable grounds to believe

the accused had committed the crime. Indeed, one of the officers testified that: "We arrested them to determine whether they actually did it or not". Thus the arrest in the *Duguay* case could not and did not comply with the requirements of s. 450(1) of the *Code* and the arrest was unlawful. Against this background of an unlawful arrest, the Court of Appeal then considered whether the detention of the accused violated s. 9 of the *Charter*. It was in this context that MacKinnon A.C.J.O. stated that an arrest which had been made solely to assist in an investigation was an arrest made for an "improper purpose".

The statement goes no further than confirming that an otherwise unlawful arrest cannot be justified on the grounds that it was necessary in order to further the investigation of the crime. It should not be taken as establishing a principle that whenever a lawful arrest is made, in circumstances where the police intend to do further investigation, that the arrest should then be considered to have been made for an improper purpose.

On the contrary, it has long been the rule in Canada and the United Kingdom that the police can continue their investigation subsequent to an arrest. The essential role of the police is to investigate crimes. That role and function can and should continue after they have made a lawful arrest. The continued investigation will benefit society as a whole and not infrequently the arrested person. It is in the interest of the innocent arrested person that the investigation continue so that he or she may be cleared of the charges as quickly as possible.

This well established principle was reiterated by Lord Denning, M.R., in *Dallison v. Caffery*, 1906 CanLII 168 (MB KB), [1964] 3 W.L.R. 385 (C.A.), at p. 398:

When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says he was working, for there he may find persons to confirm or refute his alibi. The constable can put him up on an identification parade to see if he is picked out by the witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice. By which I mean, of course, justice not only to the man himself but also to the community at large. The measures must, however, be reasonable.

The same principle was confirmed by the House of Lords in *Holgate-Mohammed v. Duke*, [1984] A.C. 437, at p. 445.

An arrest which is lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest. To repeat, in the case at bar the police had reasonable and probable grounds on which to base their decision to arrest the appellant. Further, there was nothing improper about the police intention to continue their investigation of the crime after they had made the arrest. Neither that intention nor the continued investigation made the arrest unlawful. The circumstances of the arrest of the appellant did not constitute an infringement of s. 9 of the *Charter*.

IV. Did the Detention for 18 Hours Before the Charge Was Laid Constitute an Arbitrary Detention?

It was the appellant's position that his detention for 18 hours before a formal charge was laid was an unreasonable delay caused solely by the desire of the police to further their investigation. It was said that the detention contravened the provisions of s. 454(1) of the *Code* and s. 9 of the *Charter*. As noted above, Detective-Sergeant Larkin candidly stated that the delay in laying the formal charge was occasioned by the need to bring the victims to Windsor in order to conduct the identification parade. He conceded that although he had adequate grounds to arrest the appellant, he did not have sufficient evidence to warrant a conviction without a further identification. He readily agreed that if the appellant had not been identified, he would have been released in the same manner as Girard. The issue then is whether in the circumstances of this case the detention of the appellant for the significant period of a little over 18 hours, primarily for the purpose of furthering the police investigation, constituted a violation of s. 9 of the *Charter*.

For convenience, s. 454(1) is here set out again:

- 454. (1)** A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 449(3) shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law, namely:
- (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and

(b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,

unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,

(c) the peace officer or officer in charge releases the person under any other provision of this Part, or

(d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (3) or otherwise conditionally or unconditionally, and so releases him.

In *R. v. Koszulap* (1974), [1974 CanLII 1461 \(ON CA\)](#), 27 C.R.N.S. 226, at p. 234, Martin J.A. of the Ontario Court of Appeal carefully noted that s. 454(1) does not give a police officer "an unqualified right to keep such person in custody for the purposes of investigation for a period of 24 hours before taking such person before a justice". Instead, he observed, the section states that the police must take the person before a justice without unreasonable delay and that the 24 hours is simply the outer limit of the time span.

However, in the circumstances of this case the elapsed time was not unreasonable. It will be remembered that over six days had elapsed from the time of issuing the bulletin for the appellant's arrest until the moment that the arrest was made. This is clearly not a case where the victim could, for example, be taken to the place of employment of the suspect to see if an identification could be made. An identification parade seemed not only the fairest means of identification, but also the sole practical means of identification. Further, the victims themselves lived outside the jurisdiction. It was necessary to make arrangements to bring them across the border to attend the line-up. It will be recalled that the appellant was arrested at 7:25 at night. It would be unlikely that the victims could be found and brought to the line-up before the next morning. The appellant was brought before the justice immediately following the line-up which was held shortly after 1:44 p.m. This was a little more than 18 hours after the arrest.

In *R. v. Precourt* (1976), [1976 CanLII 692 \(ON CA\)](#), 39 C.C.C. (2d) 311 (Ont. C.A.), Martin J.A. considered a somewhat similar factual situation. In that case the accused was arrested for robbery at 4:30 p.m. He gave an exculpatory statement to the police at 11:30 p.m. and was kept in detention

overnight so that he could be placed in a line-up the next morning. On these facts, Martin J.A. at p. 319 stated:

It could not be suggested that there was anything improper in the investigation conducted by the police on the evening of August 21, 1973, with the apparent assistance of the appellant, or that the investigating officers were not justified in holding the appellant at the police station overnight with a view to placing him and [his co-accused] in a line-up the following morning.

It that case, it was held that the only improper conduct on the part of the police consisted in taking the accused back to the police station after he had been remanded in custody by a provincial judge when he should have been taken to a provincial jail. The fact that the accused was kept in custody for the purposes of conducting an identification parade, before taking him before a magistrate, was not deemed to be an unreasonable delay.

Position in Other Jurisdictions

It has been seen that the English authorities permit the police to continue their investigations following the arrest while the accused is detained and before the arrested person is formally charged.

The Australian authorities are of little or no assistance in the consideration of this issue as the wording of the applicable Australian legislation is very different from ours.

The American cases dealing with this issue are also of limited value as most of them deal with Rule 5(a) of the *Federal Rules of Criminal Procedure*. Rule 5(a) reads:

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER

(a) Appearance before the Commissioner.

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

The American authorities stress the importance of the factual background to the resolution of each case. Nevertheless, of interest is the case of *Ralph v. Pepersack*, 335 F.2d 128 (4th Cir. 1964). The court there stressed again the importance of the facts. It then continued at p. 139:

In the circumstances it was reasonable and necessary to hold Ralph in custody until Mrs. Peck could, with reasonable dispatch, come to the station and attempt to identify him Had she been able to positively identify him as her assailant, he should have been formally charged immediately. If, on the other hand, she could say with certainty that he *was not* the person who attacked her and had not other circumstances justifying his detention developed, he should then have been released. Confrontation by the only witness to the crime for which he was convicted presented the most expeditious, probably the most reliable and perhaps the only, means of determining whether Ralph was telling the truth. [Emphasis in original.]

The court concluded that there was not unreasonable delay in that case and that even if Rule 5(a) was applicable, it had not been violated.

This conclusion was reached even though the reasons noted further at p. 139 that:

The second, and more fundamental, answer . . . is that neither Rule 5(a) nor the McNabb-Mallory rule is applicable to criminal prosecutions in the state courts.

It can be seen that this American decision seems to support the position I have taken.

V. Disposition

In the particular circumstances of the case at bar, the delay was not unreasonable and in my view offended neither the provisions of [s. 454\(1\)](#) of the [Criminal Code](#) nor [s. 9](#) of the [Charter](#).

In the result, the appeal is dismissed and the order of the Court of Appeal directing a new trial is confirmed.

Appeal dismissed.

Solicitors for the appellant: Kerekes, Collins, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

TAB 34

Canada (Minister of Citizenship and Immigration) v. Tobias, 1997 CanLII 322 (SCC), [1997] 3 SCR 391

Source:	Supreme Court of Canada
Date:	1997-09-25
File number:	25811
Other citations:	131 FTR 230 — 151 DLR (4th) 119 — 218 NR 81 — 74 ACWS (3d) 52 — 10 CR (5th) 163 — 118 CCC (3d) 443 — 14 CPC (4th) 1 — 1 Admin LR (3d) 1 — 40 Imm LR (2d) 23 — EYB 1997-02452 — JE 97-1836 — [1997] SCJ No 82 (QL) — [1997] ACS no 82
Citation:	Canada (Minister of Citizenship and Immigration) v. Tobias, 1997 CanLII 322 (SCC), [1997] 3 SCR 391, < https://canlii.ca/t/1fr01 >, retrieved on 2026-03-23
Most recent unfavourable mention	Sliwin v College of Physicians and Surgeons , 2017 ONSC 1947 (CanLII) [...] [88] In my view, however, Tobias , supra, is distinguishable . [...]

Canada (Minister of Citizenship and Immigration) v. Tobias, [1997] 3 S.C.R. 391

Erichs Tobias *Appellant*

v.

The Minister of Citizenship and Immigration

Respondent

and between

Johann Dueck

Appellant

v.

The Minister of Citizenship and Immigration

Respondent

and between

Helmut Oberlander

Appellant

v.

The Minister of Citizenship and Immigration

Respondent

and

The Canadian Jewish Congress

Intervener

Indexed as: Canada (Minister of Citizenship and Immigration) v. Tobiass

File No.: 25811.

1997: June 26; 1997: September 25.

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

on appeal from the federal court of appeal

Courts -- Jurisdiction -- Appeals -- Federal Court of Appeal -- Federal Court Trial Division staying citizenship revocation proceedings -- Whether stay of proceedings a decision made under s. 18(1) of Citizenship Act -- Whether decision to stay proceedings can be appealed to Federal Court of Appeal -- Citizenship Act, R.S.C., 1985, c. C-29, s. 18(1), (3) -- Federal Court Act, R.S.C., 1985, c. F-7, s. 27(1).

Courts -- Judges -- Judicial independence -- Government official meeting with Chief Justice of Federal Court to express concern about slow progress of citizenship revocation proceedings -- Whether meeting between government official and chief justice interfered with judicial independence -- If so, whether stay of proceedings appropriate remedy.

Civil procedure -- Remedies -- Stay of proceedings -- Meeting between government official and chief justice causing damage to appearance of judicial independence -- Whether stay of proceedings appropriate remedy.

In January 1995 the appellants received notices informing them that the respondent Minister intended to seek revocation of their Canadian citizenship on the ground that they had obtained it by failing to divulge to Canadian officials details of their involvement in atrocities committed during the Second World War. At the appellants' request, the cases were referred to the Federal Court -- Trial Division. Numerous procedural disputes then arose. On December 12, 1995 counsel for one of the appellants argued for the whole day on the preliminary motions before the Associate Chief Justice. In January 1996 the court advised the parties that May 15 and 16 had been set aside for the completion of the argument. Counsel for the respondent wrote a letter to the court administrator, a copy of which he sent to counsel for the appellants, complaining in strong terms about the slow progress of the cases. Following a teleconference with the parties, the Associate Chief Justice confirmed that oral argument on the preliminary issues would take place

on May 15 and 16, 1996. On March 1, T, the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met with the Chief Justice of the Federal Court. The two men discussed the scheduling of the appellants' cases and later that day exchanged letters, neither of which was copied to any of the counsel for the appellants. In his letter to the Chief Justice, T referred to the fact that the Attorney General was being asked to consider taking a reference to the Supreme Court of Canada to determine some preliminary points of law primarily because the Trial Division was unable or unwilling to proceed with the cases expeditiously. In his reply, the Chief Justice stated that he had discussed T's concerns with the Associate Chief Justice, and that both were prepared to take all reasonable steps to avoid such a reference. He added that the Associate Chief Justice said he had not fully appreciated "the urgency of dealing with these matters as expeditiously as the Government would like" until he had read T's letter. However, now that he was aware of the Government's concerns he would devote one week from May 15 to deal with the cases not only with respect to the preliminary points but also with respect to the merits. The respondent provided copies of these letters to the appellants. Counsel for the appellants advised the court that they would move for a stay of proceedings on the ground that T and the Chief Justice had interfered with the independence of the Associate Chief Justice. The Associate Chief Justice then recused himself. He directed that the appellants' cases should go forward under a new judge. The appellants' application for a stay of proceedings was granted. The Federal Court of Appeal, having decided that it had jurisdiction to consider the appeal, set aside the stay.

Held: The appeal should be dismissed.

The Federal Court of Appeal had jurisdiction to hear the Crown's appeal in this case. The stay of proceedings ordered was not a decision made "under" [s. 18\(1\)](#) of the [Citizenship Act](#). Section 18(1) refers to a very particular kind of decision: a decision as to whether a person "has obtained, retained, renounced or resumed citizenship" by false pretences. Whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings. [Section 18\(3\)](#) of the [Citizenship](#)

Act, which provides that no appeal lies from a decision of the Trial Division made under s. 18(1), thus does not apply. A decision allowing or denying a motion for a stay of proceedings is a decision made under s. 50 of the *Federal Court Act* and may be appealed according to the rules set out in s. 27 of that Act.

The appearance of judicial independence suffered significantly as a result of the meeting between T and the Chief Justice. The test for determining whether the appearance of judicial independence has been maintained is whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges. As a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. The meeting between T and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases. Again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of T. While a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness, the actions of the Chief Justice here were in the nature of a response to a party rather than to a problem. Similarly, the Associate Chief Justice acted inappropriately by responding as he did to the Chief Justice's intervention without the participation of counsel for the appellants. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of those involved, nor is there any solid evidence that the independence of the judges in question was actually compromised.

An appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay of proceedings, which is a discretionary remedy. While a stay is usually sought to remedy some unfairness to the individual that has resulted from state misconduct, there is also a "residual category" of cases in which a stay may be warranted. This residual category comprises cases in which a prosecution is conducted in such an unfair or vexatious manner that it contravenes notions of justice and thus undermines the integrity of the judicial process. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. It must also be shown that no remedy other than a stay is reasonably capable of removing this misconduct. As well, it may be necessary in some cases to balance the interests that would be served by granting a stay of proceedings against the interest that society has in having a final decision on the merits. This balancing process would not be appropriate in the case of an ongoing affront to judicial independence or of a particularly egregious interference, either of which would outweigh any interest society might have in continuing the proceedings. Neither of these circumstances is present here.

A stay of proceedings is not the appropriate remedy in these cases. First, there is no likelihood that the carrying forward of the cases will manifest, perpetuate or aggravate any abuse. Second, the lesser remedy of ordering the cases to go forward under the supervision of a different judge of the Trial Division without any direction or intervention from the Chief Justice or the Associate Chief Justice will suffice. Third, Canada's interest in not giving shelter to those who concealed their wartime participation in acts of atrocities outweighs any foreseeable harm that might be done to the appellants or to the integrity of the system by proceeding with the cases. The appropriate remedy here is to have the cases against the appellants go forward under the supervision of a judge of the Trial Division who has had nothing to do with the affairs that form the subject matter of this appeal. The judge appointed will ignore all directions previously given by the Associate Chief Justice or the Chief Justice in these cases. The Chief Justice and Associate Chief Justice should not have anything further to do with these cases.

Cases Cited

Referred to: *Roberts v. Canada*, [1989 CanLII 122 \(SCC\)](#), [1989] 1 S.C.R. 322; *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986 CanLII 91 \(SCC\)](#), [1986] 1 S.C.R. 752; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1976 CanLII 10 \(SCC\)](#), [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen*, [1977 CanLII 13 \(SCC\)](#), [1977] 2 S.C.R. 654; *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149; *R. v. Seaboyer*, [1991 CanLII 76 \(SCC\)](#), [1991] 2 S.C.R. 577; *R. v. Jewitt*, [1985 CanLII 47 \(SCC\)](#), [1985] 2 S.C.R. 128; *R. v. Hinse*, [1995 CanLII 54 \(SCC\)](#), [1995] 4 S.C.R. 597; *Valente v. The Queen*, [1985 CanLII 25 \(SCC\)](#), [1985] 2 S.C.R. 673; *R. v. Lippé*, [1990 CanLII 18 \(SCC\)](#), [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986 CanLII 24 \(SCC\)](#), [1986] 2 S.C.R. 56; *Elsom v. Elsom*, [1989 CanLII 100 \(SCC\)](#), [1989] 1 S.C.R. 1367; *R. v. Carosella*, [1997 CanLII 402 \(SCC\)](#), [1997] 1 S.C.R. 80; *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411; *R. v. Conway*, [1989 CanLII 66 \(SCC\)](#), [1989] 1 S.C.R. 1659; *Ruffo v. Conseil de la magistrature*, [1995 CanLII 49 \(SCC\)](#), [1995] 4 S.C.R. 267; *R. v. Vermette*, [1988 CanLII 87 \(SCC\)](#), [1988] 1 S.C.R. 985; *R. v. Hubbert* (1975), [1975 CanLII 53 \(ON CA\)](#), 29 C.C.C. (2d) 279; *R. v. Latimer*, [1997 CanLII 405 \(SCC\)](#), [1997] 1 S.C.R. 217; *Benner v. Canada (Secretary of State)*, [1997 CanLII 376 \(SCC\)](#), [1997] 1 S.C.R. 358; *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 Q.B. 710.

Statutes and Regulations Cited

[Canadian Charter of Rights and Freedoms](#), ss. 7, 24(2).

[Citizenship Act](#), R.S.C., 1985, c. C-29, ss. 2 “Court”, 10, 18(1), (3).

[Federal Court Act](#), R.S.C., 1985, c. F-7, ss. 6(1), (3), 27(1) [am. 1990, c. 8, s. 7], 46, 50(1).

[Federal Court Rules](#), C.R.C., c. 663, rr. 5, 450-455, 461, 477, 900-920, 1714-1715.

[Supreme Court Act](#), R.S.C., 1985, c. S-26, s. 40.

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Canada. Parliament. House of Commons. *Beauchesne's Rules & Forms of the House of Commons of Canada, with Annotations, Comments and Precedents*, 6th ed. By Alistair

Fraser, W. F. Dawson and John A. Holtby. Toronto: Carswell, 1989.

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APPEAL from a judgment of the Federal Court of Appeal, [1997 CanLII 6328 \(FCA\)](#), [1997] 1 F.C. 828, 142 D.L.R. (4th) 270, 208 N.R. 21, [1997] F.C.J. No. 2 (QL), setting aside a stay of proceedings entered by the Federal Court -- Trial Division, [1996 CanLII 4077 \(FC\)](#), [1996] 2 F.C. 729, 116 F.T.R. 69, 41 Admin. L.R. (2d) 272, [1996] F.C.J. No. 865 (QL). Appeal dismissed.

Gesta J. Abols, for the appellant Tobiass.

Donald B. Bayne, for the appellant Dueck.

Michael Code, for the appellant Oberlander.

W. Ian C. Binnie, Q.C., for the respondent.

Ed Morgan, for the intervener.

The following is the judgment delivered by

//The Court//

1 THE COURT -- This appeal raises three principal questions. The first and threshold question is whether this Court has jurisdiction to hear an appeal from a decision of a judge of the Federal Court -- Trial Division to stay a citizenship revocation proceeding. The second question is whether certain events constituted an actual or apparent affront to judicial independence. The third

question is whether, if there was any affront to judicial independence, a stay was, under the circumstances, the appropriate remedy.

I. Facts

2 The facts of this appeal present some difficulties. Much of the relevant evidence was known to Cullen J., who considered the appellants' application at first instance. But other items of evidence emerged only recently, following an order of this Court dated May 5, 1997. The additional evidence was not considered at trial and so has not given rise to any findings of fact. It is accordingly for this Court to determine the weight that should be assigned to it.

A. *The Evidence That Was Available to the Trial Division*

3 The following was known to the Trial Division and to the Federal Court of Appeal. Both courts based their decisions entirely upon it.

4 On January 27, 1995, the Registrar of Canadian Citizenship sent Notices of Revocation to the appellants, Helmut Oberlander, Johann Dueck and Erichs Tobiass. The purpose of these notices was to inform the appellants that the Minister of Citizenship and Immigration ("the Minister") intended to seek revocation of their Canadian citizenship on the ground that they had obtained it by failing to divulge to Canadian officials details of their involvement in atrocities committed during the Second World War. Mr. Oberlander, it was said, had concealed his "membership in the German *Sicherheitspolizei und SD* and Einsatzkommando 10A during the Second World War and [his] participation in the executions of civilians during that period of time"; Mr. Dueck his "membership in the Selidovka district (*ralon*) police in German occupied Ukraine during the period 1941 to 1943, and [his] participation in the executions of civilians and

prisoners-of-war during that time”; and Mr. Tobias his “membership in the *lettische Sicherheitshilfspolizei* (commonly known as the *Arajs Kommando*) subordinate to the German *Sicherheitspolizei und SD* during the period 1941 to 1943 in German occupied Latvia and [his] participation in the executions of civilians during that time and [his] membership in the *Waffen SS* during the period 1943 to 1945”.

5 As they were entitled to do under s. 18(1)(a) of the *Citizenship Act*, R.S.C., 1985, c. C-29, the appellants asked the Minister to refer their cases to the Federal Court -- Trial Division. By May 1, 1995, the Minister had referred all three cases to the court.

6 There then followed many procedural disputes. In May of 1995, the respondent sought directions from the court about the procedure to be followed and the appellants sought disclosure of the respondent’s case. On June 30, 1995, the respondent’s motions for directions came on for hearing before Jerome A.C.J. During the initial hearing, counsel for the appellants raised many preliminary issues. The Associate Chief Justice ordered the three cases joined for purposes of resolving the preliminary issues and he set a timetable for the filing of arguments in relation to them.

7 Throughout the summer of 1995, the appellants sought disclosure of documents that they judged to be relevant to their preliminary motions. In addition, they pressed the respondent to produce the details of the case against them. On August 25, 1995, Mr. Christopher Amerasinghe, who was counsel for the respondent at the time, informed counsel for the appellant Dueck that many of the relevant documents were in the process of being translated and so were unavailable.

8 On October 4, 1995, Jerome A.C.J. telephoned the parties to schedule the argument of the preliminary motions. Mr. Amerasinghe indicated that he intended to claim that certain documents sought by the appellants were privileged. The parties agreed that the questions of disclosure and privilege had to be settled before the cases could proceed. The Associate Chief Justice chose December 12, 1995 as the date upon which he would hear argument concerning those questions. Mr. Amerasinghe agreed that December 12 was “a reasonable date as scheduling goes in courts in Toronto”.

9 In November, the respondent released some documents to the appellants but withheld others. On December 12, 1995, counsel for the appellant Dueck argued for the whole day. At the end of the day, the matter was set over for continuation.

10 On January 10, 1996, the Federal Court -- Trial Division advised the parties that May 15 and 16, 1996 had been set aside for the completion of the argument that had begun on December 12, 1995. Less than a week later, Mr. Amerasinghe wrote to the Court Administrator to protest the May dates. In the letter, a copy of which he sent to counsel for the appellants, Mr. Amerasinghe pointed out that many of the proposed witnesses were of “advanced age” and “frail in health”. He complained in strong terms about the slow progress of the cases.

11 On February 19, 1996, the parties and the Associate Chief Justice participated in a teleconference. Mr. Amerasinghe repeated the points he had made earlier in his letter to the Court Administrator and offered to make submissions in writing in order to expedite the resolution of the preliminary issues. The Associate Chief Justice decided that he wished to have oral submissions. He confirmed that the oral argument would take place on May 15 and 16, 1996.

The events that form the heart of this appeal took place on March 1, 1996. On that day, Mr. Ted Thompson, who was the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met with Isaac C.J. of the Federal Court. The two men discussed the scheduling of the appellants' cases and later that day exchanged letters, neither of which was copied to any of the counsel for the appellants. The letters read as follows:

March 1, 1996

HAND DELIVERED

The Honourable Chief Justice J. A. Isaac
Federal Court of Canada
Supreme Court of Canada Building
Ottawa, Ontario
K1A 0H9

Dear Chief Justice Isaac:

Re: Erichs Tobias, T-569-95, Helmut Oberlander, T-866-95 and Johann Dueck, T-938-95

Further to our meeting of this morning in which I advised you that the Attorney General of Canada is being asked to consider taking a Reference to the Supreme Court of Canada to determine some preliminary points of law primarily because the Federal Court Trial Division is unable or unwilling to proceed with the subject cases expeditiously.

Notices of Intention to revoke the citizenship of the above-named individuals were sent out in January of 1995. They were persons who had been investigated in connection with allegations of war crimes and crimes against humanity during the second world war. Over the course of the next three months the cases were referred to the Federal Court. After complying with the requirements of Rule 920, Motions were brought requesting directions from the Court regarding discovery of evidence and taking evidence on commission. The Motions were filed April 13th (Tobias), May 11th (Oberlander) and May 18th (Dueck), 1995 respectively. These Motions were necessary as there are no procedural rules governing these proceedings. We suggested the procedure followed in the *Luitjens* case be followed. Our Motion was originally set down for argument on June 30, 1995. Associate Chief Justice Jerome had become seized of the three cases and determined to hear all preliminary motions regarding them. On June 30th, counsel for Dueck argued that the three cases should be joined and also indicated that he wished to bring a Motion to stay the proceedings for abuse of process. Jerome, A.C.J. joined the three cases and granted adjournments over the objections of our counsel. September 15, 1995 was set as the date for the filing of facta and in a tele-conference call on October 4, 1995 he set December 12, 1995 as the date on which argument was to be heard.

On December 12th, counsel for Dueck was permitted to argue all day and it was necessary to set the matter over for continuation. Jerome, A.C.J. indicated that the continuing date would be in February of 1996 despite our request for an earlier date and having regard to the fact that counsel for Dueck was available in early January. The Court declined to fix a date for continuation while all parties were present. When our counsel called the Court in January of 1996 requesting a date for continuation, he was advised several days later that argument had been set down for May 15th and

16th. We wrote the Court expressing concern about the long day [*sic*] and the urgency of proceeding with this matter. We suggested concluding the argument by written submissions. Counsel for Mr. Dueck objected and Jerome, A.C.J. indicated that even with written submissions he would want oral argument and on February 18th via tele-conference with all parties he ordered that the dates of May 15 and 16 stand.

There are likely to be approximately 12 similar cases brought to the Federal Court with as many as 6 persons being given notice during the course of this year.

We are very concerned if these cases are not dealt with expeditiously they will never be heard on their merits. A crucial witness on the *Tobiass* case has cancer and may not be able to testify. In the *Dueck* case one key witness has died, one is in hospital and two others are so ill that they are unable to travel. Our counsel has estimated that at the current pace of proceeding and considering appeals in respect to interlocutory matters it will be years before these matters can be heard on their merits.

As you know, there is great public interest in seeing these cases disposed of on their merits and the potential for embarrassment is very high should it be seen that the Justice system is unable to respond to these urgent cases in a timely way.

I would appreciate any assistance you can offer.

Yours very truly,

J. E. Thompson
Assistant Deputy Attorney General
Civil Litigation
[Phone numbers]

By Hand

Mr. J. E. (Ted) Thompson, Q.C.

Assistant Deputy Attorney General
Civil Litigation Section
Department of Justice
Ottawa K1A 0H8

Dear Mr. Thompson:

Re: Erichs Tobiass T-569-95, Helmut Oberlander T-866-95 and
Johann Dueck T-938-95

I refer to our discussions this morning and to your subsequent letter concerning these matters.

I have discussed your concerns with the Associate Chief Justice and, like me, he is prepared to take all reasonable steps possible to avoid a Reference to the Supreme Court of Canada on these matters.

The Associate Chief Justice has informed me that there are now before the Court five citizenship revocation cases -- the three mentioned in your letter which are being dealt with by Mr. Amerasinghe and, two earlier ones: one is being dealt with by Ms. Charlotte Bell (*Khalil*) and the other by Mr. Amerasinghe (*Nemsila*). The Associate Chief Justice has heard all of the evidence and argument in *Nemsila* but he had been asked by counsel for *Nemsila* to defer judgment in that case until *Khalil* has been concluded. Argument has commenced in that latter case and has been adjourned to 29 April for continuation.

In light of the concerns expressed in your letter the Associate Chief Justice will meet with Ms. Bell and, Ms. Jackman who appears for the Respondent, early next week to fix an early date for final argument. If an early date cannot be fixed he will give judgment in *Nemsila* and then deal with *Khalil* at the earliest possible date.

As regards the three cases about which you wrote, the Associate Chief Justice says firstly, that he did not fully appreciate until he read your letter, the urgency of dealing with these matters as expeditiously as the Government would like. However, now that he is aware he will devote one week from 15 May to deal with these cases not only with respect to the preliminary points but also with respect to the merits. Finally, he has authorized me to say that additional cases of this class coming into the Court will be given the highest priority in light of the concerns expressed in your letter.

Yours truly,

Julius A. Isaac

c.c.-- The Hon. James A. Jerome
Associate Chief Justice

13 On March 7, 1996, the respondent provided copies of these letters to the appellants. In the cover letter, Mr. Amerasinghe explained that Mr. Thompson had approached the Chief Justice at the beginning of March to discuss the conduct of citizenship revocation cases generally and had, in the course of the meeting, happened to mention the appellants' cases.

14 On April 2, 1996, counsel for the appellants Dueck and Oberlander requested disclosure of all documents that related directly or indirectly to the meeting that took place on March 1, 1996. Mr. Amerasinghe answered the next day that "there is no other correspondence between Mr. Thompson and the Chief Justice relating to this matter". No disclosure was made of any documents besides the letters themselves.

15 On April 10, 1996, the Court Administrator informed counsel that the Associate Chief Justice would hear argument concerning preliminary motions on May 15 and 16, 1996, and if

necessary during the following week. The Associate Chief Justice also sent word that he intended to be done with the cases by July of 1996.

16 On April 23, 1996, counsel for the appellants advised the court that they would move for a stay of proceedings on the ground that Mr. Thompson and Isaac C.J. had interfered with the independence of Jerome A.C.J. On April 30, counsel for the appellants Dueck and Oberlander indicated that they would be content to have the Associate Chief Justice remain in charge of the cases. Counsel for the appellant Tobiass had nothing to say on the subject, though he had indicated earlier that he would not object to having the Associate Chief Justice remain to settle the preliminary motions.

17 On May 6, the Associate Chief Justice recused himself. He directed that the appellants' cases should go forward under a new judge on May 15, 1996 and indicated that the new judge's list would be cleared to permit him to deal expeditiously with any remaining questions that the cases might pose.

B. Further Evidence

18 On May 5, 1997, this Court ordered the respondent to produce "[t]he internal Department of Justice documents concerning the fact[s] referred to" in a report prepared for the Government by former Chief Justice of the Ontario Court of Appeal, the Honourable Charles Dubin. On May 22, the Court ordered the respondent to comply fully with the order of May 5. In response to the two orders, the respondent disclosed many internal documents.

19 The following emerges from these documents.

20 Counsel for the respondent objected strongly to the Associate Chief Justice's management of the appellants' cases. It appears that Mr. Amerasinghe had concluded as early as December 14, 1995 that the Associate Chief Justice was a "problematic" judge.

21 On February 27, 1996, the Department of Justice's Litigation Committee decided that "our only option in the circumstances [i.e. in response to delay in the Federal Court -- Trial Division] appears to be a reference to the Supreme Court of Canada of the preliminary questions that have been raised". Mr. Thompson seems not to have been present during the discussion. A reference in a subsequent memorandum reveals that "the Litigation Committee at its meeting on February 27, 1996, specifically recommended that no one should approach the Chief Justice to apprise him of the government's intention to refer certain questions to the Supreme Court".

22 On March 1, 1996, Mr. Amerasinghe made the following note of a telephone conversation between himself and Mr. Thompson:

J.E.T. [J. Edward (Ted) Thompson] Called and informed me he had met with Isaac who told him that he would get Jerome to recuse himself from the cases and would put an efficient judge to deal quickly with the cases. Isaac had said he would ensure any appeals would be dealt with speedily.

According to Mr. Amerasinghe, later that same day the Chief Justice dined at Mr. Thompson's home.

23 More than two months after the meeting between Mr. Thompson and the Chief Justice took place, Mr. Amerasinghe recorded his suspicion that Mr. Thompson's real intention in

approaching the Chief Justice had been to protect a friend from the embarrassment of a reference to the Supreme Court. Indeed, Mr. Amerasinghe indicated that Mr. Thompson and the Chief Justice were friends and frequent interlocutors. According to Mr. Amerasinghe's report, the Chief Justice invited Mr. Thompson to inform him of perceived problems with the administration of the Federal Court, and Mr. Thompson obliged.

II. Judgments in Appeal

A. *Trial Division*, [1996 CanLII 4077 \(FC\)](#), [1996] 2 F.C. 729

24 On the strength of the letters exchanged by Mr. Thompson and the Chief Justice on March 1, 1996, Cullen J. concluded that irreparable harm had been done to the appearance of judicial impartiality. He entered a stay of proceedings.

25 Cullen J. thought that a reasonable observer presented with the letters of March 1, 1996 might conclude that, as a result of the meeting between Mr. Thompson and the Chief Justice, pressure was brought to bear on the Associate Chief Justice to hurry the appellants' cases along, quite possibly to the appellants' detriment. In this way damage was done to the appearance of judicial independence.

26 Because it was the Chief Justice who intervened, and the Chief Justice enjoys some authority over the entire court, Cullen J. thought that a reasonable observer would worry that the independence of all the judges and not only of the Associate Chief Justice had been compromised.

27 Having concluded that the appearance of judicial independence had suffered, Cullen J. considered whether a stay of proceedings was the appropriate remedy. He concluded that no remedy other than a stay of proceedings would cure the wrong done to the appearance of judicial independence. A less radical remedy would only “weaken judicial independence and leave the impression that transgressions of the Court’s integrity may be reprimanded but, ultimately, will be forgotten” (p. 748).

B. *Federal Court of Appeal*

28 The respondent purported to appeal Cullen J.’s decision.

(i) Motion to Quash for Want of Jurisdiction

29 The appellants moved to quash the appeal for want of jurisdiction. They argued that s. 18(3) of the *Citizenship Act* placed Cullen J.’s decision to stay the proceedings beyond appeal. The court dismissed the motion over Pratte J.A.’s dissent: (1996), 208 N.R. 49.

(a) *Marceau J.A.*

30 Marceau J.A. held that Cullen J.’s decision was capable of appeal. He concluded that s. 18(3) bars appeal only of decisions that a person has or has not obtained citizenship by impermissible means. He agreed (at p. 53) that the bar extends also to “all interlocutory rulings and decisions made with a view to ultimately coming to” a decision on the merits. However, he thought that the decision to enter a stay of proceedings did not come within the bar, because such a decision is neither a decision on the merits nor a decision made with a view to coming to a decision on the merits.

(b) *Stone J.A.*

31 Stone J.A. read s. 18(3) of the *Citizenship Act* as barring appeal only of decisions made under s. 18(1). Section 18(3), he argued, does not bar appeal of decisions made under other provisions of the *Citizenship Act* or under other Acts of Parliament. Because Cullen J. entered the stay using a power given by s. 50(1) of the *Federal Court Act*, R.S.C., 1985, c. F-7, s. 18(3) of the *Citizenship Act* did not bar an appeal of it.

(c) *Pratte J.A. (dissenting)*

32 Pratte J.A. interpreted s. 18(3) as barring appeal not only of a final decision on the merits of a citizenship reference but also of “the myriad of decisions that the Trial Division may make in the course of the reference including . . . a decision granting or refusing a stay of the reference proceedings” (p. 52). He judged that any other reading of the provision would lead to absurdities.

(ii) Stay of Proceedings

33 Having decided that it had jurisdiction to consider the appeal, the court unanimously set aside the stay of proceedings: 1997 CanLII 6328 (FCA), [1997] 1 F.C. 828. Each judge offered his own reasons for doing so.

34 Marceau J.A. concluded that the Associate Chief Justice had retained his judicial independence throughout the period in question. He noted that it is part of the role of a chief justice to manage his or her court. A chief justice must ensure that the court provides “timely justice”. Therefore, when a chief justice learns, by whatever means, that the pace of a proceeding is abnormally slow, he or she has a positive duty to investigate, though care must be taken not to interfere with the adjudicative functions of the presiding judge. In the light of this understanding of the role of a chief justice, Marceau J.A. could find no evidence to support the conclusion that the Chief Justice had done anything improper in approaching the Associate Chief Justice to discuss the pace of the appellants’ case.

35 Marceau J.A. likewise concluded that the appearance of judicial independence had not suffered as a result of the Chief Justice’s intervention with the Associate Chief Justice.

36 Although in Marceau J.A.’s view there had been no affront to judicial independence, he nevertheless considered whether, if there had been an affront, a stay of proceedings would have been the appropriate remedy. He concluded that it would not have been.

37 The question, in Marceau J.A.’s mind, was whether going ahead with the proceedings would perpetuate the appearance of impropriety. The inquiry was forward-looking. What happened in the past could not justify a stay unless its ill effects were likely to persist. Marceau J.A. concluded that if the proceedings were to go ahead under some other judge, the appearance of an affront to judicial independence would be dispelled. It was quite unreasonable to suppose, as Cullen J. did, that the entire bench of the Trial Division had been tainted.

38 Because he concluded that Cullen J. had exercised his discretion to grant a stay on the basis of a mistaken understanding of the governing principles, Marceau J.A. held that the stay should be set aside.

(b) *Pratte J.A.*

39 Pratte J.A. wrote only to add two observations to Marceau J.A.'s reasons. The first was that no reasonable person would ever conclude from the Chief Justice's intervention in the appellants' cases that the independence of every member of the Trial Division had been compromised. The second was that Cullen J. was wrong to conclude that there was nothing unusually slow about the pace of the proceedings. The pace of the proceedings before the Associate Chief Justice "had been so slow as to certainly give rise to a suspicion that justice was not rendered with reasonable diligence" (p. 835). Thus, when the Chief Justice learned of the situation, regardless of how the information came to him, he was "duty bound to intervene".

(c) *Stone J.A.*

40 Although concurring with his colleagues, Stone J.A. took an approach slightly different from theirs. He agreed with them there was "nothing in the record to suggest that the motivation for the meeting with and the letter to the Chief Justice was other than to convey the concern of a party for perceived delay in the progress of the cases in view of the age and state of health of the respondents and of potential witnesses" (p. 867). However, he believed that the appearance of judicial independence had suffered as a result of the events of March 1, 1996.

41 Having found some apprehension of bias, Stone J.A. had to consider what the appropriate remedy might be. He was not persuaded that what he had before him amounted to one of the “clearest of cases”, in which a stay of proceedings was warranted. Although what transpired was improper, there was no evidence that either Mr. Thompson or the Chief Justice had acted in bad faith. Stone J.A. agreed with Marceau J.A. that the lesser remedy of a new proceeding before a new judge would sufficiently answer any affront that the appearance of judicial independence had suffered.

III. Issues

42 This appeal presents three issues. The first is whether an appeal lies from a decision of a judge of the Trial Division to grant a stay of proceedings in a citizenship revocation proceeding commenced under s. 18(1) of the *Citizenship Act*. The second is whether judicial independence, or the appearance of it, suffered as a result of the meeting between Mr. Thompson and Isaac C.J. The third is whether, if any damage was done to the appearance of judicial independence, the trial judge properly exercised his discretion to enter a stay of proceedings.

IV. Analysis

43 We conclude that an appeal lies from a decision of the Trial Division to grant a stay of proceedings in a case such as this one. We further conclude that the appearance, but not the fact, of judicial independence suffered as a result of the meeting between Mr. Thompson and the Chief Justice, but that a stay of proceedings is not the appropriate remedy.

A. Jurisdiction

44 The appellants contend that, in light of s. 18(3) of the *Citizenship Act*, Cullen J.'s order was final and could not be appealed either to the Federal Court of Appeal or to this Court. To properly assess the merits of this submission, the interplay between s. 18 of the *Citizenship Act* and ss. 27 and 50 of the *Federal Court Act* must be considered.

45 Section 18 of the *Citizenship Act* provides that:

18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and

(a) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

(b) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

...

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom. [Emphasis added.]

Section 2 of the same Act makes it clear that the “Court” referred to in s. 18 is the Federal Court -- Trial Division.

46 Sections 27 and 50 of the *Federal Court Act* provide that:

27. (1) An appeal lies to the Federal Court of Appeal from any

(a) final judgment,

- (b) judgment on a question of law determined before trial,
- (c) interlocutory judgment, or
- (d) determination on a reference made by a federal board, commission or other tribunal or the Attorney General of Canada,

of the Trial Division.

50. (1) The Court may, in its discretion, stay proceedings in any cause or matter,

. . .

- (b) where for any . . . reason it is in the interest of justice that the proceedings be stayed.

47 Section 27 of the *Federal Court Act* provides a general right of appeal from final and interlocutory judgments of the Federal Court -- Trial Division. Section 18(3) of the *Citizenship Act*, however, provides that “notwithstanding any other Act of Parliament”, no appeal lies from any decision of the Federal Court -- Trial Division made “under” s. 18(1). Thus, s. 18(3) of the *Citizenship Act* effectively removes the general right of appeal set out at s. 27 of the *Federal Court Act* with respect to all decisions made “under” s. 18(1).

48 No doubt Parliament may validly limit the jurisdiction of the Federal Court of Appeal in this manner. As this Court held in *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 S.C.R. 322, at p. 331, “the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts”. See also: *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*, 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752, at p. 766; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, 1976 CanLII 10 (SCC), [1977] 2 S.C.R. 1054; and *McNamara Construction (Western) Ltd. v. The Queen*, 1977 CanLII 13 (SCC), [1977] 2 S.C.R. 654. There is no appeal to the Federal Court of Appeal save in those circumstances specifically provided by statute.

49 Nevertheless, during the oral hearing and in the submissions made subsequently, some doubt was expressed as to whether s. 18(3) of the *Citizenship Act* had the effect of ousting the jurisdiction conferred upon this Court by s. 40 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (assuming without deciding that this provision would otherwise apply). Furthermore, it was suggested that, if s. 18(3) had such an effect, s. 7 of the *Canadian Charter of Rights and Freedoms* may be the source of a right of appeal directly to this Court in certain circumstances. However, in light of the conclusion reached as to the interpretation of s. 18(3) of the *Citizenship Act*, it will not be necessary to address these issues.

50 We agree with the conclusion of the Federal Court of Appeal that the stay of proceedings ordered by Cullen J. was not a decision made “under” s. 18(1) of the *Citizenship Act*. Section 18(3) of the *Citizenship Act* therefore does not apply to it and an appeal lies to the Federal Court of Appeal pursuant to s. 27 of the *Federal Court Act*.

51 This conclusion flows from the wording of s. 18. Section 18(1) refers to a very particular kind of decision: a decision as to whether a person “has obtained, retained, renounced or resumed citizenship” by false pretences. However, a stay of proceedings is entered for reasons which are completely unrelated to the circumstances surrounding the obtaining, retaining, renouncing or resuming of citizenship. Indeed, a decision to order (or not to order) a stay of proceedings is different from the type of determination that the Court is called upon to make under subsection 18(1).

52 This point was recognized by the Federal Court of Appeal in *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149, where it was held that a decision under s. 18(1) of

the *Citizenship Act* is not a “final judgment” of the Federal Court -- Trial Division for the purposes of s. 27 of the *Federal Court Act* (at p. 152):

. . . there is no conflict at all between s. 18(3) and s. 27(1). First, this decision is not a “final judgment” of the court, nor is it an “interlocutory judgment”. Although the decision followed a hearing at which much evidence was adduced, it was merely a finding of fact by the court, which was to form the basis of a report by the minister and, eventually, a decision by the Governor in Council, as described by ss. 10 and 18(1). The decision did not finally determine any legal rights.

53 By way of contrast, a stay of proceedings is most definitely a “final judgment” of the Federal Court -- Trial Division. It has the effect of permanently bringing the proceedings to an end. It is a decision made under s. 50 of the *Federal Court Act* and not under s. 18(1) of the *Citizenship Act*.

54 It may be argued that a literal interpretation of s. 18(1) leads to the absurd and inequitable result that only a decision that a person obtained citizenship by false pretences would be final and without appeal. The opposite decision, namely that a person did not obtain citizenship by false pretences, could be appealed by the Minister.

55 Yet the language of s. 18(1) of the *Citizenship Act* should not be taken to mean that this subsection encompasses only a positive decision that citizenship was obtained by false pretences. It is true that s. 18(1) provides that the Minister may issue a report under s. 10 only if the court decides that citizenship was in fact obtained by false pretences. However, this language necessarily implies that the court may arrive at the opposite conclusion. Therefore, on its plain meaning, s. 18(1) empowers the Federal Court -- Trial Division to decide whether citizenship was

“obtained, retained, renounced or resumed” by false pretences. Such a decision, be it affirmative or negative, is a decision made “under” s. 18(1). It may not be appealed either by the person who is the subject of the reference or by the Minister.

56 Although the issue does not arise here, there is a great deal of force to the argument that s. 18(1) of the *Citizenship Act* encompasses not only the ultimate decision as to whether citizenship was obtained by false pretences, but also those decisions made during the course of a s. 18 reference which are related to this determination. This would encompass all the interlocutory decisions which the court is empowered to make in the context of a s. 18 reference (see, for instance, s. 46 of the *Federal Court Act* and Rules 5, 450-455, 461, 477, 900-920, 1714 and 1715 of the *Federal Court Rules*, C.R.C., c. 663). This interpretation of s. 18(1) was adopted by the Federal Court of Appeal in *Luitjens, supra*, where it was held that interlocutory decisions made in the context of s. 18(1) reference are decisions made “under” s. 18(1). It is not necessary for the purpose of this decision to determine whether this conclusion should be varied. That should only be done in an appeal where the issue arises from the facts.

57 However, whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings.

58 Unlike interlocutory decisions, a stay of proceedings will not be made in order to more efficiently determine the ultimate question of whether citizenship was obtained by false pretences. An order staying proceedings is therefore not related to this ultimate decision.

Furthermore, it may be that allowing appeals from interlocutory decisions made in the context of a s. 18 reference would effectively defeat Parliament's goal of finality in citizenship matters. As McLachlin J. observed in *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, there is a valid policy concern to control the "plethora of interlocutory appeals and the delays which inevitably flow from them" (p. 641). This same concern will not, however, generally apply to orders staying proceedings. Stays of proceedings are granted but rarely and only in the "clearest of cases". They are granted for reasons unrelated to the merits of the s. 18 reference and are usually divorced from the "citizenship" context of the reference. Allowing appeals from stays of proceedings would therefore not seriously threaten the goal of finality in citizenship matters.

It should be noted that, even if s. 18(1) of the *Citizenship Act* were to be interpreted as encompassing not only the final determination as to whether citizenship was obtained by false pretences but also any decisions related to this determination, an exception should be made for a decision to deny a motion for a stay of proceedings. It is arguable that a decision denying a stay of proceedings is "related" to the question of whether citizenship was obtained by false pretences insofar as it has the effect of allowing the inquiry on the merits to proceed. However, it would appear to be fundamentally unfair, and contrary to the rules of natural justice, to allow appeals to be taken from a decision to order a stay of proceedings but not from a decision refusing to order a stay. Such a result could not have been intended by Parliament.

It follows that a decision allowing or denying a motion for a stay of proceedings is not a decision made "under" s. 18(1). It is a decision made under s. 50 of the *Federal Court Act* and may be appealed according to the rules set out at s. 27 of that Act. The appellants contend that this is at odds with the principles set out in *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128. They argue that the better interpretation of s. 18 of the *Citizenship Act* is that all decisions made in the context of a s. 18 reference, be they final or interlocutory, "on the merits" or

procedural, should be considered to have been made “under” s. 18(1) and therefore are subject to s. 18(3).

62 At issue in *Jewitt* was s. 605(1)(a) (now s. 676(1)(a)) of the *Criminal Code* which provided for a right of appeal by the Crown “against a judgment or verdict of acquittal” in certain circumstances. It was held that any order of the Court, regardless of the terminology used, which effectively brings proceedings to a final conclusion in favour of the accused is tantamount to a verdict of acquittal for the purposes of appeal. Such an order includes a stay of proceedings.

63 The appellants contend that if, in the criminal law context, a stay of proceedings is for the purposes of appeal tantamount to a decision on the merits, there is no reason for holding that it is not tantamount to a decision as to whether citizenship was obtained by false pretences under s. 18(1) of the *Citizenship Act*. The principle underlying *Jewitt*, it is argued, is that substance ought to triumph over form. If the order has the effect of bringing the proceedings to a close, it should, for the purposes of appeal, be considered a decision on the merits in favour of the person against whom the proceedings were instituted.

64 On their face the reasons in *Jewitt* appear to be compelling authority in favour of the appellants’ position. However, *Jewitt* must be read in light of the more recent judgment of *R. v. Hinse*, 1995 CanLII 54 (SCC), [1995] 4 S.C.R. 597. There, the accused sought leave to appeal a judgment of the court of appeal setting aside his conviction and entering a stay of proceedings. The issue was whether such a judgment is tantamount, for the purposes of appeal, to a judgment setting aside a conviction and entering a verdict of acquittal or ordering a new trial. The majority of this Court held that it was not.

The statutory basis of the court of appeal's power to order a stay of proceedings was held to be not s. 686(2) of the *Criminal Code* (which empowers the court to set aside a conviction and from which no appeal by the accused lies), but s. 686(8) (which empowers the court to make ancillary orders). Furthermore, it was held that, as an order made under s. 686(8) of the *Criminal Code*, a stay of proceedings does not represent "a functionally integral part of a 'judgment . . . setting aside or affirming a conviction' " (p. 626). Rather, it was held that "an order rendered under s. 686(8) represents a separate, divisible judicial act from which the accused or the Crown may independently seek leave to appeal under s. 40(1) of the *Supreme Court Act*" (p. 626). On this point, Lamer C.J. held, at pp. 619-20, that:

The power of an appellate court to impose a stay of criminal proceedings, similar to a trial court, derives its origin from the inherent jurisdiction of a superior court of record at common law. But given the breadth of the language of the residual order provision, I believe that the concrete exercise of that inherent power necessarily manifests itself through the statutory font of s. 686(8). . . . While the power of a court of appeal to order a stay of proceedings for abuse of process traces its origins to the common law, the actual exercise of that authority inevitably carries a statutory gloss by virtue of s. 686(8) of the *Criminal Code*. . . .

But while an appellate court's power to direct a stay of criminal proceedings ought to be properly understood as an exercise of its authority to enter an order under s. 686(8) of the *Code*, an order under s. 686(8) nonetheless represents a fundamentally distinct judicial order from an order for a new trial in accordance with s. 686(2)(b) within the structure of the appeals regime of the *Criminal Code*. As such, I do not believe that both types of orders are necessarily jointly excluded from this Court's general jurisdiction to grant leave by virtue of s. 40(3) of the *Supreme Court Act*.
[Emphasis added.]

This reasoning applies with equal force in the context of the *Citizenship Act*. The power to order a stay does not flow by necessary implication from the power to decide if citizenship was obtained by false pretences, set out at s. 18(1). Rather, it is a power which not only has its source in a different statutory provision (s. 50 of the *Federal Court Act*) but is also

unrelated to the power set out at s. 18(1). To borrow the words of Lamer C.J. in *Hinse*, it is a “separate, divisible judicial act” (p. 626). Appeals from a decision to stay proceedings (or to refuse to enter a stay) should therefore be governed by the rules applicable to the statutory provision empowering the court to make this decision. Those rules are set out at s. 27 of the *Federal Court Act* and they provide expressly for a right of appeal. It follows that the Court of Appeal had jurisdiction to hear the Crown’s appeal in this case.

B. *Judicial Independence*

67 We conclude that the meeting between Mr. Thompson and Isaac C.J. and the subsequent conduct of officials of the Department of Justice did indeed cause damage to the appearance of judicial independence. The question remains as to the extent of that damage and how it should be weighed in considering whether a stay should be granted in these significant and important proceedings.

68 The independence of judges has two aspects: an institutional aspect and a personal aspect. As Le Dain J. wrote in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at p. 691:

. . . the word “independent” in s. 11(d) of the *Charter* is to be understood as referring to the status or relationship of judicial independence as well as to the state of mind or attitude of the tribunal in the actual exercise of its judicial function.

The parties agree that it is the personal aspect of judicial independence -- what is sometimes called “impartiality” -- that is at issue here. No one alleges, and indeed there is no credible evidence to suggest, that the integrity of the Federal Court as an institution has been compromised.

69 Though it is very important that the judiciary should actually remain independent, it is equally important that the judiciary should be seen to be independent. In our view, there is not sufficient evidence to support the conclusion that the Chief Justice and the Associate Chief Justice did not in fact remain independent. However, the evidence does compel us to conclude that the appearance of judicial independence suffered significantly as a result of what happened on March 1, 1996.

70 The test for determining whether the appearance of judicial independence has been maintained is an objective one. The question is whether a well-informed and reasonable observer would perceive that judicial independence has been compromised. As Lamer C.J. wrote in *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, at p. 139, “[t]he overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality”.

71 The essence of judicial independence is freedom from outside interference. Dickson C.J., in *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, described the concept in these words, at p. 69:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

72 What emerges from all of this is a simple test for determining whether the appearance of judicial independence has been maintained: whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.

73 There are many principles of professional conduct that must be observed in order to maintain the appearance of judicial independence. Two of these are particularly relevant here.

74 First, and as a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. See the Honourable J. O. Wilson, *A Book for Judges* (1980), at p. 52. The meeting between Mr. Thompson and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, and this despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases.

75 Second, and again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of Mr. Thompson. We agree with Pratte J.A. that a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness. Yet, the actions of Isaac C.J. were more in the nature of a response to a party rather than to a problem. Thus, an action that might have been innocuous and even obligatory under other circumstances acquired an air of impropriety as a result of the events that preceded it. Quite simply, it was inappropriate.

In similar fashion, by responding as he did to the Chief Justice's intervention without the participation of counsel for the appellants, Jerome A.C.J. acted inappropriately. We believe that there is ample evidence that might lead a reasonable observer to conclude that the Associate Chief Justice was not able to conduct the appellants' cases free from the interference of the federal Department of Justice and of the Chief Justice of his court. Before March 1, 1996, the Associate Chief Justice was content with the pace at which the appellants' cases were advancing through his court. Indeed, even after Mr. Amerasinghe wrote to the Court Administrator to complain about the slow pace of the proceedings, the Associate Chief Justice resolved not to expedite consideration of the preliminary motions. Instead, he insisted on hearing oral argument according to the original, exceedingly dilatory schedule. It was only after the March 1, 1996 meeting between Mr. Thompson and the Chief Justice that Jerome A.C.J. acquired an appreciation of the Government's position. In his letter of March 1, 1996, the Chief Justice wrote:

As regards the three cases about which you wrote, the Associate Chief Justice says firstly, that he did not fully appreciate until he read your letter, the urgency of dealing with these matters as expeditiously as the Government would like. However, now that he is aware he will devote one week from 15 May to deal with these cases not only with respect to the preliminary points but also with respect to the merits. Finally, he has authorized me to say that additional cases of this class coming into the Court will be given the highest priority in light of the concerns expressed in your letter.
[Emphasis added.]

Subsequent developments confirmed that the Associate Chief Justice had indeed finally received the Government's message. On April 10, 1996, the Associate Chief Justice retreated from his earlier position and announced that he would set aside sufficient time in May to dispose of all the preliminary issues in the appellants' cases. He also indicated that he would bring the cases to a final conclusion by July.

78 We do not see how a reasonable observer could fail at least to wonder whether the Government, through Mr. Thompson, had succeeded in influencing the Associate Chief Justice to take a position more favourable to the Government's interests than he would otherwise have done. Making this conclusion even more likely is the undertaking of the Chief Justice and the Associate Chief Justice to Mr. Thompson that all reasonable steps would be taken to avoid a reference to the Supreme Court of Canada.

79 The respondent tries to resist this conclusion by saying that the impetus to efficiency came not from Mr. Thompson and the Government but from the Chief Justice. The Chief Justice, the respondent says, was duty-bound to look into what was, by any objective standard, a serious delay in proceedings in his court. The respondent thus offers the Chief Justice as a kind of *novus actus interveniens* who stands between the Government and the Associate Chief Justice and, by the propriety of his own intentions, severs what would otherwise be an improper link between them.

80 What the respondent's submission overlooks is that the Chief Justice was not able to exercise his administrative function entirely free from outside interference. Mr. Thompson approached the Chief Justice and told him that if the Associate Chief Justice did not pick up the pace, the Federal Court would face the embarrassment of having the Government go "over its head" to this Court. The Chief Justice's letter to Mr. Thompson suggests that this "threat" carried some weight with him and with the Associate Chief Justice as well:

I have discussed your concerns with the Associate Chief Justice and, like me, he is prepared to take all reasonable steps possible to avoid a Reference to the Supreme Court of Canada on these matters.

It is reasonable to suppose that the threat of appeal to a higher authority influenced the Chief Justice and Associate Chief Justice to act in a way that would otherwise have been unpalatable to them. In this we agree entirely with Stone J.A., who found that “an informed person would conclude that this decision, by which the hearing of all preliminary motions and the trials would be compressed into a relatively short time frame, would redound to the disadvantage of the individual respondents [now appellants] and was taken so as ‘to avoid’ a reference to the Supreme Court” (p. 868). To interfere with the scheduling of cases because of delay is one thing but to pledge to take all reasonable steps to avoid a reference to the Supreme Court of Canada is quite another. It is wrong and improper for a judge to give such an undertaking. What is pertinent is to avoid delays, not to avoid appeals or recourse to higher courts.

81 However, the respondent is quite right to observe that the delay in the Federal Court -- Trial Division was inordinate and arguably inexcusable, and posed a real problem for the Department of Justice and for the Chief Justice. The fact is that in the space of a year, the Associate Chief Justice heard only one day of argument, and that on a preliminary motion. In our view, the Associate Chief Justice’s dilatoriness defies explanation. The appellants attempt nevertheless to explain it, saying that the Associate Chief Justice had reason to delay the proceedings until judgment had been given by himself in a case called *Nemsila*, which might have cast some light on citizenship revocation cases generally. The Chief Justice for his part mentioned the *Nemsila* case in his letter of March 1, 1996, though he did not attempt to offer it as a justification for delay in the appellants’ cases.

82 However, even accepting that there was reason to await the rendering of judgment in *Nemsila*, the proper procedure would have been to hear argument on the appellants’ motion and, if necessary, to reserve judgment. To call three cases to a halt awaiting the outcome of another case strikes us as a procedure calculated to create unnecessary delay. The appellants also point out that the respondent was not ready to proceed to a hearing on the merits. Apparently the respondent had

not finished translating certain witness statements. But no one has suggested that the matter should have been brought to a conclusion on the merits before May 15, 1996, only that some progress should have been made toward resolving the preliminary questions before that date, and to settle the preliminary questions would not have required that all the witness statements should be available. Therefore, the fact that the respondent was not yet ready to proceed to trial cannot excuse the delay in the Associate Chief Justice's consideration of the preliminary questions.

83 What all this means is that Mr. Thompson went to the Chief Justice with a legitimate grievance. This fact does not excuse what Mr. Thompson did -- he assuredly chose an impermissible means of presenting his grievance -- but it does cast into very real doubt the sinister interpretation that the appellants have attempted to place on his conduct. Given the vexing delay that the respondent had faced in the Trial Division, it is quite understandable that Mr. Thompson would have wished to do something about it. We believe that Mr. Thompson's motives were proper. It was his judgment that is questionable. What Mr. Thompson did was not wicked or done in bad faith. It is enough to say that what he did was inappropriate. As senior counsel in the Department of Justice, he arranged to speak privately -- without opposing counsel present -- to the Chief Justice, concerning cases which were pending. This he should not have done.

84 The appellants suggest that there was a "conspiracy" to have the Associate Chief Justice recuse himself from the cases. Clearly there is insufficient evidence before this Court to dispose of this question fully, and we do not believe that it is crucial to the outcome of this appeal. Still, in our view, to accept that suggestion would stretch the bounds of credulity. Although Mr. Amerasinghe recorded that Mr. Thompson had gotten the Chief Justice to agree to have the Associate Chief Justice recuse himself, the evidence is all inconsistent with the existence of any such agreement. As events developed, the Associate Chief Justice did not recuse himself. Quite the contrary, on April 10, 1996, the Associate Chief Justice indicated that he wished to hear

argument concerning the preliminary motions on May 15 and 16, as previously scheduled. It was only after the appellants indicated that they would seek a stay of proceedings on the ground that the Associate Chief Justice's independence had been compromised that the Associate Chief Justice recused himself. In the light of these events, the only way that the suggestion of a conspiracy can be credited is on the supposition that Mr. Thompson, the Chief Justice, and the Associate Chief Justice orchestrated the whole affair, from the disclosure of the March 1 correspondence through to the appellants' motion for a stay of proceedings. Again, we would emphasize that we lack the evidence necessary to decide this question and do not purport to do so. But that supposition passes all belief. Certainly no reasonable observer, apprised of all the facts, would believe it. Therefore, all that Mr. Amerasinghe's note shows is that Mr. Amerasinghe believed that some arrangement had been made to have the Associate Chief Justice recuse himself. The outcome of this appeal cannot turn on what Mr. Amerasinghe believed.

85 In short, the evidence supports the conclusion that the appearance of judicial independence suffered a serious affront as a result of the March 1, 1996 meeting between Mr. Thompson and Isaac C.J. This affront very seriously compromised the appearance of judicial independence. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of the actors in this drama, nor is there any solid evidence that the independence of the judges in question was actually compromised.

C. The Remedy

86 Although the meeting and subsequent exchange of letters between Mr. Thompson and the Chief Justice were very serious matters that compromised the appearance of the Chief Justice's and the Associate Chief Justice's independence, on balance the damage was not sufficiently serious to warrant the granting of that ultimate remedy of a stay of proceedings. The lesser remedy of

ordering the appellants' cases to proceed before a different judge of the Federal Court -- Trial Division will, together with the additional conditions, suffice.

(i) The Standard of Review

87 A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in *Elsom v. Elsom*, [1989 CanLII 100 \(SCC\)](#), [1989] 1 S.C.R. 1367, at p. 1375:

[A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

See also *R. v. Carosella*, [1997 CanLII 402 \(SCC\)](#), [1997] 1 S.C.R. 80, at para. 48.

(ii) The Legal Principles

88 Though Cullen J. derived his power to enter a stay of proceedings from [s. 50\(1\)\(b\)](#) of the *Federal Court Act* and not from the *Charter* or the common law, the same principles that govern stays of proceedings under the latter heads of power apply equally well here. The "interest of justice" referred to in [s. 50\(1\)\(b\)](#) of the *Federal Court Act* is not fundamentally different from the concerns that animate the jurisprudence developed under [s. 24\(2\)](#) of the *Charter*, although the context in which [s. 50\(1\)\(b\)](#) operates may be different.

Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a “residual category” of cases in which a stay may be warranted. L’Heureux-Dubé J. described it this way, in *R. v. O’Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 73:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

The residual category, it bears noting, is a small one. In the vast majority of cases, the concern will be about the fairness of the trial.

If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.

(*O’Connor*, *supra*, at para. 75.)

The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been

done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See *O'Connor*, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See *O'Connor*, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.

92 After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings": *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667. We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern. Rather, it merely recognizes that in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding.

(iii) Application of the Law to the Facts

93 For several reasons, a stay of proceedings is not the appropriate remedy in these cases. First, there is no likelihood that the carrying forward of the cases will manifest, perpetuate or aggravate any abuse. Second, the lesser remedy of ordering the cases to go forward under the supervision of a different judge of the Trial Division without any direction or intervention from the Chief Justice or the Associate Chief Justice will suffice. In this connection, we believe that, if Isaac C.J. or Jerome A.C.J. considered the situation and the possible perception of bias by reasonable observers, they would agree that it would be preferable if they did not participate in any future cases dealing with the same or related issues. Third, Canada's interest in not giving shelter to those who concealed their wartime participation in acts of atrocities outweighs any foreseeable harm that might be done to the appellants or to the integrity of the system by proceeding with the cases. To the extent that he thought otherwise, the trial judge was in error.

(a) *No Likelihood That Any Abuse Will Be Manifested in the Future*

94 Although damage was done to the appearance of judicial independence, there is no indication that it will be manifested, perpetuated or aggravated by any future proceeding. Therefore, a stay of proceedings is not an appropriate remedy.

95 The appellants' best argument is that this case falls into the "residual category" mentioned in *O'Connor* because the state conducted its case against them so unfairly and vexatiously that harm was done to the very integrity of the judicial system. To carry forward in the light of what was done, they submit, would be to condone official misconduct and thereby to aggravate the abuse.

96 The problem with the appellants' submission is that it reflects a misunderstanding of the stay of proceedings as a remedy. When one looks at the criteria identified by L'Heureux-Dubé

J. in *O'Connor, supra*, at para. 75, and the accompanying discussion, what emerges, in our view, are the following propositions. A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent -- a remedy aimed at preventing the perpetuation or aggravation of a particular abuse. Admittedly, if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice. It is conceivable, we suppose, that something so traumatic could be done to an individual in the course of a proceeding that to continue the prosecution of him, even in an otherwise unexceptionable manner, would be unfair. Similarly, if the authorities were to fabricate and plant evidence at the scene of a crime, the continued pursuit of a criminal prosecution might well be damaging to the integrity of the judicial system.

97 However, the damage that the appearance of judicial independence suffered as a result of the meeting between Mr. Thompson and the Chief Justice was not so serious that to proceed despite it would constitute an abuse. A reasonable, fully-informed member of the public, confronted with a continuation of the proceedings, would not think that an injustice was being perpetuated. Mr. Thompson, the Chief Justice and the Associate Chief Justice acted imprudently, but not to such an extent that they undermined public confidence in the justice system. Nothing was done that could have rendered the proceedings oppressive for the appellants. Undoubtedly, the appellants had a legitimate concern that the judge who had charge of their cases and the Chief Justice had become partial to the state. But that concern had to do only with the particular judges involved and not with the justice system as a whole. Thus it is clear that remedies other than a stay will rectify this unfortunate situation.

98 The appellants further submit that the appearance of judicial partiality will continue in the future if the cases are allowed to proceed. In our view, there is no prospect of judicial partiality in the future. The Chief Justice intervened only with the Associate Chief Justice. His conduct did not compromise the integrity of any other judges. The taint is confined to the Associate Chief Justice and the Chief Justice and can be readily contained.

99 Despite these rather obvious facts, Cullen J. found that a reasonable person would worry that the Chief Justice would exercise an improper influence over any judge appointed to hear the appellants' cases. With respect, we do not agree. His finding rests on an incomplete view of the law. Contrary to public perception, it is clear that a chief justice is only "*primus inter pares* in the court". *Ruffo v. Conseil de la magistrature*, [1995 CanLII 49 \(SCC\)](#), [1995] 4 S.C.R. 267, at para. 59. He or she enjoys no particular authority over other judges, save an administrative one. See *Federal Court Act*, s. 6(1).

100 Any influence that the Chief Justice might have had over the Associate Chief Justice might have been by virtue of some particular quality of their personal relationship. In this respect, we cannot refrain from commenting that the formal structural relationship between the Chief Justice and the Associate Chief Justice is not clear and in the aftermath of these events, perhaps the appropriate authorities might wish to consider the matter further to clarify the situation. But that aside, what happened between the Chief Justice and the Associate Chief Justice should not be taken as a reflection of the institutional relationship between them. A reasonable observer would understand this, and would understand also that the individual judges of the Trial Division "have nothing to gain by not deciding as their consciences dictate and nothing to lose by doing justice": *Ruffo*, *supra*, at para. 101.

101 The sturdy resolve that Cullen J. himself demonstrated in deciding to grant a stay of proceedings was no aberration. It is precisely what any reasonably intelligent person, apprised of the workings of the Federal Court, would expect. However, by failing to credit the reasonable observer with sufficient understanding to recognize what was apparent even in his own conduct, Cullen J. committed an error of law. His exercise of discretion was founded on a misdirection and so cannot be allowed to stand.

102 The decision of this Court in *R. v. Vermette*, [1988 CanLII 87 \(SCC\)](#), [1988] 1 S.C.R. 985, affords a good illustration of the correct approach to problems of apparent partiality. *Vermette* involved certain inflammatory and well-publicized remarks made by the Premier of Quebec about a case that was then before the courts. The trial judge entered a stay of proceedings, in part on the ground that the Premier's remarks had infringed the accused's right to a fair trial by making it unlikely that an impartial panel of jurors could be found. This Court set aside the stay. It held that the trial judge had founded his decision on impermissible speculation. La Forest J., for the majority, observed that there was "no evidence indicating that it will be impossible to select an impartial jury in a reasonable time" (p. 992). He further emphasized that, in the words of the Ontario Court of Appeal, "[t]here is an initial presumption that a juror . . . will perform his duties in accordance with his oath". See *R. v. Hubbert* (1975), [1975 CanLII 53 \(ON CA\)](#), 29 C.C.C. (2d) 279, at p. 289.

103 The same kind of reasoning applies here. It is mere speculation that no impartial judge can be found. There is an initial presumption of fundamental importance that judges will be faithful to their solemn oath of office and not pay heed to any ill-advised interventions of a chief justice whose authority to intervene is limited to administrative matters. This serves as an answer not only to the suggestion that Mr. Thompson and the Chief Justice will persist in their improper behaviour but also to the recent suggestion that Mr. Thompson's interference in the affairs of the Federal Court was more extensive than previously believed. Even if it is true that Mr. Thompson

served as a sort of informer for the Chief Justice, reporting to him on judges whose performance was not acceptable to the federal government, still there is no reason to believe that such chicanery has impaired or will impair the ability of the judges of the Federal Court to function independently and in accordance with their oaths. The judge's oath is a solemn and weighty covenant, not lightly betrayed. Until some evidence appears that the independence of a particular judge may have been compromised, as happened with respect to the Associate Chief Justice as a result of the Chief Justice's letter of March 1, 1996, it remains a matter of speculation that a judge will be anything less than entirely faithful to the office.

(b) *A Lesser Remedy Is Sufficient*

104 For reasons similar to the ones we have already given, the abuse will be sufficiently remedied if we order that the cases against the appellants should go forward under a different judge of the Trial Division. There is every reason to think that the example of independence set by Cullen J. below will be followed by his successor.

105 If any illustration is needed of the sufficiency of a new trial as a remedy for bias, no better one can be found than the recent decision of this Court in *R. v. Latimer*, [1997 CanLII 405 \(SCC\)](#), [1997] 1 S.C.R. 217. In that case, it emerged following the trial that Crown counsel and the police had administered a sort of litmus test to prospective jurors. In particular, they had sought to discover what prospective jurors thought about moral issues that would arise in the course of the trial. Five of the jurors who had been questioned in this way became members of the jury. This Court condemned the actions of Crown counsel as “nothing short of a flagrant abuse of process and interference with the administration of justice” (para. 43).

106 The reasonable inference to be drawn is that if the lesser remedy of a new trial was adequate in *Latimer*, which arguably involved a more serious apprehension of bias than this appeal does, then *a fortiori* it is adequate here.

(c) *Society's Interests Weigh Against a Stay*

107 If we had concluded that having regard to the other factors it was unclear whether the abuse was sufficient to warrant a stay, we would have found that the societal interest in seeing these cases through to their conclusion tips the balance against a stay. The following words of L'Heureux-Dubé J., in *O'Connor*, *supra*, at para. 81, are apt:

. . . in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused.

108 Perhaps the first thing to notice is that what is at stake for the appellants in this case is arguably different from what is at stake for the typical accused in the typical criminal case. The state is trying to deprive the appellants of their citizenship and not of their liberty. Canadian citizenship is undoubtedly a very “valuable privilege” (see *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358, at para. 72). For some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty. Yet for most, liberty is more valuable still. Therefore, the interests on the appellants’ side of the balance do not weigh quite so heavily as they would if the proceedings were purely criminal in nature.

On the other side of the balance, society's interest in having a final decision on the merits is obvious. It is imperative that the truth should come to light. If it is not proven that the appellants did the things they are said to have done, then they will retain their citizenship. But if some or all of the alleged acts are proven then the appropriate action must be taken. What is at stake here, in however small a measure, is Canada's reputation as a responsible member of the community of nations. In our view, this concern is of the highest importance

An ongoing affront to judicial independence may be such that any further proceedings in the case would lack the appearance that justice would be done. In such a case the societal interest would not be served by a decision on the merits that is tainted by an appearance of injustice. The interest in preserving judicial independence will trump any interest in continuing the proceedings. Even in the absence of an ongoing appearance of injustice, the very severity of the interference with judicial independence could weigh so heavily against any societal interest in continuing the proceedings that the balancing process would not be engaged. This would occur rarely and only in the clearest of cases. Neither of these circumstances is present here. We have concluded that continuing the proceedings under the conditions we have outlined will not result in an ongoing appearance of injustice. Moreover, the affronts to judicial independence were serious but not so serious as to warrant a stay without balancing the harm to the image of the justice system against the interest of society in seeing alleged war criminals brought to justice. The crimes involved rank among the most heinous in history, and the civilized world's resolve to apply the appropriate sanctions should not be interfered with lightly. What transpired between Mr. Thompson and the Chief Justice on March 1, 1996 cannot justify such an interference, wrong and improper as it was. If it were established that Mr. Thompson and the Chief Justice had acted in bad faith and not out of a legitimate concern for the expeditious conduct of the appellants' cases, then this might well have constituted one of those rare and clearest of cases. But this was not the case. As matters stand, society's interest in seeing the cases through to their conclusion is of a most pressing nature and outweighs the affront to the appearance of judicial independence.

111 Therefore, the only just decision under the circumstances is that the cases should be allowed to proceed. To paraphrase the remarks of our colleague La Forest J. in *Vermette, supra*, at p. 994, “judicial abdication is not the remedy”. It is in the public interest that allegations of the most wicked kinds of criminal activity should be scrutinized by the judiciary. In all the circumstances, the imprudent actions of Mr. Thompson, the Chief Justice, and the Associate Chief Justice should not be permitted to frustrate the judicial process.

(iv) Conclusion

112 A stay of proceedings should not be granted in this case. Rather, the appropriate remedy is to have the cases against the appellants go forward under the supervision of a judge of the Trial Division, one who has, up to this point, had nothing to do with the affairs that form the subject matter of this appeal. The judge appointed will ignore all directions previously given by the Associate Chief Justice or the Chief Justice in these cases. Isaac C.J. and Jerome A.C.J. should not have anything further to do with these cases.

113 Before we conclude, there is one final matter that bears mentioning. It is this.

114 A well-known rule of Parliamentary practice holds that no Member of the House of Commons should comment upon any matter that is pending before the courts. The following account of what is called the “*sub judice* rule” appears in *Beauchesne’s Rules & Forms of the House of Commons of Canada* (6th ed. 1989), at p. 153 (para. 505):

Members are expected to refrain from discussing matters that are before the courts or tribunals which are courts of records. The purpose of this *sub judice* convention is to protect the parties in a case awaiting or undergoing trial and persons who stand to be affected by the outcome of a judicial inquiry. It is a voluntary restraint imposed by the House upon itself in the interest of justice and fair play.

Though the rule is a matter of Parliamentary convention and not of statutory law, “[i]t is desirable that the convention of Parliament as to matters sub judice should, so far as possible, be the same as the law administered in the courts”, or, in other words, that parliamentarians should act in a way that does not render more difficult the administration of the law by judges. See *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 Q.B. 710 (C.A.), at pp. 740-41, *per* Lord Denning M.R.

115 It seems to us that the decision to make public the report of the Honourable Charles Dubin on communications between Department of Justice officials and the courts while the matter was before the courts raises concerns about the *sub judice* rule. The Honourable Mr. Dubin was under retainer to the Department of Justice. He was responsible to the Minister of Justice. If Parliamentary convention did not permit the Minister to speak about the conduct of Mr. Thompson and the Chief Justice, then arguably it did not permit him to retain a third party to speak on his behalf about important aspects of the same subject matter that was before the courts.

116 The release of the report complicated the conduct of the appeal. Once it was released the appellants moved for production of many documents that the Department of Justice had handed over to Mr. Dubin. Their demands involved first the Federal Court of Appeal and later this Court in difficult and time-consuming inquiries into questions of privilege, and ultimately placed this Court in the awkward position of having to consider without the benefit of a trial judge’s findings of fact the credibility of certain items of evidence. These difficulties could easily have been avoided had the report not been released until after the conclusion of proceedings in the courts.

117 Nevertheless, the *sub judice* rule was not raised as a ground of appeal. Therefore, it is not for us to say whether the Minister violated the rule. However, we can say that even if the release of the report did constitute a violation of the rule, still that would not be a sufficient reason to grant a stay of proceedings in the circumstances of this case. As La Forest J. wrote in *Vermette*, *supra*, at p. 994, “judicial abdication is not the remedy for an infringement of the *sub judice* rule”.

118 Also of concern is the intervention of the Canadian Judicial Council. We understand that one of the Council’s committees issued a report in which comments were made about the conduct of Isaac C.J. and Jerome A.C.J. in connection with the appellants’ cases. Although the Canadian Judicial Council is not bound by the *sub judice* rule, it might have been preferable in these circumstances for the Council to have refrained from making its report while the matter of the stay of proceedings was still working its way through the courts. There is a further complication arising from the premature release of these reports. It arises because these reasons could be taken as indicating that we take a more serious view of these events than did either the Honourable Mr. Dubin or the Judicial Council although the Council did not have the benefit of all the material that was before this Court.

V. Disposition

119 We would dismiss the appeal. The stay of proceedings is set aside and the cases against the appellants are directed to proceed before a judge of the Trial Division. In accordance with s. 6(3) of the *Federal Court Act*, which provides for the precedence of judges in the event that the Chief Justice and Associate Chief Justice are unable to act, the senior judge who is able to act should choose a presiding judge from among those judges of the Trial Division who have heretofore had nothing to do with the conduct of these cases. The judge thus chosen will ignore

any undertakings that Isaac C.J. or Jerome A.C.J. made to Mr. Thompson. Neither Isaac C.J. nor Jerome A.C.J. will have anything further to do with these cases.

120 Under all the circumstances, we would award costs to the appellants here and in the courts below.

Appeal dismissed with costs to the appellants.

Solicitor for the appellant Tobiass: Gesta J. Abols, Toronto.

Solicitors for the appellant Dueck: Bayne Sellar Boxall, Ottawa.

Solicitors for the appellant Oberlander: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondent: George Thomson, Toronto.

Solicitor for the intervener: Ed Morgan, Toronto.

TAB 35

Canada (Minister of Citizenship and Immigration) v. Tobias, 1997 CanLII 322 (SCC), [1997] 3 SCR 391

Source:	Supreme Court of Canada
Date:	1997-09-25
File number:	25811
Other citations:	131 FTR 230 — 151 DLR (4th) 119 — 218 NR 81 — 74 ACWS (3d) 52 — 10 CR (5th) 163 — 118 CCC (3d) 443 — 14 CPC (4th) 1 — 1 Admin LR (3d) 1 — 40 Imm LR (2d) 23 — EYB 1997-02452 — JE 97-1836 — [1997] SCJ No 82 (QL) — [1997] ACS no 82
Citation:	Canada (Minister of Citizenship and Immigration) v. Tobias, 1997 CanLII 322 (SCC), [1997] 3 SCR 391, < https://canlii.ca/t/1fr01 >, retrieved on 2026-03-23
Most recent unfavourable mention	Sliwin v College of Physicians and Surgeons , 2017 ONSC 1947 (CanLII) [...] [88] In my view, however, Tobias , supra, is distinguishable . [...]

Canada (Minister of Citizenship and Immigration) v. Tobias, [1997] 3 S.C.R. 391

Erichs Tobias *Appellant*

v.

The Minister of Citizenship and Immigration

Respondent

and between

Johann Dueck

Appellant

v.

The Minister of Citizenship and Immigration

Respondent

and between

Helmut Oberlander

Appellant

v.

The Minister of Citizenship and Immigration

Respondent

and

The Canadian Jewish Congress

Intervener

Indexed as: Canada (Minister of Citizenship and Immigration) v. Tobiass

File No.: 25811.

1997: June 26; 1997: September 25.

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

on appeal from the federal court of appeal

Courts -- Jurisdiction -- Appeals -- Federal Court of Appeal -- Federal Court Trial Division staying citizenship revocation proceedings -- Whether stay of proceedings a decision made under s. 18(1) of Citizenship Act -- Whether decision to stay proceedings can be appealed to Federal Court of Appeal -- Citizenship Act, R.S.C., 1985, c. C-29, s. 18(1), (3) -- Federal Court Act, R.S.C., 1985, c. F-7, s. 27(1).

Courts -- Judges -- Judicial independence -- Government official meeting with Chief Justice of Federal Court to express concern about slow progress of citizenship revocation proceedings -- Whether meeting between government official and chief justice interfered with judicial independence -- If so, whether stay of proceedings appropriate remedy.

Civil procedure -- Remedies -- Stay of proceedings -- Meeting between government official and chief justice causing damage to appearance of judicial independence -- Whether stay of proceedings appropriate remedy.

In January 1995 the appellants received notices informing them that the respondent Minister intended to seek revocation of their Canadian citizenship on the ground that they had obtained it by failing to divulge to Canadian officials details of their involvement in atrocities committed during the Second World War. At the appellants' request, the cases were referred to the Federal Court -- Trial Division. Numerous procedural disputes then arose. On December 12, 1995 counsel for one of the appellants argued for the whole day on the preliminary motions before the Associate Chief Justice. In January 1996 the court advised the parties that May 15 and 16 had been set aside for the completion of the argument. Counsel for the respondent wrote a letter to the court administrator, a copy of which he sent to counsel for the appellants, complaining in strong terms about the slow progress of the cases. Following a teleconference with the parties, the Associate Chief Justice confirmed that oral argument on the preliminary issues would take place

on May 15 and 16, 1996. On March 1, T, the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met with the Chief Justice of the Federal Court. The two men discussed the scheduling of the appellants' cases and later that day exchanged letters, neither of which was copied to any of the counsel for the appellants. In his letter to the Chief Justice, T referred to the fact that the Attorney General was being asked to consider taking a reference to the Supreme Court of Canada to determine some preliminary points of law primarily because the Trial Division was unable or unwilling to proceed with the cases expeditiously. In his reply, the Chief Justice stated that he had discussed T's concerns with the Associate Chief Justice, and that both were prepared to take all reasonable steps to avoid such a reference. He added that the Associate Chief Justice said he had not fully appreciated "the urgency of dealing with these matters as expeditiously as the Government would like" until he had read T's letter. However, now that he was aware of the Government's concerns he would devote one week from May 15 to deal with the cases not only with respect to the preliminary points but also with respect to the merits. The respondent provided copies of these letters to the appellants. Counsel for the appellants advised the court that they would move for a stay of proceedings on the ground that T and the Chief Justice had interfered with the independence of the Associate Chief Justice. The Associate Chief Justice then recused himself. He directed that the appellants' cases should go forward under a new judge. The appellants' application for a stay of proceedings was granted. The Federal Court of Appeal, having decided that it had jurisdiction to consider the appeal, set aside the stay.

Held: The appeal should be dismissed.

The Federal Court of Appeal had jurisdiction to hear the Crown's appeal in this case. The stay of proceedings ordered was not a decision made "under" [s. 18\(1\)](#) of the [Citizenship Act](#). Section 18(1) refers to a very particular kind of decision: a decision as to whether a person "has obtained, retained, renounced or resumed citizenship" by false pretences. Whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings. [Section 18\(3\)](#) of the [Citizenship](#)

Act, which provides that no appeal lies from a decision of the Trial Division made under s. 18(1), thus does not apply. A decision allowing or denying a motion for a stay of proceedings is a decision made under s. 50 of the *Federal Court Act* and may be appealed according to the rules set out in s. 27 of that Act.

The appearance of judicial independence suffered significantly as a result of the meeting between T and the Chief Justice. The test for determining whether the appearance of judicial independence has been maintained is whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges. As a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. The meeting between T and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases. Again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of T. While a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness, the actions of the Chief Justice here were in the nature of a response to a party rather than to a problem. Similarly, the Associate Chief Justice acted inappropriately by responding as he did to the Chief Justice's intervention without the participation of counsel for the appellants. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of those involved, nor is there any solid evidence that the independence of the judges in question was actually compromised.

An appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay of proceedings, which is a discretionary remedy. While a stay is usually sought to remedy some unfairness to the individual that has resulted from state misconduct, there is also a "residual category" of cases in which a stay may be warranted. This residual category comprises cases in which a prosecution is conducted in such an unfair or vexatious manner that it contravenes notions of justice and thus undermines the integrity of the judicial process. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. It must also be shown that no remedy other than a stay is reasonably capable of removing this misconduct. As well, it may be necessary in some cases to balance the interests that would be served by granting a stay of proceedings against the interest that society has in having a final decision on the merits. This balancing process would not be appropriate in the case of an ongoing affront to judicial independence or of a particularly egregious interference, either of which would outweigh any interest society might have in continuing the proceedings. Neither of these circumstances is present here.

A stay of proceedings is not the appropriate remedy in these cases. First, there is no likelihood that the carrying forward of the cases will manifest, perpetuate or aggravate any abuse. Second, the lesser remedy of ordering the cases to go forward under the supervision of a different judge of the Trial Division without any direction or intervention from the Chief Justice or the Associate Chief Justice will suffice. Third, Canada's interest in not giving shelter to those who concealed their wartime participation in acts of atrocities outweighs any foreseeable harm that might be done to the appellants or to the integrity of the system by proceeding with the cases. The appropriate remedy here is to have the cases against the appellants go forward under the supervision of a judge of the Trial Division who has had nothing to do with the affairs that form the subject matter of this appeal. The judge appointed will ignore all directions previously given by the Associate Chief Justice or the Chief Justice in these cases. The Chief Justice and Associate Chief Justice should not have anything further to do with these cases.

Cases Cited

Referred to: *Roberts v. Canada*, [1989 CanLII 122 \(SCC\)](#), [1989] 1 S.C.R. 322; *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986 CanLII 91 \(SCC\)](#), [1986] 1 S.C.R. 752; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1976 CanLII 10 \(SCC\)](#), [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen*, [1977 CanLII 13 \(SCC\)](#), [1977] 2 S.C.R. 654; *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149; *R. v. Seaboyer*, [1991 CanLII 76 \(SCC\)](#), [1991] 2 S.C.R. 577; *R. v. Jewitt*, [1985 CanLII 47 \(SCC\)](#), [1985] 2 S.C.R. 128; *R. v. Hinse*, [1995 CanLII 54 \(SCC\)](#), [1995] 4 S.C.R. 597; *Valente v. The Queen*, [1985 CanLII 25 \(SCC\)](#), [1985] 2 S.C.R. 673; *R. v. Lippé*, [1990 CanLII 18 \(SCC\)](#), [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986 CanLII 24 \(SCC\)](#), [1986] 2 S.C.R. 56; *Elsom v. Elsom*, [1989 CanLII 100 \(SCC\)](#), [1989] 1 S.C.R. 1367; *R. v. Carosella*, [1997 CanLII 402 \(SCC\)](#), [1997] 1 S.C.R. 80; *R. v. O'Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411; *R. v. Conway*, [1989 CanLII 66 \(SCC\)](#), [1989] 1 S.C.R. 1659; *Ruffo v. Conseil de la magistrature*, [1995 CanLII 49 \(SCC\)](#), [1995] 4 S.C.R. 267; *R. v. Vermette*, [1988 CanLII 87 \(SCC\)](#), [1988] 1 S.C.R. 985; *R. v. Hubbert* (1975), [1975 CanLII 53 \(ON CA\)](#), 29 C.C.C. (2d) 279; *R. v. Latimer*, [1997 CanLII 405 \(SCC\)](#), [1997] 1 S.C.R. 217; *Benner v. Canada (Secretary of State)*, [1997 CanLII 376 \(SCC\)](#), [1997] 1 S.C.R. 358; *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 Q.B. 710.

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[Federal Court Rules](#), C.R.C., c. 663, rr. 5, 450-455, 461, 477, 900-920, 1714-1715.

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APPEAL from a judgment of the Federal Court of Appeal, [1997 CanLII 6328 \(FCA\)](#), [1997] 1 F.C. 828, 142 D.L.R. (4th) 270, 208 N.R. 21, [1997] F.C.J. No. 2 (QL), setting aside a stay of proceedings entered by the Federal Court -- Trial Division, [1996 CanLII 4077 \(FC\)](#), [1996] 2 F.C. 729, 116 F.T.R. 69, 41 Admin. L.R. (2d) 272, [1996] F.C.J. No. 865 (QL). Appeal dismissed.

Gesta J. Abols, for the appellant Tobiass.

Donald B. Bayne, for the appellant Dueck.

Michael Code, for the appellant Oberlander.

W. Ian C. Binnie, Q.C., for the respondent.

Ed Morgan, for the intervener.

The following is the judgment delivered by

//The Court//

1 THE COURT -- This appeal raises three principal questions. The first and threshold question is whether this Court has jurisdiction to hear an appeal from a decision of a judge of the Federal Court -- Trial Division to stay a citizenship revocation proceeding. The second question is whether certain events constituted an actual or apparent affront to judicial independence. The third

question is whether, if there was any affront to judicial independence, a stay was, under the circumstances, the appropriate remedy.

I. Facts

2 The facts of this appeal present some difficulties. Much of the relevant evidence was known to Cullen J., who considered the appellants' application at first instance. But other items of evidence emerged only recently, following an order of this Court dated May 5, 1997. The additional evidence was not considered at trial and so has not given rise to any findings of fact. It is accordingly for this Court to determine the weight that should be assigned to it.

A. *The Evidence That Was Available to the Trial Division*

3 The following was known to the Trial Division and to the Federal Court of Appeal. Both courts based their decisions entirely upon it.

4 On January 27, 1995, the Registrar of Canadian Citizenship sent Notices of Revocation to the appellants, Helmut Oberlander, Johann Dueck and Erichs Tobiass. The purpose of these notices was to inform the appellants that the Minister of Citizenship and Immigration ("the Minister") intended to seek revocation of their Canadian citizenship on the ground that they had obtained it by failing to divulge to Canadian officials details of their involvement in atrocities committed during the Second World War. Mr. Oberlander, it was said, had concealed his "membership in the German *Sicherheitspolizei und SD* and *Einsatzkommando 10A* during the Second World War and [his] participation in the executions of civilians during that period of time"; Mr. Dueck his "membership in the Selidovka district (*ralon*) police in German occupied Ukraine during the period 1941 to 1943, and [his] participation in the executions of civilians and

prisoners-of-war during that time”; and Mr. Tobiaß his “membership in the *lettische Sicherheitshilfspolizei* (commonly known as the *Arajs Kommando*) subordinate to the German *Sicherheitspolizei und SD* during the period 1941 to 1943 in German occupied Latvia and [his] participation in the executions of civilians during that time and [his] membership in the *Waffen SS* during the period 1943 to 1945”.

5 As they were entitled to do under s. 18(1)(a) of the *Citizenship Act*, R.S.C., 1985, c. C-29, the appellants asked the Minister to refer their cases to the Federal Court -- Trial Division. By May 1, 1995, the Minister had referred all three cases to the court.

6 There then followed many procedural disputes. In May of 1995, the respondent sought directions from the court about the procedure to be followed and the appellants sought disclosure of the respondent’s case. On June 30, 1995, the respondent’s motions for directions came on for hearing before Jerome A.C.J. During the initial hearing, counsel for the appellants raised many preliminary issues. The Associate Chief Justice ordered the three cases joined for purposes of resolving the preliminary issues and he set a timetable for the filing of arguments in relation to them.

7 Throughout the summer of 1995, the appellants sought disclosure of documents that they judged to be relevant to their preliminary motions. In addition, they pressed the respondent to produce the details of the case against them. On August 25, 1995, Mr. Christopher Amerasinghe, who was counsel for the respondent at the time, informed counsel for the appellant Dueck that many of the relevant documents were in the process of being translated and so were unavailable.

8 On October 4, 1995, Jerome A.C.J. telephoned the parties to schedule the argument of the preliminary motions. Mr. Amerasinghe indicated that he intended to claim that certain documents sought by the appellants were privileged. The parties agreed that the questions of disclosure and privilege had to be settled before the cases could proceed. The Associate Chief Justice chose December 12, 1995 as the date upon which he would hear argument concerning those questions. Mr. Amerasinghe agreed that December 12 was “a reasonable date as scheduling goes in courts in Toronto”.

9 In November, the respondent released some documents to the appellants but withheld others. On December 12, 1995, counsel for the appellant Dueck argued for the whole day. At the end of the day, the matter was set over for continuation.

10 On January 10, 1996, the Federal Court -- Trial Division advised the parties that May 15 and 16, 1996 had been set aside for the completion of the argument that had begun on December 12, 1995. Less than a week later, Mr. Amerasinghe wrote to the Court Administrator to protest the May dates. In the letter, a copy of which he sent to counsel for the appellants, Mr. Amerasinghe pointed out that many of the proposed witnesses were of “advanced age” and “frail in health”. He complained in strong terms about the slow progress of the cases.

11 On February 19, 1996, the parties and the Associate Chief Justice participated in a teleconference. Mr. Amerasinghe repeated the points he had made earlier in his letter to the Court Administrator and offered to make submissions in writing in order to expedite the resolution of the preliminary issues. The Associate Chief Justice decided that he wished to have oral submissions. He confirmed that the oral argument would take place on May 15 and 16, 1996.

The events that form the heart of this appeal took place on March 1, 1996. On that day, Mr. Ted Thompson, who was the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met with Isaac C.J. of the Federal Court. The two men discussed the scheduling of the appellants' cases and later that day exchanged letters, neither of which was copied to any of the counsel for the appellants. The letters read as follows:

March 1, 1996

HAND DELIVERED

The Honourable Chief Justice J. A. Isaac
Federal Court of Canada
Supreme Court of Canada Building
Ottawa, Ontario
K1A 0H9

Dear Chief Justice Isaac:

Re: Erichs Tobias, T-569-95, Helmut Oberlander, T-866-95 and Johann Dueck, T-938-95

Further to our meeting of this morning in which I advised you that the Attorney General of Canada is being asked to consider taking a Reference to the Supreme Court of Canada to determine some preliminary points of law primarily because the Federal Court Trial Division is unable or unwilling to proceed with the subject cases expeditiously.

Notices of Intention to revoke the citizenship of the above-named individuals were sent out in January of 1995. They were persons who had been investigated in connection with allegations of war crimes and crimes against humanity during the second world war. Over the course of the next three months the cases were referred to the Federal Court. After complying with the requirements of Rule 920, Motions were brought requesting directions from the Court regarding discovery of evidence and taking evidence on commission. The Motions were filed April 13th (Tobias), May 11th (Oberlander) and May 18th (Dueck), 1995 respectively. These Motions were necessary as there are no procedural rules governing these proceedings. We suggested the procedure followed in the *Luitjens* case be followed. Our Motion was originally set down for argument on June 30, 1995. Associate Chief Justice Jerome had become seized of the three cases and determined to hear all preliminary motions regarding them. On June 30th, counsel for Dueck argued that the three cases should be joined and also indicated that he wished to bring a Motion to stay the proceedings for abuse of process. Jerome, A.C.J. joined the three cases and granted adjournments over the objections of our counsel. September 15, 1995 was set as the date for the filing of facta and in a tele-conference call on October 4, 1995 he set December 12, 1995 as the date on which argument was to be heard.

On December 12th, counsel for Dueck was permitted to argue all day and it was necessary to set the matter over for continuation. Jerome, A.C.J. indicated that the continuing date would be in February of 1996 despite our request for an earlier date and having regard to the fact that counsel for Dueck was available in early January. The Court declined to fix a date for continuation while all parties were present. When our counsel called the Court in January of 1996 requesting a date for continuation, he was advised several days later that argument had been set down for May 15th and

16th. We wrote the Court expressing concern about the long day [*sic*] and the urgency of proceeding with this matter. We suggested concluding the argument by written submissions. Counsel for Mr. Dueck objected and Jerome, A.C.J. indicated that even with written submissions he would want oral argument and on February 18th via tele-conference with all parties he ordered that the dates of May 15 and 16 stand.

There are likely to be approximately 12 similar cases brought to the Federal Court with as many as 6 persons being given notice during the course of this year.

We are very concerned if these cases are not dealt with expeditiously they will never be heard on their merits. A crucial witness on the *Tobiass* case has cancer and may not be able to testify. In the *Dueck* case one key witness has died, one is in hospital and two others are so ill that they are unable to travel. Our counsel has estimated that at the current pace of proceeding and considering appeals in respect to interlocutory matters it will be years before these matters can be heard on their merits.

As you know, there is great public interest in seeing these cases disposed of on their merits and the potential for embarrassment is very high should it be seen that the Justice system is unable to respond to these urgent cases in a timely way.

I would appreciate any assistance you can offer.

Yours very truly,

J. E. Thompson
Assistant Deputy Attorney General
Civil Litigation
[Phone numbers]

By Hand

Mr. J. E. (Ted) Thompson, Q.C.

Assistant Deputy Attorney General
Civil Litigation Section
Department of Justice
Ottawa K1A 0H8

Dear Mr. Thompson:

Re: Erichs Tobiass T-569-95, Helmut Oberlander T-866-95 and
Johann Dueck T-938-95

I refer to our discussions this morning and to your subsequent letter concerning these matters.

I have discussed your concerns with the Associate Chief Justice and, like me, he is prepared to take all reasonable steps possible to avoid a Reference to the Supreme Court of Canada on these matters.

The Associate Chief Justice has informed me that there are now before the Court five citizenship revocation cases -- the three mentioned in your letter which are being dealt with by Mr. Amerasinghe and, two earlier ones: one is being dealt with by Ms. Charlotte Bell (*Khalil*) and the other by Mr. Amerasinghe (*Nemsila*). The Associate Chief Justice has heard all of the evidence and argument in *Nemsila* but he had been asked by counsel for *Nemsila* to defer judgment in that case until *Khalil* has been concluded. Argument has commenced in that latter case and has been adjourned to 29 April for continuation.

In light of the concerns expressed in your letter the Associate Chief Justice will meet with Ms. Bell and, Ms. Jackman who appears for the Respondent, early next week to fix an early date for final argument. If an early date cannot be fixed he will give judgment in *Nemsila* and then deal with *Khalil* at the earliest possible date.

As regards the three cases about which you wrote, the Associate Chief Justice says firstly, that he did not fully appreciate until he read your letter, the urgency of dealing with these matters as expeditiously as the Government would like. However, now that he is aware he will devote one week from 15 May to deal with these cases not only with respect to the preliminary points but also with respect to the merits. Finally, he has authorized me to say that additional cases of this class coming into the Court will be given the highest priority in light of the concerns expressed in your letter.

Yours truly,

Julius A. Isaac

c.c.-- The Hon. James A. Jerome
Associate Chief Justice

13 On March 7, 1996, the respondent provided copies of these letters to the appellants. In the cover letter, Mr. Amerasinghe explained that Mr. Thompson had approached the Chief Justice at the beginning of March to discuss the conduct of citizenship revocation cases generally and had, in the course of the meeting, happened to mention the appellants' cases.

14 On April 2, 1996, counsel for the appellants Dueck and Oberlander requested disclosure of all documents that related directly or indirectly to the meeting that took place on March 1, 1996. Mr. Amerasinghe answered the next day that "there is no other correspondence between Mr. Thompson and the Chief Justice relating to this matter". No disclosure was made of any documents besides the letters themselves.

15 On April 10, 1996, the Court Administrator informed counsel that the Associate Chief Justice would hear argument concerning preliminary motions on May 15 and 16, 1996, and if

necessary during the following week. The Associate Chief Justice also sent word that he intended to be done with the cases by July of 1996.

16 On April 23, 1996, counsel for the appellants advised the court that they would move for a stay of proceedings on the ground that Mr. Thompson and Isaac C.J. had interfered with the independence of Jerome A.C.J. On April 30, counsel for the appellants Dueck and Oberlander indicated that they would be content to have the Associate Chief Justice remain in charge of the cases. Counsel for the appellant Tobiass had nothing to say on the subject, though he had indicated earlier that he would not object to having the Associate Chief Justice remain to settle the preliminary motions.

17 On May 6, the Associate Chief Justice recused himself. He directed that the appellants' cases should go forward under a new judge on May 15, 1996 and indicated that the new judge's list would be cleared to permit him to deal expeditiously with any remaining questions that the cases might pose.

B. Further Evidence

18 On May 5, 1997, this Court ordered the respondent to produce "[t]he internal Department of Justice documents concerning the fact[s] referred to" in a report prepared for the Government by former Chief Justice of the Ontario Court of Appeal, the Honourable Charles Dubin. On May 22, the Court ordered the respondent to comply fully with the order of May 5. In response to the two orders, the respondent disclosed many internal documents.

19 The following emerges from these documents.

20 Counsel for the respondent objected strongly to the Associate Chief Justice's management of the appellants' cases. It appears that Mr. Amerasinghe had concluded as early as December 14, 1995 that the Associate Chief Justice was a "problematic" judge.

21 On February 27, 1996, the Department of Justice's Litigation Committee decided that "our only option in the circumstances [i.e. in response to delay in the Federal Court -- Trial Division] appears to be a reference to the Supreme Court of Canada of the preliminary questions that have been raised". Mr. Thompson seems not to have been present during the discussion. A reference in a subsequent memorandum reveals that "the Litigation Committee at its meeting on February 27, 1996, specifically recommended that no one should approach the Chief Justice to apprise him of the government's intention to refer certain questions to the Supreme Court".

22 On March 1, 1996, Mr. Amerasinghe made the following note of a telephone conversation between himself and Mr. Thompson:

J.E.T. [J. Edward (Ted) Thompson] Called and informed me he had met with Isaac who told him that he would get Jerome to recuse himself from the cases and would put an efficient judge to deal quickly with the cases. Isaac had said he would ensure any appeals would be dealt with speedily.

According to Mr. Amerasinghe, later that same day the Chief Justice dined at Mr. Thompson's home.

23 More than two months after the meeting between Mr. Thompson and the Chief Justice took place, Mr. Amerasinghe recorded his suspicion that Mr. Thompson's real intention in

approaching the Chief Justice had been to protect a friend from the embarrassment of a reference to the Supreme Court. Indeed, Mr. Amerasinghe indicated that Mr. Thompson and the Chief Justice were friends and frequent interlocutors. According to Mr. Amerasinghe's report, the Chief Justice invited Mr. Thompson to inform him of perceived problems with the administration of the Federal Court, and Mr. Thompson obliged.

II. Judgments in Appeal

A. *Trial Division*, [1996 CanLII 4077 \(FC\)](#), [1996] 2 F.C. 729

24 On the strength of the letters exchanged by Mr. Thompson and the Chief Justice on March 1, 1996, Cullen J. concluded that irreparable harm had been done to the appearance of judicial impartiality. He entered a stay of proceedings.

25 Cullen J. thought that a reasonable observer presented with the letters of March 1, 1996 might conclude that, as a result of the meeting between Mr. Thompson and the Chief Justice, pressure was brought to bear on the Associate Chief Justice to hurry the appellants' cases along, quite possibly to the appellants' detriment. In this way damage was done to the appearance of judicial independence.

26 Because it was the Chief Justice who intervened, and the Chief Justice enjoys some authority over the entire court, Cullen J. thought that a reasonable observer would worry that the independence of all the judges and not only of the Associate Chief Justice had been compromised.

27 Having concluded that the appearance of judicial independence had suffered, Cullen J. considered whether a stay of proceedings was the appropriate remedy. He concluded that no remedy other than a stay of proceedings would cure the wrong done to the appearance of judicial independence. A less radical remedy would only “weaken judicial independence and leave the impression that transgressions of the Court’s integrity may be reprimanded but, ultimately, will be forgotten” (p. 748).

B. *Federal Court of Appeal*

28 The respondent purported to appeal Cullen J.’s decision.

(i) Motion to Quash for Want of Jurisdiction

29 The appellants moved to quash the appeal for want of jurisdiction. They argued that s. 18(3) of the *Citizenship Act* placed Cullen J.’s decision to stay the proceedings beyond appeal. The court dismissed the motion over Pratte J.A.’s dissent: (1996), 208 N.R. 49.

(a) *Marceau J.A.*

30 Marceau J.A. held that Cullen J.’s decision was capable of appeal. He concluded that s. 18(3) bars appeal only of decisions that a person has or has not obtained citizenship by impermissible means. He agreed (at p. 53) that the bar extends also to “all interlocutory rulings and decisions made with a view to ultimately coming to” a decision on the merits. However, he thought that the decision to enter a stay of proceedings did not come within the bar, because such a decision is neither a decision on the merits nor a decision made with a view to coming to a decision on the merits.

(b) *Stone J.A.*

31 Stone J.A. read s. 18(3) of the *Citizenship Act* as barring appeal only of decisions made under s. 18(1). Section 18(3), he argued, does not bar appeal of decisions made under other provisions of the *Citizenship Act* or under other Acts of Parliament. Because Cullen J. entered the stay using a power given by s. 50(1) of the *Federal Court Act*, R.S.C., 1985, c. F-7, s. 18(3) of the *Citizenship Act* did not bar an appeal of it.

(c) *Pratte J.A. (dissenting)*

32 Pratte J.A. interpreted s. 18(3) as barring appeal not only of a final decision on the merits of a citizenship reference but also of “the myriad of decisions that the Trial Division may make in the course of the reference including . . . a decision granting or refusing a stay of the reference proceedings” (p. 52). He judged that any other reading of the provision would lead to absurdities.

(ii) Stay of Proceedings

33 Having decided that it had jurisdiction to consider the appeal, the court unanimously set aside the stay of proceedings: 1997 CanLII 6328 (FCA), [1997] 1 F.C. 828. Each judge offered his own reasons for doing so.

34 Marceau J.A. concluded that the Associate Chief Justice had retained his judicial independence throughout the period in question. He noted that it is part of the role of a chief justice to manage his or her court. A chief justice must ensure that the court provides “timely justice”. Therefore, when a chief justice learns, by whatever means, that the pace of a proceeding is abnormally slow, he or she has a positive duty to investigate, though care must be taken not to interfere with the adjudicative functions of the presiding judge. In the light of this understanding of the role of a chief justice, Marceau J.A. could find no evidence to support the conclusion that the Chief Justice had done anything improper in approaching the Associate Chief Justice to discuss the pace of the appellants’ case.

35 Marceau J.A. likewise concluded that the appearance of judicial independence had not suffered as a result of the Chief Justice’s intervention with the Associate Chief Justice.

36 Although in Marceau J.A.’s view there had been no affront to judicial independence, he nevertheless considered whether, if there had been an affront, a stay of proceedings would have been the appropriate remedy. He concluded that it would not have been.

37 The question, in Marceau J.A.’s mind, was whether going ahead with the proceedings would perpetuate the appearance of impropriety. The inquiry was forward-looking. What happened in the past could not justify a stay unless its ill effects were likely to persist. Marceau J.A. concluded that if the proceedings were to go ahead under some other judge, the appearance of an affront to judicial independence would be dispelled. It was quite unreasonable to suppose, as Cullen J. did, that the entire bench of the Trial Division had been tainted.

38 Because he concluded that Cullen J. had exercised his discretion to grant a stay on the basis of a mistaken understanding of the governing principles, Marceau J.A. held that the stay should be set aside.

(b) *Pratte J.A.*

39 Pratte J.A. wrote only to add two observations to Marceau J.A.'s reasons. The first was that no reasonable person would ever conclude from the Chief Justice's intervention in the appellants' cases that the independence of every member of the Trial Division had been compromised. The second was that Cullen J. was wrong to conclude that there was nothing unusually slow about the pace of the proceedings. The pace of the proceedings before the Associate Chief Justice "had been so slow as to certainly give rise to a suspicion that justice was not rendered with reasonable diligence" (p. 835). Thus, when the Chief Justice learned of the situation, regardless of how the information came to him, he was "duty bound to intervene".

(c) *Stone J.A.*

40 Although concurring with his colleagues, Stone J.A. took an approach slightly different from theirs. He agreed with them there was "nothing in the record to suggest that the motivation for the meeting with and the letter to the Chief Justice was other than to convey the concern of a party for perceived delay in the progress of the cases in view of the age and state of health of the respondents and of potential witnesses" (p. 867). However, he believed that the appearance of judicial independence had suffered as a result of the events of March 1, 1996.

41 Having found some apprehension of bias, Stone J.A. had to consider what the appropriate remedy might be. He was not persuaded that what he had before him amounted to one of the “clearest of cases”, in which a stay of proceedings was warranted. Although what transpired was improper, there was no evidence that either Mr. Thompson or the Chief Justice had acted in bad faith. Stone J.A. agreed with Marceau J.A. that the lesser remedy of a new proceeding before a new judge would sufficiently answer any affront that the appearance of judicial independence had suffered.

III. Issues

42 This appeal presents three issues. The first is whether an appeal lies from a decision of a judge of the Trial Division to grant a stay of proceedings in a citizenship revocation proceeding commenced under s. 18(1) of the *Citizenship Act*. The second is whether judicial independence, or the appearance of it, suffered as a result of the meeting between Mr. Thompson and Isaac C.J. The third is whether, if any damage was done to the appearance of judicial independence, the trial judge properly exercised his discretion to enter a stay of proceedings.

IV. Analysis

43 We conclude that an appeal lies from a decision of the Trial Division to grant a stay of proceedings in a case such as this one. We further conclude that the appearance, but not the fact, of judicial independence suffered as a result of the meeting between Mr. Thompson and the Chief Justice, but that a stay of proceedings is not the appropriate remedy.

A. Jurisdiction

44 The appellants contend that, in light of s. 18(3) of the *Citizenship Act*, Cullen J.'s order was final and could not be appealed either to the Federal Court of Appeal or to this Court. To properly assess the merits of this submission, the interplay between s. 18 of the *Citizenship Act* and ss. 27 and 50 of the *Federal Court Act* must be considered.

45 Section 18 of the *Citizenship Act* provides that:

18. (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and

(a) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or

(b) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

...

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom. [Emphasis added.]

Section 2 of the same Act makes it clear that the “Court” referred to in s. 18 is the Federal Court -- Trial Division.

46 Sections 27 and 50 of the *Federal Court Act* provide that:

27. (1) An appeal lies to the Federal Court of Appeal from any

(a) final judgment,

- (b) judgment on a question of law determined before trial,
- (c) interlocutory judgment, or
- (d) determination on a reference made by a federal board, commission or other tribunal or the Attorney General of Canada,

of the Trial Division.

50. (1) The Court may, in its discretion, stay proceedings in any cause or matter,

. . .

- (b) where for any . . . reason it is in the interest of justice that the proceedings be stayed.

47 Section 27 of the *Federal Court Act* provides a general right of appeal from final and interlocutory judgments of the Federal Court -- Trial Division. Section 18(3) of the *Citizenship Act*, however, provides that “notwithstanding any other Act of Parliament”, no appeal lies from any decision of the Federal Court -- Trial Division made “under” s. 18(1). Thus, s. 18(3) of the *Citizenship Act* effectively removes the general right of appeal set out at s. 27 of the *Federal Court Act* with respect to all decisions made “under” s. 18(1).

48 No doubt Parliament may validly limit the jurisdiction of the Federal Court of Appeal in this manner. As this Court held in *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 S.C.R. 322, at p. 331, “the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts”. See also: *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*, 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752, at p. 766; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, 1976 CanLII 10 (SCC), [1977] 2 S.C.R. 1054; and *McNamara Construction (Western) Ltd. v. The Queen*, 1977 CanLII 13 (SCC), [1977] 2 S.C.R. 654. There is no appeal to the Federal Court of Appeal save in those circumstances specifically provided by statute.

49 Nevertheless, during the oral hearing and in the submissions made subsequently, some doubt was expressed as to whether s. 18(3) of the *Citizenship Act* had the effect of ousting the jurisdiction conferred upon this Court by s. 40 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (assuming without deciding that this provision would otherwise apply). Furthermore, it was suggested that, if s. 18(3) had such an effect, s. 7 of the *Canadian Charter of Rights and Freedoms* may be the source of a right of appeal directly to this Court in certain circumstances. However, in light of the conclusion reached as to the interpretation of s. 18(3) of the *Citizenship Act*, it will not be necessary to address these issues.

50 We agree with the conclusion of the Federal Court of Appeal that the stay of proceedings ordered by Cullen J. was not a decision made “under” s. 18(1) of the *Citizenship Act*. Section 18(3) of the *Citizenship Act* therefore does not apply to it and an appeal lies to the Federal Court of Appeal pursuant to s. 27 of the *Federal Court Act*.

51 This conclusion flows from the wording of s. 18. Section 18(1) refers to a very particular kind of decision: a decision as to whether a person “has obtained, retained, renounced or resumed citizenship” by false pretences. However, a stay of proceedings is entered for reasons which are completely unrelated to the circumstances surrounding the obtaining, retaining, renouncing or resuming of citizenship. Indeed, a decision to order (or not to order) a stay of proceedings is different from the type of determination that the Court is called upon to make under subsection 18(1).

52 This point was recognized by the Federal Court of Appeal in *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149, where it was held that a decision under s. 18(1) of

the *Citizenship Act* is not a “final judgment” of the Federal Court -- Trial Division for the purposes of s. 27 of the *Federal Court Act* (at p. 152):

. . . there is no conflict at all between s. 18(3) and s. 27(1). First, this decision is not a “final judgment” of the court, nor is it an “interlocutory judgment”. Although the decision followed a hearing at which much evidence was adduced, it was merely a finding of fact by the court, which was to form the basis of a report by the minister and, eventually, a decision by the Governor in Council, as described by ss. 10 and 18(1). The decision did not finally determine any legal rights.

53 By way of contrast, a stay of proceedings is most definitely a “final judgment” of the Federal Court -- Trial Division. It has the effect of permanently bringing the proceedings to an end. It is a decision made under s. 50 of the *Federal Court Act* and not under s. 18(1) of the *Citizenship Act*.

54 It may be argued that a literal interpretation of s. 18(1) leads to the absurd and inequitable result that only a decision that a person obtained citizenship by false pretences would be final and without appeal. The opposite decision, namely that a person did not obtain citizenship by false pretences, could be appealed by the Minister.

55 Yet the language of s. 18(1) of the *Citizenship Act* should not be taken to mean that this subsection encompasses only a positive decision that citizenship was obtained by false pretences. It is true that s. 18(1) provides that the Minister may issue a report under s. 10 only if the court decides that citizenship was in fact obtained by false pretences. However, this language necessarily implies that the court may arrive at the opposite conclusion. Therefore, on its plain meaning, s. 18(1) empowers the Federal Court -- Trial Division to decide whether citizenship was

“obtained, retained, renounced or resumed” by false pretences. Such a decision, be it affirmative or negative, is a decision made “under” s. 18(1). It may not be appealed either by the person who is the subject of the reference or by the Minister.

56 Although the issue does not arise here, there is a great deal of force to the argument that s. 18(1) of the *Citizenship Act* encompasses not only the ultimate decision as to whether citizenship was obtained by false pretences, but also those decisions made during the course of a s. 18 reference which are related to this determination. This would encompass all the interlocutory decisions which the court is empowered to make in the context of a s. 18 reference (see, for instance, s. 46 of the *Federal Court Act* and Rules 5, 450-455, 461, 477, 900-920, 1714 and 1715 of the *Federal Court Rules*, C.R.C., c. 663). This interpretation of s. 18(1) was adopted by the Federal Court of Appeal in *Luitjens, supra*, where it was held that interlocutory decisions made in the context of s. 18(1) reference are decisions made “under” s. 18(1). It is not necessary for the purpose of this decision to determine whether this conclusion should be varied. That should only be done in an appeal where the issue arises from the facts.

57 However, whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings.

58 Unlike interlocutory decisions, a stay of proceedings will not be made in order to more efficiently determine the ultimate question of whether citizenship was obtained by false pretences. An order staying proceedings is therefore not related to this ultimate decision.

Furthermore, it may be that allowing appeals from interlocutory decisions made in the context of a s. 18 reference would effectively defeat Parliament's goal of finality in citizenship matters. As McLachlin J. observed in *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577, there is a valid policy concern to control the "plethora of interlocutory appeals and the delays which inevitably flow from them" (p. 641). This same concern will not, however, generally apply to orders staying proceedings. Stays of proceedings are granted but rarely and only in the "clearest of cases". They are granted for reasons unrelated to the merits of the s. 18 reference and are usually divorced from the "citizenship" context of the reference. Allowing appeals from stays of proceedings would therefore not seriously threaten the goal of finality in citizenship matters.

It should be noted that, even if s. 18(1) of the *Citizenship Act* were to be interpreted as encompassing not only the final determination as to whether citizenship was obtained by false pretences but also any decisions related to this determination, an exception should be made for a decision to deny a motion for a stay of proceedings. It is arguable that a decision denying a stay of proceedings is "related" to the question of whether citizenship was obtained by false pretences insofar as it has the effect of allowing the inquiry on the merits to proceed. However, it would appear to be fundamentally unfair, and contrary to the rules of natural justice, to allow appeals to be taken from a decision to order a stay of proceedings but not from a decision refusing to order a stay. Such a result could not have been intended by Parliament.

It follows that a decision allowing or denying a motion for a stay of proceedings is not a decision made "under" s. 18(1). It is a decision made under s. 50 of the *Federal Court Act* and may be appealed according to the rules set out at s. 27 of that Act. The appellants contend that this is at odds with the principles set out in *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128. They argue that the better interpretation of s. 18 of the *Citizenship Act* is that all decisions made in the context of a s. 18 reference, be they final or interlocutory, "on the merits" or

procedural, should be considered to have been made “under” s. 18(1) and therefore are subject to s. 18(3).

62 At issue in *Jewitt* was s. 605(1)(a) (now s. 676(1)(a)) of the *Criminal Code* which provided for a right of appeal by the Crown “against a judgment or verdict of acquittal” in certain circumstances. It was held that any order of the Court, regardless of the terminology used, which effectively brings proceedings to a final conclusion in favour of the accused is tantamount to a verdict of acquittal for the purposes of appeal. Such an order includes a stay of proceedings.

63 The appellants contend that if, in the criminal law context, a stay of proceedings is for the purposes of appeal tantamount to a decision on the merits, there is no reason for holding that it is not tantamount to a decision as to whether citizenship was obtained by false pretences under s. 18(1) of the *Citizenship Act*. The principle underlying *Jewitt*, it is argued, is that substance ought to triumph over form. If the order has the effect of bringing the proceedings to a close, it should, for the purposes of appeal, be considered a decision on the merits in favour of the person against whom the proceedings were instituted.

64 On their face the reasons in *Jewitt* appear to be compelling authority in favour of the appellants’ position. However, *Jewitt* must be read in light of the more recent judgment of *R. v. Hinse*, 1995 CanLII 54 (SCC), [1995] 4 S.C.R. 597. There, the accused sought leave to appeal a judgment of the court of appeal setting aside his conviction and entering a stay of proceedings. The issue was whether such a judgment is tantamount, for the purposes of appeal, to a judgment setting aside a conviction and entering a verdict of acquittal or ordering a new trial. The majority of this Court held that it was not.

The statutory basis of the court of appeal's power to order a stay of proceedings was held to be not s. 686(2) of the *Criminal Code* (which empowers the court to set aside a conviction and from which no appeal by the accused lies), but s. 686(8) (which empowers the court to make ancillary orders). Furthermore, it was held that, as an order made under s. 686(8) of the *Criminal Code*, a stay of proceedings does not represent "a functionally integral part of a 'judgment . . . setting aside or affirming a conviction' " (p. 626). Rather, it was held that "an order rendered under s. 686(8) represents a separate, divisible judicial act from which the accused or the Crown may independently seek leave to appeal under s. 40(1) of the *Supreme Court Act*" (p. 626). On this point, Lamer C.J. held, at pp. 619-20, that:

The power of an appellate court to impose a stay of criminal proceedings, similar to a trial court, derives its origin from the inherent jurisdiction of a superior court of record at common law. But given the breadth of the language of the residual order provision, I believe that the concrete exercise of that inherent power necessarily manifests itself through the statutory font of s. 686(8). . . . While the power of a court of appeal to order a stay of proceedings for abuse of process traces its origins to the common law, the actual exercise of that authority inevitably carries a statutory gloss by virtue of s. 686(8) of the *Criminal Code*. . . .

But while an appellate court's power to direct a stay of criminal proceedings ought to be properly understood as an exercise of its authority to enter an order under s. 686(8) of the *Code*, an order under s. 686(8) nonetheless represents a fundamentally distinct judicial order from an order for a new trial in accordance with s. 686(2)(b) within the structure of the appeals regime of the *Criminal Code*. As such, I do not believe that both types of orders are necessarily jointly excluded from this Court's general jurisdiction to grant leave by virtue of s. 40(3) of the *Supreme Court Act*.
[Emphasis added.]

This reasoning applies with equal force in the context of the *Citizenship Act*. The power to order a stay does not flow by necessary implication from the power to decide if citizenship was obtained by false pretences, set out at s. 18(1). Rather, it is a power which not only has its source in a different statutory provision (s. 50 of the *Federal Court Act*) but is also

unrelated to the power set out at s. 18(1). To borrow the words of Lamer C.J. in *Hinse*, it is a “separate, divisible judicial act” (p. 626). Appeals from a decision to stay proceedings (or to refuse to enter a stay) should therefore be governed by the rules applicable to the statutory provision empowering the court to make this decision. Those rules are set out at s. 27 of the *Federal Court Act* and they provide expressly for a right of appeal. It follows that the Court of Appeal had jurisdiction to hear the Crown’s appeal in this case.

B. *Judicial Independence*

67 We conclude that the meeting between Mr. Thompson and Isaac C.J. and the subsequent conduct of officials of the Department of Justice did indeed cause damage to the appearance of judicial independence. The question remains as to the extent of that damage and how it should be weighed in considering whether a stay should be granted in these significant and important proceedings.

68 The independence of judges has two aspects: an institutional aspect and a personal aspect. As Le Dain J. wrote in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at p. 691:

. . . the word “independent” in s. 11(d) of the *Charter* is to be understood as referring to the status or relationship of judicial independence as well as to the state of mind or attitude of the tribunal in the actual exercise of its judicial function.

The parties agree that it is the personal aspect of judicial independence -- what is sometimes called “impartiality” -- that is at issue here. No one alleges, and indeed there is no credible evidence to suggest, that the integrity of the Federal Court as an institution has been compromised.

69 Though it is very important that the judiciary should actually remain independent, it is equally important that the judiciary should be seen to be independent. In our view, there is not sufficient evidence to support the conclusion that the Chief Justice and the Associate Chief Justice did not in fact remain independent. However, the evidence does compel us to conclude that the appearance of judicial independence suffered significantly as a result of what happened on March 1, 1996.

70 The test for determining whether the appearance of judicial independence has been maintained is an objective one. The question is whether a well-informed and reasonable observer would perceive that judicial independence has been compromised. As Lamer C.J. wrote in *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, at p. 139, “[t]he overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality”.

71 The essence of judicial independence is freedom from outside interference. Dickson C.J., in *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, described the concept in these words, at p. 69:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

72 What emerges from all of this is a simple test for determining whether the appearance of judicial independence has been maintained: whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges.

73 There are many principles of professional conduct that must be observed in order to maintain the appearance of judicial independence. Two of these are particularly relevant here.

74 First, and as a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. See the Honourable J. O. Wilson, *A Book for Judges* (1980), at p. 52. The meeting between Mr. Thompson and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, and this despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases.

75 Second, and again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of Mr. Thompson. We agree with Pratte J.A. that a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness. Yet, the actions of Isaac C.J. were more in the nature of a response to a party rather than to a problem. Thus, an action that might have been innocuous and even obligatory under other circumstances acquired an air of impropriety as a result of the events that preceded it. Quite simply, it was inappropriate.

In similar fashion, by responding as he did to the Chief Justice's intervention without the participation of counsel for the appellants, Jerome A.C.J. acted inappropriately. We believe that there is ample evidence that might lead a reasonable observer to conclude that the Associate Chief Justice was not able to conduct the appellants' cases free from the interference of the federal Department of Justice and of the Chief Justice of his court. Before March 1, 1996, the Associate Chief Justice was content with the pace at which the appellants' cases were advancing through his court. Indeed, even after Mr. Amerasinghe wrote to the Court Administrator to complain about the slow pace of the proceedings, the Associate Chief Justice resolved not to expedite consideration of the preliminary motions. Instead, he insisted on hearing oral argument according to the original, exceedingly dilatory schedule. It was only after the March 1, 1996 meeting between Mr. Thompson and the Chief Justice that Jerome A.C.J. acquired an appreciation of the Government's position. In his letter of March 1, 1996, the Chief Justice wrote:

As regards the three cases about which you wrote, the Associate Chief Justice says firstly, that he did not fully appreciate until he read your letter, the urgency of dealing with these matters as expeditiously as the Government would like. However, now that he is aware he will devote one week from 15 May to deal with these cases not only with respect to the preliminary points but also with respect to the merits. Finally, he has authorized me to say that additional cases of this class coming into the Court will be given the highest priority in light of the concerns expressed in your letter.
[Emphasis added.]

Subsequent developments confirmed that the Associate Chief Justice had indeed finally received the Government's message. On April 10, 1996, the Associate Chief Justice retreated from his earlier position and announced that he would set aside sufficient time in May to dispose of all the preliminary issues in the appellants' cases. He also indicated that he would bring the cases to a final conclusion by July.

78 We do not see how a reasonable observer could fail at least to wonder whether the Government, through Mr. Thompson, had succeeded in influencing the Associate Chief Justice to take a position more favourable to the Government's interests than he would otherwise have done. Making this conclusion even more likely is the undertaking of the Chief Justice and the Associate Chief Justice to Mr. Thompson that all reasonable steps would be taken to avoid a reference to the Supreme Court of Canada.

79 The respondent tries to resist this conclusion by saying that the impetus to efficiency came not from Mr. Thompson and the Government but from the Chief Justice. The Chief Justice, the respondent says, was duty-bound to look into what was, by any objective standard, a serious delay in proceedings in his court. The respondent thus offers the Chief Justice as a kind of *novus actus interveniens* who stands between the Government and the Associate Chief Justice and, by the propriety of his own intentions, severs what would otherwise be an improper link between them.

80 What the respondent's submission overlooks is that the Chief Justice was not able to exercise his administrative function entirely free from outside interference. Mr. Thompson approached the Chief Justice and told him that if the Associate Chief Justice did not pick up the pace, the Federal Court would face the embarrassment of having the Government go "over its head" to this Court. The Chief Justice's letter to Mr. Thompson suggests that this "threat" carried some weight with him and with the Associate Chief Justice as well:

I have discussed your concerns with the Associate Chief Justice and, like me, he is prepared to take all reasonable steps possible to avoid a Reference to the Supreme Court of Canada on these matters.

It is reasonable to suppose that the threat of appeal to a higher authority influenced the Chief Justice and Associate Chief Justice to act in a way that would otherwise have been unpalatable to them. In this we agree entirely with Stone J.A., who found that “an informed person would conclude that this decision, by which the hearing of all preliminary motions and the trials would be compressed into a relatively short time frame, would redound to the disadvantage of the individual respondents [now appellants] and was taken so as ‘to avoid’ a reference to the Supreme Court” (p. 868). To interfere with the scheduling of cases because of delay is one thing but to pledge to take all reasonable steps to avoid a reference to the Supreme Court of Canada is quite another. It is wrong and improper for a judge to give such an undertaking. What is pertinent is to avoid delays, not to avoid appeals or recourse to higher courts.

81 However, the respondent is quite right to observe that the delay in the Federal Court -- Trial Division was inordinate and arguably inexcusable, and posed a real problem for the Department of Justice and for the Chief Justice. The fact is that in the space of a year, the Associate Chief Justice heard only one day of argument, and that on a preliminary motion. In our view, the Associate Chief Justice’s dilatoriness defies explanation. The appellants attempt nevertheless to explain it, saying that the Associate Chief Justice had reason to delay the proceedings until judgment had been given by himself in a case called *Nemsila*, which might have cast some light on citizenship revocation cases generally. The Chief Justice for his part mentioned the *Nemsila* case in his letter of March 1, 1996, though he did not attempt to offer it as a justification for delay in the appellants’ cases.

82 However, even accepting that there was reason to await the rendering of judgment in *Nemsila*, the proper procedure would have been to hear argument on the appellants’ motion and, if necessary, to reserve judgment. To call three cases to a halt awaiting the outcome of another case strikes us as a procedure calculated to create unnecessary delay. The appellants also point out that the respondent was not ready to proceed to a hearing on the merits. Apparently the respondent had

not finished translating certain witness statements. But no one has suggested that the matter should have been brought to a conclusion on the merits before May 15, 1996, only that some progress should have been made toward resolving the preliminary questions before that date, and to settle the preliminary questions would not have required that all the witness statements should be available. Therefore, the fact that the respondent was not yet ready to proceed to trial cannot excuse the delay in the Associate Chief Justice's consideration of the preliminary questions.

83 What all this means is that Mr. Thompson went to the Chief Justice with a legitimate grievance. This fact does not excuse what Mr. Thompson did -- he assuredly chose an impermissible means of presenting his grievance -- but it does cast into very real doubt the sinister interpretation that the appellants have attempted to place on his conduct. Given the vexing delay that the respondent had faced in the Trial Division, it is quite understandable that Mr. Thompson would have wished to do something about it. We believe that Mr. Thompson's motives were proper. It was his judgment that is questionable. What Mr. Thompson did was not wicked or done in bad faith. It is enough to say that what he did was inappropriate. As senior counsel in the Department of Justice, he arranged to speak privately -- without opposing counsel present -- to the Chief Justice, concerning cases which were pending. This he should not have done.

84 The appellants suggest that there was a "conspiracy" to have the Associate Chief Justice recuse himself from the cases. Clearly there is insufficient evidence before this Court to dispose of this question fully, and we do not believe that it is crucial to the outcome of this appeal. Still, in our view, to accept that suggestion would stretch the bounds of credulity. Although Mr. Amerasinghe recorded that Mr. Thompson had gotten the Chief Justice to agree to have the Associate Chief Justice recuse himself, the evidence is all inconsistent with the existence of any such agreement. As events developed, the Associate Chief Justice did not recuse himself. Quite the contrary, on April 10, 1996, the Associate Chief Justice indicated that he wished to hear

argument concerning the preliminary motions on May 15 and 16, as previously scheduled. It was only after the appellants indicated that they would seek a stay of proceedings on the ground that the Associate Chief Justice's independence had been compromised that the Associate Chief Justice recused himself. In the light of these events, the only way that the suggestion of a conspiracy can be credited is on the supposition that Mr. Thompson, the Chief Justice, and the Associate Chief Justice orchestrated the whole affair, from the disclosure of the March 1 correspondence through to the appellants' motion for a stay of proceedings. Again, we would emphasize that we lack the evidence necessary to decide this question and do not purport to do so. But that supposition passes all belief. Certainly no reasonable observer, apprised of all the facts, would believe it. Therefore, all that Mr. Amerasinghe's note shows is that Mr. Amerasinghe believed that some arrangement had been made to have the Associate Chief Justice recuse himself. The outcome of this appeal cannot turn on what Mr. Amerasinghe believed.

85 In short, the evidence supports the conclusion that the appearance of judicial independence suffered a serious affront as a result of the March 1, 1996 meeting between Mr. Thompson and Isaac C.J. This affront very seriously compromised the appearance of judicial independence. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of the actors in this drama, nor is there any solid evidence that the independence of the judges in question was actually compromised.

C. The Remedy

86 Although the meeting and subsequent exchange of letters between Mr. Thompson and the Chief Justice were very serious matters that compromised the appearance of the Chief Justice's and the Associate Chief Justice's independence, on balance the damage was not sufficiently serious to warrant the granting of that ultimate remedy of a stay of proceedings. The lesser remedy of

ordering the appellants' cases to proceed before a different judge of the Federal Court -- Trial Division will, together with the additional conditions, suffice.

(i) The Standard of Review

87 A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in *Elsom v. Elsom*, [1989 CanLII 100 \(SCC\)](#), [1989] 1 S.C.R. 1367, at p. 1375:

[A]n appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

See also *R. v. Carosella*, [1997 CanLII 402 \(SCC\)](#), [1997] 1 S.C.R. 80, at para. 48.

(ii) The Legal Principles

88 Though Cullen J. derived his power to enter a stay of proceedings from [s. 50\(1\)\(b\)](#) of the *Federal Court Act* and not from the *Charter* or the common law, the same principles that govern stays of proceedings under the latter heads of power apply equally well here. The “interest of justice” referred to in [s. 50\(1\)\(b\)](#) of the *Federal Court Act* is not fundamentally different from the concerns that animate the jurisprudence developed under [s. 24\(2\)](#) of the *Charter*, although the context in which [s. 50\(1\)\(b\)](#) operates may be different.

Most often a stay of proceedings is sought to remedy some unfairness to the individual that has resulted from state misconduct. However, there is a “residual category” of cases in which a stay may be warranted. L’Heureux-Dubé J. described it this way, in *R. v. O’Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 73:

This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

The residual category, it bears noting, is a small one. In the vast majority of cases, the concern will be about the fairness of the trial.

If it appears that the state has conducted a prosecution in a way that renders the proceedings unfair or is otherwise damaging to the integrity of the judicial system, two criteria must be satisfied before a stay will be appropriate. They are that:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.

(*O’Connor*, *supra*, at para. 75.)

The first criterion is critically important. It reflects the fact that a stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been

done. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole in the future. See *O'Connor*, at para. 82. For this reason, the first criterion must be satisfied even in cases involving conduct that falls into the residual category. See *O'Connor*, at para. 75. The mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. Ordinarily, the latter condition will not be met unless the former is as well -- society will not take umbrage at the carrying forward of a prosecution unless it is likely that some form of misconduct will continue. There may be exceptional cases in which the past misconduct is so egregious that the mere fact of going forward in the light of it will be offensive. But such cases should be relatively very rare.

92 After considering these two requirements, the court may still find it necessary to consider a third factor. As L'Heureux-Dubé J. has written, "where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings": *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667. We take this statement to mean that there may be instances in which it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits. This is not to say, of course, that something akin to an egregious act of misconduct could ever be overtaken by some passing public concern. Rather, it merely recognizes that in certain cases, where it is unclear whether the abuse is sufficient to warrant a stay, a compelling societal interest in having a full hearing could tip the scales in favour of proceeding.

(iii) Application of the Law to the Facts

93 For several reasons, a stay of proceedings is not the appropriate remedy in these cases. First, there is no likelihood that the carrying forward of the cases will manifest, perpetuate or aggravate any abuse. Second, the lesser remedy of ordering the cases to go forward under the supervision of a different judge of the Trial Division without any direction or intervention from the Chief Justice or the Associate Chief Justice will suffice. In this connection, we believe that, if Isaac C.J. or Jerome A.C.J. considered the situation and the possible perception of bias by reasonable observers, they would agree that it would be preferable if they did not participate in any future cases dealing with the same or related issues. Third, Canada's interest in not giving shelter to those who concealed their wartime participation in acts of atrocities outweighs any foreseeable harm that might be done to the appellants or to the integrity of the system by proceeding with the cases. To the extent that he thought otherwise, the trial judge was in error.

(a) *No Likelihood That Any Abuse Will Be Manifested in the Future*

94 Although damage was done to the appearance of judicial independence, there is no indication that it will be manifested, perpetuated or aggravated by any future proceeding. Therefore, a stay of proceedings is not an appropriate remedy.

95 The appellants' best argument is that this case falls into the "residual category" mentioned in *O'Connor* because the state conducted its case against them so unfairly and vexatiously that harm was done to the very integrity of the judicial system. To carry forward in the light of what was done, they submit, would be to condone official misconduct and thereby to aggravate the abuse.

96 The problem with the appellants' submission is that it reflects a misunderstanding of the stay of proceedings as a remedy. When one looks at the criteria identified by L'Heureux-Dubé

J. in *O'Connor, supra*, at para. 75, and the accompanying discussion, what emerges, in our view, are the following propositions. A stay is not a form of punishment. It is not a kind of retribution against the state and it is not a general deterrent. If it is appropriate to use punitive language at all, then probably the best way to describe a stay is as a specific deterrent -- a remedy aimed at preventing the perpetuation or aggravation of a particular abuse. Admittedly, if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice. It is conceivable, we suppose, that something so traumatic could be done to an individual in the course of a proceeding that to continue the prosecution of him, even in an otherwise unexceptionable manner, would be unfair. Similarly, if the authorities were to fabricate and plant evidence at the scene of a crime, the continued pursuit of a criminal prosecution might well be damaging to the integrity of the judicial system.

97 However, the damage that the appearance of judicial independence suffered as a result of the meeting between Mr. Thompson and the Chief Justice was not so serious that to proceed despite it would constitute an abuse. A reasonable, fully-informed member of the public, confronted with a continuation of the proceedings, would not think that an injustice was being perpetuated. Mr. Thompson, the Chief Justice and the Associate Chief Justice acted imprudently, but not to such an extent that they undermined public confidence in the justice system. Nothing was done that could have rendered the proceedings oppressive for the appellants. Undoubtedly, the appellants had a legitimate concern that the judge who had charge of their cases and the Chief Justice had become partial to the state. But that concern had to do only with the particular judges involved and not with the justice system as a whole. Thus it is clear that remedies other than a stay will rectify this unfortunate situation.

98 The appellants further submit that the appearance of judicial partiality will continue in the future if the cases are allowed to proceed. In our view, there is no prospect of judicial partiality in the future. The Chief Justice intervened only with the Associate Chief Justice. His conduct did not compromise the integrity of any other judges. The taint is confined to the Associate Chief Justice and the Chief Justice and can be readily contained.

99 Despite these rather obvious facts, Cullen J. found that a reasonable person would worry that the Chief Justice would exercise an improper influence over any judge appointed to hear the appellants' cases. With respect, we do not agree. His finding rests on an incomplete view of the law. Contrary to public perception, it is clear that a chief justice is only "*primus inter pares* in the court". *Ruffo v. Conseil de la magistrature*, [1995 CanLII 49 \(SCC\)](#), [1995] 4 S.C.R. 267, at para. 59. He or she enjoys no particular authority over other judges, save an administrative one. See *Federal Court Act*, s. 6(1).

100 Any influence that the Chief Justice might have had over the Associate Chief Justice might have been by virtue of some particular quality of their personal relationship. In this respect, we cannot refrain from commenting that the formal structural relationship between the Chief Justice and the Associate Chief Justice is not clear and in the aftermath of these events, perhaps the appropriate authorities might wish to consider the matter further to clarify the situation. But that aside, what happened between the Chief Justice and the Associate Chief Justice should not be taken as a reflection of the institutional relationship between them. A reasonable observer would understand this, and would understand also that the individual judges of the Trial Division "have nothing to gain by not deciding as their consciences dictate and nothing to lose by doing justice": *Ruffo*, *supra*, at para. 101.

101 The sturdy resolve that Cullen J. himself demonstrated in deciding to grant a stay of proceedings was no aberration. It is precisely what any reasonably intelligent person, apprised of the workings of the Federal Court, would expect. However, by failing to credit the reasonable observer with sufficient understanding to recognize what was apparent even in his own conduct, Cullen J. committed an error of law. His exercise of discretion was founded on a misdirection and so cannot be allowed to stand.

102 The decision of this Court in *R. v. Vermette*, [1988 CanLII 87 \(SCC\)](#), [1988] 1 S.C.R. 985, affords a good illustration of the correct approach to problems of apparent partiality. *Vermette* involved certain inflammatory and well-publicized remarks made by the Premier of Quebec about a case that was then before the courts. The trial judge entered a stay of proceedings, in part on the ground that the Premier's remarks had infringed the accused's right to a fair trial by making it unlikely that an impartial panel of jurors could be found. This Court set aside the stay. It held that the trial judge had founded his decision on impermissible speculation. La Forest J., for the majority, observed that there was "no evidence indicating that it will be impossible to select an impartial jury in a reasonable time" (p. 992). He further emphasized that, in the words of the Ontario Court of Appeal, "[t]here is an initial presumption that a juror . . . will perform his duties in accordance with his oath". See *R. v. Hubbert* (1975), [1975 CanLII 53 \(ON CA\)](#), 29 C.C.C. (2d) 279, at p. 289.

103 The same kind of reasoning applies here. It is mere speculation that no impartial judge can be found. There is an initial presumption of fundamental importance that judges will be faithful to their solemn oath of office and not pay heed to any ill-advised interventions of a chief justice whose authority to intervene is limited to administrative matters. This serves as an answer not only to the suggestion that Mr. Thompson and the Chief Justice will persist in their improper behaviour but also to the recent suggestion that Mr. Thompson's interference in the affairs of the Federal Court was more extensive than previously believed. Even if it is true that Mr. Thompson

served as a sort of informer for the Chief Justice, reporting to him on judges whose performance was not acceptable to the federal government, still there is no reason to believe that such chicanery has impaired or will impair the ability of the judges of the Federal Court to function independently and in accordance with their oaths. The judge's oath is a solemn and weighty covenant, not lightly betrayed. Until some evidence appears that the independence of a particular judge may have been compromised, as happened with respect to the Associate Chief Justice as a result of the Chief Justice's letter of March 1, 1996, it remains a matter of speculation that a judge will be anything less than entirely faithful to the office.

(b) *A Lesser Remedy Is Sufficient*

104 For reasons similar to the ones we have already given, the abuse will be sufficiently remedied if we order that the cases against the appellants should go forward under a different judge of the Trial Division. There is every reason to think that the example of independence set by Cullen J. below will be followed by his successor.

105 If any illustration is needed of the sufficiency of a new trial as a remedy for bias, no better one can be found than the recent decision of this Court in *R. v. Latimer*, [1997 CanLII 405 \(SCC\)](#), [1997] 1 S.C.R. 217. In that case, it emerged following the trial that Crown counsel and the police had administered a sort of litmus test to prospective jurors. In particular, they had sought to discover what prospective jurors thought about moral issues that would arise in the course of the trial. Five of the jurors who had been questioned in this way became members of the jury. This Court condemned the actions of Crown counsel as “nothing short of a flagrant abuse of process and interference with the administration of justice” (para. 43).

106 The reasonable inference to be drawn is that if the lesser remedy of a new trial was adequate in *Latimer*, which arguably involved a more serious apprehension of bias than this appeal does, then *a fortiori* it is adequate here.

(c) *Society's Interests Weigh Against a Stay*

107 If we had concluded that having regard to the other factors it was unclear whether the abuse was sufficient to warrant a stay, we would have found that the societal interest in seeing these cases through to their conclusion tips the balance against a stay. The following words of L'Heureux-Dubé J., in *O'Connor*, *supra*, at para. 81, are apt:

. . . in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused.

108 Perhaps the first thing to notice is that what is at stake for the appellants in this case is arguably different from what is at stake for the typical accused in the typical criminal case. The state is trying to deprive the appellants of their citizenship and not of their liberty. Canadian citizenship is undoubtedly a very “valuable privilege” (see *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358, at para. 72). For some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty. Yet for most, liberty is more valuable still. Therefore, the interests on the appellants’ side of the balance do not weigh quite so heavily as they would if the proceedings were purely criminal in nature.

On the other side of the balance, society's interest in having a final decision on the merits is obvious. It is imperative that the truth should come to light. If it is not proven that the appellants did the things they are said to have done, then they will retain their citizenship. But if some or all of the alleged acts are proven then the appropriate action must be taken. What is at stake here, in however small a measure, is Canada's reputation as a responsible member of the community of nations. In our view, this concern is of the highest importance

An ongoing affront to judicial independence may be such that any further proceedings in the case would lack the appearance that justice would be done. In such a case the societal interest would not be served by a decision on the merits that is tainted by an appearance of injustice. The interest in preserving judicial independence will trump any interest in continuing the proceedings. Even in the absence of an ongoing appearance of injustice, the very severity of the interference with judicial independence could weigh so heavily against any societal interest in continuing the proceedings that the balancing process would not be engaged. This would occur rarely and only in the clearest of cases. Neither of these circumstances is present here. We have concluded that continuing the proceedings under the conditions we have outlined will not result in an ongoing appearance of injustice. Moreover, the affronts to judicial independence were serious but not so serious as to warrant a stay without balancing the harm to the image of the justice system against the interest of society in seeing alleged war criminals brought to justice. The crimes involved rank among the most heinous in history, and the civilized world's resolve to apply the appropriate sanctions should not be interfered with lightly. What transpired between Mr. Thompson and the Chief Justice on March 1, 1996 cannot justify such an interference, wrong and improper as it was. If it were established that Mr. Thompson and the Chief Justice had acted in bad faith and not out of a legitimate concern for the expeditious conduct of the appellants' cases, then this might well have constituted one of those rare and clearest of cases. But this was not the case. As matters stand, society's interest in seeing the cases through to their conclusion is of a most pressing nature and outweighs the affront to the appearance of judicial independence.

111 Therefore, the only just decision under the circumstances is that the cases should be allowed to proceed. To paraphrase the remarks of our colleague La Forest J. in *Vermette, supra*, at p. 994, “judicial abdication is not the remedy”. It is in the public interest that allegations of the most wicked kinds of criminal activity should be scrutinized by the judiciary. In all the circumstances, the imprudent actions of Mr. Thompson, the Chief Justice, and the Associate Chief Justice should not be permitted to frustrate the judicial process.

(iv) Conclusion

112 A stay of proceedings should not be granted in this case. Rather, the appropriate remedy is to have the cases against the appellants go forward under the supervision of a judge of the Trial Division, one who has, up to this point, had nothing to do with the affairs that form the subject matter of this appeal. The judge appointed will ignore all directions previously given by the Associate Chief Justice or the Chief Justice in these cases. Isaac C.J. and Jerome A.C.J. should not have anything further to do with these cases.

113 Before we conclude, there is one final matter that bears mentioning. It is this.

114 A well-known rule of Parliamentary practice holds that no Member of the House of Commons should comment upon any matter that is pending before the courts. The following account of what is called the “*sub judice* rule” appears in *Beauchesne’s Rules & Forms of the House of Commons of Canada* (6th ed. 1989), at p. 153 (para. 505):

Members are expected to refrain from discussing matters that are before the courts or tribunals which are courts of records. The purpose of this *sub judice* convention is to protect the parties in a case awaiting or undergoing trial and persons who stand to be affected by the outcome of a judicial inquiry. It is a voluntary restraint imposed by the House upon itself in the interest of justice and fair play.

Though the rule is a matter of Parliamentary convention and not of statutory law, “[i]t is desirable that the convention of Parliament as to matters sub judice should, so far as possible, be the same as the law administered in the courts”, or, in other words, that parliamentarians should act in a way that does not render more difficult the administration of the law by judges. See *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 Q.B. 710 (C.A.), at pp. 740-41, *per* Lord Denning M.R.

115 It seems to us that the decision to make public the report of the Honourable Charles Dubin on communications between Department of Justice officials and the courts while the matter was before the courts raises concerns about the *sub judice* rule. The Honourable Mr. Dubin was under retainer to the Department of Justice. He was responsible to the Minister of Justice. If Parliamentary convention did not permit the Minister to speak about the conduct of Mr. Thompson and the Chief Justice, then arguably it did not permit him to retain a third party to speak on his behalf about important aspects of the same subject matter that was before the courts.

116 The release of the report complicated the conduct of the appeal. Once it was released the appellants moved for production of many documents that the Department of Justice had handed over to Mr. Dubin. Their demands involved first the Federal Court of Appeal and later this Court in difficult and time-consuming inquiries into questions of privilege, and ultimately placed this Court in the awkward position of having to consider without the benefit of a trial judge’s findings of fact the credibility of certain items of evidence. These difficulties could easily have been avoided had the report not been released until after the conclusion of proceedings in the courts.

117 Nevertheless, the *sub judice* rule was not raised as a ground of appeal. Therefore, it is not for us to say whether the Minister violated the rule. However, we can say that even if the release of the report did constitute a violation of the rule, still that would not be a sufficient reason to grant a stay of proceedings in the circumstances of this case. As La Forest J. wrote in *Vermette*, *supra*, at p. 994, “judicial abdication is not the remedy for an infringement of the *sub judice* rule”.

118 Also of concern is the intervention of the Canadian Judicial Council. We understand that one of the Council’s committees issued a report in which comments were made about the conduct of Isaac C.J. and Jerome A.C.J. in connection with the appellants’ cases. Although the Canadian Judicial Council is not bound by the *sub judice* rule, it might have been preferable in these circumstances for the Council to have refrained from making its report while the matter of the stay of proceedings was still working its way through the courts. There is a further complication arising from the premature release of these reports. It arises because these reasons could be taken as indicating that we take a more serious view of these events than did either the Honourable Mr. Dubin or the Judicial Council although the Council did not have the benefit of all the material that was before this Court.

V. Disposition

119 We would dismiss the appeal. The stay of proceedings is set aside and the cases against the appellants are directed to proceed before a judge of the Trial Division. In accordance with s. 6(3) of the *Federal Court Act*, which provides for the precedence of judges in the event that the Chief Justice and Associate Chief Justice are unable to act, the senior judge who is able to act should choose a presiding judge from among those judges of the Trial Division who have heretofore had nothing to do with the conduct of these cases. The judge thus chosen will ignore

any undertakings that Isaac C.J. or Jerome A.C.J. made to Mr. Thompson. Neither Isaac C.J. nor Jerome A.C.J. will have anything further to do with these cases.

120 Under all the circumstances, we would award costs to the appellants here and in the courts below.

Appeal dismissed with costs to the appellants.

Solicitor for the appellant Tobiass: Gesta J. Abols, Toronto.

Solicitors for the appellant Dueck: Bayne Sellar Boxall, Ottawa.

Solicitors for the appellant Oberlander: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondent: George Thomson, Toronto.

Solicitor for the intervener: Ed Morgan, Toronto.

TAB 36

Vancouver (City) v. Ward, 2010 SCC 27 (CanLII), [2010] 2 SCR 28

Source: Supreme Court of Canada

Date: 2010-07-23

File number: 33089

Other citations: 321 DLR (4th) 1 — 404 NR 1 — [2010] 9 WWR 195 —
491 WAC 222 — [2010] EXP 2331 — 7 BCLR (5th) 203 —
76 CR (6th) 207 — 290 BCAC 222 — 213 CRR (2d) 166 —
75 CCLT (3d) 1 — [2010] CarswellBC 1947 —
EYB 2010-177090 — JE 2010-1305 — [2010] SCJ No 27 (QL)

Citation: Vancouver (City) v. Ward, 2010 SCC 27 (CanLII), [2010] 2
SCR 28, <<https://canlii.ca/t/2bq8r>>, retrieved on 2026-03-
23



SUPREME COURT OF CANADA

CITATION: Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2
S.C.R. 28

DATE: 20100723
DOCKET: 33089

BETWEEN:

City of Vancouver
Appellant
and
Alan Cameron Ward
Respondent

AND BETWEEN:

**Her Majesty The Queen in Right of the
Province of British Columbia**
Appellant
and
Alan Cameron Ward
Respondent
- and -

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Aboriginal Legal Services of
Toronto Inc., Association in Defence of the Wrongly Convicted,
Canadian Civil Liberties Association, Canadian Association of
Chiefs of Police, Criminal Lawyers' Association (Ontario),
British Columbia Civil Liberties Association and
David Asper Centre for Constitutional Rights**
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)
(paras. 1 to 80)

Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28

City of Vancouver

Appellant

v.

Alan Cameron Ward

Respondent

- and -

**Her Majesty The Queen in Right
of the Province of British Columbia**

Appellant

v.

Alan Cameron Ward

Respondent

and

**Attorney General of Canada,
Attorney General of Ontario,**

**Attorney General of Quebec,
Aboriginal Legal Services of Toronto Inc.,
Association in Defence of the Wrongly Convicted,
Canadian Civil Liberties Association,
Canadian Association of Chiefs of Police,
Criminal Lawyers' Association (Ontario),**

**British Columbia Civil Liberties Association and
David Asper Centre for Constitutional Rights**

Interveners

Indexed as: Vancouver (City) v. Ward

2010 SCC 27

File No.: 33089.

2010: January 18; 2010: July 23.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Enforcement — Damage award as remedy for breach of rights — Quantum — Claimant strip searched and his car seized in violation of his constitutional rights — Whether claimant entitled to damages as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — If so, how should quantum of damages be assessed.

During a ceremony in Vancouver, the city police department received information that an unknown individual intended to throw a pie at the Prime Minister who was in attendance. Based on his appearance, police officers mistakenly identified W as the would-be pie-thrower, chased him down and handcuffed him. W, who loudly protested his detention and created a disturbance, was arrested for breach of the peace and taken to the police lockup. Upon his arrival,

the corrections officers conducted a strip search. While W was at the lockup, police officers impounded his car for the purpose of searching it once a search warrant had been obtained. The detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge W for attempted assault. W was released approximately 4.5 hours after his arrest. He brought an action in tort and for breach of his rights guaranteed by the *Canadian Charter of Rights and Freedoms* against several parties, including the Province and the City. With respect to the strip search and the car seizure, the trial judge held that, although the Province and the City did not act in bad faith and were not liable in tort for either incident, the Province's strip search and the City's vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The trial judge assessed damages under s. 24(1) of the *Charter* at \$100 for the seizure of the car and \$5,000 for the strip search. The Court of Appeal, in a majority decision, upheld the trial judge's ruling.

Held: The appeal should be allowed in part.

The language of s. 24(1) is broad enough to include the remedy of constitutional damages for breach of a claimant's *Charter* rights if such remedy is found to be appropriate and just in the circumstances of a particular case. The first step in the inquiry is to establish that a *Charter* right has been breached; the second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.

Once the claimant has established that damages are functionally justified, the state has the opportunity to demonstrate, at the third step, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. Countervailing considerations include the existence of alternative remedies. Claimants need not show that they have exhausted all other recourses. Rather, it is for the state to show that other remedies including private law remedies or another *Charter* remedy are available in the particular case that will sufficiently address the *Charter* breach. Concern for effective governance may also negate the appropriateness of s. 24(1) damages. In some situations, the state may establish that an

award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

If the state fails to negate that the award is “appropriate and just”, the final step is to assess the quantum of the damages. To be “appropriate and just”, an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of s. 24(1) damages. Where the objective of compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed. With the objectives of vindication and deterrence, the appropriate determination is an exercise in rationality and proportionality. Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. Damages under s. 24(1) should also not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

Here, damages were properly awarded for the strip search of W. This search violated his [s. 8 Charter](#) rights and compensation is required, in this case, to functionally fulfill the objects of constitutional damages. Strip searches are inherently humiliating and degrading and the *Charter* breach significantly impacted on W’s person and rights. The correction officers’ conduct which caused the breach was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Combined with the police conduct, the impingement on W also engages the objects of vindication of the right and deterrence of future breaches. The state did not establish countervailing factors and damages should be awarded for the breach. Considering the seriousness of the injury and the finding that the corrections officers’ actions were not intentional, malicious, high-handed or oppressive, the trial judge’s \$5,000 damage award was appropriate.

With respect to the seizure of the car, W has not established that damages under s. 24(1) are appropriate and just from a functional perspective. The object of compensation is not engaged as W did not suffer any injury as a result of the seizure. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. A declaration under s. 24(1) that the vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

Cases Cited

Considered: *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; **referred to:** *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229; *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429; *Fose v. Minister of Safety and Security*, 1997 (3) SA 786; *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328; *Smith v. Wade*, 461 U.S. 30 (1983); *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941; *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, 1996 CanLII 208 (SCC), [1996] 2 S.C.R. 345; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.

Statutes and Regulations Cited

Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001.

Canadian Charter of Rights and Freedoms, ss. 8, 9, 24, 32.

Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 49, 51.

Constitution Act, 1982, s. 52(1).

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Saunders and Low JJ.A.), 2009 BCCA 23, 89 B.C.L.R. (4th) 217, 265 B.C.A.C. 174, 446 W.A.C. 174, 304 D.L.R. (4th) 653, [2009] 6 W.W.R. 261, 63 C.C.L.T. (3d) 165, [2009] B.C.J. No. 91 (QL), 2009 CarswellBC 115, affirming a decision of Tysoe J., 2007 BCSC 3, 63 B.C.L.R. (4th) 361, [2007] 4 W.W.R. 502, 45 C.C.L.T. (3d) 121, [2007] B.C.J. No. 9 (QL), 2007 CarswellBC 12, finding a breach of *Charter* rights and awarding damages. Appeal allowed in part.

Tomasz M. Zworski, for the appellant the City of Vancouver.

Bryant Alexander Mackey and *Barbara Carmichael*, for the appellant Her Majesty the Queen in Right of the Province of British Columbia.

Brian M. Samuels, *Kieran A. G. Bridge* and *Jennifer W. Chan*, for the respondent.

Mark R. Kindrachuk, *Q.C.*, and *Jeffrey G. Johnston*, for the intervener the Attorney General of Canada.

Robert E. Charney and *Josh Hunter*, for the intervener the Attorney General of Ontario.

Isabelle Harnois and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Kimberly R. Murray and *Julian N. Falconer*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Louis Sokolov and *Heidi Rubin*, for the intervener the Association in Defence of the Wrongly Convicted.

Stuart Svonkin and *Jana Stettner*, for the intervener the Canadian Civil Liberties Association.

Vincent Westwick and *Karine LeBlanc*, for the intervener the Canadian Association of Chiefs of Police.

Sean Dewart and *Tim Gleason*, for the intervener the Criminal Lawyers' Association (Ontario).

Kent Roach and *Grace Pastine*, for the interveners the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

-

[1] The *Canadian Charter of Rights and Freedoms* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. The first and most important remedy is the nullification of laws that violate the *Charter* under s. 52(1) of the

Constitution Act, 1982. This is supplemented by s. 24(2), under which evidence obtained in breach of the *Charter* may be excluded if its admission would bring the administration of justice into disrepute, and s. 24(1) — the provision at issue in this case — under which the court is authorized to grant such remedies to individuals for infringement of *Charter* rights as it “considers appropriate and just in the circumstances”.

[2] The respondent Ward’s *Charter* rights were violated by Vancouver and British Columbia officials who detained him, strip searched his person and seized his car without cause. The trial judge awarded Mr. Ward damages for the *Charter* breaches, and the majority of the Court of Appeal of British Columbia upheld that award.

[3] This appeal raises the question of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be. Although the *Charter* is 28 years old, authority on this question is sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

[4] I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[5] I conclude that damages were properly awarded for the strip search of Mr. Ward, but not justified for the seizure of his car. I would therefore allow the appeal in part.

II. Facts

[6] On August 1, 2002, Prime Minister Chrétien participated in a ceremony to mark the opening of a gate at the entrance to Vancouver's Chinatown. During the ceremony, the Vancouver Police Department ("VPD") received information that an unknown individual intended to throw a pie at the Prime Minister, an event that had occurred elsewhere two years earlier. The suspected individual was described as a white male, 30 to 35 years, 5' 9", with dark short hair, wearing a white golf shirt or T-shirt with some red on it.

[7] Mr. Ward is a Vancouver lawyer who attended the August 1 ceremony. On the day, Mr. Ward, a white male, had grey, collar-length hair, was in his mid-40s and was wearing a grey T-shirt with some red on it. Based on his appearance, Mr. Ward was identified — mistakenly — as the would-be pie-thrower. When the VPD officers noticed him, Mr. Ward was running and appeared to be avoiding interception. The officers chased Mr. Ward down and handcuffed him. Mr. Ward loudly protested his detention and created a disturbance, drawing the attention of a local television camera crew. The television broadcast showed that Mr. Ward had a "very agitated look on his face", "appeared to be yelling for the benefit of the onlookers" and was "holding back" as he was being escorted down the street.

[8] Mr. Ward was arrested for breach of the peace and taken to the police lockup in Vancouver, which was under the partial management of provincial corrections officers. Upon his arrival, the corrections officers instructed Mr. Ward to remove all his clothes in preparation for a strip search. Mr. Ward complied in part but refused to take off his underwear. The officers did not

insist on complete removal and Mr. Ward was never touched during the search. After the search was completed, Mr. Ward was placed in a small cell where he spent several hours before being released.

[9] While Mr. Ward was at the lockup, VPD officers impounded his car for the purpose of searching it once a search warrant had been obtained. VPD detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge Mr. Ward for attempted assault. Mr. Ward was released from the lockup approximately 4.5 hours after he was arrested and several hours after the Prime Minister had left Chinatown following the ceremony.

III. Judicial History

A. *Supreme Court of British Columbia*, 2007 BCSC 3, 63 B.C.L.R. (4th) 361

[10] Mr. Ward brought an action in tort and for breach of his *Charter* rights against the City, the Province, and individual police and corrections officers for his arrest, detention, strip search, and car seizure. Justice Tysoe found Mr. Ward's arrest for breach of the peace to be lawful and dismissed the action against the individual police and corrections officers. However, Tysoe J. held that — although they did not act in bad faith and were not liable in tort for either incident — the Province's strip search and the City's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. In addition, Tysoe J. found that the City breached Mr. Ward's rights under s. 9 of the *Charter* and committed the tort of wrongful imprisonment by keeping Mr. Ward in the police lockup longer than necessary.

[11] Tysoe J. assessed damages under s. 24(1) of the *Charter* at \$100 for the seizure of the car and \$5,000 for the strip search. He rejected the governments' argument that damages were an inappropriate remedy for *Charter* breaches absent bad faith, abuse of power, or tortious conduct. In addition, Tysoe J. awarded \$5,000 in damages for the wrongful imprisonment. This award is not at issue on this appeal.

B. *British Columbia Court of Appeal, 2009 BCCA 23, 89 B.C.L.R. (4th) 217*

[12] Justice Low, Finch C.J.B.C. concurring, upheld Tysoe J.'s ruling, agreeing with Mr. Ward that bad faith, abuse of power, or tortious conduct are not necessary requirements for the awarding of *Charter* damages.

[13] Justice Saunders, dissenting, would have allowed the Province and City appeals, holding that damages cannot be awarded where the police did not act in bad faith and simply made a mistake as to the proper course of action.

IV. Constitutional Provisions

[14] Section 24(1) of the *Charter* provides as follows:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

V. Issues

[15] The issues are the following:

A. When are damages under s. 24(1) available?

1. The language of s. 24(1) and the nature of *Charter* damages;
2. Step one: Proof of a *Charter* breach;
3. Step two: Functional justification of damages;
4. Step three: Countervailing factors;
5. Step four: Quantum of s. 24(1) damages;
6. Forum and procedure.

B. Application to the Facts

1. Damages for the strip search;
2. Damages for the car seizure.

VI. Analysis

A. *When Are Damages Under Section 24(1) Available?*

(1) The Language of Section 24(1) and the Nature of *Charter* Damages

[16] Section 24(1) empowers courts of competent jurisdiction to grant “appropriate and just” remedies for *Charter* breaches. This language invites a number of observations.

[17] First, the language of the grant is broad. As McIntyre J. observed, “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”: *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, at p. 965. The judge of “competent jurisdiction” has broad discretion to determine what remedy is appropriate and just in the circumstances of a particular case.

[18] Second, it is improper for courts to reduce this discretion by casting it in a strait-jacket of judicially prescribed conditions. To quote McIntyre J. in *Mills* once more, “[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion”: *Mills*, at p. 965.

[19] Third, the prohibition on cutting down the ambit of s. 24(1) does not preclude judicial clarification of when it may be “appropriate and just” to award damages. The phrase “appropriate and just” limits what remedies are available. The court’s discretion, while broad, is not unfettered. What is appropriate and just will depend on the facts and circumstances of the particular case. Prior cases may offer guidance on what is appropriate and just in a particular situation.

[20] The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.

[21] Damages for breach of a claimant’s *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant’s rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to

the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude that s. 24(1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24(1), and often other s. 24(1) remedies will be more responsive to the breach.

[22] The term “damages” conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81, a case dealing with New Zealand’s *Bill of Rights Act 1990*, an action for public law damages “is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable”. In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual’s constitutional rights. An action for public law damages — including constitutional damages — lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.

(2) Step One: Proof of a *Charter* Breach

[23] Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

(3) Step Two: Functional Justification of Damages

[24] A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. This approach has been adopted in awarding non-pecuniary damages in personal injury cases (*Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229), and, in my view, a similar approach is appropriate in determining when damages are “appropriate and just” under s. 24(1) of the *Charter*.

[25] I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual’s *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

[26] These functions of s. 24(1) damages are supported by foreign constitutional jurisprudence and, by analogy, foreign jurisprudence arising in the statutory human rights context.

[27] Compensation has been cited by Lord Woolf C.J. (speaking of the *European Convention of Human Rights*) as “fundamental”. In most cases, it is the most prominent of the three functions that *Charter* damages may serve. The goal is to compensate the claimant for the loss caused by the *Charter* breach; “[t]he applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed”: *Anufrijeva v. Southwark*

London Borough Council, [2003] EWCA Civ 1406, [2004] Q.B. 1124, at para. 59, *per* Lord Woolf C.J. Compensation focuses on the claimant's personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant's intangible interests. In the public law damages context, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety: *Dunlea; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429. Often the harm to intangible interests effected by a breach of rights will merge with psychological harm. But a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury.

[28] Vindication, in the sense of affirming constitutional values, has also been recognized as a valid object of damages in many jurisdictions: see *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (C.C.), at para. 55, for a summary of the international jurisprudence. Vindication focuses on the harm the infringement causes society. As Didcott J. observed in *Fose*, violations of constitutionally protected rights harm not only their particular victims, but society as a whole. This is because they "impair public confidence and diminish public faith in the efficacy of the [constitutional] protection": *Fose*, at para. 82. While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society.

[29] Finally, deterrence of future breaches of the right has also been widely recognized as a valid object of public law damages: e.g., *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328, at para. 19; *Taunoa*, at para. 259; *Fose*, at para. 96; *Smith v. Wade*, 461 U.S. 30 (1983), at p. 49. Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. This purpose is similar to the criminal sentencing object of

“general deterrence”, which holds that the example provided by the punishment imposed on a particular offender will dissuade potential criminals from engaging in criminal activity. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity: *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941. Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

[30] In most cases, all three objects will be present. Harm to the claimant will evoke the need for compensation. Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award. Indeed, the view that constitutional damages are available only for pecuniary or physical loss has been widely rejected in other constitutional democracies: see, e.g., *Anufrijeva*; *Fose*; *Taunoa*; *Smith*; and *Ramanoop*.

[31] In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for “appropriate and just” damages under s. 24(1) of the *Charter*.

(4) Step Three: Countervailing Factors

[32] As discussed, the basic requirement for the award of damages to be “appropriate and just” is that the award must be functionally required to fulfill one or more of the objects of compensation, vindication of the right, or deterrence of future *Charter* breaches.

[33] However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

[34] A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be “appropriate and just”. The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

[35] The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that

were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.

[36] The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation: *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667 (C.A.), at p. 678.

[37] Declarations of *Charter* breach may provide an adequate remedy for the *Charter* breach, particularly where the claimant has suffered no personal damage. Considering declarations in *Taunoa*, at para. 368, McGrath J. writes:

The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

[38] Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on

government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.

[39] In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was “clearly wrong, in bad faith or an abuse of power”: para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.

[40] The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:

The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective

government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79]

[41] The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least “clearly wrong”, bars Mr. Ward’s claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid — applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

[42] State conduct pursuant to a valid statute may not be the only situation in which the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance, although no others have been established in this case. It may be that in the future other situations may be recognized where the appropriateness of s. 24(1) damages could be negated on grounds of effective governance.

[43] Such concerns may find expression, as the law in this area matures, in various defences to s. 24(1) claims. *Mackin* established a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is “clearly wrong, in bad faith or an abuse of power” (para. 78). If and when other concerns under the rubric of effective governance emerge, these may be expected to give rise to analogous public law defences. By analogy to

Mackin and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that "malice" be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339), while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards, contemplates the lower "negligence" standard (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129). When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". While the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state. Similarly, it may be necessary for the court to consider the procedural requirements of alternative remedies. Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the *Charter*. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law. These are complex matters which have not been explored on this appeal. I therefore leave the exact parameters of future defences to future cases.

[44] I find it useful to add a comment on the judgment of our Court in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, 1996 CanLII 208 (SCC), [1996] 2 S.C.R. 345. *Béliveau St-Jacques* is not determinative of the availability of the public law remedy of damages under s. 24(1). The judgment raised specific issues concerning the interpretation of ss. 49 and 51 of the *Quebec Charter of human rights and freedoms*, R.S.Q., c. C-12, and its interaction with the statutory regime set up under the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001.

[45] If the claimant establishes breach of his *Charter* rights and shows that an award of damages under s. 24(1) of the *Charter* would serve a functional purpose, having regard to the objects of s. 24(1) damages, and the state fails to negate that the award is “appropriate and just”, the final step is to determine the appropriate amount of the damages.

(5) Step Four: Quantum of Section 24(1) Damages

[46] The watchword of s. 24(1) is that the remedy must be “appropriate and just”. This applies to the amount, or quantum, of damages awarded as much as to the initial question of whether damages are a proper remedy.

[47] As discussed earlier, damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles. This is all the more so because other *Charter* remedies may not provide compensation for the claimant’s personal injury resulting from the violation of his *Charter* rights. However, as discussed earlier, cases may arise where vindication or deterrence play a major and even exclusive role.

[48] Where the objective of compensation is engaged, the concern is to restore the claimant to the position she would have been in had the breach not been committed, as discussed above. As in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.

[49] In some cases, the *Charter* breach may cause the claimant pecuniary loss. Injuries, physical and psychological, may require medical treatment, with attendant costs. Prolonged detention may result in loss of earnings. *Restitutio in integrum* requires compensation for such financial losses.

[50] In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*.

[51] When we move from compensation to the objectives of vindication and deterrence, tort law is less useful. Making the appropriate determinations is an exercise in rationality and proportionality and will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada's courts. That said, some initial observations may be made.

[52] A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct: see, in the context of s. 24(2), *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

[53] Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair — or “appropriate and just” — to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant’s needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

[54] Courts in other jurisdictions where an award of damages for breach of rights is available have generally been careful to avoid unduly high damage awards. This may reflect the difficulty of assessing what is required to vindicate the right and deter future breaches, as well as the fact that it is society as a whole that is asked to compensate the claimant. Nevertheless, to be “appropriate and just”, an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches. The private law measure of damages for similar wrongs will often be a useful guide. However, as Lord Nicholls warns in *Ramanoop*, at para. 18, “this measure is no more than a guide because . . . the violation of the constitutional right will not always be coterminous with the cause of action at law”.

[55] In assessing s. 24(1) damages, the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right. At the same time, damages under s. 24(1) should not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

[56] A final word on exemplary or punitive damages. In *Mackin*, Justice Gonthier speculated that “[i]n theory, a plaintiff could seek compensatory and punitive damages by way of ‘appropriate and just’ remedy under s. 24(1) of the *Charter*”: para. 79. The reality is that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect. Nevertheless, it is worth noting a general reluctance in the international community to award purely punitive damages: see *Taunoa*, at paras. 319-21.

[57] To sum up, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

(6) Forum and Procedure

[58] For a tribunal to grant a *Charter* remedy under s. 24(1), it must have the power to decide questions of law and the remedy must be one that the tribunal is authorized to grant: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. Generally, the appropriate forum for an award of damages under s. 24(1) is a court which has the power to consider *Charter* questions and which by statute or inherent jurisdiction has the power to award damages. Provincial criminal courts are not so empowered and thus do not have the power to award damages under s. 24(1).

[59] As was done here, the claimant may join a s. 24(1) claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of *Charter* damages, recourse to s. 24(1) will be unnecessary. This may add useful context and facilitate the s. 24(1) analysis.

This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.

B. Application to the Facts

[60] At trial, Justice Tysoe held that the provincial correction officers' strip search and the Vancouver Police Department's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. There are thus two distinct claims to consider.

(1) Damages for the Strip Search

[61] The first question is whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages. This requires him to show: (1) a breach of his *Charter* rights; and (2) that an award of damages would serve a functional purpose in the circumstances, having regard to the objects of s. 24(1) damages. If these are established, the burden shifts to the state (step 3) to show why, having regard to countervailing factors, an award of damages under s. 24(1) of the *Charter* would be inappropriate. If the state fails to negate s. 24(1) damages, the inquiry moves to the final step, assessment of the appropriate amount of the damages.

[62] Here the first step is met. Justice Tysoe found that the strip search violated Mr. Ward's personal rights under s. 8 of the *Charter*. This finding is not challenged on this appeal. Nor is it suggested that the British Columbia Supreme Court is not an appropriate forum for the action.

[63] The second question is whether damages would serve a functional purpose by serving one or more of the objects of s. 24(1) damages — compensation, vindication and deterrence.

[64] In this case, the need for compensation bulks large. Mr. Ward's injury was serious. He had a constitutional right to be free from unreasonable search and seizure, which was violated in an egregious fashion. Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 90.

[65] The corrections officers' conduct which caused the breach of Mr. Ward's *Charter* rights was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Mr. Ward did not commit a serious offence, he was not charged with an offence associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Mr. Ward did not pose a risk of harm to himself or others, nor was there any suggestion that any of the officers believed that he did. In these circumstances, a reasonable person would understand that the indignity resulting from the search was disproportionate to any benefit which the search could have provided. In addition, without asking officers to be conversant with the details of court rulings, it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is concealing weapons that could be used to harm themselves or others: *Golden*, at para. 97.

[66] In sum, the *Charter* breach significantly impacted on Mr. Ward's person and rights and the police conduct was serious. The impingement on Mr. Ward calls for compensation. Combined with the police conduct, it also engages the objects of vindication of the right and deterrence of future breaches. It follows that compensation is required in this case to functionally fulfill the objects of public law damages.

[67] The next question is whether the state has established countervailing factors that would render s. 24(1) damages inappropriate or unjust.

[68] The state has not established that alternative remedies are available to achieve the objects of compensation, vindication or deterrence with respect to the strip search. Mr. Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr. Ward's claim in tort, it did not change the fact that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated. No tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward's only recourse is a claim for damages under s. 24(1) of the *Charter*. Nor has the state established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*.

[69] I conclude that damages for the strip search of Mr. Ward are required in this case to functionally fulfill the objects of public law damages, and therefore are *prima facie* "appropriate and just". The state has not negated this. It follows that damages should be awarded for this breach of Mr. Ward's *Charter* rights.

[70] This brings us to the issue of quantum. As discussed earlier, the amount of damages must reflect what is required to functionally fulfill the relevant objects of s. 24(1) compensation, while remaining fair to both the claimant and the state.

[71] The object of compensation focuses primarily on the claimant's personal loss: physical, psychological, pecuniary, and harm to intangible interests. The claimant should, in so far as possible, be placed in the same position as if his *Charter* rights had not been infringed. Strip searches are inherently humiliating and thus constitute a significant injury to an individual's intangible interests regardless of the manner in which they are carried out. That said, the present search was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal of Mr. Ward's underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward's injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.

[72] The objects of vindication and deterrence engage the seriousness of the state conduct. The corrections officers' conduct was serious and reflected a lack of sensitivity to *Charter* concerns. That said, the officers' action was not intentional, in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.

[73] Considering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion, I conclude that the trial judge's \$5,000 damage award was appropriate.

(2) Damages for the Car Seizure

[74] As with the strip search, we must determine whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages to compensate for the constitutional wrong he suffered due to the City's seizure of his vehicle. Again, this requires determining: (1) breach of

Charter right; (2) whether an award of damages would serve a functional purpose, having regard to the objects of s. 24(1) damages; (3) whether the state has established countervailing factors negating an award of s. 24(1) damages; and (4) quantum, if the right to damages is established.

[75] The trial judge found that the seizure of the car violated Mr. Ward's rights under s. 8 of the *Charter*. This finding is not contested and thus satisfies the first requirement.

[76] The next question is whether Mr. Ward has established that damages under s. 24(1) for the car seizure are appropriate and just from a functional perspective.

[77] The object of compensation is not engaged by the seizure of the car. The trial judge found that Mr. Ward did not suffer any injury as a result of the seizure. His car was never searched and, upon his release from lockup, Mr. Ward was driven to the police compound to pick up the vehicle. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. The police officers did not illegally search the car, but rather arranged for its towing under the impression that it would be searched once a warrant had been obtained. When the officers determined that they did not have grounds to obtain the required warrant, the vehicle was made available for pickup.

[78] I conclude that a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

VII. Disposition

[79] The appeal is allowed in part. The award against the City in the amount of \$100 is set aside, substituted by a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The award of damages against the Province in the sum of \$5,000 for breach of Mr. Ward's s. 8 *Charter* rights is confirmed.

[80] We have been informed of a pre-existing agreement between Mr. Ward and the Province regarding costs and, as such, no cost order is made between Mr. Ward and the Province. No costs are awarded to or against the City.

Appeal allowed in part.

Solicitor for the appellant the City of Vancouver: City of Vancouver, Vancouver.

Solicitor for the appellant Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Samuels & Company, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Ste-Foy.

Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto; Falconer Charney, Toronto.

Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Sack Goldblatt Mitchell, Toronto.

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

Solicitor for the intervener the Canadian Association of Chiefs of Police: Ottawa Police Service, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

TAB 37

TAB 38

Vickery v. Nova Scotia Supreme Court (Prothonotary), 1991 CanLII 90 (SCC), [1991] 1 SCR 671

Source:	Supreme Court of Canada
Date:	1991-03-28
File number:	21598
Other citations:	124 NR 95 — 104 NSR (2d) 181 — 283 APR 181 — 64 CCC (3d) 65 — 12 WCB (2d) 560 — [1991] CarswellNS 461 — JE 91-604 — [1991] SCJ No 23 (QL)
Citation:	Vickery v. Nova Scotia Supreme Court (Prothonotary), 1991 CanLII 90 (SCC), [1991] 1 SCR 671, < https://canlii.ca/t/1fsm3 >, retrieved on 2026-03-23

Vickery v. Nova Scotia Supreme Court (Prothonotary), [1991] 1 S.C.R. 671

Claude Vickery

Appellant

v.

**Prothonotary of the Supreme Court of Nova Scotia
at Halifax and Brent Stephen Nugent**

Respondents

and

Canadian Association of Journalists

Intervener

Indexed as: Vickery v. Nova Scotia Supreme Court (Prothonotary)

File No.: 21598.

1990: October 31, November 1; 1991: March 28.

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

on appeal from the supreme court of nova scotia, appeal division

Evidence -- Exhibits -- Access -- Audio and video tapes admitted in evidence in criminal trial resulting in conviction -- Appeal court finding evidence inadmissible and overturning conviction -- Whether member of public entitled to access to tapes.

Courts -- Administration -- Exhibits -- Access -- Audio and video tapes admitted in evidence in criminal trial resulting in conviction -- Appeal court finding evidence inadmissible and overturning conviction -- Whether member of public entitled to access to tapes.

Respondent N was convicted of second degree murder on the basis of audio cassettes containing an alleged confession and a video cassette of an alleged re-enactment of the killing. The trial, the admission of the tapes into evidence and information about their contents were reported in the media. On appeal the majority found that the audio and video evidence had not been freely and voluntarily obtained from N, that it had been obtained in violation of his right to counsel, and that its admission into evidence brought the administration of justice into disrepute. As a result of the exclusion of the evidence, N's conviction was overturned. Appellant, a journalist, requested a copy of the tapes, but the respondent prothonotary refused to release them. The Nova Scotia Supreme Court, Trial Division, granted appellant's application, as a member of the public, to obtain the tapes. The Appeal Division reversed the judgment.

Held (L'Heureux-Dubé, Cory and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier and Stevenson JJ.: N's privacy interests as a person acquitted of a crime outweigh the public right of access to exhibits judicially determined to be inadmissible against him. The court, as custodian of the exhibits, is bound to inquire into the use to be made of them and is fully entitled to regulate that use. Such exhibits are frequently the property of non-parties and there is ordinarily a proprietary interest in them. In this case N was a participant in the creation of the tapes, a creation found to have been in violation of his constitutional rights, and the court ought to take steps to protect his legitimate interests. In the face of obvious prejudice and with no proposed use being specified, the order for unrestricted access should not have been made. The exhibits were produced at trial and were open to public scrutiny and discussion, so that the open justice requirement had been met. Further, while those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal, and contemporaneous reporting is protected, different considerations may govern when the process is at an end and the discussion removed from the hearing context. While fair, accurate, contemporaneous reports are likely to be balanced, to display the full context, and to expose the arguments on both sides, the subsequent release and publication of selected exhibits is fraught with the risk of unfairness. The courts must be careful not to become unwitting parties to N's harassment by facilitating the broadcasting of material which was found to have been obtained in violation of his fundamental rights.

In short, curtailment of public accessibility is justified where there is a need to protect the innocent, and N must be considered an innocent person for this purpose. Someone who has been accused and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his *Charter* rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.

The Court should not entertain appellant's argument that the prohibition of access was an infringement of his rights under *s. 2(b)* of the *Canadian Charter of Rights and Freedoms*, since that point was not developed in the courts below. Had the point been raised, the parties would have had the right to lead evidence, the Court would have had the benefit of the reasoning of the courts below, and interested parties might have sought to intervene.

Per L'Heureux-Dubé, Cory and McLachlin JJ. (dissenting): Two principles of fundamental importance to our democratic society must be weighed in the balance in this case: the right to privacy and the principle of open courts. Here the openness of the courts must prevail. This result is necessary to maintain public confidence in the administration of justice. Further, appellate deference should be accorded to the trial judge's discretionary order concerning access, which was reasonable and should be upheld.

There is a strong presumption in favour of access to ensure judicial accountability. Criminal appeals, like criminal trials, should be as open as possible. The media, as the public's representative, should have access to all the exhibits which are part of the appeal proceedings and which may form the basis for the appellate court's decision. In particular, access should not be denied on the grounds that the tapes were found to be inadmissible. The public has a right to know what was excluded by the appellate court and the reason for its exclusion. To prohibit access to all evidence which has been ruled inadmissible would permit the courts to operate in secret. The trial judge in this case admitted all the tapes and the dissenting member of the court of appeal would have admitted the videotape and most of the audio tapes. This diversity of views on the issue of admissibility further supports the case for access, since the public is entitled to know the actual evidence that was the subject of differing judicial opinion.

Finally, the production of the tapes at trial did not satisfy the common law right of access and the underlying open court principle. The fact that the tapes have been played before should not weaken any claim for access, and makes the privacy interest less compelling. The right of access to court documents, which includes the opportunity to inspect and copy such records, facilitates the openness of court processes. While it is not necessary in this case to consider whether it is guaranteed by *s. 2(b)* of the *Charter*, this right also promotes and advances the constitutional values of freedom of expression.

Cases Cited

By Stevenson J.

Applied: *Attorney General of Nova Scotia v. MacIntyre*, [1982 CanLII 14 \(SCC\)](#), [1982] 1 S.C.R. 175; **distinguished:** *Re Regina and Lortie*, [1985 CanLII 3637 \(QC CA\)](#), [1985] C.A. 451, 21 C.C.C. (3d) 436; **referred to:** *Solomon v. McLaughlin*, [1982 CanLII 1161 \(AB KB\)](#), [1982] 4 W.W.R. 415; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

By Cory J. (dissenting)

Ex parte Drawbaugh, 2 App. D.C. 404; *Craig v. Harney*, 331 U.S. 367 (1947); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *United States v. Mitchell*, 551 F.2d 1252 (1976); *United States v. Myers*, 635 F.2d 945 (1980); *United States v. Criden*, 648 F.2d 814 (1981); *In re National Broadcasting Co.*, 653 F.2d 609 (1981); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (1981); *United States v. Edwards*, 672 F.2d 1289 (1982); *United States v. Beckham*, 789 F.2d 401 (1986); *United States v. Webbe*, 791 F.2d 103 (1986); *Valley Broadcasting Co. v. United States District Court for the District of Nevada*, 798 F.2d 1289 (1986); *Attorney General of Nova Scotia v. MacIntyre*, [1982 CanLII 14 \(SCC\)](#), [1982] 1 S.C.R. 175; *Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [1989] 2 S.C.R. 1326; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987 CanLII 79 \(SCC\)](#), [1987] 1 S.C.R. 110; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042.

Statutes and Regulations Cited

American Constitution, First Amendment.

[Canadian Charter of Rights and Freedoms](#), ss. 2(b), 24(2).

Defamation Act, R.S.N.S. 1967, c. 72, s. 13(1)(b).

Nova Scotia Civil Procedure Rule 30.11(6).

Authors Cited

Whelan, William J. "Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right" (1982), 50 *Fordham L. Rev.* 551.

APPEAL from a judgment of the Nova Scotia Supreme Court, Appeal Division (1989), [1989 CanLII 198 \(NS CA\)](#), 91 N.S.R. (2d) 126, 233 A.P.R. 126, 41 C.C.C. (3d) 6, 71 C.R. (3d) 33, reversing a judgment of Glube C.J.T.D. (1988), [1988 CanLII 7126 \(NS SC\)](#), 87 N.S.R. (2d) 29, 222 A.P.R. 29, granting appellant access to electronic tapes filed as exhibits in a criminal trial. Appeal dismissed, L'Heureux-Dubé, Cory and McLachlin JJ. dissenting.

David G. Coles, James L. Connors and Danny J. Henry, for the appellant.

R. M. Endres and M. Smith, Q.C., for the respondent the Prothonotary of the Supreme Court of Nova Scotia at Halifax.

Marguerite J. MacNeil, Kevin G. Coady and R. James Filliter, for the respondent Nugent.

Richard G. Dearden, for the intervener.

//Stevenson J.//

The judgment of Lamer C.J. and Wilson, La Forest, Sopinka, Gonthier and Stevenson JJ. was delivered by

STEVENSON J. -- The appellant appeals a judgment of the Supreme Court of Nova Scotia Appeal Division refusing him access to electronic tapes filed as exhibits in the criminal trial of the respondent Nugent. The issue is whether the appellant, a journalist, is entitled to have access and copy those tapes which, while admitted at a trial, were held to be inadmissible by that Appeal Division, which acquitted Nugent.

In May 1987, Nugent was convicted, at trial, of second degree murder. At that trial, two forms of electronic tapes, prepared by the R.C.M.P., were admitted into evidence. One form of tape was audio cassettes, containing an alleged confession by Nugent to the killing of the victim. The other form was a video cassette of an alleged re-enactment of the killing by Nugent. These tapes became the basis of the Crown's case against Nugent and, ultimately, the basis of his conviction. The trial, the admission of the tapes into evidence, and information of their content, were reported in the media.

On May 10, 1988, in a four-to-one decision, the Appeal Division allowed Nugent's appeal of his conviction, set the conviction aside, and entered an acquittal. The majority of the Appeal Division ruled that the audio and video evidence was not obtained freely and voluntarily from Nugent, that it was obtained in violation of his right to counsel, and that its admission into evidence brought the administration of justice into disrepute.

On May 16, 1988, the appellant wrote to the Attorney General's Department requesting a copy of the audio and video tapes which were admitted at Nugent's trial. The appellant was advised to contact the Registrar of the Appeal Division, as custodian of such exhibits. The Registrar, by letter of May 19, 1988, indicated that he would not release the exhibits, either before or after the appeal period, which was still running. This refusal on the part of the Registrar eventually led to the appellant's bringing an application, as a member of the public, to obtain the tapes from the Registrar, as Prothonotary of the Supreme Court at Halifax.

In his application the appellant swore that he was a television producer "currently doing research on the topic of video tapes and their use by the police in recording confessions, re-enactments of crime and recording of surveillance activities". He swore that he had been denied access by the prothonotary, who proposed releasing the exhibits to the Crown, but invited the appellant to apply to a Supreme Court judge in chambers.

The prothonotary, in making his ruling, referred to Nova Scotia Civil Procedure Rule 30.11(6):

On the expiration of the time for appeal or on the disposition of the appeal, the prothonotary or registrar on his or her own initiative shall return the exhibits to the respective solicitors or

parties who put the exhibits in evidence at the trial. . . .

Glube C.J.T.D. heard the application, hearing counsel for Nugent on the application as well as counsel for the appellant and the prothonotary: (1988), [1988 CanLII 7126 \(NS SC\)](#), 87 N.S.R. (2d) 29. She concluded that the appellant was entitled to access, including the right to make copies. In the course of her ruling she said, at p. 34:

I was not asked to rule on, nor does this application relate to, whether or not these videotapes and copies of audiotapes could be played on television. If that issue was before me, I would be prepared to put restrictions on the viewing, such as nondisclosure of the individual and location of the event, as well as blocking off the face of Mr. Nugent. However, on the actual application, I was unable to accept the argument of Mr. Coady on behalf of Mr. Nugent that the ends of justice require that I refuse the application in spite of the decision of the Court of Appeal and the remarks in **MacIntyre** [*Attorney General of Nova Scotia v. MacIntyre*, [1982 CanLII 14 \(SCC\)](#), [1982] 1 S.C.R. 175] about protection of the innocent. Any violation of that protection has already occurred and controls over future publication could be imposed if the appropriate application is made.

Based on the case law cited, namely, **MacIntyre** and **Lortie** [*Re Regina and Lortie* (1985), [1985 CanLII 3637 \(QC CA\)](#), 21 C.C.C. (3d) 436 (Que. C.A.)], I concluded that this was an appropriate case in which to grant the application for access to and permitting copying of the audio and videotapes as requested. I find their release does not bring the administration of justice into disrepute. The public interest outweighs any private interest. Had an application been made during the trial, it might well have been granted.

The appeal was argued before us on the basis that the issue was one of access; no question was raised regarding the right to copy if access were properly permitted. Moreover, counsel for the appellant suggested other uses that might be made of the copied tapes, for example, to criticize the decision of the Attorney General not to appeal the decision acquitting Nugent. The order of the chambers judge makes no restriction on the use to be made, and the appellant seeks an order from this Court, free of any restrictions upon the use of the copies. That order does not reserve any questions of use nor reserve any right of further application. Counsel for Vickery declined, during argument, to delineate the use to which the copies would be put.

Nugent was given party status in order to appeal the judgment of Glube C.J.T.D. Macdonald J.A. speaking for the Appeal Division reversed the judgment: (1989), [1989 CanLII 198 \(NS CA\)](#), 91 N.S.R. (2d) 126. After referring to *MacIntyre*, *supra*, and *Solomon v. McLaughlin*, [1982 CanLII 1161 \(AB KB\)](#), [1982] 4 W.W.R. 415 (Alta. Q.B.), he recognized the principle that the court is the keeper

of its records and may exercise its discretion in excluding them from public access where the circumstances require. He added the following (at pp. 132-33):

The acquittal of Mr. Nugent . . . is equivalent to a finding of innocence with respect to any subsequent criminal proceedings. As a matter of public policy, it is my opinion that the acquittal should also be treated as the equivalent of a finding of innocence with respect to the right of the public to inspect, copy and publish the prejudicial material contained in the [respondent's] confessions. I recognize that the rule is that the public have a general right to inspect judicial records and documents. This right is not absolute but rather is one where, as Chief Justice Dickson said in **MacIntyre** (p. 149), "Every court has a supervisory and protecting power over its own records."

In my opinion, Mr. Nugent comes within the exception to the general access rule with respect to innocent persons referred to in the **MacIntyre** case. There the fundamental principle that the innocent must be protected from unnecessary harm was held to override the public access interest in those cases where nothing is found upon the execution of a valid search warrant. That being so, in my view the protection of the innocent from unnecessary harm should prevail here and override the public access interest in Mr. Nugent's confessions.

In the hearing before us the appellant sought to argue that the prohibition of access was an infringement of his rights under *s. 2(b)* of the *Canadian Charter of Rights and Freedoms*.

That point was not pursued in the courts below. While this Court undoubtedly has a discretion to entertain arguments not developed in the courts below, I would not extend that privilege to the appellant in this case. Had the point been raised in chambers, the parties would have had the right to lead evidence. We would have had the benefit of the reasoning of the courts below. If the issue had been clearly raised, interested parties might have sought to intervene even though no constitutional question in the technical sense of that term was raised. I note in passing, however, that if the appellant were to succeed on the *Charter* ground, the effect would be to impose a gloss upon rule 30.11(6).

In my view this Court should not entertain the *Charter* argument at this stage.

I turn then to the matters to be considered in judging whether to grant access to filed exhibits. In my view, the Appeal Division was correct in concluding that Nugent's privacy interests as a person acquitted of a crime outweigh the public right of access to exhibits judicially determined to be inadmissible against him.

The case of *Re Regina and Lortie*, [1985 CanLII 3637 \(QC CA\)](#), [1985] C.A. 451, 21 C.C.C. (3d) 436, to which the chambers judge referred, is distinguishable. In that case, the question was whether, pending the disposition of an appeal, there should be a temporary prohibition against the showing of tapes which were exhibits and had been copied. The majority of the Quebec Court of Appeal granted the prohibition. L'Heureux-Dubé J.A. (as she then was) dissented. Her comments were stressed before us. Her strong defence of the openness concept accords with the views of this Court in *MacIntyre*. In *Lortie*, the accused, whose privacy interests would be of paramount concern, supported the showing of the tapes. L'Heureux-Dubé J.A. was very careful to note (at p. 443 C.C.C.) that the question of copying and broadcasting of the tapes after the court of appeal had given its decision was not before the court. That question was before the Nova Scotia Appeal Division and is before us.

In *MacIntyre*, the other case to which the chambers judge referred, the press sought access to search warrants and supporting material. Dickson J. (as he then was), speaking for the majority, noted that it was unwise to attempt any comprehensive definition of the right of access (p. 183), and pointed out the competing policy considerations of respect for individual privacy and the need for "openness" in respect of judicial acts. This Court concluded that protection of the innocent would override public access, but that where the warrant was executed and something found the parties affected and the public should have access to the material upon which the warrant had been issued. Because a search warrant is issued *in camera*, allowing access to the materials in those circumstances serves public accessibility and concomitant judicial accountability (p. 186).

In this appeal, the exhibits were presented at an open trial to which there was public access and, indeed, information relating to them was publicly discussed.

I have already noted that the heart of *MacIntyre* is public accessibility as an important ingredient of judicial accountability. The applicant, in his sworn affidavit in support of this application, makes no claim to serve that interest. He does not indicate that these tapes are to be used to engage in some scrutiny of the judicial process. Public access to the trial and appellate process in which these exhibits

were discussed was in no way impeded and there is no basis on the material before us for concluding that unrestricted dissemination of them would make any meaningful contribution to scrutiny.

I believe that the Appeal Division was correct in applying the principles in *MacIntyre* and concluding that the interests of Nugent outweighed those put forward by the appellant.

In my view, the chambers judgment fails to recognize four significant factors that come into play in deciding whether the appellant should be given access to (and thus the ability to copy and disseminate) these exhibits. (I note that these points may not have been put to the chambers judge in argument). The factors are:

- 1) The nature of exhibits as part of the court "record".
- 2) The right of the court to inquire into the use to be made of access, and to regulate it.
- 3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.
- 4) That those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

1) The Nature of Exhibits as Part of the Court "Record"

An exhibit is not a court record of the same order as records produced by the court, or pleadings and affidavits prepared and filed to comply with court requirements. Exhibits are frequently the property of non-parties and there is, ordinarily, a proprietary interest in them. When they have served the purpose for their filing they are ordinarily at the disposition of the person who produced them. While they remain in its custody, the court has a duty to pass upon any request for access. That function is ordinarily exercised by its officers, such as the prothonotary here, but the court having custody of the exhibits has supervision over their use. The chambers judge here noted the Nova Scotia rule which directs that exhibits be turned over to the party producing them (Rule 30.11(6), *supra*). She observed that the reason for the rule was to relieve the court of the task of storing unwanted exhibits. The rule, however, reflects the fact that exhibits are not the property of the court.

While proprietary interests are not stressed by any of the parties before us, they are relevant to characterizing the nature of exhibits in balancing the interests of competing parties. Ordinarily the person entitled to possession would be a party to any application for access to them. Here, Nugent was a party to their creation.

I note that counsel here suggested that someone might want access to the tapes for the purpose of preparing educational programmes for the police. If that were the object of the request, the police, who probably own them, might well have some view to express.

Once exhibits have served their purpose in the court process, the argument based on unfettered access as part of the open process lying at the heart of the administration of justice loses some of its pre-eminence.

2)The Right of the Court to Inquire Into the Use to be Made of Access, and to Regulate It

It follows that the court, as the custodian of the exhibits, is bound to inquire into the use that is to be made of them and, in my view, is fully entitled to regulate that use by securing appropriate undertakings and assurances if those be advisable to protect competing interests. Nugent has put forward a genuine interest in the disposition of the tapes. He was a participant in their creation, a creation found to have been a violation of his constitutional rights, and the court ought to take steps to protect his legitimate interests.

In exercising its supervisory powers over material surrendered into its care, the court may regulate the use made of it. In circumstances such as these I do not think it right to say, as the chambers judge suggested, that Nugent must initiate other proceedings to protect or promote his privacy interests. While subsequent proceedings might lie, the court is, on the application, able to obviate that step. There is no need for a multiplicity of proceedings, nor should someone in the position of Nugent run the risk of bolting the laboratory door after the virus has not only been removed, but reproduced. In an application of this nature the court must protect the respondent and

accommodate the public interest in access. This can only be done in terms of the actual purpose and, in the face of obvious prejudice and the absence of a specific purpose, the order for unrestricted access and reproduction should not have been made.

3) The Fulfillment of the Open Justice Requirement

The exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.

I do not, for one moment, gainsay the importance of the principle that justice must be administered openly, but I am inclined to agree with the observation of Powell J. of the United States Supreme Court, quoted by Macdonald J.A. in the judgment appealed from, at p. 131, that "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." (*Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 610.)

In the course of that judgment, Powell J. noted that the court having custody of records and other material has a responsibility to exercise an informed discretion "with a sensitive appreciation of the circumstances that led to their production" (p. 603). As none of the United States authorities to which I have been referred deal with the copying of inadmissible exhibits, I am unable to say what conclusion a court in the United States would reach, but I am persuaded that conclusion is, in the United States, as here, reached upon a balancing of the interests at the time access is sought.

I am not persuaded that the court appealed from erred in its conclusion that the chambers judge had given insufficient weight to Nugent's privacy rights, rights he holds after a judicial acquittal. He surrendered that privacy during the trial process, but he did not surrender it for all time.

4) Non-Contemporaneous Public Scrutiny

Those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

Nugent's privacy was surrendered to the judicial process. Public access to and reporting of those proceedings is a price that he and any other accused must pay in the interests of ensuring the accountability of those engaged in the administration of justice. This principle is reflected in the special privilege that our law has traditionally accorded those who report judicial proceedings. Yet, modern defamation statutes restrict that privilege to contemporaneous reporting (see for example s. 13(1)(b) of the *Defamation Act*, R.S.N.S. 1967, c. 72, which is also c. D-3 of the C.S.N.S.). The reason, I suggest, is obvious. Fair, accurate, contemporaneous reports are likely to be balanced, to display the full context, and to expose the arguments on both sides. The subsequent release and publication of selected exhibits is fraught with risk of partiality, with a lack of fairness. Those policy considerations which form our attitude towards the openness of the administration of justice are relevant to an application such as this. Nugent cannot escape from proceedings in which he was involved, nor from the fair and accurate reporting of them, but the courts must be careful not to become unwitting parties to his harassment by facilitating the broadcasting of material which was found to have been obtained in violation of his fundamental rights.

As Dickson J. observed in *MacIntyre*, at p. 184:

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent

Before us counsel suggested that there might be scope for challenging the decision of the Attorney General not to appeal Nugent's acquittal by the Appeal Division and the tapes could be used to that end. I am by no means persuaded that it is necessary to go beyond the proceedings in the trial and appeal to make that challenge.

Conclusion

While *MacIntyre* did not address access to or copying of exhibits, the principles discussed there must, *a fortiori*, apply to them.

In *MacIntyre*, Dickson J. said this (at pp. 186-87):

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

The appellant would have us interpret the expression "innocent person" extremely narrowly. Dickson J. did not claim to define exhaustively the limitations of rights of access. He said this (at p. 183):

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted.

He also spoke of innocent persons who were the subject of search warrants as entitled to protection from "the stigmatization to name and reputation which would follow publication of the search" (p. 187).

I find it difficult to fathom how Nugent could be considered anything other than an innocent person within *MacIntyre*. Someone who has been accused and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his *Charter* rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.

The Appeal Division was correct in concluding that Nugent's privacy interests outweighed the appellant's interests in viewing and disseminating the exhibits.

It may be said that the order of the chambers judge was discretionary in nature. I am not satisfied that it should be so characterized and, as the point was not made by the appellant, authorities supporting that characterization were not advanced. However, assuming the order was "discretionary", the chambers judge did not have all the relevant considerations before her, gave

insufficient weight to Nugent's innocence and should have insisted upon the proposed use being specified so that any order could be crafted accordingly. In my view it was wrong to give an order, let alone an unrestricted order.

I would dismiss the appeal, with costs to the respondent Nugent, with no costs for or against the prothonotary or the Attorney General.

//Cory J.//

The reasons of L'Heureux-Dubé, Cory and McLachlin JJ. were delivered by

CORY J. (dissenting) -- I have read with great interest the reasons of my colleague Justice Stevenson but, with respect, I cannot agree with them.

The Principles that Must be Weighed in the Balance

There are two principles of fundamental importance to our democratic society which must be weighed in the balance in this case. The first is the right to privacy which inheres in the basic dignity of the individual. This right is of intrinsic importance to the fulfilment of each person, both individually and as a member of society. Without privacy it is difficult for an individual to possess and retain a sense of self-worth or to maintain an independence of spirit and thought.

The second principle is that courts must, in every phase and facet of their processes, be open to all to ensure that so far as is humanly possible, justice is done and seen by all to be done. If court proceedings, and particularly the criminal process, are to be accepted, they must be completely open so as to enable members of the public to assess both the procedure followed and the final result obtained. Without public acceptance, the criminal law is itself at risk.

In this appeal an appropriate balance must be struck between the right to privacy and the principle of open courts.

The American Experience

At the outset, it may be of assistance to consider the American experience in the field. This review should be conducted carefully and cautiously, bearing in mind the differences between the American Constitution and the *Canadian Charter of Rights and Freedoms*, as well as the differences in the history and background of the two countries. The examination is undertaken not with the aim of slavishly following the American decisions, but rather to benefit from the discussions and learning which have emanated from the American jurisprudence and scholarship.

A. Contrasting the English and American Approaches

Courts in both England and the United States have traditionally recognized the existence of a common law right to inspect and copy judicial records. This right has often been referred to as a "right of access". It has a long and honoured history, gaining recognition as early as the fourteenth century. In 1644, Lord Coke advocated an unrestricted right of access to judicial records. In England, however, while all persons enjoyed a general right of access, only those with an evidentiary or proprietary interest in the records were able to enforce their right if it were denied them.

The American approach, on the other hand, was based on a clear general right of access to court records, the enforcement of which was not restricted to those asserting a special interest in the documents. Generally, the American approach has favoured access for all citizens. As early as 1894, American courts recognized the right of access to judicial records including transcripts, evidence and other material. They did so on the basis that the denial of access would be an attempt to maintain secrecy in judicial records and would conflict with "the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice". See *Ex parte Drawbaugh*, 2 App. D.C. 404, at pp. 407-8.

B. *The United States Supreme Court and the Open Court Principle*

The open court principle has two facets. The first is the right of the public and of the media, as members or agents of the public, to attend trials and court proceedings and to report on all that transpires. The second facet is the right of the public to scrutinize and criticize the judicial process. In order to exercise this right effectively, it is necessary to have full access to the information upon which such scrutiny and criticism may be based.

The United States Supreme Court has on several occasions emphasized the importance of public scrutiny of the judicial process. In *Craig v. Harney*, 331 U.S. 367 (1947), the court stressed the public nature of court proceedings and vindicated the right of members of the press to report on them. In his reasons, Douglas J. stated, at p. 374: "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity."

The importance of the press in securing the principle of open courts and court processes was emphasized again by the U.S. Supreme Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), where it stated (at p. 350):

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Supreme Court stressed the importance of the public's right to know the contents of public records. Although recognizing the legitimacy of privacy concerns, the court relied on the First Amendment to conclude (at p. 491) that the State could not

impose sanctions on the accurate publication of the name of a rape victim obtained from public records -- more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.

The court emphasized the need in modern society for full and open access to public records. It stated (at p. 495):

Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

The *Cox* decision also contains important observations about the role of the media in facilitating public debate and in furthering the open court principle. The court stated (at pp. 491-92):

. . . in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately upon the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

See also *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), where the Supreme Court again reaffirmed the essential role of the press in safeguarding effective judicial administration by exposing the judicial process to public scrutiny.

Finally, the U.S. Supreme Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), held that the right to attend criminal trials is implicit in the guarantees of the First Amendment. On behalf of the majority, Burger C.J. recognized public access to the criminal courtroom as a right guaranteed by the American Constitution and, in doing so, emphasized the importance of public acceptance of the criminal justice process. At page 571, he noted that:

. . . especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

He went on to state (at pp. 571-73):

When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," . . .

The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." . . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice,"

Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system" [citing the concurring judgment of Brennan J. in *Nebraska Press Assn.*, *supra.*] [Emphasis added.]

These decisions stress the vital importance of the open court principle and the public scrutiny of the judicial process which it facilitates. In so doing, they provide a context in which to consider the American approach to the more immediate question of access to taped evidence.

C. The American Approach to Access to Audio and Video Tape Evidence

The U.S. Supreme Court considered the issue of public and media access to taped evidence in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). The media sought access to audio tapes which had been introduced in evidence at the trial of aides to President Nixon on charges arising out of the Watergate break-ins. During the trial, 22 hours of audio tapes were played for the jury. All those in court, including members of the media, were provided with earphones and transcripts of the tapes. Six weeks after the trial had begun, several broadcasters filed a motion seeking permission to obtain and copy the tapes played at trial. They based their claim on the common law right of access to judicial records. District Court Judge Sirica denied access on the grounds that broadcast of the tapes would endanger the rights of the defendants on appeal. The broadcasters appealed Judge Sirica's order to the Court of Appeals for the District of Columbia.

In *United States v. Mitchell*, 551 F.2d 1252 (1976), the D.C. Circuit Court of Appeals considered the common law right to inspect and copy judicial records and determined that the right is essential to the functioning of a democratic state, although it is not absolute. Since no clear guidelines could be articulated as to when judicial records should be closed to the public, the decision necessarily rested within the discretion of the trial court, subject to appellate review for abuse of discretion. However, the court stated that any incursions on the right of access should be made only where "justice so requires". It observed as well that "once an exhibit is publicly displayed [in open court], the interests in subsequently denying access to it necessarily will be diminished" (p. 1261). The Court of Appeals thus found a strong presumption in favour of access and determined that only compelling circumstances could militate against release. Since such circumstances were absent in that case, the D.C. Court of Appeals overturned the decision of Judge Sirica and granted access to the tapes.

In *Nixon v. Warner Communications, supra*, the U.S. Supreme Court reviewed the *Mitchell* decision. In a 5/4 split, the court reversed the Court of Appeals and denied the broadcasters' request for access. The broadcasters had claimed a constitutional right of access under both the free press clause of the First Amendment and the Sixth Amendment guarantee of a public trial. The court rejected these claims. It held that, while physical access to judicial records is a right at common law, the right is not absolute and is not constitutional in nature. In rejecting the Sixth Amendment claim, Powell J. stated at p. 610:

The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.

It is important to note, however, that this statement was made in refuting the broadcasters' claim to a constitutional right of access. It was not directed to the balancing process required when considering the common law right of access.

With respect to the latter issue, the court held that the general common law right of access is subject to the "sound discretion" of the trial court. It observed that the question of access would typically be resolved by weighing "the interests advanced by the parties in light of the public interest

and the duty of the courts", and that this balancing exercise would take place in the larger context of "the presumption -- however gauged -- in favor of public access to judicial records" (p. 602).

At the same time, the court refused to define the scope of the common law right or to identify the specific factors to be weighed in determining whether to grant access. Rather, the majority decided the issue on the basis of "an additional, unique element" not argued by either of the parties -- namely, the *Presidential Recordings Act*. In the court's view, the Act provided an alternative administrative procedure by which the public could gain access to all presidential materials of historical interest, including the recordings at issue. Accordingly, the court held (at p. 606) that it:

. . . need not weigh the parties' competing arguments as though the District Court were the only potential source of information regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release.

Since then, American federal appeal courts have differed as to the interpretation which should be given to the *Nixon* decision and have articulated varying approaches to the issue of access to taped evidence.

In the first line of cases, which arose out of various FBI "sting" operations, the *Nixon* decision was construed narrowly as turning on the applicability of the *Presidential Recordings Act*. Having distinguished *Nixon* in this way, several appeal courts followed, either expressly or implicitly, the approach taken by the D.C. Circuit Court in the *Mitchell* case, *supra*. They held that the common law right created an extremely strong presumption in favour of access which, though not of constitutional stature, could be overcome only rarely and in the clearest of cases. The holding of the Second Circuit Court of Appeals in *United States v. Myers*, 635 F.2d 945 (1980), is typical. The court stated (at p. 952):

. . . it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction. . . . When physical evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial, only the most compelling circumstances should prevent contemporaneous public access to it.

The same approach was adopted by the Third Circuit Court of Appeals in *United States v. Criden*, 648 F.2d 814 (1981), and by the District of Columbia Circuit in *In re National Broadcasting Co.*, 653 F.2d 609 (1981).

It is important to consider the grounds advanced in opposition to the release of the tapes in these cases. The defendants argued that access would jeopardize their right to a fair trial as guaranteed by the Sixth Amendment and would also render unfair the pending criminal trials of other defendants through the prejudicial effect publicity would have upon present and prospective jurors. All the appeal courts rejected this argument. They held that standard jury instructions and the examination of prospective jurors in the selection process together provided sufficient mechanisms to safeguard the fair trial rights of criminal defendants from any potential prejudice which might arise from broadcasting the tapes.

A contrary position was taken by the Fifth Circuit in *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (1981). The court accepted that a common law right of access exists, but determined that the standard of appellate review was whether or not the trial court had abused its discretion in its decision regarding access. In direct refutation of the earlier line of authority, the court held that the observations of the trial judge were essential in considering whether a fair trial could be ensured for present and prospective defendants and that the balancing of competing values was heavily reliant on the observations and insights of the presiding judge. The court considered its appellate role to be a narrow one.

In subsequent cases, American appellate courts have attempted to reconcile the more extreme positions and to articulate a "middle ground". The first such attempt was made by the Seventh Circuit in *United States v. Edwards*, 672 F.2d 1289 (1982). The court recognized the presumption in favour of access and citing the *Mitchell* case, *supra*, observed that the "common law right supports and furthers many of the same interests which underlie those freedoms protected by the Constitution" (p. 1294). At the same time, referring to *Belo Broadcasting*, *supra*, the court acknowledged that the right was non-constitutional in origin and conceded that a number of factors might militate against public access. It set out its position in these words (at p. 1294):

. . . we hold that there is a strong presumption in support of the common law right to inspect and copy judicial records. Where there is a clash between the common law right of access and a defendant's constitutional right to a fair trial, a court may deny access, but only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture. . . . We stress that it is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight. [Emphasis added.]

This position was echoed by the Sixth Circuit in *United States v. Beckham*, 789 F.2d 401 (1986), and by the Eighth Circuit in *United States v. Webbe*, 791 F.2d 103 (1986).

Finally, in *Valley Broadcasting Co. v. United States District Court for the District of Nevada*, 798 F.2d 1289 (1986), the Ninth Circuit reaffirmed the middle ground position. In so doing, the court expanded upon the holding in *Edwards, supra*, by specifically requiring the trial judge not only to articulate the reasons for denying access, but also to substantiate possible prejudice with a clear factual basis for the danger. The court put its position this way (at p. 1295):

The only potential prejudice appropriate for consideration by the district court was, therefore, the added prejudice that might result from broadcasting excerpts of the tapes as opposed to simply describing their contents. While we recognize that the added danger of jury taint arising from the transmission of the tapes themselves may vary from case to case, we reemphasize that the district court must articulate the factual basis for the danger without relying on hypothesis or conjecture.

D. *General Principles Emerging from the American Cases*

The American courts have for many years recognized a common law right of access to judicial records. All courts have held this right to include a common law, but not a constitutional, right of access to taped evidence introduced at trial. There is also a consensus that the decision as to whether to grant access is within the discretion of the trial court, which must balance the relevant interests at stake. In *Nixon*, the U.S. Supreme Court committed this determination to "the sound discretion" of the trial judge.

American courts have agreed that the standard of appellate review to be applied to the trial judge's determination regarding access is whether there has been an "abuse of discretion". Although

there is agreement as to the standard to be applied, there is variation amongst the appellate courts as to whether the application of that standard should be deferential or strict.

All courts considered the media to be the representatives of the public with regard to judicial proceedings. The cases recognize the right and responsibility of the media to keep the public informed of the workings of the courts, particularly in the criminal context. The courts have acknowledged that the media play an essential role in furnishing the information upon which public scrutiny and criticism of court proceedings can properly be based, and that in fulfilling this role the media make a substantial contribution to the democratic process of government. It is the media which make the courts truly accessible and "public".

The American cases indicate that there are several factors weighing in favour of public access to evidentiary tapes. First, it is said that audio and video tapes provide additional meaning to the written word or eyewitness account. Gestures, facial expressions, voice patterns and voice intensity are all modes of communication common to humanity that are lost in transcripts. Second, all persons present in the courtroom at trial witness the tapes as they are introduced into evidence for the benefit of the triers of fact. Broadcasting the tapes publicly would give effect and meaning to the open court principle by allowing members of the public who are unable to be physically present in the courtroom to witness all that privileged members of the public have been able to see for themselves. Third, public broadcasting of the taped evidence allows those who cannot be present at the trial to weigh the evidence and form their own opinion. This, it is said, satisfies both the appearance and the reality of justice within the community. Finally, public access to judicial records permits the public to keep an eye on all branches of government, including the judiciary.

On the other side of the balance, certain interests are put forward as militating against media access to audio and video tapes. In the American cases, the primary countervailing concern is the possible prejudice to the right of an accused to a fair trial. Other interests weighing against access are concerns relating to admissibility and privacy.

It must be remembered that the balancing in the American cases is far different from that required in the case at bar. In the American decisions the common law right of access had to be balanced against the constitutional right of present or prospective defendants to a fair trial as guaranteed by the Sixth Amendment to the American Constitution. In those cases where access was denied, the defendant's constitutional right to a fair trial was considered to outweigh the common law right of access. Furthermore, it is not without significance that, despite their concern for the Sixth Amendment rights of present and prospective defendants, the majority of American appellate courts were still willing to grant access.

In the case at bar, the fair trial interest simply does not arise. Nugent stands in no criminal jeopardy. He has been acquitted of the murder charge and the time for any further appeal has long since elapsed. He cannot claim any prejudice to a present or future right to a fair trial. Thus, the primary concern weighing in the balance against access in the American jurisprudence is not present in this case.

It is worth bearing in mind that some of the American cases suggest that the right to a fair trial is the only countervailing interest which could overcome the strong presumption in favour of access. It is significant as well that in the American setting, the principal contention of those writers who argue most vehemently against access is the need to preserve the right of the accused to a fair trial. Furthermore, none of them would recommend that the denial of access be indefinite. See, for example, William J. Whelan, "Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right" (1982), 50 *Fordham L. Rev.* 551, at pp. 580-81:

. . . it is clear that the proper time to stem any possible prejudice is before it is allowed to occur. In the cases that involve requests to copy tapes in evidence, the trial judge should deny their release until all risk of prejudice to the current defendants and to those implicated by the tapes has passed. Only when all rights to appeal are exhausted should the tapes be made available for copying.

. . .

When the records are video and audio tapes introduced into evidence at trial, the presumption in favor of release should not apply. Because there is a reasonable possibility that the broadcast of those tapes will irreparably harm the accused's right to a fair trial, the courts as a matter of law should deny the release of the tapes for copying until the accused is no longer in jeopardy. [Emphasis added.]

In light of the above analysis, it would appear that in the United States the media would be granted access to the tapes filed as exhibits in the trial of Mr. Nugent.

The Factors to be Considered in the Present Case

At the outset, I should say that for the reasons given by my colleague, I agree that the appellant's argument that his [s. 2\(b\) Charter](#) right to freedom of expression had been breached should not be considered. This argument was not raised before the judge of first instance and, although argued before the Court of Appeal, was not considered by that court in its reasons.

A. The Nature and Extent of the Common Law Right of Access to Court Documents in Canada

There can be no doubt that there exists in Canada a common law right of access to court documents. The nature and extent of that right will determine the outcome of this appeal. The common law right of access is of fundamental importance to the functioning of courts and to the preservation of public confidence in court processes. The right of access was considered in the pre-*Charter* case of *Attorney General of Nova Scotia v. MacIntyre*, [1982 CanLII 14 \(SCC\)](#), [1982] 1 S.C.R. 175. In that case Dickson J., as he then was, clearly acknowledged that there is a strong general presumption in favour of access to judicial records. At page 184 he stated:

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

He went on to observe that there is a need for contextual balancing in deciding whether to grant access in individual cases. After noting the general right to inspect and copy public records that exists in the United States, he said at p. 183:

By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the right of access to judicial records or delineation of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems

to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of "openness" in respect of judicial acts.

In emphasizing the need for openness with respect to judicial acts, Dickson J. stated at p. 185:

It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

B. Some General Policy Considerations

It is important that the public have confidence in the workings and proceedings of the courts. There can be a cathartic effect to a criminal trial. When a serious crime has been committed, the community quite naturally is outraged. In earlier times that sense of outrage sometimes led to vengeful acts which triggered a chain of violent action and reaction and occasionally led to mob violence. The criminal trial has pre-empted violence by providing an outlet and a means of sublimating the community's sense of outrage at the commission of a serious crime. It provides both a stage and a forum whereby the alleged crime can be explored and, if the accused is found to be guilty, the appropriate penalty imposed. An open trial process demonstrates to all, whether the family of the victim, the family of the accused, or the members of the community in general, that the entire criminal process has been conducted fairly and that those accused of crimes have been dealt with justly.

To operate effectively, the criminal law must have the support of the community. The public has traditionally, and very properly, had a compelling interest in the criminal trial process. In simpler days gone by, a significant segment of the community could attend criminal proceedings. Those who were present could and did advise their families and friends as to the nature of those proceedings. The process was, in the truest sense of the term, open to the public.

Obviously times have changed. Courtroom space is limited. Even if it were not, it is impossible for most members of the community to attend in court no matter how much they might wish to do so. Obligations to work and family make attendance impossible. The public is now represented by

members of the media who are, in a very practical sense, the proxies of the community at the trial process. This has been recognized by reserving a special place for members of the press in most courtrooms.

The public has accepted the media as their representatives at the unfolding of the criminal process. However, it necessarily follows that the modern community must rely upon the media for a fair and accurate depiction of the proceedings in order to facilitate the public right to comment on and criticize that process. This simply cannot be done without the degree of openness which would provide the media with full access to court documents, records and exhibits. The more barriers that are placed in the way of access, the more suspect the proceedings become and the greater will be the irrational criticism of the process. It is through the press that the vitally important concept of the open court is preserved.

The open court principle has been clearly recognized by this Court in previous decisions. As noted above, the *MacIntyre* case, *supra*, emphasized the importance of public scrutiny of the courts. More recently, in *Edmonton Journal v. Alberta (Attorney General)*, [1989 CanLII 20 \(SCC\)](#), [1989] 2 S.C.R. 1326, I discussed the open court principle in the context of the [s. 2\(b\) Charter](#) right to freedom of expression. I stated at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

With regard to the role which the media play in advancing this principle, the following appears at p. 1340:

It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

Although these remarks were made in the *Charter* context, the underlying principles are of general application and import in a democratic society. The rationale of the open court principle is important to the balancing exercise whether under the *Charter* or, as in the present case, at common law.

Appeals are the natural and frequent continuation of the criminal trial process. What is the community to make of a situation where an accused has been found guilty and the decision reversed by a court of appeal? No matter how right and proper that appellate decision may be, it will always be difficult for a community to accept. These difficulties will be magnified if the appellate court decision is based upon material which is not made accessible to the public's representative, the media.

Therefore, like the criminal trial, the criminal appeal should be as open as possible. The media, as the public's representative, should have access to all the exhibits which are part of the appeal proceedings and which may form the basis for the appellate court's decision. There can be no confidence in the criminal law process unless the public is satisfied with all court proceedings from the beginning of the process to the end of the final appeal. Of the three levels of government, it is the courts above all which must operate openly. While what is done in secret is forever suspect, what is done openly, whether susceptible to praise or condemnation, is more likely to meet with acceptance. There cannot be reasonable comment or criticism unless all aspects of the proceedings are known to the public.

In the absence of some overriding principle, there should, in my view, be access to the tapes filed as exhibits at trial and on appeal. Particularly is this true in a situation such as the present where the issue of the admissibility of the tapes formed the very basis of the appeal court decision. Access is essential if the community is to continue to support and have confidence in the work of the courts, particularly in the criminal context. Let us see if there is any such overriding principle applicable in this case.

C.Should Access be Denied on the Grounds that the Tapes were Found to be Inadmissible?

In arguing that access to the tapes should be denied, Nugent emphasized that the tapes had been ruled inadmissible by the Court of Appeal as having been obtained in violation of his *Charter* and common law rights. Nugent argued that the tapes should not remain part of the public record after the Court of Appeal made "the very pointed rulings that resulted in their inadmissibility".

In the American case of *Criden, supra*, there was a question as to the admissibility of the tapes filed in evidence. Nevertheless, the Third Circuit Court of Appeals ruled that the public interest in access prevailed over the issue of admissibility. Noting that the right of access is based on the public's interest in seeing and knowing the events which actually transpired, the Court pointed out that it would be unduly restrictive of the right of access were it to be confined to evidence found to have been properly admitted. Only through access can the public reasonably consider and criticize the rulings of the court, including rulings as to admissibility. Therefore, it would appear that in the United States access to the tapes would not be denied simply because they were ruled inadmissible. The approach of the Third Circuit Court of Appeals seems eminently sound.

It is not without significance that in the case at bar the majority of the Court of Appeal indicated that there was nothing manifest on the videotape itself which would make it inadmissible; rather, it is what had transpired earlier which rendered it so. This contrasts with the situation with respect to some of the audio tapes which should clearly not have been admitted in view of the police conduct recorded on the tapes themselves. Apart from any question of prior police misconduct, a viewing of the videotape demonstrates that there is nothing in it that would cater to a morbid or prurient appetite. It is a measured, unemotional recounting of a killing. If anything to do with a murder case can be said to be unexceptional, this tape fits that description.

Should the issue of admissibility in itself prohibit access to the tapes? I think not. The media as the agent of the public ought to have access to the tapes and be able to make copies of them. The public has a right to know what was excluded by the appellate court and the reason for its exclusion. To prohibit access to all evidence which has been ruled inadmissible would permit the courts to operate in secret.

Although it is necessary and appropriate that rulings be made at the trial level as to what may be properly admitted for consideration by the triers of fact, the trial is now over. The principal issue in the Court of Appeal was the admissibility of the taped evidence. There should not be a priestly cult of the law whereby lawyers and judges exclusively determine those items of the appeal record which can be seen and heard by members of the public. What evidence is admitted or excluded usually determines the outcome of a trial. Appeal court decisions on this issue are important to the public. Anything that prevents light being shed upon the subject can only lead to dark suspicion of the process.

The ruling of the Court of Appeal was based to a large extent on the denial to Nugent of his *Charter* right to counsel. [Section 24\(2\)](#) of the *Charter* provides:

24. . . .

(2) Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this [Charter](#), the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The importance of the *Charter* as the supreme law of the land cannot be denied. It follows as the night the day that the public has a right to know what courts consider to be evidence which is so unacceptable that its admission would bring the administration of justice into disrepute. The public should be able to comment on and, if appropriate, to criticize the court's position on that issue. It is a matter of public importance, interest and concern.

In this case, judicial opinion differed on the issue of admissibility. The trial judge admitted all the tapes. Four members of the Court of Appeal held all of the tapes to be inadmissible. The dissenting member of the court would have admitted the video tape and most of the audio tapes. This diversity of views on the issue of admissibility further supports the case for access, since the public is entitled to know the actual evidence that was the subject of differing judicial opinion. I therefore conclude that the fact that the tapes were ruled inadmissible should not constitute a bar to their

accessibility by the media. The public has a right to know what was ruled admissible and the reason for that ruling.

D. Did the Production and Playing of the Tapes in Open Court Satisfy the Common Law Right to Access?

It was argued that the production and playing of the tapes during the trial satisfied the common law right of access and the underlying open court principle.

It may be that in some cases the production of audio or video tapes in open court would satisfy the public's right of access to those tapes. However, it cannot be forgotten that the ruling as to their inadmissibility determined the outcome of the appeal. So far as the community in which Nugent lived was concerned, he had been found guilty by a jury of his peers. The community and the public in general had a right to know the basis for the reversal of that decision by the Court of Appeal.

Surely the media cannot be faulted for not knowing at the time of trial what grounds of appeal might be raised or the issues upon which an appeal would be decided. Even experienced appellate counsel often raise additional legal issues that were not considered at trial. The media, on behalf of the public, are entitled to gain access to and copy the tapes which became the focal point of the appeal. It is neither fair nor reasonable to say that the media at trial should have recognized the legal issue or anticipated the centrality of the question of admissibility of the tapes on appeal and reported and commented on the tapes accordingly.

In my view, it cannot be said that the production of the tapes at trial satisfies the principle of open courts. The appellate proceeding must be as open as the trial. Court records and documents, including exhibits filed at trial which form part of the appeal record, should, as a general rule, be open to all. The fact that the tape has been played before should not weaken any claim for access. Indeed, the fact that the tape has been publicly viewed renders the privacy interest less compelling. The view expressed by the Third Circuit Court of Appeals in the *Criden* case, *supra*, is apposite (at p. 828):

Whatever the validity of the original ruling, the tapes were in fact admitted into evidence, their contents publicized, and the transcripts of the tapes released to the press. Thus, whatever

privacy right defendants may have claimed in such tapes is irretrievably lost, and if any remedy remains, it must perforce be confined to appellate action with regard to the underlying conviction.

Developments in Canada since 1982 have raised the common law right of access and the open court principle on which it is based to even greater prominence. With the advent of the *Charter of Rights and Freedoms*, courts are playing a far wider role in the affairs of all Canadians than ever before. The concepts of freedom of religion, freedom of expression and equality rights have been and will continue to be before the courts. With this widening judicial role, there is an increased public interest in judicial decisions and their effects. As a result, the principle of open courts has attained ever-greater significance. When the balancing of competing rights and interests is undertaken, due weight must be given to the added importance of open courts. What is done by the courts away from the clear light of public scrutiny fosters public suspicion, no matter how ill-founded that suspicion might be. Suspicion nurtures the cancerous growth of mistrust which must, if possible, be avoided.

In this case, on balancing the privacy considerations of Nugent against the principle of open courts, the openness of the courts must prevail. This result is necessary to avoid ill-founded suspicion of the courts and to maintain public confidence in the administration of justice. It is openness which maintains both the integrity of the court system and public confidence in it. The preservation of that essential policy of openness must outweigh Mr. Nugent's privacy interest in the tapes which were already displayed to the public at the time of trial.

E. *Proprietary Interests*

Finally, my colleague has raised the issue of proprietary interests in exhibits. With respect, I am of the view that it does not arise in the present case. Regardless of the question of ownership of the audio and video tapes, the fact remains that the tapes were in the custody of the Supreme Court of Nova Scotia at the time the application for access was brought. Thus, it was entirely appropriate that a party seeking access apply to the court; indeed, this was the only manner a party seeking access could proceed. Once the application was made, the court was correct in retaining custody of the exhibits until the question of access was determined. Its right to do so flows from a court's

supervisory and protecting power over its own records, as recognized by this Court in *MacIntyre*, *supra*. As a result, I am of the view that the question of proprietary interest in the tapes is irrelevant to the determination of the present appeal.

Conclusion

There can be no question that there must be a strong presumption in favour of openness to ensure judicial accountability. Certainly, it is clear that the right of access not only facilitates the openness of court processes, but also promotes and advances the constitutional values of freedom of expression. As a result, it is deserving of recognition and protection in appropriate instances, of which the present case is a prime example. Accordingly, I am of the view that access was properly granted in the present case.

The Discretionary Nature of the Order of the Trial Judge and Appellate Review of that Order

There is a further and independent basis for upholding the decision of the judge of first instance. Glube C.J.T.D. considered the matter fully before granting access to the tapes. She was well aware of the effect that the reproduction or broadcast of the tapes might have upon Nugent and specifically reserved the question of what use might be made of the tapes. Referring to the videotape, she stated that steps might be taken to protect the identity of Nugent. It was clearly implicit in her order that before any use could be made of the tapes, the matter was to come before her again once the media had gained access. Thus, the trial judge carefully considered the matter before exercising her discretion. I would note in passing that the question as to what steps might properly be taken to control the use of the tapes is not before this Court. The sole issue is the media's right of access to the tapes.

It is clear that an appellate court should not interfere with a discretionary order unless a significant error is revealed. In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110, Beetz J., speaking for the Court, quoted with approval from the decision of the House of Lords in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042.

The latter case emphasized the limits imposed upon a court of appeal in substituting its own discretion for that of a motion judge granting an interlocutory injunction, even in situations where the appellate court has had the benefit of additional evidence. In that case Lord Diplock stated:

. . . it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.

I can find no error that would justify setting aside the order of Glube C.J.T.D. Indeed, in my view, the decision in *MacIntyre, supra*, would lead to the conclusion that Glube C.J.T.D. was correct in the order which she granted.

Summary

There is a common law right of access to judicial records and this right includes the opportunity to inspect and to copy such records.

It is not necessary in this case to consider whether that right is guaranteed by s. 2(b) of the *Charter*. Nevertheless, the right of access plays an important role in promoting openness of the courts and accountability of the judiciary, and clearly advances the values enshrined in s. 2(b) of the *Charter*.

There is a very strong presumption in favour of access. That presumption must be balanced against other important rights and interests.

The balancing exercise must be conducted on a case-by-case basis. Any order made with regard to access is discretionary. If access is to be denied, the trial court should outline the opposing interests which have been deemed sufficient to overcome the strong presumption in favour of the common law right of access.

In considering and balancing the right of Nugent to privacy, it must be remembered that Nugent has undergone a trial and the tapes were played in public. In those circumstances the right to privacy, although it always must be taken into account, is of less weight than it would be had the tapes never been played. Further, the importance of the openness of the courts and judicial accountability weighs heavily in favour of access in the present case.

Appellate deference should be accorded to the discretionary order of the trial judge concerning access. See *Attorney General of Manitoba v. Metropolitan Stores, supra*.

Disposition

The trial judge's decision to grant access in this case is reasonable and should be upheld. In the result, I would allow the appeal and restore the order of the judge of first instance.

Appeal dismissed, L'HEUREUX-DUBÉ, CORY and MCLACHLIN JJ. dissenting.

Solicitors for the appellant: Boyne, Clarke, Dartmouth.

*Solicitor for the respondent the Prothonotary of the Supreme Court of Nova Scotia at Halifax:
The Department of the Attorney General, Halifax.*

Solicitors for the respondent Nugent: Coady, Filliter, Halifax.

Solicitors for the intervener: Gordon, Strathy & Henderson, Ottawa.

TAB 39

Andrews v. Grand & Toy Alberta Ltd., 1978 CanLII 1 (SCC), [1978] 2 SCR 229

Source:	Supreme Court of Canada
Date:	1978-01-19
Other citations:	19 NR 50 — 83 DLR (3d) 452 — [1978] 1 WWR 577 — AZ-78111098 — 8 AR 182 — 3 CCLT 225 — [1978] CarswellAlta 214 — EYB 1978-147395 — [1978] SCJ No 6 (QL) — [1978] ACS no 6
Citation:	Andrews v. Grand & Toy Alberta Ltd., 1978 CanLII 1 (SCC), [1978] 2 SCR 229, < https://canlii.ca/t/1mkb5 >, retrieved on 2026-03-23
Most recent unfavourable mention	Laurie v Her Majesty the Queen in Right of Alberta , 2021 ABQB 833 (CanLII) [...] [23] Ms. Laurie did not identify why this Court is not bound by Andrews v Grand & Toy Alberta Ltd. As such, though Ms. Laurie clearly believes otherwise, Canadian law does indeed establish a maximum price on a person's health, well-being, comfort, and life expectancy: \$365,000. [...]

SUPREME COURT OF CANADA

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229

Date: 1978-01-19

J. A. Andrews, Dorothy Andrews, Ivan Stefanyk (*Plaintiffs*) *Appellants*;

and

Grand & Toy Alberta Ltd. and Robert G. Anderson (*Defendants*) *Respondents*.

1977: June 15, 16; 1978: January 19.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Damages — Young adult rendered a quadriplegic and faced with lifetime of dependency on others — Applicable principles in assessment of damages.

In a negligence action for personal injury involving a young man rendered a quadriplegic in a traffic accident, ' the trial judge awarded \$1,022,477.48. The Appellate Division of the Supreme Court of Alberta reduced that sum to \$516,544.48. Leave to appeal to this Court was granted on the question whether the Appellate Division erred in law in the assessment of damages.

Liability was not an issue. The trial judge found that the fault was entirely that of the respondents. The Appellate Division (one member dissenting on this issue) found the appellant James Andrews 25 per cent contributorily negligent. Those findings did not arise for discussion in this appeal. Nor did the question of special damages.

This Court was called upon to establish the correct principles of law applicable in assessing damages in cases such as this where a young person has suffered wholly incapacitating injuries and faces a lifetime of dependency on others. On the date of the accident, Andrews was an apprentice carman, 21 years of age and unmarried.

Held: The appeal should be allowed. General damages were assessed at \$740,000 which together with the special damages of \$77,344 gave a final figure of \$817, 344. Of this amount the appellant was granted judgment for 75 per cent, that is \$613,008, under the uncontested apportionment of liability.

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1. Pecuniary loss

(a) Future care

(i) Standard of care: The paramount issue to be decided was whether in a case of total or near-total disability the future care of the victim should be in an institutional or a home care environment. The trial judge chose home care and found that it would take \$4,135 per month to provide such care for Andrews. The Appellate Division agreed that home care would be better but denied it to him. It considered that this standard of care was unreasonably and unrealistically high. Without giving any reason for selecting the particular figure chosen, it substituted \$1,000 per month. The Court of Appeal erred in law in the approach it took. It failed to show that the trial judge applied any wrong principle of law or that the overall amount awarded by him was a wholly erroneous estimate of the damage.

Contrary to the view expressed in the Appellate Division, there is no duty to mitigate damage, in the sense of being forced to accept less than real loss. There is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. But, in a case like the present, where both Courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment. It does not mean that Andrews must languish in an institution which on all evidence is inappropriate for him. The ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages

at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims against him are legitimate and justifiable.

Was it reasonable for Andrews to ask for \$4,135 per month for home care? Home care is expensive, but auxiliary hospital care is so utterly unattractive and so utterly in conflict with the principle of proper compensation that this Court was offered no middle ground.

(ii) Life expectancy: Figures introduced at trial showed that the life expectancy of 23-year-old persons in general is 50 years. However, a statistical average is helpful only if the appropriate group is used. Medical testimony at trial indicated that possibly five years less than normal would be a reasonable expectation of life

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for a quadriplegic. This figure was accepted by the Appellate Division and also by this Court.

(iii) Contingencies of life: The trial judge allowed a 20 per cent discount for "contingencies and hazards of life". The allowance by the Appellate Division of a further 10 per cent discount was an error. The trial judge's figure of 20 per cent as a discount for contingencies was not an allowance for a decreased life expectancy, as the Appellate Division characterized it, for this had already been taken into account by reducing the normal 50-year expectancy to 45 years. The "contingencies and hazards of life" in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings, such as unemployment, accident, illness. They are not merely to be added to the latter so as to achieve a cumulative result. The trial judge's figure of 20 per cent was accepted by this Court as a reasonable allowance for the contingencies relating to future care.

(iv) Duplication with compensation for loss of future earnings: Proper future care is the paramount goal of damages for personal injuries. To determine accurately the needs and costs in respect of future care, basic living expenses should be included. The costs of necessities when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. The projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.

(v) Cost of special equipment: In addition to his anticipated monthly expenses, Andrews required an initial capital amount for special equipment. The assessment by both Courts below was correct in principle and was therefore accepted.

(b) Prospective loss of earnings

It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made.

(i) Level of earnings: The holding of the Appellate Division that \$1,200 per month represents a reasonable estimate of Andrews' future average level of earnings was affirmed.

(ii) Length of working life: The capitalization of future earning capacity must be based not on the shortened life expectancy but rather on the expected working life span prior to the accident. It is the loss of the

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income-earning capacity which existed prior to the accident for which the appellant must be compensated.

(iii) Contingencies: The figure used to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents and business depression, is obviously an arbitrary one. The figure of 20 per cent which was used in the lower Courts (and in many other cases), although not entirely satisfactory, should be accepted.

(iv) Duplication of the cost of future basic maintenance: At trial evidence was given that the cost of basics for a person in the position of Andrews prior to the accident would be approximately 53 per cent of income. This figure was accepted and his anticipated future monthly earnings were accordingly reduced to \$564.

(c) Considerations relevant to both heads of pecuniary loss

(i) Capitalization rate: allowance for inflation and the rate of return on investments: The discount rate to be used in calculating the present value of the awards for future care and loss of earnings in this case should be varied from five to seven per cent. The approach at trial was to take as a rate of return the rental value of money which might exist during periods of economic stability, and consequently to ignore inflation. The approach adopted by this Court was to use present rates of return on long-term investments and to make some allowance for the effects of future inflation.

(ii) Allowance for Tax: As it is earning capacity and not lost earnings which is the subject of compensation, no consideration should be taken of the amount by which the income from the award for prospective earnings will be reduced by payment of taxes on

the interest, dividends or capital gain. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.

The impact of taxation upon the income from the capital sum for future care is mitigated by the existence of s. 110(1) (c) (IV.1) of the *Income Tax Act* in respect of the deduction of medical expenses. Because of this provision and because of the position taken in the Courts below, where no allowance was made to adjust the amount assessed for future care in light of the reduction from taxation, this Court made no allowance for that item.

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Also, with respect to the determination of the present value of the cost of future care, the calculations should provide for a self-extinguishing sum. To allow a residual capital amount would be to over-compensate the injured person by creating an estate for him.

2. Non-pecuniary losses

In the case of a young adult quadriplegic like Andrews the amount of \$100,000 should be adopted as the appropriate award for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities and loss of expectation of life. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.

Total award

Rather than make an overall assessment of the total sum, it is more appropriate to make an overall assessment of the total under each head of future care, prospective earnings, and non-pecuniary loss, in each case in light of general considerations such as the awards of other courts in similar cases and an assessment of the reasonableness of the award.

Nance v. B.C. Electric Railway Co., [1951 CanLII 374 \(UK JCPC\)](#), [1951] A.C. 601; *Admiralty Commissioners v. S.S. Susquehanna*, [1926] A.C. 655; *West & Son Ltd. v. Shephard*, [1964] A.C. 326; *Admiralty Commissioners v. S.S. Valeria*, [1922] 2 A.C. 242; *Livingstone v. Rawyards Coal Co.* (1880), 5 App. Cas. 25; *Cunningham v. Harrison*, [1973] 3 All E.R. 463; *Fletcher v. Autocar & Transporters Ltd.*, [1968] 1 All E.R. 726; *R. v. Jennings*, [1966 CanLII 11 \(SCC\)](#), [1966] S.C.R. 532; *Bisson v. Corporation of Powell River* (1967), [1967 CanLII 521 \(BC CA\)](#), 62 W.W.R. 707, 64 W.W.R. 768; *Jennings v. Cronsberry* (1965), [1965 CanLII 24 \(ON CA\)](#), 50 D.L.R. (2d) 385; *Skelton v. Collins* (1966), 39 A.L.J.R. 480; *Olivier v. Ashman*, [1962] 2 Q.B. 210; *McCann v. Sheppard*, [1973] 1 W.L.R. 540; *Warren v. King*, [1963] 3 All E.R. 521; *McKay v. Board of Govan School Unit No. 29 of Saskatchewan*, [1968 CanLII 76 \(SCC\)](#), [1968] S.C.R. 589; *Bresatz v. Przibilla* (1962), 108 C.L.R. 541; *Mallet v. McMonagle*, [1970] A.C. 166; *Re: Anti-Inflation Act*, [1976 CanLII 16 \(SCC\)](#), [1976] 2 S.C.R. 373; *Schroth v. Innes, Perry and Shiels*, [1976 CanLII 1085 \(BC CA\)](#), [1976] 4 W.W.R. 225; *Ward v. James*, [1965] 1 All E.R. 563; *Hamel v. Prather*, [1976 ALTASCAD 3 \(CanLII\)](#), [1976] 2 W.W.R. 742; *Jackson v. Millar*, [1975 CanLII 20 \(SCC\)](#), [1976] 1 S.C.R. 225, referred to.

APPEAL by the plaintiffs, from a judgment of the Supreme Court of Alberta, Appellate Division^[1], reducing an award of damages of Kirby

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J. in a negligence action for personal injuries. Appeal allowed.

D. K. Laidlaw, Q.C., R. Cummings and D. Andrews, for the plaintiffs, appellants.

J. A. Weir and B. Larbalestier, for the defendants, respondents.

The judgment of the Court was delivered by

DICKSON J.—This is a negligence action for personal injury involving a young man rendered a quadriplegic in a traffic accident for which the respondent Anderson and his employer, Grand & Toy Alberta Ltd., have been found partially liable. Leave to appeal to this Court was granted on the question whether the Appellate Division of the Supreme Court of Alberta erred in law in the assessment of damages. At trial Mr. Justice Kirby awarded \$1,022,477.48; the Appellate Division reduced that sum to \$516,544.48.

The amount awarded in each Court under each of the several heads of damages is set out below:

<u>Pecuniary Loss</u>		
(a) <u>Cost of Future Care</u>	<u>Trial</u>	<u>Appellate Division</u>
—special equipment	\$14,200	\$14,200
—monthly amount	4,135	1,000
—contingencies	20%	30%
—capitalization rate	5%	5%
—life expectancy	45 years	45 years
-	\$735,594	\$164,200
(b) <u>Loss of Prospective Earnings</u>		
—level of earnings	\$ 830	\$1,200
—basic deduction to avoid duplication between the award for future care and that part of the lost earnings that would have been spent on living expenses	440	—
Net	\$390	\$1,200

—contingencies	20%	20%
—work span	30.81	30.81
—capitalization rate	5%	5%
Total	\$ 59,539	\$175,000
<u>Non-Pecuniary Loss</u>		
—Pain and Suffering	\$150,000	\$100,000
—Loss of Amenities		
—Loss of Expectation of Life		
<u>Special Damages</u>	\$77,344	\$77,344

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Liability is not an issue. The trial judge found that the fault was entirely that of the respondents. The Appellate Division (McDermid J.A. dissenting on this issue) found the appellant James Andrews 25 per cent contributorily negligent. Those findings do not arise for discussion in this appeal. Nor does the question of special damages.

This Court is called upon to establish the correct principles of law applicable in assessing damages in cases such as this where a young person has suffered wholly incapacitating injuries and faces a lifetime of dependency on others. The question of "million dollar" awards has not arisen in Canada until recently, but within the past several years four such cases have been before the Courts, namely: (i) the case at bar; (ii) *Thornton v. The v Board of School Trustees of School District No. 57 (Prince George)*, at present under appeal to this Court, in which the award at trial was \$1,534,058, reduced on appeal to \$649,628; (iii) *Teno v. Arnold*, also under appeal to this Court, in which the award for general damages at trial was \$950, 000, reduced on appeal to \$875,000; (iv) *McLeod v. Hodgins*, (unreported), in which Mr. Justice Robins, of the Ontario High Court, awarded at trial an amount of \$1,041,197, of which \$1,000, 000 were general damages.

Let me say in introduction what has been said many times before, that no appellate court is justified in substituting a figure of its own for that awarded at trial simply because it would have awarded a different figure if it had tried the case at first instance. It must be satisfied that a wrong principle of law was applied, or that the overall amount is a wholly erroneous estimate of the damage; *Nance v. B.C. Electric Railway Co.*^[2]

The method of assessing general damages in separate amounts, as has been done in this case, in my opinion, is a sound one. It is the only way in which any meaningful review of the award is possible on appeal and the only way of affording

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reasonable guidance in future cases. Equally important, it discloses to the litigants and their advisers the components of the overall award, assuring them thereby, that each of

the various heads of damage going to make up the claim has been given thoughtful consideration.

The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.

The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs. In making this comment I am not unaware of the negative recommendation of the British Law Commission (Law Com. 56-*Report on Personal Injury Litigation-Assessment of Damages*) following strong opposition from insurance interests and the plaintiffs' bar.

The apparent reliability of assessments provided by modern actuarial practice is largely illusory, for actuarial science deals with probabilities, not actualities. This is in no way to denigrate a respected profession, but it is obvious that the validity of the answers given by the actuarial witness, as with a computer, depends upon the soundness of the postulates from which he proceeds. Although a useful aid, and a sharper tool than the "multiplier-multiplicand" approach favoured in some jurisdictions, actuarial evidence speaks in terms of group experience. It cannot, and does not 'purport to, speak as to the individual sufferer. So long as we are tied to lump sum

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awards, however, we are tied also to actuarial calculations as the best available means of determining amount.

In spite of these severe difficulties with the present law of personal injury compensation, the positive administrative machinery required for a system of reviewable periodic payments, and the need to hear all interested parties in order to fashion a more enlightened system, both dictate that the appropriate body to act must be the Legislature rather than the Courts. Until such time as the Legislature acts, the Courts must proceed on established principles to award damages which compensate accident victims with justice and humanity for the losses they may suffer.

I proceed now to a brief recital of the injuries sustained by the appellant James Andrews in the present case. He suffered a fracture with dislocation of the cervical spine between the fifth and sixth cervical vertebrae, causing functional transection of the spinal cord, but leaving some continuity; compound fracture of the left tibia and left humerus; fracture of the left patella. The left radial nerve was damaged. The lesion of the spinal cord left Andrews with paralysis involving most of the upper limbs, spine and lower limbs. He has lost the use of his legs, his trunk, essentially his left arm and most of his right arm. To add to the misery he does not have normal bladder, bowel and sex functions. He suffers from spasticity in both upper and lower limbs. He has difficulty turning in bed and must be repositioned every two hours. He needs regular physiotherapy and should have someone in close association with him at all times, such as a trained male orderly. The only functioning muscles of respiration are those of the diaphragm and shoulders. There is

much more in the evidence but it need not be recited. Andrews is severely, if not totally disabled. Dr. Weir, a specialist in neurosurgery, said of Andrews' condition that "there is no hope of functional improvement." For the rest of his life he will be dependent on others for dressing, personal hygiene, feeding and, indeed, for his very survival. But, of utmost importance, he is not a vegetable or a piece of cordwood. He is a man of above average intelligence and his mind is unimpaired. He can see, hear and speak as before. He has partial use of his right arm and

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hand. With the aid of a wheelchair he is mobile. With a specially-designed van he can go out in the evening to visit friends, or to the movies, or to a pub. He is taking driving lessons and proving to be an apt pupil. He wants to live as other human beings live. Since May 31, 1974, he has resided in his own apartment with private attendant care. The medical long-term care required is not at a sophisticated level but rather at a practical care level.

Andrews was twenty-one years of age and unmarried on the date of the accident. On that date he was an apprentice carman employed by the Canadian National Railways in the City of Edmonton.

I turn now to consider assessment of the damages to which Andrews is entitled.

Pecuniary Loss

(a) Future Care

(i) Standard of Care: While there are several subsidiary issues to be decided in this case, there is one paramount issue: in a case of total or near-total disability should the future care of the victim be in an institutional or a home care environment? The trial judge chose home care. The Appellate Division agreed that home care would be better but denied it to him. Chief Justice McGillivray who delivered the judgment of the Court on this issue said: "All the evidence called supports the proposition that psychologically and emotionally Andrews would be better in a home of his own, where he would be lord of the manor, as it were." Some evidence even indicated the medical superiority of a home environment.

The trial judge found that it would take \$4,135 per month to provide care for Andrews in a home environment. The Appellate Division considered that this standard of care was unreasonably and unrealistically high. Without giving any reason for selecting the particular figure chosen, the Appellate Division substituted \$1,000 per month. Obviously, here is the heart of the controversy. On

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other matters there was substantial agreement between the lower Courts.

In my opinion, the Court of Appeal erred in law in the approach it took. After the statement quoted above that Andrews would be better psychologically and emotionally in a home of his own, Chief Justice McGillivray referred to some of the evidence supporting that proposition. He quoted the following passage from the evidence of Dr. Weir:

Well, I think [sic] that the greatest problem they have and the greatest burden of their affliction is the fact that they are all depressed because not only have they lost the potential for many normal and enjoyable human activities. In fact up until the present they pretty well have been converted into lifelong inhabitants of a hospital institution and an institution is an institution, it is virtually a life sentence and has

been to this date. I would say that if you really, you know, if you wanted to give him the optimal potential it would be in a home environment in which he had some, in which he had the control of it to the same extent that the rest of us have control over our own homes and dwelling places. I don't really think that any hospital or medical institution has the potential to give someone that same feeling that they are in fact the lords and masters of their own castle.

The Chief Justice noted that Andrews had said he would not live in an institution and the following excerpts from the evidence were quoted:

Q. Tell us, Jim, would you be prepared to live in an auxiliary hospital?

A. Never.

Q. Would you elaborate on that?

A. Well there is just no way that I would go into an auxiliary hospital that is—I don't know, I think that is one step into a grave, that is all it is, too many old folks that have nothing to do but reminisce, you know, I don't know, but just from what I have heard of auxiliary hospitals.

Q. Well how about other disabled people, do you have any difficulty getting along with them, would you be prepared to live with them, say if they were even younger?

A. My age?

Q. Yes.

A. With my same disability?

Q. Yes, if you were in some place with people that have disabled problems?

A. No, because it is the same thing, people get into a state of depression and they throw it on the group,

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like even now in the hospital like the way it is now there is a group of younger people and, you know, even friction can be created amongst us because of one person's bad day kind of thing, and I wouldn't want to live with other disabled persons, not at all.

I am hesitant to enter upon a detailed analysis of the reasons advanced by the Appellate Division for its decision, but in view of the importance of the matters raised in this litigation, not only for the appellant Andrews but for others in a similar plight, I do not think any other course is open.

Following the passage from the evidence of Andrews which I have quoted, Chief Justice McGillivray said:

In having a home of his own, it is stated that Andrews needs at least 20 hours a day care. He has to be turned at night every two hours, he has to have constant attention, and it is on this footing that two orderlies and a housekeeper and the cost of operating a three-bedroom home are advanced as being reasonable costs. Now, while the proposition that to the extent that money can do it, a plaintiff should be put

into the position he would have been in, but for the accident, this does not mean that the plaintiff does not have to be reasonable and mitigate damage.

With respect, I agree that a plaintiff must be reasonable in making a claim. I do not believe that the doctrine of mitigation of damages which might be applicable, for example, in an action for conversion of goods, has any place in a personal injury claim. In assessing damages in claims arising out of personal injuries, the ordinary common law principles apply. The basic principle was stated by Viscount Dunedin in *Admiralty Commissioners v. S.S. Susquehanna*^[3], at p. 661 (cited with approval in *West & Son Ltd. v. Shephard*^[4], at p. 345) in these words:

... the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act ...

The principle was phrased differently by Lord Dunedin in the earlier case of *Admiralty Commissioners*

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v. S.S. Valeria^[5], at p. 248, but to the same effect:

... in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do, the loss which he has suffered as the natural result of the wrong done to him.

The principle that compensation should be full for pecuniary loss is well established. See *McGregor on Damages*, 13 ed., at p. 738:

The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss he has suffered. This is today a clear principle of law.

To the same effect, Kemp & Kemp, *Quantum of Damages*, vol. 1, 3rd ed., at p. 4: "The person suffering the damage is entitled to full compensation for the financial loss suffered." This broad principle was propounded by Lord Blackburn at an early date in *Livingstone v. Rawyards Coal Company*^[6], at p. 39, in these words:

I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent [sic] within reason that money can be used to sustain or improve the mental or physical health of the injured person it

may properly form part of a claim.

Contrary to the view expressed in the Appellate Division of Alberta, there is no duty to mitigate, in the sense of being forced to accept less than real loss. There is a duty to be reasonable. There cannot be "complete" or "perfect" compensation. An award must be moderate and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. But, in a case like the present, where both Courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment. It does not mean that Andrews must languish in an institution which on all evidence is inappropriate for him.

The reasons for judgment of the Appellate Division embodied three observations which are worthy of brief comment. The first: "It is the choice of the Respondent to live in a home of his own, and from the point of view of advancing a claim for damages, it is a most salutary choice, because it is vastly the most expensive." I am not entirely certain as to what is meant by this observation. If the import is that the appellant claimed a home life for the sole purpose of inflating his damage claim, then I think the implication is both unfair and unsupported by evidence. There is no doubt upon the medical and other evidence that a home environment would be salutary to the health of the appellant and productive of good effects. It cannot be unreasonable for a person to want to live in a home of his own.

The next observation:

Secondly, it should be observed that in many cases, particularly in Alberta, where damages have been awarded, the persons injured were going to live with their families. Here, the evidence (in spite of the fact that the Respondent's mother advanced a claim for \$237.00 which represented a towing charge for the motor cycle and parking, taxis and bus fare expended on visits to her son in the Hospital for approximately a

nine-month period prior to the issue of the Statement of Claim) is that the Respondent and his mother were not close before the accident, and matters proceeded on the footing that the mother's natural love and affection should have no part in Andrews' future. Again, this situation is the most expensive from the point of view of the Respondent.

The evidence showed that the mother of the appellant James Andrews was living alone, in a second-floor apartment and that relations between Andrews and his mother were strained at times. This should have no bearing in minimizing Andrews' damages. Even if his mother had been able to look after Andrews in her own home, there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis. The second observation is irrelevant.

The third observation was in these words:

Thirdly, it should be observed that the learned trial judge has referred with approval to the English authorities which held that full compensation for pecuniary loss must be given. It does not, however, follow that every conceivable expense which a

plaintiff may conjure up is a pecuniary loss. On the evidence, then, should this Court consider that Andrews should live in a home of his own for the next 45 years at the expense of the Appellant?

I agree that a plaintiff cannot "conjure up" "every conceivable expense." I do not think that a request for home care falls under that rubric.

Each of the three observations seems to look at the matter solely from the point of view of the respondents and the expense to them. An award must be fair to both parties but the ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by assuring that the claims raised

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against him are legitimate and justifiable.

The Appellate Division relied upon *Cunningham v. Harrison*^[7]. In that case, as a result of an accident, the plaintiff was permanently paralyzed in his body and all four limbs. The trial judge found that the plaintiff was a self-opinionated person who should, if possible, live in some dwelling of his own where he would be looked after by a housekeeper and the persons who did the nursing. The Court of Appeal held that the plaintiff's entitlement to reasonable expenses for nursing and accommodation appropriate to a normal person should not be increased by reason of his exceptional personality. The Court of Appeal in reducing the award from £72,616 to £59,316 took into account three factors: (i) the difficulty of obtaining a housekeeper and nurses; (ii) that ground floor flats specially designed for handicapped persons were being built in the Borough; (iii) that the plaintiff might accept the aid of statutory and voluntary organizations at much less cost. None of these factors is significant in the present case. Although it reduced the award, the Court nevertheless affirmed that the award included provision for a housekeeper and nursing services and also for extra accommodation. The case does not stand for the proposition that though home care is better, it will not be provided because the cost is excessive. In the present case, the Appellate Division asked: "If Andrews does have a home of his own, however, should he not so locate that orderly service from existing hospitals could be available to him at night and in the daytime for his hygienic and getting-up periods? Is it to be assumed that in a province such as Alberta, orderly services could not be given outside the four walls of an institution if the subject of the service is a nearby resident?" The respondents did not raise the possibility about which the Court speculated. There was no evidence as to the feasibility of such a proposal, no evidence as to the availability or cost of outpatient care.

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With respect to Andrews' disinclination to live in an institution, the Court commented: "He might equally say that he would not live in Alberta, as he did not wish to face old friends, or for any other reasons, and that he wished to live in Switzerland or the Bahamas." Andrews is not asking for a life in Europe or in the Caribbean. He asks that he be permitted to continue to live in Alberta and to see his old friends, but in his own home or apartment, not in an institution.

The Court then expressed the view that the standard accepted by the trial judge was the equivalent of supplying a private hospital. The phrase "private hospital" is both pejorative and misleading. It suggests an extravagant standard of care. The standard sought by the appellant is simply practical nursing in the home. The amount Andrews is seeking is, without question, very substantial, but essentially it means providing two orderlies and a

housekeeper. The amount is large because the victim is young and because life is long. He has forty-five years ahead. That is a long time.

In reducing the monthly amount to \$1,000, the Appellate Division purported to apply a "final test" which was expressed in terms of the expenses that reasonably-minded people would incur, assuming sufficient means to bear such expense. It seems to me difficult to conceive of any reasonably-minded person of ample means who would not be ready to incur the expense of home care, rather than institutional care, for himself or for someone in the condition of Andrews for whom he was responsible. No other conclusion is open upon the evidence adduced in this case. If the test enunciated by the Appellate Division is simply a plea for moderation then, of course, no one would question it. If the test was intended to suggest that reasonably-minded people would refuse to bear the expense of home care, there is simply no evidence to support that conclusion.

The Appellate Division, seeking to give some meaning to the test, said that it should be open to consider "standards of society as a whole as they

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presently exist." As instances of such standards the Court selected the daily allowances provided under *The Workmen's Compensation Act*, 1973 (Alta.), c. 87, s. 56, and the federal *Pension Act*, R.S.C. 1970, c. P-7, s. 28. The standard of care expected in our society in physical injury cases is an elusive concept. What a legislature sees fit to provide in the cases of veterans and in the cases of injured workers and the elderly is only of marginal assistance. The standard to be applied to Andrews is not merely "provision", but "compensation": *i.e.* what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care. If there were severe mental impairment, or in the case of an immobile quadriplegic, the results might well be different; but where the victim is mobile and still in full control of his mental facilities, as Andrews is, it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better.

Other points raised by the Appellate Division in support of its reversal of the trial judge, may be briefly noted: (i) "It seems to me probable that there will be, at Government expense, people employed to look after quadriplegics. In the United States, there are now a few institutions which have special apartments as part of the hospital setting, where patients can receive attention and, at the same time, have privacy." There is no evidence that the Government of Alberta at present has any plans to provide special care or institutions for quadriplegics. Any such possibility is speculation. (ii) "Will the Respondent, in fact, operate a home of his own?" The Court expressed the fear that Andrews would take the award, then go into an auxiliary hospital and have the public pay. It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of

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compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes. Financial advice is readily available. He has the flexibility to plan his life and to plan for contingencies. The preference of our law to date has been to leave this flexibility in the plaintiffs hands: see Fleming, "Damages: Capital or Rent?" (1969), 19 U. of Toronto L.J. 295. Save for infants and the mentally incompetent, the courts have no

power to control the expenditure of the award. There is nothing to show that the dangers the Appellate Division envisaged have any basis in fact.

In its conclusion, the Appellate Division held that the damages awarded by the trial judge were "unreasonably and unrealistically high" and an award which would result in the appellant receiving approximately \$1,000 a month for cost of care would be entirely adequate and would constitute a generous award. The Appellate Division further reduced the award by 30 per cent for potential contingencies. Why \$1,000? The main issue at trial was the choice between home care and institutional care. There is no question but that Andrews could be taken care of in an auxiliary hospital, but both Courts below concluded that home care was the appropriate standard. The trial judge made an award reflecting the cost of home care. The Appellate Division made an award related to neither home care nor institutional care. The effect is to compel a youthful quadriplegic to live the rest of his life in an auxiliary hospital. In my opinion, the Appellate Division failed to show that the trial judge applied any wrong principle of law or that the overall amount awarded by him was a wholly erroneous estimate of the damage. With great respect, the irrelevant considerations which the Appellate Division took into account were errors in law.

Is it reasonable for Andrews to ask for \$4,135 per month for home care? Part of the difficulty of this case is that twenty-four hour orderly care was not directly challenged. Counsel never really engaged in consideration of whether, assuming

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home care, such care could be provided at lesser expense. Counsel wants the Court, rather, to choose between home care and auxiliary hospital care. There are unanimous findings below that home care is better. Although home care is expensive, auxiliary hospital care is so utterly unattractive and so utterly in conflict with the principle of proper compensation that this Court is offered no middle ground.

The basic argument, indeed the only argument, against home care is that the social cost is too high. In these days the cost is distributed through society through insurance premiums. In this respect, I would adopt what was said by Salmon L.J. in *Fletcher v. Autocar & Transporters, Ltd.*^[8], at p. 750, where he stated:

Today, however, virtually all defendants in accident cases are insured. This certainly does not mean compensation should be extravagant, but there is no reason why it should not be realistic... . It might result in some moderate increase in premium rates which none would relish, but of which no one in my view, could justly complain. It would be monstrous to keep down premiums by depressing damages below their proper level, i.e., a level which ordinary men would regard as fair-unprejudiced by its impact on their own pockets.

I do not think the area of future care is one in which the argument of the social burden of the expense should be controlling, particularly in a case like the present where the consequences of acceding to it would be to fail in large measure to compensate the victim for his loss. Greater weight might be given to this consideration where the choice with respect to future care is not so stark as between home care and an auxiliary hospital. Minimizing the social burden of expense may be a factor influencing a choice between acceptable alternatives. It should never compel the choice of the unacceptable.

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(ii) Life expectancy: At trial, figures were introduced which showed that the life expectancy of 23-year-old persons in general is 50 years. As Chief Justice McGillivray said in the

Appellate Division, it would be more useful to use statistics on the expectation of life of quadriplegics. A statistical average is helpful only if the appropriate group is used. At trial, Dr. Weir and Dr. Gingras testified that possibly five years less than normal would be a reasonable expectation of life for a quadriplegic. The Appellate Division accepted this figure. On the evidence I am willing to accept it.

(iii) Contingencies of Life: The trial judge did, however, allow a 20 per cent discount for "contingencies and hazards of life." The Appellate Division allowed a further 10 per cent discount. It characterized the trial judge's discount as being for "life expectancy" or "duration of life", and said that this ignored the contingency of "duration of expense": *i.e.* that despite any wishes to the contrary, Andrews in the years to come may be obliged to spend a great deal of time in hospital for medical reasons or because of the difficulty of obtaining help. With respect, the Appellate Division appears to have misunderstood what the trial judge did. The figure of 20 per cent as a discount for contingencies was arrived at first under the heading of Prospective Loss of Earnings and then simply transferred to the calculation of Costs of Future Care. It was not an allowance for a decreased life expectancy, for this had already been taken into account by reducing the normal 50-year expectancy to 45 years. The "contingencies and hazards of life" in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings, such as unemployment, accident, illness. They are not merely to be added to the latter so as to achieve a cumulative result. Thus, so far as the action taken by the Appellate Division is concerned, in my opinion, it was an error to increase by an extra 10 per cent the contingency allowance of the trial judge.

This whole question of contingencies is fraught with difficulty, for it is in large measure pure speculation. It is a small element of the illogical

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practice of awarding lump sum payments for expenses and losses projected to continue over long periods of time. To vary an award by the value of the chance that certain contingencies may occur is to assure either over-compensation or under-compensation, depending on whether or not the event occurs. In light of the considerations I have mentioned, I think it would be reasonable to allow a discount for contingencies in the amount of 20 per cent, in accordance with the decision of the trial judge.

(iv) Duplication with compensation for loss of future earnings

It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.

When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings: *i.e.* the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse: *i.e.* to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

The trial judge took the first approach, reducing loss of future earnings by 53 per cent. The Appellate Division took the second. In my opinion, the approach of the trial judge is to

be preferred. This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included.

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The costs of necessities when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings. For the acceptability of this method of proceeding see the judgment of this Court in *The Queen v. Jennings*^[9], at pp. 540-1, and also *Bisson v. Corporation of Powell River*^[10], at pp. 720-1, *Jennings v. Cronsberry*^[11], at p. 418,

(v) Cost of special equipment: In addition to his anticipated monthly expenses, Andrews requires an initial capital amount for special equipment. Both Courts below held that \$14,200 was an appropriate figure for the cost of this equipment. In my opinion, this assessment is correct in principle, and I would therefore accept it.

(b) Prospective loss of earnings

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings, supra*. A capital asset has been lost: what was its value?

(i) Level of earnings: The trial judge fixed the projected level of earnings of Andrews at \$830 per month, which would have been his earnings on January 1, 1973. The Appellate Division raised this to \$1,200 per month, a figure between his present salary and the maximum for his type of work of \$1,750 per month. Without doubt the value of Andrews' earning capacity over his working life is higher than his earnings at the time of

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the accident. Although I am inclined to view even that figure as somewhat conservative, I would affirm the holding of the Appellate Division that \$1,200 per month represents a reasonable estimate of Andrews' future average level of earnings.

(ii) Length of working life: Counsel for the appellants objected to the use of 55 rather than 65 as the projected retirement age for Andrews. It is agreed that he could retire on full pension at 55 if he stayed with his present employer, Canadian National Railways. I think it is reasonable to assume that he would, in fact, retire as soon as it was open for him to do so on full pension.

One must then turn to the mortality tables to determine the working life expectancy for the appellant over the period between the ages of 23 and 55. The controversial question immediately arises whether the capitalization of future earning capacity should be based on the expected working life span prior to the accident, or the shortened life expectancy. Does one give credit for the "lost years"? When viewed as the loss of a capital asset consisting of income-earning capacity rather than a loss of income, the answer is

apparent: it must be the loss of that capacity which existed prior to the accident. This is the figure which best fulfils the principle of compensating the plaintiff for what he has lost: see *Mayne and McGregor on Damages*, 12 ed., at p. 659; Kemp & Kemp, *Quantum of Damages*, 3rd ed., vol. 1, Supplement, c. 3, p. 28; *Skelton v. Collins*^[12]. In the instant case, the trial judge refused to follow the *Olivier v. Ashman*^[13] approach, the manifest injustice of which is demonstrated in the much criticized case of *McCann v. Sheppard*^[14], and in this I think the judge was right. I would accept his decision that Andrews had a working life expectancy of 30.81 years.

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(iii) Contingencies: It is a general practice to take account of contingencies which might have affected future earnings, such as unemployment, illness, accidents and business depression. In the *Bisson* case, which also concerned a young quadriplegic, an allowance of 20 per cent was made. There is much support for the view that such a discount for contingencies should be made: see e.g. *Warren v. King*^[15]; *McKay v. Board of Govan School Unit No. 29 of Saskatchewan*^[16]. There are, however, a number of qualifications which should be made. First, in many respects, these contingencies implicitly are already contained in an assessment of the projected average level of earnings of the injured person, for one must assume that this figure is a projection with respect to the real world of work, vicissitudes and all. Second, not all contingencies are adverse, as the above list would appear to indicate. As is said in *Bresatz v. Przibilla*^[17], in the Australian High Court, at p. 544: "Why count the possible buffets and ignore the rewards of fortune?" Finally, in modern society there are many public and private schemes which cushion the individual against adverse contingencies. Clearly, the percentage deduction which is proper will depend on the facts of the individual case, particularly the nature of the plaintiff's occupation, but generally it will be small: see Stevens, "Actuarial Assessment of Damages: The Thalidomide Case" (1972), 35 M.L.R. 140, at p. 150.

In reducing Andrews' award by 20 per cent Mr. Justice Kirby gives no reasons. The Appellate Division also applied a 20 per cent reduction. It seems to me that actuarial evidence could be of great help here. Contingencies are susceptible to more exact calculation than is usually apparent in the cases; see Traversy: "Actuaries and the Courts", 29 Aust. L.J. 557. In my view, some degree of specificity, supported by evidence, ought to be forthcoming at trial.

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The figure used to take account of contingencies is obviously an arbitrary one. The figure of 20 per cent which was used in the lower Courts (and in many other cases) although not entirely satisfactory, should, I think, be accepted.

(iv) Duplication of the Cost of Future Basic Maintenance

As discussed, since basic needs such as food, shelter, and clothing have been included in the cost of future care, a deduction must be made from the award for prospective earnings to avoid duplication. The injured person would have incurred expenses of this nature even if he had not suffered the injury. At trial evidence was given that the cost of basics for a person in the position of Andrews prior to the accident would be approximately 53 per cent of income. I would accept this figure and reduce his anticipated future monthly earnings accordingly to a figure of \$564.

(c) Considerations relevant to both heads of pecuniary loss

(i) Capitalization rate: allowance for inflation and the rate of return on investments

What rate of return should the Court assume the appellant will be able to obtain on his investment of the award? How should the Court recognize future inflation? Together these considerations will determine the discount rate to use in actuarially calculating the lump sum award.

The approach at trial was to take as a rate of return the rental value of money which might exist during periods of economic stability, and consequently to ignore inflation. This approach is widely referred to as the Lord Diplock approach, as he lent it his support in *Mallett v. McMonagle*^[18]. Although this method of proceeding has found favour in several jurisdictions in this country and elsewhere, it has an air of unreality. Stable, non-inflationary economic conditions do not exist at present, nor did they exist in the recent past, nor are they to be expected in the foreseeable future.

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In my opinion, it would be better to proceed from what known factors are available rather than to ignore economic reality. Analytically, the alternate approach to assuming a stable economy is to use existing interest rates and then make an allowance for the long-term expected rate of inflation. At trial the expert actuary, Mr. Grindley, testified as follows:

Yes, as J mentioned yesterday, I was comfortable with that assumption 5% interest because it produces the same result as for example 8% interest and 3% inflation.

...

I would be happy to use either of the following two packages of assumption, either an 8% interest rate combined with provision for amounts which would increase 3% in every year in the future or a 5% interest rate and level amount, level amounts, that is no allowance for inflation.

One thing is abundantly clear: present interest rates should not be used with no allowance for future inflation. To do so would be patently unfair to the plaintiff. It is not, however, the level of inflation in the short term for which allowance must be made, but that predicted over the long term. It is this expectation which is built into present interest rates for long-term investments. It is also this level of inflation which may at present be predicted to operate over the lifetime of the plaintiff to increase the cost of care for him at the level accepted by the Court, and to erode the value of the sum provided for lost earning capacity.

In *Bisson v. Corporation of Powell River, supra*, the British Columbia Court of Appeal held that there had been a misdirection, or non-direction amounting to misdirection, in the trial judge's charge to the jury with respect to quantum of damages for the plaintiff's personal injuries. Bull J.A. listed several instances of misdirection, including failure to instruct the jury that although they might give some thought to possibilities of future inflation, it was wrong to include any built-in inflation factors in the actuarial calculations with respect to the sums for future care and loss of prospective earnings. An appeal to this Court was

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dismissed^[19], Cartwright C.J.C. giving short oral reasons as follows:

We are all of opinion that the Court of Appeal (1968) 1967 CanLII 521 (BC CA), 62 W.W.R. 707, were right in holding that they were justified in setting aside the

assessment of damages made by the jury. In such circumstances they had jurisdiction under R. 36 of the British Columbia Court of Appeal Rules to reduce the damages instead of ordering a new trial. We find ourselves unable to say that in fixing the amount of damages the Court of Appeal erred in principle or that the figure at which they arrived was such as to represent a wholly erroneous estimate.

In my opinion, this cannot be taken as an express endorsement by this Court of the method of calculation expressed by Bull J.A. When discussing this issue, Bull J.A. stated that the correct procedure was to use a capitalization rate of five or six per cent, since there was evidence that six per cent was a normal and available rate of return on first-class securities, and not to build in any inflation rate at all. With respect, I cannot understand how thought is to be given to the possibility of inflation in calculating the award if no inflation factor is to be built into the calculation of the award. In his judgment, Bull J.A. further states, p. 723:

If inflationary trends appear, it may well be that the use to which the money is put, whatever it may be, will itself increase its own amount as part of an inflationary process. It is well known that interest rates, or the "wages" of money, rise in times of inflation.

One might offer two comments: First, the words: "If inflationary trends appear ..." reflect economic conditions in 1967 when serious inflation was only on the horizon. During the past ten years, inflation has become one of the most serious Canadian problems. This Court^[20] recognized the *Anti-Inflation Act*, 1974-75-76 (Can.), c. 75, as a measure necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole. Second, the passage immediately

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above quoted accepts the proposition that interest rates or the "wages" of money rise in times of inflation. This rise is attributable, at least in part, to the erosion of the dollar. Accepting the highly unlikely proposition that the appellant will be able to invest for the balance of his lifetime at current high rates the capital sum awarded to him, this investment will provide him with a constant number of dollars each year, but the services which those dollars will provide will become more costly by the year. If current high interest rates abate with a reduction of inflationary pressures and return, say, to the 1967 rates of five or six per cent, it is obvious that reinvestment from time to time in later years of the equities or fixed income securities comprising the capital sum will be at rates which fall far short of those at present available. Then, even the number of dollars the appellant gets will be less than *even the present cost of care*. With respect, the economic analysis in *Bisson* proceeds on the erroneous basis that the cost of services decreases as the rate of inflation decreases. On the contrary, a decrease in the rate of inflation merely results in a lower rate of increase in the cost of these services.

In *Schroth v. Innes, Perry and Shiels*^[21], Bull J.A., delivering the judgment of the Court, repeated his views on this matter. Again, the relevance of inflation was recognized in principle but was excluded from the calculation of the award. At p. 236, Bull J.A. states, "... it is today's money to which the respondent Shiels is entitled in damages." With respect, we are not concerned only with today's money. The real concern is in determining what that money will provide in the way of services over the next 45 years.

Bull J.A. voiced his disapproval of any recognition for inflation, whether by building in an inflation factor while using current rates of return, or by using a hypothetical "stable state."

The learned judge attempted to refute the conclusion that inflation should be included. He said, p. 239:

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With the greatest deference, I do not agree with the basic premises of those conclusions. To me what was really said was that current interest rates, much higher than those prevailing in the old days of the so-called "stable economy", exist only because of an existing inflated economy and of current fear of future inflation; and hence should not be used unless future inflation estimates or factors are fed into the computer also. That may well be so in England but I am not prepared to accede to that proposition with respect to this country. I think it general knowledge that interest rates in Canada for many years have reached higher levels because of the desire and need to attract new capital from abroad to create and service our expanding industrial and commercial economy. But I content myself with saying that I am satisfied that the current high rates of interest (which have been with us for years with only modest variations up and down) reflect today the present value of already inflated money in exactly the same way as do current high wages and prices generally. They live together, and the use of a high level of wages as one side of the coin and a low level of interest for the other is, in my respectful view, wrong.

In my opinion, this analysis is manifestly in error. Fear of future inflation is not confined to England. It is such as to have constituted a national emergency in this country. The current high rates of interest do not merely reflect the present value of already inflated money. They reflect the present expectation of *future* inflation. This is not the only factor which determines the existing interest rate, but it is without doubt one of the major factors. In my opinion, recognition of this fact must be made in the calculations of a damage award.

The approach which I would adopt, therefore, is to use present rates of return on long-term investments and to make some allowance for the effects of future inflation. Once this approach is adopted, the result, in my opinion, is different from the five per cent discount figure accepted by the trial judge. While there was much debate at trial over a difference of a half to one percentage point, I think it is clear from the evidence that high quality long-term investments were available at time of trial at rates of return in excess of ten per cent. On the other hand, evidence was specifically introduced that the former head of the Economic Council of Canada, Dr. Deutsch, had recently forecast a

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rate of inflation of three and one-half per cent over the long-term future. These figures must all be viewed flexibly. In my opinion, they indicate that the appropriate discount rate is approximately seven per cent. I would adopt that figure. It appears to me to be the correct result of the approach I have adopted: *i.e.* having regard to present investment market conditions and making an appropriate allowance for future inflation. I would, accordingly, vary to seven per cent the discount rate to be used in calculating the present value of the awards for future care and loss of earnings in this case. The result in future cases will depend upon the evidence adduced in those cases.

(ii) Allowance for tax: In *The Queen v. Jennings, supra*, this Court held that an award for prospective income should be calculated with no deduction for tax which might have been attracted had it been earned over the working life of the plaintiff. This results [sic] from the fact that it is earning capacity and not lost earnings which is the subject of compensation. For the same reason, no consideration should be taken of the amount by which the income from the award will be reduced by payment of taxes on the interest, dividends, or

capital gain. A capital sum is appropriate to replace the lost capital asset of earning capacity. Tax on income is irrelevant either to decrease the sum for taxes the victim would have paid on income from his job, or to increase it for taxes he will now have to pay on income from the award.

In contrast with the situation in personal injury cases, awards under the *Fatal Accident Acts* should reflect tax considerations, since they are to compensate dependants for the loss of support payments made by the deceased. These support payments could only come out of take-home pay, and the payments from the award will only be received net of taxes: see the contemporaneous decision of this Court in *Keizer v. Hanna and Buch*.

The impact of taxation upon the income from the capital sum for future care is mitigated by the

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existence of s. 110(1)(c)(iv.1) of the *Income Tax Act*, in respect of the deduction of medical expenses, which provides that medical expenses in excess of three per cent of the taxpayer's income includes "remuneration for one full-time attendant upon an individual who was a taxpayer ... in a self-contained domestic establishment in which the cared for person lived." This exemption, I should think, permits a deduction for the payment of one full-time attendant for seven days a week, regardless of whether this attendance is provided by several attendants working over twenty-four hour periods, or one person working twenty-four hour shifts seven days a week.

The exact tax burden is extremely difficult to predict, as the rate and coverage of taxes swing with the political winds. What concerns us here is whether some allowance must be made to adjust the amount assessed for future care in light of the reduction from taxation. No such allowance was made by the Courts below. Elaborate calculations were provided by the appellant to give an illusion of accuracy to this aspect of the wholly speculative projection of future costs. Because of the provision made in the *Income Tax Act* and because of the position taken in the Alberta Courts, I would make no allowance for that item. The Legislature might well consider a more generous income tax treatment of cases where a fund is established by judicial decision and the sole purpose of the fund is to provide treatment or care of an accident victim.

One subsidiary point should be affirmed with respect to the determination of the present value of the cost of future care. The calculations should provide for a self-extinguishing sum. To allow a residual capital amount would be to over-compensate the injured person by creating an estate for him. This point was accepted by the lower Courts and not challenged by the parties.

Non-Pecuniary Losses

Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this, he is

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entitled to compensation. But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of

necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

However, if the principle of the paramountcy of care is accepted, then it follows that there is more room for the consideration of other policy factors in the assessment of damages for non-pecuniary losses. In particular, this is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

It is also the area where there is the clearest justification for moderation. As one English commentator has suggested, there are three theoretical approaches to the problem of non-pecuniary loss (Ogus, 35 M.L.R.I). The first, the "conceptual" approach, treats each faculty as a proprietary asset with an objective value, independent of the individual's own use or enjoyment of it. This was the ancient "bot," or tariff system, which prevailed in the days of King Alfred, when a thumb was worth thirty shillings. Our law has long since thought such a solution unsubtle. The second, the "personal" approach, values the injury in terms of the loss of human happiness by the particular victim. The third, or "functional" approach,

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accepts the personal premise of the second, but rather than attempting to set a value on lost happiness, it attempts to assess the compensation required to provide the injured person "with reasonable solace for his misfortune." "Solace" in this sense is taken to mean physical arrangements which can make his life more endurable rather than "solace" in the sense of sympathy. To my mind, this last approach has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way. As Windeyer J. said in *Skelton v. Collins*, *supra*, at p. 495:

... he is, I do not doubt, entitled to compensation for what he suffers. Money may be compensation for him if having it can give him pleasure or satisfaction.... But the money is not then a recompense for a loss of something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.

However one may view such awards in a theoretical perspective, the amounts are still largely arbitrary or conventional. As Denning L.J. said

in *Ward v. James*^[22], there is a great need in this area for assessability, uniformity and predictability. In my opinion, this does not mean that the courts should not have regard to the individual situation of the victim. On the contrary, they must do so to determine what has been lost. For example, the loss of a finger would be a greater loss of amenities for an amateur pianist than for a person not engaged in such an activity. Greater compensation would be required to provide things and activities which would function to make up for this loss. But there should be guidelines for the translation into monetary terms of what has been lost. There must be an exchange rate, albeit conventional. In *Warren v. King*, *supra*, at p. 528, the following dictum of Harman L.J. appears, which I would adopt, in respect of the assessment of non-pecuniary loss for a living plaintiff:

It seems to me that the first element in assessing such compensation is not to add up items as loss of pleasures, of earnings, of marriage prospects, of children and so on, but to consider the matter from the other side, what can be done to alleviate the disaster to the victim, what will it cost to enable her to live as tolerably as may be in the circumstances.

Cases like the present enable the Court to establish a rough upper parameter on these awards. It is difficult to conceive of a person of his age losing more than Andrews has lost. Of course, the figures must be viewed flexibly in future cases in recognition of the inevitable differences in injuries, the situation of the victim, and changing economic conditions.

The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this

loss, but variation should not be made merely for the province in which he happens to live.

There has been a significant increase in the size of awards under this head in recent years. As Moir J.A., of the Appellate Division of the Alberta Supreme Court, has warned: "To my mind, damages under the head of loss of amenities will go up and up until they are stabilized by the Supreme Court of Canada." (*Hamel v. Prather*^[23], at p. 748.) In my opinion, this time has come.

It is customary to set only one figure for all non-pecuniary loss, including such factors as pain and suffering, loss of amenities, and loss of expectation of life. This is a sound practice. Although these elements are analytically distinct, they overlap and merge at the edges and in practice. To suffer pain is surely to lose an amenity of a happy life at that time. To lose years of one's expectation of life is to lose all amenities for the lost period, and to cause mental pain and suffering in the contemplation of this prospect. These problems, as well as the fact that these losses have the common trait of irreplaceability, [sic] favour a composite award for all non-pecuniary losses.

There is an extensive review of authorities in the Court of Appeal judgment in this case (reported [1975 ALTASCAD 42 \(CanLII\)](#), [1976] 2 W.W.R. 385) as well as in the *Thornton* (reported [1976 CanLII 1083 \(BC CA\)](#), [1976] 5 W.W.R. 240) and *Teno* (reported (1976), 67 D.L.R. (3d.) 9) cases to which I have referred. I need not review these past authorities.

What is important is the general picture. It is clear that until very recently damages for non-pecuniary losses, even from very serious injuries such as quadriplegia, were substantially below \$100,000. Recently, though, the figures have increased markedly. In *Jackson v. Millar*^[24], this Court affirmed a figure of \$150,000 for non-pecuniary loss in an Ontario case of a paraplegic. However, this was done essentially on the principle of non-interference with awards allowed by provincial Courts of Appeal. The need for a general assessment with respect to damages for non-pecuniary

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loss, which is now apparent, was not as evident at that time. Even in Ontario, prior to these recent cases, general damages allocable for non-pecuniary loss, such as pain and suffering and loss of amenities, were well below \$100,000.

In the present case, \$150,000 was awarded at trial, but this amount was reduced to \$100,000 by the Appellate Division. In *Thornton* and *Teno* \$200,000 was awarded in each case, unchanged in the provincial Courts of Appeal.

I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of \$100,000. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature.

Total Award

This is largely a matter of arithmetic. Of course, in addition, it is customary for the Court to make an overall assessment of the total sum. This, however, seems to me to be a hangover from the days of global sums for all general damages. It is more appropriate to make an overall assessment of the total under each head of future care, prospective earnings, and non-pecuniary loss, in each case in light of general considerations such as the awards of other courts in similar cases and an assessment of the reasonableness of the award.

In the result I would assess general damages for the appellant Andrews as follows:

1. <u>Pecuniary Loss</u>	
(a) <u>Cost of future care</u>	
—special equipment	\$14,200
—amount for monthly payments (monthly amount \$4,135: life expectancy 45 years; contingencies 20%; capitalization rate 7%)	557,232

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(b) <u>Prospective loss of earnings</u>	
(monthly amount \$564; work span 30.81 years; contingencies 20%; capitalization rate 7%)	\$ 69,981

2. <u>Non-pecuniary Loss</u>	
—compensation for physical and mental pain and suffering endured and to be endured, loss of amenities and enjoyment of life, loss of expectation of life	100,000
Total General Damages	\$741,413
Rounded off at	\$740,000

To arrive at the total damage award, the special damages of \$77,344 must be added to give a final figure of \$817,344.

The appellant Andrews will have judgment for seventy-five per cent of that amount, that is, \$613,008.

The appellants should have their costs in this Court and in the trial court. The respondents should have their costs in the Court of Appeal as they achieved substantial success in that Court in respect of the finding of contributory negligence on the part of Andrews.

Judgment accordingly.

Solicitors for the plaintiffs, appellants.. Klinge, Cummings, Andrews & Wilton, Edmonton.

Solicitors for the defendants, respondents: Newson, Hyde, Edmonton.

[1] 1975 ALTASCAD 42 (CanLII), [1976] 2 W.W.R. 385, 64 D.L.R. (3d) 663.

[2] 1951 CanLII 374 (UK JCPC), [1951] A.C. 601.

[3] [1926] A.C. 655.

[4] [1964] A.C. 326.

[5] [1922] 2 A.C. 242.

[6] (1880), 5 App. Cas. 25.

[7] [1973] 3 All E.R. 463.

[8] [1968] 1 All E.R. 726.

[9] 1966 CanLII 11 (SCC), [1966] S.C.R. 532.

- [10] (1967), 1967 CanLII 521 (BC CA), 62 W.W.R. 707.
- [11] (1965), 1965 CanLII 24 (ON CA), 50 D.L.R. (2d) 385.
- [12] (1966), 39 A.L.J.R. 480.
- [13] [1962] 2 Q.B. 210.
- [14] [1973] 1 W.L.R. 540.
- [15] [1963] 3 All E.R. 521.
- [16] 1968 CanLII 76 (SCC), [1968] S.C.R. 589.
- [17] (1962), 108 C.L.R. 541.
- [18] [1970] A.C. 166.
- [19] [1968] S.C.R. v., 64 W.W.R. 768.
- [20] 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373.
- [21] 1976 CanLII 1085 (BC CA), [1976] 4 W.W.R. 225.
- [22] [1965] 1 All E.R. 563.
- [23] 1976 ALTASCAD 3 (CanLII), [1976] 2 W.W.R. 742.
- [24] 1975 CanLII 20 (SCC), [1976] 1 S.C.R. 225.

TAB 40

Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130

Source:	Supreme Court of Canada
Date:	1995-07-20
File number:	24216
Other citations:	24 OR (3d) 865 — 126 DLR (4th) 129 — 184 NR 1 — 56 ACWS (3d) 495 — 84 OAC 1 — 25 CCLT (2d) 89 — 30 CRR (2d) 189 — [1995] CarswellOnt 396 — EYB 1995-68609 — JE 95-1495 — [1995] SCJ No 64 (QL) — [1995] ACS no 64
Citation:	Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, < https://canlii.ca/t/1frgn >, retrieved on 2026-03-23
Most recent unfavourable mention	Greenaway v. Festeryga , 2022 ONSC 3210 (CanLII) [...] [108] The facts in Hill are distinguishable and far more egregious than here. [...]

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130

**Morris Manning and
the Church of Scientology of Toronto**

Appellants

v.

S. Casey Hill

Respondent

and

The Attorney General for Ontario, the Canadian Civil Liberties Association, the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, the Book and Periodical Council, the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian Magazine Publishers' Association

Interveners

Indexed as: Hill v. Church of Scientology of Toronto

File No.: 24216.

1995: February 20; 1995: July 20.

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

on appeal from the court of appeal for ontario

Constitutional law -- [Charter of Rights](#) -- Application -- Libel and slander -- Church of Scientology commencing criminal contempt proceedings against Crown attorney -- Church's counsel and representatives holding press conference on courthouse steps -- Counsel reading from and commenting on allegations in contempt motion -- Contempt allegations subsequently found to be untrue -- Crown attorney bringing action for damages in libel -- Whether Crown attorney's action for damages "government action" -- Whether Charter applies -- [Canadian Charter of Rights and Freedoms](#), s. 32(1).

Libel and slander -- Common law of defamation -- [Canadian Charter of Rights and Freedoms](#) -- Whether common law of defamation complies with values underlying Charter -- Whether "actual malice" rule should be adopted.

Libel and slander -- Defences -- Qualified privilege -- Church of Scientology commencing criminal contempt proceedings against Crown attorney -- Church's counsel and representatives holding press conference on courthouse steps -- Counsel reading from and commenting on allegations in contempt motion -- Contempt allegations subsequently found to be untrue -- Crown attorney bringing action for damages in libel -- Whether defence of qualified privilege available.

Libel and slander -- Damages -- General damages -- Aggravated damages -- Punitive damages -- Church of Scientology commencing criminal contempt proceedings against Crown attorney -- Church's counsel and representatives holding press conference on courthouse steps -- Counsel reading from and commenting on allegations in contempt motion -- Contempt allegations subsequently found to be untrue -- Crown attorney bringing action for damages in libel -- Counsel and Church found jointly liable for general damages -- Church found liable for aggravated and punitive damages -- Whether cap should be imposed on general damages in defamation cases -- Whether damage awards should stand.

The appellant M, accompanied by representatives of the appellant Church of Scientology, held a press conference on the courthouse steps. M, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent, a Crown attorney. The notice of motion alleged that the respondent had misled a judge and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or his imprisonment. At the contempt proceedings, the allegations against the respondent were found to be untrue and without foundation. He thereupon commenced an action for damages in libel against the appellants. Both appellants were found jointly liable for general damages in the amount of \$300,000 and Scientology alone was found liable for aggravated damages of \$500,000 and punitive damages of \$800,000. This judgment was affirmed by the Court of Appeal. The major issues raised in this appeal are whether the common law of

defamation is consistent with the *Canadian Charter of Rights and Freedoms* and whether the jury's award of damages can stand.

Held: The appeal should be dismissed.

Per La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The respondent's action for damages does not constitute government action within the meaning of s. 32 of the *Charter*. The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. Reputation is an integral and fundamentally important aspect of every individual; it exists for everyone quite apart from employment. The appellants impugned the character, competence and integrity of the respondent himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way. The fact that the respondent's suit may have been funded by the Ministry does not alter his constitutional status or cloak his personal action in the mantle of government action. Further, even if there were sufficient government action to bring this case within s. 32, the appellants failed to provide any evidentiary basis upon which to adjudicate their constitutional attack.

The common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. In its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it. The common law strikes an appropriate balance between the twin values of reputation and freedom of expression. The protection of reputation is of vital importance, and consideration must be given to the particular significance reputation has for a lawyer. Although it is not specifically mentioned in the

Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. Further, reputation is intimately related to the right to privacy, which has been accorded constitutional protection. The "actual malice" rule should not be adopted in Canada in an action between private litigants. The law of defamation is not unduly restrictive or inhibiting. Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of individuals to protect their reputation.

Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. The privilege is not absolute, however, and can be defeated if the dominant motive for publishing the statement is actual or express malice. Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes any indirect motive or ulterior purpose that conflicts with the sense of duty or the mutual interest which the occasion created. Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. The fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. The information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given.

The traditional common law rule with respect to reports on documents relating to judicial proceedings is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had

not been filed with the court or referred to in open court. Prior to holding the press conference M had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. The fact that the proper documents were not filed until the next morning should not defeat the qualified privilege which attached to this occasion. M's conduct, however, far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against the respondent. As an experienced lawyer, M ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on the respondent's professional integrity. M failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated. The press conference was held on the courthouse steps in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed the respondent in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize M's conduct as amounting to actual malice, it was certainly high-handed and careless and exceeded any legitimate purpose the press conference may have served. His conduct therefore defeated the qualified privilege that attached to the occasion.

When properly instructed, jurors are uniquely qualified to assess the damages suffered by the plaintiff. An appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure. General damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly

demonstrates to the community the vindication of the plaintiff's reputation. No cap should be placed on general damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. Second, at the time the cap was placed on non-pecuniary damages in personal injury cases, their assessment had become a very real problem for the courts and for society as a whole, which is not the case with libel actions. The award of \$300,000 by way of general damages was justified in this case. Both appellants published the notice of motion. All persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort, and it would thus be wrong in law to have a jury attempt to apportion liability for general damages between the joint tortfeasors. The reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the accounts. The misconduct of the appellants continued after the first publication. Prior to the commencement of the hearing of the contempt motion, Scientology was aware that the allegations it was making against the respondent were false, yet it persisted with the contempt hearings, as did M. At the conclusion of the hearings, both appellants were aware of the falsity of the allegations. Nonetheless, when the libel action was instituted, the defence of justification was put forward by both of them. Although M withdrew the plea of justification, this was only done in the week prior to the commencement of the trial itself, and Scientology did not withdraw its plea until the hearing of the appeal. Finally, the manner in which the respondent was cross-examined by the appellants, coupled with the manner in which they presented their position to the jury, in light of their knowledge of the falsity of their allegations, are further aggravating factors to be taken into account.

Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by

increasing the mental distress and humiliation of the plaintiff. The factors that a jury may properly take into account in assessing aggravated damages include whether there was a withdrawal of the libellous statement made by the defendant and an apology tendered, whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time the libel was published. In this case, there was ample evidence upon which the jury could properly base their finding of aggravated damages. Every aspect of this case demonstrates the very real and persistent malice of Scientology.

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. They should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. Unlike compensatory damages, punitive damages are not at large, and consequently courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose, as they did in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive.

Per L'Heureux-Dubé J.: Cory J.'s reasons were generally agreed with, except with respect to the scope of the defence of qualified privilege. The common law of defamation, as it is applied to the parties in this action, is consistent with the values enshrined in the *Charter*. There is accordingly no need to amend or alter it or, in particular, to adopt the "actual malice" rule. The defence of qualified privilege, however, is not available with respect to reports of pleadings in purely private litigation upon which no judicial action has yet been taken. The defence is available only with respect to reports of judicial proceedings. While there is a right to publish details of

judicial proceedings before they are heard in open court, such publication does not enjoy the protection of qualified privilege if it is defamatory.

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Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187 (1986); *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011; *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1; *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743; *Adam v. Ward*, [1917] A.C. 309; *McLoughlin v. Kutasy*, [1979 CanLII 39 \(SCC\)](#), [1979] 2 S.C.R. 311; *Horrocks v. Lowe*, [1975] A.C. 135; *Taylor v. Despard*, [1956 CanLII 124 \(ON CA\)](#), [1956] O.R. 963; *Netupsky v. Craig*, [1972 CanLII 19 \(SCC\)](#), [1973] S.C.R. 55; *Douglas v. Tucker*, [1951 CanLII 54 \(SCC\)](#), [1952] 1 S.C.R. 275; *Sun Life Assurance Co. of Canada v. Dalrymple*, [1965 CanLII 9 \(SCC\)](#), [1965] S.C.R. 302; *Gazette Printing Co. v. Shallow* (1909), [1909 CanLII 46 \(SCC\)](#), 41 S.C.R. 339; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988 CanLII 52 \(SCC\)](#), [1988] 2 S.C.R. 122; *Walker v. CFTO Ltd.* (1987), [1987 CanLII 126 \(ON CA\)](#), 59 O.R. (2d) 104; *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, [1993] 4 All E.R. 975; *Ley v. Hamilton* (1935), 153 L.T. 384; *Andrews v. Grand & Toy Alberta Ltd.*, [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229; *Arnold v. Teno*, [1978 CanLII 2 \(SCC\)](#), [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978 CanLII 12 \(SCC\)](#), [1978] 2 S.C.R. 267; *Jill Fishing Ltd. v. Koranda Management Inc.*, [1993] B.C.J. No. 1861 (QL); *Cassell & Co. v. Broome*, [1972] 1 All E.R. 801; *Blackshaw v. Lord*, [1983] 2 All E.R. 311; *Sutcliffe v. Pressdram Ltd.*, [1990] 1 All E.R. 269; *Carson v. John Fairfax & Sons Ltd.* (1993), 113 A.L.R. 577; *Lawson v. Burns*, [1976 CanLII 1499 \(BC SC\)](#), [1976] 6 W.W.R. 362; *Kerr v. Conlogue* (1992), [1992 CanLII 924 \(BC SC\)](#), 65 B.C.L.R. (2d) 70; *Egger v. Chelmsford*, [1965] 1 Q.B. 248.

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APPEAL from a judgment of the Ontario Court of Appeal (1994), [1994 CanLII 10572 \(ON CA\)](#), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129, affirming a judgment of the Ontario Court of Justice (General Division) awarding the respondent damages for libel against the appellants. Appeal dismissed.

Bryan Finlay, Q.C., and *Christopher J. Tzekas*, for the appellant Morris Manning.

Marc J. Somerville, Q.C., and *R. Ross Wells*, for the appellant the Church of Scientology of Toronto.

Robert P. Armstrong, Q.C., and Kent E. Thomson, for the respondent.

Lori Sterling and Hart Schwartz, for the intervener the Attorney General for Ontario.

Robert J. Sharpe and Kent Roach, for the intervener the Canadian Civil Liberties Association.

Edward M. Morgan, for the interveners the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, and the Book and Periodical Council.

Peter W. Hogg, Q.C., and Brian MacLeod Rogers, for the interveners the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian Magazine Publishers' Association.

The judgment of La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

1 CORY J. -- On September 17, 1984, the appellant Morris Manning, accompanied by representatives of the appellant Church of Scientology of Toronto ("Scientology"), held a press conference on the steps of Osgoode Hall in Toronto. Manning, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent Casey Hill, a Crown attorney. The notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or the imprisonment of Casey Hill.

2 At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation. Casey Hill thereupon commenced this action for damages in libel against both Morris Manning and Scientology. On October 3, 1991, following a trial before Carruthers J. and a jury, Morris Manning and Scientology were found jointly liable for general damages in the amount of \$300,000 and Scientology alone was found liable for aggravated damages of \$500,000 and punitive damages of \$800,000. Their appeal from this judgment was dismissed by a unanimous Court of Appeal: (1994), [1994 CanLII 10572 \(ON CA\)](#), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 71 O.A.C. 161, 20 C.C.L.T. (2d) 129.

I. Factual Background

3 As in all actions for libel, the factual background is extremely important and must be set out in some detail. At the time the defamatory statements were made, Casey Hill was employed as counsel with the Crown Law Office, Criminal Division of the Ministry of the Attorney General for the Province of Ontario. He had given advice to the Ontario Provincial Police ("OPP") regarding a warrant obtained on March 1, 1983 which authorized a search of the premises occupied by Scientology. During the execution of the search warrant on March 3 and 4, 1983, approximately 250,000 documents, comprising over 2 million pages of material, were seized. These documents were stored in some 900 boxes at an OPP building in Toronto.

4 Immediately following the seizure, Scientology retained Clayton Ruby to bring a motion to quash the search warrant and to seek the return of the seized documents. Casey Hill, who had gained experience and special skill in the area of search and seizure, acted as counsel for the Crown.

- 5 The litigation commenced on March 7, 1983 and continued throughout 1983 and 1984. On July 11, 1984, Osler J. ruled that solicitor-and-client privilege applied to 232 of the seized documents he had reviewed and ordered that they remain sealed pending further order of the court. Several sealing orders and endorsements were ultimately made by Justices of the Supreme Court of Ontario.
- 6 Throughout this period, Casey Hill dealt frequently with Clayton Ruby and other counsel for Scientology in connection with various matters ranging from the trivial to the significant. They were invariably resolved in a spirit of co-operation and professional courtesy, even in those situations where the parties proceeded with contested motions.
- 7 In March of 1983, Scientology retained Charles Campbell to make an application to Rosemarie Drapkin, the Deputy Registrar General of the Ministry of Consumer and Commercial Relations, requesting that its president, Earl Smith, be granted the authorization to solemnize marriages pursuant to s. 20(2) of the *Marriage Act*, R.S.O. 1980, c. 256. One year later, Scientology commenced an application for judicial review of Rosemarie Drapkin's failure to approve that application.
- 8 Rosemarie Drapkin believed that it would help her to assess the application if she could review the seized documents. To that end, Kim Twohig, a solicitor in the Civil Division of the Crown Law Office, approached Casey Hill in July 1984. He advised her that there was a motion outstanding before Osler J. for an order quashing the search warrant and that access would only be granted if a court order was obtained pursuant to s. 490(15) (formerly 446(15)) of the *Criminal Code*, R.S.C., 1985, c. C-46. He explained that there had been several interim rulings in this matter and stated that "this was probably the type of case where the judge hearing such an application would want notice given to Scientology".

- 9 During the last week of July 1984, Casey Hill travelled to Nassau to meet with the Attorney General of the Bahamas in respect of an ongoing criminal investigation. In the course of a telephone conversation, Kim Twohig conveyed to Casey Hill the urgent need she had to gain access to the documents as a date had been fixed to hear Scientology's application for judicial review. Casey Hill testified that he told Kim Twohig that her *Criminal Code* application would have to be served on the Crown Law Office, Criminal Division in the usual fashion to obtain its consent.
- 10 Kim Twohig prepared the necessary materials, including the notice of motion and an affidavit of Rosemarie Drapkin, and obtained the requisite consent from James Blacklock of the Crown Law Office, Criminal Division. The application was then filed in Weekly Court on July 30, 1984 with the assistance of Jerome Cooper, a solicitor with the Ministry of Consumer and Commercial Relations. No notice was given to Scientology. The following day, a consent order granting access to all of the seized documents was issued by Sirois J. in chambers without submissions from counsel.
- 11 In her testimony at the trial of this action, Kim Twohig agreed that she alone made the decision not to provide notice to Scientology of her application. She testified that she assumed that the presiding judge would determine whether notice was necessary or appropriate. It was only later that she realized that the order of Sirois J. might provide access to sealed documents.
- 12 By letter dated August 22, 1984, Rosemarie Drapkin wrote to Charles Campbell concerning Scientology's application and advised that she had "reviewed certain documents relating to the Scientology organization which were seized pursuant to the search warrant" issued on March 1, 1983. Attached to the letter was a list of 89 documents, some of which had purportedly been sealed by order of Osler J. It was this information which raised the concern of Scientology and its legal advisers.

- 13 In response, Clayton Ruby wrote a somewhat precipitous and very aggressive letter to the Solicitor General of Ontario dated August 28, 1984. In it he accused the OPP of acting "as if there were no rule of law" and of "simply ignoring solicitor/client privilege and making a mockery of the courts". He called for a "full investigation" and demanded disciplinary action be taken "against everyone involved". Clayton Ruby was not aware of the order of Sirois J. at that time. He simply assumed that those involved had acted improperly.
- 14 As early as September 5, 1984, Clayton Ruby, along with other counsel and representatives of Scientology, decided that what had occurred was "disgraceful and shocking" and constituted contempt. They arrived at this conclusion without having taken any steps to ensure the accuracy of their impressions.
- 15 In a letter addressed to Casey Hill dated September 6, 1984, Clayton Ruby asked for Casey Hill's assistance in obtaining information regarding the circumstances under which the order of Sirois J. had been granted and why Scientology had not received notice of the application. He requested a response within five days. It should be noted that at the time this letter was written, Clayton Ruby was a Bencher of the Law Society and Vice-Chairman of the Law Society's Discipline Committee.
- 16 The letter implied that there could be disciplinary proceedings brought before the Law Society of Upper Canada and that a contempt action might be instituted. Not surprisingly, it was given serious consideration by Casey Hill and others at the Ministry of the Attorney General. Hill sought the advice of his Director, Howard Morton. Morton wrote a letter to Ruby stating that in light of the serious nature of the allegations, he would not be able to reply within the five-day period imposed by Ruby.
- 17 On September 6 and 7, 1984, Michael Code (then an associate of Clayton Ruby) telephoned Casey Hill, Jerome Cooper and Kim Twohig to find out how access to the

privileged documents had been obtained. They all conveyed a similar version of the past events and assured him that the sealed documents were not opened but rather that unsealed copies must have been examined. Code conceded in cross-examination that everyone he spoke to was cooperative.

18 On September 11, 1984, however, without making any further inquiries and without awaiting the reply from Casey Hill and Howard Morton, Ruby retained the appellant Morris Manning to advise Scientology in respect of possible contempt proceedings. On September 13, 1984, representatives of Scientology met with Morris Manning, Charles Campbell, Clayton Ruby, Michael Code and an articling student at Ruby's office. A decision was made to commence an application for criminal contempt against both Casey Hill and Jerome Cooper. Morris Manning testified that a critical piece of information which prompted him to bring the contempt application was the characterization by Michael Code of Casey Hill's attitude during their conversation. Casey Hill had allegedly said that if the Church missed sealing all copies of the privileged documents it was "too bad". In Morris Manning's opinion, this demonstrated a contemptuous attitude towards the court. He reached this conclusion without ever speaking to Casey Hill or any of the others involved in the incident such as Rosemarie Drapkin, Kim Twohig, James Blacklock, Jerome Cooper or Detective Inspector Ormsby, the senior officer of the OPP responsible for the investigation of Scientology. Nor had Morris Manning interviewed those representatives of Scientology who were directly involved in the sealing of the documents.

19 The evidence adduced at the contempt hearing clearly established that Casey Hill played no part in the application before Sirois J. and had nothing to do with the execution or filing of the consent on behalf of the Attorney General for Ontario. In fact, he was only informed of any difficulties associated with the order of Osler J. in late August 1984, when he received a telephone call from Detective Inspector Ormsby. At that time, Ormsby advised him that Rosemarie Drapkin had attended at the OPP building in which the seized documents were held with the order of Sirois J., but that she was denied access to the

sealed documents. The sealed documents were never opened. What Rosemarie Drapkin may have seen were unsealed copies of the sealed documents that were probably located in different boxes than the sealed originals.

20 Between September 13 and 17, 1984, Morris Manning prepared a notice of motion for the contempt application returnable in Weekly Court some time in early January 1985. During this time, he did not make any attempt to determine what was being done with the seized documents or to ascertain whether any continuing breach of privilege was occurring.

(A) *The "Enemy Canada" File*

21 Long before he gave advice to the OPP in connection with the search and seizure of documents which took place on March 3 and 4, 1983, Casey Hill had become a target of Scientology's enmity. Over the years, he had been involved in a number of matters concerning Scientology's affairs. As a result, it kept a file on him. This was only discovered when the production of the file was ordered during the course of this action. The file disclosed that from approximately 1977 until at least 1981, Scientology closely monitored and tracked Casey Hill and had labelled him an "Enemy Canada". Casey Hill testified that from his experience, persons viewed by Scientology as its enemies were "subject to being neutralized".

(B) *The Press Conference*

22 In the file of Charles Campbell there was a note dated September 10 or 11, 1984 which made reference to a press conference to be held the following Monday, September 17, 1984. It appears, then, that before it had even consulted Morris Manning, Scientology intended to call a press conference

23 The press conference was organized by Earl Smith. He contacted a number of media organizations, including CFTO-TV, CBC television and *The Globe and Mail* and invited them to the event which was to be held in front of Osgoode Hall. Morris Manning was appearing on that day before the Court of Appeal in an unrelated matter and attended the press conference in his barrister's gown.

24 He testified that he answered a number of questions concerning the contempt proceedings and then, at the request of the media, read a passage from the notice of motion for the television cameras. Copies of the notice of motion were distributed to the media along with a typewritten document, prepared by Scientology, entitled "Chronology of Events Leading to Contempt Motion".

25 The notice of motion in essence alleged that Casey Hill had participated in the misleading of Sirois J. and that he had participated in or aided and abetted others in the opening and inspection of documents which to his knowledge were sealed by Osler J.

26 On the evening of September 17, 1984, the CFTO broadcast was seen by an audience of approximately 132,000 people. The text of the broadcast is set out in Appendix A to these reasons. The CBC broadcast was seen by approximately 118,000 people. The text is found in Appendix B. The following morning, an article appeared in *The Globe and Mail* entitled "Motion of Contempt Launched by Church". Approximately 108,000 copies of the edition containing this article were distributed. The article is reproduced in Appendix C. All three publications repeated the allegations made in the notice of motion.

(C) *The Felske Memorandum*

27 Patricia Felske is a Scientologist who had attended at the offices of the OPP on a regular basis since March 1983 for the purpose of reviewing the seized materials and ensuring that the privileged documents were sealed. Between August 29, 1984, and September 27, 1984, she, along with other representatives from Scientology, opened the

sealed envelopes and verified their contents against photocopies of the documents that Rosemarie Drapkin had examined. Their purpose was to determine whether Ms. Drapkin had been granted access to the restricted materials.

28 On September 17, 1984, the day of the press conference, the Scientology investigation was well advanced and neither then nor later was there any indication that Drapkin gained access to sealed documents. Scientology and Manning nevertheless proceeded with the press conference before any conclusive findings had been made on this issue.

29 On November 2, 1984, Patricia Felske prepared a brief summary of her findings, entitled "Time Track Re: Solicitor and Client Privileged Documents", which she sent to Clayton Ruby, Charles Campbell, Morris Manning and Diane Martin, another of Scientology's lawyers. In it she concluded that "[t]here was no evidence to support any allegation that the sealed envelopes had been tampered with by the OPP" (emphasis added).

(D) *The Contempt Trial*

30 The contempt trial was heard by Cromarty J. for 11 days beginning the next Monday, November 5, 1984. Morris Manning and Charles Campbell had carriage of the proceedings on behalf of Scientology. A number of witnesses were called by them, including Clayton Ruby, Michael Code, Kim Twohig, Rosemarie Drapkin, James Blacklock, Detective Inspector Ormsby and four other members of the OPP who had direct responsibility for the seized documents.

31 Following the presentation of Scientology's case, Cromarty J. dismissed the application on a motion for non-suit on December 7, 1984: 13 W.C.B. 231. He held that there was no evidence that Casey Hill participated in any stage of the application made before Sirois J. or that he should have been aware of any need for further inquiry into Kim Twohig's actions.

32 From the contents of the Felske Memorandum, which only came to light at the trial of the present action, it is evident that prior to the start of the contempt hearing, Scientology was well aware that no sealed envelopes had been opened. Yet, it still proceeded with a contempt prosecution against Casey Hill.

33 Morris Manning testified that he never received the Felske Memorandum and conceded that if he had been aware of it, he would have been obliged to disclose it to Casey Hill. However, on the weekend prior to the start of the contempt trial, Morris Manning was briefed by Charles Campbell. At trial, both Campbell and Ruby acknowledged that they had received the Felske Memorandum. In addition, Campbell testified that all important information concerning the prosecution was shared with everybody involved. It might be inferred that this would include Manning.

34 Further, Morris Manning met with Patricia Felske and two other representatives of Scientology during the weekend prior to the hearing of the contempt motion. However, he testified that they were not interviewed for the purpose of giving evidence at the contempt trial nor were they called to do so. Cromarty J. characterized the failure to call these individuals as "a most eloquent omission".

35 There was another equally eloquent omission. The OPP officers who were called by Scientology to testify were not asked to produce the sealed envelopes they were directed to bring with them to court. If they had, it would have been obvious that the envelopes had not been tampered with.

(E) *The Attempt to Disqualify Casey Hill from the Search and Seizure Proceedings*

36 As stated earlier, Scientology made an application in March 1983 to quash the search warrant which the OPP had used to seize its documents. This application was commenced

before Osler J. prior to September 17, 1984, but was adjourned until the completion of the contempt proceedings. Throughout this time, Casey Hill represented the Crown as lead counsel.

37 The application was resumed on December 18, 1984. By that time, the contempt charges had been dismissed as unfounded and this libel action had been commenced. Casey Hill continued to represent the Crown but made a full disclosure of all the relevant circumstances to Osler J. He submitted that the proceedings involved the interpretation and application of legal principles rather than the exercise of prosecutorial discretion and, as a consequence, his ability to act as responding counsel was not impaired.

38 Scientology, nevertheless, moved to disqualify Casey Hill on the ground that occasions might arise where he would have to exercise a discretion as to the production of a document and as to the significance to be attached to it. Scientology contended that this could reflect adversely upon it and, in due course result in a favourable consideration of Casey Hill's libel suit. Scientology was essentially suggesting that Casey Hill would use his position as Crown counsel to further his private interests. This was a serious attack on his professional integrity which added to the sting of the libel uttered to that point.

39 Osler J. emphatically rejected these arguments. He stated that it was fundamentally important for the Crown to "proceed courageously in the face of threats and attempts at intimidation or in the face of proceedings that have been found to be groundless but have obviously had the effect of harassment".

(F) *Pleas of Justification*

40 On February 18, 1985, Scientology delivered its statement of defence in this action. Notwithstanding the findings contained in the Felske Memorandum prepared by its own

members, and the conclusion reached by Cromarty J. in the contempt hearing, Scientology entered a plea of justification.

41 Scientology also put forward as true an allegation that Casey Hill directed and supervised the OPP in the opening and reviewing of 20 boxes of documents which had been sealed by order of Linden J. This was found by the Court of Appeal to constitute a separate allegation of contempt and a further attack upon the integrity of Casey Hill in the performance of his duties as Crown counsel.

42 Scientology maintained its plea of justification throughout the trial and did not withdraw it until the first day of the hearing before the Court of Appeal on December 6, 1993, some nine years after the original libel.

43 Morris Manning delivered his statement of defence on April 1, 1985, and also asserted a plea of justification which he did not withdraw until the week prior to the commencement of the trial. He persisted in this plea despite the decision of Cromarty J. dismissing the motion to commit Casey Hill for contempt and despite the overwhelming evidence indicating that the allegations made against Hill were false.

(G) *The Conduct of Scientology at Trial*

44 Scientology continued its attack against Casey Hill throughout the trial of this action, both in the presence of the jury and in its absence. More than once, it reiterated the libel even though it knew that these allegations were false. Clearly, it sought to repeatedly attack Casey Hill's moral character. Some examples are set out below.

(1) The Cross-Examination of Casey Hill

45 Counsel for Scientology subjected Casey Hill to a lengthy cross-examination which the Court of Appeal correctly described as a "skilful and deliberate attempt at character assassination" (p. 452 O.R.). Counsel suggested that Casey Hill often improperly coached his witnesses and took the same approach with respect to his own testimony at the libel trial. It was insinuated that Casey Hill was an untrustworthy person who would breach his undertakings as he had done in this case in relation to the sealed documents. Attempts were also made to blame him for the failure to give notice to Scientology concerning the application before Sirois J. even though he had been vindicated seven years earlier by Cromarty J.

(2) The "Veiled Threat" Against Clayton Ruby

46 Michael Code testified that during the course of his conversation with Casey Hill on September 6, 1984, the latter had made a veiled threat against Clayton Ruby which he described in the following terms:

He [Casey Hill] suggests we may receive an ominous reply to Clay's complaints. He is awaiting a report back from the police. What he said to me was something to the effect that there was a police investigation of Mr. Ruby's conduct and basically, you better watch it. [Emphasis added.]

47 When Casey Hill was called in reply, he denied making any such threat or using the word "ominous" during the conversation. Rather, he testified that he had used the word "omnibus" in reference to a combined reply to the letters that Ruby sent to the Solicitor General and to himself.

48 In cross-examination, counsel for Scientology accused Casey Hill of fabricating this version of events. Not only did counsel suggest that Hill had lied on the stand, but the

general tenor of his questioning implied that Hill was so unprincipled that he would use the power of the state to intimidate an opposing lawyer.

(3) The Closing Address to the Jury by Counsel for Scientology

49 During his closing address, counsel for Scientology contended that Casey Hill had demonstrated feigned and insincere emotion when he described his reaction to seeing the publication of the CFTO broadcast on the evening of September 17, 1984. He suggested to the jury that it may have been nothing more than a "skilled performance to tug at your heartstrings" in order to influence the verdict.

(H) *The Events Following the Verdict of the Jury*

50 The day after the jury's verdict, on October 4, 1991, Scientology republished the libel in a press release delivered to the media. A few weeks later, it issued another press release attacking the verdict of the jury as "outrageous" and "so exorbitant and so grossly out of proportion that it was influenced more by *L.A. Law* than Canadian legal tradition". Shortly thereafter, it proceeded with a motion before Carruthers J. to adduce evidence which, it contended, would bear "directly on the credibility and reputation of the plaintiff S. Casey Hill". That motion was later withdrawn.

II. Judgments Below

(A) *Trial by Jury* (Carruthers J. presiding)

51 This action for damages for libel was commenced on December 14, 1984. The trial before Carruthers J. and a jury lasted from September 3, 1991 until October 3, 1991. The questions posed to the jury and their answers were as follows:

SPECIAL VERDICT

QUESTIONS

A. With Respect to the Defendant, Morris Manning

1. Did the CBC broadcast refer to the plaintiff?

A. Yes

2. Did Morris Manning instruct, authorize or consent to the publication of the Notice of Motion at the press conference?

A. Yes

B. With Respect to Both Defendants

3. Are the words complained of in the CFTO and CBC broadcasts on September 17, 1984, the Globe & Mail article on September 18, 1984 and the Notice of Motion defamatory of the plaintiff?

A. Yes

4. If the answer to Question 3 is "yes", what general damages, if any, is the plaintiff, Casey Hill, entitled to from the defendants, The Church of Scientology of Toronto and Morris Manning?

A. \$300,000

5. If your answer to Question 3 is "yes", is he entitled to any aggravated damages from the defendant, Morris Manning, in addition to any general damages already

assessed, and if so, in what amount?

A. Nil

6. If your answer to Question 3 is "yes", is he entitled to any aggravated damages from the defendant, The Church of Scientology of Toronto, in addition to any general damages already assessed, and if so, in what amount?

A. \$500,000

7. If your answer to Question 3 is "yes", is he entitled to any punitive damages from the defendant, The Church of Scientology of Toronto, and if so, in what amount?

A. \$800,000

52 Following the verdict, the appellants made a motion before Carruthers J. requesting that he completely disregard the jury's assessment of damages because it was "outrageous, exorbitant and entirely out of proportion to the sting of the defamation" ((1992), [1992 CanLII 7516 \(ON SC\)](#), 7 O.R. (3d) 489, at p. 497). Carruthers J. concluded that the jury was properly instructed as to the object and purpose of each head of damage and that there was evidence upon which the jury could have reached a conclusion that it was entitled to award damages under each of the three heads.

53 Carruthers J. refused to "invade the province of the jury" in order to make his own assessment of the damages (at p. 502). He noted that since both defendants vigorously opposed each of the several motions on behalf of the plaintiff to discharge the jury, it was not open to them to suggest that he fix damages himself.

54 The Court of Appeal, in its careful and extensive reasons, rejected the appellants' allegation that the common law of defamation violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*. It did so for two reasons. First, the court held that it was nothing more than a "bare assertion" of unconstitutionality which could not support their constitutional challenge (at p. 414). Second, the court held that even if the constitutional challenge could be resolved in the absence of an evidentiary foundation, the appellants failed to show that the action for damages commenced by Casey Hill was a form of "government action" which was necessary in order to attract the application of the *Charter*. The court rejected the argument that Casey Hill's position as a public figure implicated the government in whatever action he pursued. It also dismissed the submission that the government funding of his action was relevant to this question.

55 The Court of Appeal then considered the argument that interpreting the common law in a manner consistent with the *Charter* required the adoption of the "actual malice" standard of liability set out in the reasons of the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). There, Brennan J. held that public officials could only collect damages for statements concerning their fitness for office in circumstances where they could demonstrate that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 280). After noting that the common law concept of malice involves an assessment of different factors, such as animosity, hostility, ill will and spite, the court concluded that the adoption of the rule in *New York Times v. Sullivan*, *supra*, would result in a major change to the common law that was neither necessary nor merited. It found that the existing rule was historically based on sound policy reasons which recognized the importance of the protection of the reputation of individuals who assume the responsibilities of public officials.

56 The appellants also submitted that the trial judge erred in ruling that the circumstances of the press conference did not constitute an occasion of qualified privilege and in declining to charge the jury with respect to that defence. The Court of Appeal found that under the common law, qualified privilege attached only to the publication of documents read or referred to in open court. It was opposed to conferring a privilege on a press conference held for the purpose of disseminating to the public details of a pending legal proceeding at a time when no document in connection with that legal proceeding had yet been filed in any court office. In rejecting the argument that this Court's judgment in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, superseded the common law rule, the court stated that, while there is a right to publish details of judicial proceedings before they are heard in open court, "such publication does not enjoy the protection of qualified privilege if it is defamatory" (p. 427).

57 On the subject of general damages, the Court of Appeal examined the libellous statement, the circumstances of its publication and its effect on Casey Hill. It found that "[t]he false statements can be seen as little short of allegations of a criminal breach of trust" (p. 437), "calculated to engender in the minds of those who learned of [them] that they were very serious and entirely credible" (p. 438). Accordingly, they justified a very substantial award of general damages to compensate Casey Hill for the damage to his reputation and the injury to his feelings. This, it was held, should be the result even though he had received several promotions and appointments by the time of trial.

58 With respect to aggravated damages, the Court of Appeal examined the circumstances existing prior to, at the time of and following the publication of the libel. It concluded that the jury was entitled to find that its award for general damages was not large enough to provide adequate solatium to Casey Hill for the aggravation of his injury which was caused by Scientology's malicious libel and reprehensible conduct.

59 The court then turned its attention to the issue of punitive damages and concluded as follows at p. 459:

What the circumstances of this case demonstrated beyond peradventure to the jury was that Scientology was engaged in an unceasing and apparently unstoppable campaign to destroy Casey Hill and his reputation. It must have been apparent to the jury that a very substantial penalty was required because Scientology had not been deterred from its course of conduct by a previous judicial determination that its allegations were unfounded nor by its own knowledge that its principal allegation [that the sealed documents had been opened] was false.

60 The court also observed that it would not interfere with the award of punitive damages on the ground that Scientology persisted in its attack on Casey Hill's reputation even after the jury's verdict.

61 On the question of pre-judgment interest, the court concluded that since the appellants had accommodated counsel for Casey Hill in order to permit him to participate in a Royal Commission, it would be unfair to charge them with prejudgment interest for this period. Also, in considering whether Morris Manning should bear an equal portion of the costs of the trial with Scientology, the court pointed out that much of the trial was devoted to the plea of justification pursued by Scientology alone. Furthermore, the majority of the damages were awarded against Scientology. Therefore, the court concluded that the trial costs should be apportioned, with Morris Manning paying only 30 percent of the assessed costs and Scientology the balance. However, it added that the parties should remain jointly and severally liable for all costs with each having a claim over against the other for any amount paid beyond their apportioned liability.

III. Analysis

62 Two major issues are raised in this appeal. The first concerns the constitutionality of the common law action for defamation. The second relates to the damages that can

properly be assessed in such actions.

63 Let us first review the appellants' submissions pertaining to defamation actions. The appellants contend that the common law of defamation has failed to keep step with the evolution of Canadian society. They argue that the guiding principles upon which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants. This, they say, is an unwarranted restriction which is imposed in a manner that cannot be justified in a free and democratic society. The appellants add that if the element of government action in the present case is insufficient to attract *Charter* scrutiny under s. 32, the principles of the common law ought, nevertheless, to be interpreted, even in a purely private action, in a manner consistent with the *Charter*. This, the appellants say, can only be achieved by the adoption of the "actual malice" standard of liability articulated by the Supreme Court of the United States in the case of *New York Times v. Sullivan, supra*.

64 In addition, the appellant Morris Manning submits that the common law should be interpreted so as to afford the defence of qualified privilege to a lawyer who, acting on behalf of a client, reads and comments in public upon a notice of motion which he believes, in good faith, has been filed in court, and which subsequently is filed. Let us consider first whether the *Charter* is directly applicable to this case.

(A) *Application of the Charter*

65 The appellants have not challenged the constitutionality of any of the provisions of the *Libel and Slander Act*, R.S.O. 1990, c. L.12. The question, then, is whether the common law of defamation can be subject to *Charter* scrutiny. The appellants submit that by reason of his position as a government employee, Casey Hill's action for damages constitutes "government action" within the meaning of s. 32 of the *Charter*. In the alternative, the

appellants submit that, pursuant to s. 52 of the *Constitution Act, 1982*, the common law must be interpreted in light of *Charter* values. I will address the s. 32 argument first.

(1) Section 32: Government Action

66 Section 32(1) reads:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

67 In *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, McIntyre J., with regard to the application of the *Charter* to the common law, stated at pp. 598-99:

It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. . . . It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom. [Emphasis added.]

68 La Forest J., writing for the majority in *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, stressed the importance of this limitation on the application of the *Charter* to the actions of government. He said this at p. 262:

The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.

69 La Forest J. warned that subjecting all private and public action to constitutional review would mean reopening whole areas of settled law and would be "tantamount to setting up an alternative tort system" (p. 263). He expressed the very sage warning that this "could strangle the operation of society" (p. 262). See also McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361, at p. 367, cited in *Dolphin Delivery Ltd.*, *supra*, at p. 597.

70 The appellants argue that at all material times Casey Hill was an agent of the Crown, acting on behalf of the Attorney General of Ontario, and that the defamatory statements which are the subject of the present action were made in relation to acts undertaken by him in that capacity. They further submit that Casey Hill commenced these legal proceedings at the direction and with the financial support of the Attorney General in order to vindicate the damage to the reputation of the Ministry resulting from criticism levelled at the conduct of one of its officials. It is, therefore, contended that this action represents an effort by a government department to use the action of defamation to restrict and infringe the freedom of expression of the appellants in a manner that is contrary to the *Charter*.

71 These submissions cannot be accepted. They have no legal, evidentiary or logical basis of support. Casey Hill's constitutional status for the purpose of the application of the *Charter* should not be determined by the nature of the allegations made against him.

Rather, the determination of whether state involvement existed is dependent upon the circumstances surrounding the institution of the libel proceedings.

72 The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their employment status. To accept the appellants' position would mean that identical defamatory comments would be subject to two different laws, one applicable to government employees, the other to the rest of society. Government employment cannot be a basis for such a distinction. Reputation is an integral and fundamentally important aspect of every individual. It exists for everyone quite apart from employment.

73 In order to establish the requisite government action for *Charter* scrutiny, the appellants argue that it is easy to distinguish between a janitor working in a government building who is simply an employee and a Crown Attorney who is an agent of the state. It is said that when a person who is clearly an agent of the state acts, he or she is acting for or on behalf of the state. I cannot accept this proposition. There are a significant number of public servants who represent the Crown in any number of ways. While it might be easy to differentiate between the extreme examples set forth by the appellants, the grey area between those extremes is too extensive and the functions of the officials too varied to draw any effective line of distinction. The experience in the United States following the decision in *New York Times v. Sullivan*, *supra*, is instructive in this regard. That case modified the common law in relation to defamation suits brought by public officials and touched off an intense debate with respect to who might be designated as a public official or figure rather than a private person. See, for example, G. C. Christie, "Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches" (1976), 75 *Mich. L. Rev.* 43.

74 There is no doubt that Crown Attorneys exercise statutory powers as agents of the government. See *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17; *Crown*

Attorneys Act, R.S.O. 1990, c. C.49; and the *Criminal Code*, s. 504. Therefore, as McIntyre J. pointed out in *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, at p. 209, they benefit from the protection of any immunity which attaches to their office. However, they may become personally liable when they exceed their statutory powers. By extension, actions taken by Crown Attorneys which are outside the scope of their statutory duties are independent of and distinct from their status as agents for the government. Such was the case here.

75 The appellants impugned the character, competence and integrity of Casey Hill, himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity. There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested him to do so. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way. See *Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211, at pp. 311-14. Further, the fact that Casey Hill's suit may have been funded by the Ministry of the Attorney General does not alter his constitutional status or cloak his personal action in the mantle of government action. See *McKinney, supra*, at p. 269.

76 The private nature of these proceedings is apparent, as well, from the respondent's statement of claim, and particularly from the allegation contained in para. 19 that the defamatory statements:

. . . constituting as they do statements of the most serious professional misconduct by the Plaintiff, have damaged his professional reputation and brought him into public scandal, odium and contempt, by reason of which the Plaintiff has suffered damage.

77 The position taken by the appellants at trial is also revealing. Scientology argued that Casey Hill was proceeding with the litigation to advance his "secondary private interest",

that he was trying to "get back at [Scientology] for prosecuting him for contempt", and that the libel action amounted to "a risk-free opportunity . . . to pick up some easy money".

78 The personal nature of the libel action is also evident in the cross-examination of Casey Hill concerning his work with the OPP. At that time, counsel for Scientology stated that the libel action had nothing "to do with damages suffered by Mr. Hill. It's part of an attack motivated by the attitude towards the Church of Scientology, motivated by the fact that as a result of the contempt prosecution he is removed from prosecuting".

79 In my opinion, the appellants have not satisfied the government action requirement described in s. 32. Therefore, the *Charter* cannot be applied directly to scrutinize the common law of defamation in the circumstances of this case.

80 Even if there were sufficient government action to bring this case within s. 32, the appellants failed to provide any evidentiary basis upon which to adjudicate their constitutional attack. This Court has stated on a number of occasions that it will not determine alleged *Charter* violations in the absence of a proper evidentiary record. See, for example, *MacKay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357. In light of the conclusion that the government action requirement of s. 32 has not been met, I need not address this issue. Yet, I feel a brief comment is necessary because of the light it sheds on the manner in which the appellants have conducted themselves in this litigation.

81 The action was commenced in December 1984. By the fall of 1985, the appellants were made aware of the requirement to adduce constitutional evidence. In dismissing the appellants' pre-trial motion with respect to the constitutional issues, O'Driscoll J. clearly indicated that the constitutional questions must be decided upon evidence adduced at trial. The date for trial was fixed in January 1991 and confirmed in June. On September 4, 1991, two days into the proceedings, counsel for Scientology sought to adjourn the trial on the grounds that there was "a possibility of . . . seeking to call expert evidence in regard to the

freedom of speech issue in this trial". Counsel conceded that he had not prepared or delivered any reports of experts in respect to this issue, and indeed, that he had not yet even consulted with experts. He simply wanted the adjournment in order to "explore that area". The request for adjournment was very properly dismissed.

82 There is no government action involved in this defamation suit. It now must be determined whether a change or modification in the law of defamation is required to make it comply with the underlying values upon which the *Charter* is founded.

(2) Section 52: *Charter* Values and the Common Law

(a) *Interpreting the Common Law in Light of the Values Underlying the *Charter**

(i) Review of the Decisions Dealing With the Issue

83 This Court first considered the application of the *Charter* to the common law in *Dolphin Delivery, supra*. In that case, the issue was whether an injunction to restrain secondary picketing violated the *Charter* freedom of expression. It was held that, pursuant to s. 32(1) of the *Charter*, a cause of action could only be based upon the *Charter* when particular government action was impugned. Therefore, the constitutionality of the common law could be scrutinized in those situations where a case involved government action which was authorized or justified on the basis of a common law rule which allegedly infringed a *Charter* right. However, *Dolphin Delivery, supra*, also held that the common law could be subjected to *Charter* scrutiny in the absence of government action. McIntyre J. wrote, at pp. 592-93, that, in light of s. 52(1) of the *Constitution Act, 1982*, "there can be no doubt" that the *Charter*, applies to the common law:

The English text provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". If this

language is not broad enough to include the common law, it should be observed as well that the French text adds strong support to this conclusion in its employment of the words "*elle rend inopérantes les dispositions incompatibles de tout autre règle de droit*". . . . To adopt a construction of s. 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act. [Emphasis in *Dolphin Delivery*.]

In emphasizing that the common law should develop in a manner consistent with *Charter* principles, a distinction was drawn between private litigants founding a cause of action on the *Charter* and judges exercising their inherent jurisdiction to develop the common law. At page 603 this was written:

Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the *Charter* is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of *Charter* causes of action or *Charter* defences between individuals.

[Emphasis added.]

84 Since 1986, this Court has subjected the common law to *Charter* scrutiny in a number of situations where government action was based upon a common law rule: *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933; *R. v. Salituro*, 1991 CanLII 17

(SCC), [1991] 3 S.C.R. 654; and *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835. However, *Dolphin Delivery*, *supra*, remains the only case which has closely examined the application of the *Charter* in the context of purely private litigation. Nevertheless, it is helpful to review the different approaches which have been suggested in those cases in order to better appreciate which principles should properly apply in cases of private litigation.

85 In *R. v. Salituro*, *supra*, the Crown called the accused's estranged wife as a witness. The common law rule prohibiting spouses from testifying against each other was found to be inconsistent with developing social values and with the values enshrined in the *Charter*. At page 670, Iacobucci J., writing for the Court, held:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

Further, at p. 675 this Court held:

Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.

86 Unlike the present appeal and the decisions of this Court in *B.C.G.E.U.*, *Swain*, and *Dagenais*, the common law rule in *Salituro* was not alleged to infringe a specific *Charter* right. Rather, it was alleged to be inconsistent with those fundamental values that provide the foundation for the *Charter*. Although the Court in *Salituro* considered whether Parliament had, through the *Evidence Act*, intended to preserve the common law rule, it did not undertake an analysis similar to that which would be required under s. 1 to determine if the *Charter* breach was justifiable. Rather, it proceeded to balance, in a broad and flexible manner, the conflicting values. The reasons examined the origins of the impugned common law rule and the justifications which had been raised for upholding it. These concerns were weighed against the *Charter's* recognition of the equality of women and, more specifically, against the concept of human dignity which inspires the *Charter*. It was held that the values which were set out in the common law rule did not represent the values of today's society which are reflected in the provisions of the *Charter*.

87 In *B.C.G.E.U.*, *supra*, McEachern C.J.B.C. on his own motion issued an injunction against a union picketing in front of the courthouse: 1983 CanLII 572 (BC SC), [1983] 6 W.W.R. 640. It was held that the common law rule giving rise to the picketing injunction breached s. 2(b). The breach was then found to be justified following a traditional s. 1 analysis.

88 Subsequently, in *R. v. Swain*, *supra*, Lamer C.J. observed that the s. 1 analysis, which has evolved since *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, may not always provide the appropriate framework by which to evaluate the justifications for maintaining a common law rule. In *R. v. Swain*, the Crown raised the insanity defence, over objections by the accused, on the basis of the common law rule which authorized such a procedure. That rule was found to violate s. 7 of the *Charter*. At pages 978-79, Lamer C.J. held:

Before turning to s. 1, however, I wish to point out that because this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. For example, having found that the existing common law rule limits an accused's rights under s. 7 of the *Charter*, it may not be strictly necessary to go on to consider the application of s. 1. Having come to the conclusion that the common law rule enunciated by the Ontario Court of Appeal limits an accused's right to liberty in a manner which does not accord with the principles of fundamental justice, it could, in my view, be appropriate to consider at this stage whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice.

If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. Of course, if it were not possible to reformulate the common law rule so as to avoid an infringement of a constitutionally protected right or freedom, it would be necessary for the Court to consider whether the common law rule could be upheld as a reasonable limit under s. 1 of the *Charter*.

Nevertheless, in *R. v. Swain*, the formal s. 1 analysis was undertaken since *Oakes, supra*, provided a familiar structure for analysis, the constitutional questions were stated with s. 1 in mind and the Court had the benefit of extensive argument on s. 1.

89 Finally, in *Dagenais, supra*, the CBC challenged a publication ban which prevented them from airing one of their programmes. It was held that where the common law rule on publication bans conflicted with *Charter* values, the common law rule must be varied in such a manner as to enable the Court to consider both the objective of a publication ban and the proportionality of the ban's effect on protected *Charter* rights. Without adopting a

formal s. 1 analysis, it was held that this approach "clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*" (p. 878).

90 In light of these cases, then, it remains to be determined what approach should be followed when, in the context of private litigation with no government action involved, a common law rule is alleged to be inconsistent with the *Charter*.

(ii) Approach That Should Be Followed

91 It is clear from *Dolphin Delivery, supra*, that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. As was said in *Salituro, supra*, at p. 678:

The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society.

92 Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

93 When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not

to import into private litigation the analysis which applies in cases involving government action.

94 In *Dolphin Delivery*, *supra*, it was noted that the *Charter* sets out those specific constitutional duties which the state owes to its citizens. When government action is challenged, whether it is based on legislation or the common law, the cause of action is founded upon a *Charter* right. The claimant alleges that the state has breached its constitutional duty. The state, in turn, must justify that breach. While criminal cases present the prime example of government action, challenges to government action can also arise in civil cases. The state's obligation to uphold its constitutional duties is no less pressing in the civil sphere than in the criminal. The two cases of *B.C.G.E.U.*, *supra*, and *Dagenais*, *supra*, present a very specific type of "government action" in the civil context. In both cases, the Court was called upon to consider the operations of the Court and to determine the extent of its own jurisdiction to consider matters which were essentially public in nature. The cases did not involve strictly private litigation. Therefore, they must be approached with caution when considering what analysis should be applied in purely private civil litigation.

95 Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.

96 Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking *Charter* values into account. Far-reaching changes to the common law must be left to the legislature.

97 When the common law is in conflict with *Charter* values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the *Charter* "challenge" in a case involving private litigants does not allege the violation of a *Charter* right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.

98 Finally, the division of onus which normally operates in a *Charter* challenge to government action should not be applicable in a private litigation *Charter* "challenge" to the common law. This is not a situation in which one party must prove a *prima facie* violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a *Charter* right, it is appropriate that the government undertake the justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party

challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified.

99 With that background, let us first consider the common law of defamation in light of the values underlying the *Charter*.

(b) *The Nature of Actions for Defamation: The Values to Be Balanced*

100 There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash. As Edgerton J. stated in *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), at p. 458, cert. denied 317 U.S. 678 (1942), whatever is "added to the field of libel is taken from the field of free debate". The real question, however, is whether the common law strikes an appropriate balance between the two. Let us consider the nature of each of these values.

(i) Freedom of Expression

101 Much has been written of the great importance of free speech. Without this freedom to express ideas and to criticize the operation of institutions and the conduct of individual members of government agencies, democratic forms of government would wither and die. See, for example, *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100, at p. 133; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at p. 306; and *Boucher v. The King*, 1950 CanLII 2 (SCC), [1951] S.C.R. 265, at p. 326. More recently, in *Edmonton Journal*, *supra*, at p. 1336, it was said:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic

societies and institutions. The vital importance of the concept cannot be over-emphasized.

102 However, freedom of expression has never been recognized as an absolute right. Duff C.J. emphasized this point in *Reference re Alberta Statutes, supra*, at p. 133:

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means . . . "freedom governed by law." [Emphasis added.]

See also *Cherneskey v. Armadale Publishers Ltd.*, [1978 CanLII 20 \(SCC\)](#), [1979] 1 S.C.R. 1067, at pp. 1072 and 1091.

103 Similar reasoning has been applied in cases argued under the [Charter](#). Although a *Charter* right is defined broadly, generally without internal limits, the *Charter* recognizes, under s. 1, that social values will at times conflict and that some limits must be placed even on fundamental rights. As La Forest J. explained in *United States of America v. Cotroni*, [1989 CanLII 106 \(SCC\)](#), [1989] 1 S.C.R. 1469, at p. 1489, this Court has adopted a flexible approach to measuring the constitutionality of impugned provisions wherein "the underlying values [of the *Charter*] must be sensitively weighed in a particular context against other values of a free and democratic society . . .".

104 In *R. v. Keegstra*, [1990 CanLII 24 \(SCC\)](#), [1990] 3 S.C.R. 697, for example, s. 319(2) of the [Criminal Code](#) was found to be justified as a reasonable limit on the appellant's freedom to spread falsehoods relating to the Holocaust and thus to promote hatred against an identifiable group. Dickson C.J. adopted the contextual approach to s. 1 and concluded that, since hate propaganda contributed little to the values which underlie the right

enshrined under s. 2(b), namely the quest for truth, the promotion of individual self-development, and participation in the community, a restriction on this type of expression might be easier to justify than would be the case with other kinds of expression.

105 In *R. v. Butler*, [1992 CanLII 124 \(SCC\)](#), [1992] 1 S.C.R. 452, the obscenity provisions of the *Criminal Code*, s. 163, were questioned. It was held, under the s. 1 analysis, that pornography could not stand on an equal footing with other kinds of expression which directly engage the "core" values of freedom of expression. Further, it was found that the fact that the targeted material was expression motivated by economic profit more readily justified the imposition of restrictions.

106 Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. This concept was accepted in *Globe and Mail Ltd. v. Boland*, [1960 CanLII 2 \(SCC\)](#), [1960] S.C.R. 203, at pp. 208-9, where it was held that an extension of the qualified privilege to the publication of defamatory statements concerning the fitness for office of a candidate for election would be "harmful to that 'common convenience and welfare of society'". Reliance was placed upon the text *Gatley on Libel and Slander in a Civil Action: With Precedents of Pleadings* (4th ed. 1953), at p. 254, wherein the author stated the following:

It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.

See also *Derrickson v. Tomat* (1992), [1992 CanLII 8669 \(BC CA\)](#), 88 D.L.R. (4th) 401 (B.C.C.A.), at p. 408.

(ii) The Reputation of the Individual

107 The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

108 Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

109 From the earliest times, society has recognized the potential for tragic damage that can be occasioned by a false statement made about a person. This is evident in the Bible, the Mosaic Code and the Talmud. As the author Carter-Ruck, in *Carter-Ruck on Libel and Slander* (4th ed. 1992), explains at p. 17:

The earliest evidence in recorded history of any sanction for defamatory statements is in the Mosaic code. In *Exodus* XXII 28 we find 'Thou shalt not revile the gods nor curse the ruler of thy people' and in *Exodus* XXIII 1 'Thou shalt not raise

a false report: put not thine hand with the wicked to be an unrighteous witness'. There is also a condemnation of rumourmongers in *Leviticus* XIX 16 'Thou shalt not go up and down as a talebearer among thy people'.

110 To make false statements which are likely to injure the reputation of another has always been regarded as a serious offence. During the Roman era, the punishment for libel varied from the loss of the right to make a will, to imprisonment, exile for life, or forfeiture of property. In the case of slander, a person could be made liable for payment of damages.

111 It was decreed by the Teutons in the *Lex Salica* that if a man called another a "wolf" or a "hare", he must pay the sum of three shillings; for a false imputation of unchastity in a woman the penalty was 45 shillings. In the Normal Costumal, if people falsely called another "thief" or "manslayer", they had to pay damages and, holding their nose with their fingers, publicly confess themselves a liar.

112 With the separation of ecclesiastical and secular courts by the decree of William I following the Norman conquest, the Church assumed spiritual jurisdiction over defamatory language, which was regarded as a sin. The Church "stayed the tongue of the defamer at once *pro custodia morum* of the community, and *pro salute animae* of the delinquent". See V. V. Veeder, "The History and Theory of the Law of Defamation" (1903), 3 *Colum. L. Rev.* 546, at p. 551.

113 By the 16th century, the common law action for defamation became commonplace. This was in no small measure due to the efforts of the Star Chamber to eradicate duelling, the favoured method of vindication. The Star Chamber even went so far as to punish the sending of challenges. However, when it proscribed this avenue of recourse to injured parties, the Star Chamber was compelled to widen its original jurisdiction over seditious libel to include ordinary defamation.

114 The modern law of libel is said to have arisen out of the case *De Libellis Famosis* (1605), 5 Co. Rep. 125a, 77 E.R. 250. There, the late Archbishop of Canterbury and the then Bishop of London were alleged to have been "traduced and scandalized" by an anonymous person. As reported by Coke, it was ruled that all libels, even those against private individuals, ought to be sanctioned severely by indictment at common law or in the Star Chamber. The reasoning behind this was that the libel could incite "all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace" (p. 251). It was not necessary to show publication to a third person and it made no difference whether the libel was true or whether the plaintiff had a good or bad reputation. Eventually, truth was recognized as a defence in cases involving ordinary defamation.

115 It was not until the late 17th century that the distinction between libel and slander was drawn by Chief Baron Hale in *King v. Lake* (1679), Hardres 470, 145 E.R. 552, where it was held that words spoken, without more, would not be actionable, with a few exceptions. Once they were reduced to writing, however, malice would be presumed and an action would lie.

116 The character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century, subject to a few refinements such as the introduction and recognition of the defences of privilege and fair comment. From the foregoing we can see that a central theme through the ages has been that the reputation of the individual is of fundamental importance. As Professor R. E. Brown writes in *The Law of Defamation in Canada* (2nd ed. 1994), at p. 1-4:

"(N)o system of civil law can fail to take some account of the right to have one's reputation remain untarnished by defamation." Some form of legal or social constraints on defamatory publications "are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism." [Footnotes omitted.]

117 Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance. As David Lepofsky suggests in "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?" (1994), 4 *N.J.C.L.* 169, at p. 197, reputation is the "fundamental foundation on which people are able to interact with each other in social environments". At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth. This sentiment was eloquently expressed by Stewart J. in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), who stated at p. 92:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.

118 In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation. In his essay entitled "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993), 27 *L. Soc. Gaz.* 119, David Hawreluk described the importance of a reputation for integrity. At page 121, he quoted Lord Birkett on the subject:

The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself and he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and

uprightness, and no profession, perhaps, offers greater temptations to forsake them; but whatever gifts an advocate may possess, be they never so dazzling, without the supreme qualification of an inner integrity he will fall short of the highest . . .

119 Similarly, Esson J. in *Vogel v. Canadian Broadcasting Corp.*, [1982 CanLII 801 \(BC SC\)](#), [1982] 3 W.W.R. 97 (B.C.S.C.), at pp. 177-78 stated:

The qualities required of a lawyer who aspires to the highest level of his profession are various, but one is essential. That is a reputation for integrity. The programs were a massive attack upon that reputation. The harm done to it can never be wholly undone, and therefore the stigma so unfairly created will always be with the plaintiff.

When the details of the Vogel affair have faded from memory, what will remain in the minds of many people throughout Canada is a lurking recollection that he was the centre of a scandal which arose out of his conduct in office.

120 Although it is not specifically mentioned in the [Charter](#), the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

121 Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in *R. v. Dyment*, [1988 CanLII 10 \(SCC\)](#), [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. In order to

undertake the requisite balancing of values, let us first review the change to the existing common law proposed by the appellants.

(c) *The Proposed Remedy: Adopting the New York Times v. Sullivan "Actual Malice" Rule*

122 In *New York Times v. Sullivan*, *supra*, the United States Supreme Court ruled that the existing common law of defamation violated the guarantee of free speech under the First Amendment of the Constitution. It held that the citizen's right to criticize government officials is of such tremendous importance in a democratic society that it can only be accommodated through the tolerance of speech which may eventually be determined to contain falsehoods. The solution adopted was to do away with the common law presumptions of falsity and malice and place the onus on the plaintiff to prove that, at the time the defamatory statements were made, the defendant either knew them to be false or was reckless as to whether they were or not.

123 At the outset, it is important to understand the social and political context of the times which undoubtedly influenced the decision in *New York Times v. Sullivan*, *supra*. The impugned publication was an editorial advertisement, placed in the appellant's newspaper, entitled "Heed Their Rising Voices". It criticized the widespread segregation which continued to dominate life in the southern states in the late 1950s and early 1960s. Prominent and well respected individuals, including Mrs. Eleanor Roosevelt, lent their name to the advertisement. It communicated information, recited grievances, protested abuses and sought financial support. The group or movement sponsoring the advertisement was characterized by Brennan J. as one "whose existence and objectives are matters of the highest public interest and concern" (p. 266). Black J. described the controversy at the heart of the suit in the following terms at p. 294:

One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment.

124 The advertisement did not mention by name the plaintiff, who was a white elected commissioner from Montgomery, Alabama. Only 35 copies of the edition of the *New York Times* which carried that advertisement were circulated in Montgomery, and only 394 were circulated in the entire state of Alabama. The trial took place in 1960, in a segregated court room in Montgomery, before a white judge and all-white jury. Damages of \$500,000 U.S. were awarded. This would be the current equivalent in Canada of approximately \$3.5 million.

125 The Supreme Court, in overturning the verdict, clearly perceived the libel action as a very serious attack not only on the freedom of the press but, more particularly, on those who favoured desegregation in the southern United States. It was concerned that such a large damage award could threaten the very existence of, in Black J.'s words, "an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials" (p. 294). This concern was intensified by the fact that a second libel verdict of \$500,000 U.S. had already been awarded to another Montgomery commissioner against the *New York Times*. In addition, 11 other libel suits, arising out of the same advertisement, were pending against the newspaper.

126 Another motivating factor for this radical change to the common law was the American jurisprudence to the effect that the statements of public officials which came "within the outer perimeter of their duties" were privileged unless actual malice was proved. The rationale behind this privilege was that the threat of damage suits would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties": *Barr v. Matteo*, 360 U.S. 564 (1959), at p. 571. The Supreme Court in the *Sullivan*

decision held that analogous considerations supported the protection which it accorded to critics of the government.

(d) *Critiques of the "Actual Malice" Rule*

(i) Comments on the Decision in the United States

127 The "actual malice" rule has been severely criticized by American judges and academic writers. It has been suggested that the decision was overly influenced by the dramatic facts underlying the dispute and has not stood the test of time. See, for example, R. A. Epstein, "Was *New York Times v. Sullivan* Wrong?" (1986), 53 *U. Chi. L. Rev.* 782, at p. 787; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), at p. 767. Commentators have pointed out that, far from being deterred by the decision, libel actions have, in the post-*Sullivan* era, increased in both number and size of awards. They have, in this way, mirrored the direction taken in other tort actions. See Epstein, *supra*; R. P. Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight" (1985), 71 *Iowa L. Rev.* 226, at pp. 228-29. It has been said that the *New York Times v. Sullivan*, decision has put great pressure on the fact-finding process since courts are now required to make subjective determinations as to who is a public figure and what is a matter of legitimate public concern. See Christie, *supra*, at pp. 63-64.

128 Perhaps most importantly, it has been argued the decision has shifted the focus of defamation suits away from their original, essential purpose. Rather than deciding upon the truth of the impugned statement, courts in the U.S. now determine whether the defendant was negligent. Several unfortunate results flow from this shift in focus. First, it may deny the plaintiff the opportunity to establish the falsity of the defamatory statements and to determine the consequent reputational harm. This is particularly true in cases where the falsity is not seriously contested. See Bezanson, *supra*, at p. 227.

129 Second, it necessitates a detailed inquiry into matters of media procedure. This, in turn, increases the length of discoveries and of the trial which may actually increase, rather than decrease, the threat to speech interests. See D. A. Barrett, "Declaratory Judgments for Libel: A Better Alternative" (1986), 74 *Cal. L. Rev.* 847, at p. 855.

130 Third, it dramatically increases the cost of litigation. This will often leave a plaintiff who has limited funds without legal recourse. See P. N. Leval, "The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in its Proper Place" (1988), 101 *Harv. L. Rev.* 1287, at p. 1288; A. Lewis, "*New York Times v. Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment'" (1983), 83 *Colum. L. Rev.* 603; M. London, "The 'Muzzled Media': Constitutional Crisis or Product Liability Scam?" in *At What Price? Libel Law and Freedom of the Press* (1993), at pp. 17-20.

131 Fourth, the fact that the dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse. See L. C. Bollinger, "The End of *New York Times v. Sullivan*: Reflections on *Masson v. New Yorker Magazine*", [1991] *Sup. Ct. Rev.* 1, at p. 6; J. A. Barron, "Access to the Press -- A New First Amendment Right" (1966-67), 80 *Harv. L. Rev.* 1641, at pp. 1657-58.

132 A number of jurists in the United States have advocated a reconsideration of the *New York Times v. Sullivan* standard. These include one of the justices of the Supreme Court who participated in that decision. In *Dun & Bradstreet, Inc.*, *supra*, White J. stated, in a minority concurring opinion with which Burger C.J. concurred on this point, that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation" (p. 767). He went on to state at pp. 767-69:

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz*: "(T)here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." . . . Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. . . . Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests . . .

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." . . .

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results. [Emphasis added.]

133 In the subsequent case of *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187 (1986), the majority of the United States Supreme Court refused to grant *certiorari*. Burger C.J. and Rehnquist J. dissented because of their view that the court should re-examine *New York Times v. Sullivan, supra*, and "give plenary attention to this important issue" (p. 1187).

(ii) Consideration of the Actual Malice Rule in the United Kingdom

134 The courts in England have refused to adopt the "actual malice" standard. In *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011, the House of Lords considered an action brought by a municipal council against the publisher of a Sunday newspaper. The claim for damages, which was denied, arose from articles concerning the authority's management of its superannuation fund. In his reasons, Lord Keith stated that public interest considerations similar to those underlying the *New York Times v. Sullivan*, *supra*, decision were involved in that it was "of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism" (p. 1017). However, the appropriateness of the "actual malice" standard was not considered and it was not incorporated into the law of England. In fact, Lord Keith stated that if the individual reputation of any of the local councillors had been wrongly damaged by the impugned publication, they could have brought an action for defamation in their personal capacity.

(iii) The Australian Position on Actual Malice

135 The Australian case of *Theophanous v. Herald & Weekly Times Ltd.* (1994), 124 A.L.R. 1 (H.C.), considered an action brought by a member of that country's House of Representatives in response to a letter to the editor of a local newspaper which was critical of his views. Although a plurality of the seven judges sitting on the High Court held that the existing law of defamation curtailed the constitutionally protected right to political discussion, it rejected the adoption of the "actual malice" standard, stating at pp. 22-23:

Even assuming that, in conformity with *Sullivan*, the test is confined to plaintiffs who are public officials, in our view it gives inadequate protection to reputation. . . .

. . . the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States.

(iv) The Position Taken by International Law Reform Commissions

136 International law reform organizations have also criticized the *New York Times v. Sullivan* rule. The Australian Law Reform Commission's Report No. 11, *Unfair Publication: Defamation and Privacy* (the Kirby Committee Report) (1979), criticized the concept of "public official" on the basis that "a minor elected official or public servant [would be] in a more vulnerable position than a prominent businessman" (p. 252). The United Kingdom *Report of the Committee on Defamation* (the Faulks Committee Report) (1975), held that the rule "would in many cases deny a just remedy to defamed persons" (p. 169). Finally, the Irish Law Reform Commission's *Report on the Civil Law of Defamation* (the Keane Final Report) (1991), stated that "while the widest possible range of criticism of public officials and public figures is desirable, statements of fact contribute meaningfully to public debate only if they are true" (p. 82).

(e) *Conclusion: Should the Law of Defamation be Modified by Incorporating the Sullivan Principle?*

137 The *New York Times v. Sullivan* decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

138 The Canadian Daily Newspaper Association indicated, in its response to *A Consultation Draft of the General Limitations Act* (September 1991) at p. 3, that the law of libel is a "carefully-crafted regime" which has "functioned fairly for the media and for complainants for many years". Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of the individuals to protect their reputation. The words of Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743, at pp. 745-46, are worth repeating:

Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual . . . whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand . . . the right of the public . . . to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

139 None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar. First, this appeal does not involve the media or political commentary about government policies. Thus the issues considered by the High Court of Australia in *Theophanous, supra*, are also not raised in this case and need not be considered.

140 Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.

141 In conclusion, in its application to the parties in this action, the common law of
defamation complies with the underlying values of the *Charter* and there is no need to
amend or alter it.

142 Consideration must now be given to the submission made on behalf of Morris Manning
that the defence of qualified privilege should be expanded to include reports upon
pleadings and court documents that have been filed or are at the point of being filed.

(f) *Should the Common Law Defence of Qualified Privilege be Expanded to Comply
with Charter Values?*

143 Qualified privilege attaches to the occasion upon which the communication is made,
and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917]
A.C. 309 (H.L.), at p. 334:

. . . a privileged occasion is . . . an occasion where the person who makes a
communication has an interest or a duty, legal, social, or moral, to make it to the
person to whom it is made, and the person to whom it is so made has a corresponding
interest or duty to receive it. This reciprocity is essential.

This passage was quoted with approval in *McLoughlin v. Kutasy*, 1979 CanLII 39 (SCC), [1979] 2
S.C.R. 311, at p. 321.

144 The legal effect of the defence of qualified privilege is to rebut the inference, which
normally arises from the publication of defamatory words, that they were spoken with
malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is
presumed and the defendant is free to publish, with impunity, remarks which may be
defamatory and untrue about the plaintiff. However, the privilege is not absolute and can

be defeated if the dominant motive for publishing the statement is actual or express malice.

See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.

145 Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*, *supra*, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, 1956 CanLII 124 (ON CA), [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, *supra*, at pp. 323-24, and *Netupsky v. Craig*, 1972 CanLII 19 (SCC), [1973] S.C.R. 55, at pp. 61-62.

146 Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. See *The Law of Defamation in Canada*, *supra*, at pp. 13-193 and 13-194; *Salmond and Heuston on the Law of Torts* (20th ed. 1992), at pp. 166-67. As Loreburn E. stated at pp. 320-21 in *Adam v. Ward*, *supra*:

. . . the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

147 In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. For example, in *Douglas v. Tucker*, 1951 CanLII 54 (SCC), [1952] 1 S.C.R. 275, the defendant, during an election campaign, stated that the plaintiff, who was the officer of an investment company, had charged a farmer and his wife an exorbitant rate of interest causing them to lose their property. The plaintiff maintained that the allegation was without foundation. In response, the defendant asserted that the plaintiff was facing a

charge of fraud which had been adjourned until after the election. This Court held that the defendant had an interest in responding to the plaintiff's denial, thereby giving rise to an occasion of qualified privilege. However, it ruled that the occasion was exceeded because the defendant's comments went beyond what was "germane and reasonably appropriate" (p. 286).

148 In *Sun Life Assurance Co. of Canada v. Dalrymple*, [1965 CanLII 9 \(SCC\)](#), [1965] S.C.R. 302, the district manager of the defendant insurance company threatened to resign and take the district agents with him. This Court held that it fell within the scope of the privilege for the company to make certain defamatory comments about the plaintiff in order to dissuade its agents from leaving.

149 The principal question to be answered in this appeal is whether the recitation of the contents of the notice of motion by Morris Manning took place on an occasion of qualified privilege. If so, it remains to be determined whether or not that privilege was exceeded and thereby defeated.

150 The traditional common law rule with respect to reports on documents relating to judicial proceedings is set out in *Gatley on Libel and Slander* (8th ed. 1981), at p. 252, in these words:

The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged.

See, also, *The Law of Defamation in Canada*, *supra*, at pp. 14-35, 14-42; *Carter-Ruck on Libel and Slander*, *supra*, at pp. 140-41.

The rationale behind this rule is that the public has a right to be informed about all aspects of proceedings to which it has the right of access. This is why a news report referring to the contents of any document filed as an exhibit, or admitted as evidence during the course of the proceedings, is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had not been filed with the court or referred to in open court. Duff C.J. explained the reasoning for this in *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339, at p. 360:

The publicity of proceedings involving the conduct of a judicial authority serves the important purposes of impressing those concerned in the administration of justice with a sense of public responsibility, and of affording every member of the community an opportunity of observing for himself the mode in which the business of the public tribunals is carried on; but no such object would appear to be generally served by applying the privilege to the publication of preliminary statements of claims and defence relating only to private transactions; formulated by the parties themselves; in respect of which no judicial action has been taken, and upon which judicial action may never be invoked. It is only when such preliminary statements or the claims or defences embodied in them form the basis or the subject of some hearing before, or some action by, a court or a judicial officer, that their contents can become the object of any real public concern as touching the public administration of justice.

In *Edmonton Journal*, *supra*, at pp. 1338-40, I noted that the public scrutiny of our courts by the press was fundamentally important in our democratic society and that s. 2(b) protected not only speakers, but listeners as well. This right to report on court proceedings extended to pleadings and court documents filed before trial, since access to these documents served the same societal needs as reporting on trials. Even in private actions, such as those for wrongful dismissal or for personal damages, the public may well have an interest in knowing the kinds of submissions which can be put forward.

Both societal standards and the legislation have changed with regard to access to court documents. When the qualified privilege rule was set out in *Shallow, supra*, court documents were not open to the public. Today, the right of access is guaranteed by legislative provision, in this case s. 137(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. As well, s. 2(b) of the *Charter* may in some circumstances provide a basis for gaining access to some court documents. However, just as s. 137(1) provides for limitations on the right of access to court documents, so too is the s. 2(b) guarantee subject to reasonable limits that can be demonstrably justified in a free and democratic society. This Court's reasons in *Canadian Newspapers Co. v. Canada (Attorney General)*, 1988 CanLII 52 (SCC), [1988] 2 S.C.R. 122, provide an illustration of the kind of restriction that has been upheld in relation to information flowing from court proceedings. In that case, the constitutionality of s. 442(3) of the *Criminal Code* was upheld. It imposed a publication ban on the identity of a complainant in sexual assault cases (or any information that might disclose her identity) upon the request of that complainant. There is no need to elaborate further on the scope of access, however, since it does not arise on the facts of this case. It is sufficient to observe that, in appropriate circumstances, s. 2(b) may provide the means to gain access to court documents. It follows that the concept of qualified privilege should be modified accordingly.

The public interest in documents filed with the court is too important to be defeated by the kind of technicality which arose in this case. The record demonstrates that, prior to holding the press conference, Morris Manning had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. In fact, the proper documents were served and filed the very next morning. The fact that, by some misadventure, the strict procedural requirement of filing the documents had not been fulfilled at the time of the press conference should not defeat the qualified privilege which attached to this occasion.

155 This said, it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

156 The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion.

(B) *Damages*

(1) The Standard of Appellate Review

157 The appellants do not contend that the trial judge made any substantive error in his careful directions to the jury. Thus, there is no question of misdirection of the jury or of its

acting upon an improper basis or of any jury consideration given to wrongfully admitted or excluded evidence. The sole issue is whether the quantum of the jury's award can stand.

158 Jurors are drawn from the community and speak for their community. When properly instructed, they are uniquely qualified to assess the damages suffered by the plaintiff, who is also a member of their community. This is why, as Robins J.A. noted in *Walker v. CFTO Ltd.* (1987), [1987 CanLII 126 \(ON CA\)](#), 59 O.R. (2d) 104 (C.A.), at p. 110, it is often said that the assessment of damages is "peculiarly the province of the jury". Therefore, an appellate court is not entitled to substitute its own judgment as to the proper award for that of the jury merely because it would have arrived at a different figure.

159 The basis upon which an appellate court can act was very clearly enunciated by Robins J.A. in *Walker, supra*. He stated at p. 110 that the court should consider:

. . . whether the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice.

160 The history of this action emphasizes the reasonableness of the jury's verdict. It was the appellants who had always insisted upon the jury assessing damages for the libel. When the jury had retired to consider their verdict, they returned after four hours with the sagacious question: "what if any are realistic maximums that have been assessed by society in recent history?". The trial judge prudently sought the advice of counsel on the question. Counsel for the appellants agreed with the trial judge that no guidance could be given to the jury as to the quantum of damages. The jury was so advised. They deliberated for another five hours and returned the verdict which is the subject matter of this appeal.

161 There can be no doubt that the decision of the trial judge on this issue, which was concurred in by counsel for the appellants, was correct. In Ontario, there is no statutory provision for giving guidelines to a jury on this issue. It is significant that in 1989, when the *Courts of Justice Act* was amended (S.O. 1989, c. 67, s. 4) to permit trial judges and counsel to give guidance to juries concerning damage awards in personal injury actions, no provision was made in the Act pertaining to libel actions or any other type of tort action. It would appear, then, that the legislators specifically left the assessment of damages in libel actions to the jury.

162 The appellants relied upon the case of *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, [1993] 4 All E.R. 975 (C.A.), to support their position that an appellate court should reduce this award. In that case, however, the English Court of Appeal was acting pursuant to newly enacted legislation. This legislation, passed in 1990, specifically provided that, in cases where the court had the authority to order a new trial on the ground that the damages awarded by a jury were excessive or inadequate, it could, instead of ordering a new trial, substitute a sum for damages which it considered to be proper. This statutory provision led the court in *Rantzen* to modify its approach to the review of a jury's assessment of damages. Therefore, this case is of little use.

163 If guidelines are to be provided to juries, then clearly this is a matter for legislation. In its absence, the standard which must be applied remains that the jury's assessment should not be varied unless it shocks the conscience of the court. With this in mind, let us first consider the jury's assessment of damages.

(2) General Damages

164 It has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. See *Ley v. Hamilton* (1935), 153 L.T. 384 (H.L.), at p. 386. They are, as stated, peculiarly within the province of the jury. These are sound principles that should be followed.

165 The consequences which flow from the publication of an injurious false statement are invidious. The television report of the news conference on the steps of Osgoode Hall must have had a lasting and significant effect on all who saw it. They witnessed a prominent lawyer accusing another lawyer of criminal contempt in a setting synonymous with legal affairs and the courts of the province. It will be extremely difficult to correct the impression left with viewers that Casey Hill must have been guilty of unethical and illegal conduct.

166 The written words emanating from the news conference must have had an equally devastating impact. All who read the news reports would be left with a lasting impression that Casey Hill has been guilty of misconduct. It would be hard to imagine a more difficult situation for the defamed person to overcome. Every time that person goes to the convenience store, or shopping centre, he will imagine that the people around him still retain the erroneous impression that the false statement is correct. A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. It is members of the community in which the defamed person lives who will be best able to assess the damages. The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation.

(a) *Should a Cap be Imposed on Damages in Defamation Cases?*

167 The appellants contend that there should be a cap placed on general damages in defamation cases just as was done in the personal injury context. In the so-called "trilogy" of *Andrews v. Grand & Toy Alberta Ltd.*, [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229,

Arnold v. Teno, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, 1978 CanLII 12 (SCC), [1978] 2 S.C.R. 267, it was held that a plaintiff claiming non-pecuniary damages for personal injuries should not recover more than \$100,000.

168 In my view, there should not be a cap placed on damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. In the latter case, the plaintiff is compensated for every aspect of the injury suffered: past loss of income and estimated future loss of income, past medical care and estimated cost of future medical care, as well as non-pecuniary damages. Second, at the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole. The damages awarded were varying tremendously not only between the provinces but also between different districts of a province. Perhaps as a result of motor vehicle accidents, the problem arose in the courts every day of every week. The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicles and, indeed, businesses of all kinds throughout the land. In those circumstances, for that one aspect of recovery, it was appropriate to set a cap.

169 A very different situation is presented with respect to libel actions. In these cases, special damages for pecuniary loss are rarely claimed and often exceedingly difficult to prove. Rather, the whole basis for recovery for loss of reputation usually lies in the general damages award. Further, a review of the damage awards over the past nine years reveals no pressing social concern similar to that which confronted the courts at the time the trilogy was decided. From 1987 to 1991, there were only 27 reported libel judgments in Canada, with an average award of \$30,000. Subsequent to the decision in this case, from 1992 to 1995, there have been 24 reported libel judgments, with an average award of less than \$20,000. This later figure does not include the award in *Jill Fishing Ltd. v. Koranda Management Inc.*, [1993] B.C.J. No. 1861 (S.C.), which involved the assessment of

damages for a number of different causes of action. Therefore, there is no indication that a cap is required in libel cases.

170 There is a great difference in the nature of the tort of defamation and that of negligence. Defamation is the intentional publication of an injurious false statement. While it is true that an actual intention to defame is not necessary to impose liability on a defendant, the intention to do so is nevertheless inferred from the publication of the defamatory statement. This gives rise to the presumption of malice which may be displaced by the existence of a qualified privilege. Personal injury, on the other hand, results from negligence which does not usually arise from any desire to injure the plaintiff. Thus, if it were known in advance what amount the defamer would be required to pay in damages (as in the personal injury context), a defendant might look upon that sum as the maximum cost of a licence to defame. A cap would operate in a manner that would change the whole character and function of the law of defamation. It would amount to a radical change in policy and direction for the courts.

171 The courts in England have unequivocally rejected the comparison of libel and personal injury cases. See, for example, *Cassell & Co. v. Broome*, [1972] 1 All E.R. 801 (H.L.), at p. 824; *Blackshaw v. Lord*, [1983] 2 All E.R. 311 (C.A.), at pp. 337, 340; *Sutcliffe v. Pressdram Ltd.*, [1990] 1 All E.R. 269 (C.A.), at pp. 281-82, 289; and *Rantzen v. Mirror Group Newspapers (1986) Ltd.*, *supra*.

172 It is true that in Australia a majority of the High Court held in *Carson v. John Fairfax & Sons Ltd.* (1993), 113 A.L.R. 577, that some useful reference could be made to personal injury cases in assessing general damages. However, the 4-3 division in the court shows the serious concern which this issue engendered. McHugh J., a member of the minority, wrote (at p. 629):

Awards in personal injury cases and defamation actions serve different purposes, have different elements and different histories. They are not comparable. I think that it is a mistake to believe that the pain and suffering component of a personal injury award can be isolated from the other components of that award and then compared to an award of compensatory damages in a defamation action.

173 In any event, I would observe that, if the trilogy were to be applied, the value of the cap in 1991 would be approximately \$250,000. It follows that even if the appellants' contention on this issue was accepted, the general damages of \$300,000 assessed by the jury would come very close to the range said to be reasonable by the appellants.

(b) Joint Liability for General Damages

174 Manning complains that the judge erred in refusing to accept his request that the verdict in general damages be rendered separately. He argues that his liability should be limited to the statement he made at the press conference and should not extend to the subsequent circulation of the notice of motion. The trial judge's error, he argues, contributed to the very high award by the jury. This position cannot be accepted.

175 It must be remembered that at trial: a) it was the position of Manning's counsel that Manning and Scientology should be jointly and severally liable for general damages in respect of each of the defamatory statements published by them; b) Scientology admitted that it published each of the defamatory statements at issue in the action; c) Manning admitted that he published each of the defamatory statements with the exception of the notice of motion; and d) the jury specifically found that Manning published the notice of motion.

Thus, both Manning and Scientology published the notice of motion. It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury. It would thus be inappropriate and wrong in law to have a jury attempt to apportion liability either for general or for special damages between the joint tortfeasors Manning and Scientology. See *Lawson v. Burns*, [1976 CanLII 1499 \(BC SC\)](#), [1976] 6 W.W.R. 362 (B.C.S.C.), at pp. 368-69; *Gatley on Libel and Slander* (8th ed.), *supra*, at p. 600. However, this comment does not apply to aggravated damages, which are assessed on the basis of the particular malice of each joint tortfeasor.

(c) *Application of Principles to the Facts Established in this Case*

It cannot be forgotten that at the time the libellous statement was made, Casey Hill was a young lawyer in the Crown Law office working in the litigation field. For all lawyers their reputation is of paramount importance. Clients depend on the integrity of lawyers, as do colleagues. Judges rely upon commitments and undertakings given to them by counsel. Our whole system of administration of justice depends upon counsel's reputation for integrity. Anything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer. It matters not that subsequent to the publication of the libel, Casey Hill received promotions, was elected a bencher and eventually appointed a trial judge in the General Division of the Court of Ontario. As a lawyer, Hill would have no way of knowing what members of the public, colleagues, other lawyers and judges may have been affected by the dramatic presentation of the allegation that he had been instrumental in breaching an order of the court and that he was guilty of criminal contempt.

178 This nagging doubt and sense of hurt must have affected him in every telephone call he made and received in the course of his daily work, in every letter that he sent and received and in every appearance that he made before the courts of the province of Ontario. He would never know who, as a result of the libellous statement, had some lingering suspicion that he was guilty of misconduct which was criminal in nature. He would never know who might have believed that he was a person without integrity who would act criminally in the performance of his duties as a Crown counsel. He could never be certain who would accept the allegation that he was guilty of a criminal breach of trust which was the essential thrust of the libel.

179 The publication of the libellous statement was very carefully orchestrated. Members of the press and the television media attended at Osgoode Hall in Toronto to meet two prominent lawyers, Morris Manning and Clayton Ruby. Osgoode Hall is the seat of the Court of Appeal and the permanent residence of the Law Society. The building is used as the background in a great many news reports dealing with important cases emanating from the Court of Appeal. In the minds of the public, it is associated with the law, with the courts and with the justice system. Manning went far beyond a simple explanation of the nature of the notice of motion. He took these very public steps without investigating in any way whether the allegations made were true.

180 At the time this press conference was called, Scientology members had been working with the sealed documents for some time and they had not yet discovered any of the sealed documents to have been opened. Yet, Scientology persisted in the publication of this libel against Hill, who was listed in their files as an "enemy".

181 Hill movingly described the effect the reading of the press reports of the press conference had upon him and of viewing the television broadcast. He put it in this way:

I was sick. I was shocked. I understood from reading it that it related to access to the documents. The type of thing that Mr. Ruby and I had been dealing with over

many months, and I was just incredulous.

. . .

I was horrified when I saw it. I had had a long history of dealing with counsel for the Church of Scientology. Small problems, medium-sized problems and very serious problems had been raised between us.

Every effort was made to answer those issues as they came up. When I saw the newscast, I realized that there was really nothing I could do to stop the information from getting out. I thought it was false. I thought it was a very dramatic representation . A well-known lawyer as Mr. Manning was -- and he was gowned.

. . .

And he was standing before the High Court. The indication that I had been involved in opening sealed documents and giving permission was totally false. For me, in seeing it, it was equivalent to saying I was a cheat and that I had obstructed the course of justice. It was an attack on my professional reputation and I had no way of stopping it.

. . .

I also have no way of knowing whether there are people in the community who would be in a position to place some reliance on the fact that regardless of the outcome of the criminal case, Manning, a prominent lawyer, and the Church of Scientology of Toronto, had still expressed a view on September 17th.

182 The factors which should be taken into account in assessing general damages are clearly and concisely set out in *Gatley on Libel and Slander* (8th ed.), *supra*, at pp. 592-93, in these words:

SECTION 1. ASSESSMENT OF DAMAGES

1451. Province of the jury. In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury," who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to

the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

183 There will of necessity be some overlapping of the factors to be considered when aggravated damages are assessed. This can be seen from a further reference to the *Gatley* text at pp. 593-94 where this appears:

1452. Aggravated damages. The conduct of the defendant, his conduct of the case, and his state of mind are thus all matters which the plaintiff may rely on as aggravating the damages. "Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation." "In awarding 'aggravated damages' the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous, rather than a more moderate award to provide an adequate solatium. . . that is because the injury to the plaintiff is actually greater, and, as the result of the conduct exciting the indignation, demands a more generous solatium."

184 In considering and applying the factors pertaining to general damages in this case it will be remembered that the reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the

accounts. The insidious harm of the orchestrated libel was indeed spread widely throughout the community.

185 The misconduct of the appellants continued after the first publication. Prior to the commencement of the hearing of the contempt motion before Cromarty J., Scientology was aware that the allegations it was making against Casey Hill were false. Yet, it persisted with the contempt hearings as did Morris Manning. At the conclusion of the contempt hearing, both appellants were aware of the falsity of the allegations. Nonetheless, when the libel action was instituted, the defence of justification was put forward by both of them. The statement of defence alleging justification or truth of the allegation was open for all the public to see. Despite their knowledge of its falsity, the appellants continued to publish the libel. Although Manning withdrew the plea of justification, this was only done in the week prior to the commencement of the trial itself. For its part, Scientology did not withdraw its plea of justification until the hearing of the appeal. Finally, the manner in which Hill was cross-examined by the appellants, coupled with the manner in which they presented their position to the jury, in light of their knowledge of the falsity of their allegations, are further aggravating factors to be taken into account.

186 When all these facts are taken into account there is no question that the award of \$300,000 by way of general damages was justified in this case.

(d) *Comparison with Other Libel Cases*

187 At the outset, I should state that I agree completely with the Court of Appeal that each libel case is unique and that this particular case is in a "class by itself". The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff,

and the actions and motivations of the defendants. It follows that there is little to be gained from a detailed comparison of libel awards.

(3) Aggravated Damages

(a) *General Principles*

188 Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:

Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress -- the humiliation, indignation, anxiety, grief, fear and the like -- suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as "aggravated damages".

189 These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

190 If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, *Walker v. CFTO Ltd.*, *supra*, at p. 111; *Vogel*, *supra*, at p. 178; *Kerr v. Conlogue* (1992), [1992 CanLII 924 \(BC SC\)](#), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome*, *supra*, at

pp. 825-26. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard*, *supra*, at p. 975.

191 There are a number of factors that a jury may properly take into account in assessing aggravated damages. For example, was there a withdrawal of the libellous statement made by the defendants and an apology tendered? If there was, this may go far to establishing that there was no malicious conduct on the part of the defendant warranting an award of aggravated damages. The jury may also consider whether there was a repetition of the libel, conduct that was calculated to deter the plaintiff from proceeding with the libel action, a prolonged and hostile cross-examination of the plaintiff or a plea of justification which the defendant knew was bound to fail. The general manner in which the defendant presented its case is also relevant. Further, it is appropriate for a jury to consider the conduct of the defendant at the time of the publication of the libel. For example, was it clearly aimed at obtaining the widest possible publicity in circumstances that were the most adverse possible to the plaintiff?

(b) *The Application to the Facts of this Case*

192 In this case, there was ample evidence upon which the jury could properly base their finding of aggravated damages. The existence of the file on Casey Hill under the designation "Enemy Canada" was evidence of the malicious intention of Scientology to "neutralize" him. The press conference was organized in such a manner as to ensure the widest possible dissemination of the libel. Scientology continued with the contempt proceedings although it knew its allegations were false. In its motion to remove Hill from the search warrant proceedings, it implied that he was not trustworthy and might act in those proceedings in a manner that would benefit him in his libel action. It pleaded justification or truth of its statement when it knew it to be false. It subjected Hill to a

demeaning cross-examination and, in its address to the jury, depicted Hill as a manipulative actor.

193 It is, as well, appropriate for an appellate court to consider the post-trial actions of the defendant. It will be recalled that Scientology, immediately after the verdict of the jury, repeated the libel, thus forcing the plaintiff to seek and obtain an injunction restraining Scientology from repeating the libel. It did not withdraw its plea of justification until the hearing of the appeal. All this indicates that the award of aggravated damages was strongly supported by the subsequent actions of Scientology.

194 In summary, every aspect of this case demonstrates the very real and persistent malice of Scientology. Their actions preceding the publication of the libel, the circumstances of its publication and their subsequent actions in relation to both the search warrant proceedings and this action amply confirm and emphasize the insidious malice of Scientology. Much was made of their apology tendered at the time of the hearing in the Court of Appeal. There is a hollow ring to that submission when it is remembered that it was not until the fifth day of oral argument before the Court of Appeal that the apology was tendered. Scientology can gain little comfort from such a late and meaningless apology.

195 These damages were awarded solely against Scientology and are based upon the misconduct of that appellant. There is no question of Manning being in any way responsible for these damages. Indeed, there cannot be joint and several responsibility for either aggravated or punitive damages since they arise from the misconduct of the particular defendant against whom they are awarded. See, for example, *Sun Life, supra*, at p. 1310; *Egger v. Chelmsford*, [1965] 1 Q.B. 248 (C.A.), at pp. 263 and 265; *Vogel, supra*, at p. 171; S. M. Waddams, *The Law of Damages* (2nd ed. 1991), at pp. 11-23 and 11-24. Scientology's behaviour throughout can only be characterized as recklessly high-handed, supremely arrogant and contumacious. There seems to have been a continuing conscious

effort on Scientology's part to intensify and perpetuate its attack on Casey Hill without any regard for the truth of its allegations.

(4) Punitive Damages

(a) *General Principles*

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

197 Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

198 This was the test formulated by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*. In that case, he found that the general damages award of \$908,000 was obviously sufficient to satisfy whatever need there was for punishment and deterrence. He found that, in those circumstances, the \$50,000 punitive damage award served no rational purpose. The Court

of Appeal, in the case at bar, applied the same reasoning and upheld the award of punitive damages.

199 Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.

(b) *The Application to the Facts of this Case*

200 There can be no doubt that the conduct of Scientology in the publication of the injurious false statement pertaining to its "enemy" was malicious. Its publication was carefully planned and carried out in a manner which ensured its widest possible dissemination in the most damaging manner imaginable. The allegation made against Hill was devastating. It was said that he had been guilty of breach of trust, breach of a court order and that his conduct and behaviour was criminal. Scientology's actions from the time of publication, throughout the trial, and after the trial decision was rendered constituted a continuing attempt at character assassination by means of a statement which it knew to be false. It was such outrageous conduct that it cried out for the imposition of punitive damages.

201 There might have been some concern that, in light of the award of general and aggravated damages totalling \$800,000, there might not be a rational basis for punitive damages. However any lingering doubt on that score is resolved when Scientology's persistent misconduct subsequent to the trial is considered. On the very next day following

the verdict, Scientology republished the libel in a press release delivered to the media. It then brought a motion to adduce fresh evidence which it stated would have a bearing "on the credibility and reputation of the plaintiff S. Casey Hill" which, if presented at trial, "would probably have changed the result". Its actions were such that Hill was forced to bring an application for an injunction enjoining Scientology from republishing the libel. In his reasons for granting the injunction, Carruthers J. stated that he was forced to take that action because "no amount awarded on account of punitive damages would have prevented or will prevent the Church of Scientology from publishing defamatory statements about the plaintiff". Even the injunction did not deter Scientology which moved to set it aside. Further, in its notice of appeal of the libel judgment, Scientology alleged that the trial judge had erred in ruling the decision of Cromarty J. in the contempt proceedings was *res judicata* of the issues raised in the libel trial.

202 During the appeal, it was conceded and the evidence and events confirmed that in all likelihood, no amount of general or aggravated damages would have deterred Scientology. Clearly then, this was an appropriate case for an award of punitive damages. Scientology did not withdraw its plea of justification until the first day of the oral argument in the Court of Appeal. Nor was any apology tendered by Scientology until the fifth day of oral argument before the Court of Appeal.

203 The award of punitive damages, therefore, served a rational purpose in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive. Scientology has alleged that the size of the award of punitive damages had a chilling effect on its right to freedom of expression. However as stated earlier, in spite of the slow and methodical progress of this case to trial and appeal, and despite the motion brought six years before the trial which drew attention to the need for evidence, Scientology adduced no evidence as to the chilling effect of the award. In its absence, this argument should not be considered. It may be that different factors will have

to be taken into consideration where evidence is adduced and where a member of the media is a party to the action. However, those are considerations for another case on another day.

IV. Disposition

204 The appeal is dismissed with costs.

APPENDIX A

CFTO BROADCAST

The Toronto Church of Scientology has filed charges of contempt of court against two provincial lawyers. The Church believes the lawyers violated a court order by opening sealed documents which were seized last year in a raid on the Church's headquarters. A report from CFTO's Tim Webber:

Webber:

Eighteen months ago, more than one hundred O.P.P. officers stormed out of three buses and into the offices of the Church of Scientology. They seized hundreds of thousands of documents in two days of searching. Police said they were looking for evidence of tax fraud, consumer fraud and other indictable offences. Many of these seized documents were deemed confidential by the Church. Some they said were confessions between priests and penitents and they convinced a judge to order about two hundred of the documents sealed. Today, lawyers for the Church filed charges alleging that the sealing order has been violated.

Manning:

The documents were ordered sealed by Mr. Justice Osler, pursuant to a request by counsel, in a very serious matter, and they were opened and revealed to persons whom we say were unauthorized to so do.

Webber:

The charges are against Jerome Cooper, a lawyer for Consumer and Commercial Relations, and Crown Attorney S. Casey Hill. The documents filed today alleged that the two convinced another Supreme Court Justice to allow the Ministry of Consumer and Commercial Relations to view the sealed documents in the company of O.P.P. officers. One of the lawyers being charged, Jerome Cooper, today told us he had absolutely no comment on the matter. The trial date has already been set for the 17th of January, but lawyers for the Church of Scientology are hoping to convince the defendants and the Court so start even sooner.

APPENDIX B

CBC BROADCAST

The Church of Scientology has filed a suit against two Toronto based Crown Attorneys. The Church had its offices raided by police and documents seized in March of 1983. Lawyers for the Church say those documents were opened and read by persons not authorized to do so.

Manning:

They were confidential documents which have been ordered sealed by Supreme Court of Ontario Justices which were opened with the permission of counsel for the Crown. And this constitutes, in the opinion of the Church, a contempt of court. We've had a date set in January. But hopefully, we can get a date set earlier with the consent of the Chief Justice of the Trial Division, or the Chief Justice of Ontario on the basis that it's a very important matter. It's important to the administration of justice.

APPENDIX C

GLOBE AND MAIL

The Church of Scientology of Toronto is asking the Supreme Court of Ontario to find a Crown prosecutor and a lawyer with the Ontario Ministry of Consumer and Commercial Relations in contempt of court.

Morris Manning, a lawyer acting for the church, said in an interview yesterday that he has filed a motion asking for S. Casey Hill, a prosecutor with the Ontario Ministry of the Attorney-General, and Jerome Cooper, a lawyer with the Consumer Ministry, to be jailed or fined.

The motion claims that Mr. Cooper misled Mr. Justice Jean-Charles Sirois of the Supreme Court of Ontario into releasing to the Consumer Ministry documents seized by the Ontario Provincial Police in a raid on the Church's headquarters.

The motion says Judge Sirois was not told that many of the documents had been ordered sealed by another Ontario Supreme Court judge while the Church contests the legality of the search warrant used by the O.P.P. in the raid last year.

The motion claims Mr. Hill, who represented the Attorney-General during the search warrant hearings "aided and abetted in the misleading of Mr. Justice Sirois".

A hearing on the motion has been set for January 17.

The following are the reasons delivered by

205 L'HEUREUX-DUBÉ J. -- I have had the advantage of reading the reasons of my colleague Justice Cory and, except on one point, generally agree with them as well as with

his disposition of this appeal.

206

First, however, in order to dispel any possible confusion regarding the applicability of the *Canadian Charter of Rights and Freedoms* to the common law, I note that this issue can be easily summarized in the following two principles, both of which were first articulated by McIntyre J. in *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573:

1. The *Charter* does not directly apply to the common law unless it is the basis of some governmental action.
2. Even though the *Charter* does not directly apply to the common law absent government action, the common law must nonetheless be developed in accordance with *Charter* values. (To the same effect, see *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, and *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836, *per* L'Heureux-Dubé J.)

In other words, the basic rule is that, absent government action, the *Charter* only applies indirectly to the common law.

207

In light of the above, I agree with Cory J. that where the common law is "challenged" on *Charter* grounds, a traditional s. 1 analysis will generally not be appropriate. Instead, "*Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary" (para. 97). As well, I agree with Cory J. that "the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the

common law should be modified" (para. 98). Such an approach is, in my view, consistent with the fact that, absent government action, the *Charter* only applies indirectly to the common law.

208 Applying this approach in the case at hand, I agree with Cory J.'s conclusion that the common law of defamation, as it is applied to the parties in this action, is consistent with the values enshrined in the *Charter*. Accordingly, I agree with my colleague that there is no need to amend or alter the common law. In particular, I agree that the "actual malice" rule adopted by the U.S. Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should not be adopted into the Canadian common law of defamation.

209 Second, the one issue on which I part company with my colleague concerns the scope of the defence of qualified privilege. Traditionally, this Court has held that the defence of qualified privilege is available with respect to reports of judicial proceedings, but not with respect to reports of pleadings in purely private litigation upon which no judicial action has yet been taken: *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339. The appellants, however, argue that *Shallow* is no longer good law as it had been overtaken by this Court's more recent decision in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326. My colleague appears to accept this argument. Accordingly, he broadens the scope of the defence of qualified privilege, making it available with respect to reports of pleadings upon which no judicial action has yet been taken. I disagree. In my view, *Shallow* and *Edmonton Journal* are entirely consistent. In this respect, I adopt the following statement from the judgment of the Court of Appeal in the case at hand ((1994), 1994 CanLII 10572 (ON CA), 18 O.R. (3d) 385, at p. 427):

We were urged to extrapolate from *Edmonton Journal* the proposition that the common law of defamation should respect such constitutional forms of expression as the reporting of information pertaining to intended court proceedings by conferring qualified privilege on the occasion of the publication of such reports. With respect, we do not agree. *Edmonton Journal* struck down, in the name of freedom of expression, statutory provisions which sought to inhibit the publication of the details of pending matrimonial and other civil actions. But it by no means follows that the publication of

such details should be accorded the mantle of qualified privilege if they are defamatory.

Edmonton Journal and *Gazette Printing* stand together without conflict: there is a right to publish details of judicial proceedings before they are heard in open court, but such publication does not enjoy the protection of qualified privilege if it is defamatory. As Duff J. noted in the extract from p. 364 of *Gazette Printing* set out above, no such privilege is necessary if the statements published are true, and no such privilege is desirable if they are not true.

210 Subject to the above, I would dispose of this appeal as does my colleague Cory J.

Appeal dismissed with costs.

Solicitors for the appellant Morris Manning: Weir & Foulds, Toronto.

Solicitors for the appellant the Church of Scientology of Toronto: Gowling, Strathy & Henderson, Kitchener.

Solicitors for the respondent: Tory Tory DesLauriers & Binnington, Toronto.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Robert Sharpe and Kent Roach, Toronto.

Solicitors for the interveners the Writers' Union of Canada, PEN Canada, the Canadian Association of Journalists, the Periodical Writers Association of Canada, and the Book and Periodical Council: Davies, Ward & Beck, Toronto.

Solicitors for the interveners the Canadian Daily Newspaper Association, the Canadian Community Newspapers Association, the Canadian Association of Broadcasters, the Radio-Television News Directors Association of Canada, the Canadian Book Publishers' Council and the Canadian Magazine Publishers' Association: Blake, Cassels & Graydon, Toronto.

TAB 41

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 (CanLII), [2008] 2 SCR 114

Source:	Supreme Court of Canada
Date:	2008-05-22
File number:	31902
Other citations:	293 DLR (4th) 29 — 375 NR 81 — 165 ACWS (3d) 954 — 238 OAC 130 — AZ-50492888 — 55 CCLT (3d) 36 — [2008] CarswellOnt 2824 — EYB 2008-133554 — JE 2008-1083 — [2008] SCJ No 27 (QL) — [2008] ACS no 27
Citation:	Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 (CanLII), [2008] 2 SCR 114, < https://canlii.ca/t/1wz6f >, retrieved on 2026-03-23
Most recent unfavourable mention	Xiang v Wong , 2024 BCSC 512 (CanLII) [...] As a matter of law, despite the guidance of Mustapha , there remains limited jurisprudence that would guide a party in evaluating its claim. [...]



SUPREME COURT OF CANADA

CITATION: Mustapha v. Culligan of Canada Ltd., [2008] 2 S.C.R. 114, 2008 SCC 27

DATE: 20080522
DOCKET: 31902

BETWEEN:

Waddah Mustapha (a.k.a. Martin Mustapha)
Appellant / Respondent on cross-appeal
and
Culligan of Canada Ltd.
Respondent / Appellant on cross-appeal

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

REASONS FOR JUDGMENT: McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)
(paras. 1 to 20)

Mustapha v. Culligan of Canada Ltd., [2008] 2 S.C.R. 114, 2008 SCC 27

Waddah Mustapha

(a.k.a. Martin Mustapha)

Appellant/Respondent on cross-appeal

v.

Culligan of Canada Ltd.

Respondent/Appellant on cross-appeal

Indexed as: Mustapha v. Culligan of Canada Ltd.

Neutral citation: 2008 SCC 27.

File No.: 31902.

2008: March 18; 2008: May 22.

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

on appeal from the court of appeal for ontario

Torts — Negligence — Duty of care — Foreseeability — Personal injury — Mental injury — Customer suing his bottled water supplier in negligence after finding remains of flies in unopened bottle — Customer claiming mental injury — Whether damage too remote to allow recovery.

In the course of replacing an empty bottle of drinking water with a full one, M saw a dead fly and part of another dead fly in the unopened replacement bottle. Obsessed with the event and its “revolting implications” for the health of his family, he developed a major depressive disorder, phobia and anxiety. He sued C, the supplier of the bottle of water, for psychiatric injury. The trial judge awarded him general and special damages, as well as damages for loss of business, but the Court of Appeal overturned the judgment on the basis that the injury was not reasonably foreseeable and hence did not give rise to a cause of action.

Held: The appeal and the cross-appeal should be dismissed.

M’s damage is too remote to allow recovery. As the manufacturer of a consumable good, C owed M, the ultimate consumer of that good, a duty of care in supplying bottled water to him, and it breached the standard of care by providing M with contaminated water. The requirement of personal injury, which includes serious and prolonged psychological injury, is also met: M suffered a debilitating psychological injury which had a significant impact on his life. C’s breach caused that injury in fact, but not in law: M failed to show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. Unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable. In this case, the trial judge erred in applying a subjective standard. [3] [6-11] [15] [18]

The claim for damages for breach of contract also fails. M’s damage could not be reasonably supposed to have been within the contemplation of the parties when they entered into

their agreement. [19]

Cases Cited

Referred to: *Donoghue v. Stevenson*, [1932 CanLII 536 \(FOREP\)](#), [1932] A.C. 562; *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, [2001 SCC 79](#); *Page v. Smith*, [1996] 1 A.C. 155; *Hinz v. Berry*, [1970] 2 Q.B. 40; *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), [1999 CanLII 2863 \(ON CA\)](#), 48 O.R. (3d) 228; *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388; *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617; *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509; *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, [1999 BCCA 599](#); *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35; *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, [2006 SCC 30](#).

Authors Cited

Linden, Allen M., and Bruce Feldthusen. *Canadian Tort Law*, 8th ed. Markham, Ont.: LexisNexis Butterworths, 2006.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Cronk and Blair JJ.A. and Then J. (*ad hoc*)) (2006), [2006 CanLII 41807 \(ON CA\)](#), 84 O.R. (3d) 457, 275 D.L.R. (4th) 473, 218 O.A.C. 271, 43 C.C.L.T. (3d) 27, [2006] O.J. No. 4964 (QL), 2006 CarswellOnt 7937, setting aside a judgment of Brockenshire J. (2005), 32 C.C.L.T. (3d) 123, [2005] O.J. No. 1469 (QL), 2005 CarswellOnt 1456, allowing an action in negligence. Appeal and cross-appeal dismissed.

Paul J. Pape, Susan M. Chapman and John J. Adair, for the appellant/respondent on cross-appeal.

Hillel David and Lisa La Horey, for the respondent/appellant on cross-appeal.

The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — The plaintiff, Mr. Mustapha, sues for psychiatric injury sustained as a result of seeing the dead flies in a bottle of water supplied by the defendant, Culligan. In the course of replacing an empty bottle of drinking water with a full one, Mr. Mustapha saw a dead fly and part of another dead fly in the unopened replacement bottle. He became obsessed with the event and its “revolting implications” for the health of his family, which had been consuming water supplied by Culligan for the previous 15 years. The plaintiff developed a major depressive disorder with associated phobia and anxiety. He sued Culligan for damages.

[2] The trial judge found that seeing the flies in the water resulted in psychiatric injuries to Mr. Mustapha, and awarded him \$80,000 in general damages, \$24,174.58 in special damages, and \$237,600 in damages for loss of business ((2005), 32 C.C.L.T. (3d) 123). The Ontario Court of Appeal overturned the judgment on the basis that the injury was not reasonably foreseeable and hence did not give rise to a cause of action ((2006), [2006 CanLII 41807 \(ON CA\)](#), 84 O.R. (3d) 457). The issue before this Court is whether the cause of action has been established. For different reasons than the Court of Appeal, I conclude that it has not.

[3] A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant’s behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant’s breach. I shall examine each of these elements of negligence in turn. As I will explain, Mr. Mustapha’s claim fails because he has failed to establish that his damage was caused in law by the defendant’s negligence. In other words, his damage is too remote to allow recovery.

1. Did the Defendant Owe the Plaintiff a Duty of Care?

[4] The first question to consider in an action for negligence is whether the defendant owed the plaintiff a duty of care. The question focuses on the relationship between the parties. It asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.). Whether such a relationship exists depends on foreseeability, moderated by policy concerns: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).

[5] In many cases, the relationship between the plaintiff and the defendant is of a type which has already been judicially recognized as giving rise to a duty of care. In such cases, precedent determines the question of duty of care and it is unnecessary to undertake a full-fledged duty of care analysis. As stated by A. M. Linden and B. Feldthusen, categories of relationships that have been recognized and relationships analogous to such pre-established categories need not be tested by the *Anns* formula: *Canadian Tort Law* (8th ed. 2006), at p. 302; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 35-36.

[6] The relationship between the parties in this case does not belong to a novel category. It has long been established that the manufacturer of a consumable good owes a duty of care to the ultimate consumer of that good: *Donoghue v. Stevenson*. It follows that Culligan owed Mr. Mustapha a duty of care in the supplying of bottled water to him.

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2. Did the Defendant's Behaviour Breach the Standard of Care?

[7] The second question in a negligence action is whether the defendant's behaviour breached the standard of care. A defendant's conduct is negligent if it creates an unreasonable risk of harm (Linden and Feldthusen, at p. 130). The trial judge found that the defendant Culligan breached the standard of care by providing the plaintiff with contaminated water, and the parties did not appeal that finding before this Court. This is hardly surprising; it is clear that a supplier of bottled water intended for personal consumption is under a duty to take reasonable care to ensure that the water is not contaminated by foreign elements. The second element of liability in tort for negligence is therefore met.

3. Did the Plaintiff Sustain Damage?

[8] Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort. As Lord Lloyd said in *Page v. Smith*, [1996] 1 A.C. 155 (H.L.), at p. 188:

In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests in law. [Emphasis added.]

[9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary

annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), [1999 CanLII 2863 \(ON CA\)](#), 48 O.R. (3d) 228 (C.A.): “Life goes on” (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

[10] On the findings of the trial judge, supported by medical evidence, Mr. Mustapha developed a major depressive disorder with associated phobia and anxiety. This psychiatric illness was debilitating and had a significant impact on his life; it qualifies as a personal injury at law. It follows that Mr. Mustapha has established that he sustained damage.

4. Was the Plaintiff’s Damage Caused by the Defendant’s Breach?

[11] The fourth and final question to address in a negligence claim is whether the defendant’s breach caused the plaintiff’s harm in fact and in law. The evidence before the trial judge establishes that the defendant’s breach of its duty of care in fact caused Mr. Mustapha’s psychiatric injury. We are not asked to revisit this conclusion. The remaining question is whether that breach also caused the plaintiff’s damage in law or whether it is too remote to warrant recovery.

[12] The remoteness inquiry asks whether “the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable” (Linden and Feldthusen, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that “it is the foresight of the reasonable man which alone can determine responsibility” (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (P.C.), at p. 424).

[13] Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is “possible”; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* as a “real risk”, i.e. “one which would occur to the mind of a reasonable man in the position of the defendant[t] . . . and which he would not brush aside as far-fetched” (*Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] A.C. 617 (P.C.), at p. 643).

[14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of “ordinary fortitude” or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police*, [1998] 3 W.L.R. 1509 (H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, [1999 BCCA 599](#); *Vanek*. As stated in *White*, at p. 1512: “The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals.”

[15] As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in *Vanek*, at paras. [59-61](#), is inherent in the

notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, *per* Gleeson C.J., this “is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm” (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

[16] To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability “is not to be confused with the ‘eggshell skull’ situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected”. Rather, it is a threshold test for establishing compensability of damage at law.

[17] I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff’s particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff’s injury may have been reasonably foreseeable to the defendant. In this case, however, there was no evidence to support a finding that Culligan knew of Mr. Mustapha’s particular sensibilities.

[18] It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by Culligan's negligence, Mr. Mustapha must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. This he failed to do. The only evidence was about his own reactions, which were described by the medical experts as "highly unusual" and "very individual" (C.A. judgment, at para. 52). There is no evidence that a person of ordinary fortitude would have suffered injury from seeing the flies in the bottle; indeed the expert witnesses were not asked this question. Instead of asking whether it was foreseeable that the defendant's conduct would have injured a person of ordinary fortitude, the trial judge applied a subjective standard, taking into account Mr. Mustapha's "previous history" and "particular circumstances" (para. 227), including a number of "cultural factors" such as his unusual concern over cleanliness, and the health and well-being of his family. This was an error. Mr. Mustapha having failed to establish that it was reasonably foreseeable that a person of ordinary fortitude would have suffered personal injury, it follows that his claim must fail.

5. The Claim in Contract

[19] The plaintiff also brought a claim for damages arising out of breach of contract, although he appears not to have pursued it with vigour. This claim fails. With regards to Mr. Mustapha's psychiatric injury, there is no inconsistency in principle or in outcome between negligence law and contract law. Damages arising out of breach of contract are governed by the expectation of the parties at the time the contract was made (*Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, at p. 151, applied with respect to mental distress in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, [2006 SCC 30](#)), as distinguished from the time of the tort, in the case of tort. I have concluded that personal injury to Mr. Mustapha was not reasonably foreseeable by the defendant at the time of the alleged tort. The same evidence suggests that Mr. Mustapha's damage could not be reasonably supposed to have been within the contemplation of the parties when they entered into their agreement.

6. Conclusion

[20] For the reasons discussed, I conclude that the loss suffered by the plaintiff, Mr. Mustapha, was too remote to be reasonably foreseen and that consequently, he cannot recover damages from the defendant. I would dismiss the appeal with costs. In light of these findings, I find it unnecessary to deal with the cross-appeal, and dismiss it without costs.

Appeal dismissed with costs. Cross-appeal dismissed.

Solicitors for the appellant/respondent on cross-appeal: Pape Barristers, Toronto.

*Solicitors for the respondent/appellant on cross-appeal: McCague Peacock Borlack
McInnis & Lloyd, Toronto.*

TAB 42

TAB 43

Cinar Corporation v. Robinson, 2013 SCC 73 (CanLII), [2013] 3 SCR 1168

Source:	Supreme Court of Canada
Date:	2013-12-23
File number:	34469; 34468; 34467; 34466
Other citations:	366 DLR (4th) 193 — 452 NR 123 — 235 ACWS (3d) 495 — AZ-51029656 — [2014] EXP 62 — 118 CPR (4th) 1 — 8 CCLT (4th) 1 — EYB 2013-230908 — JE 2014-32 — [2013] SCJ No 73 (QL) — [2013] ACS no 73
Citation:	Cinar Corporation v. Robinson, 2013 SCC 73 (CanLII), [2013] 3 SCR 1168, < https://canlii.ca/t/g2fgx >, retrieved on 2026-03-23
Most recent unfavourable mention	Canadian Copyright Licensing Agency (Access Copyright) v. Canada , 2018 FCA 58 (CanLII) [...] [124] I consider that Robinson is distinguishable . [...]



SUPREME COURT OF CANADA

CITATION: Cinar Corporation v. Robinson, 2013 SCC 73, [2013] 3 S. C.R. 1168 **DATE:** 20131223
DOCKET: 34466, 34467, 34468, 34469

BETWEEN:

Cinar Corporation and Les Films Cinar inc.
Appellants
and
Claude Robinson and Les Productions Nilem inc.
Respondents

- and -

**France Animation S.A., Christophe Izard, Ravensburger Film + TV GmbH,
RTV Family Entertainment AG, Christian Davin, Ronald A. Weinberg, Ronald A. Weinberg,
in his capacity as sole liquidator of the succession of the late Micheline Charest, BBC
Worldwide Television, Theresa Plummer-Andrews, Hélène Charest, McRaw Holdings Inc.,
Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB, 3918203 Canada
Inc. and Music Canada
Intervenors**

AND BETWEEN:

**Ronald A. Weinberg and Ronald A. Weinberg, in his capacity as
sole liquidator of the succession of the late Micheline Charest**

**Appellants
and**

Claude Robinson and Les Productions Nilem inc.

Respondents

- and -

**Christophe Izard, France Animation S.A., Ravensburger Film + TV GmbH,
RTV Family Entertainment AG, Cinar Corporation, Les Films Cinar inc., Christian Davin,
BBC Worldwide Television, Theresa Plummer-Andrews, Hélène Charest, McRaw Holdings
Inc., Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB, 3918203
Canada Inc. and Music Canada**

Intervenors

AND BETWEEN:

**Christophe Izard, France Animation S.A.,
Ravensburger Film + TV GmbH and RTV Family Entertainment AG**

**Appellants
and**

Claude Robinson and Les Productions Nilem inc.

Respondents

- and -

**Les Films Cinar inc., Cinar Corporation,
Ronald A. Weinberg, Ronald A. Weinberg, in his capacity as sole liquidator of the succession
of the late Micheline Charest and Music Canada**

Intervenors

AND BETWEEN:

Claude Robinson and Les Productions Nilem inc.

**Appellants
and**

**France Animation S.A., Ravensburger Film + TV GmbH, Videal Gesellschaft Zur Hertellung
Von Audiovisuellen Produkten MHB, RTV Family Entertainment AG, Christian Davin,
Christophe Izard, Les Films Cinar inc., Cinar Corporation, 3918203 Canada Inc., Ronald A.
Weinberg and Ronald A. Weinberg, in his capacity as sole liquidator of the succession of the
late Micheline Charest**

Respondents

- and -

Music Canada

Intervener

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

REASONS FOR JUDGMENT:
(paras. 1 to 152)

McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ. concurring)

Claude Robinson and Les Productions Nilem inc., 2013 SCC 73, [2013] 3 S.C.R. 1168

Cinar Corporation and Les Films Cinar inc.

Appellants

v.

Claude Robinson and Les Productions Nilem inc.

Respondents

and

**France Animation S.A., Christophe Izard,
Ravensburger Film + TV GmbH,
RTV Family Entertainment AG,
Christian Davin, Ronald A. Weinberg,
Ronald A. Weinberg, in his capacity as sole liquidator
of the succession of the late Micheline Charest,
BBC Worldwide Television, Theresa Plummer-Andrews,
Hélène Charest, McRaw Holdings Inc.,
Videal Gesellschaft Zur Herstellung Von Audiovisuellen
Produkten MHB, 3918203 Canada Inc. and Music Canada**

Interveners

- and -

**Ronald A. Weinberg and Ronald A. Weinberg,
in his capacity as sole liquidator of the succession
of the late Micheline Charest**

Appellants

v.

Claude Robinson and Les Productions Nilem inc.

Respondents

and

**Christophe Izard, France Animation S.A.,
Ravensburger Film + TV GmbH,
RTV Family Entertainment AG,
Cinar Corporation, Les Films Cinar inc.,
Christian Davin, BBC Worldwide Television,
Theresa Plummer-Andrews,
Hélène Charest, McRaw Holdings Inc.,
Videal Gesellschaft Zur Hertellung Von Audiovisuellen
Produkten MHB, 3918203 Canada Inc. and Music Canada**

Interveniers

- and -

**Christophe Izard, France Animation S.A.,
Ravensburger Film + TV GmbH and
RTV Family Entertainment AG**

Appellants

v.

Claude Robinson and Les Productions Nilem inc.

Respondents

and

**Les Films Cinar inc., Cinar Corporation, Ronald A. Weinberg,
Ronald A. Weinberg, in his capacity as sole liquidator
of the succession of the late Micheline Charest and
Music Canada**

Interveniers

- and -

Claude Robinson and Les Productions Nilem inc.

Appellants

v.

France Animation S.A., Ravensburger Film + TV GmbH,

**Videal Gesellschaft Zur Herstellung Von Audiovisuellen Produkten MHB,
RTV Family Entertainment AG, Christian Davin, Christophe Izard,
Les Films Cinar inc., Cinar Corporation, 3918203 Canada Inc.,
Ronald A. Weinberg and Ronald A. Weinberg,
in his capacity as sole liquidator of the succession
of the late Micheline Charest**

Respondents

and

Music Canada

Intervener

Indexed as: Cinar Corporation v. Robinson

2013 SCC 73

File Nos.: 34466, 34467, 34468, 34469.

2013: February 13; 2013: December 23.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Intellectual property — Copyright — Infringement — Reproduction of a substantial part of an original work — Whether trial judge failed to follow correct approach in assessing whether a “substantial part” of a work was reproduced — Whether trial judge failed to give sufficient weight to differences between works at issue — Whether trial judge erred in finding that features of original work are protected by the [Copyright Act](#) — Whether trial judge erred by relying on inadmissible expert evidence.

Intellectual property — Copyright — Infringement — Damages — Quantum — Disgorgement of profits — Whether Court of Appeal erred in interfering with trial judge’s

assessment of profits — Whether liability for disgorgement of profits may be imposed on a solidary basis — Whether Andrews trilogy cap applies to non-pecuniary damages that do not stem from bodily injury — Whether Court of Appeal erred in interfering with trial judge’s assessment of punitive damages — Whether punitive damages may be awarded on a solidary basis — Copyright Act, R.S.C. 1985, c. C-42, s. 35 — Civil Code of Québec, S.Q. 1991, c. 64, art. 1621 — Charter of human rights and freedoms, R.S.Q., c. C-12, s. 49.

R spent years developing an educational children’s television show, “The Adventures of Robinson Curiosity” (“*Curiosity*”). R drew his inspiration from Daniel Defoe’s novel *Robinson Crusoe*, as well as from his own life experiences. He developed characters, drew detailed sketches and storyboards, wrote scripts and synopses, and designed promotional materials for his *Curiosity* project.

From 1985 to 1987, R and his company, Les Productions Nilem inc. (“Nilem”), undertook various initiatives to get the *Curiosity* project developed. In so doing, R gave a copy of his *Curiosity* work to W and C, who were directors and officers of Cinar Corporation (“Cinar”). During this same period, a presentation on *Curiosity* was given to I, a French creator of children’s television shows. Despite the various efforts undertaken by R and his partners, the project failed to attract investors and stalled.

R shelved his project, but did not forget about it. On September 8, 1995, R watched on television the first episode of a new children’s television show, “Robinson Sucroë” (“*Sucroë*”). He was stunned to see that *Sucroë*, as he perceived it, was a blatant copy of *Curiosity*. R subsequently discovered that several parties who had been given access to his *Curiosity* project, namely Cinar, W, C and I, were also involved in the production of *Sucroë*.

R and Nilem commenced an action for copyright infringement against Cinar, W, C, and I, and various co-producers and distributors of *Sucroë*.

The trial judge concluded that R's *Curiosity* was an original work protected by copyright, that the creators of *Sucroë* had copied *Curiosity*, and that the features reproduced in *Sucroë* represented a substantial part of *Curiosity*. He found that Cinar, W, C, I, France Animation S.A., Ravensburger Film + TV GmbH and RTV Family Entertainment AG (collectively the "Cinar appellants") were liable for infringement of copyright. He also held D, the chief executive officer of France Animation at the relevant time, personally liable for the infringement. Finally, the trial judge found that Cinar, W, and C were extra-contractually liable towards R and Nilem for having violated their obligations of good faith and of loyalty.

The trial judge awarded damages on a solidary basis (the equivalent of "joint and several" liability in the common law) and costs in the amount of \$5,224,293: \$607,489 in compensatory damages for R's pecuniary losses stemming from the infringement; \$1,716,804 to disgorge the profits earned as a result of the infringement; \$400,000 for the psychological harm suffered by R; \$1,000,000 in punitive damages; and \$1,500,000 for costs on a solicitor-client basis.

The Court of Appeal upheld the trial judge's findings on infringement. It confirmed the trial judge's findings of personal liability for copyright infringement, except for D, against whom the evidence was insufficient in its view.

The Court of Appeal also upheld the trial judge's award of compensatory damages for R's pecuniary losses, subject to a minor mathematical correction. It rejected the trial judge's order for disgorgement of profits against W, C and I because those profits were retained by corporations. It also ordered disgorgement on a joint basis (the equivalent of "several" liability in the common law) rather than solidarily. In addition, the Court of Appeal excluded amounts incorrectly included by the trial judge in the calculation of profits, reducing the amount to be disgorged.

The Court of Appeal held that the cap established in the *Andrews* trilogy was applicable to the award for psychological suffering and reduced the award to \$121,350, which represents 50 percent of the cap's value at the date of the summons.

In addition, the Court of Appeal reduced the award for punitive damages from \$1,000,000 to \$250,000, on the ground that punitive damages in Quebec must be moderate, and held that they could not be awarded on a solidary basis. It held Cinar liable for \$100,000 in punitive damages, and each of W, C and I liable for \$50,000. It also affirmed the trial judge's award of \$1,500,000 for costs on a solicitor-client basis, but declined to award additional costs on a solicitor-client basis for the appeal.

Four appeals have been brought from the Court of Appeal's judgment (in files 34466, 34467, 34468, and 34469). The Cinar appellants appeal the finding of liability for infringement (in files 34466, 34467 and 34468). R and Nilem appeal the reduction in damages and disgorgement of profits ordered by the Court of Appeal (in file 34469).

Held: The appeals in files 34466, 34467 and 34468 should be dismissed, and the appeal in file 34469 should be allowed in part.

The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other, forms the background against which the arguments of the parties must be considered.

In the present case, the trial judge found that the Cinar appellants copied a number of features from R's *Curiosity* and that, considered as a whole, the copied features constituted a substantial part of R's work. The Cinar appellants argue that instead of applying a holistic approach, the trial judge should have applied a three-step approach requiring him to (1) determine what elements of *Curiosity* were original, within the meaning of the [Copyright Act](#); (2) exclude non-protectable features of R's work (such as ideas, elements drawn from the public domain, and generic elements commonplace in children's television shows); and (3) compare what remains of *Curiosity* after this "weeding-out" process to *Sucroë*, and determine whether a substantial part of *Curiosity* was reproduced.

As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal. The approach proposed by the Cinar appellants would risk dissecting R's work into its component parts. The "abstraction" of R's work to the essence of what makes it original and the exclusion of non-protectable elements *at the outset of the analysis* would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of R's work is *individually* original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of R's skill and judgment expressed in his work as a whole. The trial judge accordingly did not err by failing to follow the three-step approach advocated by the Cinar appellants.

Likewise, the trial judge did not err by engaging in a qualitative and holistic assessment of the similarities between the works, which took into account the relevant similarities and differences between the works. The question of whether there has been substantial copying focuses on whether the copied features constitute a substantial part *of the plaintiff's work* — not whether they amount to a substantial part *of the defendant's work*. The alteration of copied features or their integration into a work that is notably different from the plaintiff's work does not necessarily preclude a claim that a substantial part of a work has been copied.

In essence, the aspects of the trial judge's reasons that the Cinar appellants take issue with are findings of mixed fact and law. They invite this Court to embark on a fresh assessment of the features copied from *Curiosity*. However, they have failed to demonstrate palpable or overriding errors in the trial judge's findings on substantiality.

The Cinar appellants further argue that the trial judge based the bulk of his findings on the issue of substantial copying on inadmissible expert evidence. For expert evidence to be admitted at trial, it must (a) be relevant; (b) be necessary to assist the trier of fact; (c) not offend any exclusionary rule; and (d) involve a properly qualified expert. These criteria apply to trials for copyright infringement, as they do in other intellectual property cases.

The Cinar appellants argue that the second criterion — necessity of the evidence — is not met in the case at hand. The expert evidence was not necessary to assist the court, they say, because the question of whether a substantial part has been copied must be assessed from the perspective of the lay person in the intended audience for the works at issue.

The perspective of the lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works. However, the question always remains whether a substantial part of the plaintiff's work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of someone reasonably versed in the relevant art or technology. In the present case, the necessity criterion of the test for the admissibility of expert evidence is satisfied.

With respect to damages, R and Nilem seek *inter alia* to have the trial judge's entire award of profits reinstated. Regarding profits from the *Sucroë* soundtrack, they argue that there is a causal link between the infringement and the profits derived from the soundtrack and that the trial judge therefore correctly included them as part of his award of profits. The apportionment of profits between infringing and non-infringing components of a work is essentially a factual determination which is subject to judicial discretion. An appellate court may only disturb the trial judge's findings on apportionment if there are errors of law or palpable and overriding errors of fact. The trial judge did not make a reviewable error in concluding that it was inappropriate to apportion profits to the soundtrack as a non-infringing component of the work. The Court of Appeal accordingly erred by interfering with the trial judge's conclusion in this regard.

As for the trial judge's characterization of the payment from Ravensburger Film + TV GmbH to France Animation S.A. as revenue, there is agreement with the Court of Appeal that this characterization constitutes a palpable and overriding error and that this amount should be removed

from the revenues taken into account when calculating the profits generated by *Sucroë*. However, in connection with the characterization of the payment due by Cinar to a partnership called Jaffa Road as revenue, the trial judge did not err in this regard and this amount should not be deducted as an expense when calculating the profits from *Sucroë*.

On the issue of liability for disgorgement of profits under the *Copyright Act*, the Court of Appeal was correct in concluding that the trial judge erred in ordering disgorgement against all infringers on a solidary basis. [Section 35](#) of the *Copyright Act* provides a dual remedy for copyright infringement: damages for the plaintiff's losses and disgorgement of the profits retained by the defendant. The latter is not intended to compensate the plaintiff and is not subject to the principles that govern general damages awarded under Quebec's law of extra-contractual liability, whose aim is compensatory. Disgorgement under s. 35 of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co-defendants by imposing liability for disgorgement on a solidary basis. For the same reasons, W, C, and I are not personally liable to disgorge profits. In addition, the Court of Appeal's apportionment with respect to the disgorgement of profits should be maintained.

In connection with non-pecuniary damages, and in particular whether the *Andrews* trilogy cap should be applied in the present case, the scope of application of the cap beyond non-pecuniary damages stemming from bodily injury should not be extended. Furthermore, R's non-pecuniary damages cannot be characterized as stemming from bodily injury, within the meaning of [art. 1607](#) of the *Civil Code of Québec*. It is more appropriate to characterize R's psychological suffering as a non-pecuniary damage stemming from *material* injury. Indeed, the infringement of copyright was a breach of R's property rights. It is the initial breach, rather than the consequences flowing from that breach, which serves to characterize the type of injury suffered. The Court of Appeal accordingly erred in applying the *Andrews* trilogy cap in the present case.

In terms of assessing quantum for this injury, there is agreement with the trial judge that R's non-pecuniary damages are analogous to those claimed by a victim of defamation. The trial judge had the advantage of observing R in court over a long period of time and was well placed to conduct a personalized evaluation of his non-pecuniary damages. He made no palpable and overriding error in his assessment of R's non-pecuniary damages.

As regards punitive damages, they cannot be awarded on a solidary basis. This Court has recognized that the punitive damages regime under the *Charter* is autonomous from the extra-contractual civil liability regime established under the *Civil Code of Québec*. Article 1526 of the *Civil Code of Québec* applies to extra-contractual fault causing injury and cannot ground the solidarity of punitive damages awarded under the *Charter*. Furthermore, awarding punitive damages on a solidary basis would be inconsistent with the principles set forth in art. 1621 of the *Civil Code of Québec*, which expressly requires that the objectives of punitive damages — prevention, deterrence (both specific and general), and denunciation of acts that are particularly reprehensible in the opinion of the justice system — be taken into account when awarding them. Both the objectives of punitive damages and the factors relevant to assessing them suggest that awards of punitive damages must be individually tailored to each defendant against whom they are ordered. This requirement of individualization militates against awarding punitive damages on a solidary basis.

In addition, the Court of Appeal was correct to re-assess the quantum of punitive damages, although it did not give sufficient weight to the gravity of the conduct in this case. Indeed, Cinar, W, C, and I consistently and contemptuously denied having access to R's work, and disparaged R's claims that they had copied his work. The impact of this conduct on R was equally serious. It deprived him not only of a source of revenue, but also of his sense of proprietorship over a project that had deep personal significance for him. This said, punitive damages must be awarded with restraint. Article 1621 of the *Civil Code of Québec* expressly provides that the award of punitive damages “may not exceed what is sufficient to fulfil their preventive purpose”. An amount of \$500,000 reaches an appropriate balance between the overarching principle of restraint that governs these damages, on the one hand, and the need to deter conduct of this gravity, on the

other. The Court of Appeal held Cinar liable for two-fifths of the amount of punitive damages, and each of W, C, and I liable for one-fifth, and this represents a reasonable apportionment in the circumstances.

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APPEALS from a judgment of the Quebec Court of Appeal (Thibault, Morin and Doyon JJ.A.), [2011 QCCA 1361](#), [2011] R.J.Q. 1415, 108 C.P.R. (4th) 165, [2011] Q.J. No. 9469 (QL), 2011 CarswellQue 15414, SOQUIJ AZ-50771854, setting aside in part a decision of Auclair J., [2009 QCCS 3793](#), [2009] R.J.Q. 2261, 83 C.P.R. (4th) 1, [2009] R.R.A. 1135, [2009] J.Q. n° 8395 (QL), 2009 CarswellQue 8380, SOQUIJ AZ-50572488. Appeals in files 34466, 34467 and 34468 dismissed. Appeal in file 34469 allowed in part.

William Brock and Cara Cameron, for the appellants (34466)/respondents (34469) Cinar Corporation and Les Films Cinar inc. and for the respondent (34469) 3918203 Canada Inc.

Guy Régimbald, Normand Tamaro, Gilles M. Daigle and Marie-Catherine Deschênes, for the respondents (34466, 34467, 34468)/appellants (34469) Claude Robinson and Les Productions Nilem inc.

Pierre Y. Lefebvre and Alain Y. Dussault, for the appellants (34468)/respondents (34469) Christophe Izard, France Animation S.A., Ravensburger Film + TV GmbH and RTV

Family Entertainment AG and for the respondent (34469) Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB.

Guy J. Pratte, Daniel Urbas and Marc-André Grou, for the respondent (34469) Christian Davin.

Raynold Langlois, Q.C., Dimitri Maniatis, Jean-Patrick Dallaire and Fabrice Vil, for the appellants (34467)/respondents (34469) Ronald A. Weinberg and Ronald A. Weinberg, in his capacity as sole liquidator of the succession of the late Micheline Charest.

Barry B. Sookman and Daniel G. C. Glover, for the intervener Music Canada.

The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — Canadian law protects the exclusive right of copyright owners to reproduce or to authorize the reproduction of their works. The unauthorized reproduction of a substantial part of an original work constitutes copyright infringement, for which a copyright owner can seek various remedies. The present appeals require this Court to determine whether a substantial part of a work has been reproduced, to examine the role of expert evidence in infringement cases, and to assess whether the trial judge committed reviewable errors in his award of damages.

[2] I conclude that copyright was infringed and would order compensatory damages, disgorgement of profits, and punitive damages.

I. Background

[3] Claude Robinson was a dreamer. He spent years meticulously crafting an imaginary universe for an educational children’s television show, “The Adventures of Robinson Curiosity” (“*Curiosity*”). Robinson drew his inspiration from Daniel Defoe’s novel *Robinson Crusoe*, as well

as from his own life experiences. He developed a character — Robinson Curiosity — who lives on a tropical island and must learn to interact with its other inhabitants. From 1982 onwards, he drew detailed sketches and storyboards, wrote scripts and synopses, and designed promotional materials. In October 1985, the Copyright Office issued a registration certificate identifying Robinson as the author of *Curiosity* and Les Productions Nilem inc. (“Nilem”) — a corporation of which Robinson is the sole director and shareholder — as the owner of the rights to the literary work.

[4] From 1985 to 1987, Robinson and Nilem undertook various initiatives to get the *Curiosity* project developed. Of particular relevance to this appeal, in 1986 Cinar Corporation (“Cinar”) was retained by one of Robinson’s production partners, Pathonic International Inc. (“Pathonic”), as a consultant to promote the project in the United States and to offer general production advice. Ronald Weinberg and his late wife Micheline Charest, who were directors and officers of Cinar, became involved in the project. Robinson gave Weinberg and Charest a copy of his *Curiosity* work. Ultimately, nothing came of Cinar’s efforts to find financial partners for the project in the United States.

[5] In 1987, Robinson partnered with Les Productions SDA ltée (“SDA”) to produce the television show. Nilem and SDA set up two corporations, Curious Island Productions Inc. and Curious Island Enterprises Inc., which they intended to use as vehicles for the production.

[6] During that same year, Robinson and SDA participated in a television industry convention held at Cannes, in France. At this convention, they allegedly gave a presentation on *Curiosity* to Christophe Izard, a French creator of children’s television shows.

[7] Despite the various efforts undertaken by Robinson and his partners, the project failed to attract investors and stalled. Curious Island Productions and Curious Island Enterprises were dissolved on December 12, 1990.

[8] Robinson shelved his project, but did not forget about it. In 1995, he explored the possibility of converting his *Curiosity* project into interactive educational software for children.

However, these fresh efforts were cut short when, on September 8, 1995, Robinson watched on television the first episode of a new children's television show, "Robinson Sucroë" ("*Sucroë*"). He was stunned to see that *Sucroë*, as he perceived it, was a blatant copy of *Curiosity*.

[9] In Robinson's view, the characters and environment depicted in *Sucroë* closely tracked his work. Like *Curiosity*, *Sucroë* features a bearded, Robinson Crusoe-inspired protagonist who wears glasses and a straw hat. In both works, the protagonist lives on an island and interacts with other characters. There are however notable differences between the works. Many of the "side-kicks" in *Curiosity* are animals, whereas in *Sucroë* they are predominantly humans. Also, *Sucroë*, unlike *Curiosity*, features a band of marauding pirates as "villains".

[10] Robinson discovered that several parties who had been given access to his *Curiosity* project, namely Cinar, Weinberg, Charest, and Izard, were also involved in the production of *Sucroë*. He concluded that *Sucroë* was not an independent creation, but rather had been developed by copying *Curiosity*. He and Nilem commenced an action for copyright infringement against Cinar, Weinberg, Charest, Izard, and various co-producers and distributors of *Sucroë*. They also claimed damages under the rules of extra-contractual liability, contending that Cinar, Weinberg, and Charest had breached their obligations of good faith and loyalty under the contract for services that they concluded with Pathonic, and that in doing so they knowingly caused damages to Robinson and Nilem.

[11] The trial lasted 83 days and resulted in the production of a voluminous evidentiary record. After considering the testimony of over 40 witnesses and 4 experts, as well as extensive documentary and audio-visual evidence, the trial judge concluded that Robinson's *Curiosity* was an original work protected by copyright, that the creators of *Sucroë* had copied *Curiosity*, and that the features reproduced in *Sucroë* represented a substantial part of *Curiosity*. He found that Cinar, Weinberg, Charest, Izard, France Animation S.A., Ravensburger Film + TV GmbH and RTV Family Entertainment AG (collectively referred to as the "Cinar appellants" in these reasons) were liable for infringement of copyright. He also held Christian Davin, the chief executive officer of France Animation at the relevant time, personally liable for the infringement. Finally, the trial judge

found that Cinar, Weinberg, and Charest were extra-contractually liable towards Robinson and Nilem for having violated their obligations of good faith and of loyalty: [2009 QCCS 3793](#), [2009] R.J.Q. 2261.

[12] The trial judge awarded damages on a solidary basis (the equivalent of “joint and several” liability in the common law) and costs in the amount of \$5,224,293: \$607,489 in compensatory damages for Robinson’s pecuniary losses stemming from the infringement; \$1,716,804 to disgorge the profits earned as a result of the infringement; \$400,000 for the psychological harm suffered by Robinson; \$1,000,000 in punitive damages; and \$1,500,000 for costs on a solicitor-client basis.

[13] The Court of Appeal upheld the trial judge’s findings on infringement. It confirmed the trial judge’s findings of personal liability for copyright infringement, except for Davin, against whom the evidence was insufficient in its view: [2011 QCCA 1361](#), 108 C.P.R. (4th) 165.

[14] The Court of Appeal upheld the trial judge’s award of compensatory damages for Robinson’s pecuniary losses, subject to a minor mathematical correction. It rejected the trial judge’s order for disgorgement of profits against Weinberg, Charest, and Izard because those profits were retained by corporations. It also ordered disgorgement on a joint basis (the equivalent of “several” liability in the common law) rather than solidarily. In addition, the Court of Appeal excluded amounts incorrectly included by the trial judge in the calculation of profits, reducing the amount to be disgorged.

[15] The Court of Appeal held that the cap established in the *Andrews* trilogy (*Andrews v. Grand & Toy Alberta Ltd.*, [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229, *Thornton v. School District No. 57 (Prince George)*, [1978 CanLII 12 \(SCC\)](#), [1978] 2 S.C.R. 267, and *Arnold v. Teno*, [1978 CanLII 2 \(SCC\)](#), [1978] 2 S.C.R. 287) was applicable to the award for psychological suffering and reduced the award to \$121,350, which represents 50 percent of the cap’s value at the date of the summons.

[16] The Court of Appeal reduced the award for punitive damages from \$1,000,000 to \$250,000, on the ground that punitive damages in Quebec must be moderate, and held that they could not be awarded on a solidary basis. It held Cinar liable for \$100,000 in punitive damages, and each of Weinberg, Charest, and Izard liable for \$50,000.

[17] The Court of Appeal held that interest and the additional indemnity (arts. 1618 and 1619 of the *Civil Code of Québec*, S.Q. 1991, c. 64 (“CCQ”)) on the award of compensatory damages should be computed as of July 16, 1996, and as of July 1, 2001, for the award of profits. It also affirmed the trial judge’s award of \$1,500,000 for costs on a solicitor-client basis, but declined to award additional costs on a solicitor-client basis for the appeal.

[18] Four appeals have been brought from the Court of Appeal’s judgment (in files 34466, 34467, 34468, and 34469). The Cinar appellants appeal the finding of liability for infringement. Robinson and Nilem appeal the reduction in damages and disgorgement of profits ordered by the Court of Appeal.

II. Issues

[19] The appeals raise a number of issues, which I will address as follows:

- A. The Standing of Robinson and Nilem
- B. The Infringement of Copyright
- C. The Personal Liability of Weinberg, Charest, and Davin for Infringement
- D. The Extra-contractual Liability of Cinar, Weinberg, and Charest
- E. Disgorgement of Profits
- F. Non-pecuniary Damages
- G. Punitive Damages

III. Analysis

A. *The Standing of Robinson and Nilem*

[20] The appellant Weinberg argues that neither Robinson nor Nilem has standing to bring an action for copyright infringement because Robinson assigned all of his rights in *Curiosity* to Nilem, and Nilem thereafter assigned those rights to Curious Island Enterprises. He argues that, as a result of these assignments, neither Robinson nor Nilem retains any rights in *Curiosity*.

[21] Weinberg bears the burden of proving the loss of copyright: s. 34.1 of the *Copyright Act*, R.S.C. 1985, c. C-42 (“*Copyright Act*” or “*Act*”) (s. 34 at the time this action was commenced); *Massie & Renwick Ltd. v. Underwriters’ Survey Bureau Ltd.*, 1940 CanLII 1 (SCC), [1940] S.C.R. 218, at pp. 233-34. In my view, he has failed to discharge this burden. On the record before this Court, I would not interfere with the conclusion of the courts below that Robinson and Nilem were co-owners of the rights to *Curiosity*. And I agree with the courts below that any rights transferred by Nilem to Curious Island Enterprises reverted to Nilem. The 1987 shareholders’ agreement by which Nilem transferred its rights to Curious Island Enterprises contained a resolutory clause pursuant to which the rights would revert back to Nilem if Curious Island Enterprises was dissolved, and Curious Island Enterprises was indeed dissolved on December 12, 1990.

[22] Consequently, Robinson and Nilem have standing to bring their action.

B. *The Infringement of Copyright*

(1) The Scope of the Protection Afforded by the *Copyright Act*

[23] The *Copyright Act* strikes “a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator”: *Théberge v. Galerie d’Art du Petit Champlain inc.*, 2002 SCC 34, [2002] 2 S.C.R.

336, at para. 30; see also *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326, at paras. 8-11; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231, at paras. 7-8; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 40. It seeks to ensure that an author will reap the benefits of his efforts, in order to incentivize the creation of new works. However, it does not give the author a monopoly over ideas or elements from the public domain, which all are free to draw upon for their own works. For example, “[t]he general stock of incidents in fiction or drama is free for all to use — a substantial part of everyone’s culture, not of any one individual’s work”: D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011), at p. 182.

[24] The Act protects *original* literary, dramatic, musical, and artistic works: s. 5. It protects the expression of ideas in these works, rather than ideas in and of themselves: *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, at para. 8. An original work is the expression of an idea through an exercise of skill and judgment: *CCH*, at para. 16. Infringement consists of the unauthorized taking of that originality.

[25] However, the Act does not protect every “particle” of an original work, “any little piece the taking of which cannot affect the value of [the] work as a whole”: Vaver, at p. 182. Section 3 of the *Copyright Act* provides that the copyright owner has the sole right to reproduce “the work or any substantial part thereof”.

[26] A substantial part of a work is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its quantity”: *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 481, *per* Lord Pearce. What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.

[27] A substantial part of a work is not limited to the words on the page or the brushstrokes on the canvas. The [Act](#) protects authors against both literal and non-literal copying, so long as the copied material forms a substantial part of the infringed work. As the House of Lords put it,

the “part” which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part. . . . [T]he original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original.

(*Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2001] 1 All E.R. 700, at p. 706, *per* Lord Hoffmann; see also *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930), *per* Learned Hand J.)

[28] The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other, forms the background against which the arguments of the parties must be considered.

(2) The Issue on Appeal

[29] The Cinar appellants no longer contest the trial judge’s findings that Robinson’s work as a whole was original, that several of the appellants had access to the work, and that *Sucroë* and *Curiosity* share common features. Rather, they argue that the trial judge made several errors in his assessment of whether a substantial part of *Curiosity* is reproduced in *Sucroë*, giving rise to a remedy for copyright infringement.

(3) The Standard of Review

[30] The conclusion of the trial judge that a substantial part of a plaintiff’s work was copied is entitled to appellate deference. The issue of substantiality is one of mixed fact and law. Consequently, an appellate court should generally defer to the trial judge’s findings on substantiality, unless those findings are based on an error of law or palpable and overriding errors

of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Designers Guild*, at p. 707, per Lord Hoffman, and p. 708, per Lord Millett; *Baigent v. The Random House Group Ltd.*, [2007] EWCA Civ 247, [2007] F.S.R. 24, at paras. 125-26; *Delrina Corp. v. Triolet Systems Inc.* (2002), 2002 CanLII 11389 (ON CA), 58 O.R. (3d) 339 (C.A.), at para. 81; Vaver, at p. 182.

(4) Did the Trial Judge Err in Finding That a Substantial Part of Robinson’s Work Was Reproduced in *Sucroë*?

[31] The trial judge, upheld by the Court of Appeal, found that the Cinar appellants infringed Robinson’s copyright by copying a substantial part of his original work without his or Nilem’s authorization: see ss. 3(1) and 27(1) of the *Copyright Act*.

[32] The Cinar appellants contend that the trial judge (a) failed to follow the correct approach to assessing substantiality; (b) failed to give sufficient weight to the significant differences between *Sucroë* and *Curiosity*; (c) made an error in finding that the features of *Curiosity* reproduced in *Sucroë* were protected by the *Copyright Act*; and (d) based his findings on inadmissible expert evidence. I will address each of these arguments in turn.

(a) *Did the Trial Judge Fail to Follow the Correct Approach to Assessing Whether a “Substantial Part” of a Work Was Reproduced?*

[33] The trial judge found that the Cinar appellants copied a number of features from Robinson’s *Curiosity*, including the visual appearance of the main protagonist, the personality traits of the main protagonist and of other characters, visual aspects of the setting, and recurring scenographic elements. He concluded that, considered as a whole, the copied features constituted a substantial part of Robinson’s work.

[34] The Cinar appellants argue that instead of applying a holistic approach, the trial judge should have applied a three-step approach requiring him to (1) determine what elements of *Curiosity* were original, within the meaning of the *Copyright Act*; (2) exclude non-protectable features of Robinson’s work (such as ideas, elements drawn from the public domain, and generic

elements commonplace in children’s television shows); and (3) compare what remains of *Curiosity* after this “weeding-out” process to *Sucroë*, and determine whether a substantial part of *Curiosity* was reproduced.

[35] The approach proposed by the Cinar appellants is similar to the “abstraction-filtration-comparison” approach used to assess substantiality in the context of computer software infringement in the United States: see *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992); B. Clermont, “Les compilations et la [Loi sur le droit d’auteur](#): leur protection et leur création” (2006), 18 *C.P.I.* 219, at p. 237; B. Tarantino, “‘I’ve Got This Great Idea for a Show. . .’ — Copyright Protection for Television Show and Motion Picture Concepts and Proposals” (2004), 17 *I.P.J.* 189, at pp. 199-200. It has been discussed, though not formally adopted, in Canadian jurisprudence: *Delrina Corp.*, at paras. [43-47](#). I do not exclude the possibility that such an approach might be useful in deciding whether a substantial part of some works, for example computer programs, has been copied. But many types of works do not lend themselves to a reductive analysis. Canadian courts have generally adopted a qualitative and holistic approach to assessing substantiality. “The character of the works will be looked at, and the court will in all cases look, not at isolated passages, but at the two works as a whole to see whether the use by the defendant has unduly interfered with the plaintiff’s right”: J. S. McKeown, *Fox on Canadian Law of Copyright and Industrial Designs* (loose-leaf), at p. 21-16.4 (emphasis added).

[36] As a general matter, it is important to not conduct the substantiality analysis by dealing with the copied features piecemeal: *Designers Guild*, at p. 705, *per* Lord Hoffman. The approach proposed by the Cinar appellants would risk dissecting Robinson’s work into its component parts. The “abstraction” of Robinson’s work to the essence of what makes it original and the exclusion of non-protectable elements *at the outset of the analysis* would prevent a truly holistic assessment. This approach focuses unduly on whether each of the parts of Robinson’s work is *individually* original and protected by copyright law. Rather, the cumulative effect of the features copied from the work must be considered, to determine whether those features amount to a substantial part of Robinson’s skill and judgment expressed in his work as a whole.

[37] I thus conclude that the trial judge did not err by failing to follow the three-step approach advocated by the Cinar appellants.

(b) *Did the Trial Judge Fail to Give Sufficient Weight to the Differences Between Sucroë and Curiosity?*

[38] The Cinar appellants contend that the trial judge focused almost exclusively on the similarities between *Sucroë* and *Curiosity*, and failed to consider the differences between the works. They point to significant differences between the works: the secondary characters in *Sucroë* are humans, whereas in *Curiosity* several of those characters are animals; *Sucroë* prominently features as its “villains” a band of marauding pirates, whereas *Curiosity* does not seem to have any villains; and the protagonist in *Sucroë* is not particularly curious, whereas curiosity is the dominant personality trait of the protagonist in *Curiosity*.

[39] The question of whether there has been substantial copying focuses on whether the copied features constitute a substantial part *of the plaintiff’s work* — not whether they amount to a substantial part *of the defendant’s work*: Vaver, at p. 186; E. F. Judge and D. J. Gervais, *Intellectual Property: The Law in Canada* (2nd ed. 2011), at p. 211. The alteration of copied features or their integration into a work that is notably different from the plaintiff’s work does not necessarily preclude a claim that a substantial part of a work has been copied. As the [Copyright Act](#) states, infringement includes “any colourable imitation” of a work: definition of “infringing”, s. 2.

[40] This is not to say that differences are irrelevant to the substantiality analysis. If the differences are so great that the work, viewed as a whole, is not an imitation but rather a new and original work, then there is no infringement. As the Court of Appeal put it, “the differences may have no impact if the borrowing remains substantial. Conversely, the result may also be a novel and original work simply inspired by the first. Everything is therefore a matter of nuance, degree, and context” (para. 66).

[41] The trial judge engaged in a qualitative and holistic assessment of the similarities between the works, which took into account the relevant similarities and differences between the works. For example, he gave little weight to similarities that were due to the generic island setting of both works: the fact that beaches, luxuriant vegetation, and bananas are present in both works was, at best, a “minor” similarity (paras. 621 and 631). He also gave little weight to the alleged similarities between Gladys, a female character in *Sucroë*, and Gertrude, a character in *Curiosity* (paras. 577-81). He examined whether Robinson Sucroë could be said to be as curious as Robinson Curiosity, and recognized that curiosity was a less predominant personality trait in Sucroë than it was in Curiosity (paras. 529-31). He concluded that, *despite any differences between the works*, it was still possible to identify in *Sucroë* features copied from *Curiosity* and that these features constituted a substantial part of Robinson’s work. The trial judge did not err in approaching the matter in this way.

(c) *Did the Trial Judge Err in Finding That the Features of Curiosity Reproduced in Sucroë Are Protected by the [Copyright Act](#)?*

[42] The Cinar appellants contend that, by failing to follow their three-step approach and to give sufficient weight to differences between the works, the trial judge characterized as a substantial part of the work a series of features that are not protected by copyright law. They argue that, at most, *Sucroë* reproduced the ideas embodied in *Curiosity*, elements drawn from the public domain (such as the protagonist of Daniel Defoe’s nearly 300-year-old novel), and other elements that are not original within the meaning of the [Copyright Act](#).

[43] I turn first to the argument that *Sucroë* merely reproduced the idea of a children’s television show about a *Robinson Crusoe*-inspired character living on a tropical island, as opposed to Robinson’s expression of that idea. I cannot accept this contention. The trial judge clearly grounded his finding of copying of a substantial part not in the idea behind *Curiosity*, but in the way Robinson expressed that idea. He concluded that the overall architecture of Robinson’s submission for a television show was copied. He found that the graphic appearance and several aspects of the personality of *Curiosity*’s protagonist were copied; the personalities of the secondary

characters that gravitate around *Curiosity*'s protagonist were copied; and the graphic appearance of the makeshift village that these characters inhabit was also copied in part (paras. 685 and 824-26). These findings are not confined to the reproduction of an abstract idea; they focus on the detailed manner in which Robinson's ideas were expressed.

[44] This leaves the second argument — the suggestion that to the extent that the characters and setting of *Sucroë* replicated those found in *Curiosity*, these are generic elements that are not protected by copyright law. The story of a man marooned on an island interacting with animals, native inhabitants, and the environment is archetypal and has been reproduced for centuries, the Cinar appellants assert.

[45] Again, the trial judge's findings refute this contention. He found that *Curiosity* was an original work, within the meaning of the *Copyright Act*. He based this not on the generic nature of the characters, but on their distinct visual appearance and particular personalities, which were the product of Robinson's skill and judgment. Nor was *Curiosity*'s island an entirely generic island; the trial judge cited particular visual elements of the setting that Robinson had conceived and that the Cinar appellants had copied.

[46] The development of a group of characters that have specific personality traits and whose interactions hinge on those personalities can require an exercise of skill and judgment sufficient to satisfy the *Copyright Act*'s originality criterion: see for example *Productions Avanti Ciné-Vidéo Inc. v. Favreau* (1999), 1999 CanLII 13258 (QC CA), 177 D.L.R. (4th) 568 (Que. C.A.), leave to appeal refused, [2000] 1 S.C.R. xi. *Sucroë* reproduces more than generic elements which all are free to draw upon for inspiration. It reproduces *Curiosity*'s particular combination of characters with distinct personality traits, living together and interacting on a tropical island — elements that represent a substantial part of the skill and judgment expressed in *Curiosity*.

[47] In essence, the aspects of the trial judge's reasons that the Cinar appellants take issue with are findings of mixed fact and law. They invite this Court to embark on a fresh assessment of

the features copied from *Curiosity*. I would decline to do so. They have failed to demonstrate palpable or overriding errors in the trial judge's findings on substantiality.

(d) *Did the Trial Judge Err by Relying on Inadmissible Expert Evidence?*

[48] The Cinar appellants argue that the trial judge based the bulk of his findings regarding substantial copying on inadmissible expert evidence — the evidence of a semiologist, Dr. Charles Perraton. Semiology is the study of signs and symbols and how they convey meaning. Dr. Perraton offered evidence that, quite apart from the surface meaning of the works at issue, there were latent similarities in how the two works used atmosphere, dynamics, motifs, symbols, and structure to convey meaning. The trial judge relied on this evidence in concluding that the Cinar appellants had copied a substantial part of Robinson's work.

[49] For expert evidence to be admitted at trial, it must (a) be relevant; (b) be necessary to assist the trier of fact; (c) not offend any exclusionary rule; and (d) involve a properly qualified expert: *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9. These criteria apply to trials for copyright infringement, as they do in other intellectual property cases: *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 75.

[50] The Cinar appellants argue that the second criterion — necessity of the evidence — is not met in the case at hand. The expert evidence was not necessary to assist the court, they say, because the question of whether a substantial part has been copied must be assessed from the perspective of the lay person in the intended audience for the works at issue: see *Preston v. 20th Century Fox Canada Ltd.* (1990), 1990 CanLII 13741 (FC), 33 C.P.R. (3d) 242 (F.C.T.D.), aff'd (1993), 1993 CanLII 17624 (FCA), 53 C.P.R. (3d) 407 (F.C.A.); *Arbique v. Gabriele*, [1998] J.Q. n° 3794 (QL) (Sup. Ct.), aff'd 2003 CanLII 16298 (Que. C.A.). They argue that trial judges are well placed to understand a lay person's point of view and that the assistance of an expert is unnecessary to help them grasp this perspective.

[51] In my view, the perspective of a lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works. However, the question always remains whether a substantial part of the plaintiff's work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects — patent and latent — of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of “someone reasonably versed in the relevant art or technology”: Vaver, at p. 187.

[52] To take an example, two pieces of classical music may, to the untrained ear, sound different, perhaps because they are played on different instruments, or at different tempos. An expert musician, however, might see similarities suggesting a substantial part has been copied — the same key signature, the same arrangement of the notes in recurring passages, or a recurrent and unusual harmonic chord. It will be for the judge to determine whether the similarities establish copying of a substantial part, to be sure. But in making that determination, the judge may need to consider not only how the work sounds to the lay person in the intended audience, but also structural similarities that only an expert can detect.

[53] In the present case, the necessity criterion of the test for the admissibility of expert evidence is satisfied. First, the works at issue are intended for an audience of young children. A rigid application of the “lay person in the intended audience” standard would unduly restrict the court's ability to answer the central question, namely whether a substantial part of Robinson's work was copied. It would shift the question to whether the copied features are apparent to a five-year-old.

[54] Second, the nature of the works at issue makes them difficult to compare. The trial judge was faced with the task of comparing a sprawling unrealized submission for a television show to a finished product that had aired on television. These are not works that are easily

amenable to a side-by-side visual comparison conducted by a judge without the assistance of an expert.

[55] Finally, the works at issue had both patent and latent similarities. Or, as Dr. Perraton explained it, they shared “perceptible” and “intelligible” similarities. “Perceptible” similarities are those that can be directly observed, whereas “intelligible” similarities — such as atmosphere, dynamics, motifs, and structure — affect a viewer’s experience of the work indirectly. Expert evidence was necessary to assist the trial judge in distilling and comparing the “intelligible” aspects of the works at issue, which he would not otherwise appreciate. Consequently, the trial judge did not err in admitting the expert evidence of Dr. Perraton.

(5) Conclusion

[56] The Cinar appellants have failed to establish that the trial judge erred in concluding that they copied a substantial part of Robinson’s work.

C. The Personal Liability of Weinberg, Charest, and Davin for Infringement

[57] France Animation, Cinar, Ravensburger, and RTV Family Entertainment no longer argue that they cannot be found liable in their capacity as producers of *Sucroë*. Nor does Izard argue that he cannot be found liable in his personal capacity. However, Weinberg, Charest, and Davin contend that they cannot be found personally liable for copyright infringement.

(1) Weinberg and Charest

[58] The trial judge found that Weinberg and Charest were personally liable for the infringement of Robinson’s copyright, since they deliberately and knowingly engaged in the infringement.

[59] Weinberg argues that Robinson failed to establish on a balance of probabilities that he and Charest knowingly engaged in copyright infringement, contending that they had little direct involvement in the creative process of *Sucroë*.

[60] For a director and/or officer to be held liable for his or her company's infringement of a copyright, "there must be circumstances from which it is reasonable to conclude that the purpose of the director or officer was not the direction of the manufacturing and selling activity of the company in the ordinary course of his relationship to it but the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it": *Mentmore Manufacturing Co. v. National Merchandising Manufacturing Co.* (1978), 1978 CanLII 2037 (FCA), 89 D.L.R. (3d) 195 (F.C.A.), at pp. 204-5, *per* Le Dain J.

[61] The trial judge concluded from the whole of the evidence that Weinberg and Charest deliberately, wilfully, and knowingly infringed Robinson's copyright. This conclusion was supported by the evidence. The trial judge accepted testimony to the effect that Weinberg and Charest personally had access to and actively consulted Robinson's drawings during the development of *Sucroë* (paras. 786-99). He drew adverse inferences from Weinberg and Charest's persistent denials that they had access to Robinson's work, despite the fact that they were given copies of the work and even made comments on it in the course of their consultations with Pathonic (paras. 254-58). The findings of personal liability are supported by the evidence and should not be set aside.

(2) Davin

[62] The trial judge found Davin, the chief executive officer of France Animation at the relevant time, personally liable for copyright infringement. He relied on evidence that Davin was involved in schemes orchestrated by Cinar in order to fraudulently obtain royalties and government subsidies, and noted that Davin was the hierarchical superior of Izard, who was personally involved in the copying of Robinson's work. The Court of Appeal overturned this finding of personal

liability on the ground that it was not supported by the evidence. I agree with the Court of Appeal's conclusion.

[63] The trial judge established Davin's liability by presumption, i.e. by the inductive process of inferring an unknown fact (Davin's personal participation in copyright infringement) from known facts (Davin's hierarchical position within France Animation and his participation in other fraudulent schemes): art. 2846 *CCQ*. Courts may only rely on presumptions that are "serious, precise and concordant": art. 2849 *CCQ*; see also *Longpré v. Thériault*, [1979] C.A. 258, at p. 262.

[64] The evidence relied upon by the trial judge did not support a serious, precise and concordant presumption that Davin was personally, deliberately and knowingly involved in the copying of Robinson's work, as required by *Mentmore*. The trial judge inferred Davin's knowing and deliberate participation from general circumstantial evidence. He observed that Davin was a [TRANSLATION] "Teflon man" who had participated in fraudulent schemes (para. 835). However, these schemes were unrelated to the copying of Robinson's work. Evidence of a dishonest and arrogant personality does not suffice to ground an inference of participation in copyright infringement. He also relied on Davin's position as Izard's hierarchical superior. Yet, this alone does not establish personal participation in copyright infringement. An officer of a corporation cannot be held personally liable for copyright infringement merely on the basis of his hierarchical status as officer.

[65] Robinson also argues that Davin "authorized" the copying of Robinson's work, within the meaning of s. 3 of the *Copyright Act*. "Under s. 27(1) of the *Copyright Act*, it is an infringement of copyright for anyone to do anything that the Act only allows owners to do, including authorizing the exercise of his or her own rights": *CCH*, at para. 37. As stated in *CCH*:

"Authorize" means to "sanction, approve and countenance" Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely "[g]ive approval to; sanction, permit; favour, encourage" Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference [References omitted; para. 38.]

[66] There is no evidence that Davin actively or passively authorized the copying of Robinson’s work in this sense. Indeed, the record fails to establish that Davin even knew or should have known that *Sucroë* was developed by copying Robinson’s work.

[67] Finally, Robinson argues that Davin is liable as a producer of *Sucroë*. His name appears as [TRANSLATION] “executive producer” in the show’s credits in Canada, and as “*producteur délégué*” in France. This alone is insufficient to hold Davin personally liable. As executive producer, he was acting as an officer of France Animation. It is France Animation, as a corporate entity distinct from its directors and officers, that reproduced a substantial part of Robinson’s work by commissioning and commercializing *Sucroë*. As the Court of Appeal correctly noted, various contracts establish that it is France Animation and its co-producers, Cinar and Ravensburger, who hired the production staff and assumed financial as well as artistic responsibility for the production of *Sucroë* (para. 141).

[68] I accordingly agree with the Court of Appeal that Davin cannot be held personally liable for copyright infringement on any of the grounds argued by Robinson.

D. *The Extra-contractual Liability of Cinar, Weinberg, and Charest*

[69] Having concluded that Cinar, Weinberg, and Charest are liable for copyright infringement, it is unnecessary to examine whether they can be found liable under Quebec’s regime of extra-contractual liability. This form of liability was only argued in the alternative by Robinson and Nilem.

E. *Disgorgement of Profits*

[70] Pursuant to [s. 35](#) of the *Copyright Act*, the trial judge awarded both compensatory damages to account for Robinson’s losses (including non-pecuniary damages, discussed below) and 50 percent of the profits made by the infringers, against all the Cinar appellants, on a solidary basis.

[71] The Court of Appeal took issue with the trial judge's award of profits and made several corrections. First, it excluded \$1,117,816 in profits derived from *Sucroë*'s soundtrack, on the ground that there was no causal link between the infringement and the soundtrack. Second, it found that the trial judge erred in characterizing a payment of \$684,000 from Ravensburger to France Animation (the "Ravensburger amount") as revenue, and excluded the amount from the calculation of profits. Third, it found that a payment of \$1,111,201 made by Cinar to a partnership called Jaffa Road (the "Jaffa Road amount") should have been characterized as an expense and deducted from the calculation of profits. Fourth, it held that only the corporate defendants should have been ordered to disgorge profits, and that under s. 35 of the *Copyright Act* profits can only be ordered disgorged on a joint basis. Finally, it modified the date from which to calculate interest and the additional indemnity on the award of profits.

[72] Having concluded that under s. 35 of the *Copyright Act* profits cannot be disgorged on a solidary basis, the Court of Appeal apportioned the total amount of profits between France Animation (60 percent), Ravensburger (15 percent), and Cinar (25 percent).

[73] Robinson and Nilem now seek to have the trial judge's entire award of profits reinstated. No appeal is brought against the award of compensatory damages ordered by the trial judge under s. 35 of the *Copyright Act* for Robinson's pecuniary losses.

[74] The trial judge refused to order an accounting of profits, a decision which has not been appealed. Instead, he calculated the net profits made from *Sucroë* on the basis of documentary evidence produced by the parties. As a result, this Court does not have the benefit of the type of detailed record that typically results from a taking of accounts, and must confine itself to the trial judge's findings of fact and the documentary evidence on the record before it.

[75] I will deal in turn with each of the alleged defects in the trial judge's award of profits.

(1) Profits From the *Sucroë* Soundtrack

[76] The soundtrack to *Sucroë* is the result of an independent creative process. It was not copied from Robinson’s work, but rather was incorporated into the materials that were copied. Robinson argues that there is nevertheless a causal link between the infringement and the profits derived from the soundtrack. In his view, the soundtrack is an inextricable component of a television show that was created through a process of copyright infringement. The Cinar appellants, for their part, argue that since the soundtrack results from independent creation, there can be no causal link between the infringement and the profits related to musical rights.

[77] Section 35 of the *Copyright Act* provides that a defendant can be ordered to “disgorge its profit to the extent that such profit is caused by the infringement.” The requirement for a [causal] link between infringement and profit may require that the profit be apportioned between that which is attributable to the infringement and that which is not”: McKeown, at p. 24-82.3 (emphasis added). The onus is on the infringer to “satisfactorily separate non-infringing from infringing activities”: Vaver, at p. 653; *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F.2d 45 (2d Cir. 1939), *per* Learned Hand J. In some cases, “an infringer may so interweave the right-holder’s work with its own as to make separation impossible”: Vaver, at p. 637.

[78] The apportionment of profits between infringing and non-infringing components of a work is essentially a factual determination which is subject to judicial discretion: *Wellcome Foundation Ltd. v. Apotex Inc.*, 2001 CanLII 22028 (FCA), [2001] 2 F.C. 618 (C.A.), at para. 23; *Lubrizol Corp. v. Imperial Oil Ltd.*, 1996 CanLII 4095 (FCA), [1997] 2 F.C. 3 (C.A.), at para. 9. An appellate court may only disturb the trial judge’s findings on apportionment if there are errors of law or palpable and overriding errors of fact (*Housen*).

[79] In the case at hand, the trial judge found that [TRANSLATION] “the music revenues cannot be disassociated from the overall . . . work” (para. 1016). The Court of Appeal disagreed and asked itself what profits would have been generated if the soundtrack had been commercialized as a separate product, independently of the infringing material (para. 196). It relied on the

“differential profit” approach used in patent infringement cases, in which a comparison is made “between the defendant’s profit attributable to the invention and his profit had he used the best non-infringing option”: *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34, [2004] 1 S.C.R. 902, at para. 102.

[80] In my view, the Court of Appeal erred by interfering with the trial judge’s conclusion that the profits stemming from the soundtrack could not be dissociated from the profits derived from the infringing material. The “differential profit” approach on which the Court of Appeal relied is generally used in cases where an infringement allows the infringer to commercialize a good in a more profitable manner than he could have without the infringement. However, there is no evidence that the soundtrack could have been commercialized as a separate product if *Curiosity* had not been infringed in the first place. The soundtrack was only commercialized as a component of the television show *Sucroë*, which was itself created by copying a substantial part of Robinson’s work. The trial judge was entitled to conclude that the soundtrack had no stand-alone value, and that it generated profits only as an accessory to the television show. Consequently, he did not make a reviewable error in concluding that it was inappropriate to apportion profits to the soundtrack as a non-infringing component of the work.

(2) The Ravensburger Amount

[81] The Ravensburger amount represents \$684,000 that Ravensburger paid to France Animation. The trial judge characterized this as a form of revenue stemming from *Sucroë*. I agree with the Court of Appeal that this characterization constitutes a palpable and overriding error.

[82] The trial judge calculated the net profits stemming from *Sucroë* on a global basis, taking into account the revenue and expenses of all the co-producers. However, he treated the Ravensburger amount in isolation, looking only to the fact that it constituted a form of revenue for one of the co-producers, France Animation. This treatment of the Ravensburger amount was inconsistent with the global approach adopted elsewhere. The amount also represented an outlay of capital for another co-producer, Ravensburger. It was a contribution by Ravensburger to the

financing of *Sucroë*, and its net effect was simply to partially shift the burden of the production expenses from France Animation to Ravensburger. The amount did not constitute a form of revenue for the group of co-producers *taken as a whole*. The Court of Appeal was correct to remove this amount from the revenues taken into account when calculating the profits generated by *Sucroë*.

(3) The Jaffa Road Amount

[83] Pursuant to a distribution agreement, Cinar sold an interest in *Sucroë* to Jaffa Road for \$1,853,333. It is not contested that this amount was collected by Cinar and constitutes revenue stemming from *Sucroë*. In a later agreement, Jaffa Road transferred back to Cinar the distribution rights for Canada and the United States. That agreement provided that a minimum payment of \$1,111,201 as part of a “revenue guarantee” would be due unconditionally by Cinar about a year after the execution of the agreement. The trial judge did not characterize this amount as an expense incurred by Cinar, whereas the Court of Appeal did.

[84] The substance of the trial judge’s finding was that the Cinar appellants had not proven the actual occurrence of a transfer of \$1,111,201 from Cinar to Jaffa Road (para. 1022). The document submitted to establish this payment provided only for a “revenue guarantee” to be paid a year from the moment of execution. No evidence was tendered to demonstrate that this guarantee was executed when it actually became due. The trial judge was entitled to conclude that this document did not constitute proof of payment of the amount. Contrary to the suggestion of the Court of Appeal, he had no obligation to take this evidence at face value. Consequently, I would not deduct this amount as an expense when calculating the profits from *Sucroë*.

(4) Ordering Disgorgement Against All Infringers on a Solidary Basis

[85] The trial judge ordered disgorgement against all the parties that he found liable for infringement on a solidary basis. The Court of Appeal held that this misconstrued the disgorgement remedy under s. 35 of the *Copyright Act*. It held that a defendant can only be made to disgorge

profits that it made, as opposed to the profits of other defendants with whom it participated in an infringement.

[86] I agree with the Court of Appeal. [Section 35](#) of the *Copyright Act* provides a dual remedy for copyright infringement: damages for the plaintiff's losses and disgorgement of the profits retained by the defendant. Disgorgement of profits under s. 35 is designed mainly to prevent unjust enrichment, although it can also serve a secondary purpose of deterrence: Vaver, at p. 650. It is not intended to compensate the plaintiff. This remedy is not subject to the principles that govern general damages awarded under Quebec's law of extra-contractual liability, whose aim is compensatory. Consequently, solidarity of profits ordered disgorged under s. 35 of the *Copyright Act* cannot be inferred from art. 1526 of the *CCQ*, which makes co-authors of a fault solidarily liable for the "obligation to make reparation for injury caused to another".

[87] Disgorgement under [s. 35](#) of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co-defendants by imposing liability for disgorgement on a solidary basis.

[88] For the same reasons, Weinberg, Charest, and Izard are not personally liable to disgorge profits. The profits from *Sucroë* were retained by the corporate entities that acted as co-producers. Weinberg, Charest, and Izard should not be required to disgorge profits that they did not retain in their personal capacity.

[89] Having concluded that disgorgement must be ordered on a joint basis, I would maintain the Court of Appeal's apportionment. France Animation must disgorge 60 percent of the profits; Ravensburger, 15 percent; and Cinar, 25 percent.

(5) Interest and Additional Indemnity

[90] The trial judge applied interest and the additional indemnity (arts. 1618 and 1619 *CCQ*) to the award of profits from the date of the letter of demand, i.e. December 5, 1995.

[91] The Court of Appeal held that this amounted to imposing interest on the profits before they were earned. The profits ordered disgorged were earned during a period of over a decade, largely after December 5, 1995. Since the trial judge refused to order an accounting, it is impossible to apply the interest with precision. Consequently, the Court of Appeal applied interest and the additional indemnity from a date situated roughly at the halfway point of the period during which *Sucroë* generated revenue, i.e. July 1, 2001.

[92] The Court of Appeal's solution was fair in the circumstances of this case. The parties ordered to disgorge profits should not pay interest from a date clearly prior to the period during which the bulk of the profits were earned.

F. *Non-pecuniary Damages*

[93] The trial judge awarded Robinson \$400,000 in non-pecuniary damages as compensation for his psychological suffering. He analogized Robinson's psychological suffering to the injury sustained by a victim of defamation.

[94] The Court of Appeal reduced this award of damages to \$121,350. It reasoned that Robinson's physical symptoms of shock and depression stemmed from a bodily injury. Therefore, the trial judge should have applied the cap on non-pecuniary damages established by this Court in the *Andrews* trilogy.

(1) Applicability of the *Andrews* Cap

[95] In the *Andrews* trilogy, this Court set a cap of \$100,000 on the non-pecuniary losses that can be recovered following catastrophic bodily injury. Non-pecuniary loss is a broad category that covers elements such as "loss of enjoyment of life, esthetic prejudice, physical and psychological pain and suffering, inconvenience, loss of amenities, and sexual prejudice": *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, 1996 CanLII 172 (SCC), [1996] 3 S.C.R. 211, at para. 63; *Andrews*, at p. 264. In cases where the cap applies, it is

adjusted to account for inflation during the time that has elapsed since the trilogy was decided in 1978: *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 S.C.R. 629, at pp. 640-41.

[96] Although the cap was articulated by this Court in the context of appeals from common law provinces, it is applied by Quebec courts when assessing non-pecuniary damages stemming from bodily injury: J.-L. Baudouin and P. Deslauriers, *La responsabilité civile* (7th ed. 2007), vol. I, at pp. 481-84; D. Gardner, *Le préjudice corporel* (3rd ed. 2009), at pp. 376-77. This is consistent with the concern, expressed in *Andrews*, that the amounts of these non-pecuniary damages awards “should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss” (p. 263).

[97] However, the *Andrews* cap is inapplicable to non-pecuniary damages that do not stem from bodily injury, such as those that result from defamation: *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 168; see also *Snyder v. Montreal Gazette Ltd.*, 1988 CanLII 66 (SCC), [1988] 1 S.C.R. 494, in which Lamer J. failed to attract a majority with his proposition that damages in civil law defamation cases should be capped.

[98] The Cinar appellants argue (i) that a cap should be imposed on all non-pecuniary damages, regardless of whether they stem from bodily injury, and alternatively (ii) that the non-pecuniary damages in this case do in fact stem from bodily injury.

[99] On the first argument, I would decline to extend the scope of application of the *Andrews* cap beyond non-pecuniary damages stemming from bodily injury. In *Hill*, this Court refused to apply the cap to non-pecuniary damages stemming from defamation. The Court reasoned that the policy concerns specific to bodily injury cases identified in the *Andrews* trilogy — namely the socially burdensome inflation of the amounts awarded as non-pecuniary damages — had not been made out in the field of defamation law. Likewise, the Cinar appellants have not persuaded me that there is an imminent risk of a burdensome upward trend in non-pecuniary damages awarded in copyright infringement cases.

[100] On the second argument, I do not agree that Robinson’s non-pecuniary damages can be characterized as stemming from bodily injury, within the meaning of art. 1607 of the *CCQ*. In Quebec civil law, an injury can only be characterized as a bodily injury (“*préjudice corporel*”) if “some form of a breach of physical integrity” is made out: *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 62. In making this characterization, it is important to look to whether the act that caused the injury was itself a breach of the victim’s physical integrity, rather than to whether the act had an impact on the physical health of the victim: Gardner, at p. 17. Conversely, “interferences with rights properly characterized as being of a moral nature will not be included within this class of claims”: *Schreiber*, at para. 64.

[101] The infringement of Robinson’s copyright was not a breach of his physical integrity. The infringement caused severe shock resulting in deterioration of Robinson’s physical health. However, as discussed, impact on a victim’s physical health does not suffice to characterize the injury as a bodily injury, in the absence of a breach of physical integrity: see for example *Landry v. Audet*, 2011 QCCA 535 (CanLII), at para. 107, leave to appeal refused, [2011] 3 S.C.R. v. The Court of Appeal, with respect, lost sight of this distinction.

[102] It is more appropriate to characterize Robinson’s psychological suffering as a non-pecuniary damage stemming from *material* injury. Indeed, the infringement of copyright was a breach of Robinson’s property rights. It is the initial breach, rather than the consequences flowing from that breach, which serves to characterize the type of injury suffered. As Professor Gardner states it, [TRANSLATION] “the appropriation of Claude Robinson’s work is, for him, a material injury with pecuniary consequences (the profits generated by using it) and non-pecuniary consequences (the stress, emotional distress or, in other words, psychological injury that results from it)”: “Revue de la jurisprudence 2011 en droit des obligations” (2012), 114 *R. du N.* 63, at p. 70. As discussed, the scope of application of the *Andrews* cap is limited; it does not apply to non-pecuniary damages stemming from material injury.

[103] Consequently, I conclude that in this case the Court of Appeal erred in applying the *Andrews* cap.

(2) Quantum

[104] The Cinar appellants contend that even if the *Andrews* cap is inapplicable to Robinson's non-pecuniary damages, the trial judge nevertheless committed a palpable and overriding error by awarding a grossly disproportionate amount under this head of damages.

[105] In Quebec, the quantum of non-pecuniary damages is generally assessed by combining a conceptual approach, a personal approach, and a functional approach: *St-Ferdinand*, at paras. 72-73, 75 and 77; *Gauthier v. Beaumont*, 1998 CanLII 788 (SCC), [1998] 2 S.C.R. 3, at para. 101. The conceptual approach measures loss "based on an appreciation of the objective seriousness of the injury": *Stations de la Vallée de Saint-Sauveur inc. v. M.A.*, 2010 QCCA 1509, [2010] R.J.Q. 1872, at para. 83, *per* Kasirer J.A. The personal approach "seeks to evaluate, from a subjective point of view, the pain and inconvenience resulting from the injuries suffered by the victim": *St-Ferdinand*, at para. 75, citing A. Wéry, "L'évaluation judiciaire des dommages non pécuniaires résultant de blessures corporelles: du pragmatisme de l'arbitraire?", [1986] R.R.A. 355. The functional approach seeks to calculate the cost of measures that could provide solace to the victim: *Andrews*, at p. 262. These approaches "apply jointly, and thereby encourage a personalized evaluation" of non-pecuniary damages: *St-Ferdinand*, at para. 80.

[106] In addition to applying these approaches, courts assessing non-pecuniary damages should compare the case at hand to other analogous cases in which non-pecuniary damages were awarded: *Stations de la Vallée*, at para. 83. They must attempt to treat "like cases alike" (*ibid.*), by giving roughly similar compensation to victims whose injuries are alike when assessed from the point of view of the combined approaches discussed above. However, it is not helpful to compare cases where non-pecuniary damages are capped to those where they are not. Arguments to the effect that a victim of copyright infringement should not receive more compensation for non-pecuniary damages than an accident victim rendered quadriplegic carry no weight, since the *Andrews* cap applies as binding precedent in one case but not in the other.

[107] In this case, the trial judge relied heavily on the personal approach, emphasizing the subjective impact of the infringement of copyright on Robinson's mental state and personal life. He bolstered his analysis by comparing Robinson's anguish to the similar level of anguish experienced by the plaintiff in the defamation case *Société Radio-Canada v. Gilles E. Néron Communication Marketing inc.*, 2002 CanLII 41249 (QC CA), [2002] R.J.Q. 2639 (C.A.), aff'd 2004 SCC 53, [2004] 3 S.C.R. 95. In *Néron*, the Court of Appeal confirmed an award of non-pecuniary damages in the amount of \$300,000. The trial judge also looked to the *Hill* case, in which this Court awarded \$300,000 in general damages to a victim of defamation. He correctly took into account the fact that *Hill* had been decided over a decade before the case at hand, and that a valid comparison required the amount awarded to be adjusted for inflation.

[108] I agree with the trial judge that Robinson's non-pecuniary damages are analogous to those claimed by a victim of defamation. The product of Robinson's artistic exertions was taken from him and the integrity of his personal creative process was violated, causing deep psychological suffering. These harms are similar to those suffered by a victim of defamation.

[109] The trial judge had the advantage of observing Robinson in court over a long period of time and was well placed to conduct a personalized evaluation of his non-pecuniary damages. He made no palpable and overriding error in his assessment of Robinson's non-pecuniary damages.

G. Punitive Damages

[110] In addition to compensatory damages and disgorgement of profits, the trial judge awarded \$1,000,000 in punitive damages on a solidary basis, against Cinar, Weinberg, Charest, Izard, Davin, and France Animation. He justified this award largely by referring to the persistently dishonest behaviour of these parties: they had engaged in fraudulent schemes to obtain royalties and government subsidies, had lied repeatedly about their involvement in these schemes, had lied to the court about their access to Robinson's work, and had treated Robinson with callous disregard.

[111] The Court of Appeal reduced the award to \$250,000, and apportioned jointly: \$100,000 against Cinar, and \$50,000 against each of Weinberg, Charest and Izard. It held that the other defendants had not intentionally and deliberately violated Robinson’s rights, and were thus not liable for punitive damages; that the nature of punitive damages requires them to be assessed and awarded on an individualized basis, which precludes solidarity; and that the award of punitive damages in Quebec is governed by a spirit of moderation.

[112] Robinson and Nilem submit that the trial judge’s award of punitive damages is not in error and that the Court of Appeal should not have interfered with it.

(1) Statutory Basis for Punitive Damages

[113] In Quebec, punitive damages can only be awarded where they are provided for by a specific enabling enactment: art. 1621 *CCQ*. The courts below did not fully examine the basis for the punitive damages awarded in this case, although the Court of Appeal alluded to the *Charter of human rights and freedoms*, R.S.Q., c. C-12 (“*Charter*”).

[114] Section 49 of the *Charter* provides that punitive damages may be awarded if there is an unlawful and intentional interference with any of the rights and freedoms that the *Charter* recognizes. The evidence establishes unlawful and intentional interference with several of Robinson’s *Charter* rights. Copyright infringement is a violation of s. 6 of the *Charter*, which provides that “[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law”: see *Construction Denis Desjardins inc. v. Jeanson*, 2010 QCCA 1287 (CanLII), at para. 47. Additionally, the infringement of copyright in this case interfered with Robinson’s personal rights to inviolability and to dignity, recognized by ss. 1 and 4 of the *Charter*.

[115] An interference with the right to inviolability “must affect the victim’s physical, psychological or emotional equilibrium in something more than a fleeting manner”: *St-Ferdinand*, at para. 97. The trial judge made detailed findings of fact to the effect that Robinson’s

psychological and emotional equilibrium was deeply affected as a result of the infringement and the ensuing legal proceedings (paras. 981-82).

[116] An interference with the right to dignity is a violation of “the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself”: *St-Ferdinand*, at para. 105. In *Markarian v. Marchés mondiaux CIBC inc.*, 2006 QCCS 3314 (CanLII), the Quebec Superior Court found that

[TRANSLATION] [a] lack of respect, contempt and degrading treatment constitute interference with dignity. They must reach a certain degree to be sanctioned under the [Charter](#). [para. 589]

[117] Here, Cinar, Weinberg, Charest, and Izard consistently and contemptuously denied having access to Robinson’s work, and disparaged Robinson’s claims that they had copied his work. Their behaviour constitutes an interference with Robinson’s [Charter](#) right to dignity, and provides an additional basis for the award of punitive damages.

(2) The Parties Liable for Punitive Damages

[118] The Court of Appeal was correct to conclude that only Cinar, Weinberg, Charest, and Izard could be found liable for punitive damages. Under s. 49 of the [Charter](#), punitive damages are only awarded if an interference with protected rights and freedoms is “intentional”. An interference is intentional “when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause”: *St-Ferdinand*, at para. 121. The detailed findings of the trial judge establish intentional interference with protected rights by Cinar, Weinberg, Charest, and Izard.

[119] As discussed, the same cannot be said of Davin. The record does not support the contention that he had or should have had knowledge of the actions that gave rise to an interference

with Robinson's *Charter* rights. Nor can France Animation be said to have engaged in an intentional interference with Robinson's rights as a result of its employer-employee relationship with Izard, who personally engaged in infringement. I agree with the Court of Appeal that Izard was a relatively low-level employee of France Animation and that the employer-employee relationship is not sufficient to hold France Animation liable for his intentional interference with Robinson's rights under the *Charter*. In order to establish that an employer shares its employee's intent to interfere with *Charter* rights, there must be evidence of factors such as "[o]rders given by the employer, knowledge of or failure to prohibit the unlawful acts, failure to order that the acts cease", or the employee's relatively elevated hierarchical position within the organization: *Gauthier*, at para. 111. These factors are not present here.

(3) Solidarity of Punitive Damages

[120] In my view, punitive damages cannot be awarded on a solidary basis under the *Charter*. I come to this conclusion for two reasons.

[121] First, there is no statutory basis, whether in the *Civil Code* or the *Charter*, for the solidarity of punitive damages. In Quebec civil law, solidarity of obligations between debtors is the exception, rather than the norm: D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at p. 1524. Article 1525 of the *CCQ* provides that "[s]olidarity between debtors is not presumed; it exists only where it is expressly stipulated by the parties or imposed by law." Consequently, [TRANSLATION] "[i]n the absence of a contractual stipulation, solidarity is . . . available only if it is clearly provided for in a legislative provision": J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at p. 710.

[122] The Quebec Court of Appeal's jurisprudence is divided on the issue of whether there is a statutory basis for the solidarity of punitive damages awarded under the *Charter*. In *Genex Communications inc. v. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, [2009] R.J.Q. 2743, the court, per Dalphond J.A., held that art. 1526 of the *CCQ* provides a statutory basis for solidarity. It reasoned that the co-authors of an intentional

interference with rights protected by the *Charter* are essentially in the same position as co-authors of an extra-contractual fault, who would be liable solidarily under art. 1526 of the *CCQ*.

[123] However, in *Solomon v. Québec (Procureur général)*, 2008 QCCA 1832, [2008] R.J.Q. 2127, the court, *per* Pelletier J.A., found that art. 1526 of the *CCQ* does not provide a basis for awarding punitive damages on a solidary basis under the *Charter*. It noted that the provision applies to “[t]he obligation to make reparation for injury”. This wording suggests that solidarity between co-authors of a fault only applies to compensatory damages, the purpose of which is to repair injury. The purpose of punitive damages, by contrast, is not to repair injury, but rather to achieve prevention, deterrence, and denunciation.

[124] I prefer the reasoning and result in *Solomon*. The wording of art. 1526 of the *CCQ*, which emphasizes its application to the obligation to repair injury, does not extend to the *Charter*’s punitive damages regime. Moreover, in the years since both *Solomon* and *Genex* were decided, this Court has recognized that the punitive damages regime under the *Charter* is autonomous from the extra-contractual civil liability regime established under the *Civil Code*: *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 44, *per* LeBel J. In my view, art. 1526 of the *CCQ* applies to extra-contractual fault causing injury and cannot ground the solidarity of punitive damages awarded under the *Charter*.

[125] The second reason for concluding that punitive damages cannot be awarded on a solidary basis is that this would be inconsistent with the principles set forth in art. 1621 of the *CCQ*, which provides:

1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.

Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor’s fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.

[126] Article 1621 of the *CCQ* expressly requires that the objectives of punitive damages — prevention, deterrence (both specific and general), and denunciation of acts that are particularly reprehensible in the opinion of the justice system — be taken into account when awarding them: *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at para. 155, *per* LeBel and Cromwell JJ. Among the non-exhaustive list of factors that should be taken into account when assessing the quantum of punitive damages are “(1) the gravity of the debtor’s fault, (2) the debtor’s patrimonial situation, (3) the extent of the reparation for which the debtor is already liable to the creditor and (4), where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person” (e.g. an insurer): *ibid.*, at para. 199.

[127] Both the objectives of punitive damages and the factors relevant to assessing them suggest that awards of punitive damages must be individually tailored to each defendant against whom they are ordered. This requirement of individualization militates against awarding punitive damages on a solidary basis.

[128] As art. 1621 of the *CCQ* makes clear, punitive damages “may not exceed what is sufficient to fulfil their preventive purpose”. Whether the quantum of damages is sufficient to ensure prevention is determined by looking to factors that, by their very nature, are specific to each individual defendant against whom punitive damages are awarded: V. Karim, *Les obligations* (3rd ed. 2009), vol. 2, at pp. 801-2. The gravity of the conduct of several co-defendants may vary from one defendant to the other (*ibid.*). As well, the patrimonial situation of co-defendants, the extent of the reparation for which they are already liable, and the assumption of payments by a third party are all factors that are specific to each defendant.

[129] It has been argued that awarding punitive damages on a solidary basis against the co-authors of an intentional interference with *Charter* rights would contribute to the preventive purpose of these damages. [TRANSLATION] “In some cases, such a condemnation cannot help but encourage individuals to refuse to participate in civil faults such as this for fear of having to pay punitive damages in the place of a co-author”: *Genex*, at para. 135, *per* Dalphond J.A.

[130] I agree that the possibility of being ordered to pay punitive damages on a solidary basis may have a deterrent effect. However, a properly tailored award of punitive damages, which takes into account the factors enumerated by art. 1621 of the *CCQ* and all other appropriate circumstances, will already achieve sufficient deterrence. Adding solidarity to a properly tailored award will only create a risk that the amount of punitive damages exceeds what is sufficient to ensure prevention. This would be the case where one of the defendants is insolvent, which would prevent co-defendants from recovering that defendant's share of the damages and effectively increase the punitive damages for which they are liable: Jobin and Vézina, at p. 716.

[131] I add this. In *St-Ferdinand*, this Court awarded punitive damages on a solidary basis. L'Heureux-Dubé J. (writing for the Court), held that "nothing . . . would prevent joint and several liability [from] operating" in the context of an award of punitive damages, "as it does in respect of other kinds of damages" (para. 131). However, *St-Ferdinand* was decided under the provisions of the *Civil Code of Lower Canada*. In my view, the legislative and jurisprudential developments since that ruling, in particular the introduction of art. 1621 of the *CCQ*, justify departing from the precedent set in that case.

[132] For these reasons, I conclude that the trial judge erred by awarding punitive damages under the *Charter* on a solidary basis.

(4) Quantum of Punitive Damages

[133] The Court of Appeal reduced the award of punitive damages from \$1,000,000 to \$250,000. In my view, the Court of Appeal was correct to re-assess the trial judge's award of damages. However, it gave too little weight to the gravity of Cinar, Weinberg, Charest, and Izard's conduct. I would award an amount of \$500,000 in punitive damages.

[134] In *Richard*, this Court held that an appellate court may only interfere with a trial judge's assessment of punitive damages (1) if there is an error of law; or (2) if the amount is not

rationality connected to the purposes for which the damages are awarded, namely prevention, deterrence (both specific and general), and denunciation (see para. 190).

[135] The Court of Appeal was justified in reducing the trial judge's award for punitive damages because the trial judge considered factors that were not relevant to the assessment. The trial judge took into account the fact that the Cinar appellants engaged in fraudulent schemes to obtain royalties and government subsidies to which they were not entitled. Here, punitive damages are being awarded because of an intentional interference with several of Robinson's rights under the *Charter*. Fraudulent schemes perpetrated against third parties may attract distinct remedies at civil law or sanctions at criminal law, but they are not relevant to the purposes pursued by this award of punitive damages. In light of this error of law, it is necessary to re-assess the quantum of punitive damages awarded by the trial judge: *Richard*, at para. 198.

[136] As discussed, punitive damages are assessed by looking to the purposes they serve — prevention, deterrence, and denunciation. Factors to be considered include the gravity of the debtor's fault; the debtor's patrimonial situation; the extent of the reparation for which the debtor is already liable to the creditor; and the fact that the payment of damages will be wholly or partly assumed by a third person: art. 1621 *CCQ*. I also note that, in Quebec civil law, "it is perfectly acceptable to use punitive damages, as is done at common law, to relieve a wrongdoer of its profits where compensatory damages would amount to nothing more than an expense paid to earn greater profits while flouting the law": *Richard*, at para. 206.

[137] In addition, particular attention must be paid to the gravity of the debtor's fault, which "is undoubtedly the most important factor": *Richard*, at para. 200. The gravity is assessed from two perspectives: ". . . the wrongful conduct of the wrongdoer and the seriousness of the infringement of the victim's rights" (*ibid.*).

[138] This said, punitive damages must be awarded with restraint. Article 1621 of the *CCQ* expressly provides that the award of punitive damages "may not exceed what is sufficient to fulfil their preventive purpose". The typical range for punitive damages in Quebec is between \$5,000 and

\$250,000: see review of the case law in the reasons of the Court of Appeal, at para. 249. However, in cases where the gravity of the conduct warrants it, punitive damages reaching \$1,000,000 or more have been awarded: *Markarian; Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595.

[139] In this case, the relevant factors point in different directions. On the one hand, the gravity of the conduct suggests a high amount of punitive damages. Cinar, Weinberg, Charest, and Izard engaged in intentional and calculated copyright infringement, which they planned to keep secret, all the while reaping profits from an internationally successful children's television series. They persistently denied having copied any portion of Robinson's work throughout the lengthy legal proceedings. Conduct of this nature threatens one of the fundamental goals of Canadian copyright law, namely "to prevent someone other than the creator [of a work] from appropriating whatever benefits may be generated": *Théberge*, at para. 30. The impact of this conduct on Robinson was equally serious. It deprived him not only of a source of revenue, but also of his sense of proprietorship over a project that had deep personal significance for him. He experienced profound anguish. Insult was added to injury by the callous denials of copying and by insinuations to the effect that Robinson was simply an attention-seeking eccentric.

[140] On the other hand, Cinar, Weinberg, Charest, and Izard have already been found liable towards Robinson for substantial amounts of money. As the Court of Appeal noted, they will be largely deprived of any benefits they may have gained from the infringement.

[141] I would award \$500,000 in punitive damages. The amount of \$1,000,000 awarded by the trial judge is too high. It was awarded on the basis of irrelevant factors and did not give sufficient weight to the substantial amounts awarded under other heads of damages. On the other hand, the amount of \$250,000 awarded by the Court of Appeal fails to fully reflect the gravity of the conduct and the need to deter others from engaging in similar conduct. The offending conduct was extremely lucrative; the penalties associated with it must be proportionally significant. An amount of \$500,000 reaches an appropriate balance between the overarching principle of restraint

that governs these damages, on the one hand, and the need to deter conduct of this gravity, on the other.

[142] Since I have found that these damages cannot be awarded on a solidary basis, I must apportion them among the parties. The Court of Appeal held Cinar liable for two-fifths of the amount of punitive damages, and each of Weinberg, Charest, and Izard liable for one-fifth. This appears to be reasonable, considering that Cinar drew greater financial benefit from the infringement than Weinberg, Charest, or Izard.

IV. Conclusion

[143] I conclude that the copyright in *Curiosity* was infringed. The trial judge committed no reviewable errors in finding that *Sucroë* reproduced a substantial part of *Curiosity*. The Cinar appellants incorrectly argue for an approach that dissects Robinson's work into its constituent parts. Rather, a qualitative and holistic approach must be adopted. In order to determine whether a substantial part of Robinson's work was copied, the features that were copied by the Cinar appellants must be considered cumulatively, in the context of Robinson's work taken as a whole. This is precisely the approach adopted by the trial judge. In addition, the expert evidence relied upon by the trial judge in his analysis was admissible.

[144] On the issue of liability, I agree with the Court of Appeal that the record does not ground a finding of personal liability against Davin. As for Weinberg, Charest, and Izard, their personal liability for infringement is engaged. I also find Cinar, France Animation, Ravensburger, and RTV Family Entertainment liable for infringement.

[145] My conclusions on the issue of infringement make it unnecessary to examine the extra-contractual liability of Cinar, Weinberg, and Charest.

[146] With respect to damages, I agree with the Court of Appeal that profits cannot be ordered disgorged on a solidary basis under s. 35 of the *Copyright Act*. I also agree that a payment

made by Ravensburger to France Animation could not be treated as revenue for the purpose of calculating profits. However, unlike the Court of Appeal, I would include in the calculation of profits those profits associated with the soundtrack of *Sucroë*. I would also refrain from deducting from the profits a payment that was allegedly made by Cinar to Jaffa Road. Finally, I would maintain the Court of Appeal's apportionment with respect to the disgorgement of profits.

[147] On the issue of non-pecuniary damages, the Court of Appeal erred in applying the *Andrews* trilogy cap to damages that did not stem from bodily harm. I find that the trial judge committed no palpable and overriding error in his assessment and would reinstate the award of \$400,000.

[148] As regards punitive damages, I agree with the Court of Appeal that they cannot be awarded on a solidary basis. In addition, the Court of Appeal was correct to re-assess the quantum of damages, although it did not give sufficient weight to the gravity of the conduct in this case. I would award an amount of \$500,000. Cinar is liable for two-fifths of that amount, and each of Weinberg, Charest, and Izard are liable for one-fifth.

[149] Finally, I agree with the Court of Appeal's solution with respect to the computation of interest and the additional indemnity.

[150] It follows that I would dismiss the appeals in files 34466, 34467, and 34468.

[151] With respect to file 34469, I would allow the appeal in part. Specifically, I would reinstate the profits from the *Sucroë* soundtrack and the Jaffa Road amount in the trial judge's calculation of profits; reinstate the trial judge's order of non-pecuniary damages; and award \$500,000 in punitive damages, subject to apportionment on a joint basis as discussed in these reasons.

[152] I would award Robinson and Nilem costs throughout, in addition to the trial judge's award of \$1,500,000 in solicitor-client costs for the proceedings at the trial level. The trial judge

was well placed to observe the litigation strategy of the Cinar appellants, as well as all other factors relevant to exercising his discretion to award solicitor-client costs under the *Copyright Act*. I would decline to award Robinson and Nilem costs on a solicitor-client basis for the appeals before the Court of Appeal and this Court. There were serious points of law to argue and it is not established that, on appeal, the Cinar appellants acted in bad faith or otherwise conducted themselves in a manner that warrants an award of costs on a solicitor-client basis.

Appeals 34466, 34467 and 34468 dismissed. Appeal 34469 allowed in part with costs throughout.

Solicitors for the appellants (34466)/respondents (34469) Cinar Corporation and Les Films Cinar inc. and for the respondent (34469) 3918203 Canada Inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the respondents (34466, 34467, 34468)/appellants (34469) Claude Robinson and Les Productions Nilem inc.: Gowling Lafleur Henderson, Ottawa; Mannella Gauthier Tamaro, Montréal.

Solicitors for the appellants (34468)/respondents (34469) Christophe Izard, France Animation S.A., Ravensburger Film + TV GmbH and RTV Family Entertainment AG and for the respondent (34469) Videal Gesellschaft Zur Hertellung Von Audiovisuellen Produkten MHB: Fasken Martineau DuMoulin, Montréal.

Solicitors for the respondent (34469) Christian Davin: Borden Ladner Gervais, Montréal.

Solicitors for the appellants (34467)/respondents (34469) Ronald A. Weinberg and Ronald A. Weinberg, in his capacity as sole liquidator of the succession of the late Micheline Charest: Langlois Kronström Desjardins, Montréal.

Solicitors for the intervener Music Canada: McCarthy Tétrault, Toronto.

TAB 44

Saadati v. Moorhead, 2017 SCC 28 (CanLII), [2017] 1 SCR 543

Source:	Supreme Court of Canada
Date:	2017-06-02
File number:	36703
Other citations:	409 DLR (4th) 395 — 279 ACWS (3d) 84 — [2017] 6 WWR 431 — [2017] EXP 1678 — 96 BCLR (5th) 1 — 37 CCLT (4th) 1 — [2017] CarswellBC 1446 — EYB 2017-280397 — [2017] SCJ No 28 (QL)
Citation:	Saadati v. Moorhead, 2017 SCC 28 (CanLII), [2017] 1 SCR 543, < https://canlii.ca/t/h42pw >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v. Wyminga , 2019 ONCJ 621 (CanLII) [...] In my view, Saadati is distinguishable from the case at bar, as it dealt with an issue of the law of negligence not a regulatory offence as Mr Wyminga faces. [...]



SUPREME COURT OF CANADA

CITATION: Saadati v. Moorhead, 2017 SCC 28, [2017] 1 S.C.R. 543

APPEAL HEARD: January 16, 2017
JUDGMENT RENDERED: June 2, 2017
DOCKET: 36703

BETWEEN:

Mohsen Saadati, by his Litigation Guardian, Sara Zarei
Appellant

and

**Grant Iain Moorhead,
Able Leasing (2001) Ltd. and
Thi Hao Hoang**
Respondents

- and -

Insurance Bureau of Canada
Intervener

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

REASONS FOR JUDGMENT: Brown J. (McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ. concurring)
(paras. 1 to 45)

Saadati v. Moorhead, 2017 SCC 28, [2017] 1 S.C.R. 543

Mohsen Saadati, by his Litigation Guardian, Sara Zarei

Appellant

v.

**Grant Iain Moorhead,
Able Leasing (2001) Ltd. and
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Respondents

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Insurance Bureau of Canada

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Indexed as: Saadati v. Moorhead

2017 SCC 28

File No.: 36703.

2017: January 16; 2017: June 2.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Motor vehicles — Mental injury — Damages — Claimant suing in negligence as result of motor vehicle accident — Trial judge awarding claimant damages for mental injury based on testimony of lay witnesses rather than on expert evidence establishing identified medical cause — What constitutes mental injury — Whether recovery for mental injury requires expert evidence or other proof of recognized psychiatric illness — Whether claimant sustained damage — Whether matter should be remanded to Court of Appeal.

S's tractor-truck was struck by a vehicle driven by M. This accident was the second in a series of five motor vehicle collisions involving S. S had suffered chronic pain since the first accident, which was later aggravated by the third accident. S sued M and the other defendants in negligence, seeking damages for non-pecuniary loss and past income loss arising from the second accident. The trial judge found that the second accident caused S psychological injuries, including personality change and cognitive difficulties. This finding did not rest on an identified medical cause or expert evidence, but was based on the testimony of S's friends and family to the effect that S's personality had changed for the worse after the accident. The trial judge further found that the mental injury originally caused by the second accident was indivisible from any injury caused by the third accident and awarded S \$100,000 for non-pecuniary damages. The Court of Appeal allowed the appeal on the ground that S had not demonstrated by expert evidence a medically recognized psychiatric or psychological injury. It also observed that the trial judge had erred by deciding the case on a basis neither pleaded nor argued by S.

Held: The appeal should be allowed and the trial judge's award restored.

The trial judge's award for mental injury was not made in breach of procedural fairness. While cases should not be decided on grounds not raised, in claims for negligently caused mental injury, it is generally sufficient that the pleadings allege some form of such injury. The many allegations of mental injury in S's oral and written closing submissions, combined with the broad heads of damage alleged in the pleadings, provided ample notice to the defendants of the case which they had to answer, and they did not object to these allegations.

Recovery for mental injury in negligence law depends upon the claimant satisfying the criteria applicable to any successful action in negligence: a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. The ordinary duty of care analysis is therefore to be applied to claims for negligently caused mental injury. In particular, liability for mental injury must be confined to claims which satisfy the proximity analysis within the duty of care framework and the remoteness inquiry.

A finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric injury. The law of negligence accords identical treatment to mental and physical injury. Requiring claimants who allege mental injury to prove that their condition meets the threshold of recognizable psychiatric illness, while not imposing a corresponding requirement upon claimants alleging physical injury to show that their condition carries a certain classificatory label, would accord unequal protection to victims of mental injury. Distinct rules which operate to preclude liability in cases of mental injury, but not in cases of physical injury, should not be erected. The elements of the cause of action of negligence, together with the threshold stated in *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](#), [2008] 2 S.C.R. 114, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims.

Furthermore, confining compensable mental injury to conditions that are identifiable with reference to psychiatric diagnostic tools is inherently suspect as a matter of legal methodology. While, for treatment purposes, an accurate diagnosis is obviously important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects. There is no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme. A negligent defendant need only be shown to have foreseen injury, and not a particular psychiatric illness that comes with its own label. The trier of fact's inquiry should be directed to the level of harm that the claimant's particular symptoms represent, not to whether a label could be attached to them.

To establish mental injury, claimants must show that the disturbance is serious and prolonged and rises above the ordinary annoyances, anxieties and fears that come with living in civil society. Expert evidence can assist in determining whether or not a mental injury has been shown, but where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. It also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry.

In the instant case, the trial judge accepted evidence that clearly showed a serious and prolonged disruption that transcended ordinary emotional upset or distress. These findings have not been challenged and are entitled to appellate deference. There is no legal error in the trial judge's treatment of the evidence of S's symptoms as supporting a finding of mental injury, even in the absence of expert testimony associating them with an identified condition.

It would not be just in the circumstances to remand this matter to the Court of Appeal on the questions of indivisible injury and the damage award. The indivisibility of two injuries is a finding of fact, which is entitled to deference. In addition, without full submissions and a pertinent lower court record, this is not an appropriate case to decide the effect of workers' compensation

legislation on the divisibility of injuries. Similarly, the trial judge's damage award is reasonable, supported by the record, and fairly compensates S's loss. It should therefore be restored.

Cases Cited

Applied: *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](#), [2008] 2 S.C.R. 114, aff'g (2006), [2006 CanLII 41807 \(ON CA\)](#), 84 O.R. (3d) 457; **referred to:** *Clements v. Clements*, [2012 SCC 32](#), [2012] 2 S.C.R. 181; *Bradley v. Groves*, [2010 BCCA 361](#), 326 D.L.R. (4th) 732; *Insurance Corp. of British Columbia v. Patko*, [2008 BCCA 65](#), 290 D.L.R. (4th) 687; *Rodaro v. Royal Bank of Canada* (2002), [2002 CanLII 41834 \(ON CA\)](#), 59 O.R. (3d) 74; *Burgsteden v. Long*, [2014 SKCA 115](#), 378 D.L.R. (4th) 562; *R. v. E.M.W.*, [2011 SCC 31](#), [2011] 2 S.C.R. 542; *Canada Trustco Mortgage Co. v. Renard*, [2008 BCCA 343](#), 298 D.L.R. (4th) 216; *Odhavji Estate v. Woodhouse*, [2003 SCC 69](#), [2003] 3 S.C.R. 263; *McLoughlin v. O'Brian*, [1983] 1 A.C. 410; *Miner v. Canadian Pacific Railway Co.* (1911), [1910 CanLII 340 \(AB CA\)](#), 18 W.L.R. 476; *Dulieu v. White & Sons*, [1901] 2 K.B. 669; *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141; *Horne v. New Glasgow*, [1953 CanLII 335 \(NS SC\)](#), [1954] 1 D.L.R. 832; *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310; *Page v. Smith*, [1996] 1 A.C. 155; *White v. Chief Constable of South Yorkshire Police*, [1999] 2 A.C. 455; *Tame v. New South Wales*, [2002] HCA 35, 211 C.L.R. 317; *Beecham v. Hughes* (1988), [1988 CanLII 2839 \(BC CA\)](#), 27 B.C.L.R. (2d) 1; *Rhodes v. Canadian National Railway* (1990), [1990 CanLII 5401 \(BC CA\)](#), 75 D.L.R. (4th) 248; *Toronto Railway Co. v. Toms* (1911), [1911 CanLII 3 \(SCC\)](#), 44 S.C.R. 268; *Bourhill v. Young*, [1943] A.C. 92; *Cooper v. Hobart*, [2001 SCC 79](#), [2001] 3 S.C.R. 537; *Donoghue v. Stevenson*, [1932 CanLII 536 \(FOREP\)](#), [1932] A.C. 562; *Hinz v. Berry*, [1970] 2 Q.B. 40; *McDermott v. Ramadanovic Estate* (1988), [1988 CanLII 2840 \(BC SC\)](#), 27 B.C.L.R. (2d) 45; *Cox v. Fleming* (1995), [1995 CanLII 3127 \(BC CA\)](#), 15 B.C.L.R. (3d) 201; *Mason v. Westside Cemeteries Ltd.* (1996), [1996 CanLII 8113 \(ON SC\)](#), 135 D.L.R. (4th) 361; *Flett v. Maxwell*, [1996] B.C.J. No. 1455 (QL); *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), [1999 CanLII 2863 \(ON CA\)](#), 48 O.R. (3d) 228; *Healey v. Lakeridge Health Corp.*, [2011 ONCA 55](#), 103 O.R. (3d) 401; *Frazer v. Haukioja*, [2010 ONCA 249](#), 101 O.R. (3d) 528; *Kotai v. "Queen of the North" (The)*, [2009 BCSC 1405](#), 70 C.C.L.T. (3d) 221; *Young v. Borzoni*, [2007 BCCA 16](#), 277 D.L.R. (4th) 685; *Graham v.*

MacMillan, 2003 BCCA 90, 15 C.C.L.T. (3d) 155; *Koerfer v. Davies*, [1994] O.J. No. 1408 (QL); *Duwyn v. Kaprielian* (1978), 1978 CanLII 1271 (ON CA), 22 O.R. (2d) 736; *van Soest v. Residual Health Management Unit*, [1999] NZCA 206, [2000] 1 N.Z.L.R. 179; *Sutherland v. Hatton*, [2002] EWCA Civ 76, [2002] 2 All E.R. 1; *Augustus v. Gosset*, 1996 CanLII 173 (SCC), [1996] 3 S.C.R. 268; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Pinch v. Hofstee*, 2015 BCSC 1888; *Zawadzki v. Calimoso*, 2011 BCSC 45; *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199.

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Chiasson and Frankel JJ.A.), [2015 BCCA 393](#), 81 B.C.L.R. (5th) 1, 377 B.C.A.C. 106, 648 W.A.C. 106, 23 C.C.L.T. (4th) 177, 390 D.L.R. (4th) 63, [2016] 4 W.W.R. 259, [2015] B.C.J. No. 2027 (QL), 2015 CarswellBC 2694 (WL Can.), setting aside a decision of Funt J., [2014 BCSC 1365](#), [2014] B.C.J. No. 1898 (QL), 2014 CarswellBC 2133 (WL Can.). Appeal allowed.

Dairn Shane and Joseph Fearon, for the appellant.

Kathleen S. Duffield and Steven W. Lesiuk, for the respondents.

Alan D'Silva and Aaron Kreaden, for the intervener.

The judgment of the Court was delivered by

BROWN J. —

I. Introduction

[1] This appeal, which arises from a motor vehicle accident in British Columbia, concerns principally the application of the common law of negligence to claims for mental injury.

[1] A trial judge awarded damages for mental injury to the appellant, Mohsen Saadati, on the strength not of expert evidence, but of the testimony of lay witnesses to the effect that, after the appellant’s involvement in an automobile accident caused by the respondents, his personality had changed. The British Columbia Court of Appeal reversed, holding that recovery for mental injury requires a claimant to prove, with expert medical opinion evidence, a “recognizable [or recognized] psychiatric illness”.

[2] This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for *physical* injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for *mental* injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 9, for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness. It follows that I would allow the appeal and restore the trial judge’s award.

II. Overview of Facts and Proceedings

A. *Background*

[3] On the night of July 5, 2005, the appellant was driving a tractor-truck along Front Street in New Westminster, British Columbia, when his vehicle was struck by a vehicle driven by the respondent Grant Iain Moorhead. The appellant's truck sustained significant damage, but he appeared at the time to have been uninjured. He went to a nearby hospital, but was not admitted for observation.

[4] This accident ("accident") was the second in a series of five motor vehicle collisions involving the appellant between January 2003 and March 2009, inclusive. The appellant had suffered chronic pain since the first accident, which was later aggravated by the third accident (which occurred on September 17, 2005). In 2007, the appellant sued the respondents in negligence, seeking damages for non-pecuniary loss and past income loss. Two further accidents followed in 2008 and 2009. In 2010, the appellant was declared mentally incompetent and his action was continued by a litigation guardian.

B. *Judicial History*

(1) Supreme Court of British Columbia — [2014 BCSC 1365](#)

[5] The respondents collectively admitted liability for the accident, but took the position that the appellant suffered no damage. Expert evidence was tendered on behalf of the appellant to support his claim of an injury resulting from the accident, much of which the trial judge ruled inadmissible ([2013 BCSC 636](#), 46 B.C.L.R. (5th) 392). After weighing the admissible evidence, he concluded that the appellant had not demonstrated any physical injury resulting from the accident. Citing the test for factual causation stated in *Clements v. Clements*, [2012 SCC 32](#), [2012] 2 S.C.R. 181, at para. 46, however, he did find (at para. 50 (CanLII)) that the accident caused the appellant "psychological injuries, including personality change and cognitive difficulties". While this finding did not rest on an identified medical cause, it was based upon the testimony of friends and family of the appellant to the effect that, after the accident, the appellant's personality changed for the

worse. Once a funny, energetic, and charming individual, he had become sullen and prone to mood swings. Historically close relationships with family and friends had deteriorated. He complained of headaches.

[6] The trial judge further found that the appellant's mental injury was aggravated by the third (September 17, 2005) accident. Applying the principle from *Bradley v. Groves*, 2010 BCCA 361, 326 D.L.R. (4th) 732, he found that the mental injury originally caused by the accident was indivisible from any injury caused by that later accident. Having regard to the appellant's personality change, his loss of close personal relationships with family and friends, his age, and the period involved, the trial judge awarded him \$100,000 for non-pecuniary damage. The claim for past income loss was dismissed.

(2) British Columbia Court of Appeal — 2015 BCCA 393, 81 B.C.L.R. (5th) 1

[7] On appeal, the respondents argued (*inter alia*) that the trial judge erred by awarding damages for mental injury where the appellant had not proven "a medically recognized psychiatric or psychological illness or condition" (para. 22). The Court of Appeal agreed, adding that such an illness or condition must be demonstrated by "expert medical opinion evidence" (para. 32). The law in this regard, it concluded, was left unchanged by this Court's judgment in *Mustapha*.

[8] Further, the Court of Appeal also observed (at para. 34) that, in awarding damages for mental injury, the trial judge erred by "decid[ing] the case on a basis neither pleaded nor argued by [the appellant]". Rather, the trial judge should have notified counsel that he was prepared to consider a claim that had not been pleaded, given the appellant an opportunity to amend his pleadings and, if the amendments were allowed, given the respondents an opportunity to call further evidence and make further submissions.

III. Analysis

A. *Sufficiency of the Pleadings*

[9] Drawing from the Court of Appeal’s statements regarding notice, the respondents argue that the trial judge’s award for mental injury was made in breach of procedural fairness, having no basis in the pleadings or submissions at trial. While I note that the respondents did not argue this point at the Court of Appeal, as the respondents now say and as the Court of Appeal said, cases should not be decided on grounds not raised (*Insurance Corp. of British Columbia v. Patko*, 2008 BCCA 65, 290 D.L.R. (4th) 687, at para. 37; *Rodaro v. Royal Bank of Canada* (2002), 2002 CanLII 41834 (ON CA), 59 O.R. (3d) 74 (C.A.), at para. 60; *Burgsteden v. Long*, 2014 SKCA 115, 378 D.L.R. (4th) 562, at para. 17; *R. v. E.M.W.*, 2011 SCC 31, [2011] 2 S.C.R. 542, at para. 4). This rule is an instance of natural justice: each party is entitled to know and respond to the case that it must answer (*Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343, 298 D.L.R. (4th) 216, at paras. 38-39).

[10] In claims for negligently caused mental injury, it is generally sufficient that the pleadings allege some form of such injury (*Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 74). The appellant’s Statement of Claim alleges various injuries caused by the accident, including:

- h) such further and other injuries as may become apparent through medical reports and examinations, details of which shall be provided as they become known;

and the effects or results of the said injuries upon the Plaintiff include headaches, fatigue, dizziness, nausea and sleeplessness.

(R.R., vol. I, at p. 7)

It also claims “general damages for pain and suffering, loss of earning capacity past, present and future, loss of opportunity, loss of enjoyment of life, loss of physical health . . .” (R.R., vol. I, at p. 7).

[11] At trial, the appellant introduced an expert report from Dr. Hiram Mok, a psychiatrist, who diagnosed the appellant with mental disorders (although it was unclear whether these disorders resulted from the accident or subsequent accidents). The appellant’s written closing

submissions at trial also alleged the occurrence of a psychological reaction to the accident (or in other words a mental injury):

It is submitted that if the court does not accept a proven concussion, the evidence still shows that the Plaintiff suffered from a change in mood/personality, memory loss, and cognitive difficulties as a result of the July 5 2005 accident.

If not caused by a concussion, then it must be caused by something. The only logical conclusion is that these were caused by a psychological reaction to the accident, new pains, or an aggravation of old pains.

...

It is therefore submitted that, on a balance of probabilities, if the court finds that Mohsen did not suffer a concussion, then the only logical conclusion is that Mohsen's problems with memory, cognition and change in behavior arose as a result of the July 2005 accident, which compounded upon the January 2003 accident injuries, and was compounded upon again in the September 2005 accident. [Emphasis added.]

(R.R., vol. I, at p. 285)

A similar line of argument was delivered in the appellant's oral submissions:

Now, the alternative argument, of course, we have is that if you don't find that a concussion has been made out, we submit that there is still evidence that he suffered chronic pain and some kind of emotional reaction, with resulting memory problems and cognitive problems, and change in mood, in the July 2005 accident, which but for the accident he would not have suffered from.

...

We say it's a concussion. . . . But if it's not a concussion, it's some reaction to that accident that may be compounding upon the fact that he was injured in an earlier accident back in January 2003, but something changed in this man. . . . That accident triggered that, either by way of it being a concussion or by some kind of psychological, emotional reaction to everything.

...

. . . Something happened to him that changed him. We say it's a concussion, but if it's not a concussion, it must be some kind of emotional psychiatric reaction, which isn't something that he could control. It clearly just came on him after the accident and caused him to become a changed individual between July and September 2005. And that is clear from the evidence of all of the family members. [Emphasis added.]

(R.R., vol. I, at pp. 190-92)

[12] None of these arguments regarding a “psychological”, “emotional” or “psychiatric” reaction elicited an objection from the respondents before the trial judge. And, in my view, the many allegations of such reaction appearing in the appellant’s oral and written closing submissions, combined with the broad heads of damage alleged in the pleadings, provided ample notice to the respondents of the case which they had to answer. I see no breach of procedural fairness here.

B. *Mental Injury*

[13] Liability in negligence law is conditioned upon the claimant showing (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant’s breach (*Mustapha*, at para. 3). At issue here is the third element. As they argued at the Court of Appeal, the respondents say that the trial judge erred by awarding damages for mental injury that did not correspond to a proven, recognized psychiatric illness. More specifically, the Court must answer the narrow question of whether it is strictly *necessary*, in order to support a finding of legally compensable mental injury, for a claimant to adduce expert evidence or other proof of a recognized psychiatric illness.

(1) Recovery for Mental Injury in Negligence Law

[14] The early common law’s posture towards claims for negligently caused mental harm was one of suspicion and sometimes outright hostility (*McLoughlin v. O’Brian*, [1983] 1 A.C. 410 (H.L.), at p. 433), and was “virtually programmed to entrench primitive suspicions and prejudices about ‘invisible’, intangible harm” (H. Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (2009), at p. 40). Mental injury was seen as “not derived through the senses, but [as] a product of the imagination” (*Miner v. Canadian Pacific Railway Co.* (1911), 1910 CanLII 340 (AB CA), 18 W.L.R. 476 (Alta. S.C. *en banc*), at p. 478). This scepticism persisted into the last century, such that mental injury was not compensable unless accompanied by

physical injury (see L. Bélanger-Hardy, “Reconsidering the ‘Recognizable Psychiatric Illness’ Requirement in Canadian Negligence Law” (2013), 38 *Queen’s L.J.* 583, at pp. 599-600).

[15] While the absolute bar to recovery for mental injury absent physical injury was eventually lifted, the suspicion which originally impelled that bar persisted, and common law courts continued to impose conditions upon recovery beyond those applied to claims for negligently caused physical injury. While, therefore, in England liability for negligently caused mental injury was first recognized as early as 1901 (*Dulieu v. White & Sons*, [1901] 2 K.B. 669 (Div. Ct.)), it was conditional upon “a shock which arises from a reasonable fear of immediate personal injury to oneself” (p. 675), or (after *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141 (C.A.)), “a reasonable fear of immediate personal injury either to [the claimant, or the claimant’s children]” (p. 152). While recovery for mental injury in Canada remained parasitic to recovery for compensable physical injury well into the 20th century (e.g. *Miner*), by mid-century Canadian courts had also begun to permit recovery on similar conditions as English law — typically, on claimants having had at the material time a reasonable fear of physical injury to themselves or to their family (e.g. *Horne v. New Glasgow*, [1953 CanLII 335 \(NS SC\)](#), [1954] 1 D.L.R. 832 (N.S.S.C.)).

[16] Further obstacles to recovery for mental injury arose in English law. In *McLoughlin v. O’Brian*, at pp. 419-21, Lord Wilberforce posited three considerations that could limit the boundaries of compensable “nervous shock”: the class of persons whose claims should be recognized (often referred to as relational proximity), the proximity of such persons to the accident (locational, or geographical proximity), and the means by which the “shock” is caused (temporal proximity) (G. H. L. Fridman, *The Law of Torts in Canada* (3rd ed. 2010), at p. 326). Where claimants alleged mental injury arising out of a sudden traumatic event, later judgments further distinguished between a “primary” victim (who was directly involved as a participant) and a “secondary” victim (who witnessed physical injuries caused to others) (see *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310 (H.L.); and *Page v. Smith*, [1996] 1 A.C. 155 (H.L.)). This distinction has, however, sometimes proven difficult to apply in practice (as shown by the English law’s difficulty in categorizing the status of rescuers — see *White v. Chief*

Constable of South Yorkshire Police, [1999] 2 A.C. 455 (H.L.)), and has been criticized as lacking foundation in principle, having no relevance to the justice of the claimant's case (A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 405-7; J. Stapleton, "In Restraint of Tort", in P. Birks, ed., *The Frontiers of Liability* (1994), vol. 2, 83, at p. 95; *Mustapha v. Culligan of Canada Ltd.* (2006), [2006 CanLII 41807 \(ON CA\)](#), 84 O.R. (3d) 457 (C.A.), at para. 43). That this is so has never really been disputed. As Lord Hoffmann candidly acknowledged in *White*, "in this area of the law, the search for principle was called off in *Alcock* No one can pretend that the existing law . . . is founded upon principle."

[17] Other Commonwealth courts have taken a different path. The High Court of Australia expressly rejected the categories delineated by the House of Lords, preferring a more flexible foreseeability of harm test (*Tame v. New South Wales*, [2002] HCA 35, 211 C.L.R. 317). In New Zealand, the primary/secondary victim distinction has not been definitively considered (S. Todd et al., *The Law of Torts in New Zealand* (5th ed. 2009), at pp. 182-84).

[18] Like the English courts, Canadian courts have occasionally struggled, as Professor Klar has described, "to find words which can clearly explain why, on the basis of arbitrary *policy* choices, certain types of claims seem to be too remote and uncompensable" (L. N. Klar, *Tort Law* (5th ed. 2012), at p. 505 (emphasis in original)). In *Beecham v. Hughes* (1988), [1988 CanLII 2839 \(BC CA\)](#), 27 B.C.L.R. (2d) 1 (C.A.), and *Rhodes v. Canadian National Railway* (1990), [1990 CanLII 5401 \(BC CA\)](#), 75 D.L.R. (4th) 248 (B.C.C.A.), for example, the multi-faceted proximity analysis formalized in *McLoughlin v. O'Brian* found favour. In *Beecham*, Lambert J.A. wrote (at p. 43):

. . . I would not put the entire emphasis on "causal proximity", to the exclusion of "temporal proximity", "geographical proximity" or "emotional proximity". I would try to balance them all. A close but foreseeable emotional bond, as between a parent and child, may compensate, in the determination of the composite answer on liability, for a more remote causal proximity, as where the parent is not present when the child is injured.

[19] This Court has not, however, adopted either the primary/secondary victim distinction, or *McLoughlin v. O'Brian*'s disaggregated proximity analysis. Rather, in *Mustapha*, recoverability of mental injury was viewed (at para. 3) as depending upon the claimant satisfying the criteria applicable to any successful action in negligence — that is, upon the claimant proving a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true “damage” qualifying as mental injury, which is “serious and prolonged” and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury (*Mustapha*, at para. 9); and not all mental injury is caused, in fact or in law, by the defendant's negligent conduct.

[20] Indeed, the claim in *Mustapha* failed on that last element: the claimant's damage was not caused in law by (that is, it was too remote from) the defendant's breach. *Mustapha* thus serves as a salutary reminder that, even where a duty of care, a breach, damage and factual causation are established, there remains the pertinent threshold question of legal causation, or remoteness — that is, whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16). And, just as recovery for physical injury will not be possible where injury of that kind was not the foreseeable result of the defendant's negligence, so too will claimants be denied recovery (as the claimant in *Mustapha* was denied recovery) where mental injury could not have been foreseen to result from the defendant's negligence.

[21] It follows that this Court sees the elements of the cause of action of negligence as furnishing principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury. The view that courts should require something more is founded not on legal principle, but on policy — more particularly, on a collection of concerns regarding claims for mental injury (including those advanced in this appeal by the intervener Insurance Bureau of

Canada) founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is “subjective” or otherwise easily feigned or exaggerated; and that the law should not provide compensation for “trivial matters” but should foster the growth of “tough hides not easily pierced by emotional responses” (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 449; R. Mulheron, “Rewriting the Requirement for a ‘Recognized Psychiatric Injury’ in Negligence Claims” (2012), 32 *Oxford J. Leg. Stud.* 77, at p. 82). The stigma faced by people with mental illness, including that caused by mental injury, is notorious (J. E. Gray, M. Shone and P. F. Liddle, *Canadian Mental Health Law and Policy* (2nd ed. 2008), at pp. 139 and 300-301), often unjustly and unnecessarily impeding their participation, so far as possible, in civil society. While tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them.

[22] Where, therefore, genuine factual uncertainty arises regarding the worthiness of a claim, this can and should be addressed by robust application of those elements by a trier of fact, rather than by tipping the scales via arbitrary mechanisms (R. Stevens, *Torts and Rights* (2007), at p. 56). Certainly, concerns about “subjective” symptoms or about feigned or exaggerated claims of mental injury are — like most matters of credibility — questions of fact best entrusted to the good sense of triers of fact, upon whose credibility determinations of liability and even of liberty often rest. In short, such concerns should be resolved by “a vigorous search for the truth, not the abdication of judicial responsibility” (Linden and Feldthusen, at p. 449; see also *Toronto Railway Co. v. Toms* (1911), [1911 CanLII 3 \(SCC\)](#), 44 S.C.R. 268, at p. 276; Stevens, at p. 56).

[23] I add this. As to that first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the Court’s decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one’s mental health. That right is grounded in the simple truth that a person’s mental health — like a person’s physical integrity or property, injury to which is also compensable in negligence law — is an essential means by which that person chooses to live life and pursue goals (A. Ripstein, *Private Wrongs* (2016), at pp. 87 and 252-53). And, where mental

injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury (*Bourhill v. Young*, [1943] A.C. 92 (H.L.), at p. 103; *Toronto Railway*, at p. 276). To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger" (Stevens, at p. 55).

[24] It is also implicit in *Mustapha* that the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury. With great respect to courts that have expressed contrary views, it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity, as was done in *McLoughlin v. O'Brian*. Certainly, "temporal", "geographic" and "relational" considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the "close and direct" relationship which is the hallmark of the common law duty of care (*Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 32, citing *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.), at pp. 580-81). As the Court has said, that analysis

focuses on factors arising from the relationship between the plaintiff and the defendant. . . .

. . .

As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165, at para. 24, *per* La Forest J.:

The label "proximity", as it was used by Lord Wilberforce in [*Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)], was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

(*Cooper*, at paras. 30 and 33 (emphasis in original))

(2) Recognized Psychiatric Illness

[25] As I have already said, the principal issue presented by this appeal — and, in particular, by the Court of Appeal’s conclusion that the appellant’s claim failed for lack of expert evidence demonstrating a recognized psychiatric illness — concerns the element of the cause of action of negligence requiring the claimant to show damage. More specifically, it requires the Court to consider what constitutes mental injury, and how it may be proven.

[26] The origins of the putative requirement of showing a recognized psychiatric illness appear to lie in Lord Denning M.R.’s speech in *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42:

In English law no damages are awarded for grief or sorrow caused by a person’s death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for a recognisable psychiatric illness caused by the breach of duty by the defendant.

This statement has been reiterated, albeit with some variation as to terminology. In *McLoughlin v. O’Brian*, at p. 431, for example, Lord Bridge described this hurdle as requiring “a positive psychiatric illness”. It has also been variously referred to as a “genuine”, “recognized” or “recognizable” psychiatric illness (Mulheron, at p. 81).

[27] Howsoever the term is phrased, it is far from clear on the text of *Hinz v. Berry* that it was intended to impose upon claimants the burden of showing a positive expert diagnosis. At the very least, it is not obvious that *Hinz v. Berry* sought to download to expert psychiatric witnesses the trier of fact’s task of determining whether the claimant sustained mental injury (Teff, at p. 53; Bélanger-Hardy, at pp. 607-11). The respondents’ submission, therefore — that, by “recognizable psychiatric illness”, it was intended that mental injury be “recognizable” to a psychiatrically trained expert witness, and not to an ordinary witness — is founded upon a shaky premise.

[28] Despite some early resistance, however (e.g. *McDermott v. Ramadanovic Estate* (1988), [1988 CanLII 2840 \(BC SC\)](#), 27 B.C.L.R. (2d) 45 (S.C.); *Rhodes*, per Southin J.A., concurring; *Cox v. Fleming* (1995), [1995 CanLII 3127 \(BC CA\)](#), 15 B.C.L.R. (3d) 201 (C.A.); *Mason v. Westside Cemeteries Ltd.* (1996), [1996 CanLII 8113 \(ON SC\)](#), 135 D.L.R. (4th) 361

(Ont. C.J. (Gen. Div.)); *Flett v. Maxwell*, [1996] B.C.J. No. 1455 (QL) (Prov. Ct. (Civ. Div.)), Canadian trial and appellate courts after *Hinz v. Berry* began to see the requirement of a “recognizable psychiatric illness” as conditioning recovery for mental injury upon the claimant adducing expert testimony verifying a condition *recognizable to the expert* (e.g. *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), [1999 CanLII 2863 \(ON CA\)](#), 48 O.R. (3d) 228 (C.A.), at paras. 65-67; *Healey v. Lakeridge Health Corp.*, [2011 ONCA 55](#), 103 O.R. (3d) 401; *Frazer v. Haukioja*, [2010 ONCA 249](#), 101 O.R. (3d) 528; *Kotai v. “Queen of the North” (The)*, [2009 BCSC 1405](#), 70 C.C.L.T. (3d) 221; *Young v. Borzoni*, [2007 BCCA 16](#), 277 D.L.R. (4th) 685; *Graham v. MacMillan*, [2003 BCCA 90](#), 15 C.C.L.T. (3d) 155; *Koerfer v. Davies*, [1994] O.J. No. 1408 (QL) (C.A.); *Duwyn v. Kaprielian* (1978), [1978 CanLII 1271 \(ON CA\)](#), 22 O.R. (2d) 736 (C.A.)). Similarly, despite some resistance elsewhere in the Commonwealth to restricting recovery for mental injury to claimants who can adduce such expert psychiatric evidence (N. J. Mullany and P. R. Handford, *Tort Liability for Psychiatric Damage* (1993), at p. 21), this threshold now prevails in the United Kingdom, Australia, and New Zealand (*White*, at p. 491; *Tame*, at paras. 193-94; *van Soest v. Residual Health Management Unit*, [1999] NZCA 206, [2000] 1 N.Z.L.R. 179, at para. 65).

[29] In sum — and this is the state of the law which this Court must now evaluate — the law developed by Canadian lower courts (albeit, as I have mentioned, on an unstable premise) requires claimants alleging mental injury to show that such injury has manifested itself to an expert in psychiatry in the form of a clinically diagnosed, recognizable psychiatric illness. This has therefore “place[d] the categories of mental and emotional harm for which damages may be recovered in the hands of psychiatry. Whatever that discipline chooses to identify and name as a psychiatric illness becomes the law’s boundaries for damages in this area” (*van Soest*, at p. 205, per Thomas J., dissenting).

[30] Usually, this has been done with reference to what has been said to represent a “considerable degree of international agreement on the classification of mental disorders and their diagnostic criteria”, which are contained in the *Diagnostic and Statistical Manual of Mental Disorders* (“DSM”), published by the American Psychiatric Association, and the *International*

Statistical Classification of Diseases and Related Health Problems (“ICD”), published by the World Health Organization (Mulheron, at p. 78, citing *Sutherland v. Hatton*, [2002] EWCA Civ 76, [2002] 2 All E.R. 1, per Hale L.J. (as she then was); see also Bélanger-Hardy, at p. 586). The DSM, now in its 5th edition (2013), stipulates diagnostic criteria for, and classifies, mental disorders, while the ICD, now in its 10th revision (1992), contains statistically based classifications of all diseases (including “mental and behavioural disorders”).

[31] Confining compensable mental injury to conditions that are identifiable with reference to these diagnostic tools is, however, inherently suspect as a matter of legal methodology. While, for treatment purposes, an accurate diagnosis is obviously important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects (Mulheron, at p. 88). Put simply, there is no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme. As Thomas J. observed in *van Soest* (at para. 100), a negligent defendant need only be shown to have foreseen *injury*, and not a *particular psychiatric illness* that comes with its own label. In other words, the trier of fact’s inquiry should be directed to the level of harm that the claimant’s particular symptoms represent, not to whether a label could be attached to them. Downloading the task of assessing legally recoverable mental injury to the DSM and ICD therefore imports an arbitrary control mechanism upon recovery for mental injury, conditioning recovery not upon any legally principled basis directed to the alleged *injury*, but upon conformity with a legally irrelevant classification scheme designed to facilitate identification of *particular conditions* (L. Bélanger-Hardy, “Thresholds of Actionable Mental Harm in Negligence: A Policy-Based Analysis” (2013), 36 *Dal. L.J.* 103, at pp. 113-15; Mulheron, at pp. 87-88).

[32] Resort to the DSM or ICD in the context of litigating claims for mental injury has been variously rationalized as fostering objectivity, certainty and predictability of outcomes; and as preventing “indeterminate liability” (*Tame*, at paras. 193-94; *Healey*, at para. 65; *Queen of the North*, at para. 68). These rationalizations, however, do not withstand scrutiny. In particular, the putative objectivity, certainty and predictability said to be furnished by the recognizable psychological illness requirement are in my view overstated. Psychiatric diagnoses — like

diagnoses of physical illness or injury — can sometimes be controversial even among treating practitioners (M. A. Jones, “Liability for Psychiatric Damage: Searching for a Path between Pragmatism and Principle”, in J. W. Neyers, E. Chamberlain and S. G. A. Pitel, eds., *Emerging Issues in Tort Law* (2007), 113, at p. 131). The categories identified in the DSM are, therefore, not static, and continue to be revised to reflect evolving psychiatric consensus on the classification of psychiatric disorders. Labels that were at one time widely accepted may become obsolete. The DSM (DSM-II), for example, identified homosexuality as a psychiatric disorder until 1973, after which it continued to identify “sexual orientation disturbance” for people “in conflict with” their sexual orientation. This was later replaced in the DSM-III with “ego-dystonic homosexuality”, which was itself removed in 1987 (J. Drescher, “Out of DSM: Depathologizing Homosexuality” (2015), 5 *Behav. Sci.* 565, at p. 571). The ICD retained homosexuality in its classification until 1990, and continues to identify ego-dystonic homosexuality as a recognized condition (although in 2014 the World Health Organization recommended its removal from its 11th revision, now in development) (S. Cochran et al., “Proposed declassification of disease categories related to sexual orientation in the *International Statistical Classification of Diseases and Health Related Problems* (ICD-11)” (2014), 92 *Bull. World Health Organ.* 672).

[33] Conversely, potential disorders originally excluded from the DSM may be “legitimized” by later inclusion. For example, “post-traumatic stress disorder” first appeared in the DSM (DSM-III) in 1980. And, with the publication of the DSM-IV, it no longer required “a psychologically traumatic event that is generally outside the range of usual human experience” (Jones, at p. 132). Similarly, the release of the 5th edition of the DSM (DSM-V) was preceded by a debate about the inclusion of grief as a psychiatric condition (R. A. Bryant, “Grief as a psychiatric disorder” (2012), 201 *Brit. J. Psychiatry* 9, at pp. 9-10). Rather than fostering objectivity, certainty and predictability of outcomes, then, tethering determinations of legal liability to these iterative diagnostic tools relegates the law of negligence to following a sometimes meandering path as it is cleared by the cutting edge of *au courant* thinking in modern psychiatry — wherever it may lead, or from wherever it may retreat.

[34] The view that a recognizable psychiatric illness requirement is necessary to prevent indeterminate liability, advanced before us by the respondents and the Insurance Bureau of Canada, is similarly untenable. [Article 1457](#) of the *Civil Code of Québec* imposes a liability rule binding defendants “to make reparation for the injury, whether it be bodily, moral or material in nature” (see, e.g., *Augustus v. Gosset*, [1996 CanLII 173 \(SCC\)](#), [1996] 3 S.C.R. 268, at para. 27). And yet, our attention has not been drawn to any instances where Quebec courts imposed liability that was in some way “indeterminate”. Further, and as I have explained is the case with unmeritorious or trivial claims for negligently caused mental injury, robust application of the elements of the cause of action of negligence should also be sufficient to address concerns for indeterminate liability. In particular, liability for mental injury must be confined to claims which satisfy the proximity analysis within the duty of care framework, which focuses on the relationship between the parties (*Cooper*, at para. 30), and the remoteness inquiry, which asks whether “the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable” (*Mustapha*, at para. 12, quoting Linden and Feldthusen, at p. 360). We have been given no reason to suppose that the same sort of constraints which negligence law imposes upon claimants alleging physical injury would be less effective in weeding out unworthy claims for mental injury. It is therefore not only undesirable, but unnecessary to distort negligence law by applying the mechanism of a diagnostic threshold for proving mental injury.

[35] In short, no cogent basis has been offered to this Court for erecting distinct rules which operate to preclude liability in cases of mental injury, but not in cases of physical injury. Indeed, there is good reason to recognize the law of negligence as already according each of these different forms of personal injury — mental and physical — identical treatment. As the Court observed in *Mustapha* (at para. 8), the distinction between physical and mental injury is “elusive and arguably artificial in the context of tort”. Continuing (and citing *Page v. Smith*, at p. 188), the Court explained that, “[i]n an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may . . . soon be altogether outmoded. Nothing will be gained by treating them as different ‘kinds’ of personal injury, so as to require the application of different tests in law” (emphasis in original; see also S. Deakin, A. Johnston and B. Markesinis, *Markesinis*

and *Deakin's Tort Law* (7th ed. 2013), at p. 124). This is entirely consistent with the Court's longstanding view, expressed over a century ago, by Fitzpatrick C.J. in *Toronto Railway*, at pp. 269-70:

It would appear somewhat difficult to distinguish between the injury caused to the human frame by the impact and that resulting to the nervous system in consequence of the shock The nature of the mysterious relation which exists between the nervous system and the passive tissues of the human body has been the subject of much learned speculation, but I am not aware that the extent to which the one acts and reacts upon the other has yet been definitely ascertained. . . . I cannot find the line of demarcation between the damage resulting to the human [body] . . . and that which may flow from the disturbance of the nervous system The latter may well be the result of a derangement of the relation existing between the bones, the sinews, the arteries and the nerves. In any event the resultant effect is the same. The victim is incapacitated

Or, as Davies J. (as he then was) added in *Toronto Railways* (at p. 275), “[t]he nervous system is just as much a part of man’s physical being as the muscular or other parts”. In a similar vein, Lord Macmillan, in *Bourhill v. Young* (at p. 103), said “[t]he distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer’s system.”

[36] It follows that requiring claimants who allege one form of personal injury (mental) to prove that their condition meets the threshold of “recognizable psychiatric illness”, while not imposing a corresponding requirement upon claimants alleging another form of personal injury (physical) to show that their condition carries a certain classificatory label, is inconsistent with prior statements of this Court, among others. It accords unequal — that is, less — protection to victims of mental injury. And it does so for no principled reason (Beever, at p. 410). I would not endorse it.

[37] None of this is to suggest that mental injury is always as readily demonstrable as physical injury. While allegations of injury to muscular tissue may sometimes pose challenges to triers of fact, many physical conditions such as lacerations and broken bones are objectively verifiable. Mental injury, however, will often not be as readily apparent. Further, and as *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*. While,

therefore, tort law protects persons from negligent interference with their mental health, there is no legally cognizable right to happiness. Claimants must, therefore, show much more — that the disturbance suffered by the claimant is “serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears” that come with living in civil society (*Mustapha*, at para. 9). To be clear, this does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes “mental injury”. Ultimately, the claimant’s task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness).

[38] Nor should any of this be taken as suggesting that expert evidence cannot assist in determining whether or not a mental injury has been shown. In assessing whether the claimant has succeeded, it will often be important to consider, for example, how seriously the claimant’s cognitive functions and participation in daily activities were impaired, the length of such impairment and the nature and effect of any treatment (Mulheron, at p. 109). To the extent that claimants do not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short. As Thomas J. observed in *van Soest* (at para. 103), “[c]ourts can be informed by the expert opinion of modern medical knowledge”, “without needing to address the question whether the mental suffering is a recognisable psychiatric illness or not”. To be clear, however: while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused *any* mental injury, or at least any mental injury known to psychiatry. While, for the reasons I have given, the lack of a diagnosis cannot on its own be dispositive, it is something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.

[39] The trial judge found that the accident caused the appellant to suffer “psychological injuries, including personality change and cognitive difficulties” (para. 50) such as slowed speech, leading to a deterioration of his close personal relationships with his family and friends. He remarked (at para. 65) that the appellant “was a changed man with his irritability likely reflecting a dark realization that he was not the man he once was”. These findings have not been challenged. And, as findings of fact, they are entitled to appellate deference, absent palpable and overriding error (*Housen v. Nikolaisen*, [2002 SCC 33](#), [2002] 2 S.C.R. 235, at para. 10).

[40] I see no legal error in the trial judge’s treatment of the evidence of the appellant’s symptoms as supporting a finding of mental injury. Those symptoms fit well within the *Mustapha* parameters of mental injury which I have already recounted. While there was no expert testimony associating them with a condition identified in the DSM or ICD, I reiterate that what matters is substance — meaning, those symptoms — and not the label. And, the evidence accepted by the trial judge clearly showed a serious and prolonged disruption that transcended ordinary emotional upset or distress.

IV. Conclusion and Disposition

[41] I would allow the appeal, with costs in this Court and in the courts below.

[42] The respondents seek to have the matter returned to the Court of Appeal for determination of their alternative grounds of appeal before that court — that the trial judge erred in finding that the mental injury caused by the accident was indivisible from any injury arising from the third accident; and that the damage award was excessive. I would, instead, restore the trial judge’s award.

[43] The (in)divisibility of two injuries is a question of fact (*Bradley*, at paras. [32 and 37](#)). Here, the trial judge found that “the cause of the change to the plaintiff’s personality and his cognitive difficulties cannot be divided based on the events before and after September 17, 2005” (para. 58). That finding, which was open to him to make on this record, is entitled to deference.

The respondents now argue that the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, “serves to sever the case even in the context of an indivisible injury”, “because the [Act] creates a complete scheme and bars compensation” (transcript, at p. 82). This argument, based on an interpretation of s. 10 of the *Workers Compensation Act*, was made briefly in oral argument at trial (see R.R., vol. I, at pp. 253-54), but did not appear in their written submissions. While this argument appears to have found support in *Pinch v. Hofstee*, 2015 BCSC 1888, it was not dealt with by the trial judge in this case. For whatever reason, the respondents did not raise it at the Court of Appeal or in their factum filed at this Court. It was revived only in their oral submissions before us. Without endorsing or rejecting the reasoning in *Pinch*, I observe that, without full submissions and a pertinent lower court record, this is not an appropriate circumstance to decide the effect of workers’ compensation legislation on the divisibility of injuries.

[44] As to the quantum of the award, I note that both accidents at the root of this appeal occurred nearly 12 years ago, and that the litigation — in which the respondents have admitted liability — is now (as of this month) fully 10 years old. Further, the modest award in this case is not out of step with non-pecuniary damage awards from British Columbia courts for injuries causing personality changes and cognitive difficulties with similar consequences upon the plaintiff’s enjoyment of life (e.g. *Zawadzki v. Calimoso*, 2011 BCSC 45).

[45] The Court’s power to remand to a court of appeal is discretionary (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 46.1; *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199, at para. 68). The passage of time since the acknowledged wrong against Mr. Saadati and the commencement of these proceedings militates against remand. As in *Wells*, the damages assessed by the trial judge are reasonable, supported by the record, and fairly compensate the appellant’s loss. I conclude, therefore, that it would not “be just in the circumstances” (s. 46.1) to remand this matter to the Court of Appeal.

Appeal allowed with costs throughout.

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Solicitor for the respondents: Intact Insurance Company, Vancouver.

Solicitors for the intervener: Stikeman Elliott, Toronto.

[1] Legal nomenclature describes this kind of injury variously: for example, as “nervous shock” (see L. N. Klar, *Tort Law* (5th ed. 2012), at p. 498); or “mental injury” (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114; L. Bélanger-Hardy, “Reconsidering the ‘Recognizable Psychiatric Illness’ Requirement in Canadian Negligence Law” (2013), 38 *Queen’s L.J.* 583, at p. 586); or “psychological injury” (see Bélanger-Hardy, at p. 584); or “psychiatric damage” (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 447), or “psychiatric injury” (*Mustapha*). For his part, the trial judge employed the term “psychological injury”, while the Court of Appeal referred to “psychiatric or psychological illness”. While there may be meaningful distinctions among these terms within the relevant disciplines, for the purpose of deciding the general bounds of recoverability in law, no legal significance attaches to the particular term used. For the sake of clarity, however, I refer to the injury alleged here as “mental injury”.

TAB 45

TAB 46

R. v. Tsekouras, 2017 ONCA 290 (CanLII)

Source: Court of Appeal for Ontario
Date: 2017-04-11
File number: C60103
Other citations: 353 CCC (3d) 349 — 139 WCB (2d) 144 —
378 CRR (2d) 243 — [2017] OJ No 1768 (QL)
Citation: R. v. Tsekouras, 2017 ONCA 290 (CanLII),
<<https://canlii.ca/t/h34nj>>, retrieved on 2026-03-23

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Tsekouras, 2017 ONCA 290
DATE: 20170411
DOCKET: C60103

Strathy C.J.O., Weiler and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

John Tsekouras

Appellant

Joseph S. Wilkinson, for the appellant

Stephen Dawson, for the Crown

Heard: September 6-7, 2016

On appeal from the conviction entered on March 5, 2015 by Justice John deP. Wright of the Superior Court of Justice, sitting without a jury, with reasons reported at [2015 ONSC 1470](#).

Watt J.A.:

[1] Project Dolphin was in its final few days. But some unfinished business remained. Searches. Seizures. Arrests. The dismantling of a drug trafficking enterprise.

[2] On takedown day investigators coordinated their activities. Searches, seizures and arrests were to take place simultaneously.

[3] For some time, police had suspected John Tsekouras was the person in charge of this organization. But their suspicions fell short of what was required to arrest Tsekouras. So investigators watched John Tsekouras. Very closely. What he did. Where he went. Whom he met. To whom he spoke.

[4] When John Tsekouras took some documents out of one vehicle and put them into another, investigators changed their minds. No more surveillance. It was time to make an arrest.

[5] John Tsekouras had his Blackberry in his hand. An officer approached Tsekouras. Gun drawn, but pointed downward. Tsekouras took the battery out of his Blackberry and threw the device when ordered to the ground by the officer.

[6] The reasons for the arrest are not entirely clear. Perhaps, it was for attempting to obstruct justice. Or maybe it was for possession of the proceeds of crime. What is clear is that John Tsekouras did not remain under arrest for long. A senior officer arrived and directed that Tsekouras be released immediately and unconditionally. And so John Tsekouras went on his way.

[7] Among the things taken from John Tsekouras incidental to his arrest were two Blackberry devices. Neither the one he had thrown down, nor the other one seized from his vehicle, were returned. Police told John Tsekouras that they wanted to search the Blackberry devices. And depending on what investigators found during their search, they told Tsekouras, the charge on which he had been arrested and released may be "revisited".

[8] A few months later, police did search the contents of the Blackberry Tsekouras had thrown to the ground. What they found became a critical part of the case against Tsekouras at his trial on several preliminary and substantive drug offences. And the authority relied upon to harvest the contents of the Blackberry became a central focus of the trial and the appeal to this court from convictions that were entered at trial.

[9] These reasons explain why I would dismiss John Tsekouras' appeal despite the investigative missteps made in the collection of this evidence adduced at trial.

THE BACKGROUND FACTS

[10] The grounds of appeal advanced do not command protracted reference to the evidence adduced at trial. However, what is required is a review of the manner in which the evidentiary cornucopia located in the Blackberry was collected by investigators.

Project Dolphin

[11] Project Dolphin was a joint forces investigation into drug trafficking in Thunder Bay and elsewhere in Canada. The police services involved included the Royal Canadian Mounted Police ("RCMP"), the Ontario Provincial Police ("OPP"), and the Thunder Bay Police Service ("TBPS").

[12] The targets of Project Dolphin included John Tsekouras, Frank Muzzi and Salvatore Larizza. The drugs involved were marijuana and cocaine. In the course

of the investigation, police also seized oxycodone. The RCMP was conducting a joint proceeds of crime investigation.

[13] The principal transactions with which the investigators were concerned were the planned purchase of two kilograms of cocaine by Tsekouras and Keith Ritchie from a person known as "Penguin" and 18 pounds of marijuana and one kilogram of cocaine left by Frank Muzzi in Salvatore Larizza's garage with Larizza's agreement.

The Case for the Crown

[14] The case for the Crown at trial included evidence of:

- i. messages found on Tsekouras' Blackberry seized incident to his arrest and retained by police after his unconditional release without formal charge;
- ii. the hearsay statement of Salvatore Larizza admitted under the principled exception to the hearsay rule after Larizza's death prior to trial; and
- iii. the guilty plea and accompanying agreed statement of facts on which it was based in the prosecution of Frank Muzzi.

Takedown Day

[15] The investigative plan for takedown day for Project Dolphin included the execution of warranted searches, the seizures of controlled substances and related paraphernalia and the arrests of some of the participants in the drug trafficking enterprise.

[16] The investigative plan for takedown day for John Tsekouras consisted of surveillance of Tsekouras and his family contemporaneously with searches of several properties with which Tsekouras was associated. The simple fact was that

police lacked reasonable grounds to arrest Tsekouras, although they suspected he was the head of the drug trafficking organization they were investigating.

The Arrest of John Tsekouras

[17] When surveillance officers saw John Tsekouras remove a box of papers from one parked vehicle and put it into another occupied by some of his family members, they decided to stop him.

[18] A police officer approached Tsekouras on foot, his gun drawn but pointed downward and at his side. Tsekouras had a Blackberry in his hand. As the officer approached, he told Tsekouras to get down on the ground. Tsekouras took the battery out of his Blackberry and threw it on the ground. As the officer took Tsekouras to the ground, Tsekouras threw his Blackberry on the ground.

[19] The officer arrested Tsekouras. Incidental to the arrest, officers seized the Blackberry on the ground; a second Blackberry from Tsekouras' vehicle; and two amounts of cash.

[20] A few moments later, one of the senior investigating officers arrived at the scene of Tsekouras' arrest. He directed that Tsekouras be released unconditionally. And this was done.

The Blackberry is Retained

[21] Despite Tsekouras' unconditional release, police kept the Blackberry seized incident to his arrest. They also kept the second Blackberry seized on the same basis from Tsekouras' vehicle.

[22] A police officer told Tsekouras that they (the police) would be keeping both Blackberrys to examine them. If they found any evidence during their examination, the officer told Tsekouras they (the police) would "revisit" the obstruct justice charge.

The Initial Examination of the Blackberry

[23] An officer of the TBPS attempted to examine Tsekouras' Blackberry. The device was locked and password protected. The officer lacked the capacity to examine the Blackberry.

[24] The Blackberry that was seized from Tsekouras' vehicle was not password protected. A review of the contents by TBPS revealed nothing relevant for the purposes of the investigation. No further mention need be made of this phone.

The Request for Further Examination

[25] The password protected Blackberry seized from Tsekouras was one of several electronic devices officers of TBPS had seized on takedown day. They wanted these devices examined, their data harvested and an analysis conducted. Since TBPS lacked the capacity to gain access to and analyze the data on the locked devices, these devices were sent to the RCMP laboratory to open the encryption and to recover the documents.

[26] The RCMP laboratory required completion of a form to accompany any device sent to their lab for examination and analysis. Among other things, the form required the submitting police agency to state the legal authority for the examination and analysis sought. Search warrants accompanied every device but one – the Blackberry of John Tsekouras.

[27] The authority relied upon to permit the examination and analysis of Tsekouras' Blackberry was a decision of a judge of the Superior Court of Justice. This authority – *R. v. McTavish* (8 December 2010), CR-09-00003591-00 (Ont. S.C.J.) – was said to permit examination and analysis of the contents of an electronic device seized as incident to an arrest. On the *Charter* application to exclude the evidence, it was agreed that this decision did not authorize the search.

[28] Over the next several months, the RCMP laboratory proceeded to decrypt the device and harvest its contents as requested by TBPS.

The Larizza Defection

[29] Salvatore Larizza was in a tight spot. Project Dolphin investigators had searched his garage. There, they found 18 pounds of marijuana and 1 kilogram of cocaine. He was charged with several drug offences, but released from custody. The conditions on which Larizza had been released included house arrest, a term that chafed on him.

[30] Larizza along with his counsel approached Project Dolphin investigators. Larizza had decided to cooperate with the investigators. About six months after takedown day, he provided a *KGB* statement that implicated Muzzi in delivery of the drugs found in his (Larizza's) garage. The delivery occurred the night before takedown day.

[31] As a result of Larizza's statement, Frank Muzzi was arrested on several charges arising out of the seizure made at Larizza's garage.

[32] The Crown consented to the variation Larizza requested in his release terms after the *KGB* statement had been completed.

The Data Return

[33] A month after Larizza's *KGB* statement, about seven months after takedown day, TBPS received the data the RCMP had harvested from Tsekouras' Blackberry. An officer, whose task it had been to prepare informations to obtain (ITOs) for the search warrants for Project Dolphin, discovered that no warrant had accompanied Tsekouras' Blackberry when it had been sent to the RCMP lab.

[34] Analysis of the data sent to TBPS was suspended until a search warrant could be obtained. The purpose of the warrant was to authorize a re-search of the

Blackberry and a second harvest of its data. But this could not be done because of the effect of the first search on the Blackberry.

[35] TBPS continued their analysis of the original data from the Blackberry. Two months later, they completed their task.

The Reports to a Justice

[36] About one month after the initial seizure of Tsekouras' Blackberry, an officer from TBPS completed a Report to a Justice in Form 5.2 as required by s. 489.1 of the *Criminal Code*. In accordance with what was then the practice in Thunder Bay, the officer put the report in the Court Services mail slot to be sent to the offices of the justice of the peace for signature. About 90 days later, and periodically thereafter, the officer sent applications for further detention as required by s. 490(2) of the *Criminal Code*. He forwarded these applications in the same manner by leaving them in the Court Services mail slot for delivery to a justice of the peace.

[37] The officer who completed the applications for further detention under s. 490(2) was unaware of the notice requirement in the section. No notice was given to John Tsekouras on any of the three occasions on which the extensions were sought. The officer was also unaware that a search warrant had been issued later for Tsekouras' Blackberry.

[38] About 18 months later, investigators found out that 49 Reports to a Justice required for Project Dolphin searches never reached a justice of the peace. These reports were never signed.

The Arrest of John Tsekouras

[39] About ten months after takedown day, police arrested John Tsekouras on several drug charges arising out of the Project Dolphin investigation.

Frank Muzzi Pleads Guilty

[40] Almost 18 months after takedown day, Frank Muzzi pleaded to four counts on an indictment including conspiracy to traffic in cocaine and in marijuana. One of the counts was in connection with the drugs he had left in Larizza's garage the night before the takedown.

[41] The basis upon which Muzzi entered his guilty pleas included:

- i. an agreed statement of facts; and
- ii. a portion of Larizza's *KGB* statement that Muzzi acknowledged was correct.

[42] Frank Muzzi received an agreed-upon sentence. Charges against his mother and sister were withdrawn. The Crown agreed Frank Muzzi would not be called as a witness for the Crown at *any* co-conspirators' trial.

The Trial Proceedings

[43] At John Tsekouras' trial, the Crown proposed to tender evidence of the results of the search of Tsekouras' Blackberry, of Larizza's *KGB* statement; and of Muzzi's guilty plea and the statement of facts on which the guilty plea and conviction were based. Each attracted objection from trial counsel (who is also counsel on appeal) and was the subject of a pre-trial admissibility ruling.

[44] The trial judge made several rulings as each pre-trial application concluded.

[45] He rejected the trial Crown's contention that Tsekouras had no reasonable expectation of privacy in the contents of the Blackberry because he had thrown it down, thus discarding it, immediately before or on arrest.

[46] The trial judge found the warrantless search of Tsekouras' Blackberry infringed s. 8 of the *Charter*, but admitted the evidence obtained in the search

under s. 24(2). He also admitted Larizza's *KGB* statement and Muzzi's guilty plea and its factual underpinnings under the principled exception to the hearsay rule.

[47] John Tsekouras did not testify or call any defence evidence in response to the case for the Crown.

THE GROUNDS OF APPEAL

[48] John Tsekouras ("the appellant") advances five grounds of appeal. Four relate to evidentiary rulings made by the trial judge. The fifth challenges the reasonableness of some of the convictions.

[49] The appellant says that the trial judge erred in admitting as evidence:

- i. the contents extracted from the appellant's Blackberry seized and examined without warrant;
- ii. the hearsay statement of Sal Larizza;
- iii. the statement of fact filed and relied upon in the guilty plea proceedings of Frank Muzzi; and
- iv. the hearsay statements of Larizza and Muzzi under the co-conspirators' exception to the hearsay rule.

[50] The appellant also argues that the convictions entered on four counts of preliminary and substantive crimes relating to cocaine are unreasonable.

Ground #1: The Admissibility of the Blackberry Evidence

[51] For all practical purposes, this ground of appeal reduces to a claim that the trial judge, having correctly found breaches of s. 8 of the *Charter* in the warrantless search and wrongful detention of the appellant's Blackberry, erred in failing to exclude the contents recovered from the Blackberry under s. 24(2).

[52] The circumstances in which the appellant's Blackberry was seized, detained and its contents harvested have already been canvassed. No useful purpose

would be served by a further recital of them. However, to provide some background for the arguments advanced, it is worthwhile to record the essential features of the trial judge's s. 24(2) analysis before turning to the attacks marshalled against them.

The Ruling of the Trial Judge

[53] The trial judge's analysis under s. 24(2) was premised on three discrete, but related breaches of s. 8 of the *Charter*:

- i. the warrantless search of the Blackberry;
- ii. the unauthorized seizure of the contents of the Blackberry; and
- iii. the unlawful detention of the Blackberry in breach of ss. 489.1 and 490 of the *Criminal Code*.

[54] In his admissibility analysis under s. 24(2), the trial judge considered the three lines of inquiry mandated by *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. He characterized the first line of inquiry – the seriousness of the breach – as a potential "tiebreaker in what is essentially a contest between [the second and third lines of inquiry]".

[55] In his assessment of the seriousness of the *Charter* infringement, the trial judge found that investigators did not ignore the necessity for warrants in this major crime investigation. They made a mistake, however, in connection with the appellant's Blackberry and, on realizing their mistake, immediately sought and obtained a warrant. Similarly, the failure to obtain orders under ss. 489.1 and 490 was not the fault of Project Dolphin investigators, rather it was "ultimately the fault of another branch of the justice system". The failure to obtain the orders arose from carelessness, not bad faith or recklessness.

[56] The trial judge acknowledged that the impact of the breach on the *Charter*-protected interests of the appellant was significant in light of the enhanced privacy

interest associated with such devices. That said, the trial judge concluded that the impact of the breach on the *Charter*-protected interests of the appellant was mitigated by several factors:

- i. the uncertain state of the law about the need for a warrant to search cellphones at the time the search was conducted;
- ii. the fact that the appellant was advised when released unconditionally that his phone might be searched but took no steps to retrieve it;
- iii. the fact that a warrant was subsequently obtained, which indicated not only that it would have been granted had it been sought earlier, but also that it belied any deliberate, reckless or negligent conduct on behalf of anyone to violate the *Charter*; and
- iv. the fact that the officer who sent the Blackberry to the RCMP to extract the data made reasonable inquiries about search authority and was provided with a response that was wrong through carelessness rather than unacceptable negligence or recklessness.

[57] The trial judge concluded that the third line of inquiry under *Grant* favoured admission of the evidence which consisted of the actual messages sent and received on the appellant's Blackberry. This was real evidence of a high degree of reliability, which was crucial to the case for the Crown.

[58] In the final analysis, the trial judge was satisfied that the *Grant* lines of inquiry favoured admissibility of the messages recovered from the appellant's Blackberry.

The Arguments on Appeal

[59] The appellant takes no issue with the findings of constitutional infringement made by the trial judge. A warrantless search of the Blackberry and seizure of its

data and the unlawful detention of the Blackberry, which amounted to a further breach of s. 8. But, the appellant says, the trial judge erred in his section 24(2) analysis. Properly conducted, that analysis would have resulted in exclusion of the Blackberry evidence, the result which should follow here.

[60] The appellant says that the trial judge erred in his overall approach to s. 24(2). The first line of inquiry cannot be fairly described as a "tiebreaker", the role assigned to it by the trial judge, between the second and third lines of inquiry. The first two lines of inquiry favour exclusion; the third, admission of the evidence. But all are of equal importance and are to be balanced together. What is more, the trial judge failed to properly characterize the seriousness of the *Charter* violation and considered factors relevant to the seriousness of the *Charter*-infringing state conduct when assessing the impact of the breach on the *Charter*-protected interests of the appellant.

[61] The appellant also alleges the trial judge made several specific errors in his s. 24(2) analysis. He erred in characterizing the Blackberry evidence as "crucial" for the Crown's case. The Crown had available to it *viva voce* evidence from two co-conspirators, one awaiting trial in separate proceedings (Ritchie) and another (Muzzi) already convicted and sentenced on the basis of a joint submission. In addition, the trial judge was wrong in minimizing the seriousness of the *Charter* breach on the basis that the law on cellphone searches was in a state of flux at the time the Blackberry was searched. Investigators knew that a search warrant was required. A warrant accompanied every device except the appellant's Blackberry. Their reliance on *R. v. McTavish* was unreasonable and reflected bad faith in the face of obvious knowledge of the need for a warrant. The trial judge committed a further error in finding comfort from the fact that there were grounds to get a warrant. The existence of grounds – while relevant to the seriousness of the state

conduct – does not affect the significance of the invasion of the appellant's privacy rights.

[62] In connection with the reporting requirements of s. 489.1 and those of s. 490 concerning retention of seized items, the appellant says that the trial judge made further errors:

- i. in finding good faith in attempted compliance with ss. 489.1 and 490 by simply leaving the Reports to a Justice in a Court Services mail slot and failing to follow up about receipt;
- ii. in failing to find that non-compliance with the notice requirements of s. 490(2) was based on plain ignorance of the statutory requirements, or at best, unacceptable negligence; and
- iii. in reversing the burden imposed by s. 490(2) by considering as mitigation of the failure to give notice, the appellant's failure to seek the return of his Blackberry.

[63] According to the appellant, a proper application of the lines of inquiry mandated by *Grant* would yield a result contrary to the ruling admitting the evidence made at trial.

[64] The violations were serious. The arrest was arbitrary, thus could not ground a lawful seizure of the Blackberry incident to arrest, much less a subsequent search, intentionally done without a warrant. The search could not comply with the requirements set out by the Supreme Court of Canada for searches of cell phones incident to arrest in *R. v. Fearon*, [2014 SCC 77](#), [2014] 3 S.C.R. 621.

[65] The appellant says the unconstitutional conduct of the authorities had a significant impact on his *Charter*-protected interests. He had a high expectation of privacy in the information contained in the Blackberry, an interest that continued without proper judicial supervision for a period of 10 months. This detention was

the result of serious systemic failures on the part of TBPS investigators, failures that were not mitigated by the belated attempt to regularize unconstitutional conduct by the subsequent issue of a search warrant.

[66] Exclusion of this evidence, the appellant continues, requires that acquittals be substituted for the convictions entered at trial. Without the evidence provided by search of the Blackberry, the convictions would be unreasonable. To order a new trial would permit the Crown to reverse a tactical decision it made at the first trial and to attempt to establish guilt on an evidentiary basis available but not pursued at first instance. The prevailing jurisprudence does not permit the Crown to do so.

[67] The respondent does not take issue with the findings of constitutional infringement made by the trial judge, but resists any suggestion of legal error or palpable or overriding errors of fact in the trial judge's s. 24(2) analysis, or in his conclusion to admit the evidence harvested from the appellant's Blackberry.

[68] At the outset, the respondent reminds us that we must begin from a stance of deference to the findings of fact made by the trial judge, absent palpable and overriding error in connection with those findings. We should approach the appellant's complaints with caution because, in the main, they are grounded on a set of facts that the appellant wishes the trial judge had found, rather than those that he did find.

[69] The respondent says that the trial judge did not treat any single factor or line of inquiry under *Grant* as a first among equals or as dispositive of the issue of admissibility. What is more, no overarching rule mandates how to balance the lines of inquiry or *Grant* factors. The trial judge's reference to the absence of an automatic rule of exclusion upon proof of constitutional infringement reflects existing jurisprudence and does not constitute error. His misplace of the seriousness of police misconduct when considering the impact of that misconduct

on the *Charter*-protected interests of the appellant is at best a venial error that would not affect the ultimate conclusion.

[70] According to the respondent, the trial judge's characterization of the law relating to the search of cellphones as uncertain was accurate. At the time of trial, neither this court nor the Supreme Court of Canada had issued any definitive pronouncement describing the legal authority required to search a cellphone or similar electronic device. It follows, the respondent continues, that the failure to obtain a warrant could properly be attributed to legal uncertainty, rather than an intentional, reckless or negligent disregard for the appellant's *Charter* rights.

[71] The respondent submits that the existence of grounds to obtain a search warrant, as demonstrated by the warrant subsequently issued, was properly considered a factor that mitigated the seriousness of the police conduct in this case.

[72] As for the breaches of ss. 489.1 and 490, the respondent takes issue with the appellant's submission that the trial judge imposed an obligation on the appellant to apply for the return of his Blackberry. Fairly read, the reasons of the trial judge do not support the appellant's claim. Rather, his reference to the appellant not seeking the return of his Blackberry was just one factor in the totality of the circumstances that the trial judge considered. The trial judge properly characterized the nature of the breach and its impact on the admissibility determination.

[73] The respondent contends that the trial judge properly described the evidence from the Blackberry as "crucial" to the case for the Crown. It was not rendered less crucial because of the existence of compellable co-conspirators. The problems associated with calling such witnesses are notorious.

[74] In the end, the respondent says, the trial judge got it right. This evidence was properly admitted at trial.

The Governing Principles

[75] Section 24(2) of the *Charter* is an admissibility rule. It determines whether evidence obtained in a constitutionally impermissible manner will make its way into a criminal trial for the use of the trier of fact or be denied entry. The section not only recognizes that the admission of constitutionally tainted evidence and its use to demonstrate guilt may bring the administration of justice into disrepute, but also that exclusion of the evidence can equally bring the administration of justice into disrepute: *R. v. McGuffie*, 2016 ONCA 365, 336 C.C.C. (3d) 486, at para. 60.

[76] We determine the admissibility of constitutionally tainted evidence under s. 24(2) by considering all the circumstances and pursuing three lines of inquiry. We examine:

- the seriousness of the *Charter*-infringing state conduct;
- the impact of the breach on the *Charter*-protected interests of the accused; and
- society's interest in an adjudication on the merits.

See, *Grant*, at paras. 71-86.

[77] In this case, the parties occupy common ground about the fact of constitutional infringement and that evidence harvested from the appellant's Blackberry was obtained in a constitutionally impermissible manner. But they part company on the seriousness of the *Charter*-infringing state conduct; the impact of that conduct on the appellant's *Charter*-protected interests; and on the result that should follow from the pursuit of those lines of inquiry in this case.

[78] The three lines of inquiry to be followed under *Grant* entail not only findings of fact, but also the weighing of various interests frequently at odds with one

another: *McGuffie*, at para. 64. The trial judge's role in the s. 24(2) application made at trial was to balance the assessments under each of the three *Grant* lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute: *Grant*, at para. 71.

[79] The trial judge found two infringements of s. 8 of the *Charter*, one of which yielded evidence that the Crown tendered for admission at trial. The infringements were:

- i. the non-warranted search of the appellant's Blackberry and harvesting of its contents for use as evidence; and
- ii. the detention of the Blackberry without the supervision required under s. 489.1 and notice to the appellant under s. 490(2).

[80] Before turning to the principles that govern the *Grant* lines of inquiry and the standard of review that we are to apply when invited to scrutinize a trial judge's application of them, it is worthwhile to begin with a brief examination of the authority to conduct a search of a Blackberry or similar electronic device and the obligations of seizing authorities to ensure post-seizure supervision of detained items.

The Authority to Search the Blackberry

[81] I discuss first, the authority to search a Blackberry or similar device seized incident to arrest.

[82] The appellant's initial arrest and the seizure of his Blackberry incident to arrest took place in 2011. The subsequent extraction of its data took place in 2011 and 2012. The trial judge's s. 24(2) ruling was released on October 20, 2014, nearly two months before the Supreme Court of Canada released its decision in *Fearon* about the availability of the power to search incident to arrest as an

authority to permit the search of cellphones and similar devices taken from a suspect.

[83] Several points of significance to the trial judge's determination of the seriousness of the *Charter*-infringing state conduct and its impact on the appellant's *Charter*-protected interests emerge from the decision in *Fearon*.

[84] First, the *Fearon* court pointed out that in 2014 Canadian courts had not provided a consistent response to the question of whether the power of search incident to arrest permitted the search of cellphones and similar devices found on the suspect. At least four approaches had emerged: *Fearon*, at para. 2. If the law lacked consistency in 2014, it is a reasonable inference that it was equally unsettled, if not more so, in 2011.

[85] Second, a cellphone may be searched incident to arrest, provided what is searched and how the search is conducted are strictly incidental to the arrest and the police keep detailed notes of what has been searched and why: *Fearon*, at para. 4.

[86] Third, the power to search incident to arrest is a focused power assigned to police so that they can pursue their investigations promptly upon arrest. But the authority is not without its limits. The search must be truly incidental to the arrest, that is to say, exercised in the pursuit of a valid purpose related to the proper administration of justice: *Fearon*, at paras. 16 and 21.

[87] Fourth, a search is properly incidental to arrest when the police attempt to achieve some valid purpose connected to the arrest, such as protecting evidence from destruction by the arrested person or others, or discovering evidence. If the purpose of the search is the discovery of evidence, there must be some reasonable prospect of finding evidence of the offence for which the accused is being arrested: *Fearon*, at para. 22; *R. v. Caslake*, 1998 CanLII 838 (SCC), [1998]

1 S.C.R. 51, at paras. 19-25. What matters is that there be a link between the location and purpose of the search and the grounds for the arrest: *Fearon*, at para. 25; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 49.

[88] The *Fearon* court recognized that some modification of the common law search incident to arrest power was necessary when the object to be searched was a cellphone or similar device. After all, searches of these devices have the potential to be a much more significant invasion of privacy than the typical search incident to arrest of pockets, purses, briefcases and motor vehicles: *Fearon*, at para. 58. Something more than the requirements of a lawful arrest and a search that is at once truly incidental to the arrest and reasonably conducted is essential to further protect a suspect against the risk of wholesale invasion of privacy: *Fearon*, at para. 58.

[89] The *Fearon* court made it clear that nothing short of strict adherence to the requirement that a search incident to arrest be truly incidental to the arrest would be tolerated where the object to be searched was a cellphone or similar device. The searches must be done promptly to effectively serve their purpose, such as the discovery of evidence: *Fearon*, at para. 75. To give effect to this approach, the court modified the general rules applicable to searches incident to arrest in three ways.

[90] First, the scope of the search. The scope of the search of a cellphone or similar device incident to arrest must be tailored to the purpose for which it may lawfully be conducted. Not only the nature, but also the extent of the search performed on the cellphone or similar device must be truly incidental to the particular arrest for the particular offence. And so it is, at least as a general rule, that only recently sent or drafted emails, texts, photos and the call log may be examined. The reason is simple: only those sorts of items will have the necessary degree of connectedness to the purposes for which prompt examination of the

device is authorized: *Fearon*, at para. 76. Investigators must be able to explain, within the limited purposes of search incident to arrest or with reference to some other valid purpose, what they searched and why they did so: *Caslake*, at para. 25.

[91] From this modification of the general rule relating to searches incident to arrest, it necessarily follows that this search authority is not a blank cheque for investigators to forage in the device unbounded. For example, to search or download its entire contents: *Fearon*, at para. 78.

[92] Second, searches to discover evidence. Cellphone searches incident to arrest are not routinely permitted simply for the purpose of discovering additional evidence. A cellphone or similar device search incident to arrest for the purpose of discovering evidence is only a valid law enforcement objective when the investigation will be stymied or significantly hampered without the ability to search the device incident to arrest. Investigators must be able to explain why it was not practical, in all the circumstances of the investigation, to postpone the search until they could obtain a warrant: *Fearon*, at para. 80.

[93] Third, a record of the search. Officers executing the search must make detailed notes of what they have examined on the device and how it was searched. The applications searched, the extent and time of the search. Its purpose and duration. See, *Fearon*, at para. 82.

[94] From *Fearon* we also learn that police are not entitled to navigate through unsettled areas of the law by following the least burdensome route. As a general rule, faced with genuine uncertainty, police should err on the side of caution by settling on a course of action that is more, rather than less respectful of the accused's privacy rights: *Fearon*, at para. 94.

Post-Seizure Supervision

[95] Section 489.1(1) applies to seizures made by peace officers as a result of searches incident to arrest: *R. v. Backhouse* (2005), [2005 CanLII 4937 \(ON CA\)](#), 194 C.C.C. (3d) 1 (Ont. C.A.), at paras. [112-113](#). Where the thing seized is not being returned to the person lawfully entitled to possess it, s. 489.1(1)(b)(ii) requires the seizing officer, as soon as it is practicable to do so, to report to a justice that she or he has seized something and is detaining it to be dealt with by the justice under s. 490(1).

[96] The *Report to a Justice* must be in a statutory form – Form 5.2. This form must describe the authority under which the seizure was made; the thing that was seized; and where, how or where applicable by whom it is being detained. The officer who files the report must date and sign it.

[97] The reporting requirement of s. 489.1(1)(b)(ii) provides a link to s. 490(1) and ensures long-term post-seizure supervision of the things seized by a judicial officer: *R. v. Garcia-Machado*, [2015 ONCA 569](#), 327 C.C.C. (3d) 215, at paras. [15-16](#); *Backhouse*, at para. [112](#).

[98] Failure to file a *Report to a Justice* in Form 5.2 means that no post-seizure supervision of the thing seized will take place: *Garcia-Machado*, at para. [16](#). But failure to file a *Report to a Justice* as soon as practicable after a thing has been seized also has a constitutional dimension: the continued detention constitutes a breach of s. 8 of the *Charter*: *Garcia-Machado*, at paras. [44-48](#).

[99] Neither section 489.1 nor Form 5.2 has anything to say about how the report is to be provided to a justice. The *Report* requires the signature of the peace officer who submits it, but does not require or provide space for a justice to sign the report to acknowledge its receipt, endorse a disposition or advise the submitting officer of either event.

[100] Section 490 governs extended detention of seized items. Section 490(2) requires notice to the person from whom a thing has been seized if the thing has been detained more than three months from the date of seizure. Neither the section nor any other *Code* provision prescribes a form for the notice, although s. 490(2)(a) describes the procedure as a "summary application". But one thing is clear: while the provision provides the opportunity, no obligation is imposed upon the person from whom the thing was seized to take any steps for its recovery.

[101] In *Garcia-Machado*, this court left for another day whether any breach of s. 490, even one that had no real impact on the judicial oversight contemplated by the provision, would amount to a breach of s. 8 of the *Charter*. *Garcia-Machado*, at para. 55.

The Grant Lines of Inquiry

[102] Section 24(2) of the *Charter* requires that the admissibility of constitutionally-tainted evidence be determined on the basis of all the circumstances. The test, broad and imprecise (*Grant*, at para. 60), requires a trial judge to assess and balance the effect of admitting the evidence on societal confidence in the justice system. The focus of s. 24(2) is long-term, prospective and societal: *Grant*, at paras. 67-71.

[103] The admissibility determination under s. 24(2) involves a balancing of assessments under each of the three lines of inquiry:

- i. the seriousness of the *Charter*-infringing state conduct;
- ii. the impact of the breach on the *Charter*-protected interests of the accused; and
- iii. society's interest in the adjudication of the case on its merits.

See, *Grant*, at para. 71.

[104] The first two inquiries operate in tandem. Both pull toward exclusion of constitutionally-tainted evidence. When the state's *Charter*-infringing conduct becomes more serious and the impact of it on the *Charter*-protected interests of the accused becomes greater, the synergistic effect of their combination strengthens the pull for and towards exclusion: *McGuffie*, at para. 62.

[105] The third line of inquiry – society's interest in the adjudication of the merits – is contraindicative – pulls towards the inclusion or admission of the evidence. This is a pull that reaches its zenith when the evidence tendered for admission is at once reliable and crucial to the case for the Crown: *McGuffie*, at para. 62. See also, *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34.

[106] These lines of inquiry under *Grant* involve fact-finding and the assignment of weight to various interests often at odds with each other. There is no overarching principle that mandates how this balance is to be achieved: *Grant*, at para. 86; *R. v. Patterson*, 2017 SCC 15, at para. 54; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 48; *R. v. Manchulenko*, 2013 ONCA 543, 301 C.C.C. (3d) 182, at paras. 89-93.

[107] A trial judge's decision to admit or exclude evidence obtained in a constitutionally flawed manner is entitled to deference on appeal, absent an error in principle, a palpable and overriding error of fact or a determination that is unreasonable: *McGuffie*, at para. 64; *Grant*, at paras. 86, 127; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 82.

[108] The first line of inquiry under *Grant* requires a trial judge to evaluate the seriousness of the *Charter*-infringing state conduct. This conduct will vary in its seriousness, from inadvertent or minor, on the one hand, to wilful or reckless, on the other. The same may be said about the effect of admitting the evidence on the repute of the administration of justice: *Grant*, at para. 74.

[109] Various factors may attenuate or exacerbate the seriousness of the *Charter*-infringing state conduct. Extenuating factors, such as the need to prevent the disappearance of evidence, or good faith on the part of investigators, may attenuate the seriousness of police conduct that results in a *Charter* breach. On the other hand, no rewards are given for ignorance of *Charter* standards. Negligence or wilful blindness is not the equivalent of good faith: *Grant*, at para. 75. Nor can good faith be based on an unreasonable error or ignorance about the officer's scope of authority: *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 59; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 55. The more deliberate the conduct of the police in breach of the *Charter*, the more likely this line of inquiry will favour exclusion: *Grant*, at para. 75.

[110] The second line of inquiry requires an examination of the extent to which the *Charter* breach actually interfered with or undermined the interests protected by the right infringed. Again here there is a spectrum: fleeting and technical to profoundly intrusive. The more serious the impact, the greater the risk that admission of the evidence will bring the administration of justice into disrepute by signalling to the public that the high-sounding nature of the rights is belied by their feeble evidentiary impact in proceedings against the person whose rights have been trampled: *Grant*, at para. 76.

[111] To determine the seriousness of the infringement under this line of inquiry, a court must look to the interests engaged by the right infringed and examine the extent to which the violation actually impacted on those interests: *Grant*, at para. 77. An unreasonable search that intrudes upon an area in which an individual reasonably enjoys a high expectation of privacy or that demeans a person's dignity is more serious than one that does not: *Grant*, at para. 78.

[112] In assessing the actual impact of a breach on a *Charter*-protected interest of an accused, discoverability retains a useful role. The more likely that the evidence

would have been obtained without the *Charter*-infringing state conduct, the lesser may be the impact of that *Charter*-infringing conduct on the underlying interests protected by the *Charter* right. The converse is also true: *Grant*, at para. 122. See also, *Cole*, at paras. 93 and 97. Of course discoverability is a double edged sword. It may signal that the breach of the accused's right was less serious. But it also renders the state conduct more egregious as the evidence was "discoverable" without breaching the accused's *Charter* rights: *R. v. Bains*, 2014 BCCA 43, 306 C.C.C. (3d) 222, at para. 51; *Côté*, 2011 SCC 46, [2011] S.C.R. 215, at paras. 70-72.

[113] A final point concerns the evidentiary underpinnings for circumstances said to mitigate the seriousness of the *Charter*-infringing state conduct or its impact on the *Charter*-protected interests of the accused. These factual findings of mitigation must be soundly grounded in the evidence, not based on speculation: *R. v. Pino*, 2016 ONCA 389, 337 C.C.C. (3d) 402, at paras. 95-98.

The Principles Applied

[114] As I will explain, I would not give effect to this ground of appeal. In my view, the trial judge did not err in his overall approach to the admissibility issue under s. 24(2) or in connection with the specific flaws identified by the appellant.

[115] At the outset, it is essential to keep in mind that the admissibility inquiry in which the trial judge engaged under s. 24(2) of the *Charter* includes not only findings of fact, but also the weighing of various interests frequently at odds with one another. These findings of fact, assessments of competing interests and characterizations of the nature and extent of any breach are entitled to deference absent palpable and overriding errors of fact, errors of law or principle or plainly unreasonable conclusions.

[116] Second, while it was necessary for the trial judge to consider the three lines of inquiry demanded by *Grant*, no overarching principle dictates the manner or order in which these lines of inquiry are to be considered. Further, the trial judge's ultimate assessment need not be mathematically precise. The overarching principle is that the trial judge must take into account *all* the circumstances. This trial judge did that.

[117] Third, I do not read the trial judge's observation about the first line of inquiry being a "tie breaker" as reflecting error in assigning that line of inquiry a place of superordinance in the *Grant* analysis. Read in its appropriate context, the trial judge was simply pointing out that when one factor favours exclusion (line of inquiry #2) and another admission (line of inquiry #3), the outcome of the remaining line of inquiry is apt (although not in every circumstance) to dictate the ultimate result of an analysis of an issue that is to be decided on a basis of probabilities.

[118] Fourth, the trial judge did not err in considering the uncertain state of the law as a relevant factor in his s. 24(2) analysis. Recall that in 2014 the Supreme Court of Canada described the inconsistencies among Canadian courts about whether a search of a cellphone was permitted as part of a search incident to arrest, or whether some further authority, like a search warrant, was required. In such a state of uncertainty, it scarcely follows that it was unreasonable or indicative of bad faith for investigators to rely on a judicial precedent said to support such a search.

[119] Further, it was not error for the trial judge to conclude from the fact that a search warrant was later obtained that had one been sought immediately after seizure of the Blackberry, it would likely have been granted, the contents harvested and evidence obtained. Discoverability has a place in the *Grant* analysis. That the evidence was discovered without a warrant was not the product of deliberate *Charter*-infringing state conduct.

[120] The trial judge also found an infringement of s. 8 of the *Charter* because police had failed to file any *Report to a Justice* in Form 5.2 and failed to notify the appellant of their summary application under s. 490.

[121] In this case, unlike in *Garcia-Machado*, the police did complete on several occasions a *Report to a Justice*. In accordance with what was then the practice, they left the reports for delivery to a justice of the peace. Delivery never happened, but not for dint of effort. This case is different from *Garcia-Machado*, which was not available for the trial judge to consider.

Ground #2: The Hearsay Statement of Salvatore Larizza

[122] The second ground of appeal challenges the decision of the trial judge to admit as evidence a sworn videotaped statement of Sal Larizza, a former accused who had been separately charged but died before trial.

[123] A brief description of the background, the circumstances under which the statement came to be taken and the ruling of the trial judge for admitting it as evidence will serve as a useful framework for the discussion that follows.

The Essential Background

[124] On takedown day, police executed a search warrant at Sal Larizza's home. In a box in his garage, officers found 1 kilogram of cocaine and 18 pounds of marijuana. Police suspected, but could not prove, that the drugs had been stashed there by Muzzi and Ritchie. Larizza was arrested. Neither Muzzi nor Ritchie were charged.

[125] Sal Larizza remained in custody for about a week after his arrest until he was released on bail. The terms of his release required him to live at his sister's home where he was to occupy a single room together with his young daughter. He was also subject to house arrest.

[126] A few days after his arrest, Sal Larizza was interviewed by police. The interview was audio and videotaped. Larizza denied knowing about how the drugs came to be found in his garage at home. He said that his home was not a stash house. He claimed not to know Muzzi well.

[127] There was no formal motion to admit Larizza's post-arrest statement on the *voir dire* to determine the admissibility of his later *KGB* statement. In the interests of trial fairness, the trial judge admitted the earlier statement. It was relevant to both threshold and ultimate reliability.

The *KGB* Statement

[128] About three months after his arrest, Sal Larizza asked the Crown to consent to variations in his judicial interim release order. Larizza wanted a deletion of the house arrest term and a change in the residence condition. Discussions took place between Larizza, his lawyer and the lead investigator about Larizza providing a statement explaining how the marijuana and cocaine got into his garage where they were found on takedown day.

[129] Sal Larizza agreed to provide a statement to police.

[130] Larizza's statement was audio and video recorded. It was given under oath. Larizza was warned about the consequences of making a false statement. He was told that the statement would be disclosed to those facing trial. The statement lasted 1 hour and 20 minutes.

[131] In his *KGB* statement, Sal Larizza admitted that he had provided a stash house for Muzzi and another man. Both had a key to his (Larizza's) house and could come and go as they pleased. Muzzi and another man showed up in Muzzi's truck the evening before takedown day. They asked whether they could store some marijuana in Larizza's garage overnight. Muzzi promised he would remove the marijuana early the next morning.

[132] Sal Larizza denied knowledge of any cocaine being part of the delivery the night prior to takedown day. Police noticed indicia of a cocaine-cutting operation in Larizza's home.

The Death of Sal Larizza

[133] Sal Larizza died prior to trial. Somebody killed him in his own home.

The Ruling of the Trial Judge

[134] The case for admissibility of Larizza's *KGB* statement was advanced under the principled exception to the hearsay rule.

[135] Necessity was uncontroversial. Larizza was dead.

[136] The trial judge considered the cumulative effect of several factors in concluding that threshold reliability had been established:

- i. the statement was audio and video recorded;
- ii. the statement was under oath;
- iii. Larizza was warned about the consequences of providing false information;
- iv. the events described in the statement were within Larizza's direct knowledge;
- v. the narrative provided was in Larizza's own words, not in response to leading or suggestive questioning;
- vi. the initiative for the statement originated with Larizza, not the police or the Crown;
- vii. Larizza had legal advice before making the statement;
- viii. the statement was confirmed by real evidence in some of its material aspects;

- ix. the statement was strikingly similar in content to what Muzzi admitted to be his involvement when he pleaded guilty to various charges;
- x. Larizza repeated crucial information a number of times; and
- xi. What Larizza appeared to regard as his interest in co-operating with the authorities.

[137] The trial judge also considered Larizza's previous statement to the police as a prior inconsistent statement.

[138] The trial judge admitted Larizza's *KGB* statement. It does not appear that he was asked to exclude it on the basis that its prejudicial effect exceeded its probative value.^[1]

The Arguments on Appeal

[139] The appellant contests the trial judge's admissibility ruling on two grounds. He says that the trial judge did not provide adequate reasons for his decision, thus rendering it impervious to appellate review. He also argues that what the trial judge did say reveals that he considered irrelevant factors and failed to consider relevant factors in concluding that the requirement of threshold reliability had been met.

[140] On the inadequacy of reasons, the appellant says that the trial judge devoted the majority of his reasons to a rote repetition of the governing legal principles, but offered no real insight into why he found threshold reliability established and the statement admissible. The most important consideration here was the inability of the appellant to cross-examine the declarant. Yet the trial judge failed to consider whether or how the circumstances in which the statement was made could and did function as an adequate substitute or proxy for the inability to cross-examine.

[141] The appellant submits that in reaching his conclusion on reliability, the trial judge failed to consider that Larizza's motive in providing the statement was to obtain a significant bail variation and that the *KGB* statement was fundamentally at odds with his post-arrest statement – given five months earlier – in which he claimed no knowledge of events he described in much detail later.

[142] In addition to his failure to consider relevant factors, the appellant continues, the trial judge assigned a place in his analysis to factors of which no account should have been taken. That Larizza took the initiative, consulted a lawyer and repeated crucial information several times. And that the statement was strikingly similar to what Muzzi admitted on his guilty plea. The trial judge also failed to recognize the double hearsay aspect of the statement when Larizza repeated what he claimed Muzzi said when he (Muzzi) had asked to store the drugs in Larizza's garage.

[143] The respondent supports the admissibility ruling of the trial judge. The trial judge's reasons are adequate to permit meaningful appellate review. They reveal no consideration of irrelevant factors or failure to consider relevant factors. The case for admissibility was overwhelming.

[144] The respondent reminds us that in considering this alleged error, we are to begin from a stance of deference, absent an error in principle or in law, a palpable and overriding error of fact or a plainly unreasonable conclusion. Deference should not be shunted aside here.

[145] The respondent says that the trial judge's ruling reflects governing principles. Inability to cross-examine a hearsay declarant is not dispositive of an application to admit a hearsay statement. This inability may be overcome by circumstantial guarantees of trustworthiness arising out of the circumstances in which the statement came about. In this case, the trial judge took into account relevant

factors, including that essential parts of Larizza's narrative were confirmed by other evidence, such as Muzzi's guilty plea. He did not consider irrelevant factors, at least none that marred the essential features of his analysis that provided an appropriate foundation for meaningful appellate review.

The Governing Principles

[146] At the outset, factual findings that underpin a finding of admissibility are entitled to deference absent palpable and overriding error: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 31; *R. v. Chretien*, 2014 ONCA 403, 309 C.C.C. (3d) 418, at para. 44.

[147] The central underlying concern with the admission of hearsay evidence is the inability of the party opposite to cross-examine the declarant on the truth and accuracy of the reported statement, to test his or her perception, memory, narration and sincerity:, at paras. 18-19; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 2.

[148] When hearsay evidence is tendered for admission under the principled exception to the hearsay rule and no issue arises about the necessity requirement because of the death of the declarant, the task of the trial judge is to determine whether the reliability requirement has been met. Reliability, the current equivalent of Wigmore's "circumstantial guarantee of trustworthiness" or "probability of trustworthiness", operates as a substitute or surrogate for the more traditional mechanism for testing reliability – cross-examination. Reliability intervenes to ensure that only hearsay statements worthy of consideration by a trier of fact get before it.

[149] It is well established that the reliability requirement under the principled exception to the hearsay rule refers to threshold, not ultimate reliability. After all, the ultimate reliability of any piece of evidence received in a criminal trial is for the

trier of fact to determine in the context of all the evidence adduced at trial: *Khelowan*, at paras. 2-3, 50; *Youvarajah*, at para. [23](#).

[150] Since the underlying concern when hearsay evidence is proposed for admission is the opponent's ability to test it by traditional means, the reliability requirement under the principled approach seeks to identify those cases in which this difficulty is sufficiently expunged to justify receiving the evidence by exception to the general exclusionary rule: *Khelowan*, at para. 61.

[151] A proponent who seeks the reception of hearsay evidence under the principled exception usually tries to satisfy the reliability requirement in either of two ways. One way is to show that no real concern exists about the truth of the statement because of the circumstances in which the statement came about. Another way of satisfying the reliability requirement is to demonstrate that no real concern arises from the introduction of the statement in hearsay form because, in the circumstances, the opponent can sufficiently test its truth and accuracy: *Khelowan*, at paras. 62-63. See also, *R. v. Blackman*, [2008 SCC 37](#), [2008] 2 S.C.R. 298, at para. [35](#).

[152] These two methods of satisfying the reliability requirement are not mutually exclusive: *Khelowan*, at para. 65; *Blackman*, at para. [65](#); *R. v. Devine*, [2008 SCC 36](#), [2008] 2 S.C.R. 283, at paras. [22-23](#). That said, where the declarant is not available for cross-examination, the focus of the reliability inquiry will necessarily be on the circumstances in which the statement came about. The trial judge should consider the cumulative effect of all the evidence relevant to the reliability issue with his or her focus on the particular dangers presented by the evidence: *Khelowan*, at para. 4.

[153] The factors to be considered on the inquiry into reliability cannot be categorized in terms of threshold and ultimate reliability. Trial judges are to undertake a more functional approach with their focus on the particular dangers

raised by the hearsay evidence tendered for admission. But the approach of the trial judge to the reliability requirement and, more broadly, the issue of admissibility, must respect the distinction in roles between the trier of law and the trier of fact. To retain the integrity of the fact-finding process, the issue of ultimate reliability must not be pre-empted by a determination made on the admissibility *voir dire*: *Khelowan*, at paras. 4, 93.

[154] Where a proponent seeks to satisfy the reliability requirement by evidence about the circumstances in which the statement was made, a trial judge may also consider the presence of corroborating, or for that matter, conflicting evidence: *Khelowan*, at para. 100; *Chretien*, at para. 54.

[155] A final point concerns the duty of a trial judge to give reasons when ruling on the admissibility of evidence and the scope of appellate review of those reasons.

[156] The robust body of jurisprudence about the duty of trial judges to provide reasons for recording convictions and the scope of appellate review of those reasons for sufficiency does not apply in the same way to evidentiary rulings. Subject to a duty of procedural fairness, there is no general duty to provide reasons for an evidentiary ruling. The failure to give reasons on an evidentiary ruling is not fatal provided that the decision is supportable on the evidence or the basis for the decision is apparent from the circumstances. The importance of the subject-matter of the ruling also has a bearing on whether procedural fairness compels reasons: See, *R. v. Woodard*, 2009 MBCA 42, 245 C.C.C. (3d) 522, at paras. 22, 24-25.

The Principles Applied

[157] As I will explain, I would not give effect to this ground of appeal.

[158] The trial judge was required to decide whether the Crown had established that Larizza's *KGB* statement satisfied the reliability requirement of the principled

exception to the hearsay rule. That determination required a functional approach, a consideration of all the circumstances surrounding the making of the statement, to determine whether the Crown had shown that there was no real concern about the truth of the statement because of the circumstances in which it came about.

[159] To begin, I am satisfied that the reasons of the trial judge on his admissibility ruling are adequate to permit meaningful appellate review. The reasons record the principles that the trial judge considered and, albeit briefly, why he was satisfied that the reliability requirement had been met. Nothing more was necessary.

[160] Second, the factual findings that go into the determination of reliability are entitled to deference. The trial judge was well-placed to assess the hearsay dangers, in this case, essentially sincerity, and the effectiveness of any safeguards to assist in their conquest. Absent an error in principle, the trial judge's determination of the threshold reliability is entitled to deference in this case.

[161] Among the circumstances in which the statement was made, recall that, unlike most hearsay statements where a declarant is unavailable to testify, this statement was made under oath with a warning about the consequences of providing false information to the police. Larizza was told that the statement would be disclosed to those affected by it. The information Larizza provided was first-hand, much of it confirmed by other evidence gathered during the investigation.

[162] To be fair, some of the factors that the trial judge noted seem unhelpful in determining the threshold reliability of the statement. That Larizza took the initiative in contacting the police. That he repeated crucial pieces of information on different occasions during the statement. However, I am satisfied that those considerations do not warrant interference with the reliability finding, given the other valid considerations.

[163] Third, the trial judge was well aware of the motive that underlay Larizza's statement. He wanted his bail varied. But the judge also knew that whatever Larizza said, it would make no difference to the charges outstanding against him. He took those factors into account although they seem to have greater relevance to the issue of the ultimate reliability than to what is required for reliability under the principled exception to the hearsay rule.

[164] Fourth, the trial judge had an advantage not often available in cases involving unavailable declarants and hearsay said to meet the reliability requirement because of the circumstances in which the statement was made. The trial judge was an eye and ear witness to the statement, thus was in a position to evaluate, at the threshold, the sincerity of Larizza to the extent it was revealed by his appearance on the video.

[165] Finally, the double hearsay claim is misplaced. Larizza recounted what Muzzi (and Ritchie) said and did the night before takedown day. They brought drugs to Larizza's house. They asked about leaving them in his garage. They did so. With Larizza's permission. Their conduct was an act in furtherance of a common unlawful design to traffic in controlled substances. What they did and what Larizza saw them doing was not hearsay. Their joint request was not hearsay. To the extent it implied trafficking, it was properly admissible under the co-conspirators' exception to the hearsay rule.

Ground #3: The Muzzi Guilty Plea and Underlying Facts

[166] This ground of appeal also has to do with evidence received at trial after a *voir dire* into its admissibility. First, some added background.

The Additional Background

[167] Frank Muzzi was arrested on takedown day on several drug offences and a related criminal organization charge. None of the charges related to the cocaine

and marijuana found in Larizza's garage on takedown day. Shortly after Sal Larizza gave his *KGB* statement to police, Muzzi was charged with further offences arising out of the seizure of the cocaine and marijuana in Larizza's garage.

[168] Within a year of Larizza's statement, Muzzi pleaded guilty to several charges, including those related to the seizures at Larizza's residence. Muzzi was represented by very experienced counsel. The statement of facts read by the trial Crown to support the plea included a reference to a part of Larizza's *KGB* statement. The excerpt was a passage in which Larizza recounted what Muzzi had said when he brought a box over to Larizza's house and asked whether he could store it (the box) overnight:

It's just for the night. ...Tomorrow morning it will be out,
it'll be off the property.

Muzzi left the box. The following morning police executed a search warrant at Larizza's house, found the box and arrested Larizza.

[169] Muzzi's counsel said: "...my client acknowledges his involvements in the events in question and the facts with respect to these activities are acknowledged as being correct and ample for a finding of guilt."

[170] Frank Muzzi received an agreed-upon sentence. Charges against his mother and sister were withdrawn. Although the record of his guilty plea and sentencing proceedings contains no mention of it, the trial Crown also agreed not to call Frank Muzzi as a witness in any future proceedings against the other alleged co-conspirators.

The Ruling of the Trial Judge

[171] The trial judge admitted the fact that Muzzi pleaded guilty and made admissions for a non-hearsay purpose on the *voir dire* and the trial. The judge concluded:

I am prepared to admit that fact for use on this *voir dire* for the determination of the threshold reliability of the Larizza statement. It doesn't matter whether the contents of Muzzi's statements were true. The fact that he made the statements many months after Larizza made his statement is something the trier of fact may consider in determining the reliability of Larizza's statement. The fact that the truth of Muzzi's statements is not in evidence detracts from but does not nullify the usefulness of the fact that he made statements that tend to confirm Larizza's statement.

I am prepared to admit that fact and the contents of his admissions into evidence at trial as evidence to be used in determining the collateral issue of identification of the cell phone communicators other than the accused.

The Arguments on Appeal

[172] The appellant says that the trial judge was wrong to admit the Muzzi plea and acknowledged facts. Each was hearsay. Neither was necessary nor reliable.

[173] The appellant focuses principally on the trial judge's failure to consider the threshold requirement of necessity. Muzzi was in custody serving a sentence in a federal penitentiary. He was a competent and compellable witness for the Crown. There was no suggestion that, if called as a witness, he would resile from the admissions he made on entering his guilty plea. His availability meant that the necessity requirement could not be satisfied and the evidence should have been excluded.

[174] The appellant says that this evidence had no legitimate non-hearsay use, thus should not have been received on this basis either. It is well-settled that the plea of guilty of one person, even of a co-accused, is not admissible against another accused of the same or a related crime.

[175] The respondent rejects any suggestion that this evidence was received or used by the trial judge as evidence of the truth of the facts admitted. The evidence

was tendered, received and used for a non-hearsay purpose, as circumstantial evidence to assist in proof of the identity of a person with whom the appellant communicated on his Blackberry.

The Governing Principles

[176] The plea of guilty of one person accused of a crime is not evidence, much less proof, that another, accused of the same crime, committed it: *R. v. Berry* (1957), [1957 CanLII 505 \(ON CA\)](#), 118 C.C.C. 55 (Ont. C.A.), at p. 60. A plea of guilty is a formal admission by its maker of each essential element of the offence to which the plea is entered. This formal admission relieves the Crown of the burden of proving these essential elements on admissible evidence beyond a reasonable doubt.

[177] The pleas of guilty or convictions of other alleged co-conspirators are not admissible to prove the existence or fact of the conspiracy in the trial of another or other alleged co-conspirators: *R. v. May* (1984), [1984 CanLII 3489 \(ON CA\)](#), 13 C.C.C. (3d) 257 (Ont. C.A.), at p. 260, leave to appeal refused, [1984] 2 S.C.R. viii; *R. v. Paquet* (1999), [1999 CanLII 2259 \(NB CA\)](#), 140 C.C.C. (3d) 283 (N.B. C.A.), at paras. [22-23](#).

[178] Where a plea of guilty by a third party is admissible in a criminal trial, it may be proven in a variety of ways. For example, the person who pleaded guilty may testify to that effect. Documentary evidence of the plea may be received under the principles relating to the admission of public documents or court records or the provisions of the [Canada Evidence Act](#), R.S.C. 1985, c. C-5. See, *R. v. Caesar*, [2016 ONCA 599](#), 339 C.C.C. (3d) 354, at para. [33](#).

[179] Transcripts of court proceedings, including transcripts of guilty pleas, may be admissible to prove what was actually said or what actually happened in an earlier proceeding, but they are not rendered admissible as evidence of the truth of their

contents simply because of their nature, common law principles or statutory provisions. The hearsay rule intercedes and must be overcome by some listed or principled exception if proving the truth of their contents is the object of their proponent: *Caesar*, at para. 47. Needless to say, if the proponent's purpose is otherwise, the hearsay rule erects no bar.

[180] Three brief points should be made about the operation of the hearsay rule in the circumstances.

[181] First, a critical feature of the hearsay rule is the purpose for which the evidence, which is said to be hearsay, is tendered. It is only where the evidence is offered to prove the truth of its contents that the hearsay rule applies and renders the evidence *prima facie* inadmissible: *Khelowan*, at para. 57; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 36.

[182] Second, what a person says may have probative value as non-hearsay, as for example, to establish the identity of the speaker. Used in this way, no assumption of the truth of the statement is required and the hearsay rule is not implicated: *R. v. Evans*, 1993 CanLII 86 (SCC), [1993] 3 S.C.R. 653, at pp. 662-663; *R. v. Ferber* (1987), 1987 ABCA 86 (CanLII), 36 C.C.C. (3d) 157 (Alta. C.A.), at p. 160.

[183] Third, evidence of things done and said by alleged co-conspirators may be admitted as circumstantial evidence of the existence of an agreement. Admissibility on this basis for this purpose depends on the inferences available from the evidence as a whole. Evidence of things done and said admitted for this purpose need not be done or said in furtherance of the common design: *R. v. Puddicombe*, 2013 ONCA 506, 299 C.C.C. (3d) 534, at para. 112.

The Principles Applied

[184] I would not accede to the argument advanced in support of this ground of appeal for three reasons.

[185] First, the basis on which the evidence was admitted and used. The evidence of Muzzi's plea of guilty and the iteration of the facts on which it was based was neither tendered nor used to prove the truth of what was said. It was used on the *voir dire* in determining the threshold reliability of Larizza's *KGB* statement and in proving Muzzi's identity as a person with whom the appellant communicated. Neither use attracted the application of the hearsay rule.

[186] Second, the admissibility of the evidence as non-hearsay. Evidence of what Muzzi said and did, as for example in Larizza's garage the night before the takedown, was admissible as circumstantial evidence of the existence of an agreement to traffic in controlled substances. The manner in which the trial judge used this evidence in determining whether the appellant's guilt had been proven beyond a reasonable doubt did not exceed the basis upon which it was tendered and properly admissible.

[187] Third, the inclusion of Larizza's statement in the uncontested statement of facts. This complaint is unavailing as a result of my determination that Larizza's *KGB* statement was properly admitted at trial.

Ground #4: The Admissibility of Muzzi's and Larizza's Statements under the Co-conspirators' Exception

[188] This ground of appeal asserts error in the reception of evidence of Muzzi's utterances on the night before takedown day and Larizza's repetition of them in his *KGB* statement admitted in evidence at trial. It is unnecessary to repeat the background events that resulted in Larizza's statement or its admission at trial. The

point raised is a narrow one and can be determined briefly in light of the discussions that have preceded it.

The Ruling of the Trial Judge

[189] In a brief endorsement, the trial judge reviewed the argument advanced at trial and relying upon *R. v. Chang* (2003), [2003 CanLII 29135 \(ON CA\)](#), 173 C.C.C. (3d) 397 (Ont. C.A.) explained his rejection of it:

The defence argued that since Muzzi is incarcerated, he was "available" and the Crown should not take refuge behind an exception to the hearsay rule. I was impressed with the defence argument that the Crown could not avoid presenting Muzzi to the court in person simply because of a promise by the Crown not to call him as a witness which was part of Muzzi's sentencing proceedings. In retrospect I agree with the Crown that just as the Crown has a discretion to proceed against alleged co-conspirators jointly thereby making them "unavailable" so too the Crown should not be restricted in the exercise of its discretion with respect to plea discussions. (*R. v. Chang* ¶ 103). In any event, we cannot expect in the circumstances of this case to get evidence from Muzzi of the same value. (See *Chang* ¶ 105.) In the event the defence has not met the onus placed upon it.

The Arguments on Appeal

[190] In advancing argument in support of this ground of appeal, the appellant accepts that under the co-conspirators' exception to the hearsay rule, acts and declarations of co-conspirators in furtherance of the common design may be admitted against other probable members of the conspiracy to prove their actual membership or participation in that conspiracy. The appellant also accepts that even when it applies to double hearsay, the co-conspirators' exception as articulated in *R. v. Carter*, [1981 CanLII 158 \(SCC\)](#), [1982] 1 S.C.R. 937, satisfies the necessity and reliability requirements of the principled exception to the hearsay rule, at least where the declarant's testimony is unavailable to the Crown because he or she is a co-accused.

[191] The appellant also accepts that it is his burden to demonstrate why in this case the evidence did not meet the fundamental criteria applicable to the principled approach to the hearsay rule. However, he says that he has met that burden because the acts and declarations of Muzzi do not satisfy the necessity requirement under the principled approach. The appellant points out that Muzzi was available to testify for the Crown. He was in a federal penitentiary serving a sentence for his involvement in various drug offences. He was a competent witness for the Crown and his attendance could be compelled by subpoena. Nothing in the trial record indicates that he would have been uncooperative or would have failed to give evidence in accordance with the admissions he made when he pleaded guilty. This demonstrated lack of necessity renders the evidence inadmissible.

[192] The respondent takes the position that the evidence in issue was properly admitted. The evidence, which consisted of acts and declarations of Muzzi in furtherance of the common unlawful object, was admissible despite its hearsay nature under the co-conspirators' exception to the hearsay rule. As a general rule, the co-conspirators' exception satisfies the criteria of necessity and reliability under the principled approach.

[193] The respondent acknowledges that in some circumstances evidence that is admissible under the co-conspirators' exception may not satisfy the necessity and reliability requirements of the principled approach. But those instances will be rare. In this case, as the trial judge properly concluded, the appellant has failed to meet that burden in connection with the necessity requirement.

[194] Neither Ritchie nor Muzzi was available to testify.

[195] Ritchie was awaiting trial on a separate indictment. Although he was a competent witness for the Crown at the appellant's trial and could be compelled to testify, calling him as a witness would leave the Crown open to an argument that

any prosecution of Ritchie after he gave evidence at the appellant's trial would be an abuse of process.

[196] In connection with Muzzi, who was also a competent witness for the Crown who could be compelled by subpoena to attend the appellant's trial, the respondent submits that he too was unavailable. When Muzzi pleaded guilty and received an agreed-upon sentence, the trial Crown agreed that Muzzi would not be called as a prosecution witness in the subsequent trials of any alleged co-conspirators. This was an agreement that the trial Crown could make in the exercise of his prosecutorial discretion. There is no suggestion that such an agreement was beyond the reach of prosecutorial discretion or amounted to an abuse of that discretion. As a result, Muzzi was not available as a witness.

[197] In addition, the respondent reminds us, the necessity requirement refers to reasonable necessity. It may be met where a trial judge is satisfied that there is no reasonable prospect of obtaining meaningful evidence from a witness of an accurate and frank rendition of relevant events or evidence of equivalent value to contemporaneous acts and declarations.

The Governing Principles

[198] Several principles combine to inform the determination of this ground of appeal.

[199] First, the relationship between the listed and principled exceptions to the hearsay rule.

[200] The traditional or listed exceptions to the hearsay rule, such as the co-conspirators' exception, remain presumptively in place. However, a listed exception can be challenged to determine whether it is supported by the indicia of necessity and reliability required by the principled approach: *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 15.

[201] Sometimes, evidence that would be admissible under a listed exception may be excluded because, in a given set of circumstances, the requirements of necessity and reliability have not been met. But these instances are said to be "rare": *Mapara*, at para. 15.

[202] Second, the relationship between the co-conspirators' exception and the principled approach.

[203] The co-conspirators' exception to the hearsay rule meets the requirements of the principled approach to the hearsay rule: *Mapara*, at para. 31. The conditions imposed under *Carter* provide sufficient circumstantial guarantees of trustworthiness to satisfy the reliability requirement: *Mapara*, at para. 27. The necessity requirement is satisfied by a combination of factors such as the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy: *Mapara*, at para. 18; *Chang*, at para. 105.

[204] Third, the requirement or indicium of necessity.

[205] The criterion or requirement of necessity is accorded a flexible definition, capable of encompassing diverse situations with a common feature – the unavailability of relevant direct evidence. Necessity may be established not only by the unavailability of the declarant for testing by cross-examination, but also where we cannot expect to get evidence of the same value from the same or other sources: *R. v. Smith*, 1992 CanLII 79 (SCC), [1992] 2 S.C.R. 915, at pp. 933-934; *Chang*, at para. 105. Whether the necessity criterion has been met requires a consideration of all of the circumstances in each individual case: *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740, at p. 798; *Chang*, at para. 105.

The Principles Applied

[206] Several reasons persuade me to reject this ground of appeal.

[207] First, it is a "rare case" in which evidence that is admissible under the co-conspirators' exception does not also satisfy the indicia of necessity and reliability under the principled exception. Reliability is not an issue here and, in any event, is satisfied by the *Carter* rule. Necessity is to be determined on the basis of a consideration of all the circumstances. A trial judge's conclusion on this issue is entitled to deference.

[208] Second, necessity is accorded a flexible definition. It is capable of encompassing diverse situations. At its core, necessity is concerned with the unavailability of relevant direct evidence. The physical or testimonial unavailability of the declarant is not the only basis upon which necessity may be established.

[209] Third, for different reasons, relevant direct evidence was not available from either Ritchie or Muzzi, thus the necessity for its introduction under the hearsay exception.

[210] For practical purposes, Muzzi was not available to give evidence for the prosecution at trial. As a non-party at the appellant's trial, Muzzi was a competent witness for the Crown and could be compelled to testify. But whether as a *quid pro quo* for his guilty plea or otherwise, the trial Crown agreed that Muzzi would not be called as a witness for the Crown in any later prosecution of an alleged co-conspirator. This decision was an exercise of prosecutorial discretion elusive of judicial review absent evidence of abuse of process of which there is none here.

[211] As for the availability of Ritchie to provide relevant direct evidence, the circumstances are different, but the result the same. As a separately indicted accused Ritchie was competent and could be compelled to give evidence for the Crown. But, leaving to one side his willingness to testify and to do so truthfully,

about which we know nothing, requiring him to testify at the appellant's trial would invite an application by Ritchie at his own trial to stay proceedings for abuse of process.

[212] In the end, there is also the question of onus. That fell upon the appellant to establish that this was one of the "rare cases" in which the co-conspirators' exception failed to comply with the requirements of the principled approach, in this case, because it failed to establish necessity. In that task, the appellant failed.

Ground #5: Unreasonable Verdicts

[213] The appellant challenges as unreasonable the convictions entered on several counts alleging preliminary and substantive offences involving cocaine. A brief reference to the trial judge's reasons provides sufficient background to assess the viability of this complaint.

The Reasons of the Trial Judge

[214] The trial judge found the appellant not guilty of trafficking cocaine as a result of his purchase of cocaine from a person described as "Penguin" and also of conspiracy to traffic cocaine with Penguin. The trial judge considered the evidence adduced at trial insufficient to ground a finding that Penguin was aware that the appellant purchased the cocaine for the purpose of selling it.

[215] The trial judge then examined the relationship between the appellant and Ritchie. He found that Ritchie's assistance in acquiring the cocaine from Penguin bespoke an agreement to which Ritchie and the appellant were parties. In reaching this conclusion, the judge considered the nature of the relationship between the two men; the substantial amount of cocaine involved; and Ritchie's use of the same method of transferring money that he had used in the past in drawing an inference that the cocaine – two kilograms – would be trafficked. The agreement to

traffic established a conspiracy to traffic cocaine and rendered the appellant and Ritchie parties to trafficking.

[216] The trial judge was also satisfied that the appellant had constructive possession of the cocaine from Penguin when three factors coalesced:

- i. the money was paid;
- ii. the cocaine was shipped to the appellant; and
- iii. the appellant was provided with the tracking details for the package containing the cocaine.

The Arguments on Appeal

[217] The appellant acknowledges that the trial judge correctly concluded that, as a mere purchaser of cocaine, the appellant could not be convicted of conspiracy to traffic or trafficking cocaine with Penguin. Where the trial judge erred, the appellant says, was in drawing the further inferences necessary to reach a conclusion of guilt on the counts involving Ritchie.

[218] The appellant contends that the cumulative effect of the evidence demonstrated nothing more than that Ritchie was an agent for the purchaser – the appellant – whose only role was to send the money to Penguin. There was no evidence that Ritchie knew the purpose for which the money was being sent. It follows that the evidence could not support a finding that Ritchie and the appellant conspired to traffic cocaine. In addition, the simple fact that money was sent and cocaine shipped did not establish that the appellant was in possession of cocaine or party to a conspiracy to possess it.

[219] The respondent begins with a brief reminder about the scope of review available when an appellant claims a verdict is unreasonable. The fundamental issue is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. Absent a palpable and overriding error, an

appellate court must not revisit findings of fact made or inferences drawn by triers of fact. These findings and inferences are entitled to significant deference and cannot be pushed aside simply because other inferences may have been available or the reviewing court would not have decided the case in the same way.

[220] The respondent says that the cumulative effect of the email correspondence adduced at trial showed that the appellant and Ritchie worked together to purchase and have delivered two kilograms of cocaine from Penguin. It was acknowledged at trial that two kilograms of cocaine was an amount sufficient for the purpose of trafficking.

[221] The respondent contends that the appellant had constructive possession of the two kilograms of cocaine shipped by Penguin in return for the cash payment sent by Ritchie. The appellant knew that Penguin sent cocaine to him, in return for a cash payment, and provided the appellant with the tracking details necessary to take delivery. This satisfied the requirements of constructive possession.

[222] Finally, the respondent relies on the fact that the appellant did not provide an innocent explanation of his conduct as a factor that undermines the appellant's assertion that the verdict was unreasonable.

The Governing Principles

[223] Several principles of general application have a say in our decision on this ground of appeal. Some have to do with the scope of review permitted in response to claims of an unreasonable verdict. Others relate to drawing inferences from evidence adduced at trial. Yet others explain the requirements for constructive possession.

[224] First, unreasonable verdict review.

[225] To decide whether a verdict is unreasonable, we must determine whether the verdict rendered is one that a properly instructed jury or a judge could reasonably

have rendered: *R. v. Yebes*, [1987 CanLII 17 \(SCC\)](#), [1987] 2 S.C.R. 168, at p. 186 *R. v. R.P.*, [2012 SCC 22](#), [2012] 1 S.C.R. 746, at para. 9. We must not of course merely substitute our view for that of the trial judge. However, in order to apply the test, we must re-examine and to some extent, within the limit of appellate disadvantage, re-weigh and consider the effect of the evidence adduced at trial: *Yebes*, at p. 186.

[226] A verdict may also be unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that is:

- i. plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding; or
- ii. incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge.

See, *R.P.*, at para. 9; *R. v. Sinclair*, [2011 SCC 40](#), [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21.

[227] In considering the reasonableness of the verdict, this court may infer from the appellant's failure to testify, an inability to provide an innocent explanation: *R. v. Ellis*, [2013 ONCA 739](#), 303 C.C.C. (3d) 228, at para. 51.

[228] Second, inferences and claims of unreasonable verdicts.

[229] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established by evidence adduced at trial. An inference is a conclusion that may, not must, be drawn in the circumstances. A single item or several items of evidence may give rise to more than one inference. It is for the trier of fact, whether judge or jury, to determine what inferences are to be drawn from the evidence taken as a whole and whether the cumulative effect of those inferences satisfies or falls short of the standard of proof required in a criminal case.

[230] Whether a trial judge has drawn the proper inference from a fact or group of facts established by the evidence is a question of fact, as is whether the whole of the evidence is sufficient to establish an essential element of an offence: *R. v. Kent*, [1994 CanLII 62 \(SCC\)](#), [1994] 3 S.C.R. 133, at p. 143. Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by a trial judge unless those findings and inferences are:

- i. clearly wrong;
- ii. unsupported by the evidence; or
- iii. otherwise unreasonable.

Any error must be plainly identified and be shown to have affected the result. In other words, the error must be shown to be at once palpable and overriding: *R. v. Clark*, [2005 SCC 2](#), [2005] 1 S.C.R. 6, at para. 9.

[231] It is of the essence of circumstantial evidence that a single item of evidence may support more than one inference. The same may be said of several items of circumstantial evidence, whether considered individually or assessed cumulatively. That different inferences may be drawn from individual items of evidence, or from the evidence as a whole, does not entitle a reviewing court to re-weigh or recalibrate the evidence by substituting, for a reasonable inference drawn by the trial judge, an equally – or even more – persuasive inference of its own. The task of the reviewing court is to determine whether the inferences drawn by the trial judge are "reasonably supported by the evidence". No more. No less. See, *H.L. v. Canada (Attorney General)*, [2005 SCC 25](#), [2005] 1 S.C.R. 401, at para. 74.

[232] Third, the elements of possession.

[233] A person may be found in possession of a thing in different ways. Among those ways is knowingly having the thing in some place, irrespective of whether

the person owns or occupies the place, for the use or benefit of himself or somebody else: *Criminal Code*, s. 4(3)(a)(ii).

The Principles Applied

[234] As I will briefly explain, I would reject this ground of appeal.

[235] The core findings of fact made by the trial judge do not reflect palpable and overriding error. The inferences drawn by the trial judge from the cumulative effect of this evidence fall well within the field of reasonable inferences available on this evidence. As the communications reveal, this was not a first-time transaction between Ritchie and the appellant, on the one hand, and Penguin, on the other. The quantity of drugs shipped – two kilograms – was plainly for the purpose of trafficking. The drugs were being shipped to a place for pick-up in a package that the appellant had the information necessary to locate. Nothing more was required.

CONCLUSION

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

Released: April 11, 2017 ("G.R.S.")

"David Watt J.A."

"I agree. G.R. Strathy C.J.O."

"I agree. K.M. Weiler J.A."

[1] While a trial judge is nevertheless obliged to balance whether the probative effect of the statement outweighs its prejudicial value, here, it was obvious that he did.

TAB 47

R. v. Gauthier, 2013 SCC 32 (CanLII), [2013] 2 SCR 403

Source:	Supreme Court of Canada
Date:	2013-06-07
File number:	34444
Other citations:	360 DLR (4th) 1 — 445 NR 97 — [2013] EXP 1924 — 298 CCC (3d) 277 — 2 CR (7th) 269 — 108 WCB (2d) 793 — EYB 2013-222820 — JE 2013-1033 — [2013] SCJ No 32 (QL)
Citation:	R. v. Gauthier, 2013 SCC 32 (CanLII), [2013] 2 SCR 403, < https://canlii.ca/t/fxsxs >, retrieved on 2026-03-24
Most recent unfavourable mention	R. v. Bengy , 2015 ONCA 397 (CanLII) [...] This case is distinguishable from R. v. Gauthier, 2013 SCC 32 , [2013] 2 S.C.R. 403 , in which the trial judge ruled that even though two defences had an air of reality, only one would be sent to the jury because the two defences were incompatible. [...]



SUPREME COURT OF CANADA

CITATION: R. v. Gauthier, 2013 SCC 32, [2013] 2 S.C.R. 403

DATE: 20130607

DOCKET: 34444

BETWEEN:

Cathie Gauthier
Appellant
and
Her Majesty The Queen
Respondent
- and -
Attorney General of Ontario
Intervener

OFFICIAL ENGLISH TRANSLATION: Reasons of Wagner J.

CORAM: LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: Wagner J. (LeBel, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring)
(paras. 1 to 65)

DISSENTING REASONS: Fish J.
(paras. 66 to 107)

R. v. Gauthier, 2013 SCC 32, [2013] 2 S.C.R. 403

Cathie Gauthier *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: R. v. Gauthier

2013 SCC 32

File No.: 34444.

2012: December 13; 2013: June 7.

Present: LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Defences — Charge to jury — Defences that are incompatible in theory — Accused charged with being party, together with her spouse, to murder of their three children — Alternative defence that accused had abandoned common intention to kill children — Whether it was appropriate to exclude defence of abandonment from defences put to jury on basis that it was incompatible with defence's principal theory, absence of mens rea.

*Criminal law — Defences — Abandonment — Participation in crime — Accused charged with being party, together with her spouse, to murder of their three children — Alternative defence that accused had abandoned common intention to kill children — Essential elements of defence of abandonment in context of forms of participation in crime provided for in [s. 21\(1\)](#) and [s. 21\(2\)](#) of *Criminal Code* — Whether defence of abandonment raised by accused met air of reality test.*

G was charged with being a party, together with her spouse, L, to the murder of their three children at the dawn of the year 2009. According to the Crown's theory, G was a party to the murder in planning it as part of a murder-suicide pact and in supplying the murder weapon. She did not act to prevent the children from being poisoned with drinks served by her spouse, which contained Gravol and oxazepam. Thus, she aided L to kill the children. At her jury trial, G submitted in her defence that she had not bought the medication to poison her children, that she was in a dissociative state on December 31, 2008 when she wrote some incriminating documents, and that this state meant she could not have formed the specific intent to commit the murders. In the alternative, should her argument based on the absence of *mens rea* be rejected, she claimed to have abandoned the common purpose of killing the children and to have clearly communicated her intention to do so to her spouse. The jury found G guilty of the first degree murder of her three children. The Court of Appeal upheld the guilty verdict, concluding that the trial judge had not

erred in refusing to put the defence of abandonment to the jury, since it was incompatible with the defence's principal theory.

Held (Fish J. dissenting): The appeal should be dismissed.

Per LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.: There is no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

The defence of abandonment must be submitted to the jury only if there is evidence in the record that is reasonably capable of supporting the necessary inferences in respect of each of the elements of this defence. The defence can be raised by an accused who is a party to an offence on the basis that he or she did or omitted to do anything for the purpose of aiding any person to commit the offence, or abetted any person in committing it (s. 21(1) of the *Criminal Code*), or on the basis that he or she had formed with other persons an intention to carry out an unlawful purpose and to assist each other therein and that an offence was committed in carrying out the common purpose (s. 21(2) of the *Criminal Code*), if the evidence shows (1) that there was an intention to abandon or withdraw from the unlawful purpose; (2) that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue; (3) that the communication served unequivocal notice upon those who wished to continue; and (4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence. There will be circumstances in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a

person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person's intention to withdraw from the unlawful purpose will on its own be considered reasonable and sufficient.

In this case, G's evidence that she communicated her withdrawal from the deadly plan and that her communication was timely and unequivocal is insufficient. The only relevant passage from her testimony is one in which she used the plural pronoun "we" (using the French pronoun "*on*" as an equivalent for the plural "*nous*") in saying "I told Marc we couldn't [do that]". But even if it were assumed that this evidence would be sufficient for a jury to reasonably conclude that G had communicated her intention to withdraw from the plan and that her communication was timely and unequivocal, that communication would not on its own have sufficed, in the circumstances of this case, for the judge to put the defence of abandonment to the jury. G did more than merely promise to take part in the murder-suicide pact. She supplied her spouse with the intoxicants he used to cause the children's deaths. She therefore had to do more either to neutralize the effects of her participation or to prevent the commission of the offence. For example, she could have hidden or destroyed the medication she had purchased, remained watchful and taken the children to a safe place for the evening, insisted that her spouse give her verbal confirmation of what he intended to do, or simply called the authorities. The record did not therefore contain evidence upon which a properly instructed jury acting reasonably could have found that G had abandoned the common unlawful purpose, and could accordingly have acquitted her, if it believed the evidence to be true. The defence of abandonment therefore did not meet the air of reality test, and the trial judge was not required to put the defence to the jury.

Per Fish J. (dissenting): Canadian courts have for more than 70 years held that the defence of abandonment comprises only two essential elements: (i) change of intention; and (ii) where practical and reasonable, timely and unequivocal notice of withdrawal. This test has been repeatedly and consistently applied in prosecutions under [s. 21\(1\)](#) and [s. 21\(2\)](#) of the *Criminal Code* alike. The defence of abandonment does not require that the accused take steps to neutralize prior participation in the criminal enterprise or to prevent the commission of the offence. While

such evidence may strengthen a defence of abandonment, failure to take neutralizing or preventative steps is not fatal.

In light of the state of the law universally accepted in Canada at the time of G's trial, it would be fundamentally unfair at this stage to fault her for failing to demonstrate anything more than a change of intention, plus timely and unequivocal notice of withdrawal from the murder-suicide pact. Since G's testimony provided some evidence on these two essential elements, there was an air of reality to the defence. The trial judge therefore erred by withholding the defence of abandonment from the jury. Incompatibility between G's defence of abandonment and her primary defence should not be relied upon to deprive the accused of a defence for which an air of reality has been established.

G testified that she told L his plan did not make sense and he "could not do it". She also told him that she did not want to be a part of it. She demonstrated her disapproval of the murder-suicide pact by tearing up two documents: a last will and testament written by her and a story of L's life containing references to the pact. She was convinced by his facial expression that the murder-suicide pact was off. This testimony provides some evidence that G no longer intended to participate in the murder-suicide pact and that she provided timely and unequivocal notice of this change of intention to the principal offender. That the evidence could have left the jury with a reasonable doubt as to G's guilt is all that was required. It was for the jury to determine whether G's words and conduct were believable and sufficient to demonstrate timely and unequivocal notice of withdrawal.

G is entitled to a fresh trial, where the jury will not be wrongly prevented from considering on its merits her defence of abandonment, however weak and unpromising this Court might believe it to be.

Cases Cited

By Wagner J.

Considered: *Wu v. The King*, [1934 CanLII 28 \(SCC\)](#), [1934] S.C.R. 609; *R. v. Whitehouse* (1940), [1940 CanLII 244 \(BC CA\)](#), 55 B.C.R. 420; **referred to:** *R. v. Cinous*, [2002 SCC 29](#), [2002] 2 S.C.R. 3; *R. v. Caron* (1998), [1998 CanLII 10146 \(QC CA\)](#), 126 C.C.C. (3d) 84; *R. v. Graveline*, [2006 SCC 16](#), [2006] 1 S.C.R. 609; *R. v. Faid*, [1983 CanLII 136 \(SCC\)](#), [1983] 1 S.C.R. 265; *Miller v. The Queen*, [1976 CanLII 12 \(SCC\)](#), [1977] 2 S.C.R. 680; *Henderson v. The King*, [1948 CanLII 17 \(SCC\)](#), [1948] S.C.R. 226; *R. v. Kirkness*, [1990 CanLII 57 \(SCC\)](#), [1990] 3 S.C.R. 74; *R. v. Bird*, [2009 SCC 60](#), [2009] 3 S.C.R. 638; *R. v. Fournier*, [2007 QCCA 1822 \(CanLII\)](#).

By Fish J. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Morin and Bouchard JJ.A.), [2011 QCCA 1395 \(CanLII\)](#), SOQUIJ AZ-50774324, [2011] J.Q. n° 9850 (QL), 2011 CarswellQue 7766, upholding the accused’s convictions for first degree murder. Appeal dismissed, Fish J. dissenting.

René Duval, for the appellant.

Sonia Rouleau, Régis Boisvert and Mélanie Paré, for the respondent.

Grace Choi and Christine Bartlett-Hughes, for the intervener.

English version of the judgment of LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. delivered by

WAGNER J. —

I. Overview

[1] Under Canadian law, individuals who intend to commit crimes may change their minds and avoid criminal liability by abandoning that intention. This appeal concerns, first of all, the circumstances in which a trial judge may put seemingly incompatible defences to a jury. Another question it raises is in what circumstances the trial judge must put the defence of abandonment to the jury in the context of the form of participation in a crime provided for in [s. 21\(1\)](#) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The appellant, Cathie Gauthier, was charged with being a party, together with her spouse, to the murder of their three children at the dawn of the year 2009. On October 24 of that same year, upon completion of a trial by judge and jury, she was convicted on all three counts of first degree murder.

[3] She submits that the trial judge erred in deciding not to put to the jury the defence of abandonment of the common intention to kill the children. For reasons that differ from those of the Court of Appeal, I find that the judge did not err in doing so, and I would dismiss the appeal.

II. Facts

[4] The facts of this case reveal a set of circumstances, as dramatic as they were tragic, that engendered the despair that ultimately led to the murder of three young children.

[5] Before I discuss the questions of law raised by this appeal, a brief review of the facts is therefore in order.

[6] The appellant met Marc Laliberté in 2000 and decided to move in with him in Chibougamau with her daughter Joëlle from a previous union. The couple had two other children: Marc-Ange, born in 2001, and Louis-Philippe, born in 2004. They moved to Amos in 2002. Misfortune seemed to dog the family. The appellant was sexually assaulted, and this caused her

considerable emotional distress as a result of which she was unable to leave the family home for very long. Marc Laliberté lost his mother and fell into a deep depression. Hoping for better luck, the family left Amos for Saguenay, where Kathie Ouellet, a childhood friend of the appellant's, lived. Marc Laliberté sold the family home and quit his job, and the family settled into their new surroundings. However, their new life got off to a rough start.

[7] Once in Saguenay, Marc Laliberté had difficulty finding a stable job and resigned himself to receiving employment insurance benefits. Meanwhile, the appellant was unable to hold on to the few short-term jobs she was able to find. In short, the couple encountered ever greater financial difficulties, and were forced to make an assignment in bankruptcy in October 2008.

[8] The holiday season was drawing near. On Christmas Eve, despite their bad luck, the couple decided to give the children the chance to enjoy this “festive” period. Marc Laliberté refused to pay the rent for December, and used the money so saved to buy numerous gifts for the children and for friends.

[9] On December 27, 2008, the appellant renewed her and her spouse's prescriptions for oxazepam, a soporific drug used to treat anxiety attacks, giving false reasons for doing so early. She told the pharmacist that her spouse was going through a difficult period and that they were about to go on a trip. While at the drug store, she also purchased some children's Graval. That same day, the family went to Normandin to visit members of Marc Laliberté's family for a few hours.

[10] On December 28, 2008, the appellant sent an e-mail message entitled [TRANSLATION] “a miracle, please” to the Fondation maman Dion in which, after recounting the family's difficulties, she asked for help. She wrote: “. . . I would like a miracle for Dec. 31, 2008”.

[11] The evening of December 29, she visited her friend Kathie Ouellet and told her that she did not know what she would do with her children if her spouse was not there. The next day, the appellant gave her nicest clothes to Ms. Ouellet.

[12] On December 31, according to the appellant, her spouse spent the morning working on the computer, and he turned the screen off every time she came near. Around noon, he joined her in the kitchen. He told her that he had made a decision and that the whole family would be leaving together. He then dictated some documents to her that she wrote down like a robot, she said, after which she had no memory of what was in them. Marc Laliberté then left the house. According to the appellant, it was then that she noticed some papers left on the kitchen counter, and after reading them, she realized what was going on. When her spouse returned in the afternoon, she told him she did not agree with the murder-suicide pact, and she tore up the documents. She claimed to have understood from the expression on her spouse's face that he had resigned himself to abandoning the dark plan.

[13] The appellant testified that the rest of the day was uneventful. That evening, as planned, the family sat down in front of the television to watch a movie together. Marc Laliberté prepared some drinks and popcorn for all the family. Shortly after that, the appellant noticed that one of the boys had fallen asleep, and then she too fell asleep. She said she had not suspected that their drinks had been poisoned.

[14] The physical evidence that was filed included two torn-up documents that had been found in the garbage can: a handwritten joint will, in the appellant's hand, and a document prepared on the computer by Marc Laliberté in which he told his life's story. Another copy of the will, typed out and signed by both spouses, was found on the kitchen island. Three handwritten letters from Cathie Gauthier to her friend Kathie Ouellet, to her biological mother and to her last employer completed the evidence. All these letters mentioned that the couple had decided together to end their and their children's lives. Some empty medicine bottles, as well as the prescriptions for oxazepam and the drug store's sales slip dated December 27, 2008, were also found in the kitchen.

[15] During the evening of January 1, 2009, the appellant called the emergency services number, asked for an ambulance and told the operator that her left wrist was slit, saying that

[TRANSLATION] “it was a pact, my husband killed our three children”, and adding that “we told ourselves we wouldn’t start 2009, but . . .”.

[16] When first responders arrived on the scene, they found the appellant with an injured wrist and pronounced her spouse and their three children dead. The evidence shows that the children were poisoned with Gravol and oxazepam. Traces of oxazepam were also detected in the appellant, whose left wrist had allegedly been slit by her spouse, Marc Laliberté.

III. Trial by Judge and Jury

[17] At her jury trial, the appellant submitted in her defence that she had not bought the medication to poison her children, that she was in a dissociative state on December 31, 2008 when she wrote the incriminating documents, and that this state meant she could not have formed the specific intent to commit the murders. In the alternative, should her argument based on the absence of *mens rea* be rejected, she claimed to have abandoned the common purpose of killing the children and to have clearly communicated her intention to do so to her spouse.

[18] The Crown’s theory was based on the proposition that the appellant was a party, together with her spouse, to the murder of her three children in that they planned it together as part of a murder-suicide pact and in that she supplied the murder weapon. She did not act on December 31, 2008 to prevent the children from being poisoned with the drinks containing the medication. Thus, she aided Marc Laliberté to kill the children.

[19] In his final instructions, the trial judge told the jury that three possible verdicts were open to it: first degree murder, second degree murder or acquittal. On whether it was appropriate to put the defence of abandonment of the common purpose to the jury, the judge pointed out to counsel, in the jury’s absence, that when the defence of abandonment has come before Canadian courts, it has been in the context of the form of participation in a crime provided for in [s. 21\(2\)](#) of the [Criminal Code](#), and he questioned the availability of this defence in the context of [s. 21\(1\)](#). Although he mentioned the defence of abandonment in summarizing the argument of counsel for

the appellant for the jury, the judge did not put this alternative defence to the jury. After three days of deliberations, the jury found the appellant guilty of the first degree murder of her three children.

[20] Cathie Gauthier appealed that decision to the Court of Appeal, which upheld the guilty verdict. Bouchard J.A. concluded that the trial judge had not erred in refusing to put the defence of abandonment to the jury. In his view, an alternative defence that is incompatible with the defence's principal theory cannot be put to the jury ([2011 QCCA 1395 \(CanLII\)](#)).

IV. Relevant Provisions

[21] [Section 21](#) of the *Criminal Code* reads as follows:

21. (1) [Parties to offence] Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) [Common intention] Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

V. Issues

[22] There are two main issues in this appeal. First, was it appropriate to exclude the defence of abandonment from the defences put to the jury on the basis that it was incompatible with the defence's principal theory, the absence of *mens rea*? If not, did the defence of abandonment meet the air of reality test? For the reasons that follow, I find that the answer to both these questions is no.

VI. Analysis

A. *Was It Appropriate to Exclude the Alternative Defence of Abandonment From the Defences Put to the Jury Solely Because It Was Theoretically Incompatible With the Defence's Principal Theory?*

1. When It Is Appropriate to Put a Defence to the Jury

[23] It is well established that any defence with an air of reality should go to the jury (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 51). This Court has held that a defence meets the air of reality test if there is “(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true” (*Cinous*, at para. 82).

[24] The reason why the trial judge is required to screen the defences that can be put to the jury should be borne in mind. This requirement is essentially rooted in a concern not to confuse jurors by putting to them a defence that lacks an evidential foundation. This premise gives rise to two principles: On the one hand, a trial judge must put to the jury all defences that arise on the facts, regardless of whether they have been specifically raised by the accused. On the other hand, the judge must withhold from the jury any defences that lack an air of reality.

[25] The burden on the accused is merely evidential. If the trial judge properly applies the relevant principles, he or she must identify the evidence that is most favourable to the accused and assume it to be true, regardless of whether it was adduced or mentioned by the accused. The judge must not enquire into whether the witnesses are credible or assess the probative value of this evidence. If each element of a defence is supported by direct evidence or may reasonably be inferred from circumstantial evidence, the judge must put this defence to the jury.

2. Alternative Defences That Are Incompatible With the Defence's Principal Theory

[26] The Court of Appeal concluded, on the basis that the alternative defence of abandonment was incompatible with the appellant's principal theory, that the trial judge did not have to put this defence to the jury:

[TRANSLATION] In my opinion, the judge was right not to draw the jury's attention to this defence. I note that, according to the appellant, there was no suicide pact or planning, and she was in a dissociative state when her spouse told her of his plan for all of them to leave together. She could not therefore be allowed, if she were not believed, to change her story and maintain that she had pulled out of a plan whose existence she had been denying from the start. Taking part in a suicide pact and then pulling out of it is in itself plausible. However, that is not what the appellant is arguing. Rather, she is denying the very existence of such a pact and then claiming that she can pull out of it if she is not believed. The judge did not have to put to the jury this alternative defence that is incompatible with the appellant's principal theory [para. 71]

[27] The Crown takes a more nuanced position, arguing that, because the effect of the appellant's primary defence — which was essentially based on a total absence of *mens rea* — was that the defence of abandonment lacked any factual foundation and could not therefore apply, this alternative defence did not meet the air of reality test:

[TRANSLATION] Refusing to take part in a plan and abandoning a plan are defences that are logically incompatible with one another. If, throughout the trial, the appellant denies intending to kill her children, how can she, if she is not believed in this regard, change her position and say that she withdrew from a plan whose existence she has previously denied? The defence of abandonment of a common purpose necessarily implies a recognition of having been a party to that common purpose, which the appellant has always denied. [R.F., at para. 57]

[28] In this case, I agree with the Court of Appeal, although for different reasons, that the defence of abandonment should not have been put to the jury. Let me explain this.

[29] In *Wu v. The King*, [1934 CanLII 28 \(SCC\)](#), [1934] S.C.R. 609, which was mentioned in *R. v. Caron* (1998), [1998 CanLII 10146 \(QC CA\)](#), 126 C.C.C. (3d) 84 (Que. C.A.), a case the Court of Appeal cited with approval, this Court stated that a judge does not have a duty to put to the

jury an alternative defence whose factual foundation is incompatible with the defence's principal theory. In *Wu*, the accused, after having raised only an alibi defence at trial, argued on appeal that the trial judge had erred in not putting to the jury the alternative defences of self-defence and provocation. Lamont J. made the following comments:

The rule, therefore, that an accused person at trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record. Even then the rule, in my opinion, is not without exception, and one exception is, that it has no application where the accused, by the defence which he sets up at the trial, has negatived the alternative defence for which he afterwards seeks a new trial.

...

. . . The defence that the accused was in Victoria at the time of the shooting was not only inconsistent with, but it negatived the defence now sought to be set up. Under these circumstances I fail to see how any duty could rest on the trial judge to instruct the jury to consider an alternative defence which the accused, by the defence he did set up, declared had no foundation in fact. [p. 617]

[30] With respect, *Wu* does not stand for the proposition that a judge does not have a duty to put to the jury an alternative defence that is theoretically incompatible with the defence's principal theory. Rather, it reaffirms the cardinal rule that the trial judge need not — indeed must not — put to the jury a defence in respect of which there is no evidence in the record that would be sufficient, if it existed and if it were believed to be true, for a jury acting reasonably to accept the defence. This is clear from the comments of Lamont J. on this point, which read in full as follows:

There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is, that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto. The only evidence appearing in the record upon which even an argument could be founded that the accused shot in self defence is that of Irwin and Bodner that, prior to the shooting, the complainant was running after the accused and his companion, waving his arms and shouting in Oriental. What he was saying we do not know. If it were material to the defence to prove that the words amounted to provocation, the onus was upon the accused to prove what the words were. On any event provocation, which would reduce murder to manslaughter, is not a defence to the charge as laid. Shooting in self defence would constitute a valid defence provided the accused brings himself within [sections 53 and 54](#) of the [Criminal Code](#). It

is justifiable to repel an unprovoked attack if the force used by the accused is not meant to cause death or grievous bodily harm and is not more than is necessary for the purpose of self defence. It is justified, even if it does cause death or grievous bodily harm, if it is done under reasonable apprehension of death or grievous bodily harm to himself, and if he believes, on reasonable grounds, that it is necessary for his own preservation. There is no evidence in the record from which a jury could reasonably infer that the accused when he shot the complainant did so under a reasonable apprehension of death or bodily harm to himself, or that he reasonably believed that he could not otherwise save himself from bodily injury. [Emphasis added; pp. 616-17.]

[31] The passage from *Wu* quoted in the Court of Appeal's reasons, at para. 71, in support of the proposition that the trial judge is not required to put to the jury an alternative defence that is incompatible with the primary defence is merely an *obiter dictum* that could be a source of confusion and should not be relied on. An accused might, for example, raise an alibi defence and testify that he or she was not in the city where the crime was committed at the relevant time, whereas certain Crown witnesses say that the accused was at the scene of the crime but was highly intoxicated. Even though the defences of alibi and of self-induced intoxication are incompatible in theory, the trial judge should, in my view, put both of them to the jury if they both meet the air of reality test.

[32] More recently, in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, this Court clarified the principle that if two defences are theoretically incompatible, they can nevertheless be put to the jury so long as they both meet the air of reality test. Although Fish J. pointed out that it is dangerous to put theoretically incompatible defences to a jury, he saw no error in the trial judge's decision to put to the jury, in addition to the primary defence of automatism, the alternative defence of self-defence the accused wished to raise. Regarding the incompatibility of the two defences, Fish J. wrote the following, at para. 10:

. . . the particular defences in issue here — automatism and self-defence — are, as the Crown suggested on the hearing of this appeal, incompatible in theory, though perhaps not always in practice. That is because self-defence implies deliberate conduct that is at odds with the fundamental premise of automatism, a state of dissociative, involuntary conduct.

[33] Nevertheless, the Court had held in *R. v. Faid*, [1983 CanLII 136 \(SCC\)](#), [1983] 1 S.C.R. 265, that the trial judge had not erred in refusing to put the defence of provocation to the jury as an alternative to the primary defence of self-defence. Although it is true that these two defences are incompatible in theory — self-defence involves reasoned conduct, whereas provocation, on the contrary, presupposes a temporary loss of self-control — it is important to point out that the refusal was not based on this incompatibility. Rather, the Court found that there was no evidence in the record to support the argument that the accused had acted in the heat of passion. That case was not therefore one in which the effect of the primary defence was to deprive the alternative defence of the support of evidence that was actually in the record. In *Faid*, the defence of provocation quite simply did not meet the air of reality test, because there was no evidence related to its elements. *Faid* is one illustration of the principle that any defence with an air of reality should be put to the jury.

[34] In conclusion, there is no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

B. *If the Defence of Abandonment Was Not Incompatible With the Principal Theory, Did It Meet the Air of Reality Test?*

1. Essential Elements of the Defence of Abandonment

[35] The defence of abandonment had to be submitted to the jury only if there was evidence in the record that was reasonably capable of supporting the necessary inferences in respect of each of the elements of this defence. That being said, it is necessary to begin by identifying the essential elements of the defence.

[36] In Canadian law, the defence of abandonment, which has rarely been raised, was first referred to in *R. v. Whitehouse* (1940), [1940 CanLII 244 \(BC CA\)](#), 55 B.C.R. 420 (C.A.). That case concerned the application of the defence in the specific context of the offence of participation in a crime provided for in [s. 21\(2\)](#) of the *Criminal Code*.

[37] In that context, the relevant test — which was subsequently endorsed in *Miller v. The Queen*, [1976 CanLII 12 \(SCC\)](#), [1977] 2 S.C.R. 680, *Henderson v. The King*, [1948 CanLII 17 \(SCC\)](#), [1948] S.C.R. 226, and *R. v. Kirkness*, [1990 CanLII 57 \(SCC\)](#), [1990] 3 S.C.R. 74 — was laid down as follows in *Whitehouse*, at p. 425:

I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is “timely communication” must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

[38] Thus, it was held that a defence of abandonment has three essential elements: (1) there must be an intention to abandon or withdraw from the unlawful purpose, (2) there must be timely communication of this abandonment or withdrawal from the person in question to those who wish to continue, and (3) the notice so communicated to those who continue to participate in the common purpose must be unequivocal.

[39] This appeal raises the issue of the application of the defence of abandonment in the context of the form of participation in a crime provided for in [s. 21\(1\)](#) of the *Criminal Code*.

[40] The reasons for recognizing the defence of abandonment in Canadian law bear repeating. There are two policy reasons in criminal law for making this defence available to parties

to offences. First, there is a need to ensure that only morally culpable persons are punished; second, there is a benefit to society in encouraging individuals involved in criminal activities to withdraw from those activities and report them.

[41] This Court implicitly acknowledged that the defence of abandonment applies in the context of s. 21(1) in *R. v. Bird*, 2009 SCC 60, [2009] 3 S.C.R. 638, in which it found that this defence did not meet the air of reality test in the case of an accused who had aided in the commission of a crime (see also *R. v. Fournier*, 2007 QCCA 1822 (CanLII)). However, since the Court found that the defence did not have an air of reality in that case, it did not on that occasion rule on the content of the defence in the specific context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*.

[42] It is well established that the scope of the defence of abandonment varies from case to case, depending on the circumstances (see the above-quoted passage from *Whitehouse*, at p. 425). In *Kirkness*, Wilson J. expressed the opinion that the content of the defence of abandonment depends on the type of offence and on the degree and form of participation of the accused. She endorsed, at p. 115, the following comment by Professor Manson:

Looking at the defence of abandoned intention in respect of parties, the key issues relate to the quality of withdrawal from the original plan and whether more is required to exculpate. These questions take on different significance depending on the form of accomplice liability in issue and the particular circumstances of a given case.

(A. Manson, “Re-codifying Attempts, Parties, and Abandoned Intentions” (1989), 14 *Queen’s L.J.* 85, at p. 95)

[43] Wilson J. also noted that there is a difference between the forms of participation in a crime provided for in s. 21(1) and s. 21(2), respectively, of the *Criminal Code*:

It is my view that since aiders and abettors have been treated differently from common intenders by Parliament, some difference between these two subsections must be recognized.

(*Kirkness*, at p. 116)

[44] Section 21(2) of the *Criminal Code* provides that a person who forms an intention to carry out an unlawful purpose in common with other persons is a party to an incidental offence committed by one of those other persons to the same extent as the person who actually committed it. This result derives from the first person's promise to devote physical and intellectual resources to the achievement of the common unlawful purpose. The person's liability in respect of the incidental offence therefore stems from his or her decision to participate in carrying out the unlawful purpose and to contribute resources needed to achieve it.

[45] In such a context, an intention to withdraw from the common purpose will — if a timely and unequivocal communication of this intention is addressed to the co-conspirators who persist in carrying out the unlawful purpose — be sufficient for the defence of abandonment to succeed. Communicating the intention to abandon the common purpose reduces the resources available to carry out the unlawful purpose and in so doing cancels out the effects of the participation of the withdrawing or abandoning person.

[46] The situation is very different in the context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*. Aiders and abettors generally do much more than promise their support in carrying out an unlawful purpose in the future. They perform concrete acts to aid the principal offender to commit the offence or to abet him or her in committing it. Their criminal liability and their moral culpability are proportional to these acts and stem from the fact that they have performed them. Thus, merely communicating in unequivocal terms their intention to cease participating in the commission of the offence will not be enough “to break the chain of causation and responsibility”, to repeat the words of Sloan J. from *Whitehouse*.

[47] Where a person's participation in a crime is more than a simple promise to carry out a common unlawful purpose — where, for example, the person is a party to the offence within the meaning of s. 21(1) of the *Criminal Code* — requiring an unequivocal communication of the intention to cease participating in the commission of the offence (the *Whitehouse* test) means that the accused must show that he or she took reasonable steps to neutralize the effects of his or her participation. As one author explains, using a colourful image to make his point, the intention to

withdraw must be accompanied by acts that are likely to cancel out the effects of the acts that have already been performed to aid or abet the offender:

Once the arrow is in the air, it is no use wishing to have never let it go — “Please God, let it miss!” The archer is guilty of homicide when the arrow gets the victim through the heart. The withdrawer, it is true, does not merely change his mind: he withdraws — but is that relevant if the withdrawal has no more effect on subsequent events than the archer’s repentance? [Emphasis added.]

(J. C. Smith, Commentary on *R. v. Mitchell*, [1999] *Crim. L.R.* 497)

[48] In the Quebec Court of Appeal’s judgment in *Fournier*, the accused was convicted of the first degree murder of her husband because she had hired a contract killer to murder him, had promised and later paid financial consideration to the killer, and had provided the killer with the necessary details of time and place and with information needed to identify the target. Because of the numerous acts that had been performed to aid in the commission of the murder, communicating an intention to withdraw by merely leaving the message [TRANSLATION] “cancel” on the killer’s answering device was found to be insufficient to exculpate the accused. The acts of abandonment were not proportional to the acts performed in support of the commission of the offence.

[49] For all these reasons, I would reformulate as follows the test already established in *Whitehouse* and *Kirkness* for determining whether the defence of abandonment applies, in order to adapt it specifically to the various degrees and forms of participation in crimes.

[50] One who is a party to an offence on the basis that he or she did or omitted to do anything for the purpose of aiding any person to commit the offence, or abetted any person in committing it (s. 21(1) of the *Criminal Code*), or on the basis that he or she had formed with other persons an intention to carry out an unlawful purpose and to assist each other therein and that an offence was committed in carrying out the common purpose (s. 21(2) of the *Criminal Code*), may raise the defence of abandonment if the evidence shows

(1) that there was an intention to abandon or withdraw from the unlawful purpose;

- (2) that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue;
- (3) that the communication served unequivocal notice upon those who wished to continue; and
- (4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence.

[51] I recognize that there will be circumstances, even where the accused is a party within the meaning of s. 21(1) of the *Criminal Code*, in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person's intention to withdraw from the unlawful purpose will on its own be considered reasonable, and sufficient to meet the test set out in the preceding paragraph.

[52] In conclusion, and more specifically in the context of s. 21(1) of the *Criminal Code*, the defence of abandonment should be put to the jury only if there is evidence in the record that is capable of supporting a finding that a person who was initially a party to the carrying out of an unlawful purpose subsequently took reasonable steps in the circumstances either to neutralize the effects of his or her participation or to prevent the commission of the offence.

2. Application to the Case at Bar

[53] In the case at bar, the defence of abandonment did not have an air of reality.

[54] The evidence showed that the appellant had written several documents, including some incriminating letters that were evidence of the couple's intention to end their and their children's lives. The couple explained in the letters how they planned to kill the children and take their own lives: by intoxication using a soporific drug. It was the appellant who purchased the medication that caused the children's deaths.

[55] What evidence could therefore have justified the trial judge's putting the defence of abandonment to the jury?

[56] The evidence is incomplete, to say the least.

[57] The only evidence comes from the appellant's testimony that, in the afternoon of December 31, 2008, she had notified her spouse that she had changed her mind and no longer intended to participate in the common purpose:

[TRANSLATION] I noticed some papers he'd left lying around. I, I realized what was happening. I didn't want that. When Marc came back, I, I told him it was crazy, what he was telling me. I ripped up the papers. [A.R., at p. 834]

On cross-examination, she made the following statement:

[TRANSLATION] When I saw the papers and looked at what was written on them, I said that's crazy. And I told Marc we couldn't . . .

. . .

I told Marc he couldn't do that, that I didn't want to be part of it. [Emphasis added; A.R., at p. 910.]

[58] The appellant also testified that the expression on her spouse's face had convinced her that he too had abandoned the sinister plan:

[TRANSLATION] But I gathered from his face that he was getting the message, too, and that it was all right. [A.R., at p. 913]

[59] Counsel for the appellant argues that, in light of this evidence, the trial judge had sufficient reasons to put the defence of abandonment to the jury. I find this argument wanting.

[60] In my view, the appellant's evidence that she communicated her withdrawal from the deadly plan and that her communication was timely and unequivocal is insufficient for the purposes of the air of reality test. To meet that test, it is not enough to simply identify "some evidence" or "any evidence"; the evidence must be "reasonably capable of supporting the inferences required for the defence to succeed" (*Cinous*, at paras. [82-83](#)).

[61] The only relevant passage from the appellant's testimony is the one in which she used the plural pronoun "we" (using the French pronoun "*on*" as an equivalent for the plural "*nous*") in saying "I told Marc we couldn't [do that]". This passage stands alone in the appellant's principal narrative to the effect that she never agreed to the murder-suicide pact, that she wrote the incriminating letters while in a dissociative state and that she told her spouse she disagreed with what he was planning to do as soon as she realized what it was.

[62] Nevertheless, even if it were assumed that the evidence the appellant relies upon would be sufficient for a jury to reasonably conclude that she had communicated her intention to withdraw from the plan and that her communication was timely and unequivocal, that communication would not on its own have sufficed, in the circumstances of this case, for the judge to put the defence of abandonment to the jury.

[63] The appellant did more than merely promise to take part in the murder-suicide pact. She supplied her spouse with the intoxicants he used to cause the children's deaths. She therefore had to do more either to neutralize the effects of her participation or to prevent the commission of the offence. For example, she could have hidden or destroyed the medication she had purchased, remained watchful and taken the children to a safe place for the evening, insisted that her spouse give her verbal confirmation of what he intended to do, or simply called the authorities.

[64] I conclude that the record did not contain evidence upon which a properly instructed jury acting reasonably could have found that the appellant had abandoned the common unlawful purpose, and could accordingly have acquitted her, if it believed the evidence to be true. The defence of abandonment therefore did not meet the air of reality test, and the trial judge was not required to put the defence to the jury.

VII. Disposition

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

The following are the reasons delivered by

FISH J. (dissenting) —

I

[66] Justice Wagner has set out with care and sensitivity the tragic and desperate circumstances that culminated in the murder by the appellant's husband of their three children and his own virtually contemporaneous suicide.

[67] In the wake of that tragedy and despair, the appellant, Cathie Gauthier, now stands convicted of first degree murder. And she has been sentenced to imprisonment for life without eligibility for parole for 25 years.

[68] The Crown's case against Ms. Gauthier is that she and her husband entered a murder-suicide pact that was executed with her help. She testified at trial that she had demonstrated her disapproval of the pact before the children were murdered and had notified her husband of this unwillingness to go through with the plan.

[69] Defence counsel urged the trial judge to leave open for the jury’s consideration Ms. Gauthier’s defence of abandonment. The trial judge declined to do so. The Court of Appeal upheld the trial judge on the ground that it was an [TRANSLATION] “incompatible . . . defence”: [2011 QCCA 1395 \(CanLII\)](#). Both courts below erred in law in this regard.

[70] The Court of Appeal did not consider whether the appellant’s defence of abandonment had an “air of reality” — that is to say, whether there was any evidence upon which a properly instructed jury might entertain a reasonable doubt on that issue.

[71] On the law as it was then understood, the trial judge was bound to put abandonment to the jury if there was evidence that the appellant (a) had changed — or “abandoned” — her earlier intention to aid or abet the murder of her children, and (b) had adequately communicated to her husband that she had withdrawn from their pact.

[72] This Court has repeatedly held that the defence of abandonment includes *no other essential elements*. And our attention has not been drawn to a single Canadian decision to the contrary, at any level.

[73] In my view, there *was* evidence at Ms. Gauthier’s trial upon which a properly instructed jury might well have found that she had abandoned the suicide pact in respect of which she was charged and convicted of murder. Or at least have been left with a reasonable doubt on this issue, which would of course have sufficed to warrant Ms. Gauthier’s acquittal.

[74] As a matter of law, the appellant is entitled, in my respectful view, to a fresh trial, where the jury will not be wrongly prevented from considering on its merits Ms. Gauthier’s defence of abandonment, however weak and unpromising we might believe it to be. I am aware of no legal principle that permits us to deprive her of that right.

[75] In his thorough and thoughtful reasons, Justice Wagner proposes that we now adopt additional requirements for a valid defence of abandonment where the accused, as in this case, has

done something to aid or abet the commission of the offence before satisfying the two established elements of abandonment. As we shall see, there are strong reasons of policy and precedent for resisting the proposed changes.

[76] As we shall see as well, I am not persuaded that the modifications we endorse should be made applicable on a retrial of the appellant. But even if we decide that they are, the appellant would at least be entitled to a fair opportunity to satisfy those newly recognized requirements. Her failure to do so at her first trial — prior to their recognition by this Court or, it seems, by *any* Canadian court — can hardly deprive Ms. Gauthier of a proper opportunity to do so now.

[77] With respect for those who are of a different view, I would therefore allow the appeal, set aside the appellant's convictions and order a new trial.

II

[78] Canadian courts have for more than 70 years held that the defence of abandonment comprises only two essential elements: (i) change of intention; and (ii) where practical and reasonable, timely and unequivocal notice of withdrawal.

[79] These requirements emanate from *R. v. Whitehouse* (1940), [1940 CanLII 244 \(BC CA\)](#), 55 B.C.R. 420 (C.A.), a decision that has been repeatedly approved and followed by this Court, as I mentioned earlier, and has long been firmly entrenched in Canadian law: see *Henderson v. The King*, [1948 CanLII 17 \(SCC\)](#), [1948] S.C.R. 226, at pp. 236-37; *R. v. de Tonnancourt* (1956), [1956 CanLII 470 \(MB CA\)](#), 115 C.C.C. 154 (Man. C.A.), at pp. 176 and 201-3; *R. v. Merrifield*, 1977 CarswellOnt 1806 (C.A.), at para. 3; *Miller v. The Queen*, [1976 CanLII 12 \(SCC\)](#), [1977] 2 S.C.R. 680, at p. 708; *R. v. Wagner* (1978), [1978 CanLII 401 \(BC CA\)](#), 8 B.C.L.R. 258 (C.A.), at pp. 260-61; *R. v. Joyce* (1978), [1978 CanLII 2422 \(BC CA\)](#), 42 C.C.C. (2d) 141 (B.C.C.A.), at p. 150; *R. v. Kirkness*, [1990 CanLII 57 \(SCC\)](#), [1990] 3 S.C.R. 74, at p. 89; *R. v. Johanson* (1995), [1995 CanLII 18031 \(AB CJ\)](#), 166 A.R. 60 (Prov. Ct.), at para. 23; *R. v. Fournier*, [2002 NBCA 71](#), 252 N.B.R. (2d) 256, at para. 22; *R. v. McKercher*, [2002] O.J. No. 5859 (QL) (Ct.

J.), at para. 77; *R. v. Forknall*, 2003 BCCA 43, 176 B.C.A.C. 284, at paras. 51-53; *R. v. Lacoursière* (2002), 2002 CanLII 41284 (QC CA), 7 C.R. (6th) 117 (Que. C.A.), at paras. 25-29; *R. v. P.K.*, 2006 ABCA 299, 397 A.R. 318, at para. 12; *R. v. S.R.B.*, 2009 ABCA 45, 448 A.R. 124, at paras. 10, 19-20 and 24-30, rev'd *R. v. Bird*, 2009 SCC 60, [2009] 3 S.C.R. 638, at para. 1; *R. v. Ball*, 2011 BCCA 11, 298 B.C.A.C. 166, at paras. 44-47; and *R. v. Leslie*, 2012 BCSC 683 (CanLII), at paras. 552-58.

[80] Justice Wagner does not suggest that the defence of abandonment, as it stood at the time of Ms. Gauthier's trial, required anything more than a change of intention, accompanied by timely and unequivocal notice of withdrawal. Rather, my colleague proposes a new and different test.

[81] To this end, my colleague distinguishes for present purposes between s. 21(1) and s. 21(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. The former deals with liability for aiding or abetting another in the commission of a specific offence; the latter, with liability for an offence committed by another in carrying out a common unlawful purpose.

[82] Justice Wagner would impose additional requirements on the defence of abandonment, particularly with respect to liability under s. 21(1), where the accused would need to adduce evidence that he or she took steps to neutralize any prior contribution to the commission of the offence or, in the alternative, to prevent the commission of the offence.

[83] With respect, this approach overlooks the fact that both s. 21(1) and s. 21(2) can involve active participation by the accused: see for example *Henderson* and *Miller*.

[84] Moreover, the *Whitehouse* test has been repeatedly and consistently applied in prosecutions under s. 21(1) and s. 21(2) alike.

[85] The application of the *Whitehouse* criteria to an aiding and abetting case was endorsed very recently by this Court in 2009, and even more recently by other Canadian courts:

Bird (affirming Costigan J.A.'s dissent); *Ball*, at paras. 44-47; and *Leslie*, at paras. 552-58.

[86] Indeed, *Whitehouse* itself involved parties to an offence who had “aided and abetted in the commission of the crime”: p. 424. They had “performed part, at least, of the tasks assigned to them”: again, at p. 424.

[87] It was out of this factual context that the test for abandonment was born. And the court identified only two requirements: the first, change of intention; the second, timely and unequivocal notice of withdrawal — that is, the accused must clearly communicate to the principal “that if he proceeds upon it he does so without the *further aid and assistance* of those who withdraw”: *Whitehouse*, at p. 425 (emphasis added).

[88] As the language of this oft-cited passage makes clear, the *Whitehouse* test for abandonment expressly contemplates prior aid and assistance.

[89] Moreover, to suggest that an accused under either subsection of s. 21 must neutralize prior involvement disregards an important rationale of the defence of abandonment, namely, giving the principal offender the opportunity to abandon the criminal objective. As Allan Manson explains in “Re-codifying Attempts, Parties, and Abandoned Intentions” (1989), 14 *Queen's L.J.* 85, at p. 101:

. . . the premise upon which *Whitehouse* is based: “Let it be known, if you go then you go alone.” Unequivocal withdrawal and the element of timeliness are sufficiently expansive to accommodate abettors and aiders alike because, as in *Becerra* and *Gundy*, the aim is to compel the principal to reconsider the objective in time to abandon it. This, after all, is the preventative rationale for party responsibility. Thus the defence of abandonment as structured in *Whitehouse* can apply with equal fairness and effect to all parties including aiders by interpreting timeliness in relation to the offence and the goal of ultimate abandonment.

[90] Even the most ardent proponents of a more stringent abandonment defence recognize that to require neutralizing or preventative steps would necessitate a change to Canadian law: see

M. Campbell, “Turning Back the Clock: Aiders and the Defence of Abandonment” (2010), 14 *Can. Crim. L.R.* 1, at pp. 16-17.

[91] Courts in the United Kingdom, approving *Whitehouse*, have concluded that neutralizing or preventative steps are not required to establish abandonment. In *R. v. O’Flaherty*, [2004] EWCA Crim 526, [2004] 2 Cr. App. R. 20 (p. 315), at para. 60, the Court of Appeal acknowledged that whether an accused has done enough “to demonstrate that he or she is withdrawing from the joint enterprise . . . is ultimately a question of fact and degree for the jury”. The jury should account for “the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal”. And, the court *explicitly rejected the proposition that effective withdrawal requires reasonable steps to prevent the crime*:

In cases of assistance it has sometimes been suggested that, for there to be an effective withdrawal, reasonable steps must have been taken to prevent the crime. It is clear, however, this is not necessary. [Para. 60; see also para. 61.]

See also *R. v. Otway*, [2011] EWCA Crim 3 (BAILII), at para. 32, where the court held that efforts to prevent the crime were relevant but not required for withdrawal.

[92] Justice Wagner relies on *R. v. Fournier*, [2007 QCCA 1822 \(CanLII\)](#), to support his position that mere communication of changed intention should henceforth be insufficient for abandonment in s. 21(1) cases (para. 48 of Justice Wagner’s reasons). However, in *Fournier*, unlike this case, the defence of abandonment was *not* kept from the jury. Indeed, the Court of Appeal held that the trial judge properly instructed the jury that abandonment required timely and unequivocal notice of withdrawal: *Fournier*, at paras. 18-20.

[93] I agree with my colleague that the internally repentant archer cannot, having let the arrow fly, seek refuge in the defence of abandonment (para. 47 of Justice Wagner’s reasons). The defence fails in Sir John Smith’s illustration not because preventative or neutralizing steps are required, but rather because notice of withdrawal comes too late, or not at all.

[94] These authorities all make clear that the defence of abandonment does not require that the accused take steps to neutralize prior participation in the criminal enterprise or to prevent the commission of the offence. While such evidence may strengthen a defence of abandonment, failure to take neutralizing or preventative steps is not fatal. Thus, for example, in *R. v. Edwards*, 2001 BCSC 275 (CanLII), at para. 186, the accused’s efforts to stop the commission of the offence were treated as evidence that the *Whitehouse* requirements were met — not as additional requirements of the defence.

[95] If we were to accept that the defence of abandonment now requires that an accused take steps to neutralize previous assistance or to prevent the commission of the crime, I am inclined to believe that this change should only be given prospective effect — at least in this case. As Don Stuart explains in *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 9: “It is almost universally accepted that the view that judges merely declare existing law rather than create new law is outmoded and wrong.”

[96] But on any view of the matter, in light of the state of the law universally accepted in Canada at the time of the appellant’s trial, it would be fundamentally unfair at this stage to fault the appellant for failing to demonstrate anything more than a change of intention, plus timely and unequivocal notice of withdrawal from the murder-suicide pact. Since the appellant’s testimony provided some evidence on these two essential elements, there was an air of reality to the defence. The trial judge therefore erred by withholding the defence of abandonment from the jury.

III

[97] I agree with Justice Wagner that the “incompatibility” between Ms. Gauthier’s defence of abandonment and her primary defence did not justify the trial judge’s decision to prevent the jury from considering them both. And I am therefore content to add only these brief comments on the issue of incompatibility.

[98] Incompatibility should not be relied upon to deprive the accused of a defence for which an air of reality has been established, particularly where — as in this case — defence counsel has requested that it be included in the judge’s charge: A.R., at pp. 1018 and 1037-38.

[99] As Kellock J. stated in *Henderson*: “It is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury”: p. 241. Taschereau J. likewise emphasized the accused’s “fundamental right . . . to have all the features of [the] defence adequately put to the jury”: *Henderson*, at p. 237.

IV

[100] For abandonment to be left for the jury, there must be some evidence upon which a properly instructed jury could form a reasonable doubt on the two essential elements of the defence: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 2, 49, 52-54 and 83. In my view, the appellant’s testimony satisfied this modest evidentiary threshold.

[101] Indeed, there was no suggestion at trial by the Crown— nor finding by the trial judge or the Court of Appeal — that the defence of abandonment lacked an air of reality.

[102] The appellant testified that she told Marc Laliberté his plan did not make sense and he [TRANSLATION] “could not do it” (“*pouvait pas faire ça*”). She also told him that she did not want to be a part of it. She demonstrated her disapproval of the murder-suicide pact by tearing up two documents: a last will and testament written by the appellant and a story of Marc Laliberté’s life containing references to the pact. She was convinced by his facial expression that the murder-suicide pact was off: A.R., at pp. 834-35 and 910-11.

[103] This testimony provides *some evidence* that the appellant no longer intended to participate in the murder-suicide pact and that she provided timely and unequivocal notice of this change of intention to the principal offender. That the evidence could have left the jury with a reasonable doubt as to the appellant’s guilt is all that was required.

[104] Whether the appellant ultimately “did enough” to communicate timely and unequivocal withdrawal was a question of fact that should have been left for the jury to decide: *P.K.*, at para. 11; *O’Flaherty*, at para. 60; *Cinous*, at paras. 52 and 54.

[105] In short, it was for the jury to determine whether the appellant’s words and conduct were believable and sufficient to demonstrate timely and unequivocal notice of withdrawal. As Taschereau J. stated, again in *Henderson*, at p. 237: “The question whether the agreement has been put to an end, must be judged in view of all the circumstances revealed by the evidence, and I have no doubt that it is a question for the jury.”

[106] With respect, I feel bound to conclude that the trial judge, by declining to instruct on the defence of abandonment, encroached “on the jury’s traditional function as arbiter of fact”: *Cinous*, at para. 56.

V

[107] For the foregoing reasons, I would allow the appeal, set aside the appellant’s convictions, and order a new trial.

Appeal dismissed, FISH J. dissenting.

Solicitors for the appellant: Duval Lauzon Ménard, Trois-Rivières.

Solicitor for the respondent: Directeur des poursuites criminelles et pénales du Québec, Chicoutimi.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

TAB 48

R. v. Gauthier, 2013 SCC 32 (CanLII), [2013] 2 SCR 403

Source:	Supreme Court of Canada
Date:	2013-06-07
File number:	34444
Other citations:	360 DLR (4th) 1 — 445 NR 97 — [2013] EXP 1924 — 298 CCC (3d) 277 — 2 CR (7th) 269 — 108 WCB (2d) 793 — EYB 2013-222820 — JE 2013-1033 — [2013] SCJ No 32 (QL)
Citation:	R. v. Gauthier, 2013 SCC 32 (CanLII), [2013] 2 SCR 403, < https://canlii.ca/t/fxsxs >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v. Bengy , 2015 ONCA 397 (CanLII) [...] This case is distinguishable from R. v. Gauthier, 2013 SCC 32 , [2013] 2 S.C.R. 403 , in which the trial judge ruled that even though two defences had an air of reality, only one would be sent to the jury because the two defences were incompatible. [...]



SUPREME COURT OF CANADA

CITATION: R. v. Gauthier, 2013 SCC 32, [2013] 2 S.C.R. 403

DATE: 20130607

DOCKET: 34444

BETWEEN:

Cathie Gauthier
Appellant
and
Her Majesty The Queen
Respondent
- and -
Attorney General of Ontario
Intervener

OFFICIAL ENGLISH TRANSLATION: Reasons of Wagner J.

CORAM: LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: Wagner J. (LeBel, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring)
(paras. 1 to 65)

DISSENTING REASONS: Fish J.
(paras. 66 to 107)

R. v. Gauthier, 2013 SCC 32, [2013] 2 S.C.R. 403

Cathie Gauthier *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

Indexed as: R. v. Gauthier

2013 SCC 32

File No.: 34444.

2012: December 13; 2013: June 7.

Present: LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Defences — Charge to jury — Defences that are incompatible in theory — Accused charged with being party, together with her spouse, to murder of their three children — Alternative defence that accused had abandoned common intention to kill children — Whether it was appropriate to exclude defence of abandonment from defences put to jury on basis that it was incompatible with defence's principal theory, absence of mens rea.

*Criminal law — Defences — Abandonment — Participation in crime — Accused charged with being party, together with her spouse, to murder of their three children — Alternative defence that accused had abandoned common intention to kill children — Essential elements of defence of abandonment in context of forms of participation in crime provided for in [s. 21\(1\)](#) and [s. 21\(2\)](#) of *Criminal Code* — Whether defence of abandonment raised by accused met air of reality test.*

G was charged with being a party, together with her spouse, L, to the murder of their three children at the dawn of the year 2009. According to the Crown's theory, G was a party to the murder in planning it as part of a murder-suicide pact and in supplying the murder weapon. She did not act to prevent the children from being poisoned with drinks served by her spouse, which contained Gravol and oxazepam. Thus, she aided L to kill the children. At her jury trial, G submitted in her defence that she had not bought the medication to poison her children, that she was in a dissociative state on December 31, 2008 when she wrote some incriminating documents, and that this state meant she could not have formed the specific intent to commit the murders. In the alternative, should her argument based on the absence of *mens rea* be rejected, she claimed to have abandoned the common purpose of killing the children and to have clearly communicated her intention to do so to her spouse. The jury found G guilty of the first degree murder of her three children. The Court of Appeal upheld the guilty verdict, concluding that the trial judge had not

erred in refusing to put the defence of abandonment to the jury, since it was incompatible with the defence's principal theory.

Held (Fish J. dissenting): The appeal should be dismissed.

Per LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.: There is no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

The defence of abandonment must be submitted to the jury only if there is evidence in the record that is reasonably capable of supporting the necessary inferences in respect of each of the elements of this defence. The defence can be raised by an accused who is a party to an offence on the basis that he or she did or omitted to do anything for the purpose of aiding any person to commit the offence, or abetted any person in committing it (s. 21(1) of the *Criminal Code*), or on the basis that he or she had formed with other persons an intention to carry out an unlawful purpose and to assist each other therein and that an offence was committed in carrying out the common purpose (s. 21(2) of the *Criminal Code*), if the evidence shows (1) that there was an intention to abandon or withdraw from the unlawful purpose; (2) that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue; (3) that the communication served unequivocal notice upon those who wished to continue; and (4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence. There will be circumstances in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a

person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person's intention to withdraw from the unlawful purpose will on its own be considered reasonable and sufficient.

In this case, G's evidence that she communicated her withdrawal from the deadly plan and that her communication was timely and unequivocal is insufficient. The only relevant passage from her testimony is one in which she used the plural pronoun "we" (using the French pronoun "*on*" as an equivalent for the plural "*nous*") in saying "I told Marc we couldn't [do that]". But even if it were assumed that this evidence would be sufficient for a jury to reasonably conclude that G had communicated her intention to withdraw from the plan and that her communication was timely and unequivocal, that communication would not on its own have sufficed, in the circumstances of this case, for the judge to put the defence of abandonment to the jury. G did more than merely promise to take part in the murder-suicide pact. She supplied her spouse with the intoxicants he used to cause the children's deaths. She therefore had to do more either to neutralize the effects of her participation or to prevent the commission of the offence. For example, she could have hidden or destroyed the medication she had purchased, remained watchful and taken the children to a safe place for the evening, insisted that her spouse give her verbal confirmation of what he intended to do, or simply called the authorities. The record did not therefore contain evidence upon which a properly instructed jury acting reasonably could have found that G had abandoned the common unlawful purpose, and could accordingly have acquitted her, if it believed the evidence to be true. The defence of abandonment therefore did not meet the air of reality test, and the trial judge was not required to put the defence to the jury.

Per Fish J. (dissenting): Canadian courts have for more than 70 years held that the defence of abandonment comprises only two essential elements: (i) change of intention; and (ii) where practical and reasonable, timely and unequivocal notice of withdrawal. This test has been repeatedly and consistently applied in prosecutions under [s. 21\(1\)](#) and [s. 21\(2\)](#) of the *Criminal Code* alike. The defence of abandonment does not require that the accused take steps to neutralize prior participation in the criminal enterprise or to prevent the commission of the offence. While

such evidence may strengthen a defence of abandonment, failure to take neutralizing or preventative steps is not fatal.

In light of the state of the law universally accepted in Canada at the time of G's trial, it would be fundamentally unfair at this stage to fault her for failing to demonstrate anything more than a change of intention, plus timely and unequivocal notice of withdrawal from the murder-suicide pact. Since G's testimony provided some evidence on these two essential elements, there was an air of reality to the defence. The trial judge therefore erred by withholding the defence of abandonment from the jury. Incompatibility between G's defence of abandonment and her primary defence should not be relied upon to deprive the accused of a defence for which an air of reality has been established.

G testified that she told L his plan did not make sense and he "could not do it". She also told him that she did not want to be a part of it. She demonstrated her disapproval of the murder-suicide pact by tearing up two documents: a last will and testament written by her and a story of L's life containing references to the pact. She was convinced by his facial expression that the murder-suicide pact was off. This testimony provides some evidence that G no longer intended to participate in the murder-suicide pact and that she provided timely and unequivocal notice of this change of intention to the principal offender. That the evidence could have left the jury with a reasonable doubt as to G's guilt is all that was required. It was for the jury to determine whether G's words and conduct were believable and sufficient to demonstrate timely and unequivocal notice of withdrawal.

G is entitled to a fresh trial, where the jury will not be wrongly prevented from considering on its merits her defence of abandonment, however weak and unpromising this Court might believe it to be.

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By Wagner J.

Considered: *Wu v. The King*, [1934 CanLII 28 \(SCC\)](#), [1934] S.C.R. 609; *R. v. Whitehouse* (1940), [1940 CanLII 244 \(BC CA\)](#), 55 B.C.R. 420; **referred to:** *R. v. Cinous*, [2002 SCC 29](#), [2002] 2 S.C.R. 3; *R. v. Caron* (1998), [1998 CanLII 10146 \(QC CA\)](#), 126 C.C.C. (3d) 84; *R. v. Graveline*, [2006 SCC 16](#), [2006] 1 S.C.R. 609; *R. v. Faid*, [1983 CanLII 136 \(SCC\)](#), [1983] 1 S.C.R. 265; *Miller v. The Queen*, [1976 CanLII 12 \(SCC\)](#), [1977] 2 S.C.R. 680; *Henderson v. The King*, [1948 CanLII 17 \(SCC\)](#), [1948] S.C.R. 226; *R. v. Kirkness*, [1990 CanLII 57 \(SCC\)](#), [1990] 3 S.C.R. 74; *R. v. Bird*, [2009 SCC 60](#), [2009] 3 S.C.R. 638; *R. v. Fournier*, [2007 QCCA 1822 \(CanLII\)](#).

By Fish J. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Morin and Bouchard JJ.A.), [2011 QCCA 1395 \(CanLII\)](#), SOQUIJ AZ-50774324, [2011] J.Q. n° 9850 (QL), 2011 CarswellQue 7766, upholding the accused’s convictions for first degree murder. Appeal dismissed, Fish J. dissenting.

René Duval, for the appellant.

Sonia Rouleau, Régis Boisvert and Mélanie Paré, for the respondent.

Grace Choi and Christine Bartlett-Hughes, for the intervener.

English version of the judgment of LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. delivered by

WAGNER J. —

I. Overview

[1] Under Canadian law, individuals who intend to commit crimes may change their minds and avoid criminal liability by abandoning that intention. This appeal concerns, first of all, the circumstances in which a trial judge may put seemingly incompatible defences to a jury. Another question it raises is in what circumstances the trial judge must put the defence of abandonment to the jury in the context of the form of participation in a crime provided for in [s. 21\(1\)](#) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The appellant, Cathie Gauthier, was charged with being a party, together with her spouse, to the murder of their three children at the dawn of the year 2009. On October 24 of that same year, upon completion of a trial by judge and jury, she was convicted on all three counts of first degree murder.

[3] She submits that the trial judge erred in deciding not to put to the jury the defence of abandonment of the common intention to kill the children. For reasons that differ from those of the Court of Appeal, I find that the judge did not err in doing so, and I would dismiss the appeal.

II. Facts

[4] The facts of this case reveal a set of circumstances, as dramatic as they were tragic, that engendered the despair that ultimately led to the murder of three young children.

[5] Before I discuss the questions of law raised by this appeal, a brief review of the facts is therefore in order.

[6] The appellant met Marc Laliberté in 2000 and decided to move in with him in Chibougamau with her daughter Joëlle from a previous union. The couple had two other children: Marc-Ange, born in 2001, and Louis-Philippe, born in 2004. They moved to Amos in 2002. Misfortune seemed to dog the family. The appellant was sexually assaulted, and this caused her

considerable emotional distress as a result of which she was unable to leave the family home for very long. Marc Laliberté lost his mother and fell into a deep depression. Hoping for better luck, the family left Amos for Saguenay, where Kathie Ouellet, a childhood friend of the appellant's, lived. Marc Laliberté sold the family home and quit his job, and the family settled into their new surroundings. However, their new life got off to a rough start.

[7] Once in Saguenay, Marc Laliberté had difficulty finding a stable job and resigned himself to receiving employment insurance benefits. Meanwhile, the appellant was unable to hold on to the few short-term jobs she was able to find. In short, the couple encountered ever greater financial difficulties, and were forced to make an assignment in bankruptcy in October 2008.

[8] The holiday season was drawing near. On Christmas Eve, despite their bad luck, the couple decided to give the children the chance to enjoy this “festive” period. Marc Laliberté refused to pay the rent for December, and used the money so saved to buy numerous gifts for the children and for friends.

[9] On December 27, 2008, the appellant renewed her and her spouse's prescriptions for oxazepam, a soporific drug used to treat anxiety attacks, giving false reasons for doing so early. She told the pharmacist that her spouse was going through a difficult period and that they were about to go on a trip. While at the drug store, she also purchased some children's Graval. That same day, the family went to Normandin to visit members of Marc Laliberté's family for a few hours.

[10] On December 28, 2008, the appellant sent an e-mail message entitled [TRANSLATION] “a miracle, please” to the Fondation maman Dion in which, after recounting the family's difficulties, she asked for help. She wrote: “. . . I would like a miracle for Dec. 31, 2008”.

[11] The evening of December 29, she visited her friend Kathie Ouellet and told her that she did not know what she would do with her children if her spouse was not there. The next day, the appellant gave her nicest clothes to Ms. Ouellet.

[12] On December 31, according to the appellant, her spouse spent the morning working on the computer, and he turned the screen off every time she came near. Around noon, he joined her in the kitchen. He told her that he had made a decision and that the whole family would be leaving together. He then dictated some documents to her that she wrote down like a robot, she said, after which she had no memory of what was in them. Marc Laliberté then left the house. According to the appellant, it was then that she noticed some papers left on the kitchen counter, and after reading them, she realized what was going on. When her spouse returned in the afternoon, she told him she did not agree with the murder-suicide pact, and she tore up the documents. She claimed to have understood from the expression on her spouse's face that he had resigned himself to abandoning the dark plan.

[13] The appellant testified that the rest of the day was uneventful. That evening, as planned, the family sat down in front of the television to watch a movie together. Marc Laliberté prepared some drinks and popcorn for all the family. Shortly after that, the appellant noticed that one of the boys had fallen asleep, and then she too fell asleep. She said she had not suspected that their drinks had been poisoned.

[14] The physical evidence that was filed included two torn-up documents that had been found in the garbage can: a handwritten joint will, in the appellant's hand, and a document prepared on the computer by Marc Laliberté in which he told his life's story. Another copy of the will, typed out and signed by both spouses, was found on the kitchen island. Three handwritten letters from Cathie Gauthier to her friend Kathie Ouellet, to her biological mother and to her last employer completed the evidence. All these letters mentioned that the couple had decided together to end their and their children's lives. Some empty medicine bottles, as well as the prescriptions for oxazepam and the drug store's sales slip dated December 27, 2008, were also found in the kitchen.

[15] During the evening of January 1, 2009, the appellant called the emergency services number, asked for an ambulance and told the operator that her left wrist was slit, saying that

[TRANSLATION] “it was a pact, my husband killed our three children”, and adding that “we told ourselves we wouldn’t start 2009, but . . .”.

[16] When first responders arrived on the scene, they found the appellant with an injured wrist and pronounced her spouse and their three children dead. The evidence shows that the children were poisoned with Gravol and oxazepam. Traces of oxazepam were also detected in the appellant, whose left wrist had allegedly been slit by her spouse, Marc Laliberté.

III. Trial by Judge and Jury

[17] At her jury trial, the appellant submitted in her defence that she had not bought the medication to poison her children, that she was in a dissociative state on December 31, 2008 when she wrote the incriminating documents, and that this state meant she could not have formed the specific intent to commit the murders. In the alternative, should her argument based on the absence of *mens rea* be rejected, she claimed to have abandoned the common purpose of killing the children and to have clearly communicated her intention to do so to her spouse.

[18] The Crown’s theory was based on the proposition that the appellant was a party, together with her spouse, to the murder of her three children in that they planned it together as part of a murder-suicide pact and in that she supplied the murder weapon. She did not act on December 31, 2008 to prevent the children from being poisoned with the drinks containing the medication. Thus, she aided Marc Laliberté to kill the children.

[19] In his final instructions, the trial judge told the jury that three possible verdicts were open to it: first degree murder, second degree murder or acquittal. On whether it was appropriate to put the defence of abandonment of the common purpose to the jury, the judge pointed out to counsel, in the jury’s absence, that when the defence of abandonment has come before Canadian courts, it has been in the context of the form of participation in a crime provided for in [s. 21\(2\)](#) of the [Criminal Code](#), and he questioned the availability of this defence in the context of [s. 21\(1\)](#). Although he mentioned the defence of abandonment in summarizing the argument of counsel for

the appellant for the jury, the judge did not put this alternative defence to the jury. After three days of deliberations, the jury found the appellant guilty of the first degree murder of her three children.

[20] Cathie Gauthier appealed that decision to the Court of Appeal, which upheld the guilty verdict. Bouchard J.A. concluded that the trial judge had not erred in refusing to put the defence of abandonment to the jury. In his view, an alternative defence that is incompatible with the defence's principal theory cannot be put to the jury ([2011 QCCA 1395 \(CanLII\)](#)).

IV. Relevant Provisions

[21] [Section 21](#) of the *Criminal Code* reads as follows:

21. (1) [Parties to offence] Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) [Common intention] Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

V. Issues

[22] There are two main issues in this appeal. First, was it appropriate to exclude the defence of abandonment from the defences put to the jury on the basis that it was incompatible with the defence's principal theory, the absence of *mens rea*? If not, did the defence of abandonment meet the air of reality test? For the reasons that follow, I find that the answer to both these questions is no.

VI. Analysis

A. *Was It Appropriate to Exclude the Alternative Defence of Abandonment From the Defences Put to the Jury Solely Because It Was Theoretically Incompatible With the Defence's Principal Theory?*

1. When It Is Appropriate to Put a Defence to the Jury

[23] It is well established that any defence with an air of reality should go to the jury (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 51). This Court has held that a defence meets the air of reality test if there is “(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true” (*Cinous*, at para. 82).

[24] The reason why the trial judge is required to screen the defences that can be put to the jury should be borne in mind. This requirement is essentially rooted in a concern not to confuse jurors by putting to them a defence that lacks an evidential foundation. This premise gives rise to two principles: On the one hand, a trial judge must put to the jury all defences that arise on the facts, regardless of whether they have been specifically raised by the accused. On the other hand, the judge must withhold from the jury any defences that lack an air of reality.

[25] The burden on the accused is merely evidential. If the trial judge properly applies the relevant principles, he or she must identify the evidence that is most favourable to the accused and assume it to be true, regardless of whether it was adduced or mentioned by the accused. The judge must not enquire into whether the witnesses are credible or assess the probative value of this evidence. If each element of a defence is supported by direct evidence or may reasonably be inferred from circumstantial evidence, the judge must put this defence to the jury.

2. Alternative Defences That Are Incompatible With the Defence's Principal Theory

[26] The Court of Appeal concluded, on the basis that the alternative defence of abandonment was incompatible with the appellant's principal theory, that the trial judge did not have to put this defence to the jury:

[TRANSLATION] In my opinion, the judge was right not to draw the jury's attention to this defence. I note that, according to the appellant, there was no suicide pact or planning, and she was in a dissociative state when her spouse told her of his plan for all of them to leave together. She could not therefore be allowed, if she were not believed, to change her story and maintain that she had pulled out of a plan whose existence she had been denying from the start. Taking part in a suicide pact and then pulling out of it is in itself plausible. However, that is not what the appellant is arguing. Rather, she is denying the very existence of such a pact and then claiming that she can pull out of it if she is not believed. The judge did not have to put to the jury this alternative defence that is incompatible with the appellant's principal theory [para. 71]

[27] The Crown takes a more nuanced position, arguing that, because the effect of the appellant's primary defence — which was essentially based on a total absence of *mens rea* — was that the defence of abandonment lacked any factual foundation and could not therefore apply, this alternative defence did not meet the air of reality test:

[TRANSLATION] Refusing to take part in a plan and abandoning a plan are defences that are logically incompatible with one another. If, throughout the trial, the appellant denies intending to kill her children, how can she, if she is not believed in this regard, change her position and say that she withdrew from a plan whose existence she has previously denied? The defence of abandonment of a common purpose necessarily implies a recognition of having been a party to that common purpose, which the appellant has always denied. [R.F., at para. 57]

[28] In this case, I agree with the Court of Appeal, although for different reasons, that the defence of abandonment should not have been put to the jury. Let me explain this.

[29] In *Wu v. The King*, [1934 CanLII 28 \(SCC\)](#), [1934] S.C.R. 609, which was mentioned in *R. v. Caron* (1998), [1998 CanLII 10146 \(QC CA\)](#), 126 C.C.C. (3d) 84 (Que. C.A.), a case the Court of Appeal cited with approval, this Court stated that a judge does not have a duty to put to the

jury an alternative defence whose factual foundation is incompatible with the defence's principal theory. In *Wu*, the accused, after having raised only an alibi defence at trial, argued on appeal that the trial judge had erred in not putting to the jury the alternative defences of self-defence and provocation. Lamont J. made the following comments:

The rule, therefore, that an accused person at trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record. Even then the rule, in my opinion, is not without exception, and one exception is, that it has no application where the accused, by the defence which he sets up at the trial, has negatived the alternative defence for which he afterwards seeks a new trial.

...

... The defence that the accused was in Victoria at the time of the shooting was not only inconsistent with, but it negatived the defence now sought to be set up. Under these circumstances I fail to see how any duty could rest on the trial judge to instruct the jury to consider an alternative defence which the accused, by the defence he did set up, declared had no foundation in fact. [p. 617]

[30] With respect, *Wu* does not stand for the proposition that a judge does not have a duty to put to the jury an alternative defence that is theoretically incompatible with the defence's principal theory. Rather, it reaffirms the cardinal rule that the trial judge need not — indeed must not — put to the jury a defence in respect of which there is no evidence in the record that would be sufficient, if it existed and if it were believed to be true, for a jury acting reasonably to accept the defence. This is clear from the comments of Lamont J. on this point, which read in full as follows:

There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is, that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto. The only evidence appearing in the record upon which even an argument could be founded that the accused shot in self defence is that of Irwin and Bodner that, prior to the shooting, the complainant was running after the accused and his companion, waving his arms and shouting in Oriental. What he was saying we do not know. If it were material to the defence to prove that the words amounted to provocation, the onus was upon the accused to prove what the words were. On any event provocation, which would reduce murder to manslaughter, is not a defence to the charge as laid. Shooting in self defence would constitute a valid defence provided the accused brings himself within [sections 53 and 54](#) of the [Criminal Code](#). It

is justifiable to repel an unprovoked attack if the force used by the accused is not meant to cause death or grievous bodily harm and is not more than is necessary for the purpose of self defence. It is justified, even if it does cause death or grievous bodily harm, if it is done under reasonable apprehension of death or grievous bodily harm to himself, and if he believes, on reasonable grounds, that it is necessary for his own preservation. There is no evidence in the record from which a jury could reasonably infer that the accused when he shot the complainant did so under a reasonable apprehension of death or bodily harm to himself, or that he reasonably believed that he could not otherwise save himself from bodily injury. [Emphasis added; pp. 616-17.]

[31] The passage from *Wu* quoted in the Court of Appeal's reasons, at para. 71, in support of the proposition that the trial judge is not required to put to the jury an alternative defence that is incompatible with the primary defence is merely an *obiter dictum* that could be a source of confusion and should not be relied on. An accused might, for example, raise an alibi defence and testify that he or she was not in the city where the crime was committed at the relevant time, whereas certain Crown witnesses say that the accused was at the scene of the crime but was highly intoxicated. Even though the defences of alibi and of self-induced intoxication are incompatible in theory, the trial judge should, in my view, put both of them to the jury if they both meet the air of reality test.

[32] More recently, in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, this Court clarified the principle that if two defences are theoretically incompatible, they can nevertheless be put to the jury so long as they both meet the air of reality test. Although Fish J. pointed out that it is dangerous to put theoretically incompatible defences to a jury, he saw no error in the trial judge's decision to put to the jury, in addition to the primary defence of automatism, the alternative defence of self-defence the accused wished to raise. Regarding the incompatibility of the two defences, Fish J. wrote the following, at para. 10:

. . . the particular defences in issue here — automatism and self-defence — are, as the Crown suggested on the hearing of this appeal, incompatible in theory, though perhaps not always in practice. That is because self-defence implies deliberate conduct that is at odds with the fundamental premise of automatism, a state of dissociative, involuntary conduct.

[33] Nevertheless, the Court had held in *R. v. Faid*, [1983 CanLII 136 \(SCC\)](#), [1983] 1 S.C.R. 265, that the trial judge had not erred in refusing to put the defence of provocation to the jury as an alternative to the primary defence of self-defence. Although it is true that these two defences are incompatible in theory — self-defence involves reasoned conduct, whereas provocation, on the contrary, presupposes a temporary loss of self-control — it is important to point out that the refusal was not based on this incompatibility. Rather, the Court found that there was no evidence in the record to support the argument that the accused had acted in the heat of passion. That case was not therefore one in which the effect of the primary defence was to deprive the alternative defence of the support of evidence that was actually in the record. In *Faid*, the defence of provocation quite simply did not meet the air of reality test, because there was no evidence related to its elements. *Faid* is one illustration of the principle that any defence with an air of reality should be put to the jury.

[34] In conclusion, there is no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

B. *If the Defence of Abandonment Was Not Incompatible With the Principal Theory, Did It Meet the Air of Reality Test?*

1. Essential Elements of the Defence of Abandonment

[35] The defence of abandonment had to be submitted to the jury only if there was evidence in the record that was reasonably capable of supporting the necessary inferences in respect of each of the elements of this defence. That being said, it is necessary to begin by identifying the essential elements of the defence.

[36] In Canadian law, the defence of abandonment, which has rarely been raised, was first referred to in *R. v. Whitehouse* (1940), [1940 CanLII 244 \(BC CA\)](#), 55 B.C.R. 420 (C.A.). That case concerned the application of the defence in the specific context of the offence of participation in a crime provided for in [s. 21\(2\)](#) of the *Criminal Code*.

[37] In that context, the relevant test — which was subsequently endorsed in *Miller v. The Queen*, [1976 CanLII 12 \(SCC\)](#), [1977] 2 S.C.R. 680, *Henderson v. The King*, [1948 CanLII 17 \(SCC\)](#), [1948] S.C.R. 226, and *R. v. Kirkness*, [1990 CanLII 57 \(SCC\)](#), [1990] 3 S.C.R. 74 — was laid down as follows in *Whitehouse*, at p. 425:

I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is “timely communication” must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

[38] Thus, it was held that a defence of abandonment has three essential elements: (1) there must be an intention to abandon or withdraw from the unlawful purpose, (2) there must be timely communication of this abandonment or withdrawal from the person in question to those who wish to continue, and (3) the notice so communicated to those who continue to participate in the common purpose must be unequivocal.

[39] This appeal raises the issue of the application of the defence of abandonment in the context of the form of participation in a crime provided for in [s. 21\(1\)](#) of the *Criminal Code*.

[40] The reasons for recognizing the defence of abandonment in Canadian law bear repeating. There are two policy reasons in criminal law for making this defence available to parties

to offences. First, there is a need to ensure that only morally culpable persons are punished; second, there is a benefit to society in encouraging individuals involved in criminal activities to withdraw from those activities and report them.

[41] This Court implicitly acknowledged that the defence of abandonment applies in the context of s. 21(1) in *R. v. Bird*, 2009 SCC 60, [2009] 3 S.C.R. 638, in which it found that this defence did not meet the air of reality test in the case of an accused who had aided in the commission of a crime (see also *R. v. Fournier*, 2007 QCCA 1822 (CanLII)). However, since the Court found that the defence did not have an air of reality in that case, it did not on that occasion rule on the content of the defence in the specific context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*.

[42] It is well established that the scope of the defence of abandonment varies from case to case, depending on the circumstances (see the above-quoted passage from *Whitehouse*, at p. 425). In *Kirkness*, Wilson J. expressed the opinion that the content of the defence of abandonment depends on the type of offence and on the degree and form of participation of the accused. She endorsed, at p. 115, the following comment by Professor Manson:

Looking at the defence of abandoned intention in respect of parties, the key issues relate to the quality of withdrawal from the original plan and whether more is required to exculpate. These questions take on different significance depending on the form of accomplice liability in issue and the particular circumstances of a given case.

(A. Manson, “Re-codifying Attempts, Parties, and Abandoned Intentions” (1989), 14 *Queen’s L.J.* 85, at p. 95)

[43] Wilson J. also noted that there is a difference between the forms of participation in a crime provided for in s. 21(1) and s. 21(2), respectively, of the *Criminal Code*:

It is my view that since aiders and abettors have been treated differently from common intenders by Parliament, some difference between these two subsections must be recognized.

(*Kirkness*, at p. 116)

[44] Section 21(2) of the *Criminal Code* provides that a person who forms an intention to carry out an unlawful purpose in common with other persons is a party to an incidental offence committed by one of those other persons to the same extent as the person who actually committed it. This result derives from the first person's promise to devote physical and intellectual resources to the achievement of the common unlawful purpose. The person's liability in respect of the incidental offence therefore stems from his or her decision to participate in carrying out the unlawful purpose and to contribute resources needed to achieve it.

[45] In such a context, an intention to withdraw from the common purpose will — if a timely and unequivocal communication of this intention is addressed to the co-conspirators who persist in carrying out the unlawful purpose — be sufficient for the defence of abandonment to succeed. Communicating the intention to abandon the common purpose reduces the resources available to carry out the unlawful purpose and in so doing cancels out the effects of the participation of the withdrawing or abandoning person.

[46] The situation is very different in the context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*. Aiders and abettors generally do much more than promise their support in carrying out an unlawful purpose in the future. They perform concrete acts to aid the principal offender to commit the offence or to abet him or her in committing it. Their criminal liability and their moral culpability are proportional to these acts and stem from the fact that they have performed them. Thus, merely communicating in unequivocal terms their intention to cease participating in the commission of the offence will not be enough “to break the chain of causation and responsibility”, to repeat the words of Sloan J. from *Whitehouse*.

[47] Where a person's participation in a crime is more than a simple promise to carry out a common unlawful purpose — where, for example, the person is a party to the offence within the meaning of s. 21(1) of the *Criminal Code* — requiring an unequivocal communication of the intention to cease participating in the commission of the offence (the *Whitehouse* test) means that the accused must show that he or she took reasonable steps to neutralize the effects of his or her participation. As one author explains, using a colourful image to make his point, the intention to

withdraw must be accompanied by acts that are likely to cancel out the effects of the acts that have already been performed to aid or abet the offender:

Once the arrow is in the air, it is no use wishing to have never let it go — “Please God, let it miss!” The archer is guilty of homicide when the arrow gets the victim through the heart. The withdrawer, it is true, does not merely change his mind: he withdraws — but is that relevant if the withdrawal has no more effect on subsequent events than the archer’s repentance? [Emphasis added.]

(J. C. Smith, Commentary on *R. v. Mitchell*, [1999] *Crim. L.R.* 497)

[48] In the Quebec Court of Appeal’s judgment in *Fournier*, the accused was convicted of the first degree murder of her husband because she had hired a contract killer to murder him, had promised and later paid financial consideration to the killer, and had provided the killer with the necessary details of time and place and with information needed to identify the target. Because of the numerous acts that had been performed to aid in the commission of the murder, communicating an intention to withdraw by merely leaving the message [TRANSLATION] “cancel” on the killer’s answering device was found to be insufficient to exculpate the accused. The acts of abandonment were not proportional to the acts performed in support of the commission of the offence.

[49] For all these reasons, I would reformulate as follows the test already established in *Whitehouse* and *Kirkness* for determining whether the defence of abandonment applies, in order to adapt it specifically to the various degrees and forms of participation in crimes.

[50] One who is a party to an offence on the basis that he or she did or omitted to do anything for the purpose of aiding any person to commit the offence, or abetted any person in committing it (s. 21(1) of the *Criminal Code*), or on the basis that he or she had formed with other persons an intention to carry out an unlawful purpose and to assist each other therein and that an offence was committed in carrying out the common purpose (s. 21(2) of the *Criminal Code*), may raise the defence of abandonment if the evidence shows

(1) that there was an intention to abandon or withdraw from the unlawful purpose;

- (2) that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue;
- (3) that the communication served unequivocal notice upon those who wished to continue; and
- (4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence.

[51] I recognize that there will be circumstances, even where the accused is a party within the meaning of s. 21(1) of the *Criminal Code*, in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person's intention to withdraw from the unlawful purpose will on its own be considered reasonable, and sufficient to meet the test set out in the preceding paragraph.

[52] In conclusion, and more specifically in the context of s. 21(1) of the *Criminal Code*, the defence of abandonment should be put to the jury only if there is evidence in the record that is capable of supporting a finding that a person who was initially a party to the carrying out of an unlawful purpose subsequently took reasonable steps in the circumstances either to neutralize the effects of his or her participation or to prevent the commission of the offence.

2. Application to the Case at Bar

[53] In the case at bar, the defence of abandonment did not have an air of reality.

[54] The evidence showed that the appellant had written several documents, including some incriminating letters that were evidence of the couple's intention to end their and their children's lives. The couple explained in the letters how they planned to kill the children and take their own lives: by intoxication using a soporific drug. It was the appellant who purchased the medication that caused the children's deaths.

[55] What evidence could therefore have justified the trial judge's putting the defence of abandonment to the jury?

[56] The evidence is incomplete, to say the least.

[57] The only evidence comes from the appellant's testimony that, in the afternoon of December 31, 2008, she had notified her spouse that she had changed her mind and no longer intended to participate in the common purpose:

[TRANSLATION] I noticed some papers he'd left lying around. I, I realized what was happening. I didn't want that. When Marc came back, I, I told him it was crazy, what he was telling me. I ripped up the papers. [A.R., at p. 834]

On cross-examination, she made the following statement:

[TRANSLATION] When I saw the papers and looked at what was written on them, I said that's crazy. And I told Marc we couldn't . . .

. . .

I told Marc he couldn't do that, that I didn't want to be part of it. [Emphasis added; A.R., at p. 910.]

[58] The appellant also testified that the expression on her spouse's face had convinced her that he too had abandoned the sinister plan:

[TRANSLATION] But I gathered from his face that he was getting the message, too, and that it was all right. [A.R., at p. 913]

[59] Counsel for the appellant argues that, in light of this evidence, the trial judge had sufficient reasons to put the defence of abandonment to the jury. I find this argument wanting.

[60] In my view, the appellant's evidence that she communicated her withdrawal from the deadly plan and that her communication was timely and unequivocal is insufficient for the purposes of the air of reality test. To meet that test, it is not enough to simply identify "some evidence" or "any evidence"; the evidence must be "reasonably capable of supporting the inferences required for the defence to succeed" (*Cinous*, at paras. [82-83](#)).

[61] The only relevant passage from the appellant's testimony is the one in which she used the plural pronoun "we" (using the French pronoun "*on*" as an equivalent for the plural "*nous*") in saying "I told Marc we couldn't [do that]". This passage stands alone in the appellant's principal narrative to the effect that she never agreed to the murder-suicide pact, that she wrote the incriminating letters while in a dissociative state and that she told her spouse she disagreed with what he was planning to do as soon as she realized what it was.

[62] Nevertheless, even if it were assumed that the evidence the appellant relies upon would be sufficient for a jury to reasonably conclude that she had communicated her intention to withdraw from the plan and that her communication was timely and unequivocal, that communication would not on its own have sufficed, in the circumstances of this case, for the judge to put the defence of abandonment to the jury.

[63] The appellant did more than merely promise to take part in the murder-suicide pact. She supplied her spouse with the intoxicants he used to cause the children's deaths. She therefore had to do more either to neutralize the effects of her participation or to prevent the commission of the offence. For example, she could have hidden or destroyed the medication she had purchased, remained watchful and taken the children to a safe place for the evening, insisted that her spouse give her verbal confirmation of what he intended to do, or simply called the authorities.

[64] I conclude that the record did not contain evidence upon which a properly instructed jury acting reasonably could have found that the appellant had abandoned the common unlawful purpose, and could accordingly have acquitted her, if it believed the evidence to be true. The defence of abandonment therefore did not meet the air of reality test, and the trial judge was not required to put the defence to the jury.

VII. Disposition

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

The following are the reasons delivered by

FISH J. (dissenting) —

I

[66] Justice Wagner has set out with care and sensitivity the tragic and desperate circumstances that culminated in the murder by the appellant's husband of their three children and his own virtually contemporaneous suicide.

[67] In the wake of that tragedy and despair, the appellant, Cathie Gauthier, now stands convicted of first degree murder. And she has been sentenced to imprisonment for life without eligibility for parole for 25 years.

[68] The Crown's case against Ms. Gauthier is that she and her husband entered a murder-suicide pact that was executed with her help. She testified at trial that she had demonstrated her disapproval of the pact before the children were murdered and had notified her husband of this unwillingness to go through with the plan.

[69] Defence counsel urged the trial judge to leave open for the jury’s consideration Ms. Gauthier’s defence of abandonment. The trial judge declined to do so. The Court of Appeal upheld the trial judge on the ground that it was an [TRANSLATION] “incompatible . . . defence”: [2011 QCCA 1395 \(CanLII\)](#). Both courts below erred in law in this regard.

[70] The Court of Appeal did not consider whether the appellant’s defence of abandonment had an “air of reality” — that is to say, whether there was any evidence upon which a properly instructed jury might entertain a reasonable doubt on that issue.

[71] On the law as it was then understood, the trial judge was bound to put abandonment to the jury if there was evidence that the appellant (a) had changed — or “abandoned” — her earlier intention to aid or abet the murder of her children, and (b) had adequately communicated to her husband that she had withdrawn from their pact.

[72] This Court has repeatedly held that the defence of abandonment includes *no other essential elements*. And our attention has not been drawn to a single Canadian decision to the contrary, at any level.

[73] In my view, there *was* evidence at Ms. Gauthier’s trial upon which a properly instructed jury might well have found that she had abandoned the suicide pact in respect of which she was charged and convicted of murder. Or at least have been left with a reasonable doubt on this issue, which would of course have sufficed to warrant Ms. Gauthier’s acquittal.

[74] As a matter of law, the appellant is entitled, in my respectful view, to a fresh trial, where the jury will not be wrongly prevented from considering on its merits Ms. Gauthier’s defence of abandonment, however weak and unpromising we might believe it to be. I am aware of no legal principle that permits us to deprive her of that right.

[75] In his thorough and thoughtful reasons, Justice Wagner proposes that we now adopt additional requirements for a valid defence of abandonment where the accused, as in this case, has

done something to aid or abet the commission of the offence before satisfying the two established elements of abandonment. As we shall see, there are strong reasons of policy and precedent for resisting the proposed changes.

[76] As we shall see as well, I am not persuaded that the modifications we endorse should be made applicable on a retrial of the appellant. But even if we decide that they are, the appellant would at least be entitled to a fair opportunity to satisfy those newly recognized requirements. Her failure to do so at her first trial — prior to their recognition by this Court or, it seems, by *any* Canadian court — can hardly deprive Ms. Gauthier of a proper opportunity to do so now.

[77] With respect for those who are of a different view, I would therefore allow the appeal, set aside the appellant's convictions and order a new trial.

II

[78] Canadian courts have for more than 70 years held that the defence of abandonment comprises only two essential elements: (i) change of intention; and (ii) where practical and reasonable, timely and unequivocal notice of withdrawal.

[79] These requirements emanate from *R. v. Whitehouse* (1940), [1940 CanLII 244 \(BC CA\)](#), 55 B.C.R. 420 (C.A.), a decision that has been repeatedly approved and followed by this Court, as I mentioned earlier, and has long been firmly entrenched in Canadian law: see *Henderson v. The King*, [1948 CanLII 17 \(SCC\)](#), [1948] S.C.R. 226, at pp. 236-37; *R. v. de Tonnancourt* (1956), [1956 CanLII 470 \(MB CA\)](#), 115 C.C.C. 154 (Man. C.A.), at pp. 176 and 201-3; *R. v. Merrifield*, 1977 CarswellOnt 1806 (C.A.), at para. 3; *Miller v. The Queen*, [1976 CanLII 12 \(SCC\)](#), [1977] 2 S.C.R. 680, at p. 708; *R. v. Wagner* (1978), [1978 CanLII 401 \(BC CA\)](#), 8 B.C.L.R. 258 (C.A.), at pp. 260-61; *R. v. Joyce* (1978), [1978 CanLII 2422 \(BC CA\)](#), 42 C.C.C. (2d) 141 (B.C.C.A.), at p. 150; *R. v. Kirkness*, [1990 CanLII 57 \(SCC\)](#), [1990] 3 S.C.R. 74, at p. 89; *R. v. Johanson* (1995), [1995 CanLII 18031 \(AB CJ\)](#), 166 A.R. 60 (Prov. Ct.), at para. 23; *R. v. Fournier*, [2002 NBCA 71](#), 252 N.B.R. (2d) 256, at para. 22; *R. v. McKercher*, [2002] O.J. No. 5859 (QL) (Ct.

J.), at para. 77; *R. v. Forknall*, 2003 BCCA 43, 176 B.C.A.C. 284, at paras. 51-53; *R. v. Lacoursière* (2002), 2002 CanLII 41284 (QC CA), 7 C.R. (6th) 117 (Que. C.A.), at paras. 25-29; *R. v. P.K.*, 2006 ABCA 299, 397 A.R. 318, at para. 12; *R. v. S.R.B.*, 2009 ABCA 45, 448 A.R. 124, at paras. 10, 19-20 and 24-30, rev'd *R. v. Bird*, 2009 SCC 60, [2009] 3 S.C.R. 638, at para. 1; *R. v. Ball*, 2011 BCCA 11, 298 B.C.A.C. 166, at paras. 44-47; and *R. v. Leslie*, 2012 BCSC 683 (CanLII), at paras. 552-58.

[80] Justice Wagner does not suggest that the defence of abandonment, as it stood at the time of Ms. Gauthier's trial, required anything more than a change of intention, accompanied by timely and unequivocal notice of withdrawal. Rather, my colleague proposes a new and different test.

[81] To this end, my colleague distinguishes for present purposes between s. 21(1) and s. 21(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. The former deals with liability for aiding or abetting another in the commission of a specific offence; the latter, with liability for an offence committed by another in carrying out a common unlawful purpose.

[82] Justice Wagner would impose additional requirements on the defence of abandonment, particularly with respect to liability under s. 21(1), where the accused would need to adduce evidence that he or she took steps to neutralize any prior contribution to the commission of the offence or, in the alternative, to prevent the commission of the offence.

[83] With respect, this approach overlooks the fact that both s. 21(1) and s. 21(2) can involve active participation by the accused: see for example *Henderson* and *Miller*.

[84] Moreover, the *Whitehouse* test has been repeatedly and consistently applied in prosecutions under s. 21(1) and s. 21(2) alike.

[85] The application of the *Whitehouse* criteria to an aiding and abetting case was endorsed very recently by this Court in 2009, and even more recently by other Canadian courts:

Bird (affirming Costigan J.A.'s dissent); *Ball*, at paras. 44-47; and *Leslie*, at paras. 552-58.

[86] Indeed, *Whitehouse* itself involved parties to an offence who had “aided and abetted in the commission of the crime”: p. 424. They had “performed part, at least, of the tasks assigned to them”: again, at p. 424.

[87] It was out of this factual context that the test for abandonment was born. And the court identified only two requirements: the first, change of intention; the second, timely and unequivocal notice of withdrawal — that is, the accused must clearly communicate to the principal “that if he proceeds upon it he does so without the *further aid and assistance* of those who withdraw”: *Whitehouse*, at p. 425 (emphasis added).

[88] As the language of this oft-cited passage makes clear, the *Whitehouse* test for abandonment expressly contemplates prior aid and assistance.

[89] Moreover, to suggest that an accused under either subsection of s. 21 must neutralize prior involvement disregards an important rationale of the defence of abandonment, namely, giving the principal offender the opportunity to abandon the criminal objective. As Allan Manson explains in “Re-codifying Attempts, Parties, and Abandoned Intentions” (1989), 14 *Queen's L.J.* 85, at p. 101:

. . . the premise upon which *Whitehouse* is based: “Let it be known, if you go then you go alone.” Unequivocal withdrawal and the element of timeliness are sufficiently expansive to accommodate abettors and aiders alike because, as in *Becerra* and *Gundy*, the aim is to compel the principal to reconsider the objective in time to abandon it. This, after all, is the preventative rationale for party responsibility. Thus the defence of abandonment as structured in *Whitehouse* can apply with equal fairness and effect to all parties including aiders by interpreting timeliness in relation to the offence and the goal of ultimate abandonment.

[90] Even the most ardent proponents of a more stringent abandonment defence recognize that to require neutralizing or preventative steps would necessitate a change to Canadian law: see

M. Campbell, “Turning Back the Clock: Aiders and the Defence of Abandonment” (2010), 14 *Can. Crim. L.R.* 1, at pp. 16-17.

[91] Courts in the United Kingdom, approving *Whitehouse*, have concluded that neutralizing or preventative steps are not required to establish abandonment. In *R. v. O’Flaherty*, [2004] EWCA Crim 526, [2004] 2 Cr. App. R. 20 (p. 315), at para. 60, the Court of Appeal acknowledged that whether an accused has done enough “to demonstrate that he or she is withdrawing from the joint enterprise . . . is ultimately a question of fact and degree for the jury”. The jury should account for “the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal”. And, the court *explicitly rejected the proposition that effective withdrawal requires reasonable steps to prevent the crime*:

In cases of assistance it has sometimes been suggested that, for there to be an effective withdrawal, reasonable steps must have been taken to prevent the crime. It is clear, however, this is not necessary. [Para. 60; see also para. 61.]

See also *R. v. Otway*, [2011] EWCA Crim 3 (BAILII), at para. 32, where the court held that efforts to prevent the crime were relevant but not required for withdrawal.

[92] Justice Wagner relies on *R. v. Fournier*, [2007 QCCA 1822 \(CanLII\)](#), to support his position that mere communication of changed intention should henceforth be insufficient for abandonment in s. 21(1) cases (para. 48 of Justice Wagner’s reasons). However, in *Fournier*, unlike this case, the defence of abandonment was *not* kept from the jury. Indeed, the Court of Appeal held that the trial judge properly instructed the jury that abandonment required timely and unequivocal notice of withdrawal: *Fournier*, at paras. 18-20.

[93] I agree with my colleague that the internally repentant archer cannot, having let the arrow fly, seek refuge in the defence of abandonment (para. 47 of Justice Wagner’s reasons). The defence fails in Sir John Smith’s illustration not because preventative or neutralizing steps are required, but rather because notice of withdrawal comes too late, or not at all.

[94] These authorities all make clear that the defence of abandonment does not require that the accused take steps to neutralize prior participation in the criminal enterprise or to prevent the commission of the offence. While such evidence may strengthen a defence of abandonment, failure to take neutralizing or preventative steps is not fatal. Thus, for example, in *R. v. Edwards*, 2001 BCSC 275 (CanLII), at para. 186, the accused's efforts to stop the commission of the offence were treated as evidence that the *Whitehouse* requirements were met — not as additional requirements of the defence.

[95] If we were to accept that the defence of abandonment now requires that an accused take steps to neutralize previous assistance or to prevent the commission of the crime, I am inclined to believe that this change should only be given prospective effect — at least in this case. As Don Stuart explains in *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 9: “It is almost universally accepted that the view that judges merely declare existing law rather than create new law is outmoded and wrong.”

[96] But on any view of the matter, in light of the state of the law universally accepted in Canada at the time of the appellant's trial, it would be fundamentally unfair at this stage to fault the appellant for failing to demonstrate anything more than a change of intention, plus timely and unequivocal notice of withdrawal from the murder-suicide pact. Since the appellant's testimony provided some evidence on these two essential elements, there was an air of reality to the defence. The trial judge therefore erred by withholding the defence of abandonment from the jury.

III

[97] I agree with Justice Wagner that the “incompatibility” between Ms. Gauthier's defence of abandonment and her primary defence did not justify the trial judge's decision to prevent the jury from considering them both. And I am therefore content to add only these brief comments on the issue of incompatibility.

[98] Incompatibility should not be relied upon to deprive the accused of a defence for which an air of reality has been established, particularly where — as in this case — defence counsel has requested that it be included in the judge’s charge: A.R., at pp. 1018 and 1037-38.

[99] As Kellock J. stated in *Henderson*: “It is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury”: p. 241. Taschereau J. likewise emphasized the accused’s “fundamental right . . . to have all the features of [the] defence adequately put to the jury”: *Henderson*, at p. 237.

IV

[100] For abandonment to be left for the jury, there must be some evidence upon which a properly instructed jury could form a reasonable doubt on the two essential elements of the defence: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 2, 49, 52-54 and 83. In my view, the appellant’s testimony satisfied this modest evidentiary threshold.

[101] Indeed, there was no suggestion at trial by the Crown— nor finding by the trial judge or the Court of Appeal — that the defence of abandonment lacked an air of reality.

[102] The appellant testified that she told Marc Laliberté his plan did not make sense and he [TRANSLATION] “could not do it” (“*pouvait pas faire ça*”). She also told him that she did not want to be a part of it. She demonstrated her disapproval of the murder-suicide pact by tearing up two documents: a last will and testament written by the appellant and a story of Marc Laliberté’s life containing references to the pact. She was convinced by his facial expression that the murder-suicide pact was off: A.R., at pp. 834-35 and 910-11.

[103] This testimony provides *some evidence* that the appellant no longer intended to participate in the murder-suicide pact and that she provided timely and unequivocal notice of this change of intention to the principal offender. That the evidence could have left the jury with a reasonable doubt as to the appellant’s guilt is all that was required.

[104] Whether the appellant ultimately “did enough” to communicate timely and unequivocal withdrawal was a question of fact that should have been left for the jury to decide: *P.K.*, at para. 11; *O’Flaherty*, at para. 60; *Cinous*, at paras. 52 and 54.

[105] In short, it was for the jury to determine whether the appellant’s words and conduct were believable and sufficient to demonstrate timely and unequivocal notice of withdrawal. As Taschereau J. stated, again in *Henderson*, at p. 237: “The question whether the agreement has been put to an end, must be judged in view of all the circumstances revealed by the evidence, and I have no doubt that it is a question for the jury.”

[106] With respect, I feel bound to conclude that the trial judge, by declining to instruct on the defence of abandonment, encroached “on the jury’s traditional function as arbiter of fact”: *Cinous*, at para. 56.

V

[107] For the foregoing reasons, I would allow the appeal, set aside the appellant’s convictions, and order a new trial.

Appeal dismissed, FISH J. dissenting.

Solicitors for the appellant: Duval Lauzon Ménard, Trois-Rivières.

Solicitor for the respondent: Directeur des poursuites criminelles et pénales du Québec, Chicoutimi.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

TAB 49

R. v. Cole, 2012 SCC 53 (CanLII), [2012] 3 SCR 34

Source:	Supreme Court of Canada
Date:	2012-10-19
File number:	34268
Other citations:	353 DLR (4th) 447 — 436 NR 102 — 297 OAC 1 — [2012] EXP 3703 — 290 CCC (3d) 247 — 96 CR (6th) 88 — [2012] EXPT 2118 — 269 CRR (2d) 228 — DTE 2012T-731 — JE 2012-1986 — [2012] SCJ No 53 (QL) — [2012] ACS no 53
Citation:	R. v. Cole, 2012 SCC 53 (CanLII), [2012] 3 SCR 34, < https://canlii.ca/t/ft969 >, retrieved on 2026-03-23
Most recent unfavourable mention	R. v Summers , 2023 CanLII 37444 (NL PC) [...] [45] As we have seen, despite its ruling in Cole on the inapplicability of third-party consent in Canada, the Reeves' Court proceeded "on the assumption that the entry was lawful" because of the third-party consent (at paragraph 22). [...]



SUPREME COURT OF CANADA

CITATION: R. v. Cole, 2012 SCC 53, [2012] 3 S.C.R. 34

DATE: 20121019

DOCKET: 34268

BETWEEN:

Her Majesty The Queen
Appellant
and
Richard Cole
Respondent

- and -
**Director of Public Prosecutions, Attorney General of Quebec,
Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association and
Canadian Association of Counsel to Employers**
Intervenors

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

REASONS FOR JUDGMENT: Fish J. (McLachlin C.J. and LeBel, Rothstein, Cromwell and
(paras. 1 to 106) Moldaver JJ. concurring)

DISSENTING REASONS: Abella J.
(paras. 107 to 136)

R. v. Cole, 2012 SCC 53, [2012] 3 S.C.R. 34

Her Majesty The Queen

Appellant

v.

Richard Cole

Respondent

and

**Director of Public Prosecutions,
Attorney General of Quebec,
Criminal Lawyers' Association (Ontario),
Canadian Civil Liberties Association and
Canadian Association of Counsel to Employers**

Intervenors

Indexed as: R. v. Cole

2012 SCC 53

File No.: 34268.

2012: May 15; 2012: October 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Search and seizure — Information contained on computer — Pornographic pictures of child found on employer-issued work computer — Whether accused had reasonable expectation of privacy in employer-issued work computer — Whether warrantless search and seizure of laptop computer and disc containing Internet files breached accused's rights under s. 8 of Charter — If so, whether evidence ought to be excluded pursuant to s. 24(2) of Charter.

The accused, a high-school teacher, was charged with possession of child pornography and unauthorized use of a computer. He was permitted to use his work-issued laptop computer for incidental personal purposes which he did. While performing maintenance activities, a technician found on the accused's laptop a hidden folder containing nude and partially nude photographs of an underage female student. The technician notified the principal, and copied the photographs to a compact disc. The principal seized the laptop, and school board technicians copied the temporary Internet files onto a second disc. The laptop and both discs were handed over to the police, who without a warrant reviewed their contents and then created a mirror image of the hard drive for forensic purposes. The trial judge excluded all of the computer material pursuant to ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms*. The summary conviction appeal court reversed the decision, finding that there was no s. 8 breach. The Court of Appeal for Ontario set aside that decision and excluded the disc containing the temporary Internet files, the laptop and the mirror image of its hard drive. The disc containing the photographs of the student was found to be legally obtained and therefore admissible. As the trial judge had wrongly excluded this evidence, the Court of Appeal ordered a new trial.

Held (Abella J. dissenting): The appeal should be allowed. The exclusionary order of the Court of Appeal is set aside and the order of a new trial is affirmed.

Per McLachlin C.J., and LeBel, Fish, Rothstein, Cromwell and Moldaver JJ.:

Computers that are reasonably used for personal purposes — whether found in the workplace or the home — contain information that is meaningful, intimate, and touching on the user’s biographical core. Canadians may therefore reasonably expect privacy in the information contained on these computers, at least where personal use is permitted or reasonably expected. Ownership of property is a relevant consideration, but is not determinative. Workplace policies are also not determinative of a person’s reasonable expectation of privacy. Whatever the policies state, one must consider the totality of the circumstances in order to determine whether privacy is a reasonable expectation in the particular situation. While workplace policies and practices may diminish an individual’s expectation of privacy in a work computer, these sorts of operational realities do not in themselves remove the expectation entirely. A reasonable though diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by [s. 8](#) of the *Charter*. Accordingly, it is subject to state intrusion only under the authority of a reasonable law.

The police in this case infringed the accused’s rights under [s. 8](#) of the *Charter*. The accused’s personal use of his work-issued laptop generated information that is meaningful, intimate, and organically connected to his biographical core. Pulling in the other direction are the ownership of the laptop by the school board, the workplace policies and practices, and the technology in place at the school. These considerations diminished the accused’s privacy interest in his laptop, at least in comparison to a personal computer, but they did not eliminate it entirely. On balance, the totality of the circumstances support the objective reasonableness of the accused’s subjective expectation of privacy. While the principal had a statutory duty to maintain a safe school environment, and, by necessary implication, a reasonable power to seize and search a school-board issued laptop, the lawful authority of the accused’s employer to seize and search the laptop did not furnish the police with the same power. Furthermore, a third party cannot validly consent to a search or otherwise waive a constitutional protection on behalf of another. The school board was legally entitled to inform the police of its discovery of contraband on the laptop. This

would doubtless have permitted the police to obtain a warrant to search the computer for the contraband. But receipt of the computer from the school board did not afford the police warrantless access to the personal information contained within it. This information remained subject, at all relevant times, to the accused's reasonable and subsisting expectation of privacy.

Unconstitutionally obtained evidence should be excluded under s. 24(2) if, considering all of the circumstances, its admission would bring the administration of justice into disrepute. The conduct of the police officer in this case was not an egregious breach of the *Charter*. While the police officer did attach great importance to the school board's ownership of the laptop, he did not do so to the exclusion of other considerations. The officer sincerely, though erroneously, considered the accused's *Charter* interests. Further, the officer had reasonable and probable grounds to obtain a warrant. Had he complied with the applicable constitutional requirements, the evidence would necessarily have been discovered. Finally, the evidence is highly reliable and probative physical evidence. The exclusion of the material would have a marked negative impact on the truth-seeking function of the criminal trial process. The admission of the evidence would not bring the administration of justice into disrepute and therefore the evidence should not be excluded.

Generally speaking, the decision to exclude evidence under s. 24(2) should be final. In very limited circumstances however, a material change of circumstances may justify a trial judge to revisit an exclusionary order. In this case, the Court of Appeal invited the trial judge to re-assess the admissibility of the temporary Internet files disc if the evidence becomes important to the truth-seeking function as the trial unfolds. Unconstitutionally obtained evidence, once excluded, will not become admissible simply because the Crown cannot otherwise satisfy its burden to prove the guilt of the accused beyond a reasonable doubt.

Per Abella J. (dissenting): While it is agreed that there has been a *Charter* breach, the evidence in this case should be excluded under s. 24(2). The *Charter*-infringing conduct in this case was serious in its disregard for central and well-established *Charter* standards. The police officer had years of experience in investigating cyber-crime and was expected to follow established

Charter jurisprudence. Further, the police officer's exclusive reliance on ownership to determine whether a warrant was required, was unreasonable and contradicted a finding of good faith for the purposes of s. 24(2). There were also no exigent circumstances or other legitimate reasons preventing the police from getting a warrant. The decision not to get a warrant mandates in favour of exclusion.

The impact of the breach on the accused's *Charter*-protected interests, even assuming that his reasonable expectation of privacy was reduced because it was a workplace computer, was significant given the extent of the intrusion into his privacy. The warrantless search and seizure in this case included the entire contents of the accused's computer. It had no restrictions as to scope. The extent of the search of the accused's hard drive and browsing history was significant and weighs in favour of exclusion.

Finally, while the evidence in this case is reliable, its importance to the prosecution's case is at best speculative given that the pornographic photographs themselves were admitted.

Balancing these factors, and in light of the deference owed to trial judges in applying s. 24(2), the evidence should be excluded.

Cases Cited

By Fish J.

Applied: *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; **referred to:** *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Evans*, 1996 CanLII 248 (SCC), [1996] 1 S.C.R. 8; *R. v. Borden*, 1994 CanLII 63 (SCC), [1994] 3 S.C.R. 145; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851; *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265; *R. v. M. (M.R.)*, 1998 CanLII 770 (SCC), [1998] 3 S.C.R. 393; *R. v. Edwards*, 1996 CanLII 255 (SCC), [1996] 1 S.C.R. 128; *R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281; *R. v. Buhay*, 2003

SCC 30, [2003] 1 S.C.R. 631; *O'Connor v. Ortega*, 480 U.S. 709 (1987); *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Colarusso*, 1994 CanLII 134 (SCC), [1994] 1 S.C.R. 20; *Quebec (Attorney General) v. Larocche*, 2002 SCC 72, [2002] 3 S.C.R. 708; *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757; *R. v. D'Amour* (2002), 2002 CanLII 45015 (ON CA), 166 C.C.C. (3d) 477; *R. v. Dymont*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417; *United States v. Matlock*, 415 U.S. 164 (1974); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *United States v. Ziegler*, 474 F.3d 1184 (2007); *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30; *R. v. Wong*, 1990 CanLII 56 (SCC), [1990] 3 S.C.R. 36; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Belnavis*, 1997 CanLII 320 (SCC), [1997] 3 S.C.R. 341; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Calder*, 1996 CanLII 232 (SCC), [1996] 1 S.C.R. 660; *R. v. Underwood*, 1998 CanLII 839 (SCC), [1998] 1 S.C.R. 77; *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500; *R. v. Trask*, 1987 CanLII 24 (SCC), [1987] 2 S.C.R. 304.

By Abella J. (dissenting)

R. v. Morelli, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3; *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Wong*, 1990 CanLII 56 (SCC), [1990] 3 S.C.R. 36; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

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APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Sharpe and Karakatsanis JJ.A.), [2011 ONCA 218](#), 105 O.R. (3d) 253, 277 O.A.C. 50, 231 C.R.R. (2d) 76, 269 C.C.C. (3d) 402, 83 C.R. (6th) 1, 2011 CLC ¶210-018, 90 C.C.E.L. (3d) 1, [2011] O.J. No. 1213 (QL), 2011 CarswellOnt 1766, setting aside a decision of Kane J. (2009), 190 C.R.R. (2d) 130, [2009 CanLII 20699](#), [2009] O.J. No. 1755 (QL), 2009 CarswellOnt 2251, setting aside a decision of Guay J., [2008 ONCJ 278](#), 175 C.R.R. (2d) 263, [2008] O.J. No. 2417 (QL), 2008 CarswellOnt 3601. Appeal allowed, Abella J. dissenting.

Amy Alyea and Frank Au, for the appellant.

Frank Addario, Gerald Chan and Nader R. Hasan, for the respondent.

Ronald C. Reimer and Monique Dion, for the intervener the Director of Public Prosecutions.

Dominique A. Jobin and Gilles Laporte, for the intervener the Attorney General of Quebec.

Jonathan Dawe and Michael Dineen, for the intervener the Criminal Lawyers' Association (Ontario).

Jonathan C. Lisus and Michael Perlin, for the intervener the Canadian Civil Liberties Association.

Daniel Michaluk and Joseph Cohen-Lyons, for the intervener the Canadian Association of Counsel to Employers.

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

I

[1] The Court left no doubt in *R. v. Morelli*, [2010 SCC 8](#), [2010] 1 S.C.R. 253, that Canadians may reasonably expect privacy in the information contained on their own *personal* computers. In my view, the same applies to information on *work* computers, at least where personal use is permitted or reasonably expected.

[2] Computers that are reasonably used for personal purposes — whether found in the workplace or the home — contain information that is meaningful, intimate, and touching on the user’s biographical core. *Vis-à-vis* the state, everyone in Canada is constitutionally entitled to expect privacy in personal information of this kind.

[3] While workplace policies and practices may diminish an individual’s expectation of privacy in a work computer, these sorts of operational realities do not in themselves remove the expectation entirely: The nature of the information at stake exposes the likes, interests, thoughts, activities, ideas, and searches for information of the individual user.

[4] Such was the case here. Mr. Cole, a high-school teacher, was permitted to use his work-issued laptop computer for incidental personal purposes. He did. He browsed the Internet and stored personal information on his hard drive.

[5] While performing maintenance activities, a technician found on Mr. Cole’s laptop a hidden folder containing nude and partially nude photographs of a female student. He notified the principal, and, under the latter’s discretion, copied the photographs to a compact disc or CD. The principal seized the laptop, and school board technicians copied the temporary Internet files onto a

second CD. The laptop and both CDs were handed over to the police, who without a warrant reviewed their contents and then created a mirror image of the hard drive for forensic purposes.

[6] Mr. Cole was charged with possession of child pornography and unauthorized use of a computer, contrary to ss. 163.1(4) and 342.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, respectively, and prosecuted by way of summary conviction. The trial judge excluded all of the computer material pursuant to ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms*. The Crown offered no further evidence and the charges were therefore dismissed (2008 ONCJ 278, 175 C.R.R. (2d) 263).

[7] The summary conviction appeal court reversed the decision of the trial judge, finding that there was no s. 8 breach ((2009), 2009 CanLII 20699 (ON SC), 190 C.R.R. (2d) 130). The Court of Appeal for Ontario set aside that decision and excluded the disc containing the temporary Internet files, the laptop, and the mirror image of its hard drive (2011 ONCA 218, 105 O.R. (3d) 253).

[8] I agree with the Court of Appeal that the police infringed Mr. Cole's rights under s. 8 of the *Charter*. He expected a measure of privacy in his personal information on the laptop. Even taking into account the relevant workplace policies, this expectation of privacy was reasonable in the circumstances. It was, however, a *diminished expectation of privacy* in comparison with the privacy interest considered in *Morelli* — which, unlike this case, involved a personal computer that belonged to Mr. Morelli and was searched and seized in his home.

[9] A reasonable though diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by s. 8 of the *Charter*. Accordingly, it is subject to state intrusion only under the authority of a reasonable law.

[10] The Crown in this case could point to no law authorizing the police to conduct, as they did, a warrantless search of Mr. Cole's work laptop. The lawful authority of his *employer* — a

school board — to seize and search the laptop did not furnish the *police* with the same power. And the school board's "third party consent" to the search was of no legal consequence.

[11] Unlike the Court of Appeal, however, I would not exclude any of the unconstitutionally obtained evidence under s. 24(2).

[12] For these reasons and the reasons that follow, I would allow the appeal and set aside the decision of the Court of Appeal.

II

[13] The parties agree that Mr. Cole may face a new trial regardless of the outcome of this appeal: If the appeal is allowed, the Crown may proceed to a new trial with the benefit of all of the computer evidence excluded by the trial judge; if the Crown's appeal is dismissed, the Crown can still return to trial, but only with regard to the disc containing the nude photographs.

[14] As a new trial may thus be had, I shall discuss the facts only to the extent necessary to explain my conclusion.

[15] Mr. Cole, as mentioned earlier, was a high-school teacher. In addition to his regular teaching duties, he was responsible for policing the use by students of their networked laptops. To this end, he was supplied with a laptop owned by the school board and accorded domain administration rights on the school's network. This permitted him to access the hard drives of the students' laptops.

[16] The use of Mr. Cole's work-issued laptop was governed by the school board's Policy and Procedures Manual, which allowed for incidental personal use of the board's information technology. The policy stipulated that teachers' e-mail correspondence remained private, but subject to access by school administrators if specified conditions were met. It did not address

privacy in other types of files, but it did state that “all data and messages generated on or handled by board equipment are considered to be the property of [the school board]”.

[17] There is evidence as well that the school’s Acceptable Use Policy — written for and signed by students — applied *mutatis mutandis* to teachers. This policy not only restricted the uses to which the students could put their laptops, but also warned users not to expect privacy in their files.

[18] Mr. Cole was not the only person who could remotely access networked laptops. School board technicians could do so as well. While performing maintenance activities, a school board technician found, on Mr. Cole’s laptop, a hidden folder containing nude and partially nude photographs of an underage female student.

[19] As mentioned earlier, the technician notified the principal, who directed him to copy the photographs to a compact disc. After discussing the matter with school board officials, the principal seized the laptop.

[20] At no time did Mr. Cole disclose his password. But he did ask the principal not to access a folder containing photographs of his wife.

[21] Technicians at the school board eventually gained access to Mr. Cole’s laptop and made a compact disc containing his temporary Internet files, which is said by the Crown to contain pornographic images.

[22] The next day, a police officer attended at the school and at the offices of the school board, where he took possession of the laptop and the two CDs: one containing photographs of the student; the other, Mr. Cole’s temporary Internet files. The officer reviewed the contents of both discs at the police station, and then sent the laptop away for forensic examination. A mirror image of the hard drive was created for that purpose.

[23] At no time did the officer obtain a warrant to search the laptop's hard drive or either of the compact discs.

III

[24] Mr. Cole brought a pre-trial motion seeking exclusion of the computer evidence pursuant to s. 24(2) of the *Charter*. The trial judge found that the police had violated Mr. Cole's s. 8 *Charter* rights, and, for that reason, he excluded all of the computer evidence. The summary conviction appeal court granted the Crown's appeal, finding that Mr. Cole had no reasonable expectation of privacy in his work laptop.

[25] Mr. Cole appealed successfully to the Court of Appeal for Ontario. The Court of Appeal held that Mr. Cole had a reasonable expectation of privacy in the informational content of the laptop, but that this expectation was "modified to the extent that [Mr. Cole] knew that his employer's technician could and would access the laptop as part of his role in maintaining the technical integrity of the school's information network" (para. 47).

[26] On this approach, the initial remote access by the technician was not a "search" for the purposes of s. 8. But the examinations by the police, the principal, and the school board (assuming the *Charter* applied to the latter two) *did* engage s. 8.

[27] The Court of Appeal concluded that the search and seizure of the laptop by the principal and the school board was authorized by law and reasonable. The disc containing the photographs was thus created without breaching s. 8. And since Mr. Cole had no privacy interest in the photographs themselves, he had no legal basis to attack the search and seizure by the police of the disc to which they had been copied.

[28] The laptop and the disc with Mr. Cole's temporary Internet files, however, involve different considerations. Mr. Cole had a continuing reasonable expectation of privacy in this material, and its seizure by school officials did not endow the police with *their* authority. Nor

could the school board consent to the search by the police. As the police had no other lawful authority, the s. 8 breach was established.

[29] The Court of Appeal excluded the laptop and the mirror image of its hard drive pursuant to s. 24(2) of the *Charter*. The court also excluded the disc containing the Internet files, but only provisionally, leaving it “open to the trial judge to re-assess the admissibility of this evidence if the evidence becomes important to the truth-seeking function as the trial unfolds” (para. 92).

[30] The disc containing the photographs of the student was legally obtained and therefore admissible. As the trial judge had wrongly excluded this evidence, the Court of Appeal ordered a new trial.

[31] The Crown appeals from the order excluding the laptop, its mirror image, and the Internet files disc. Mr. Cole does not challenge the admission, under ss. 8 and 24(2) of the *Charter*, of the disc containing the photographs, or the order of a new trial.

[32] This appeal thus raises three issues: (1) whether the Court of Appeal erred in concluding that Mr. Cole had a reasonable expectation of privacy in his employer-issued work computer; (2) whether the Court of Appeal erred in concluding that the search and seizure by the police of the laptop and the disc containing the Internet files was unreasonable within the meaning of s. 8 of the *Charter*; and (3) whether the Court of Appeal erred in excluding the evidence under s. 24(2) of the *Charter*.

[33] I would answer the first two questions in the negative, but not the third.

IV

[34] Section 8 of the *Charter* guarantees the right of everyone in Canada to be secure against unreasonable search or seizure. An inspection is a search, and a taking is a seizure, where a

person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18; *R. v. Evans*, 1996 CanLII 248 (SCC), [1996] 1 S.C.R. 8, at para. 11; *R. v. Borden*, 1994 CanLII 63 (SCC), [1994] 3 S.C.R. 145, at p. 160).

[35] Privacy is a matter of reasonable expectations. An expectation of privacy will attract *Charter* protection if reasonable and informed people in the position of the accused would expect privacy (*R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at paras. 14-15).

[36] If the claimant has a reasonable expectation of privacy, s. 8 is engaged, and the court must then determine whether the search or seizure was reasonable.

[37] Where, as here, a search is carried out without a warrant, it is presumptively unreasonable (*R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at para. 21; *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 161). To establish reasonableness, the Crown must prove on the balance of probabilities (1) that the search was authorized by law, (2) that the authorizing law was itself reasonable, and (3) that the authority to conduct the search was exercised in a reasonable manner (*Nolet*, at para. 21; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, at p. 278).

[38] Before applying this analytical framework here, I pause to explain why it is unnecessary on this appeal to decide whether the *Charter* applies to school officials. The Crown conceded in the courts below that it does. Like the Court of Appeal, I shall proceed on that assumption, as did Cory J. in *R. v. M. (M.R.)*, 1998 CanLII 770 (SCC), [1998] 3 S.C.R. 393, at paras. 24-25.

V

[39] Whether Mr. Cole had a reasonable expectation of privacy depends on the “totality of the circumstances” (*R. v. Edwards*, 1996 CanLII 255 (SCC), [1996] 1 S.C.R. 128, at para. 45).

[40] The “totality of the circumstances” test is one of substance, not of form. Four lines of inquiry guide the application of the test: (1) an examination of the subject matter of the alleged search; (2) a determination as to whether the claimant had a direct interest in the subject matter; (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances (*Tessling*, at para. 32; *Patrick*, at para. 27). I will discuss each in turn.

[41] In this case, the subject matter of the alleged search is the data, or *informational content* of the laptop’s hard drive, its mirror image, and the Internet files disc — not the devices themselves.

[42] Our concern is thus with *informational privacy*: “[T]he claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (*Tessling*, at para. 23, quoting A. F. Westin, *Privacy and Freedom* (1970), at p. 7).

[43] Mr. Cole’s direct interest and subjective expectation of privacy in the informational content of his computer can readily be inferred from his use of the laptop to browse the Internet and to store personal information on the hard drive.

[44] The remaining question is whether Mr. Cole’s subjective expectation of privacy was objectively reasonable.

[45] There is no definitive list of factors that must be considered in answering this question, though some guidance may be derived from the relevant case law. As Sopinka J. explained in *R. v. Plant*, 1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281, at p. 293:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control

from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

[46] The closer the subject matter of the alleged search lies to the biographical core of personal information, the more this factor will favour a reasonable expectation of privacy. Put another way, the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest.

[47] Computers that are used for personal purposes, regardless of where they are found or to whom they belong, “contain the details of our financial, medical, and personal situations” (*Morelli*, at para. 105). This is particularly the case where, as here, the computer is used to browse the Web. Internet-connected devices “reveal our specific interests, likes, and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet” (*ibid.*).

[48] This sort of private information falls at the very heart of the “biographical core” protected by s. 8 of the *Charter*.

[49] Like *Morelli*, this case involves highly revealing and meaningful information about an individual’s personal life — a factor strongly indicative of a reasonable expectation of privacy. Unlike in *Morelli*, however, this case involves a *work-issued* laptop and not a personal computer found in a private residence.

[50] The Policy and Procedures Manual of the school board asserted ownership over not only the hardware, but also the data stored on it: “Information technology systems and all data and messages generated on or handled by board equipment are considered to be the property of [the board], and are not the property of users of the information technology”.

[51] While the ownership of property is a relevant consideration, it is not determinative (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 22). Nor should it carry undue weight within the contextual analysis. As Dickson J. (later C.J.) noted in *Hunter*, at p. 158, there is “nothing in the language of [s. 8] to restrict it to the protection of property or to associate it with the law of trespass”.

[52] The *context* in which personal information is placed on an employer-owned computer is nonetheless significant. The policies, practices, and customs of the workplace are relevant to the extent that they concern the use of computers by employees. These “operational realities” may diminish the expectation of privacy that reasonable employees might otherwise have in their personal information (*O’Connor v. Ortega*, 480 U.S. 709 (1987), at p. 717, *per* O’Connor J.).

[53] Even as modified by practice, however, written policies are not determinative of a person’s reasonable expectation of privacy. Whatever the policies state, one must consider the *totality* of the circumstances in order to determine whether privacy is a reasonable expectation in the particular situation (*R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at para. 34, *per* Deschamps J.).

[54] In this case, the operational realities of Mr. Cole’s workplace weigh both for and against the existence of a reasonable expectation of privacy. *For*, because written policy and actual practice permitted Mr. Cole to use his work-issued laptop for personal purposes. *Against*, because both policy and technological reality deprived him of exclusive control over — and access to — the personal information he chose to record on it.

[55] As mentioned earlier, the Policy and Procedures Manual stated that the school board owned “all data and messages generated on or handled by board equipment”. Moreover, the principal reminded teachers, annually, that the Acceptable Use Policy applied to them. This policy provided that “[t]eachers and administrators may monitor all student work and e-mail including material saved on laptop hard drives”, and warned that “[u]sers should NOT assume that files stored on network servers or hard drives of individual computers will be private”.

[56] Though Mr. Cole’s laptop was equipped with a password, the contents of his hard drive were thus available to all other users and technicians with domain administration rights — at least when the computer was connected to the network. And even if the Acceptable Use Policy did not directly apply to teachers, as Mr. Cole maintains, he and other teachers were in fact put on notice that the privacy they might otherwise have expected in their files was limited by the operational realities of their workplace.

[57] The “totality of the circumstances” consists of many strands, and they pull in competing directions in this case. On balance, however, they support the objective reasonableness of Mr. Cole’s subjective expectation of privacy.

[58] The nature of the information in issue heavily favours recognition of a constitutionally protected privacy interest. Mr. Cole’s personal use of his work-issued laptop generated information that is meaningful, intimate, and organically connected to his biographical core. Pulling in the other direction, of course, are the ownership of the laptop by the school board, the workplace policies and practices, and the technology in place at the school. These considerations diminished Mr. Cole’s privacy interest in his laptop, at least in comparison to the personal computer at issue in *Morelli*, but they did not eliminate it entirely.

VI

[59] As Mr. Cole had a reasonable expectation of privacy in his Internet browsing history and the informational content of his work-issued laptop, any non-consensual examination by the state was a “search”; and any taking, a “seizure”.

[60] Mr. Cole does not challenge the initial inspection of the laptop by the school technician in the context of routine maintenance activities. He concedes, moreover, that the technician did not breach his s. 8 rights. In this light, I leave for another day the finer points of an employer’s right to monitor computers issued to employees.

[61] The Court of Appeal concluded that, in the circumstances of this case, the subsequent search and seizure of the laptop by school officials acting under the direction of the principal was not unreasonable within the meaning of s. 8 of the *Charter*. Mr. Cole does not challenge this conclusion.

[62] In any event, I agree with the Court of Appeal. The principal had a statutory duty to maintain a safe school environment (*Education Act*, R.S.O. 1990, c. E.2, s. 265), and, by necessary implication, a reasonable power to seize and search a school-board-issued laptop if the principal believed on reasonable grounds that the hard drive contained compromising photographs of a student. This implied power is not unlike the one found by the majority of this Court in *M. (M.R.)*, at para. 51.

[63] I likewise agree with the Court of Appeal that other school board officials had the same implied powers of search and seizure as the principal (paras. 64-66).

[64] I turn then to the conduct of the police.

[65] The police may well have been authorized to take physical control of the laptop and CD *temporarily, and for the limited purpose of safeguarding potential evidence of a crime until a search warrant could be obtained*. However, that is not what occurred here. Quite the contrary: The police seized the laptop and CD *in order to search their contents for evidence of a crime* without the consent of Mr. Cole, and without prior judicial authorization.

[66] The unresolved question on this appeal is whether the authority of the school officials afforded *the police* lawful authority to conduct this warrantless search and seizure. In my view, it did not.

[67] In taking possession of the computer material and examining its contents, the police acted independently of the school board (*R. v. Colarusso*, 1994 CanLII 134 (SCC), [1994] 1 S.C.R. 20, at pp. 58-60). The fact that the school board had acquired lawful possession of the laptop *for its*

own administrative purposes did not vest in the police a delegated or derivative power to appropriate and search the computer *for the purposes of a criminal investigation*.

[68] This was made clear in *Colarusso*, where a coroner who had lawfully seized bodily samples then turned them over to the police. As La Forest J. explained:

The arguments advanced by the Crown seeking to establish the reasonableness of warrantless seizures by a coroner rely on the underlying premise that the coroner fulfils an essential non-criminal role. The state cannot, however, have it both ways; it cannot be argued that the coroner's seizure is reasonable because it is independent of the criminal law enforcement arm of the state while the state is at the same time attempting to introduce into criminal proceedings the very evidence seized by the coroner. It follows logically, in my opinion, that a seizure by a coroner will only be reasonable while the evidence is used for the purpose for which it was seized, namely, for determining whether an inquest into the death of the individual is warranted. Once the evidence has been appropriated by the criminal law enforcement arm of the state for use in criminal proceedings, there is no foundation on which to argue that the coroner's seizure continues to be reasonable. [pp. 62-63]

[69] Where a lower constitutional standard is applicable in an administrative context, as in this case, the police cannot invoke that standard to evade the prior judicial authorization that is normally required for searches or seizures in the context of criminal investigations.

[70] The Crown relies on *Quebec (Attorney General) v. Laroche*, [2002 SCC 72](#), [2002] 3 S.C.R. 708, *R. v. Jarvis*, [2002 SCC 73](#), [2002] 3 S.C.R. 757, and *R. v. D'Amour* (2002), [2002 CanLII 45015 \(ON CA\)](#), 166 C.C.C. (3d) 477 (Ont. C.A.), for the proposition that a warrant is not required for a regulatory authority to transfer material to law enforcement officers — and that this empowers the officers to examine the transferred materials without a warrant.

[71] I would reject this submission. All of the cases relied on by the Crown arose in heavily regulated environments. In each instance, given the regulated nature of the documents in question, the individual claiming the protection of s. 8 did not have a reasonable expectation of preventing or controlling the further dissemination of his or her information to the law enforcement branch of the state.

[72] No warrant was required because the claimants in the cases cited by the Crown, unlike Mr. Cole in this case, did not have a reasonable expectation of privacy in the information remitted to law enforcement officials. Mr. Cole, throughout, retained a reasonable and “continuous” expectation of privacy in the personal information on his work-issued laptop (*Buhay*, at para. 33 (emphasis added); *R. v. Dymont*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at p. 435).

[73] The school board was, of course, legally entitled to inform the police of its discovery of contraband on the laptop. This would doubtless have permitted the police to obtain a warrant to search the computer for the contraband. But receipt of the computer from the school board did not afford the police *warrantless access* to the personal information contained within it. This information remained subject, at all relevant times, to Mr. Cole’s reasonable and *subsisting* expectation of privacy.

[74] The Crown alleges a second justification for the conduct of the police: third party consent. An employer (a third party), says the Crown, can validly consent to a warrantless search or seizure of a laptop issued to one of its employees. The underlying premise of this submission is that a third party may waive another person’s privacy interest — thereby disengaging that person’s guarantee under s. 8 of the *Charter*.

[75] In the United States, unlike in Canada, there is high authority for a doctrine of third party consent (*United States v. Matlock*, 415 U.S. 164 (1974); *Illinois v. Rodriguez*, 497 U.S. 177 (1990)).

[76] *Matlock* is premised on the notion that third party consent is justifiable because the individual voluntarily assumed the risk that his information would fall into the hands of law enforcement (see *United States v. Ziegler*, 474 F.3d 1184 (9th Circ. 2007), at p. 1191). However, this Court rejected that sort of “risk analysis” in *R. v. Duarte*, 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30, at pp. 47-48, and *R. v. Wong*, 1990 CanLII 56 (SCC), [1990] 3 S.C.R. 36, at p. 45.

[77] Moreover, the doctrine of third party consent is inconsistent with this Court's jurisprudence on *first party* consent. As Iacobucci J. explained in *Borden*, at p. 162, "[i]n order for a waiver of the right to be secure against an unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right."

[78] For consent to be valid, it must be both voluntary and informed. The adoption of a doctrine of third party consent in this country would imply that the police could interfere with an individual's privacy interests on the basis of a consent that is *not* voluntarily given by the rights holder, and *not* necessarily based on sufficient information in his or her hands to make a meaningful choice.

[79] I would therefore reject the Crown's contention that a third party could validly consent to a search or otherwise waive a constitutional protection on behalf of another.

VII

[80] With the *Charter* breach established, the inquiry shifts to s. 24(2).

[81] Unconstitutionally obtained evidence should be excluded under s. 24(2) if, considering all of the circumstances, its admission would bring the administration of justice into disrepute. This determination requires a balancing assessment involving three broad inquiries: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71).

[82] The standard of review is deferential: "Where a trial judge has considered the proper factors and has not made any unreasonable finding, his or her determination is owed considerable deference on appellate review" (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44). But

where the relevant factors have been overlooked or disregarded, a fresh *Grant* analysis is both necessary and appropriate.

[83] Both the trial judge and the Court of Appeal — erroneously, in my respectful view — excluded the unconstitutionally obtained evidence pursuant to s. 24(2) of the *Charter*.

[84] Regarding the seriousness of the *Charter*-infringing conduct, the courts below focused on the actions of Detective Constable Timothy Burt, the officer who took possession of the computer material, who searched the discs, and who sent the laptop away for forensic examination. The trial judge concluded that this officer's actions were "egregious" (para. 26), and the Court of Appeal considered his conduct serious enough to favour exclusion.

[85] I am unable to share either conclusion.

[86] The police officer did not knowingly or deliberately disregard the warrant requirement. As events were unfolding in this case, the law governing privacy expectations in work computers was still unsettled. Without the guidance of appellate case law, D.C. Burt believed, erroneously but understandably, that he had the power to search without a warrant.

[87] He did not act negligently or in bad faith. Nor does his conduct evidence insensitivity to *Charter* values, or an unacceptable ignorance of Mr. Cole's rights under the *Charter*. The officer did not rely exclusively, as the courts below suggested, on his mistaken belief that the ownership of the laptop was necessarily determinative. While this was an important factor underlying his decision not to obtain a search warrant, the officer also turned his mind to whether Mr. Cole had an expectation of privacy in the laptop (p. 130). He was alert to the possibility that the hard drive contained private or privileged material (pp. 130-31 and 164). And he testified that he intended to respect Mr. Cole's privacy interest in this regard (p. 131).

[88] More particularly, D.C. Burt testified as follows:

Q. Did you consider whether or not Richard Cole had any expectation of privacy in that computer?

A. I did consider that. The information that I was receiving was that it was the School Board's computer and that was their property. I had never received any information in regards to Mr. Cole owning that computer *or that he had any privileged material*. And I've dealt with cases where there have been privileged material on a laptop or on a computer. And the only information I had received about any private material that was on that computer came from Mr. Bourget and that was in regards to some images of Mr. Cole's — personal images of his wife and that was *the only information I had in regards to any private information there*.

Q. *And having received that information that there may be images of his wife on the laptop, would you respect that any privacy interest in those photographs?*

A. Yes, sir. Business computer or any computers may have some personal stuff on there. [Emphasis added.]

[89] What of the fact that the officer had reasonable and probable grounds to obtain a warrant? In some circumstances, this may aggravate the seriousness of the breach (*Côté*, at para. 71). Where a police officer could have acted constitutionally but did not, this might indicate that the officer adopted a casual attitude toward — or, still worse, deliberately flouted — the individual's *Charter* rights (*Buhay*, at paras. 63-64). But that is not this case: The officer, as mentioned earlier, appears to have sincerely, though erroneously, considered Mr. Cole's *Charter* interests.

[90] Accordingly, in my view, the trial judge's finding of "egregious" conduct was tainted by clear and determinative error (*Côté*, at para. 51). On the undisputed evidence, the conduct of the officer was simply not an egregious breach of the *Charter*. As earlier seen, the officer did attach great importance to the school board's ownership of the laptop, but not to the exclusion of other considerations. He did not "confuse ownership of hardware with privacy in the contents of software" (trial reasons, at para. 29).

[91] Turning then to the impact of the breach on Mr. Cole's *Charter*-protected interests, the question relates to "the extent to which the breach actually undermined the interests protected by the right infringed" (*Grant*, at para. 76). In the context of a s. 8 breach, as here, the focus is on

the magnitude or intensity of the individual's reasonable expectation of privacy, and on whether the search demeaned his or her dignity (*R. v. Belnavis*, 1997 CanLII 320 (SCC), [1997] 3 S.C.R. 341, at para. 40; *Grant*, at para. 78).

[92] In his s. 24(2) analysis, the trial judge neglected entirely to consider the diminished nature of Mr. Cole's reasonable expectation of privacy. Likewise, the Court of Appeal overlooked the fact that the operational realities of Mr. Cole's workplace attenuated the effect of the breach on his *Charter*-protected interests.

[93] Moreover, the courts below failed to consider the impact of the "discoverability" of the computer evidence on the second *Grant* inquiry. As earlier noted, the officer had reasonable and probable grounds to obtain a warrant. Had he complied with the applicable constitutional requirements, the evidence would necessarily have been discovered. This further attenuated the impact of the breach on Mr. Cole's *Charter*-protected interests (*Côté*, at para. 72).

[94] Finally, I turn to the third *Grant* inquiry: society's interest in an adjudication on the merits. The question is "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion" (*Grant*, at para. 79).

[95] Not unlike the considerations under the first and second inquiries, the considerations under this third inquiry must not be permitted to overwhelm the s. 24(2) analysis (*Côté*, at para. 48; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 40). They are nonetheless entitled to appropriate weight and, in the circumstances of this case, they clearly weigh against exclusion of the evidence.

[96] The laptop, the mirror image of its hard drive, and the disc containing Mr. Cole's temporary Internet files are all highly reliable and probative physical evidence. And while excluding it would not "gut" the prosecution entirely, I accept the Crown's submission that the forensic examination of the laptop, at least, is "critical": the metadata on the laptop may allow the

Crown to establish, for example, when the photographs were downloaded and whether they have ever been accessed.

[97] In sum, the admission of the evidence would not bring the administration of justice into disrepute. The breach was not high on the scale of seriousness, and its impact was attenuated by both the diminished privacy interest and the discoverability of the evidence. The exclusion of the material would, however, have a marked negative impact on the truth-seeking function of the criminal trial process.

[98] For all of these reasons, I would not exclude the evidence unlawfully obtained by the police in this case.

VIII

[99] Having concluded that none of the computer evidence should have been excluded pursuant to s. 24(2), it is not strictly necessary to address the provisional nature of the Court of Appeal's ruling in respect of the Internet files disc. Nevertheless, I find it appropriate to do so.

[100] Generally speaking, the decision to exclude evidence under s. 24(2) should be final. In "very limited circumstances", however, a "material change of circumstances" may justify a trial judge to revisit an exclusionary order (*R. v. Calder*, [1996 CanLII 232 \(SCC\)](#), [1996] 1 S.C.R. 660, at para. 35).

[101] For reasons of principle and of practice, the exclusion of evidence should generally be final. As the intervener Criminal Lawyers' Association (Ontario) points out, an accused is entitled, as a matter of principle, to know the case to meet. If an exclusionary order is revisited after the Crown closes its case, this principle is necessarily undermined. If the case to meet continues to shift, the prejudice is obvious and the trial might well become unmanageable (*R. v. Underwood*, [1998 CanLII 839 \(SCC\)](#), [1998] 1 S.C.R. 77, at paras. 6-7).

[102] Moreover, even when an exclusionary order is revisited *before* the Crown closes its case, there is a serious danger of prejudice to the defendant. The decisions of defence counsel over the course of the trial — premised on the assumption that the evidence has been excluded — risk being undercut. It would be extraordinarily difficult for a trial court to remedy this sort of prejudice.

[103] In this case, the Court of Appeal invited the trial judge “to re-assess the admissibility of [the temporary Internet files disc] if the evidence becomes important to the truth-seeking function as the trial unfolds” (para. 92).

[104] In my respectful view, this would not — at least not on its own — qualify as “very limited circumstances” justifying an exception to the rule. Unconstitutionally obtained evidence, once excluded, will not become admissible simply because the Crown cannot otherwise satisfy its burden to prove the guilt of the accused beyond a reasonable doubt.

IX

[105] As stated at the outset, I would allow the appeal, set aside the exclusionary order of the Court of Appeal, and affirm the order of a new trial.

[106] Mr. Cole asks that he be awarded his costs regardless of the outcome of the appeal. While the Court has the discretion to make such an order, I would decline to do so. There is nothing “remarkable” about this case — the principal criterion — and there was no allegation of “oppressive or improper conduct” on the part of the Crown (*R. v. Trask*, [1987 CanLII 24 \(SCC\)](#), [1987] 2 S.C.R. 304, at p. 308; *R. v. M. (C.A.)*, [1996 CanLII 230 \(SCC\)](#), [1996] 1 S.C.R. 500, at para. 97).

The following are the reasons delivered by

[107] ABELLA J. (dissenting) — While I agree with Justice Fish that there has been a *Charter* breach, in my respectful view, like Justice Karakatsanis in the Court of Appeal, I would exclude the disc containing the temporary Internet files and the copy of the hard drive.

[108] In *R. v. Morelli*, 2010 SCC 8 (CanLII), [2010] 1 S.C.R. 253, Fish J. observed that “it is difficult to imagine a more intrusive invasion of privacy than the search of one’s home and personal computer” (para. 105). Workplace computers, while clearly engaging different considerations, nonetheless attract many of the same privacy concerns as home computers.

[109] Workplace computers are increasingly given to employees for their exclusive use, and employees are allowed — and often expected — to use them away from the workplace for both work-related and personal use. And as more data is stored in the cloud and accessed on both workplace and personal computers, the ownership of the device or the data, far from being determinative of the reasonable expectation of privacy, becomes an increasingly unhelpful marker. In deciding whether to exclude evidence illegally seized from workplace computers, this blurring of the line between personal and workplace usage should inform the analysis.

[110] Three considerations come into play in this case in determining whether to exclude the evidence. The first is the seriousness of the *Charter*-infringing state conduct, which looks at whether the police acted in good faith based on their presumed knowledge of the law. Detective Constable Burt, an experienced officer with years of experience in investigating cyber-crime, was expected to follow established *Charter* jurisprudence. His failure to do so, in my view, represents a serious breach.

[111] This Court’s decision in *R. v. Kokesch*, 1990 CanLII 55 (SCC), [1990] 3 S.C.R. 3, is particularly helpful. In that case, the Court decided that a perimeter search of the accused’s residence violated s. 8 of the *Charter*. Prior to *Kokesch*, it was unclear whether such a search violated the *Charter*. Nonetheless, the Court excluded the impugned evidence, noting that the law of trespass was firmly settled, and that the police “ought to have known” that they were trespassing. In the words of Sopinka J.:

I do not wish to be understood as imposing upon the police a burden of instant interpretation of court decisions. The question of the length of time after a judgment that ought to be permitted to pass before knowledge of its content is attributed to the police for the purposes of assessing good faith is an interesting one, but it does not arise on these facts. The police here had the benefit of slightly more than twelve years to study *Eccles*, slightly less than six years to consider *Colet*, and slightly more than two years to digest the constitutional warrant requirement set out in *Hunter*. Any doubt they may have had about their ability to trespass in the absence of specific statutory authority to do so was manifestly unreasonable, and cannot, as a matter of law, be relied upon as good faith for the purposes of s. 24(2). [Emphasis added; p. 33.]

[112] In other words, the Court concluded that if, in conducting their search, the police disregarded settled law, any specific uncertainty in the law becomes far less determinative. Otherwise, it would open the door too widely for the admission of evidence under s. 24(2).

[113] In this case, the trial judge found that D.C. Burt assumed that “because the laptop belonged to the Rainbow District School Board, there was no need for him to get a warrant”. To borrow from *Kokesch*, D.C. Burt’s exclusive reliance on ownership to determine whether a warrant was required was unreasonable and cannot be relied on as good faith for the purposes of s. 24(2).

[114] While the law relating to the search of workplace computers was unsettled at the time of the search, what *was* settled was the fact that property rights did not determine whether a warrant was required. In 1984, *Hunter v. Southam Inc.*, [1984 CanLII 33 \(SCC\)](#), [1984] 2 S.C.R. 145, divorced the concept of privacy from the law of trespass and said that s. 8 protects “people, not places” (p. 159). In 1990, the Court found a reasonable expectation of privacy in a hotel room in *R. v. Wong*, [1990 CanLII 56 \(SCC\)](#), [1990] 3 S.C.R. 36, and in 2003, found a reasonable expectation of privacy in a rented locker in *R. v. Buhay*, [2003 SCC 30 \(CanLII\)](#), [2003] 1 S.C.R. 631. The search in this case, in June 2006, occurred many years after this established jurisprudence, undeniably a sufficient amount of time for an officer who had years of experience in cyber-crime to have known that property interests did not determine the reasonable expectation of privacy.

[115] Justice Fish finds that the trial judge made a “clear and determinative” error in finding that D.C. Burt wrongly relied on the ownership of the laptop in deciding not to get a warrant. With respect, in my view the trial judge’s conclusion is fully supported by the evidence.

[116] D.C. Burt accepted that he had reasonable grounds for a warrant. Then, on multiple occasions, he stated explicitly that he chose not to obtain a warrant because the computer, and therefore its data, were the property of the School Board:

[Crown Counsel Mr. Roy]. And did you consider obtaining a search warrant?

A. Yes, I did, sir.

Q. And whose decision was it to make with respect to whether or not you would be obtaining a search warrant? Did you consult with anyone else?

A. No, that was my decision, sir.

Q. And why did you decide not to obtain a search warrant?

A. It was my belief that the laptop in question was the property of the Rainbow District School Board, that Mr. Slywchuk had said that it was a teacher or a staff computer, that the sticker on the bottom of the laptop indicated it was property of Rainbow District School Board, and at that point I was advised that it was their property. . . .

. . .

Q. Now would your approach have been different if you were seizing a computer from a residence?

A. In a residence there are several users on computers. This is a personal computer as opposed to a business computer with a property. Most of us don't put a "Property of Tim Burt" on the back of my computer as opposed to a property of an employer. So I would look in my household and there are three, four people who could use my computer and I believe that each one of them would have a privacy interest because my son may be chatting with someone or somebody in a household may be chatting and they may claim that they have some kind of privacy. I would get a search warrant even if, use an example, a wife catches her husband doing something and says I don't want this computer, I want you to do this because I caught him doing something illegal, and it's in my possession already at headquarters, I would get a warrant for it in that time because I would be respecting the privacy of all those people on that personal computer.

Q. Did you consider whether or not Richard Cole had any expectation of privacy in that computer?

A. I did consider that. The information that I was receiving was that it was the School Board's computer and that was their property. I had never received any information in regards to Mr. Cole owning that computer or that he had any privileged material. And I've dealt with cases where there have been privileged material on a laptop or on a computer. And the only information I had received about any private material that was on that computer came from Mr. Bourget [the school principal] and that was in regards to some images of Mr. Cole's — personal images of his wife and that was the only information I had in regards to any private information there.

. . .

[Defence Counsel Mr. Keaney]. Okay. And you decided not to get a search warrant before looking at that CD called the temporary Internet folder. Why?

A. Because of the same reasons as I explained with the laptop, that I believe that the data and the images were all part of that laptop and that that laptop belonged to the Rainbow District School Board.

...

A. . . . if I believe that there's a privacy interest I would get a warrant . . . for it, but based on the information I collected up until the examination of the computer, including the procedures, the data contained within and that would be, I guess, a subject to review, the data contained and created within being the Board's property, what they call their property, I didn't believe that that data belonged to Mr. Cole. [Emphasis added.]

[117] Apart from vague references to “privileged material”, the distinction that D.C. Burtt drew between the search of a shared home computer and that of a work computer was the fact that the laptop belonged to the School Board. He acknowledged that if he were searching a home computer used by several people, he would obtain a warrant “because [he] would be respecting the privacy of all those people on that personal computer”. The distinction for him appears to have been that “[m]ost of us don't put a ‘Property of Tim Burtt’ on the back of [a] computer as opposed to a property of an employer.” Indeed, immediately after this statement, D.C. Burtt reaffirmed that he did not get a warrant in Mr. Cole's case *because of the School Board's ownership of the laptop*. This echoes the repeated statements he made throughout his testimony to justify his failure to get a warrant or to conduct a further inquiry into the privacy interests at play.

[118] Despite acknowledging that there could be personal information on Mr. Cole's computer, and despite being told by the principal of the school that Mr. Cole kept personal photographs on it, there is no evidence that D.C. Burtt took any steps to discover the extent of the private information on Mr. Cole's computer before effecting a warrantless search.

[119] D.C. Burtt acknowledged that he knew about the private use that Mr. Cole made of the laptop before he looked at the content of the CDs. He knew that Mr. Cole had a password to his computer. He had also received statements confirming that the photos were in a hidden folder, that teachers regularly kept personal information on their laptops and that Mr. Cole specifically had

“personal private information on his computer”, namely the photos of his wife. In fact, D.C. Burt even acknowledged that, in conducting a warrantless search of Mr. Cole’s workplace computer, he knew there could be “personal stuff on there”, and would make efforts to avoid it:

Business computer or any computers may have some personal stuff on there. I can even use an example from our own computers that I know that officers may check a website and may send an e-mail. So some people will have a personal folder or a personal picture or something like that. I’ll respect that because it’s not what I’m looking for. Essentially I’ve been given information in regards to possible child pornography. Mr. Cole’s wife is not part of the investigation and it’s — when the forensic images obtain . . . It’s hard to explain but the whole computer, when the . . . The forensic program takes all of the images, not just from one area. It takes it so that it can recreate a proper image. So when all those images come in I’m not particularly — I’m not looking for Mr. Cole’s family pictures. I’m not looking for Mr. Cole’s financial records. I’m not looking for anything that may be in there. What I’m looking for are images of child pornography or improper Internet — not Internet searches but web browsing where there may be access of child pornography and illegal activity related to child pornography or any other offence. [Emphasis added.]

[120] D.C. Burt would not have been able to rely on the School Board’s ownership of an office desk for a warrantless search of Mr. Cole’s personal files in the desk’s drawer, in complete disregard for Mr. Cole’s privacy interests (see *Buhay*). The same should be true of Mr. Cole’s school-owned laptop.

[121] There were also no exigent circumstances or other legitimate reasons that forced the police to proceed without a warrant. As the trial judge noted, “[h]ad the legal route to accessing the data in that computer been followed, it is likely that it could have been obtained without alerting Richard Cole about what was transpiring.” There was therefore no urgent need on the part of the police to preserve the evidence.

[122] In his testimony, D.C. Burt accepted that once he received the CDs and the laptop, he was confident that they would remain uncompromised, that their integrity would not be at issue, and that there was ample time to get a warrant. In fact, though he looked at the CDs immediately after seizing the materials on June 28, the laptop was not sent for forensic analysis until August 18, nearly two months later. This too weighs in favour of exclusion.

[123] It is also uncontested that D.C. Burt not only had ample time to obtain a warrant, he had reasonable and probable grounds to do so. The relevance of this factor was recently discussed in *R. v. Côté*, [2011 SCC 46 \(CanLII\)](#), [2011] 3 S.C.R. 215, where the Court said that the failure to obtain a warrant can either be a mitigating or an aggravating factor under the first branch of the *Grant* test, depending on whether the police had a “legitimate” reason for it (*R. v. Grant*, [2009 SCC 32 \(CanLII\)](#), [2009] 2 S.C.R. 353). In this case, it seems to me that the “legitimacy” of the warrantless search hinges on the finding that D.C. Burt’s good faith was compromised by his disregard for the established law. Since I see no reason justifying his decision not to get a warrant, this factor too mandates in favour of exclusion.

[124] The second aspect of the *Grant* test considers the impact on the *Charter*-protected interests of the accused. This factor “calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed” (*Grant*, at para. 76). The interest in this case is privacy. *Grant*, *R. v. Harrison*, [2009 SCC 34 \(CanLII\)](#), [2009] 2 S.C.R. 494, and *Côté* address the key relevant concerns at play in determining the impact of a breach of a privacy interest in this case: the reasonable expectation of privacy and the extent of the intrusion.

[125] The reasonable expectation of privacy is central to assessing the impact of the breach on the accused’s *Charter*-protected interests. Even if it can be said that there is a diminished expectation of privacy in a workplace computer, this is not the end of the inquiry. The record shows that teachers at the school kept a great deal of personal information on their computers, a fact that was known both to the school and to D.C. Burt prior to the police search. Mr. Cole himself kept personal photos, financial records, tax records, and information about a property he owned on his computer. The search also included Mr. Cole’s Internet browsing history, which would provide an extensive, unfiltered view of many aspects of his life. As Justice Fish recognized, the information that was available on the search of Mr. Cole’s computer was “meaningful, intimate, and organically connected to his biographical core”.

[126] The substantial amount of private information which was seized by the police from Mr. Cole’s computer meant that it was a highly intrusive search. In other words, regardless of

whether there is a diminished expectation of privacy in a workplace computer, the *extent* of the seizure in a given case should be relevant under s. 24(2). In *Harrison*, the Court asked whether “the breach [was] merely transient or trivial in its impact” and considered it a mitigating fact that, “[h]ad it not turned up incriminating evidence, the detention would have been brief” (paras. 28 and 30). In *Côté*, the Court noted that the police had conducted a two-hour warrantless search of the accused’s home (para. 85). And in *Morelli*, the breadth of the search of the accused’s computer was significant to the analysis (paras. 104-5).

[127] The warrantless search and seizure in this case included not only the impugned photos, but also the computer and a copy of the data on the hard drive. In other words, it had no restrictions as to scope. As a result, regardless of any diminished reasonable expectation of privacy in a workplace computer, the *extent* of the search of Mr. Cole’s hard drive and browsing history was significant, which weighs in favour of exclusion.

[128] The fact that the police had reasonable and probable grounds to obtain a search warrant and discover the evidence does little to attenuate the intrusiveness of the search that actually occurred. As this Court explained in *Côté*,

the absence of prior judicial authorization still constitutes a significant infringement of privacy. Indeed, it must not be forgotten that the purpose of the *Charter*’s protection against unreasonable searches is to prevent them before they occur, not to sort them out from reasonable intrusions on an *ex post facto* analysis: *R. v. Feeney*, 1997 CanLII 342 (SCC), [1997] 2 S.C.R. 13, at para. 45. Thus, prior authorization is directly related to, and forms part of, an individual’s reasonable expectation of privacy. [para. 84]

[129] The third and final factor in *Grant* is society’s interest in an adjudication on the merits, which “asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion” (para. 79). Three considerations have been emphasized by the Court in weighing this factor: the reliability of the evidence, its importance to the prosecution’s case, and the seriousness of the offence.

[130] First, “[i]f a breach . . . undermines the reliability of the evidence, this points in the direction of exclusion of the evidence” (*Grant*, at para. 81). While I agree with Justice Fish that the evidence in this case is reliable, a factor arguing in favour of admission, its importance to the prosecution’s case is, it seems to me, minimal, and it can hardly be said to reach the level described in *Grant* of “effectively gut[ting] the prosecution” (para. 83).

[131] There is little evidence in this case about the particular relevance of the laptop and Internet browsing history, especially given that the pornographic photographs themselves, as well as the screenshot showing their location on Mr. Cole’s computer, were both admitted. The Crown suggests that the information in the laptop, including the metadata accompanying the photos (data stored on each file that records when it was created and altered) and the Internet browsing history, help establish the context in which the files were downloaded and whether the files were viewed, copied or transmitted.

[132] At best, the Crown’s need for Mr. Cole’s *entire* hard drive and his browsing history in order to establish possession of child pornography, is highly speculative. In *Morelli*, the Court held that in order to be guilty of possession of child pornography, “one must knowingly acquire the underlying data files and store them in a place under one’s control”, such as by storing it on the hard drive (para. 66). That knowledge and control can be inferred if the pornography is found in a folder where users typically keep their personal files.

[133] In Mr. Cole’s case, the pornographic photos were stored in a folder under “My Documents” and the screenshot records their location. This location supports an inference that they were deliberately placed there by Mr. Cole. As a result, the Crown may well be able to establish possession without the metadata and browsing history.

[134] Finally, while the seriousness of the offence is a relevant factor to consider, *Grant* observed that it “has the potential to cut both ways”. Section 24(2) is focussed on the longer-term reputation of the administration of justice. As a result, “while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital

interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high” (para. 84). This statement was reaffirmed in *Harrison* and *Côté*, cases where the Court excluded evidence that was central to the prosecution of a serious offence. It seems to me that the result of these decisions is to seriously attenuate the impact of the seriousness of the offence in the s. 24(2) analysis.

[135] This brings us to balancing these factors. The *Charter*-infringing conduct in this case was serious in its disregard for central and well-established *Charter* standards. Nor were there any exigent circumstances or other legitimate reasons preventing the police from getting a warrant. The impact of the breach on Mr. Cole’s *Charter*-protected interests, even assuming that his reasonable expectation of privacy was reduced because it was a workplace computer, was significant given the extent of the intrusion into his privacy. And while the evidence in this case is reliable, its importance to the prosecution’s case is at best speculative. Balancing these factors, and in light of the deference owed to trial judges in applying s. 24(2), it seems to me that the trial judge was reasonable in excluding the evidence.

[136] I would dismiss the appeal.

Appeal allowed, ABELLA J. dissenting.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Addario Law Group, Toronto; Ruby Shiller Chan, Toronto.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Edmonton.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Dawe & Dineen, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Lax O'Sullivan Scott Lisus, Toronto.

Solicitors for the intervener the Canadian Association of Counsel to Employers: Hicks Morley Hamilton Stewart Storie, Toronto.

TAB 50

Exclusion of Evidence Due to Multiple Charter Breaches in Police Investigation

Facts

- The case arose from allegations of domestic violence and unsafe firearm storage. A woman left her home with her children, alleging physical abuse by her husband, a police officer. The police initiated a high-risk response, including warrantless searches, containment, and surveillance of the family property, leading to the husband's arrest and the seizure of firearms and drugs (paras 1-3, 211-213).

Procedural History

- [Not applicable or not found]

Parties' Submissions

- Crown: Argued that the police actions, including warrantless searches and containment, were justified by exigent circumstances and public safety concerns. Asserted that the evidence obtained was admissible and that the searches were conducted in good faith (paras 202-203, 238, 307-309, 331-332).
- Accused: Contended that the police violated his s. 8 Charter rights through warrantless searches, an unlawful strip search, and improper execution of warrants. Argued that the evidence obtained should be excluded due to serious constitutional breaches and lack of good faith (paras 203, 238-239, 286-287, 331, 343-345, 359-360).

Legal Issues

- Did the warrantless entry onto the accused's property and subsequent actions violate s. 8 of the Charter?
- Was the strip search of the accused conducted in a lawful and reasonable manner?
- Was the warrantless entry into the accused's dwelling justified under the circumstances?
- Was the consent to search and seize firearms valid and informed?
- Was the public safety warrant issued on sufficient and valid grounds?
- Was the s. 487 Criminal Code warrant valid, particularly regarding the search of out-buildings?
- Should the evidence obtained through these searches be excluded under s. 24(2) of the Charter?

Disposition

- The court excluded all evidence obtained through the searches, including firearms and drugs, under s. 24(2) of the Charter (para 431).

Reasons

Per Hill J.:

- Warrantless Entry and Containment: The police actions, including trespass, surveillance, and destruction of property, were not justified by exigent circumstances. The police failed to prioritize obtaining a Feeney warrant and acted on speculative risks rather than specific, articulable facts (paras [204-235](#), [408-410](#)).
- Strip Search: The search exceeded the scope of a lawful frisk search and amounted to a strip search under Golden. Conducted in freezing conditions without proper justification, it violated the accused's dignity and privacy (paras [240-255](#), [409](#)).
- Stealth Clear: The warrantless entry into the dwelling was based on theoretical risks rather than reasonable suspicion. The search was not supported by case-specific facts and was therefore unconstitutional (paras [258-285](#), [410](#)).
- Consent Search: The accused's consent to seize firearms was not informed, as he was misled about the legality of prior police actions. The consent was invalid under the Wills criteria (paras [286-306](#), [419](#)).
- Public Safety Warrant: While the warrant met statutory requirements, it was tainted by prior unconstitutional searches. The issuing justice was not informed of these breaches, undermining the warrant's validity (paras [307-330](#), [419](#)).
- s. 487 Warrant and Out-Buildings: The warrant was facially invalid due to the Branton error and lack of grounds for searching out-buildings. The search of the workshop was effectively warrantless and unconstitutional (paras [331-378](#), [425](#)).
- Exclusion of Evidence: The cumulative pattern of serious s. 8 breaches, institutional indifference to Charter rights, and lack of good faith warranted exclusion of the evidence. Admission would undermine the administration of justice (paras [404-430](#)).

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R. v. N.M., 2007 CanLII 31570 (ON SC)

Source:	Superior Court of Justice
Date:	2007-07-18
File number:	CRIM J(P) 1329/03; CRIM J(F) 664/06
Other citations:	223 CCC (3d) 417 — 159 CRR (2d) 50 — [2007] OJ No 3022 (QL)
Citation:	R. v. N.M., 2007 CanLII 31570 (ON SC), < https://canlii.ca/t/1sg9k >, retrieved on 2026-03-23

COURT FILE NOS.: CRIM J(P) 1329/03
CRIM J(F) 664/06
DATE: 20070718

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

- and -

N.M.

)
)
)
) M.E. Cullen, for the Attorney General
of Ontario
) S. Coroza, for the Attorney General
of Canada

)
)
)
)
)
)
) P. Brauti, for the Accused

)
)
)
)
)

) **HEARD:** May 14-18, 22-24, 28, 29,
31, and June 1, 4-6, 2007

JUDGMENT

Subject to any further Order by a court of competent jurisdiction, an Order has been made in this proceeding directing that the identity of the complainant and any information that could disclose such identity, shall not be published in any document or broadcast or transmitted in any way. In the circumstances, any further publication, broadcast or transmission of this judgment shall refer to the accused as "N.N.M."

-
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-
HILL J.

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INTRODUCTION

[1] A mother took her three children and left the family home telling her husband she was picking up groceries. She did not return. The next day, a family shelter worker phoned the police to report the woman's allegations of physical abuse in her marriage.

[2] These apparently simple circumstances triggered about seventy-two hours of intense police activity, including warrantless and warranted searches, directed toward the complainant's husband, N.M., and the family property.

[3] Mr. N.M. faces trial on two indictments, one with domestic violence and weapons charges, and a second for unlawful possession of illicit drugs. This judgment determines the admissibility of seized evidence in the face of the accused's claim that, in a number of ways, his s. 8 *Charter* right to be secure against unreasonable search and seizure was violated.

THE FACTS

The OPP Integrated Response Procedures are Activated

[4] On March 19th, 2002, Det. Const. James was the Acting Sergeant in the crime unit of the Dufferin OPP detachment in Shelburne, Ontario. At 5:10 p.m. she was contacted at home by OPP Sgt. D. Quinton who passed on information he had received from an employee of a family shelter in Orangeville. There were allegations that a Toronto Police Service (TPS) officer had assaulted his wife. James was informed that the suspect, Mr. N.M., had stated that he would kill any police officer who came to his door. She assumed it was the complainant who had related this information to the shelter staff member who in turn contacted Quinton. James, a sergeant by the time of these proceedings, requested Quinton to contact Insp. R. Jones because Mr. N.M. had access to guns and there were "threats in regards to officers".

[5] In March of 2002, Inspector R. Jones was the Duty Officer for the OPP Central Region and a Level 2 Incident Commander who had received training "to resolve...high risk incidents which generally speak to barricaded persons, hostage takings, high risk search warrants...and other complicated incidents".

[6] At 6:00 p.m. on March 19th, 2002, Insp. Jones received a phonecall from Sgt. Quinton relating the information he learned from an employee at a family violence shelter:

- (1) the detachment was investigating a Toronto police officer, N.M., aged 39 years, regarding a spousal assault allegation
- (2) the suspect had, in the past, been physically violent toward his wife
- (3) the complainant and the couple's three children were in a shelter in Orangeville
- (4) Mr. N.M. was suicidal and homicidal
- (5) the suspect had his service revolver and other firearms in his residence
- (6) there was increased use of alcohol by Mr. N.M. and he was "self-medicating"
- (7) the suspect had said to the complainant that he would kill any cops who came to his house.

[7] Insp. Jones decided to activate an integrated response leading to a call in of specialist teams such as crisis negotiators, the Emergency Response Team (ERT), the Tactics and Rescue Unit (TRU) team, canine unit, technical and medical support. According to the Inspector:

I was concerned for public safety. I was concerned for any police officers who would have gone to knock on the door to speak to Mr. N.M.. I was concerned for other members of the public and for Mr. N.M.'s wife and children, should they decide to return to the house. The – and that was my decision that the safest way of resolving this was not to send uniform officers to the house but in – to knock on the door, but instead initiate our integrated response which would end up having a containment put around Mr. N.M.' house, having a trained crisis negotiator call to speak to him, all with the intentions of course of a safe resolution to this matter.

...

...if we found Mr. N.M. at his residence, we prevented him from leaving, prevented anybody from joining him, and have trained people negotiate him out.

...

The mission statement for this call was safe containment of the subject, to safely negotiate a peaceful and safe surrender.

[8] Sgt. James produced a sketch drawn by Const. Skelding who was assigned, sometime before 7:00 p.m. on March 19th, 2002, to prepare a diagram of the N.M. property. The diagram depicts a pick-up truck in the driveway near the house and trees surrounding the property. Sgt. James testified that she believed “there was trees around the property”. As far as she knew, Skelding was simply to get “what he could see in regards to that property” without going onto the property. In cross-examination, it was pointed out to Sgt. James that Const. Skelding’s diagram (Ex. #14) showed an out-building directly behind the house. She not only agreed that the out-building could not be seen from the end of the driveway or from the roadway at the front but also that there were no photos of the property in the possession of the police which “would demonstrate that you could possibly see that out-building from off the property”. Sgt. James then stated, “I don’t know where he went on the roadway, off the roadway”.

[9] At 7:20 p.m., OPP Const. Tardiff interviewed and took a signed statement from the complainant at the shelter in Orangeville. The complainant described the domestic abuse during her marriage to the accused. The statement includes this text:

During some of the sessions with all the other yelling and comments he has said things like – never try to leave me or I’ll get you, I’ll fucking kill you and the kids and your family.

There is no time specifically assigned to these statements attributed to Mr. N.M.. The last described assault was March 4th, 2002. In the prior two weeks, her husband had been “quiet” and “withdrawn”. The complainant was concerned he was a “time bomb” building toward something “bad”.

The Incident Commander's Initial Briefing

[10] Sgt. James understood that Const. Tardiff was dispatched to interview Ms. S.M. at the shelter. Sgt. James learned that Mr. N.M. was on injury leave from his police duties. She obtained the details of the suspect's three registered handguns. In a phonecall from Const. Tardiff after 7:30 p.m. it was learned that the complainant believed her husband was at home and that he had a cellphone in a bag in the car. On March 18th, after leaving home with her children, the complainant had called Liz and Rick Benoit, two TPS officers, to tell them she had left and ask that they communicate that to Mr. N.M.. Tardiff advised that Rick Benoit spent the night of March 18/19 with the suspect at the N.M. home and that Benoit, when he left in the morning for work, found his friend to be calm and remorseful. Tardiff passed along further information including that Mr. N.M. had made reference to the "Kirec" situation.

[11] Although she made no note about Mr. N.M. being suicidal, the accused's reference to Kirec concerned Sgt. James as she knew of the 1995 or 1996 homicide/suicide investigation by her detachment. Ms. Kirec and her children were temporarily residing at a family shelter. During a visit with Mr. Kirec he shot and killed his children. When Ms. Kirec arrived to pick up the couple's children, she was sexually assaulted and killed. Mr. Kirec then took his own life. At no time during the ensuing hours did Sgt. James determine exactly what Mr. N.M. said, the context of his reference to Kirec or when the statement was made. After drawing the sergeant's attention to the fact that Ms. S.M. and the children were not in the home on March 19th, this evidence was given:

Q. So the one thing that this wasn't was a Kirec situation, true?

A. It – no, it wasn't. It – but it did bring images of – of your client being, at least in past references, homicidal and suicidal.

...

Q. Okay. Then you'll agree with me, because we've eliminated everybody else, that you had no reason to believe, no objective reason to believe that Mr. N.M. was going to harm himself, did you?

A. No.

Q. Is that, no, you agree with me?

A. I had no information that he was specifically going to harm himself this night, no.

[12] Insp. Jones arrived at the Dufferin OPP detachment at 7:30 p.m. where she was briefed by Sgt. Quinton and Det. Const. James. In the course of an early briefing, to the Inspector's recall, she was told that Mr. N.M. had, at some point, made the statement: "I am a cop. I know what to do. They'll never get me out of the house". The inspector did not know when Mr. N.M. made the statement, or to whom, but assumed it had been to his wife. Over the course of the evening, this statement attributed to N.M. was rephrased or interpreted by a number of persons to be a stated intention to shoot any police officer coming to the door of his home.

Subsequent taperecorded exchanges between trained OPP crisis negotiators also reflect a measure of uncertainty of the context of the oral statement of the complainant to Const. Tardiff in turn passed on to Sgts. Quinton and James and then to Insp. Jones:

Negotiator 1: Okay everybody why are we here, why are we here today?

Negotiator 2: Well exactly...

Negotiator 3: That, that...

Negotiator 2: ...we can't leave, the shelter called where the wife and kids are because they heard through the wife that he had made a comment that ah...

Negotiator 3: I, I'm a policeman...

Negotiator 2: Yeah.

Negotiator 3: ...I know how police work...

Negotiator 2: Work.

Negotiator 3: ...you'll never get me out of the house.

Negotiator 2: Okay.

Negotiator 3: But I, I, I said...

Negotiator 1: That, that's what we're, we're basing...

Negotiator 3: Yeah.

Negotiator 1: ...everything here. But he has never...

Negotiator 2: Well all the background of the guns and the (Inaudible)...

(Discussion).

Negotiator 2: ...how it all can be a little weird and, and...

Negotiator 1: Okay but we have never gone to the house...

Negotiator 2: No, no and asked him to come out.

(Discussion).

Negotiator 3: It could've been as simple as he could've been making that comment in regards to who's gonna get custody of the house.

Negotiator 2: Yes. But you can't read too much into this but...

[13] As well, Insp. Jones was told that the complainant was last assaulted on March 4th, 2002 and that Ms. S.M. had photos "to support the assault". The Inspector was informed that Rick Benoit, a Toronto Police Service (TPS) officer and friend of the accused, had last seen Mr. N.M. that morning and assessed him as calm and remorseful. In fact, according to the accused and Benoit, it was during the afternoon of March 19th that Benoit left the N.M. residence. Benoit was

an Emergency Task Force (ETF) officer with the TPS. Insp. Jones also learned that:

- (1) the accused possessed several registered handguns
- (2) he might have one long gun
- (3) Mr. N.M. didn't drink alcohol
- (4) he was taking four types of medication
- (5) the accused stayed in the living room area of the residence
- (6) he possessed no police scanners
- (7) he had spoken of Kirec.

On the last point, the Inspector could not recall at the time of this hearing the significance of the reference to Kirec.

[14] Insp. Jones accepted that there was conflicting information, for example, that Mr. N.M. was calm not agitated. She nonetheless believed that the safest way to resolve the situation was to contain the residence and "phone Mr. ...N.M. and ask him to leave the residence".

[15] Prior to 8:35 p.m., Sgt. James received faxed diagrams from Const. Tardiff prepared by Ms. S.M. depicting the N.M. property site as well as the layout of the main floor and basement of the residence.

[16] A command post was set up at the Mono Township offices one to two kilometres distant from the N.M. property.

[17] Insp. Jones arrived at the command post at 8:40 p.m. She attended the briefing of Staff Sgt. Schwyer given to his TRU team which had been summoned from Barrie. The Inspector did not attend the scene of the N.M. residence staying at the command post throughout the evening with the TRU team supervisor, the crisis negotiators, Sgt. James and others.

Judicial Authorization and Perimeter "Containment"

[18] Insp. Jones did not know whether an OPP ERT team had gone onto Mr. N.M.' property between 6:00 and 7:30 p.m. on March 19th, 2002. Had they done so, it would have been "a normal routine response of setting up containment by ERT team members". The Inspector could not, however, say who would have

authorized such an entry. The evidence suggests that no ERT officers did enter the property.

[19] Insp. Jones anticipated that the TRU team would “set up a perimeter containment...of the residence” to isolate Mr. N.M., to control his access to others and their access to him, to evacuate people in the area who might be in harm’s way, and to negotiate.

[20] Containment is accomplished by invisible deployment of TRU team officers on a perimeter to allow a 360° “visual containment of the premises”. The officers take cover to remain concealed from view from the residence. Asked if the containment involves an approach to a home, the inspector responded that:

...they may well be on the property of the residence that they are establishing containment on.

...

The purpose of containment is, they’re not searching, they’re not gathering any evidence, they are watching the residence to look for Mr. N.M., or anyone else who may be there.

...

And you have...officers deployed on his property?

Correct.

This is the “inner perimeter”. An “outer perimeter” of ERT officers with roadblocks is maintained to ensure that pedestrian and vehicular traffic is rerouted to avoid members of the public entering the area of the inner perimeter.

[21] Insp. W. McKinnon, the OPP Manager of Staff Development and Training for the Central Region, is himself a Level 2 Incident Commander. His understanding of a barricaded person corresponded to the 1997 *Emergency Response Services Manual* definition of an individual who has assumed a defensible position, poses a threat to life, and refuses to immediately surrender. The inspector and the *Manual* define “containment” as constant 360 degree observation of the subject location and an “inner perimeter” as the smallest possible area in which the incident can be contained without endangering life.

[22] Insp. McKinnon considered that, in exigent circumstances, containment by warrantless entry onto private property may be permissible. While each case is circumstance-driven, the police must be able to articulate grounds for their actions.

Legal, constitutional and caselaw requirements must be complied with. OPP training material defines exigent circumstances as including “a now or never” situation to preserve life. The officer noted the general police duty to preserve life and property. According to Insp. Jones, the containment process was described in the OPP standard operating procedures and manuals. The OPP standard operating procedure manuals, Police Orders, and relevant training material are all silent regarding warrantless entry onto private property to set up inner perimeter containment.

[23] Insp. Jones considered that because Sgt. James “was overseeing the criminal investigation...she had responsibilities in regards to judicial authorizations”. The witness was pressed further on the point:

Q. With respect to the potential for arrest – and you’ve referred to an arrest team – did you take any steps with respect to obtaining any kind of warrant for Mr. N.M.’s arrest?

A. The detectives were. I had a conversation with Sergeant James in regards to the judicial authorization. I know it was being worked on, but I’m not clear today whether it was a search warrant or an arrest warrant with a *Feeney*.

[24] Insp. McKinnon testified that, in an integrated response situation, criminal investigators are immediately assigned to prepare warrants including a *Feeney* warrant where an arrest may be necessary in a dwelling.

[25] Between 5:40 p.m. and about 8:00 p.m. on March 19th, according to her notes, Sgt. James started a warrant:

I had started or I was working a little bit on a warrant myself. I don’t know what warrant. I would have to assume it was a *Feeney* warrant, because I wouldn’t have any other reason to do any other warrant at this time.

In cross-examination, Sgt. James stated that she believed, in the circumstances, that a *Feeney* warrant “was required”.

[26] By 8:06 p.m., Det. Sgt. C. McCormick, then a detective constable, was assigned to be the “warrant writer”. She was tasked to prepare material for a *Feeney* warrant application to enter the N.M. residence to arrest N.M.. She had only prepared one or two *Feeney* warrant applications before. The officer was briefed as to initial information including that the situation involved a “barricaded male” which she understood to be a male party who was refusing to come out after contact by the authorities.

[27] Only in cross-examination was Insp. Jones asked to describe the legal authority to enter upon private property, without a warrant, to take up surveillance of a dwelling-house:

Q. What is the legal authority that you’re relying on for entering onto that property without a warrant?

A. It’s – the legal authority is our common law duty –

Q. Yes.

A. -- in regard to public safety. We’re not searching, we’re not gathering evidence. I believe that we had a situation where in order to ensure public safety for all three groups, Mr. N.M. –

Q. Yes.

A. -- the general public and ourselves, we needed to put a professional police containment around the property.

...

- A. Our common law duty for the – to preserve the peace and to – that's –
- Q. Yes.
- A. -- part of our – our requirement under the *Police Services Act*, that's part of our – our mandate, is to ensure that we maintain order and keep the public safe.

[28] Insp. Jones accepted that the intention was to arrest Mr. N.M. at his residence for assaulting his wife. The witness was asked if prior judicial authorization was required:

- Q. And so you understand as such you require a *Feeney* warrant to go onto the property, true?
- A. Unless there's exigent circumstances such as this.
- Q. Okay. So what you're saying is, is that there were exigent circumstances in this case?
- A. Yes, I believed we need[ed] to resolve the situation as quickly and as safely as we could and prevent – if Mr. N.M. was in the house, prevent him from leaving the house.
- Q. Is that – is that different than the public safety exception that you seemed to indicate before, or is that the same thing that you're talking about when you talk about exigent circumstances? Are they one and the same or are they two different ideas?
- A. I'm not clear what you're asking.
- Q. Sure. You seemed to suggest that there was some type of – you were acting under some type of public duty to preserve the peace –
- A. Correct.
- Q. -- and that's why you went onto the property?
- A. Correct.
- Q. Okay. And then you mentioned –
- A. And –
- Q. -- the word 'exigent' –
- A. Right.
- Q. -- circumstances, or something to that effect, and I'm asking you, is – is that one and the same ideas, that – the public duty, the exigent circumstances, [is] it all bound into one?
- A. It is – it's all bound into the urgency of the situation.
- Q. But clearly you knew that you required a *Feeney* warrant in this case, because you – you or somebody detailed somebody to become a *Feeney* officer, so to speak, and get a *Feeney* warrant?
- A. Okay, I don't recall whether we were going for a search warrant or a *Feeney* warrant. I'm not disagreeing that we were looking for judicial authorization, but we were putting police officers on the property perhaps, if required, in order to establish containment of the property, that's correct.

- Q. Right. But the point of the matter is, is that you knew that a *Feeney* warrant was required because – I take it that you turned your mind to that issue, did you not?
- A. To judicial authorization, yes.
- Q. Yes. And did you not say to yourself, well hey, we're going down to somebody's property, who might be in this house and we're going to seek to arrest him; that's – that's a *Feeney* warrant we need; did you not do that analysis?
- A. That – that's not the situation though. I – I suggest that this situation is much different, based upon the information that we had received –
- Q. Okay.
- A. -- and there were – sorry, go ahead.
- Q. No. I was going to say, well is your position then there was no need for a *Feeney* warrant?
- A. I – I don't recall. I – I – it – I just don't recall what the – if the question had been asked 'Do we need a *Feeney* warrant?', I would say 'Yes'. If the question is 'Are we going to stand on the side of the road with our hands in our pockets, doing nothing until we get the *Feeney* warrant?', I would say 'No –
- Q. Okay.
- A. -- we need to get on the property and ensure safe – by – by doing that as –
- Q. So –
- A. -- okay –
- Q. Sorry. So as I understand it, you understood the need for a *Feeney* warrant but you just weren't going to wait for one, is that true?
- A. If that had been the conversation, there was urgency to put officers on the perimeter, so yes.
- . . .
- Q. Well I appreciate that, but you're the one who is making the call to disregard the need for judicial authorization, correct? You're the one making that call?
- A. I'm the one who's putting people on the property prior to having judicial authorization, that's correct.
- Q. Right. Which you know that you need, but you're just not going to wait for it, true?
- A. The situation was serious. That's correct.
- Q. And what efforts did you make to say, hey, is somebody working on this thing? We should have somebody working on a judicial authorization. What efforts did you make?
- A. I had a conversation with Constable James.

[29] Insp. Jones assumed that James also had staff working on a warrant although she was uncertain whether that was at the detachment or elsewhere. Sgt. James testified that the Inspector was fully aware that "we were working on a *Feeney* warrant". Insp. Jones conceded that perhaps no *Feeney* warrant issued. The Inspector testified that she was at no time notified of any problem "with a

judicial authorization". She was not concerned about her lack of information about the warrant process because she "was mostly concerned with Mr. N.M."

[30] TRU team member Const. B. Traves observed that the N.M. residence was located in a rural area where the homes were "a fair distance apart".

[31] Sgt. Penrose, a member of the TRU team, considered that a *Feeney* warrant was required to enter a dwelling to effect an arrest unless there were exigent circumstances. He was unaware of any exigent circumstances relating to the N.M. case. In his view, none existed to enter the residence to arrest Mr. N.M. without a warrant. Penrose assumed someone had obtained a *Feeney* warrant respecting Mr. N.M.' arrest as he understood reasonable grounds existed to arrest for assault. In the officer's view, where a suspect came out of his dwelling, no *Feeney* warrant was necessary.

[32] At the briefing held at about 8:00 p.m. on March 19th, Sgt. Penrose learned that Mr. N.M.' pick-up truck was in the driveway on his property which had pine trees all around. There was a bungalow set back about 150' from the roadway. Penrose understood that Mr. N.M. was suicidal, had access to weapons, and had made a statement to the effect that the police would never get him out of his residence. Sgt. Penrose agreed that it was not unusual for residents in the rural areas to have long guns and for police officers to have registered weapons in their residence.

[33] The officer considered that no judicial authority was necessary to go onto private property in the interests of "public safety" while the suspect was in the house. In his view, entry onto property was legally permissible, and necessary, while awaiting a *Feeney* warrant in order to contain an individual on his property – "Our entry onto the property was absolutely the safest way to effect this arrest". In the course of cross-examination about the probabilities of any flight or safety issues where no officer was on the N.M. property, Sgt. Penrose provided this evidence:

Q. I'm going to suggest to you [in] your para-military role, what you're trained to do, and what you do, you operate on a worst case scenario whether there's evidence or not?

A. I would say you're correct sir.

[34] A/Sgt. Manca would certainly have made a note had he been briefed that Mr. N.M. was suicidal and homicidal. He made no such note. The officer understood that a *Feeney* warrant was required to go on residential property to make an arrest. As he understood it, authority to enter onto private property existed in policies and "standard practices" – policies the TRU team followed in March of 2002. Such a warrant, in the officer's view, would not be required if, for example, the suspect "fired rounds off". He did not concern himself about the existence of a *Feeney* warrant – he was trained to follow orders. It was up to the TRU team commander at the command post to ensure "authority" existed for the

team to be on the property. Manca knew that reasonable grounds existed to arrest Mr. N.M.. In respect to the entry onto the N.M.' property, the A/Sgt. believed there must have been exigent circumstances because the TRU team was there. He had no idea what those circumstances were.

[35] Over the course of the evening, Det. Sgt. McCormick received additional information as she prepared an information to obtain a *Feeney* warrant. There was no real discussion of coordinating her efforts with officers on the N.M. property – it was expected she would alert the Command Post when the telewarrant was obtained. McCormick continued to operate on the belief that OPP negotiators were in contact with Mr. N.M. who was refusing to exit his residence. The officer understood Mr. N.M.' firearms to be safely stored. The officer understood her affidavit must be accurate, honest and detailed. Questioned about the inclusion in her application material of a statement attributed to the accused relating to shooting any police officer who might try to get him out of his house, Det. Sgt. McCormick recalled that information coming from Const. Tardiff who had spoken with the complainant. However, she had no sense of the context of the utterance or when it had been made – “he’d made that comment to her at some point”.

[36] The further information received from Tardiff by Det. Sgt. McCormick, that Mr. N.M. was suicidal and homicidal and had referred to the Kirec incident, she considered to be “all one piece of information”. In her testimony, the witness sourced this information and the fact that Mr. N.M. was “depressed” to the complainant’s statement received from Tardiff. In cross-examination, Det. Sgt. McCormick acknowledged that neither reference appears in the complainant’s statement. The officer could not say whether the information obtained by Tardiff came from the complainant or some other source. She never asked Const. Tardiff to specify exactly what Mr. N.M. had said in this regard or when it was said. Det. Sgt. McCormick agreed that, with the complainant and her children at a location out of the house, the situation was on the face of it nothing like the Kirec scenario. The officer understood there had been a breakdown of the N.M. marriage. In these circumstances, she agreed that the complainant might not be the most objective source of information.

TRU Team Actions **on the M... P...**

[37] A/Sgt. Manca of the TRU team understood when he received the call to duty on March 19th that it related to a barricaded subject which he understood to mean a party in a home who was “refusing to come out” following an incident of some type.

[38] At the detachment briefing around 8:00 p.m., it was confirmed that a domestic incident caused Mr. N.M. to be barricaded and he had refused to exit his home. Const. Traves too recalled that he was deployed as part of the TRU team respecting a barricaded individual which he understood to be someone who had taken up a defensive position in a building. Insp. Jones considered a barricaded

person to be someone “who refused to surrender”. The TRU team was tasked to arrest Mr. N.M..

[39] The TRU team is trained to enter a residence and to use lethal force if necessary. On March 19/20, 2002, the team arrived at the N.M. property with their faces camouflage-painted for safety, wearing heavy body armour, heavily armed with such items as MP5 machine guns or other military assault rifles, ARWEN (Anti-Riot Weapon ENfield) capable of firing munitions such as gas or rubber bullets, Browning high power 9 mm. sidearms, knives, pepper spray and expandable batons.

[40] Between 8:00 and 9:00 p.m., nine or ten officers of the TRU team were “on ground” at the N.M. residence having established an inner perimeter on the property.

[41] At 8:55 p.m., Insp. Jones gave authority to the TRU team to disable Mr. N.M.’ pick-up truck by flattening its tires. She expected that the task would be accomplished “by taking the valve stem off or with a knife”. The Inspector was asked whether she was of the view that it was unnecessary to “get judicial authorization before you start damaging a citizen’s property” to which she responded, “If we had time to do that, that would be great, but this was a situation that was serious and needed police response”.

[42] During the evening of March 19th, the police disabled Mr. N.M.’ residence phone in their effort to ensure that if the suspect called out he would only reach the crisis negotiators. A/Sgt. Manca described the action as, “the lines are cut”. Insp. Jones did not turn her mind to the issue of judicial authorization in taking this action. Because of technical issues, it took several hours for the technical hook-up with the command post to be established allowing a direct communication line with Mr. N.M.. At some point, prior to the hook-up, Mr. N.M. tried, unsuccessfully, because the line had been disconnected, to make an outgoing phonecall.

[43] According to Insp. Jones, prior to the containment of the N.M. residence, it was unknown whether the accused was at home. She expected that the TRU team officers “who established the inner perimeter would hopefully see some movement in the house”. The Inspector knew, from information provided to her, that the suspect had been “pretty well staying close to home”. As well, Mr. N.M.’ vehicle was the only vehicle on the property.

[44] Insp. Jones acknowledged that part of the function of the TRU team in going on the property was “to see if Mr. N.M. is in the house”. The TRU team had binoculars and night vision equipment and the snipers had 10-power rifle scopes.

[45] At 9:31 p.m., the TRU team reported to the command centre that lights were on at the rear of the residence.

[46] Mr. N.M. testified that during the evening of March 19th, 2002 he ate a meal, watched TV on the main floor, cleaned the kitchen and went to bed. There

were lights on in the kitchen and livingroom and the curtains were not drawn.

[47] According to Insp. Jones, by 11:00 p.m., only one male had been observed in the house. Neighbours had been evacuated.

[48] Sgt. Penrose considered the 360° inner perimeter allowed the TRU team, in the darkness of night, to make observations of the interior of the dwelling. The sergeant understood the reconnaissance unit on the N.M. property would be permitted to get “very close” to the house perhaps within armslength. The aim is to get “as close as possible”. A/Sgt. Manca referred to the TRU sniper “observer” teams on the property “providing intelligence”. In his view, TRU reconnaissance team members could go “up to” the home to “make observations within the home” and to gather intelligence including visual observation of the subject and “specifics” as to the layout of the home. Prior to Mr. N.M.’ exit from the residence, the sniper and reconnaissance members made observations “in” the home. Const. Traves understood that the sniper teams’ optical equipment allowed them to make observations “through the windows” of Mr. N.M.’ residence. Observations were made into the home to locate Mr. N.M. and to see if anyone else was in the house. Manca’s arrest group of three including himself, Penrose and Traves, was within 35 to 40 metres of the residence.

Information-Gathering at the Command Post

[49] At 10:15 p.m., Insp. Jones received information from the chief crisis negotiator, Sgt. Bilton, that she had spoken to “the force psychiatrist”, Dr. Peter Collins. This is a routine step during an integrated response incident “so that negotiation strategies can be developed”. Insp. Jones did not know what information Dr. Collins was provided. The inspector learned that Dr. Collins believed Mr. N.M. “was a high risk for suicide” with the prospect of “a suicide by cop” scenario where the suspect would initiate a sequence of events resulting in the police shooting Mr. N.M.. Given this information, the Inspector considered that “we needed to be very cautious and careful and sure of what we were doing”.

[50] During the course of the evening, Sgt. James spoke to Const. Tardiff by phone. She learned from him that Mr. N.M. “wasn’t suicidal” and had made “no suicidal comments”. When Const. Tardiff arrived at the command post she received the statement taken from the complainant. The sergeant updated the Inspector with all the information she had.

[51] In cross-examination, Sgt. James agreed that since the complainant left the residence on March 18th without notice, it made sense that Mr. N.M. did not speak of shooting a police officer at his door in the context of his wife leaving the day before. Sgt. James acknowledged that the statement attributed to Mr. N.M. may well have been “historical” – “I don’t know when he made it”. In the complainant’s statement, she described her husband as “quiet”. Sgt. James gave this evidence:

Q. Mr. Benoit's statement in evidence was consistent with that of Ms. S.M., that he was in a quiet state?

A. Yes.

[52] Over the course of the evening, Insp. Jones received further information including:

- (1) Rick Benoit described one of Mr. N.M.' prescribed medications as Ephedrine. The inspector was advised that the drug could make Mr. N.M. anxious, have fears, agitated or restless.
- (2) The "crime team" reported that Mr. N.M. was not a drinker.
- (3) Mr. Benoit indicated that the suspect had two shotguns and a rifle.
- (4) TPS Superintendent Gotteschalk told Sgt. Bilton that Mr. N.M., who had been on sick leave for four months, had been informed that he was to be charged with perjury "in his notes and for court testimony when he returns to work".

[53] Insp. Jones did not know the sources for the information Sgt. Quinton gave her, for example regarding statements made by Mr. N.M.. It was suggested in cross-examination of Insp. Jones that as the night went on things did not in fact appear as urgent as she first thought:

- (1) it was known that the complainant and the couple's three children were at a shelter in Orangeville, a location unknown to Mr. N.M.
- (2) there was no information to suggest the suspect, a police officer, was not alone in his residence
- (3) information was received that Mr. N.M. did not drink alcohol
- (4) the freshest information regarding Mr. N.M.' condition came from a "reliable source", a trained TPS ETF officer, Benoit, who had seen him earlier in the day and indicated the suspect was calm and remorseful, not suicidal or homicidal
- (5) there was no concern about Mr. N.M. taking his prescription drugs
- (6) the last alleged assault of the complainant was over 2 weeks earlier and therefore not "a heat of the moment type situation"

- (7) the suspect had registered firearms and there was no suggestion they were involved in the commission of any offence or were illegally stored
- (8) Mr. N.M. was known not to have any police scanners
- (9) there was no information that any member of the public or any police officer was in danger on the N.M.' property
- (10) the Inspector never asked the source(s) of statements attributed to the suspect about Kirec and harming police officers coming to his house
- (11) it was night, the dwelling lights went out, and it was assumed Mr. N.M. had gone to bed.

[54] Inspector Jones agreed that there was not the urgency of a 9-1-1 call. She was nevertheless concerned for the safety of Mr. N.M., the public and the police.

[55] Sgt. Bilton was of the view that Rick Benoit should be interviewed as a possible third party intermediary to negotiate a surrender. At 10:45 p.m., Det. Sgt. Sills telephoned the command post to indicate that from his discussion with Benoit it was learned that Mr. N.M. was calm at 3:30 p.m. when Benoit left the N.M. residence, and that Mr. N.M. owned three long guns, a .22 calibre rifle and two shotguns.

Mr. N.M.'s Surrender

[56] According to Mr. N.M., he finished watching TV at 11:00 p.m., took some Tylenol 3 in order to sleep, and went to bed.

[57] At 11:50 p.m., phone communication between the command post and the N.M. residence was finally achieved. At 12:18 a.m., Det. Sgt. Sills was interviewing Rick Benoit. At 12:22 a.m. on March 20th, all of the lights in the house were turned out. Insp. Jones "hoped that it meant...that Mr. N.M. was following the normal routine of going to bed".

[58] By 12:23 to 12:25 a.m., over four hours after receiving the warrant assignment, Det. Sgt. McCormick had prepared her 11-page information to obtain a *Feeney* warrant and was in contact with the telewarrant centre to obtain a warrant. The officer's affidavit addressed the subject of night-time entry. Det. Sgt. McCormick was not told that Const. Benoit left the N.M. residence at 3:30 p.m. She was not informed by Sgt. James that information had been received that Mr.

N.M. was not suicidal. Had the officer known that, she would have included the information in her affidavit so that the justice of the peace would not be misled. As well, the affidavit described the N.M. residence as contained and surrounded without disclosure of the warrantless entry onto the property. McCormick did not know the TRU team had made a warrantless entry onto the N.M.' property. The application requested, as a special condition of execution of the arrest warrant, in order not to expose any peace officer or other person "to imminent bodily harm or death", that:

The accused is a police officer with the Toronto Police Service and has stated in the past that he will not leave the house if police come for him; that he has access to three handguns and at least three long guns; he is depressed and his family has left him; for these reasons it is incumbent to arrest him without prior announcement to preserve his safety and the safety of the officers responding.

...

Wherefore the Informant prays that an authorization be granted to permit entry of the said dwelling house without prior announcement, subject to the condition that prior announcement will only be dispensed with if the requisite grounds exist immediately prior to entry of the dwelling house.

...The Informant proposes that the authorization to enter the dwelling house for the purpose of arresting or apprehending the accused shall be carried out in accordance with the following terms and conditions...

A command post has been set up and is operational at this moment. The residence has been contained by officers surrounding the area and the Tactics and Rescue Unit is in position to enter and arrest N.M.. The Crisis Negotiators are in position and are attempting a peaceful surrender. Therefore for the safety of all concerned it is incumbent to enter and arrest N.M. without announcement and as soon as possible. The incident may last over night therefore the entry and arrest may occur during the late evening of the 19th of March 2002 and early hours of the 20th of March 2002.

[59] Insp. Jones directed the crisis negotiator to call Mr. N.M. at 12:25 a.m. on March 20th, 2002. When she did so, she knew that a *Feeney* warrant was not in existence. Asked why steps were taken without judicial authorization to arrest, the inspector gave this evidence:

Q. So the question that – that comes up is why not wait for the judi – any judicial authorization before taking those – the steps that you did?

A. Okay. It's hard to jump ahead. The decision to – with all of the information received during the evening, I had some serious concerns about Mr. N.M.. I had concerns of – of any other people who may have been around the property. I had concerns for the police. The initiation of the telephone call from the crisis negotiators ended with Mr. N.M. quickly coming out of the house. The – it's important in this sort of an incident to establish communication with whoever is in the house. We found out that it was Mr. N.M. when he picked up the phone. The officers re – re – reported that they saw some movement and they heard a voice, but up until Mr. N.M. picked up the phone, that's how we confirmed that it was him.

[60] Sgt. James understood that the existence of an issued *Feeney* warrant was "disregarded", in the sense of "not being waited for", because Insp. Jones believed exigent circumstances existed. The sergeant testified that she and the Inspector had the same information. While she accepted that the Inspector was

the ultimate decision-maker, and had more relevant training and experience, she testified that:

I'm not going to say I wouldn't have waited for a *Feeney* warrant myself...

...

If it was me by myself, going to that residence, I would have got a *Feeney* warrant...

...

And, again, as I've said before, if it was by myself and I was going to Mr. N.M.' residence, I would have got a *Feeney* warrant.

[61] Once the TRU team members were alerted that the call was to be placed to Mr. N.M., the phonecall was made by a crisis negotiator who asked the accused to come outside to "talk" to the officers who were described as on the roadway. Mr. N.M. was instructed to leave his guns in the house.

[62] Mr. N.M. testified that he was in bed about to fall asleep when the police called him to come outside. On his evidence, this was shortly after 11:00 p.m. not after midnight. After, to his recall, telling the negotiator it was unnecessary and that the police could come in and have a coffee, he dressed and went outside as directed.

[63] Insp. Jones disagreed that Mr. N.M. was "ordered" out of the house but did not dispute that whatever was said to the suspect by the police negotiator would not leave Mr. N.M. thinking it was "optional". Indeed, in the phonecall, the negotiator stated "We're trying to do this as easy as we can". Mr. N.M. described his position in these words: "I was extremely concerned with what steps the police were about to take if I did not follow their orders and direction". In the inspector's understanding, following the call, Mr. N.M. emerged from his residence without delay – "very, very quickly".

[64] Prior to Mr. N.M.' exit from his house, the TRU team placed a spotlight on the driveway about one third of the way up from the roadway. When informed that Mr. N.M. was coming out, the light was turned on to illuminate the subject as he followed verbal commands of the TRU team to proceed down the driveway to the point where he was taken into custody at a point visible from the roadway.

[65] Mr. N.M. described himself as having two herniated discs in his back as well as a mending separated shoulder associated with workplace injury. In addition, on his evidence, he was suffering from untreated post traumatic stress disorder. In Mr. N.M.' words, although "I had no idea what this was about", he complied with instructions from the TRU team officers.

[66] Mr. N.M. describes himself as having respect for OPP officers but disdain for those who arrested him whom he characterizes as "clowns" and "yokels". According to the accused, his arrest was "comical" and "the entire thing was overkill". Although not detailed in the affidavit filed by the accused, he maintains that:

- (1) his arms were wrenched during the handcuffing exercise
- (2) as he was kneeling on the ground, an overweight officer came running at him from behind and “drill[ed] his knee” into the middle of his back knocking him to the ground
- (3) he was “reefed” up by the arms.

These actions, according to Mr. N.M., aggravated his pre-existing back and shoulder injuries. Mr. N.M. made no formal complaint of the treatment he alleges he received at the hands of the OPP.

[67] Although Mr. N.M. has maintained that 70 officers were on his property, he agreed in cross-examination that he derived that number from his interpretation of disclosure materials – he actually saw only five to seven officers.

[68] A/Sgt. Manca recalled that Mr. N.M. was cooperative and obeyed all instructions given by megaphone once he exited the house. One of the first things the suspect said was “Go easy, I have a back injury”. Sgt. Penrose and A/Sgt. Manca learned at a briefing earlier in the evening that Mr. N.M. had been off work with a back injury. Prior to being handcuffed, Mr. N.M. removed his jacket and dropped it to the driveway when directed. Subsequently, a small folding knife was discovered in a pocket of that jacket. Mr. N.M. testified that the knife is always in his jacket pocket – he had no concern about wearing that jacket outside as he knew he had “done nothing wrong”. A/Sgt. Manca and Const. Traves took hands-on control of Mr. N.M., cuffed him, and led him to a location off the driveway for a personal search. According to Sgt. Penrose, at no time was Mr. N.M. kned in the back and taken to the ground. Mr. N.M. made no complaint of any injuries to the sergeant or to anyone else.

[69] A/Sgt. Manca testified that there was no physical struggle – Mr. N.M. acted as directed. The officer could not recall whether the suspect was, as well, put prone on the ground although he felt it probable that that occurred. Sgt. Penrose recalled the suspect as always on his knees not prone on the ground and that the officers were “very delicate” with Mr. N.M.. Const. Traves considered that the arrest team dealt with Mr. N.M. “very lightly”.

Personal Search of the Arrestee

[70] According to Insp. Jones, the night of March 19/20, 2002 was “miserably cold” – “a very cold night”. Sgt. Penrose described conditions as below freezing. Insp. Jones and A/Sgt. Manca recalled snow on the ground.

[71] Insp. Jones gave no instructions relating to search of the arrestee. In her words, she expected members of the TRU team, “in accordance with our policy”,

would conduct a methodical pat-down search of Mr. N.M. looking for anything which was evidence or which could be used as a weapon or to escape. Asked if the “policy” allows further steps to be taken after the initial pat-down, the inspector stated: “[t]he degree of the search is really left up to the arresting officer”. Insp. Jones’ recall was that the OPP Orders did not “really go...into a definition of a strip search”. Insp. Jones would, however, be “surprised” if a strip search, involving “removal of all of an individual’s clothing”, occurred in this case.

[72] Neither the OPP Orders today nor those published in February of 2002, contain precise definitions of pat-down or strip searches. The Orders, s. 2.43.4: METHOD, referred to a “frisk/field search” of a lawfully arrested and handcuffed person as a “lawful, systematic, safe and efficient quadrant search of the entire individual” to be conducted in as much privacy as circumstances permit and by a member of the same sex. The February, 2002 Orders indicated that “a strip/complete search” could be undertaken “when a member has reasonable grounds to believe that a frisk/field search is insufficient to secure evidence, prevent escape or ensure the safety of the police, public or the accused”. Such a search “shall be conducted”:

- (1) with the prior approval of a supervising member
- (2) in private
- (3) by a member of the same sex as the person being searched
- (4) in the presence of another member of the same sex
- (5) with no additional employees present unless safety requirements dictate otherwise.

The Order additionally states that whenever possible the person to be searched should be encouraged to remove their own clothing (unless safety requirements or destruction of evidence issues dictate otherwise), and, “[i]n all instances” unnecessary bodily contact is to be avoided.

[73] N.M. testified that he knew an arrested person in the field can expect a pat down search with the shirt lifted and the waistband area checked for weapons. He described to the court what he characterized as a strip search in the freezing conditions with the wind howling and lights trained on him. He was required to raise his t-shirt above his breast and the searchers took his sweat pants and underwear down past his knees exposing his genitals and buttocks. Mr. N.M. testified that:

My person shouldn’t have been exposed to anybody.

...

Toronto Police has policies and procedures against strip searches. They are not to be conducted out in the field regardless.

...

...they took quite a ... bit of time searching me. I was freezing. It took quite a long time... I was frozen.

[74] This search was conducted near trees at the front of the property with at least five officers present to Mr. N.M.' recall. The search, in his view, was "disgusting". Mr. N.M. explained the assertion in his affidavit that he "believe[d]" one female officer may have been present as an assumption based on the gender of the crisis negotiator who had called him. Crown counsel questioned the accused on the location of the search:

Q. I'm also going to suggest to you, sir, that when you were searched in the area of your waist and your clothing was removed, that you were off to the side and away from the vision of anybody who might be on the roadway?

A. No.

While the accused agreed he was searched at a point off his driveway, he considered he was still fully exposed to anyone on the roadway.

[75] Mr. N.M. testified that as he was searched one of the ERT officers who subsequently transported him to the station dropped his sub-machine gun "in [his] face". This event was not detailed in Mr. N.M.' filed affidavit and the witnesses who transported the accused were not asked about the allegation. Sgt. Penrose denied that any such incident occurred.

[76] Const. Traves searched Mr. N.M.. He considered the search, "a standard search" in his words, to have been conducted "within our policy" to search the arrestee for weapons. The officer was questioned further on the subject:

Q. My understanding also is that his pants were temporarily removed down past his knees, there was a check for weapons in that regard?

A. I don't – he may have. I don't recall.

Q. Okay. When you say you don't recall, that is not something that's never happened before in other cases, for example?

A. No. It happens.

Q. Okay. With regard to this case, because my understanding of it is, is that occurred, so you're not disagreeing with me?

A. I'm not disagreeing. I – I can't tell you 100 percent that it did or didn't.

...

Q. And then there was a further search in the sense that is it possible, 'cause I take it you're not recalling this, that the waist band of his boxer shorts were just checked briefly by pulling?

A. I know when I do a search I check thoroughly the – that area. It's typically where an item can be concealed.

[77] Although the search of the arrestee took place out of the direct beam of the stationary spotlight, there continued to be ambient light from that source and from rifle-mounted lights shining on Mr. N.M. as Const. Traves conducted the search.

[78] Sgt. Penrose disagreed that Mr. N.M. had been subjected to “a strip search of sorts”. He was positioned about eight to ten feet behind Mr. N.M. as the personal search unfolded. The sergeant recalled that only a frisk or pat-down search was conducted. The officer was asked if any of Mr. N.M.’ clothing was “moved”:

I believe it would have...not removed from his person but moved to facilitate seeing the waistband for instance.

[79] Sgt. Penrose observed the suspect, when directed to do so, pull his shirt up but could not recall the extent the garment was raised. He did not see the suspect’s underwear pulled down and up quickly or his pants pulled to his knees. The sergeant stated that the suspect’s pants may have been “opened”.

[80] A/Sgt. Manca testified that Mr. N.M.’ pants and underwear were not taken off with his genitals exposed. The search was conducted near some trees, a location not exposed to the house – they “always assume the worst” and therefore don’t expose themselves to the home. The officer has never performed a strip search as a member of the TRU team. He considers a strip search to involve “removal of all clothing” and “verification” of all body orifices while the arrestee is “fully naked”. Manca recalled that Traves searched Mr. N.M. in the light of the weapon-mounted lights.

[81] A/Sgt. Manca agreed that the suspect’s shirt would have been lifted up exposing his skin to verify no weapon was concealed. Mr. N.M.’ shoes were removed and searched. Any area the arrestee’s hands could have access to would have been searched including flipping and looking into the pants in order to check for a weapon or “things as small as handcuff keys”.

[82] In cross-examination, the officer testified that he could not recall whether Mr. N.M.’ pants were pulled down past his knees – it would depend on what he was wearing. Had Const. Traves pulled the arrestee’s pants down in this fashion, it would “not be unusual in these type of circumstances”. A/Sgt. Manca testified that if Const. Traves said such a search was standard procedure he would not disagree – it depends on the circumstances and the searching officer’s exercise of discretion. If briefs are taken down and back up, it is done “very, very quick”. It is the officer’s understanding that the OPP only have a search policy regarding strip searches. A/Sgt. Manca, an OPP training coordinator for tactical officers, was questioned regarding the definition of a pat-down search:

Q. And so when you use the term pat-down search, you include either the temporary removal of clothing or the lifting of clothing as part of that process?

- A. Absolutely. How can you...be 100% sure just patting someone down, you need to remove a belt, you need to lift clothing, remove jackets...

When asked whether it was the practice to “move” clothing on an arrestee, the officer gave this evidence:

- A. That would be in every circumstance definitely just as a practice for myself if I were to search someone in the waist area the belt would be removed, the pants would be unbuckled, the zipper would be brought down, and the pants would be flipped or the waist area would be flipped to make sure there was nothing within that area and ensure there was nothing hidden within the crotch area or the lower back area or between the buttocks...
- Q. And why do you do that every time?
- A. For officer safety and safety of the person being arrested.

[83] The command post was aware that Mr. N.M. exited his house at 12:28 a.m. The transport officers, Consts. Does and Anderson, were directed at 12:36 to proceed to the N.M. property to pick up an arrested party. A/Sgt. Manca’s best recall is that the personal search of Mr. N.M. took two to five minutes. Sgt. Penrose recalled a four to five-minute search. According to Does and Anderson, at 12:41 a.m., TRU team officers walked Mr. N.M. down the driveway to their location.

[84] Sgt. Penrose testified that the TRU arrest team arrested Mr. N.M. for assault at about 12:30 a.m. although they did not tell him the reason for his arrest. To his recall, the arrest team walked the arrestee to the road and turned him over to the custody of ERT officers Anderson and Does. At this time, the TRU reconnaissance team remained on the N.M. property.

[85] Const. Traves recalled that when Mr. N.M. asked what it was all about he told him that investigators would fill him in.

[86] ERT Consts. Does and Anderson understood that for some time there had been on and off again negotiations with Mr. N.M. who was barricaded in the sense of unwilling to come out of his residence. The constables noted that at 12:42 a.m. they took Mr. N.M. into their custody from the TRU team arresting officers. The hand-over occurred on the roadway. The officers found the arrestee to be cooperative. The officers recalled that Mr. N.M. thanked them for the way they treated him. Does and Anderson testified that Mr. N.M. was “re-arrested” for assault before placement in their cruiser and read his right to counsel and cautions as the nine to ten-minute ride to the detachment began.

[87] At 12:54 a.m., Det. Sgt. McCormick contacted the telewarrant centre by phone to withdraw her application for a *Feeney* warrant.

The “Stealth Clear”

[88] Insp. Jones authorized the TRU team to execute a “stealth clear” of the residence”:

Q. What in particular did you authorize?

A. I authorized the TRU team officers to enter the house and to do a ... systematic slow, safe search of the premises, looking for any other suspects, anybody who needed the police help, or any sort of weapons that could cause injuries to our officers.

...

Q. Okay. What kind of weapons are you talking about?

A. Any firearms or explosives or ammunition that could harm our officers who would be executing the warrant.

Q. What warrant?

A. The judicial authorization that – I – let me check that. I'm not sure whether we were going through with a search warrant or a *Feeney* warrant, so I'm not sure.

[89] Insp. Jones was asked whether a stealth clear would always follow “removal of a suspect from a house”:

It occurs frequently when we have this sort of an incident, because we have con – if we have not been on the – established an inner perimeter, it's difficult to know whether or not the subject was alone in the house or not. The – this is not looking for any evidence, it's looking – it's strictly a clear that is done of the residence, looking for things that would either interfere with public safety or the officers. So it's frequently done, but it is something that they – we turn our mind to on each occurrence.

[90] Asked in-chief the reasons for initiating a stealth clear in this case, Insp. Jones provided these reasons:

(1) Mr. N.M. was reported “to have a lot of weapons”, handguns and long guns, so there existed “the fear of weapons” when “the officers...or others would enter the building”.

(2) The TRU team never “called out” a description that would allow the belief that only Mr. N.M. was in the residence – “so it could easily have been that there were other people there”.

[91] In cross-examination, the Inspector was further questioned as to the existence of grounds specific to the circumstances of this case:

Q. So you believe Mr. N.M. may be on the property, but certainly no-one else, you have no evidence of that, true?

A. That – well we have no evidence that there's anybody else in the property, that's true.

Q. All right. So I take it then you have no evidence that anybody else is in immediate risk?

A. Well the – this – we're saying that there's no evidence. There's – there's no possible way to confirm what you're suggesting –

Q. Right.

A. -- but we have no information that there's anybody else on the property, I agree with that.

Q. Okay. And so then I take it you have no information that anybody else is in any kind of immediate danger –

A. I would –

Q. -- true?

A. -- agree with that –

Q. Right.

A. -- yes.

...

Q. And again you didn't receive any information about anybody else being present?

A. That's correct.

...

Q. We have no evidence at all that there's anybody else on that piece of property?

A. We have no information, correct.

Q. No information. And there's no police officers there; we have no evidence that there's a police officer who is in any – any type of harm, do we?

A. No, we don't.

...

Q. And once Mr. N.M. is brought out of the house, you'll agree with me that there is no evidence that there is anybody left in that house at all, is there?

A. We have – we made no observations of anybody arriving to the house while we were there. We didn't have any independent information that anybody was in the house, that's correct.

Q. So when I say that there is no evidence that there is anyone in the house, the answer is yes, I take it?

A. There's no information –

Q. All right.

A. -- we have – we hadn't confirmed it, but I agree with you we don't have any information by seeing a second person or hearing a ser – second party, but we'd only been on this – Mr. N.M.'s house establishing perimeter for a couple of hours. We were not sure.

...

Q. And so there's no evidence of anybody else being in the house, true? If there is, let me know.

A. Yes, we have not seen anybody separate – any – any – two people; we don't have any information for anybody that – that they are in there. It didn't – it – it doesn't mean it's absolute impossibility.

...

- Q. -- the only evidence that you have is that -- that there are some guns in the house, correct?
- A. Correct.
- Q. But nothing illegal?
- A. Not that we're aware of, that's correct.
- Q. And there's certainly no evidence that there are any booby traps or anything that can hurt anyone in that house, is there?
- A. There is no evidence of that...but as far as any evidence of Mr. N.M. having set any of those devices, no.
- . . .
- Q. And then Mr. N.M. gets ordered out and so your belief at the time would be that there was no-one in that house once Mr. N.M. leaves, correct?
- A. Well we -- we did not know that -- if there was anybody else in the house. I know we just walked through that we had no evidence to the contrary, but it's not outside the realm of possibility that there was somebody else in the house.
- Q. Sure. But that's just, you'll agree with me, speculation?
- A. Well it was -- it's not outside the realm of possibility, but there was no evidence to support it.
- . . .
- A. ...the decision was made at -- when I gave approval at around 0034.
- Q. Right. And at 0034, that's when the decision was made, you had no evidence of anybody in that house. You had no evidence of anybody in immediate danger. You had no evidence that there was anything that was going to cause harm to anybody. You had no evidence of anybody being injured in the house, and if -- if you do, I'd like you to be specific and say, Mr. Brauti, this is the piece of evidence I had to support those beliefs; do you understand the question?
- A. I understand the question.
- Q. Do you have any evidence to support those beliefs?
- A. I had no evidence to support those beliefs.

[92] In re-examination, Insp. Jones was asked further about the stealth clear actions:

- Q. Mr. Brauti was asking you a number of questions about the evidence that you had of anyone being -- anyone else being in the -- the residence, and one of your answers was 'Our experience doesn't mean there's not a second subject'?
- A. Correct.
- Q. Can you tell us what exper -- what your experience is in that regard?
- A. That the -- there have been several incidents similar to this that I have been involved in where the information is that there is the subject, or the subject and their partner, and end up being more people than that, although there's no evidence outside the house that would have provided us with that information.
- Q. And can you indicate whether or not, when they are then located, whether they have posed any risk to officers or whether they have been harmed themselves, if you recall?

A. With these other individuals?

Q. Yes.

A. I'm just trying to take my mind back, to answer that question. The potential for risk is always there, but our officers have not been harmed. By doing a stealth clear it's a – a slow procedural way and it's a safe way.

Q. Okay. Have they found persons who have been harmed?

A. I'm sure they have. On my watch they haven't.

[93] Insp. McKinnon did not consider a stealth clear action to be automatic but one of a series of options available to an incident commander. The witness noted that third party consent to enter is another option. The totality of the circumstances must be assessed. Insp. Jones testified that the stealth clear procedure is described in the OPP standard operating procedures and manuals. Nowhere in the OPP standard operating procedure manuals, Police Orders or training material are there written instructions regarding:

- (1) a stealth clear as discretionary as opposed to routine or automatic
- (2) the need for reasonable suspicion grounded in articulable facts before executing warrantless entry
- (3) those circumstances which might dictate the necessity for a stealth clear.

[94] Sgt. Penrose saw only Mr. N.M. at the property and only his vehicle there. After handing custody of Mr. N.M. to ERT officers off property, the officer was given command post authorization to enter back onto the N.M. property to perform a stealth clear of the residence. Five TRU team members entered the N.M. dwelling. According to the sergeant, there are only "rare instances" when a stealth clear, which can only be authorized by the incident commander, is not undertaken. He could not say the circumstances which dictate, one way or the other, whether a stealth clear will occur. The officer's position is that "we always assume that there could be someone else involved" and therefore, as a matter of "standard operating procedure, "enter a dwelling to "ensure 100% that the scene or location is safe". The officer considers a risk assessment to have been done at the point when the TRU team is first called in. In his testimony, Sgt. Penrose agreed there was "no evidence" of any immediate danger including no evidence of anyone else in the house or any other threat.

[95] A/Sgt. Manca described the stealth clear as a methodical search of the rooms of a dwelling in the interests of safety of the public. Any place a person could be hidden or any other "hazards" were searched. Then, once the TRU team

leaves, the next people to enter “won’t be subject to harm”. According to A/Sgt Manca, although he had no information that there was anyone else in the N.M. residence or any booby traps, in his words, “we always assume the worst”.

[96] Const. S. O’Rourke held a similar view of the existing circumstances:

Q. ...there was no indication prior to your entry that there was any other person present, fair?

A. That’s fair, yes.

Q. And there was no indication that there was any threat to anybody else whatsoever?

A. No – no information on that, that’s correct.

...

Q. But there was nothing particular to this case that would suggest an immediate danger or threat?

A. Not – not anticipated or an expected one, no.

[97] TRU team officer Traves agreed that his team had no information that anyone other than Mr. N.M. was in the house or that anything illegal was occurring in the dwelling. Although the officer had no information of any threat existing in the residence after Mr. N.M. had been arrested outside his dwelling, the stealth clear is conducted:

Q. And in response to a question my friend asked you, you said that you had no information that anything in the house was a threat. And you responded, “We don’t know that, that’s why we moved into the second stage of the operation.” What do you mean by the second stage of the operation?

A. Once the first stage, we’ve gone in and have containment, we’ve made observations of the individual, he’s been contacted, and he’s been arrested and removed from the residence.

Q. Yes.

A. Then we move into the second stage would be the stealth clear of the residence.

[98] Although Insp. Jones characterized a stealth clear as not being “an evidence search” it was expected that the TRU team would “take note” of the location of any weapons and “pass that information on to investigators, that they saw a rifle or a shotgun” and perhaps follow-up with assisting investigators in unloading any weapons. The inspector was questioned further on the subject:

Q. Because the policy would be that they don’t speak to the criminal investigators... about any evidence, right?

A. ...as I’ve testified to, if they observed something –

Q. Yes.

A. -- then they would likely share that information with the detectives, that’s correct.

Q. Okay. So for example if these officers saw certain weapons inside, they would let other officers in the case know that there’s weapons there?

A. Yes.

Q. And that information may become part of the information for a warrant?

A. It might be, yes.

Q. All right. And as far as the policy and the way these things unfold, there is nothing wrong with that from the OPP perspective, true?

A. Correct.

Insp. Jones was unaware of whether the TRU team located any weapons in the N.M.' residence.

[99] Sgt. Penrose testified that during a stealth clear the TRU team notes any weaponry seen whether or not it constitutes a risk to anyone. This officer, who led the stealth clear of the N.M.' residence, does not look for small items and, for example, in searching a closet would not open a shoebox. If the sergeant had seen a hand-held cross-bow in plain view in a closet, he would have noted it. He saw no such item. If there were bankers boxes on a closet shelf it is unlikely they would be moved to look behind. Outfitted in his tactical gear, the officer is about 6'½" in height.

[100] In making a complete visual search of the master bedroom closet, together with Const. O'Rourke, Sgt. Penrose observed an unloaded shotgun leaning in one corner and a handgun with a magazine in it in a holster on one of the two closet shelves. He did not touch the firearms. To Penrose's recall, he relayed information about these weapons through the Tactical Operations Centre to the TRU team leader in the command post assuming the information would be passed to the incident commander and to others.

[101] A/Sgt. Manca considered it the responsibility of the officers conducting a stealth clear to identify "any type of items that could be used as evidence", including weapons, and to inform investigators where they were located.

[102] Sgt. Penrose and A/Sgt. Manca were unaware of any located weapons being removed from the N.M. residence by the TRU team.

[103] As to the duration of the stealth clear, Insp. Jones believed "it went very quickly". Sgt. Penrose believed that the search of the N.M. bungalow took about one and a quarter hours. A/Sgt. Manca recalled the search as lasting 30 to 45 minutes. Once the stealth clear concluded, the ERT team "secured" the scene.

[104] Insp. Jones' use of force report noted the grounds for use of force to be the alleged domestic assault not any threats toward police officers.

T... M... P... is Secured

[105] At 12:35 a.m., Sgt. James requested Sgt. Quinton have the scene at the N.M. property held until she could obtain a warrant. In her affidavit filed in this proceeding, Sgt. James states the warrant would be to seize “firearms not being stored safely”. In her testimony, the sergeant spoke of obtaining a “gun warrant” for the arrestee’s handguns and long guns. It was a “domestic investigation” and the police “would want to gather those firearms”. Sgt. James acknowledged that in domestic assault cases it is general practice to obtain firearms in the possession of the accused. She had never before used a s.117.04 warrant in such a situation. In her experience, the firearms are often seized by officers attending the incident, the firearms are turned over by the complainant, or the court orders them surrendered as a bail condition.

[106] At about 1:34 a.m., Sgt. James heard a communication at the command post indicating that the TRU team in the N.M. residence had located a shotgun and a handgun in a closet.

[107] Between 2:15 a.m. and 2:30 a.m., Sgt. James spoke to Const. O’Rourke. O’Rourke described his team’s discovery, in the southeast bedroom closet, of an unsecured shotgun as well as an unsecured handgun in a holster and shotgun shells on a shelf.

[108] It appears that in response to Sgt. James’ request, the OPP kept a cruiser with one or more officers in the N.M. driveway as a means of keeping a presence at the scene. When Const. Quinn attended the residence during the morning of March 20th, he found Consts. Lawson and Dudzinski in a cruiser in the driveway. Quinn found the front door of the N.M. residence not just unlocked but also open. There was a period of time on March 20th when no OPP officer was present at the property.

The Consent to Seize Four Firearms

execution of the consent

[109] Mr. N.M. was placed in an OPP Dufferin Detachment cell at about 1:00 a.m. on March 20th, 2002. He was not placed under a suicide watch. Const. Does tried to reach a friend of the accused, M. H. , at Mr. N.M.’ request. Det. Sgt. McCormick asked if the arrestee wished to contact duty counsel. Mr. N.M. expressed a desire to call a particular lawyer, H. Black. McCormick left a voice message at Mr. Black’s office and provided that information to Mr. N.M. at 1:13 a.m. When Mr. N.M. next asked to contact two TPS officers, Benoit and H., Det. Sgt. McCormick passed the request on to Insp. Jones. At 1:20 a.m., McCormick informed Mr. N.M. that the inspector had directed his outgoing calls be limited to counsel. At 1:45 a.m., at Mr. N.M.’ initiation, McCormick and he had a brief discussion in the cells area regarding the complainant. Det. Sgt. McCormick recalled that the arrestee made no complaint of soreness or injury.

[110] According to Mr. N.M., because of an absence of contemporaneous notes on his part, and the passage of time, he cannot recall all the details of his time at the OPP detachment on March 20th, 2002.

[111] Sgt. James testified that, at 4:40 a.m., Det. Sgt. Sills informed her that it might be necessary for an officer to go to the N.M.' residence to retrieve medication for Mr. N.M.. At that point, according to James, she raised the matter with Mr. N.M. who stated that he didn't want his medicine or for a police officer to go to his home. According to Mr. N.M.' testimony, he was in "extreme pain" from the circumstances of his arrest and as a result he did ask Sgt. James for his Tylenol 3. When Mr. N.M. again inquired about his counsel, Sgt. James told him that the message left for his lawyer in all probability would not be picked up until morning. At 4:46 a.m., according to the officer's notes, the accused summoned her back to the cells to indicate that he recalled Mr. Black might be away on vacation. Mr. N.M. wanted his police association representative called. That was done by leaving a message and Mr. N.M. was informed. At 5:13 a.m., in response to an inquiry from Mr. N.M., he was told that bail court in Orangeville was scheduled for 1:00 p.m.

[112] Const. Quinn photographed and fingerprinted Mr. N.M. finding him very cooperative. At 8:10 a.m., an incoming phonecall from defence counsel was transferred to Mr. N.M.. At 8:25 a.m., Joanne Mulcahy, a lawyer from Mr. Black's office, spoke to Sgt. James about bail conditions for the accused's release. Sgt. James directed Ms. Mulcahy to contact Crown counsel. The call was then transferred to Mr. N.M..

[113] According to Const. Quinn, at 9:03 a.m., Mr. N.M. requested the officer attend his residence to obtain his medication. The constable did not observe the arrestee to be in any pain. The constable had the accused sign his memo book below the following text:

Request is to enter res & go to kitchen cabinet on left side beside fridge, top shelf, & grab small cardboard package approx. 1½" x 3". Medication is called "Losec" & smaller pill bottle on same shelf called "Vioxx" & larger bottle "Tylenol 3".

The constable received the authority of a supervisor to obtain the accused's medication.

[114] At 9:15 a.m., Mr. N.M. requested a call to counsel's office and Ms. Mulcahy was contacted. During this call, Ms. Mulcahy indicated to Sgt. James that her client "was willing to consent to a search for his handguns". The call ended at 9:25 a.m. Mr. N.M. was not surprised that, in the context of a domestic violence allegation, the OPP would be interested in curtailing his access to firearms. He considered he was being cooperative knowing the OPP needed his firearms.

[115] According to Sgt. James, she then spoke to Mr. N.M. in the cells area and not on videotape in an interview room. The officer did not have notes of her full discussion with the accused. While Sgt. James has no recall of Mr. N.M. being

adamant that some papers in his house not be touched, she conceded that she may have had such a discussion earlier with Ms. Mulcahy. The sergeant discussed with Mr. N.M. the location of the shotgun and three registered handguns. Mr. N.M. maintains that this pre-consent session was videotaped. To his recall, he discussed such matters as papers he wanted from a lock-box or safe for a future trial and the location of his long guns. Mr. N.M. testified that he was told a search warrant was being prepared. Mr. N.M. drew sketches of the exact location of the four firearms completing them at about 9:40 a.m. Sgt. James recalls the accused describing the shotgun and a handgun in the master bedroom closet, a handgun in a locked box in the same room, and the third handgun, in her words, “[a]t the bottom of the stairs there is French doors and above those French doors are joists of the ceiling and that’s where he’s showing that a firearm would be”. The sergeant recalled no discussion of long guns beyond the shotgun.

[116] In his 2005 affidavit, Mr. N.M. states that while on route to the OPP detachment he heard information that the police were in his home searching although he had not been shown a search or *Feeney* warrant and he had not been asked for permission to enter. In this proceeding, Mr. N.M. could not recall securing this information while in the cruiser – he could not remember whether it was from the “two officers talking or if [he] heard it in the station”.

[117] Mr. N.M. testified that he knew the police had seen the shotgun in the bedroom closet “that night”. In his affidavit, the accused deposed to being told by an unidentified male officer that the police had already “legally” searched his residence and seen the weapons and that the consent was simply to seize them. Mr. N.M. further deposed that he would not have signed a consent had he known the earlier entry to his home was without a warrant to arrest or search – “I certainly did not think that the consent was for an initial attempt at a lawful search of any part of my residence”. In this proceeding, Mr. N.M. maintained that he overheard a discussion in the detachment which led him to believe some of the firearms from the bedroom closet were in the detachment.

[118] Mr. N.M. testified here that prior to signing the consent he understood that the police had already entered his residence:

Q. Prior to signing the consent, what was your understanding regarding the police, whether or not they had been in your home?

A. I heard that they had been and I knew that they had been in from hearing what I heard.

...

Q. And what was discussed?

A. Locations of the guns, whether they were loaded or not. I asked her if they had conducted a search warrant the night before, whether they – whether they were preparing a warrant.

...

Q. What about the circumstances in this case with regard to the ERT [TRU] team coming in without a warrant or a *Feeney* warrant ordering you out of the house, is that something that you are agreeing to?

A. No, of course not.

...

Q. And finally, sir, when you signed the consent, what was your belief at the time as far as whether the police had come with a *Feeney* warrant or not, at the time you are signing the consent?

A. At the time I was signing the consent? I assumed that they had one.

Q. Okay. I'm sorry, go ahead.

A. I also assumed that they had a search warrant. I mean that's why I asked her why the guns weren't there.

[119] During Mr. N.M.'s March 26th, 2002 bail hearing, Ms. Mulcahy stated:

I can clarify this, what it was that he was never asked whether he consented. He learned that there will be a search warrant executed and he voluntarily told the police I will consent to turning over these firearms, that he understood from them that there were three firearms that they were interested in and he filled out the consent form for those. He advised them he had other weapons, but because he had personal property, personal papers in there, he indicated to the police that he wanted to go with them. They could seize it, but he wanted to insure that nobody touched his personal papers. This was also indicated on the record on Wednesday when it was adjourned to determine if there will be any further charges, so we would know where we are at. But this is it, that he was consenting to the police having anything and everything they wanted, but he was concerned about his personal papers.

In this proceeding, Mr. N.M. testified that at his bail hearing he was in pain and in "withdrawal from the pain medication". He is not sure he heard what Ms. Mulcahy said. His intention was turn over to the OPP only the things described in the consent.

[120] By 9:00 a.m., Mr. N.M. had been at the OPP detachment for eight to nine hours. Det. Sgt. McCormick described the police facility as "really small" and Sgt. James testified that it "wouldn't surprise" her if Mr. N.M. "could hear people talking about the investigation" during his period of custody.

[121] Sgt. James considered that Mr. N.M. understood, prior to giving any formal consent, that the police were preparing a warrant to search his home for weapons. He had asked to speak to his counsel about that subject. Sgt. James acknowledged that she may have told the accused's counsel which firearms they were preparing a warrant to seize. The officer gave this evidence:

Q. Had you at any time discussed the – those firearms with counsel named Joanne?

A. I'm unsure how – I – I'm not going to say I did not. I – I – I don't know how Mr. N.M. was aware that we were going to be doing a warrant in regards to the guns and I don't have any recollection of that. I – I'm not saying that I didn't tell Mr. N.M. or I didn't tell counsel. I very well could have. It could have been that Mr. N.M. overheard us in the – in the office, because it's such a small office. But I – I don't know how he obtained that information, not that it was incorrect, but...

Q. About getting the warrant?

A. About getting a warrant.

...

Q. You have already told him that these items are going to be seized for a criminal investigation?

A. I assume I would have told him that or his counsel.

[122] Further, Sgt. James believed that Mr. N.M., before giving a consent to seize firearms, understood that the police were aware of the shotgun and handgun in the bedroom closet as a result of an entry to his dwelling after his arrest:

Q. And so by the time he has said to you in the cells that, look, I'm – I'm consenting to this, it's his belief, as far as you're concerned, that the items have already been seized?

A. Like I said, I don't know what his belief was in the cells. It certainly was when we spoke on video and – and did the consent, that he felt we already had the shotgun and the handgun that was seen by the TRU Team, but he was obviously aware that we knew of that also.

...

Q. And just deducing from that, that people had obviously been in the house to make the seizure, fair?

A. Yes.

...

Q. He certainly hadn't indicated to you earlier that he was consenting to any type of general search of the residence?

A. My understanding from him and his counsel was, he was agreeing to the consent search of his handguns that were registered to him and the shotgun that we were in – that was in the closet and seen by TRU. That was my understanding.

...

Q. Now, there is no question in your mind in having dealt with Mr. N.M., that he certainly has become aware somehow that officers have been in the house and have seen these specific items and know their locations?

A. Yes.

[123] Sgt. James prepared what she described as a *Wills* consent for the shotgun and three registered handguns typing in information provided by Mr. N.M.. She was somewhat surprised that a consent was forthcoming as she considered that Mr. N.M., as a police officer, would be familiar with the necessity for the police to go through a number of steps to secure a warrant to search.

[124] Sgt. James told Mr. N.M., off-camera, that the consent procedure would be videotaped. Mr. N.M. agrees that he had legal advice prior to giving consent. The officer led the accused to an interview room at 10:15 a.m. where the consent document (Exhibit #9A) was explained and added to in terms of a more precise description of the location of the firearms. The form, signed by James and the accused, and initialled by Mr. N.M. where required, reads as follows:

CONSENT TO SEARCH

In order to assist in the investigation of **Unsafe Storage of a Firearm**, being conducted by the Ontario Provincial Police, Criminal Investigation Branch, I, **N.M.** do hereby give permission to the Ontario Provincial Police to enter and search my residence located at # **714345 1st Line EHS, Town of Mono, Ontario**, which is owned and/or controlled by me, and to seize the following items;

Beretta handgun located in the joists of the basement *By the French doors*
Smith and Weston 357 handgun located in a lock box beside the bed in the Master bedroom – *S/E side of the residence*
Beretta handgun located in the bedroom closet located in the S/E side of the residence
Shot gun located in the bedroom closet located in the S/E side of the residence

which is (are) believed on reasonable grounds to be relevant to the said investigation.

I, N.M., hereby acknowledge that;

I expressly give my consent to the herein search; _____ (initials)

I have the authority to give the consent to the herein search; _____ (initials)

I have given my consent freely, voluntarily and without any influence whatsoever by any person in authority; _____ (initials)

I am aware of the nature and extent of the search to which I am consenting; _____ (initials)

I understand my right to refuse to consent to the police search herein; _____ (initials)

I understand that I may withdraw my consent at any time before or during the said search; _____ (initials)

I am aware that any item(s) seized as a result of this consent search may be used in evidence against me or any other person charged by the police for a criminal offence; _____ (initials)

Dated: Wednesday the 20th day of March **2002, in the Town of Shelburne, Ontario.**
10:24 AM.

Signature: [signature]

Witness: [signature]
[italics denote handwriting]

[125] During the videotaped session lasting about ten minutes, to Sgt. James' observation, Mr. N.M. appeared to be experiencing some back pain. In the video, Mr. N.M. is seen rubbing his back and walking somewhat gingerly. The accused described himself as "limp[ing]" out of the interview room. During the session, Mr. N.M. appeared to be of the view that two of the firearms had already been seized. It appears that he believed those in the bedroom closet had been removed from his residence. James saw no firearms at the detachment and her information and that of others was to the contrary. At the point where Sgt. James read from the form that consent was being provided voluntarily and without influence from anyone in authority, Mr. N.M. stated while laughing:

N.M.: We won't talk about the torture.

James: Hmm?

N.M.: I'm joking.

[126] In cross-examination, Sgt. James agreed that prior to having Mr. N.M. sign the consent form she did not inform the accused that:

- (1) there had been no *Feeney* warrant issued for his arrest
- (2) the OPP TRU team entered and searched his residence without any judicial authorization
- (3) no judicial authorization to search his dwelling existed at the point of giving consent
- (4) if further items were located during the consent seizure of the four firearms they too were subject to being seized and used for criminal charges
- (5) she had an interest in seizing his other long guns by a search warrant.

[127] On the latter point, Sgt. James testified that:

A. As for the long guns, I have no real reason why we wouldn't have asked for those seizures, too. I – I don't have that information, except for that I would have thought they were in the gun – I don't know. I have no idea why I didn't ask for that.

...

Q. But you didn't mention that you would also be interested in investigating the long guns, as well?

A. No, I – I don't think we mentioned that at all.

Q. But that was the state of affairs, was it not, that you were interested in all of the weaponry?

A. It certainly would have been, in – as regards to a domestic situation. As for a criminal investigation, no. As in a safety issue, yes.

...

Q. In those situations, did that cause you a concern for firearms generally?

A. Like most domestics that we investigate, if there's firearms. And it's easier now, because long guns are supposed to be registered anyway. So – but any kind of concern in regards to a domestic situation, we – we worry about firearms and that's – that's our normal course of our investigation.

[128] At the conclusion of the execution of the consent at 10:24 a.m., Sgt. James said to Mr. N.M., "I guess they'll be right back with that medication".

consent seizure at the residence

[129] Sgt. James received a phonecall from the complainant who wanted to enter her residence to retrieve some personal belongings such as clothes. The officer, accompanied by Const. Dudzinski, arranged to meet the complainant at the N.M. residence.

[130] Sgt. James was at the N.M. residence from 11:20 a.m. until 12:02 p.m. on March 20th, 2002. After first speaking with the complainant, the sergeant and her partner proceeded to the master bedroom to the closet. There the officer observed the shotgun and handgun described in the information she had received from the TRU team. The shotgun, unloaded but not secured, propped up on its butt in the left corner of the closet, was seized. Shotgun shells were seized from the lowest of two shelves in the closet – a shelf the sergeant recalls as about 5'1" or 5'2" from the floor. In her shoes, she is about 5'4½". In her affidavit, Sgt. James states that she located two boxes of shotgun ammunition, three .40 calibre rounds, two loaded .40 calibre magazines and a box of .32 calibre automatic ammunition "[i]n the same closet".

[131] Also from the lower shelf, a loaded, unsecured Beretta handgun in a holster was seized.

[132] In her filed affidavit, Sgt. James swore that: "I also saw a small hand[-]held cross[-]bow on the top shelf of this same closet in the master bedroom". This was contrary to the officer's evidence in these proceedings that she could not see the contents of the top shelf. Sgt. James testified that Const. Dudzinski, who is 6'5" in height, reached onto the top shelf of the closet and pulled out a "small" cross-bow capable of being held and fired with one hand, saying, "Look at this". Sgt. James thought the item was a prohibited weapon. On her evidence, she directed the constable to put the cross-bow back because, in her words, "we had no consent for that". At the time, Sgt. James thought she would require a [s.117.04](#) or [s.487 Criminal Code](#) warrant to seize the cross-bow. James could not say if any bankers boxes were on the top shelf. The Crown admitted in this proceeding that there was a bankers box on the top shelf of the closet. Const. Dudzinski has no recall at all as to whether he took a cross-bow off the closet shelf. Mr. N.M. testified that the cross-bow was out of sight on the top shelf of the closet behind one or two bankers boxes in order to keep the item away from his son. A videotape made the following day during the execution of a [s.117.04](#) warrant to search shows a bankers box on the top shelf but no video or photograph was produced here showing the location of the cross-bow in the closet.

[133] Using the combination provided by Mr. N.M., a locked box, cabled to the bed in the master bedroom, was opened. In the receptacle, Sgt. James located a loaded .357 Smith and Wesson handgun and two speed loaders. Asked why she seized the additional items, the officer answered:

I can't specifically recall what my thought process was, just that it's...it would be part of the firearm. It's the ammunition for the firearm, I guess. I – I took the ammunition with it, the same as the ammunition that was in the closet.

[134] At 11:45 a.m., the two officers went to the basement and, with Const. Dudzinski standing on something and reaching into the rafters, an unloaded and unsecured .25 calibre Beretta handgun was seized along with two empty clips. As to the precise location of this seizure, Sgt. James gave this evidence:

A. We went to the basement and when – the stairs to the basement, my recollection is in the kitchen area. You go down the stairs and you enter into a room that is finished, a rec room area and right at the bottom of the stairs there's a set of French doors that goes into – to the right. It goes into an unfinished area of the basement.

...

Q. Can you tell from that diagram whether the – the doors he's referred – that are drawn there are to the right or to the left of the stairs as you come down?

A. No, it's – at the bottom of the stairs is – I don't know if – it's not three dimensional to indicate left or right of the stairs. I can advise it was my understanding that you went through to the unfinished part, because that's where the joists could be seen, not in the finished area of the basement, and that's what we did and that's – and we located the firearm that he had given us the map to, so....

...

Q. Are you able to assist us in reference to this diagram, where you actually went then to – when you went into the basement?

A. Yes. There's – you can see some line – lines going up and down the page, short lines and that's the stair steps. We went down those stairs and we went through the French doors into that hall area, what's described as a hall area. It's an unfinished area in the basement.

Q. Okay.

A. And there was – right at the French doors you could see the joists of – of the basement, on the ceiling and – and right to the right in that diagram of the French doors is where we located a Beretta handgun...

Q. Okay.

A. ...in – in the joists.

[135] Mr. N.M. considered the consent to be authority to seize specific items in the specific locations within his residence which he had described and not authority for a general search of his home.

[136] In his in-chief questioning by Mr. Brauti, Const. Dudzinski testified that he understood that while the consent permitted a search of the entire residence for weapons, he was limited to walking through the house quickly to observe any weapons lying around. The constable recalled that he and Sgt. James, though in the same room, searched independently. With leading questions in cross-examination by Crown counsel, Const. Dudzinski stated that he may have confused his searching conduct of March 21st pursuant to a public safety warrant in describing the events of March 20th.

[137] Sgt. James was examined as to the extent of her search activities in the house. Some of her responses reflected restraint:

Q. And in your mind, did that consent search allow you to – to look anywhere else in the residence, other than those areas specified in the form?

A. He – no, I – I would say not. I – I didn't go anywhere else in the residence and he was pretty specific in the locations of where his firearms were and what he wanted me to obtain.

...

Q. Did you search in any other rooms of the residence?

A. No, we did not.

...

Q. And if I was to tell you or suggest to you that what had been previously said to you was that the consent was very specific, to go to very specific locations for the sole purpose of seizing very specific items, would you agree with that?

A. Yes.

Other responses indicated that Sgt. James recalled telling Det. Const. Manser that “we had done a consent search” and that she probably told the complainant, “I’m going to the home to search it”. As well, in her testimony, the officer stated, “I conducted a consent search and I left the property”.

[138] In her affidavit, Sgt. James stated that, “When in the basement I noted a gun locker against the weight room wall”. Det. Const. Manser’s affidavit, sworn in support of the issuance of a s.117.04 public safety warrant, states that in Sgt. James’ consent attendance at the N.M. residence, “[t]he locked gun vault was located in the basement of the house” and, “The gun vault was locked”. That gun locker is in the exercise room on the opposite side of the hall and not apparently visible to the immediate area of the French doors and the location of the handgun seizure.

The Public Safety Warrant

background

[139] Sgt. James testified that McCormick forwarded to her electronically the start-up of a *Criminal Code* warrant regarding firearms in Mr. N.M.’ residence. Then, by 5:00 a.m. on March 20th, 2002, Sgt. James took over working on “a [s.] 487 warrant in regards to the guns observed by the TRU members”. She also spoke to Det. Sgt. Sills about a s. 117.04 search warrant, in her words, “because we...were kind of up in the air on what we were going to do”.

[140] After the consent search at the accused’s home, and attendance at court on March 20th, at about 4:00 p.m. at the OPP Dufferin detachment, Sgt. James passed the warrant assignment onto Det. Const. J. Manser. Sgt. James recalls providing to Manser the complainant’s and Benoit’s statements, probably a copy of her notes, and the information she had learned from the TRU team. She further told Manser that the consent search was done and that in that search a hand-held cross-bow, a prohibited weapon, had been discovered. According to James, she “directed” Manser “to get the guns” – “I don’t know if I gave her any specific

direction on what warrant to fill out or anything". Sgt. James passed on the database draft of the information to obtain (ITO) a warrant which she had been preparing.

[141] Det. Const. Manser began her preparation of the public safety warrant at about 6:25 p.m. on March 20th. She had not before drafted such an application. During the evening, she had assistance from representatives of the Provincial Weapons Enforcement Unit (PWEU) who came to the detachment. She received information and material from James, Sills and the PWEU officials as primary sources for her drafting. Manser believed it important, in the context of the ongoing domestic violence investigation, that firearms be removed from the N.M. residence for the safety of the complainant and her children. The detective constable gave this evidence at the preliminary inquiry:

Q. Are you telling me that your understanding of a 117 warrant is that you go in there to seize items because somewhere down the line at some unknown time, unknown place, a member of the public may be in danger in the future? Is that your understanding of the warrant?

A. That's correct.

[142] The affidavit in support of the public safety warrant is 95 paragraphs in length. Included in Det. Const. Manser's grounds for believing it was in the interests of public safety to execute a s. 117.04 warrant at Mr. N.M.' residence was the following information reported from the complainant to Const. Tardiff to Sgt. James to Det. Const. Manser:

28) S.M. stated to P.C. Gord TARDIF, that the physical abuse has been going on for over 15 years. The abuse started prior to their marriage. S.M. advised that her husband, N.M. is a member of the Toronto Police Service since 1988 but is presently on injury leave due to an injury sustained on the job. S.M. stated that N.M. made comments to her that "I am a copy. I know what to do. They will never get me out of the house".

29) S.M. stated further that N.M. has made suicidal and homicidal comments in the recent past. He has made comments about the KIREC homicides in which the father murdered his four children, then his wife and subsequently committed suicide. These homicides occurred in the County of Dufferin. S.M. stated that N.M. has three (3) handguns locked in a safe in the basement, and that he spends all his time in the basement watching television.

...

53) Over the last two weeks N.M. has become more and more withdrawn and seems like a time bomb; N.N. is "holed up" in the basement.

As to the consent search of March 20th, the constable learned from Sgt. James:

34) The locked gun vault was located in the basement of the residence, but was not searched. A crossbow was found in a bedroom closet, but was not removed during the consent search as no consent had been granted by M. for the cross-bow.

From Benoit's statement, Manser included this information:

- 57) N.M. is in possession of several shotguns, a .22 calibre rifle and other long guns unknown; the rifles are securely stored in the residence.

[143] Det. Const. Manser acknowledged in cross-examination that the duties of an affiant in a search warrant information were to be fair, frank, accurate, honest, full and detailed. This includes disclosure of any relevant police misconduct of which she is aware. The constable agreed in cross-examination that it would be important in an affidavit or ITO to point out for the issuing justice previous warrantless entries and searches on the N.M. property as well as the process used to arrest the suspect. Det. Const. Manser knew, and did not disclose, that the TRU team had made a warrantless entry onto the N.M. property, that the TRU officers made observations of Mr. N.M. "within his house" from on the property, that the tires of the suspect's vehicle were slashed by the TRU team, that Mr. N.M. was arrested without a *Feeney* warrant, and that the TRU team made a warrantless entry into the residence making observations of firearms. As well, the officer did not include in her affidavit that a *Feeney* warrant "was being sought" during these OPP actions or what exigent circumstances were perceived to exist:

- Q. ...but none of that was information that you provided to the justice?
- A. That's correct.
- Q. Notwithstanding the fact that you knew that warrantless entries onto the property should be disclosed, fair?
- A. Fair, yes.

[144] Further questioned on the matter, the constable stated:

- Q. You also answered with respect to the same menu of items that that was not disclosed in the affidavit for your 117 warrant, that the entry on to private property was without warrant; the observations of N.M. on this property was without warrant; that there was no *Feeney* warrant in existence at the time and that the TRU Team's entry after the arrest was without warrant.
- A. That's correct. It's missing the words "without warrant".
- Q. Yes. I think the question you haven't been asked, unless I've missed it, is why you didn't include that in your affidavit.
- A. It was not included. I – I knew that someone had started a *Feeney* warrant that was not completed and I just did not include it in the warrant. There – I don't believe there's a real reason why I didn't include it in the warrant, sir But I did have that information, yes, sir.
- Q. Looking back, in retrospect, you think it should have been included?
- A. In retrospect, I guess where we are now, there may have been spots where I should have fine-tuned my affidavit. Yes, that's correct, but not to mislead the Justice who was reading the paper over did I not include it.

execution of the s.117.04 warrant

[145] The public safety warrant was executed on March 21st, 2002. A number of weapons were seized in the N.M. residence including the following which are relevant to the prosecution's proof of various counts in the indictment – an unregistered Glock handgun in a heating register in the master bedroom (count #'s 8, 12), a #25 Remington Model 12 gauge shotgun (count #11), and various prohibited weapon knives (count #13).

The s. 487 Code Warrant

the Special Task Force investigation

[146] The TPS Chief of Police, following allegations from the defence bar of police corruption within the ranks of the Central Field Command Team No. 1 drug squad, turned investigation of the matter over to the R.C.M.P. R.C.M.P. Chief Superintendent Neily assembled a joint forces task force, the Professional Standards Special Task Force (STF), composed of R.C.M.P. investigators and members of the TPS Professional Standards Unit (internal affairs). The alleged corruption involved theft, perjury, assaults, obstruction of justice, and extortion. N.M., for a period of time a member of the drug squad, was one of the officers subject to the STF investigation.

[147] The STF began operations in May of 2001. The STF was divided into five sub-units each identified by a colour designation with four teams of four officers and the blue team having six or seven members.

[148] In March of 2002, according to Det. Sgt. A. Scott of the STF red team, Mr. N.M. was "a person of interest" regarding three or four of the ongoing STF investigations.

[149] TPS officer memo books are the property of the police force and must be handed in at the end of a tour of duty unless permission is otherwise granted, i.e. to have the notes available for court. The STF was aware that several of Mr. N.M.' memo books had not been turned in as required. The STF was interested in the missing books as relevant to its investigation. In February of 2002, STF member Det. Hoover attended Mr. N.M.' residence to serve a letter requiring that all of his outstanding memo books be turned in for the period 1995 to 2000. The STF understood that Mr. N.M. was taking the position that his memo books were already seized by Internal Affairs or at TPS 14 Division. According to STF witnesses, that had been checked and proved not to be so.

[150] In March of 2002, TPS Det. J. Lowry had not yet been assigned a STF team colour designation. He was performing a central function of net worth determination respecting TPS subject officers. Det. Lowry had considerable experience in the preparation of search warrants. Det. Lowry testified that, prior to March 20th, STF investigators had no information about police property or notebooks within Mr. N.M.' residence.

[151] On March 20th, 2002 at about 10:00 a.m., Det. Lowry was present with other STF officers when Det. Sgt. Pipe announced that N.M., one of the objects of the STF investigation, had been arrested the night before for assault. Pipe's information incorrectly stated that N.M. had been drinking heavily and that he was involved in a domestic assault the evening before.

the STF approach to Det. Const. Manser

[152] While at the OPP Dufferin detachment during the evening of March 20th, 2002 drafting her affidavit in support of the issuance of the public safety warrant, Det. Const. Manser became aware that a number of STF officers had arrived at the detachment unannounced and uninvited. Amongst that group, as she originally recalled it, were three officers she had never met – RCMP Staff Sgt. G. Carlson, TPS Det. Sgt. B. Evans, and TPS Det. Sgt. M. Earle. She would later learn that Earle did not attend that evening and it was subsequent in the investigation that she first met Earle. Carlson and Evans were members of the STF blue team.

[153] Det. Const. Manser considered the attendance of these officers to be “a very unusual set of circumstances”. While she did not learn the details of the STF investigation, she understood generally from the visiting officers that their joint forces project related to internal investigations and allegations of N.M. falsifying notes or acting inappropriately in the line of duty. She considered that investigation to have nothing to do with her s. 117.04 warrant application.

[154] According to Det. Const. Manser, the STF officers stayed in the main detachment office for “an extended period of time”. The officer testified that later in the evening Det. Sgt. Evans and a second officer she cannot now identify, but whom she then believed to be Earle, came to speak to her in the detachment crime office where she was working on her own. Evans did most of the talking. He wanted her to agree that he, along with at least one other STF officer, could accompany Manser and the OPP search team into the N.M. home as they executed the public safety warrant without it being revealed that they were part of the process. Det. Const. Manser, believing that suggestion to be inappropriate, refused to agree. She thought she might need to contact her supervisor. According to the officer, although there were no raised voices, Evans would not take “no” for an answer. He continued to press coming back with other “let's do this”-options “again and again” in a bullying manner. A further option was the suggestion that if Manser located any TPS property the STF were interested in during her search of N.M.' home, she should remove it from the house, take it to the perimeter of the property and show it to the STF officers, and then replace the material in the residence. Manser recalls that she had to stand her ground and say “no several times” - “I didn't understand why I need to say ‘no’ more than once”.

[155] Det. Const. Manser considered that these approaches and pressure by officers of senior rank were entirely inappropriate. The STF investigation was not connected to her case. In her view, the STF officers “had crossed the line” and had committed an “unlawful act” offensive to *Charter* obligations through their behaviour. It was “serious misconduct” and the STF officers “needed to be stopped”.

[156] Det. Const. Manser left the detachment at 12:30 a.m. on March 21st. The next morning, between 6:00 and 7:38 a.m., Manser reported the events of the night before to her immediate supervisor, Det. Sgt. Sills. Sills agreed that the STF officers had acted inappropriately. Det. Const. Manser made no notes or other reports of the circumstances of the STF intervention. She understood Sills “would start to reach out and deal with this issue” by making some calls.

Det. Sgt. Scott's role

[157] Det. Sgt. Scott testified that during the evening of March 20th, 2002, he received a call at home from R.C.M.P. Staff Sgt. Carlson, supervisor of the blue team, informing him that Mr. N.M. had been arrested by the OPP who were preparing to do a search warrant for the arrestee's residence. Scott maintains that he has no knowledge as to how Carlson secured this information. Carlson assigned Scott to attend at the OPP detachment in Shelburne the following day with Det. C. Blake of the red team to “brief” an OPP officer, noted by Scott as “Jill Lanser”, regarding the STF investigation respecting Mr. N.M.. Scott recalls the phone conversation as short. He didn't ask Carlson why the briefing was to be done. Within ten minutes, according to Scott, he phoned A/Insp. M. Hamel, his immediate superior, to say he was not comfortable briefing the OPP about the STF investigation for fear that any future search warrant might be tainted by a perception that the STF had somehow piggy-backed on an earlier OPP warrant. Det. Sgt. Scott informed the court that Hamel voiced agreement with his views and it was decided to meet with Chief Super. Neily about the matter the following morning.

[158] Det. Sgt. Scott testified that he, Hamel and Neily agreed at their 6:55 a.m. meeting on March 21st that speaking to the OPP in advance of their search could prove problematic. A “debriefing” after the OPP search would not pose the same problems. Scott assumed there had already been some contact between Carlson and the OPP.

[159] According to Scott, after conferring with Blake and learning that he shared the same concerns regarding a pre-search approach to the OPP, he informed Hamel he would not contact the OPP and asked that that be related to Neily. Within a couple of minutes, on Scott's evidence, Neily phoned asking that he make “a courtesy call” to the OPP to let them know that the STF would not be attending their detachment.

[160] Det. Sgt. Scott made the phonecall as directed. He taperecorded the call because he felt even the fact of calling the OPP “would become an issue” and not because he understood Manser had already been spoken to by the STF. The taping of the call caused controversy subsequently. After this, the TPS enacted a rule prohibiting the taperecording of another police officer.

[161] According to Scott, he didn’t know if Carlson or someone else had actually made arrangements for him to brief the OPP such that the OPP were expecting STF officers. Scott testified that when he telephoned Manser he knew nothing of the STF approach to her the night before.

[162] Shortly after 7:30 a.m., to Det. Const. Manser’s recall, she received a phonecall from TPS Det. Sgt. Al Scott. As said, Scott surreptitiously recorded the conversation only disclosing to Manser late in the call that it was being recorded because it was “sort of a policy”. Manser was offended by Scott’s conduct. When Scott began to relate his discussions with Chief Super. Neily and A/Insp. Hamel about avoiding “any perception...”, Manser cut him off. She thought Scott was calling to apologize for the STF actions the night before. She stated, in the next minute or so:

Well that’s, I was just actually, it’s funny that you called because I was just speaking with my Detective Sergeant here saying if they sign the warrant, they can come on the property. If they don’t, I can’t have you guys come on the property because they’re gonna just say, okay you piggy-back too, and you know they’re gonna be all over us.

...

I was just speaking with Steve [Sills], my boss...saying you know what, it’s not gonna happen that way. We can’t have it happen that way because uh, well originally I was told, “Oh, I want you to go down there and then for everything you find, come up and show it to us.” I’m thinkin’ uh-uh...

In the taped call, Scott voiced no concern, follow-up inquiry or acknowledgement regarding Manser’s statements. From this, Det. Const. Manser understood that Scott was aware of the attempts by other STF officers to subvert the warrant process and was involved in damage control.

[163] Det. Sgt. Scott testified that he didn’t find these statements by Manser odd and therefore made no inquiries as to the context. To him it may simply have related to ongoing internal discussions between Manser and Sills – “it just means that they may have talked it over and decided that that isn’t a strategy”.

[164] In the phonecall, Det. Sgt. Scott stated that he was not going to give Manser any information about what his group was looking into and wanted to avoid any perception of “piggy-backing” on the OPP warrant. It was agreed that once the OPP warrant was executed, the parties would speak again after the search. Det. Const. Manser testified here that she made no commitment to Scott to look for TPS property during her search – if she stumbled on such property, she would notify the STF in a post-search debriefing.

[165] According to Manser, once she promptly reported the STF actions to her supervisor her role in documenting the matter was at an end. It was at the preliminary inquiry, during defence cross-examination, that Det. Const. Manser's account of the STF actions first came to light publicly. An internal TPS investigation was launched.

[166] As a witness, Scott struggled in cross-examination with hypothetical questions asked by Mr. Brauti premised on Det. Const. Manser's account of events of the evening of March 20th, 2002. The witness repeatedly stated that he did not know if the reported conversation had taken place. As well as not directly responding to a hypothetical question, the witness would editorialize with such comments as "the big thing is "if"", "I wasn't there", and, "I don't know if the conversation took place". Finally, the court was required to caution the witness to directly answer a hypothetical inquiry put by counsel. In addition, Scott considered if Det. Sgt. Evans conducted himself as described by Manser that was not dissimilar to "many, many things that are discussed in the course of an investigation"; "we did it all the time in our office"; "[p]eople would have certain opinions on how things should be done"; "[c]onversations between different investigators and their supervisors are not unusual...[t]hey happen all the time"; "sitting and talking about a different strategy, I don't know if that would be considered unlawful"; "[i]t could come up in a discussion of strategy"; "I don't know if it's improper to discuss it". As well, the witness observed:

I would say that it would be more of a case of maybe they don't [know] the – the law with regards to search warrants, maybe they're thinking off the top of their heads and maybe not looking down to the – down the road to the possible ramification of doing that.

[167] Still in cross-examination, Det. Sgt. Scott sought to make a distinction between encouraging inappropriate actions and the actual commission of the acts:

...if someone brought that up in conversation and no action was taken on it, I wouldn't see a problem with it.

...

...if it happened...then, yes, it would be a problem.

...

If they had done it, of course, it would be a problem.

...

If it occurred and if it had been followed through on, yes, it would have been a problem.

...

It wouldn't be unlawful to me until an action is taken.

[168] Eventually, Det. Sgt. Scott conceded that:

- (1) if he became aware that someone had attempted to con or co-opt the OPP into allowing secret and warrantless access to real property subject to an OPP warrant he would record the matter in his notebook and inform his supervisor

- (2) "if I had...information like that and as the sub-affiant...I would tell the affiant...in being full and frank"
- (3) bullying an OPP officer had "the potential to be discreditable conduct and it would have to be reported and investigated"
- (4) any attempt by STF officers to have Det. Const. Manser take things out of the N.M. residence during the execution of her warrant might be discreditable conduct – it would be "concerning" and "would warrant that questions be asked and answered" – in the absence of the STF having grounds for a search, "[h]aving them do our search for us would be a problem"
- (5) if STF officers had gone on the N.M. property unauthorized by Det. Const. Manser's search warrant, it would be "a concern" and "a serious matter that should be investigated" and brought to the attention of a search warrant affiant.

[169] It was Det. Sgt. Scott's understanding that an investigation by two TPS inspectors into Det. Const. Manser's allegations regarding Det. Sgt. Evans, himself an inspector by the time of the inquiry, concluded that a finding of discreditable conduct was not warranted. Scott could not say why the investigation was not referred to external or non-TPS investigators.

[170] In cross-examination, Det. Sgt. Scott was questioned about Evans' approach:

- Q. And, sir, I take it that you did not find it out of the ordinary that somebody would suggest that Inspector Evans was bullying them?
- A. At – at – at the end of the prelim?
- Q. At – sitting here today.
- A. Sitting here today? Sitting here today after my contact with Inspector Evans, in relation to the complaint, no.
- Q. That doesn't come as a surprise, does it?
- A. No.
- Q. And, in fact...
- A. That's if it happened.
- Q. Right. Because you had some experience with Inspector Evans and his attempts to bully, fair?
- A. Correct.

Q. And, in fact, he's threatened you?

A. Yes, he has.

Q. In an inappropriate fashion?

A. Yes, in an inappropriate fashion.

preparation for a warrant application

[171] Det. J. Lowry described a briefing of the "majority" of STF investigators by Det. Sgt. Evans at about 1:30 p.m. on March 21st. Evans did not give the source of his information. Lowry recalled Evans saying that the OPP were then executing a search warrant on Mr. N.M.' residence. Evans gave background to the domestic assault situation and informed those at the briefing that N.M. had told his wife he would shoot a cop coming to his door. Evans incorrectly stated that when Mr. N.M. exited his residence just after 12:24 a.m. on March 20th he gave permission for a consent search. Lowry further received the erroneous information that the OPP had discovered a .357 Magnum with speed loaders in the basement rafters of the N.M. residence.

[172] Det. Sgt. Scott testified that during the evening of March 21st he was notified by Sgt. Cook of the STF purple team that the OPP search had revealed the presence of TPS files, memo books and body-pack equipment in the N.M. residence. Det. Sgt. Scott assigned Dets. Schueder and Hoover to "secure" the N.M. residence until, in the officer's words, "we made the final determination whether we [were] actually doing a warrant or not the next day". In this way, no one would be allowed to go on or off the property until a decision was made about a warrant.

[173] The following morning, March 22nd, 2002, Det. Sgt. J. Lowry was selected to prepare the ITO a search warrant should the information from the OPP support such an application. Lowry had already been involved in a number of warrants on behalf of the STF. Det. Sgt. Scott believes that Lowry knew of his phonecall to OPP Det. Const. Manser the prior day.

[174] Det. Lowry was told by Det. Sgt. Scott shortly after 6:30 a.m. on March 22nd that he would "probably" be required to prepare a s. 487 *Code* search warrant application for the N.M. residence "contingent" on what might be learned later in the day from the OPP regarding the execution of their warrant. To Lowry's recall, it seemed important to Scott that the STF not be seen as piggy-backing on the OPP warrant. He had no idea of the cause of Scott's concern. Lowry had no information that Scott had himself been in contact with the OPP. At 7:27 a.m., in a short briefing from Det. Sgt. Scott, Lowry learned that two STF officers had been sent to secure the N.M. property.

[175] Det. Lowry understood that affiants and sub-affiants respecting an ITO must be full, fair and frank. In respect of his ongoing STF duties, Lowry had a s.487 financial institution search warrant “in its infancy”. As preparatory steps for a possible search of Mr. N.M.’ property, Lowry used his computer to cut and paste from that draft, along with investigative notes from his own notebook, into a new ITO structure.

[176] Scott, Lowry and Blake travelled to the OPP Dufferin detachment meeting with Manser at 10:40 a.m. on March 22nd. Det. Sgt. Scott recalls Det. Const. Manser reporting that during the execution of a s. 117.04 search warrant on March 21st she observed, in Mr. N.M.’ house, various property which she described with TPS stickers or identification markings including numerous memo books around the house. Det. Lowry noted Manser as describing her observations of a TPS evidence bag, a police body-pack for intercepting private communications, numerous TPS memo books “around the house”, numerous envelopes and police reports with TPS stamps, and numerous pornographic videos bearing TPS stickers.

[177] In the view of Scott and Lowry, Manser’s information provided a foundation for a s. 487 warrant application by the STF.

the decision to search out-buildings

[178] According to Scott and Lowry, Det. Const. Manser told them her warrant was limited to Mr. N.M.’ dwelling as she was unaware of the three out-buildings on the property.

[179] The complainant’s diagram provided to the OPP on March 19th describes a twelve-acre property (Ex. # 1A). The M. bungalow has an attached garage. Mr. N.M. estimated the largest of the three out-buildings, a 70’ x 30’ workshop to be about 70 feet from the house. He described the building contents as “just more or less storage”. Mr. N.M. locked the building when he was not home.

[180] At the preliminary inquiry, the complainant testified that the workshop was generally kept locked and that a key to the building was kept in a drawer in the house. The complainant indicated to the court that she “hardly ever” went in the workshop and, on those occasions when she did enter the shop, her husband was always there.

[181] Det. Sgt. Scott testified that, after discussion, “the final decision” was his to have the out-buildings on the N.M. property brought within the scope of the warrant to search. The witness provided the following information:

- (1) he knew the suspect resided on a rural property

- (2) his training in various courses suggested that “especially in the rural circumstances that the out-buildings should be included in...search warrants”
- (3) notebooks could be stored not just in the garage or basement but also in out-buildings
- (4) although he “had no direct evidence that there was property in the out-buildings”, given the “amount of property” observed by Manser in the residence, his “feeling” was that “by extension” there were reasonable grounds to believe property would be found in the out-buildings.

[182] Det. Lowry’s view was that after hearing Det. Const. Manser’s account of her observations, “we decided...police property could be located” in the N.M. out-buildings as well as the dwelling as he and Scott were “under the opinion it was a logical extension that memo books, given their size, could be in the out-buildings too”.

[183] After obtaining from Manser blank electronic versions of a Form 1 ITO and Form 5 warrant to search, not identical to the forms then being used by the TPS, Det. Lowry set about drafting an ITO to search N.M.’ “dwelling house and related out buildings”. Lowry made no reference to the out-buildings in the ITO in describing his grounds of belief. The officer was cross-examined at length on the issue:

Q. Why isn’t it in your information to obtain?

A. I considered it, it’s part of the property and a logical extension to where memorandum books, police property could be.

Q. **Did you have any evidence that memorandum books would be in the out-buildings?**

A. **No.**

. . .

Q. And in relation to the out-buildings, when you are discussing this with Detective Manser, you know that there’s three out-buildings?

A. Yes.

Q. They are described as two sheds and a work shop?

A. That’s correct.

Q. And I take it that that is all the information that you had about these out-buildings?

A. Yes.

Q. Is that they were on the property, correct?

A. Yes.

- Q. That they were sheds and a work shop?
- A. Two sheds and a work shop, you are correct.
- Q. **And you weren't aware of their location on the property?**
- A. **I believe they were in proximity to the house, but that's it.**
- Q. **But you weren't given that information? The only information you were given is that they were on the property, fair?**
- A. **Fair.**
- ...
- Q. **And was it your understanding in your discussion that if you wanted to go into those buildings, they needed to be named?**
- A. **I believe so. I thought, and I could stand corrected at this point, I thought that it was within the curtil[a]ge but I wanted to err on the side of caution and include those in the affidavit, the actual information to obtain.**
- Q. Well, obviously Detective Manser was of a different view, because if she believed that they were covered by her warrant, she could have gone in, fair?
- A. I can't say what was in her mind, but yes, that sounds fair.
- Q. Okay, because I take it that your discussion was along the lines of well, I didn't go into the out-buildings because they weren't part of my warrant and they weren't part of my warrant because I didn't know they existed?
- A. That's what she said, yes.
- Q. **And I take it that you were of the view that you needed reasonable grounds in order to enter those buildings in addition to the house?**
- A. **No, I thought they'd – because of the extension, as I said earlier, in my mind I thought the extension that memo books, given their size, could be in the out-buildings. It was probable they could be there.**
- Q. **Okay, well, you had no evidence to support that though?**
- A. **That's what I said.**

(emphasis added)

[184] In the text of the grounds of belief set out in the ITO, Det. Lowry made reference to “the property”, “his home”, “the premises”, “his residence”, and “the dwelling[-]house” without reference to the out-buildings.

non-disclosure to Det. Lowry

[185] In the s. 487 ITO, Det. Lowry stated in para. 49 that he learned the details of Mr. N.M.'s arrest from Det. Sgt. Evans. Up to, and including, para. 58, presents a summary of the assault allegations, the arrest, the consent search, the charges against N.M., and the execution of the s. 117.04 public safety warrant. Para. 59 then states a different source (Manser) and additional narrative. In the ten

paragraphs apparently sourced to Evans (para. 49-58), there is reference to the OPP setting up “containment around the property” on March 19th.

[186] Det. Const. Manser accepted that, as a sub-affiant supplying information to another officer preparing an ITO a search warrant, she had a duty to be frank, honest, detailed and fair. The officer did not inform Det. Sgt. Lowry of Det. Sgt. Evans’ conduct. From her conversation with Det. Sgt. Scott she believed he was aware of Evans’ actions and since Scott was at the OPP detachment on March 22nd with Lowry, in her words:

I was under the impression since I had already spoken with Al Scott and I assumed he knew about that, they’re all part of the same unit.

[187] Det. Sgt. Scott recognized that an affiant for a search warrant ITO has an obligation to be full, fair and frank. He understood as well, in 2002, that a police officer acting as a sub-affiant had a similar duty. Det. Sgt. Scott acknowledged that he was a sub-affiant respecting Det. Lowry’s s. 487 *Code* search warrant.

[188] Det. Lowry considered Det. Const. Manser to be his sole OPP source, and therefore sub-affiant, relating to observations within the N.M. residence on March 21st. Manser did not provide Lowry a copy of her ITO and warrant materials relating to the public safety warrant because the court had ordered those materials sealed.

[189] Det. Lowry believed the OPP had a *Feeney* warrant to arrest Mr. N.M.. Lowry erroneously believed that N.M.’ consent to search occurred at the time of his arrest and related to the entire dwelling.

[190] Det. Lowry testified that he was not told by Evans or Manser that:

- (1) the OPP had conducted a warrantless entry onto the N.M. property
- (2) while positioned on the property, the OPP had made observations through the windows
- (3) the OPP went to the property without a warrant to arrest N.M.
- (4) the OPP entered the dwelling-house without a warrant
- (5) during the warrantless entry to the home, the OPP made observations leading to the issuance of a public safety warrant.

Had Lowry known these facts he would have included them in the ITO in the discharge of his duty to be full, frank and fair.

[191] Det. Lowry fully understood that in preparing a search warrant application, the police cannot simply turn a “blind eye to things that are problematic in the investigation” – “whether they’re unhelpful or extremely damaging, that information should be in the affidavit as well”.

[192] Det. Lowry testified respecting other unidentified officers that: “they had attempted to build a wall around me and not give me information as the affiant...to taint my process”. The sub-affiants, Evans, Manser and Scott, did not inform him that STF officers had attempted to persuade Manser to allow some of their number to accompany her in executing the public safety warrant relating to an entirely separate investigation without it being noted anywhere that they had been present. Lowry observed that the impropriety of such action was basic policing – “as an investigator you should know that”. Had Lowry been aware of this event, he would have included the information in his ITO:

...it would be the same as if your initial affidavit had been refused. You’ve got to put it in, anything like that...

Nor was Lowry told that the same STF officers, in a bullying fashion, sought to have Manser, as an alternative, take evidence of interest to the STF out of the N.M. residence during the execution of the s. 117.04 warrant to show it to STF officers present at the scene of the search. Had Lowry been aware of this fact, it also would have been disclosed in his affidavit.

[193] Det. Lowry further testified that had he known of the March 20th STF approach to Manser he would have reported the matter to his superiors. The detective considered the facts to be “serious”, a pre-existing “unlawful attempt to search”, probably amounting to a discreditable conduct offence under the *Police Services Act* as well as criminal conduct involving “[m]is-execution of process”.

the warrant issuance process

[194] By about 1:00 p.m., on March 22nd, Det. Lowry completed his ITO. He proceeded to the courthouse to present his warrant application. He felt his preparation and drafting had been under “time constraints” – “For entry in a dwelling-house, I’ve never done one this quickly”. The detective considered the time pressure to arise from the possibility that Mr. N.M. might secure bail that afternoon – he was “concerned with a confrontation happening if the accused and supporters showed up at his residence”.

[195] The presiding provincial court judge deliberated for about half an hour over the unsigned and unsworn ITO. When Det. Lowry was summoned to chambers, a date was corrected where the court found an error. Det. Lowry then signed and swore to the ITO. After stating he would issue the warrant, the judge signed the warrant. The issuing judge then asked Lowry what time he was going

to search and when he would “be out of the residence” receiving the answer that the detective hoped to be out “before dark”. According to Lowry, the judge said that due to “the seriousness of the situation” he would “extend” the time for execution of the warrant to midnight. At that point, the judge made handwritten endorsements on the search warrant form:

THEREFORE, it is to authorize and require you, between the hours of **2:30 + 12:00 PM** to enter into the said premises and to search for the above things...

...

****residence is vacant, situation is urgent and exigencies may require extended search***
(emphasis denotes handwriting)

[196] Although Det. Lowry’s ITO pleaded that reasonable grounds existed to believe the things to be searched for would afford evidence of an unlawful conspiracy between Sept. 1st, 1996 and May 31st, 1999, the Form 5 warrant to search described the search to be “in respect to the commission, suspected commission or intended commission” of an offence.

execution of the warrant

[197] At about 3:30 p.m. on March 22nd, the N.M.’ premises were videotaped prior to the search commencing under the authority of the warrant to search. Det. Sgt. Scott was the officer in charge of the search. Entry to the dwelling-house was gained through a rear window by Det. Blake. The search lasted until 7:02 p.m.

[198] In the dwelling, a quantity of TPS property was seized including 16 memo books and 77 steno pads.

[199] The search party located three out-buildings – an implement shed, a shed for livestock and a larger workshop. Det. Blake testified at the preliminary inquiry that the combined square footage of the out-buildings exceeded that of the dwelling.

[200] Det. Blake alone searched the three out-buildings in what he described as a “cursory” search. Blake found the workshop building locked. After locating a key in the kitchen of the home, he gained entry to this out-building. On his evidence, he was not searching for drugs but only the items listed in the warrant. The shop contained such things as shelving, boxes, a long work-bench with tools, plumbing supplies, a ladder, and a tractor engine block. On what Blake described as a “hunch” at the preliminary inquiry, he used the ladder to search an area above the door on top of a beam. This location was not visible from the floor of the shop. Det. Blake seized a baby formula can containing a Zehrs plastic grocery bag. The bag contained 3.5 g. of heroin, four tablets of MDMA, and 45.5 g. of cocaine. Empty Zehrs bags were stored in the kitchen of the residence. Subsequent testing revealed Mr. N.M.’ fingerprints on the bag seized from the shop. It appears that no items described in the s. 487 *Code* warrant were seized in the out-buildings.

ANALYSIS

General s. 8 Charter Principles

[201] Certain overarching principles, once stated, will set the backdrop for the s. 8 analysis in this case:

- (1) Individual privacy is the “essential value protected by s. 8 of the *Charter*”: *R. v. Kokesch* (1990), [1990 CanLII 55 \(SCC\)](#), 61 C.C.C. (3d) 207 (S.C.C.) at 228. “Any expectations of privacy must be reasonable” to be afforded constitutional protection: *R. v. Law* (2002), [2002 SCC 10 \(CanLII\)](#), 160 C.C.C. (3d) 449 (S.C.C.) at 459. A reasonable expectation of privacy is a personal right the existence of which is determined on the totality of the circumstances in each case having regard to the guidelines in *R. v. Edwards* (1996), [1996 CanLII 255 \(SCC\)](#), 104 C.C.C. (3d) 136 (S.C.C.) at 148-152. Further, the purpose behind the right “is to protect the privacy of individuals from unjustified state intrusion”: *R. v. Hape*, [2007 SCC 26 \(CanLII\)](#), [2007] S.C.J. No. 26 at para. 166 *per* Bastarache J. Therefore, “[t]he purpose of s. 8 of the *Charter* is to protect against unreasonable searches”: *R. v. Alkins* (2007), [2007 ONCA 264 \(CanLII\)](#), 218 C.C.C. (3d) 97 (Ont. C.A.) at para. 44.
- (2) “[P]olice conduct interfering with a reasonable expectation of privacy is said to constitute a “search” within the meaning of” s. 8 of the *Charter*. *Law*, at 457.
- (3) The essence of a “seizure”, in constitutional terms, involves a non-consensual taking of something by agents of the state: *R. v. Buhay* (2003), [2003 SCC 30 \(CanLII\)](#), 174 C.C.C. (3d) 97 (S.C.C.) at 113; *R. v. Dymont*, [1988 CanLII 10 \(SCC\)](#), [1988] 2 S.C.R. 417 (S.C.C.) at 431.
- (4) To justify police actions interfering with a reasonable expectation of privacy, the state “must be able to point to a specific statute or common law rule that authorizes the search” – “[o]therwise, they [the police] are constrained by the same rules regarding trespass...as everyone else”: *R. v. Caslake* (1998), [1998 CanLII 838 \(SCC\)](#), 121 C.C.C. (3d) 97 (S.C.C.) at 105.
- (5) Although the “scope of the constitutional guarantee under s. 8 must vary with the context” (*R. v. Campanella* (2005), [2005](#)

[CanLII 10880 \(ON CA\)](#), 195 C.C.C. (3d) 353 (Ont. C.A.) at 361), prior judicial authorization, where feasible, is a pre-condition for a constitutionally valid search and seizure: *R. v. Golden* (2001), [2001 SCC 83 \(CanLII\)](#), 159 C.C.C. (3d) 449 (S.C.C.) at 466; *Hunter et al. v. Southam et al.* (1984), [1984 CanLII 33 \(SCC\)](#), 14 C.C.C. (3d) 97 (S.C.C.) at 108; *R. v. Price* (2000), [2000 CanLII 5679 \(ON CA\)](#), 144 C.C.C. (3d) 343 (Ont. C.A.) at 353.

- (6) “[T]he fact that there may not have been sufficient grounds to obtain a warrant does not justify a warrantless search” (*Buhay*, at 114) or “constitutionally impermissible investigative techniques”: *Kokesch*, at para. [45-6](#).
- (7) Warrantless searches are presumptively unreasonable unless the Crown demonstrates on a balance of probabilities their reasonableness in the context of s. 8 principles: *R. v. Mann* (2004), [2004 SCC 52 \(CanLII\)](#), 185 C.C.C. (3d) 308 (S.C.C.) at 324; *Buhay* at 112, 114; *R. v. Evans* (1996), [1996 CanLII 248 \(SCC\)](#), 104 C.C.C. (3d) 23 (S.C.C.) at 34; *R. v. Peacock-McDonald* (2007), [2007 ONCA 128 \(CanLII\)](#), 218 C.C.C. (3d) 257 (Ont. C.A.) at para. [18](#).
- (8) A warrantless search may be found to be reasonable where it meets the test in *R. v. Collins* (1987), [1987 CanLII 84 \(SCC\)](#), 33 C.C.C. (3d) 1 (S.C.C.) at 14-15 – (a) the search is authorized by law, (b) the law itself is reasonable, and (c) the manner in which the search was carried out was also reasonable. That said, any exception to the prior authorization model ought to remain “exceedingly rare” in the face of “a strong common law rule against warrantless intrusions onto private property”: *R. v. Grant* (1993), [1993 CanLII 68 \(SCC\)](#), 84 C.C.C. (3d) 173 (S.C.C.) at 187-8.
- (9) Common law authorization may emanate from conditions of urgency: “[w]arrantless searches are presumptively unreasonable, absent exigent circumstances” (*R. v. Tessling* (2004), [2004 SCC 67 \(CanLII\)](#), 189 C.C.C. (3d) 129 (S.C.C.) at 142) making it impracticable to obtain a warrant: *R. v. Plant* (1993), [1993 CanLII 69 \(SCC\)](#), 84 C.C.C. (3d) 161 (S.C.C.) at 169; *Grant*, at 189.
- (10) The Crown cannot rely on “*ex post facto* justifications” of searches by their results: *Kokesch*, at 227; *R. v. Genest* (1989), [1989 CanLII 109 \(SCC\)](#), 45 C.C.C. (3d) 385 (S.C.C.) at 408.

- (11) A search, unlawful from the beginning, cannot be converted into a reasonable search because it is carried out in a reasonable manner: *R. v. Moran* (1987), 1987 CanLII 124 (ON CA), 36 C.C.C. (3d) 225 (Ont. C.A.) at 247 (leave to appeal refused [1988] 1 S.C.R. xi).
- (12) The police may act only to the extent empowered to do so by law: *Mann*, at 318. Where the authority to act does not emanate from statute, the common law may provide legal authority as described in a number of cases including the *Mann* decision at 320 – 324:

The test for whether a police officer has acted within his or her common law powers was first expressed by the English Court of Criminal Appeals in *Waterfield*, *supra*, at pp. 660-61. From the decision emerged a two-pronged analysis where the officer's conduct is *prima facie* unlawful interference with an individual's liberty or property. In those situations, courts must first consider whether the police conduct giving rise to the interference falls within the general scope of any duty imposed on the officer by statute or at common law. If this threshold is met, the analysis continues to consider secondly whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

...

At the first stage of the *Waterfield* test, police powers are recognized as deriving from the nature and scope of police duties, including, at common law, "the preservation of the peace, the prevention of crime, and the protection of life and property" (*Dedman*, *supra*, at p. 32). The second stage of the test requires a balance between the competing interests of the police duty and of the liberty interests at stake. This aspect of the test requires a consideration of:

...whether an invasion of individual rights is necessary in order for the peace officers to perform their duty, and whether such invasion is reasonable in light of the public purposes served by effective control of criminal acts on the one hand and on the other respect for the liberty and fundamental dignity of individuals. [*Cloutier*, *supra*, at pp. 181-82.]

...

Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian Constitutional order.

...

To continue in the *Waterfield* analysis, the conduct giving rise to the interference must involve a justified use of a police power associated with a general duty to search in relation to the protection of life and property. Put differently, the search must be reasonably necessary. The relevant considerations here include the duty being performed, the extent to which some interference with individual liberty is necessary in the performance of that duty, the importance of the performance of the duty to the public good,

Warrantless Entry on P... P...

position of parties

[202] The Crown denies any breach of s. 8 of the *Charter* relating to the warrantless police entry on the N.M. property, the disabling of the suspect's vehicle and telephone, observations made into the home, and the absence of a *Feeney* warrant:

- (1) The police were presented with information relating to domestic violence and a suspect who might be suicidal and homicidal. Mr. N.M. had access to firearms.
- (2) On March 19/20, 2002, the police were discharging statutory and common law duties to preserve the peace, protect life and arrest a suspect.
- (3) The OPP's warrantless actions, which intruded upon the accused's reasonable expectation of privacy, were a reasonable and justifiable use of powers in circumstances of exigency having regard to the urgency of the situation and the risk presented to the safety of the police, the complainant and her children, and Mr. N.M..
- (4) A *Feeney* warrant was unnecessary given that Mr. N.M. voluntarily surrendered outside his dwelling.

[203] Mr. Brauti, on the other hand, submitted that the warrantless conduct of the police offended the prior judicial authorization model and was incapable of reasonable justification on an exigent circumstances analysis:

- (1) The police objective was to arrest Mr. N.M. for assault. The police recognized that a *Feeney* warrant was required to arrest the suspect in his dwelling. An application for a *Feeney* warrant was under preparation.
- (2) While the police act under general duties to arrest and preserve life, the purported exercise of warrantless police powers by a para-military operation on the N.M. property was intrusive, unauthorized, unnecessary for public safety, and in turn unreasonable.

- (3) From the outset, the police over-reacted in treating the suspect as a barricaded person, acted on ambiguous and partial information, and precipitated a false exigency by contacting N.M. rather than waiting for an endorsed *Feeney* warrant.
- (4) The actions of the police circumvented the warrant process leading to Mr. N.M. exiting his residence involuntarily.

findings/conclusions

[204] “The public places a great deal of power into the hands of its police forces to meet the heavy responsibility police forces take upon themselves everyday in protecting our safety and security”: *R. v. Flintoff* (1998), [1998 CanLII 632 \(ON CA\)](#), 126 C.C.C. (3d) 321 (Ont. C.A.) at 332-3. Ordinarily, recognizing that the police often need to act on the spot under “the pressures and dangers” associated with criminal activity, the courts should avoid reasoning or review that involves “dictating police tactics and techniques in the context of investigations and arrests”: *R. v. Silveira* (1995), [1995 CanLII 89 \(SCC\)](#), 97 C.C.C. (3d) 450 (S.C.C.) at para. 123 *per* L’Heureux-Dubé J. This is particularly so where quick operational decisions, at times in risky circumstances, must be made by police officers with their on-the-scene appreciation of the dynamics of an unfolding situation in the context of their police training and experience: *R. v. Golub* (1997), [1997 CanLII 6316 \(ON CA\)](#), 117 C.C.C. (3d) 193 (Ont. C.A.) at 210, 212 (leave to appeal refused [1998] 1 S.C.R. ix); *R. v. White*, [2007] O.J. No. 1605 (C.A.) at para. 53-4; *R. v. Asante-Mensah* (2001), [2003 SCC 38 \(CanLII\)](#), 157 C.C.C. (3d) 481 (Ont. C.A.) at 510 (aff’d (2003), 174 C.C.C. (3d) 481 (S.C.C.)); *R. v. Polashek* (1999), [1999 CanLII 3714 \(ON CA\)](#), 134 C.C.C. (3d) 187 (Ont. C.A.) at 197-8. Certainly, immediate decisions of a police officer made in the course of duty are not generally assessed through “the lens of hindsight”: *Crompton v. Walton* (2005), [2005 ABCA 81 \(CanLII\)](#), 194 C.C.C. (3d) 207 (Alta. C.A.) at 221.

[205] That said, a broad strike zone associated with public safety of “better safe than sorry” assigned to police discretion cannot be without limits. Police actions must be authorized by law. Discretion cannot be unreasonably exercised or at odds with statutory and common law limits: *Caslake*, at 110 (“The *Charter* requires that agents of the state act in accordance with the Rule of Law”); *R. v. Harrer* (1995), [1995 CanLII 70 \(SCC\)](#), 101 C.C.C. (3d) 193 (S.C.C.) at para. 50 (“In Canada, every person has the right to expect that the authorities will comply with the *Charter*”); *Flintoff*, at 338 (“The *Charter* reflects the principle underlying criminal justice in Canada: when it comes to the imposition of the state’s coercive powers, it is obligatory that the police follow procedures mandated by law and not impose rules of their own making...”); *R. v. Schedel* (2003), [2003 BCCA 364 \(CanLII\)](#), 175 C.C.C. (3d) 193 (B.C.C.A.) at 225 (“...the police have a duty to know the law and follow it”); *R. v. Bohn* (2000), [2000 BCCA 239 \(CanLII\)](#), 145 C.C.C. (3d) 320

(B.C.C.A.) at 334 (“Police officers are expected to know and follow duties imposed on them” by law); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 486 (1986) (“...law enforcement officers are expected to obey the law and ordinarily swear to do so when they take office. Where the controlling law places limits on their authority, they cannot be said to have the authority to make contrary policy”).

[206] I accept that in examining police conduct it is error to assess each fact or observation in isolation without a totality of circumstances perspective and that an objective assessment includes the dynamics within which the police acted including their experience: *R. v. Lawes*, 2007 ONCA 10 (CanLII), [2007] O.J. No. 50 (C.A.) at para. 4; *R. v. Juan*, 2007 BCCA 351 (CanLII), [2007] B.C.J. No. 1402 (C.A.) at para. 14-27; *R. v. Rajarapnam*, 2006 ABCA 333 (CanLII), [2006] A.J. No. 1373 (C.A.) at para. 25; *R. v. Simpson* (1993), 1993 CanLII 3379 (ON CA), 79 C.C.C. (3d) 482 (Ont. C.A.) at 501.

[207] There can be no dispute that the police act under a general common law duty to preserve life: *R. v. Dedman* (1985), 1985 CanLII 41 (SCC), 20 C.C.C. (3d) 97 (S.C.C.) at 119; *R. v. Godoy* (1999), 1999 CanLII 709 (SCC), 131 C.C.C. (3d) 129 (S.C.C.) at 134, 136. In this case, all agree that the authorities were engaged in the discharge of such a duty, as well as the duty to arrest, on March 19/20, 2002.

[208] As observed in *Eccles v. Bourque* (1974), 1974 CanLII 191 (SCC), 19 C.C.C. (2d) 129 (S.C.C.) at 131, the question is whether the police “were required or authorized by law to commit a trespass” and whether, in the circumstances, the actions of the police, (entry onto Mr. N.M.’ property remaining for hours without warrant, conducting covert surveillance into the residence, destroying the suspect’s vehicle tires, and arresting the suspect without a *Feeney* warrant) amounted to a reasonably necessary and therefore justifiable use of police power. There is no dispute that these actions interfered with Mr. N.M.’ reasonable expectation of privacy. But were the actions of the police “reasonably responsive and tailored” to the circumstances known to the police “including its geographic and temporal scope”: *R. v. Clayton and Farmer*, 2007 SCC 32 (CanLII), [2007] S.C.J. No. 32 at para. 31.

[209] On the whole of the evidence I accept, I find that the real intention of the authorities was to arrest Mr. N.M. at his house for assault. This conclusion fairly flows from the totality of the circumstances including the testimony of Jones, James, and the TRU team officers, and the assignment of McCormick to prepare a *Feeney* warrant. Although the integrated response measure includes officers with special expertise such as negotiation, tactics and rescue, and technical matters, there was no expert in preparing warrant applications expeditiously under pressure. Det. Sgt. McCormick had previously prepared only one or two *Feeney* warrant applications. On the evidence, she was left on her own at the detachment with virtually no coordinated discussions with the command post receiving partial, incorrect and ambiguous information.

[210] It is not disputed that on March 19th, 2002 the police had reasonable grounds to arrest Mr. N.M. for assaulting his wife.

[211] Early on, prior to initiation of the OPP integrated response, Quinton and James, and in turn Jones, received second-hand information about N.M. from the family violence shelter employee. As is often the case with unverified hearsay, that information was wrong in several respects – Mr. N.M. did not have his service revolver at home, he was not an alcohol-consumer, and was not suicidal. As well, although Mr. N.M. was said to have threatened to shoot any police officer coming to his home, neither the exact words nor the context nor the timing of the alleged threat were known.

[212] Quite reasonably, a police officer, Const. Tardiff, was sent to interview the complainant directly. However, prior to any report back from the constable, Insp. Jones activated the OPP integrated response measures. This action was premised on the existence of a high-risk situation. It is apparent on the evidence of several witnesses that Mr. N.M. was assigned the status of a “barricaded” person – an individual who had assumed a defensible position refusing to immediately surrender. Equally evident is that no one in command or involved in the warrant application process ever acquired the specific and highly relevant details of any statements attributed to Mr. N.M. relating to violence to himself or third parties. The police acted on worst-case scenarios and inferences of current intention on N.M.’ part. Given that the apparent source for such information was the complainant, a person readily available to the authorities, it is difficult to determine why these inquiries, which no one in this hearing seems to have discounted as irrelevant, were not made.

[213] Prior to Insp. Jones’ authorization to the TRU team to execute containment actions at the N.M. property, the police had the following information as to the likely presence of N.M. in his home:

- (1) the suspect’s address was identified where he ordinarily resided with his wife and three children
- (2) Mr. N.M. was off work on an injury leave and taking prescribed medication
- (3) the complainant stated that her husband normally stayed at home and she believed him to be there
- (4) TPS Officer Benoit, only hours before, had left the suspect’s home after spending time with him at that location
- (5) it was evening and Mr. N.M.’ vehicle was parked in the driveway.

[214] These facts fully supported an application for a *Feeney* warrant on the basis that there were “reasonable grounds to believe that the person is or will be

present in the dwelling”. It is evident from the text of s. 529(1) of the *Code* that an anticipatory warrant may issue in the sense of the affiant not being required to swear that the suspect is currently in the subject dwelling.

[215] The execution of a *Feeney* warrant is subject to the deemed statutory condition that no entry to the dwelling may be made “unless the peace officer has, immediately before entering the dwelling-house, reasonable grounds to believe that the person to be arrested...is present in the dwelling-house” (s. 529(2)). Whether it is implicit that police armed with a signed *Feeney* warrant may go onto private property to acquire the grounds required by s. 529(2), or whether such actions can only be authorized by a judicially endorsed condition in the warrant pursuant to s. 529.2 or otherwise, need not be decided as, in any event, it is clear that either enabling option requires that a *Feeney* warrant first be in existence.

[216] While no final determination need be made on the point, I must say that the known circumstances appear to objectively suggest that Mr. N.M. was actually in his residence. On the evidence, it seems that the police either did not subjectively hold this belief or were applying an unnecessarily high standard of confirmation. This case is quite unlike the situation where the police attend a residence not intending to arrest a person but end up effecting an arrest (*R. v. Petrie* (2003), [2003 MBCA 1 \(CanLII\)](#), 171 C.C.C. (3d) 553 (Man. C.A.)) or where the police are presented only with the possibility that a suspect may be at a third party’s premises: *R. v. Guiboche* (2004), [2004 MBCA 16 \(CanLII\)](#), 183 C.C.C. (3d) 361 (Man. C.A.).

[217] The prosecution correctly accepts that the police entry onto private property without a warrant constituted a search: *Silveira*, at para. 140, *per* Cory J. As observed in *Kokesch*, at 228, trespassory conduct in the form of a warrantless perimeter search or “illegal intrusion onto private property must be seen as far from trivial or minimal” and:

Even before the enactment of the *Charter*, individuals were entitled to expect that their environs would be free of prowling government officials unless and until the conditions for the exercise of legal authority are met.

In *R. v. Wise* (1992), [1992 CanLII 125 \(SCC\)](#), 70 C.C.C. (3d) 193 (S.C.C.) at 227, the court characterized the violation in *Kokesch* as the police searching “the yard surrounding the accused’s home without a warrant”.

[218] This is part of “the public’s interest in being left alone by government”: *Hunter v. Southam*, at 108. “The common law has long demonstrated a respect for freedom from trespass on private property by state authorities”: *Grant*, at 188. We adhere to the belief that people should be free to enjoy their privacy without fear of intrusion by government officials including on private land and certainly within the curtilage of a dwelling: *R. v. Lauda* (1996), [1999 CanLII 970 \(ON CA\)](#), 136 C.C.C. (3d) 358 (Ont. C.A.) at 374, 381-2.

[219] The police did not have Mr. N.M.' consent to be on his property. Nor could consent be implied. While there exists, at common law, an implied consent to approach the door of a dwelling to knock and communicate with the occupant(s), that limited exception to trespassory presence is at odds with the conduct of the TRU team: see *Evans*, at 30-3; *R. v. Tricker* (1995), 96 C.C.C. (3d) 190 (Ont. C.A.) at 203-5 (leave to appeal refused [1996] 1 S.C.R. ix). As in *Evans*, here "the actions of the police went beyond the forms of conduct permitted by the implied license to knock" (at 31). Nor were the police actions limited to entry onto private property of such a minor nature as to be a forgivable trespass or not invasive of a reasonable expectation of privacy because the authorities' observations were equally available from off the property: *R. v. Lotozky* (2006), 2006 CanLII 21041 (ON CA), 210 C.C.C. (3d) 509 (Ont. C.A.) at para. 19, 21-2, 37; *R. v. Neill*, [1993] B.C.J. No. 1880 (C.A.) at para. 28; *R. v. Lundgren and Seeber*, [2004] B.C.J. No. 1498 (S.C.) at para. 5-19. For example, in *Lotozky*, at 517, Rosenberg J.A. stated, in words apposite here, that a minor intrusion on property does not violate a reasonable expectation of privacy - "there must be something more, as in the perimeter search cases, peering in windows of the home..." to attract s. 8 concerns.

[220] For everyone, a private dwelling holds a significant expectation of privacy: *Silveira*, at 463-4, 495-6 (the "historic inviolability of a dwelling-place"); *R. v. Feeney* (1997), 1997 CanLII 342 (SCC), 115 C.C.C. (3d) 129 (S.C.C.) at 153; *Tessling*, at 139. Indeed, "it may be presumed unless the contrary is shown in a particular case that information about what happens inside the house is regarded by the occupants as private": *Tessling*, at 144.

[221] "[S]urreptitious visual intrusions of a person's reasonable expectation of privacy may, in some circumstances, constitute an unreasonable search under s. 8 of the *Charter*": *Moran*, at 247; *R. v. Wong* (1987), 1990 CanLII 56 (SCC), 60 C.C.C. (3d) 460 (S.C.C.) at 465. The "consideration of whether an individual has a reasonable expectation of privacy can only be decided within the particular factual context of the surveillance": *Wong*, at 465. For example, observations made by the police as a result of a trespass may offend s. 8: *Moran*, at 247. Here, unlike the circumstances described in *Tessling*, at 146, 149, where the police surveillance could not "see" through a transparent window" or disclose "details of the home", the TRU team was able, and had as one of its objectives, to see into the N.M. home with the capacity to intrude on privacy in a highly private setting.

[222] Given that a warrantless arrest is prohibited in a dwelling-house in the absence of exigent circumstances (*Feeney*, at 154, 186-7), in the ordinary course, the police ought to have a *Feeney* warrant when going to the property of the suspect to effect an arrest: *R. v. Nguyen*, [2006] O.J. No. 4393 (S.C.J.) at para. 51. The court must be vigilant to avoid improper "circumvention of the warrant requirement": *Law*, at 461.

[223] The actions of the TRU team, on the authority of the incident commander, involved deployment onto private property without a warrant. The police covertly

remained on the property for over three hours during which stealthy surveillance as to the dwelling and its occupant was conducted with the reconnaissance unit operating within the curtilage of the residence looking into the home and sniper units utilizing rifle scopes to see into the dwelling. There was ongoing information-gathering about the house and the suspect's presence and location within the dwelling. The tires of the suspect's vehicle were destroyed. [O/Reg. 3/99 Adequacy and Effectiveness of Police Services](#), under the *Police Services Act*, requires the commander of any police force with a tactical unit to establish "procedures on preliminary perimeter control and containment" (ss. 21(1)1., 22, 23, 25(2)) and the procedures shall be "contained in a manual that is available to each member providing that service" (s. 25(3)). The relevant OPP standard operating procedures and manuals do not discuss or specify, as an option for high-risk situations, warrantless entry onto private property to conduct surveillance into a dwelling in advance of a *Feeney* warrant or in anticipation of attempting, without warrant, to persuade a suspect to surrender. Nor was any expert evidence led to justify the reasonableness and necessity of the tactical operation conducted in the circumstances extant in this case, as is sometimes the case, when the lawfulness of police behaviour is challenged: see, for example: *Euteneier v. Lee* (2005), [2005 CanLII 33024 \(ON CA\)](#), 77 O.R. (3d) 621 (C.A.) at para. 24, 27-8, 36, 70. On any account, the police actions implicated territorial and informational privacy interests of the suspect.

[224] The warrantless entry and covert surveillance amounted to searches – government conduct intruding on N.M.' reasonable expectation of privacy. But were they authorized by law?

[225] Insp. Jones understood that the warrantless actions of the TRU team on the N.M. property, in pursuit of a common law duty of the police to preserve life and to enforce public safety, were justified on the basis of urgency or the existence of exigent circumstances. OPP materials filed in this hearing describe exigent circumstances as requiring action in the face of an imminent danger or risk – a "now or never" situation.

[226] In her testimony, however, Insp. Jones strained to explain the deployment of the TRU team at the N.M. property as motivated by urgency or exigent circumstances. She did not characterize the situation as at a 9-1-1 level of urgency, as in *Godoy*, or *R. v. Nicholls* (1999), [1999 CanLII 2750 \(ON CA\)](#), 139 C.C.C. (3d) 253 (Ont. C.A.). Nor was it sufficiently urgent to straight away breach the residence to save the accused from harming himself or to arrest him without awaiting a warrant as authorized by s. 529.3 of the *Code*. The officer spoke of risk or danger to the police, the public and to Mr. N.M. himself. Objectively, there was little or no support for this position.

[227] As to the police, there was no evidence of any danger to a police officer off the property. Even accepting the most sinister, and time-present, interpretations of the statement attributed to the suspect about not being taken

from his house, no risk would vest until the police knocked on the door of the dwelling.

[228] The complainant was in no danger. She was at a distant location unknown to Mr. N.M. and in the presence of Const. Tardiff.

[229] The belief that Mr. N.M. was suicidal requiring immediate protection from himself was not reasonable. Witnesses questioned about the *Kirec* matter agreed that the circumstances of March 19th, 2002 were dissimilar to that case. Benoit reported that N.M. was calm and remorseful. Sgt. James understood that there was no real case to be made for believing the suspect was suicidal. Dr. Collins' opinion of the potential for suicide by police is not only of little value on the immediacy of Mr. N.M. being a risk to himself given the apparent lack of foundational facts, but also because the context for this view involves police intersection with the suspect – a scenario which would only realistically emerge should the police try to apprehend the suspect.

[230] “[P]olice officers must be empowered to respond quickly, effectively, and flexibly to the diversity of encounters experienced daily on the front lines of policing”: *Mann*, at 318. “[I]t will take time to obtain a search warrant”: *Silveira*, at 501. The onus is on the Crown to establish exigent circumstances. Exigent circumstances involve real urgency where “immediate action is required for the safety of the police” (*Feeney*, at 159) or where there is “imminent danger” of an event occurring should the police delay to obtain a warrant: *Grant*, at 188-9. The existence of exigent circumstances engages both a subjective and objective dimension to the belief of the police: *R. v. Duong* (2002), [2002 BCCA 43 \(CanLII\)](#), 162 C.C.C. (3d) 242 (B.C.C.A.) at 254; *R. v. McCormack* (2000), [2000 BCCA 57 \(CanLII\)](#), 143 C.C.C. (3d) 260 (B.C.C.A.) at 268.

[231] Neither Insp. Jones nor counsel relied upon s. 529.3 of the *Code*, which authorizes warrantless entry of a dwelling to effect an arrest in the exigent circumstance of reasonable grounds to believe it is necessary to do so to prevent imminent bodily harm or death to any person, as justification for the actions of the TRU team. This is undoubtedly because the police did not enter the dwelling and presence on the property exceeding three hours tends to belie belief in imminent or immediate danger.

[232] As a general rule, the existence of exigent circumstances cannot be justified on the basis of the police operationally causing an emergency. In other words, as observed in *R. v. Burlingham* (1993), [1993 CanLII 6884 \(BC CA\)](#), 85 C.C.C. (3d) 343 (S.C.C.) at 407, exigency cannot be justified where “the police created an artificial situation of urgency”. Similarly, in *Silveira*, at para. [69](#), [85](#), [91](#) and [94](#), La Forest (in dissent) noted that but for the way in which the police “chose to sequence their actions” leading to “police-created exigencies” the urgency would not have arisen and, in acting as they did, the officers “created their own exigent circumstances and should not be permitted to use them as a justification for circumventing the law”. Otherwise, observed La Forest J. at para. 84, this

approach to exigent circumstances “would give the police little incentive to acquire a warrant in advance”. Other authorities too recognize that circumstances described as exigent, and therefore purportedly supportive of exceptional warrantless police activity, ought not to be contrived or unreasonably the product of police actions: *R. v. Greffe* (1990), 1990 CanLII 143 (SCC), 55 C.C.C. (3d) 161 (S.C.C.) at 192 (no “immediate necessity” to conduct search to prevent loss of evidence); *Caslake*, at 108 citing Doherty J., as he then was, in *R. v. Lim (No. 2)* (1990), 1 C.R.R. (2d) 136 (Ont. H.C.) at 146 (re considering the “police motives” for the timing of the search); *Bohn*, at 332 (“The reason to hurry the search along was created by the decision of the police to go ahead that night, rather than wait until the next day”.); *R. v. Damianakus* (1998), 1997 CanLII 4334 (MB CA), 121 C.C.C. (3d) 293 (Man. C.A.) at 304-5.

[233] As to the slashing of the tires of Mr. N.M.’ truck during the currency of the warrantless search, given the outer perimeter containment, the heavy police presence, the lack of reference to such an option in the relevant OPP standard operating procedures for containment, and the absence of articulable facts specific to this arrest situation reasonably requiring such destruction of private property, this conduct cannot be viewed as justifiably necessary in all the circumstances.

[234] When Insp. Jones authorized telephone communications with Mr. N.M., Det. Sgt. McCormick was in contact with the telewarrant centre. No one from the command post had called her to determine the status of her application. As well, at this point, with the lights turned out in the residence, the Inspector believed it meant that Mr. N.M. had gone to bed and, in her words, “I felt that it meant my officers in the inner perimeter were probably safe”. As is evident from the evidence excerpt at para. 59 above, Insp. Jones’ testimony does not responsively indicate why, in these circumstances, a *Feeney* warrant was not obtained prior to confronting the suspect in his home at night.

[235] As matters unfolded, Mr. N.M. was arrested outside his dwelling and, as observed by Doherty J.A. in *Golub*, at 204, “As the arrest occurred outside of the respondent’s house, I need not consider the effect of the recent judgment of the Supreme Court of Canada in *Feeney*”. This is consistent with the subsequently enacted text of ss. 529 and 529.1 of the *Code* which refer to entry into a dwelling to effect an arrest. In arguing that Mr. N.M.’ exit from his residence was far from voluntary, Mr. Brauti seemed to be promoting a notion of constructive arrest of the suspect in his home by virtue of the armed police presence and what was described as the directory nature of the police phonecall. There is some support in the United States for this approach to ensure the police do not, without possessing a warrant to enter to arrest or in the absence of exigent circumstances, by trickery or show or threat of force have a prospective arrestee in a dwelling present him or herself: *Fisher v. City of San Jose*, 475 F.3d 1049, 1057 (9th Cir. 2007); *U.S. v. Al-Azzawy*, 784 F. 2d 890, 892-3 (9th Cir. 1985); *U.S. v. Morgan*, 743 F. 2d 115-8, 1164 (6th Cir. 1984); *U.S. v. Johnson*, 626 F. 2d 753, 757 (9th Cir. 1980) (aff’d on

other grounds 457 U.S. 537 (1982)); *U.S. v. Herrold*, 772 F. Supp. 1483, 1489 (U.S. Dist. Penn. 1991). In *Johnson*, the court observed:

In these circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal “entry” into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the “reach” of the arresting officers.

On the facts of the present case, and in particular the contents of the negotiator’s call and Mr. N.M.’ own testimony, I am not prepared to consider the application of those authorities.

[236] Leaving aside the sufficiency of her grounds, Det. Sgt. McCormick’s ITO a *Feeney* warrant addressed the issue of a night-time execution of the arrest warrant as may be required on a combined reading of ss. 487, 488, 487.1 and 529.5 of the *Code*. A high degree of privacy is extended regarding a residence and the *Code* therefore “imposes special requirements where a search by night is contemplated” as night-time entry is meant to occur only “in exceptional circumstances”: *R. v. Sutherland* (2000), [2000 CanLII 17034 \(ON CA\)](#), 150 C.C.C. (3d) 231 (Ont. C.A.) at 239-41; *Payton v. New York*, 445 U.S. 573, 616 (1980) *per* White J.

[237] The police “are answerable for [their] choices” – “The police need not demonstrate the correct decision was made, but that the decision was made on reasonable grounds based on the circumstances known at the time”: *Crampton*, at 220. In conclusion, the Crown has failed to discharge the burden of showing that the warrantless conduct of the TRU team was reasonably necessary in the circumstances. This was not an instance of a barricaded person or a hostage-taking where other considerations may become relevant. On the whole of the evidence, there was no objective justification for its prolonged warrantless conduct supportable on exigent circumstances relating to public safety. Had the TRU team waited for a *Feeney* warrant, properly applied for and endorsed with relevant, and perhaps extraordinary, conditions governing execution, the police would then have the flexibility to conduct the arrest operation safely on the N.M. property.

The Strip Search

position of parties

[238] Ms. Cullen submitted that the weight of credible evidence favours rejection of Mr. N.M.’ assertion that his pants were pulled down below his knees. The Crown argued that the accused is an unbelievable and unreliable witness on a number of fronts. The prosecution, however, accepts that with the arrestee’s shirt pulled up, his shoes removed, and a flip-out or partial pull-down search of his waistband area conducted, Mr. N.M. was subjected, not to a pat-down search, but to a strip search as defined in *Golden*. The Crown submitted that the police search was not conducted with the audience and lighting described by the accused. The

officers were searching Mr. N.M. in the interests of protecting themselves, the prisoner and others from harm and to ensure the accused did not escape.

[239] The defence submitted that Mr. N.M. was subjected to a search with his pants pulled to his knees or alternatively to a search exposing his genitals and buttocks at least to one or more of the arrest team. Mr. Brauti argued that aspects of the police testimony tend to confirm the accused's account of events. The defence submitted that Mr. N.M. was not the object of a field or frisk search but to a standard or routine TRU team search of the person conducted without regard to any articulable facts justifying the degree of intrusion.

findings/conclusions

[240] Mr. N.M. presented as a difficult witness in cross-examination, argumentative and not always responsive to questions. It was manifestly obvious that just below the surface he is very angry about his circumstances. There could be any number of reasons for this whether legitimate or not. The accused's memory was unreliable on several points which he explained as the result of the passage of time and the absence of contemporaneous notes to refresh his memory.

[241] Where Mr. N.M.' testimony differed from police witnesses on certain, but not all, matters relating to the circumstances of his arrest, I accept the officers' evidence. For example, the police were aware of Mr. N.M.' back injury prior to the arrest. At the time of the arrest, the officers were heavily armed. Mr. N.M. was entirely compliant. There would be no reason for an officer to knock Mr. N.M. to the ground from behind as he was on his knees. This incident is not detailed in Mr. N.M.' affidavit. I am also satisfied that no firearm was dropped near Mr. N.M.' head during the arrest process.

[242] As with the other warrantless searches, the Crown bears the onus of establishing the reasonableness of the personal search of the accused.

[243] Certain matters are not in controversy:

- (1) it was night-time and the weather was freezing cold with snow on the ground
- (2) Mr. N.M. was ordered to lift his shirt up high in order that the arresting officers could ensure no weapon was concealed on his torso or tucked into his pants
- (3) at least three heavily armed officers (Penrose, Traves, Manca) were present at the immediate location where Mr. N.M. was taken into custody

- (4) the search of the accused, while he was handcuffed, occurred in the light of at least one rifle-mounted light as well as some of the light from the spot-light though not directly in the path of its beam
- (5) the location of the search can be seen from the roadway in front of the N.M. residence
- (6) Mr. N.M.' shoes were removed and searched
- (7) no supervisory officer authorized the method of the arrestee's search
- (8) the search lasted at least two minutes and perhaps longer.

[244] Before turning to the issue of the movement of the arrestee's pants, on these facts the search amounted to more than a brief pat-down or frisk search. There was no convincing evidence as to when the small knife in Mr. N.M.' jacket was discovered in relation to the timing of the personal search.

[245] Mr. N.M. was very clear in his testimony that the search he was subjected to was contrary to his own training regarding searches in the field. He maintained that his pants were pulled down so as to expose his genitals and buttocks. He found it disgusting. Sgt. Penrose, in the immediate vicinity of the search, was not as close to N.M. as Traves and Manca. Although this officer did not see the arrestee's pants pulled down, he felt the pants may have been "opened". Const. Traves, the actual searcher, was not in a position to say the search did not happen as described by N.M.. A/Sgt. Manca, also with no specific recall of the N.M. search, considered it would not be unusual "in these type of circumstances" to pull an arrestee's pants down in the manner described by the accused. On balance, on this record, the Crown has not shown that the search did not proceed as described by the accused.

[246] It is also important to note that Insp. Jones and A/Sgt. Manca both expressed the view in this hearing that a strip search involved removal of all of an arrestee's clothing. The OPP Orders in 2002 and 2007 equate a strip search with a "complete" search with all clothing removed. A/Sgt. Manca, a trainer for TRU members, considers that a pat-down search routinely involves inspection of the interior of an arrestee's pants to the point of seeing the crotch area and between the buttocks.

[247] At common law, incidental to a lawful arrest, an arresting police officer has a discretion to search the arrestee for evidence relating to the offence for which the arrest is made, for any weapon or implement that might be used to harm the police, the arrestee or anyone else, or for any item that could facilitate escape. A search incident to arrest is an established exception to the general rule that warrantless searches are *prima facie* unreasonable: *Golden*, at 488; *Alkins*, at para. 26.

[248] In *R. v. Cloutier* (1990), [1990 CanLII 122 \(SCC\)](#), 53 C.C.C. (3d) 257 (S.C.C.) at 278, the court introduced these guidelines respecting search of the person incidental to arrest:

This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.

The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case, for example, if the purpose of the search was to intimidate, ridicule or pressure the accused in order to obtain admissions.

The search must not be conducted in an abusive fashion, and, in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.

[249] In the same case, at pages 277-8, the court recognized that, incidental to an arrest, a pat-down search without reasonable grounds would not be unreasonable:

In this regard a “frisk” search is a relatively non-intrusive procedure: outside clothing is patted down to determine whether there is anything on the person of the arrested individual. Pockets may be examined but the clothing is not removed and no physical force is applied. The duration of the search is only a few seconds. Though the search, if conducted, is in addition to the arrest, which generally entails a considerably longer and more sustained loss of freedom and dignity, a brief search does not constitute, in view of the objectives sought, a disproportionate interference with the freedom of persons lawfully arrested. There exists no less intrusive means of attaining these objectives.

A “frisk” search incidental to a lawful arrest reconciles the public’s interest in the effective and safe enforcement of the law on the one hand, and on the other its interest in ensuring the freedom and dignity of individuals.

[250] This form of field search was subsequently described in *Mann*, at page 327, as a protective search of brief duration lasting a few seconds.

[251] In *R. v. Stillman* (1997), [1997 CanLII 384 \(SCC\)](#), 113 C.C.C. (3d) 321 (S.C.C.) at 344, the court stated that the power to search incidental to arrest was predicated on pragmatic and exigent circumstances inherent to the circumstances of an arrest. Subsequently, in *Caslake*, at pages 107-8, the court observed:

...all of the limits on search incident to arrest are derived from the justification for the common law power itself: searches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question. The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual’s interest in privacy.

[252] Also in 1998, about four years before the search in this case, judgment was released in *Flintoff*. In that case, it was learned that arrestees brought to the station were strip-searched as a matter of routine policy divorced from the circumstances of the particular arrest and arrestee. At page 333, the court

described strip-searching as “one of the most intrusive manners of searching” and an extreme use of police power not justified or sanctioned by law except in limited circumstances.

[253] Then, in *Golden*, at page 467, the court determined that the common law power to search incident to arrest does not include the power to strip-search. The court held that the arrestee had been subjected to more than one strip search including (1) pulling back the pants and underwear and looking inside, and (2) pulling the pants below the knees fully exposing the genitalia and buttocks. At page 473, declaring that persons need to be free from unjustified, excessive and humiliating searches on arrest, the court further stated:

The appellant submits that the term “strip search” is properly defined as follows: the removal or **rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person’s private areas, namely genitals, buttocks**, breasts (in the case of a female), **or undergarments**. This definition in essence reflects the definition of a strip search that has been adopted in various statutory materials and policy manuals in Canada and other jurisdictions (see for example: *Toronto Police Service, Policy & Procedure Manual: Search of Persons, Arrest & Release*, at p. 3; *Crimes Act 1914* (Austl.), Part 1AA, c. 3C, s. 1 “strip search”; Cal. Penal Code 4030 (West 1984); Col. Rev. Stat. Ann. 16-3-405 (West 1982); Wash. Rev. Code. Ann. 10.79.070(1) (West 1983). In our view, **this definition accurately captures the meaning of the term “strip search” and we adopt it for the purpose of these reasons. This definition distinguishes strip searches from less intrusive “frisk” or “pat down” searches**, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee’s genital or anal regions.

(emphasis added)

The court further stated at pages 490-7:

As noted by Dickson C.J. in *Simmons*, *supra*, the different types of searches raise different constitutional considerations: the more intrusive the search, the greater the degree of justification and constitutional protection that is appropriate: *Simmons*, at p. 517. The party seeking to uphold the validity of a warrantless personal search will face a lower burden in the case of a quick pat or frisk search than in the case of a highly invasive body cavity search.

...

...strip searches can be humiliating, embarrassing and degrading for those who are subject to them, and any *post facto* remedies for unjustified strip searches cannot erase the arrestee’s experience of being strip searched.

...

Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy.

...a “frisk” or “pat down” search at the point of arrest will generally suffice for the purposes of determining if the accused has secreted weapons on his person. Only if the frisk search reveals a possible weapon secreted on the detainee’s person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee’s person will a strip search be justified. Whether searching for evidence or for weapons, **the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search.**

The requirement that the strip search be for evidence related to the grounds for the arrest or for weapons reflects the twin rationales for the common law power of search incident to arrest. Strip searches cannot be carried out as a matter of routine police department policy applicable to all arrestees.

. . .

The fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search, even where the strip search meets the definition of being “incident to lawful arrest” as discussed above. Rather, additional grounds pertaining to the purpose of the strip search are required. In *Cloutier, supra*, this Court concluded that a common law search incident to arrest does not require additional grounds beyond the reasonable and probable grounds necessary to justify the lawfulness of the arrest itself: *Cloutier, supra*, at pp. 185-86. However, this conclusion was reached in the context of a “frisk” search, which involved a minimal invasion of the detainee’s privacy and personal integrity. In contrast, a strip search is a much more intrusive search and, accordingly, a higher degree of justification is required in order to support the higher degree of interference with individual freedom and dignity. **In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest.**

In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee’s possession or evidence related to the reason for the arrest. In addition, **the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest.** Where these preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the *Charter*.

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

[254] At page 498, the court further concluded that there existed no reasonable and probable grounds to believe the search had to be conducted with urgency in light of the close proximity to the police station and “given the number of officers on the scene”. The court concluded that there was no exigency reasonably justifying a strip search in the field:

In this respect, it is critical to underscore that where the reasonableness of a strip search is challenged, it is the Crown that bears the onus of proving its legality. It thus must convince the court on a balance of probabilities that either (1) reasonable and probable grounds, as well as exigent circumstances existed, and therefore, a strip search “in the field” was warranted and was conducted in a reasonable manner; or (2) that reasonable grounds existed, that the strip search was carried out at a police station, and conducted in a reasonable manner. Because strip searches are of such an invasive character, they must be considered *prima facie* unreasonable. It is up to the state to rebut this presumption because it is in the best position to know and explain why the search took place, and why it was conducted in the manner and circumstances that it did. This onus rests upon the Crown in any case involving a strip search, as defined in these reasons.

In the present case, the Crown sought to distinguish the first part of the search in the stairwell from the subsequent efforts to seize the plastic wrap from the appellant's buttocks after he was brought back into the Subway shop. We are unwilling to accept such a distinction. The search in the stairwell, whereupon the police pulled back the appellant's pants and underwear in order to visually examine his buttock area, cannot be looked at in isolation. Rather, it must be assessed within the complete context of the events that took place after the appellant's arrest. According to the definition adopted in these reasons, the first part of the search in the stairwell was a strip search, although it was clearly of a less intrusive character than the subsequent search in the restaurant. This visual inspection of the appellant's buttocks, in and of itself, interfered with his privacy, dignity, and integrity.

[255] In the present case, Mr. N.M. exited his residence promptly after the negotiator's call. He never assumed the profile of a barricaded person. To the knowledge of the police, the accused had safely stored registered firearms. He was fully compliant with TRU team directions. Once his jacket was removed, he was restrained by handcuffs and reduced to wearing a t-shirt and sweatpants in the freezing cold. The location of his arrest was a nine to ten-minute cruiser ride from the OPP detachment. He was surrounded by highly trained tactical officers with awesome firepower. In these circumstances, it was entirely unreasonable to conduct a strip search as defined in *Golden* on the arrestee's front lawn.

Warrantless Entry of Dwelling-House

position of parties

[256] The prosecution sought to support the reasonableness of the warrantless dwelling search on the basis of the exercise of an ancillary police power incidental to the arrest of Mr. N.M.. It is said that a safety clear of the dwelling was undertaken respecting "dangerous conditions". While there was no evidence of anyone else in the residence, or injured inside, or of a booby-trap, in the interests of public safety including to protect the officers at the arrest scene, any officers who might subsequently enter with a warrant, or the returning N.M. family, the TRU team officers were entitled to assume the worst and to perform the stealth clear. The Crown's factum supports the constitutionality of the police action in these terms:

The circumstances of the Applicant's arrest and the reasons therefore gave legitimate concern for the safety of others at the scene, and for taking protective measures to ensure that no danger existed. They had just arrested someone who they believed to have a number of weapons and who had allegedly threatened never to be taken from his home. To that end, the "clearing" or protective sweep of the house subsequent to the arrest of the Applicant was consistent with the obligation of the police in relation to public safety. It would have been irresponsible for the police to have simply walked away from the residence at that time.

[257] The defence submitted that once Mr. N.M. was handcuffed and placed in the ERT officers' cruiser, there was no risk from the suspect to anyone else. Mr. Brauti pointed to the evidence of an absence of any information existing to suspect an accomplice or injured party in the N.M. dwelling or the existence of a trap of some kind. In effect, it was argued, the stealth clear was conducted on a routine,

not a case-specific, basis. Without specific articulable facts, the police relied on generalized notions of risk to execute an unreasonable warrantless search in a dwelling-house.

findings/conclusions

[258] The exercise of a warrantless entry to a dwelling-house incidental to a lawful arrest, in the purported exercise of an ancillary police power premised upon public safety concerns, has been the subject of appellate review in Ontario: *R. v. Collins* (1989), [1989 CanLII 264 \(ON CA\)](#), 48 C.C.C. (3d) 343 (Ont. C.A.); *Golub*; *R. v. Bedard* (1998), [1998 CanLII 4009 \(ON CA\)](#), 125 C.C.C. (3d) 348 (Ont. C.A.).

[259] This common law power of warrantless entry and limited search, described in the present case as a stealth clear, and as a “protective sweep” in the United States, is necessarily a narrow justification for government departure from the prior judicial authorization model. Before turning to the circumstances of the present case, review of the treatment of this common law power in the two jurisdictions will be helpful.

Ontario authorities

Collins

[260] On October 14th, 1983 a suspect, subsequently identified as Peter Collins, shot a Nepean police officer at a shopping mall in Nepean, Ontario and stole his service revolver. He then fled to unit 55, 2949 Penny Drive in Nepean. Witnesses provided these facts to the police. The authorities’ information was that Collins had a history of violence and was an escapee from a local regional detention centre. Within about five hours, the police surrounded unit #55, the residence of a female companion of Collins. The police convinced Collins to surrender. He was arrested in the porch area when he exited unit #55. Police officers then entered the residence finding no one else present. During the warrantless entry, prior to the execution of a warrant respecting seizure of the deceased officer’s firearm, officers observed in plain view a loaded sawed-off shotgun, and fully loaded .32 calibre and .38 calibre handguns, as well as ammunition.

[261] On appeal of this pre-*Feeney* case, the Crown sought, in part, to support the police entry as the exercise of an ancillary police power flowing from the circumstances of Collin’s arrest akin to the American “protective sweep” jurisprudence. The actual arrest was in very close proximity to unit #55. It was unknown whether the escapee’s girlfriend was in the unit prepared to shoot at nearby officers or whether she herself was injured.

[262] The appeal court, at pages 364-5, decided the evidence admissibility issue on a s. 24(2) *Charter* analysis:

Accordingly, it is my opinion that the appellant has failed to show that the trial judge erred in failing to find that the police conducted an unreasonable search of the appellant's place of residence and in failing to exclude evidence discovered as a result of such search. In view of the conclusion I have reached with respect to the validity of the search warrant, I need not deal with submission of Crown counsel that the police had the power to enter and search the premises of the appellant without a warrant having regard to the circumstances of the case on the basis of search incidental to arrest or a plain-view seizure. In any event, even if the search or seizure was unreasonable and constituted a breach of the right of the appellant under s. 8 of the *Charter* to be secure against unreasonable search or seizure, it is my opinion that the seized evidence was presumptively admissible. In this regard it must be kept in mind that the offence alleged was the most serious crime provided for in the *Code*, viz., murder. It must further be kept in mind that the evidence seized was in the truest sense real evidence. There can be no doubt that the police had reasonable grounds to believe that the murderer, together with the deceased police officer's revolver and the murder weapon would be found at 2949 Penny Dr., Unit 55. The police had sought advice from the Crown before entering the premises. The matter was an urgent one. There can be no doubt but that the police were acting in good faith. Prior to entering Unit 55, the police were able to contact the appellant therein by telephone. He told them in a taped telephone conversation at 5:35 p.m. that he had four guns in the unit. They persuaded him to come out of the unit. It was only after he left the unit that the police entered the premises to make the search and found and seized the deceased officer's revolver and the gun believed to be the murder weapon.

Golub

[263] About eight hours after reports of Golub striking one person, threatening to "get even" with the staff of certain licensed premises, and showing a shortened rifle carried under his jacket believed by one witness to be a sub-machine gun, the police located Golub's rented basement apartment. With the landlord's assistance, the TPS ETF surrounded the building at about 7:30 a.m. and evacuated the other tenants. The police believed Golub to be intoxicated and distraught based on information from a witness who had spent time with him the prior evening.

[264] The officer-in-charge telephoned Golub telling him the apartment was surrounded and there was no point trying to escape. Golub was directed to come out the door of his apartment with nothing in his hands and to follow the instructions of the officers outside. Within a few minutes, Golub complied by opening his door and walking out backwards. The suspect was arrested.

[265] Four matters of significance transpired relevant to the police conduct which followed:

- (1) the suspect misidentified himself when asked his name in one of the phonecalls from the police
- (2) there was a delay on Golub's part in complying with the police request necessitating a second police phonecall

- (3) when directed to leave the apartment door open, Golub closed and locked the door
- (4) when asked by the ETF supervisor, Sgt. Curts, whether there was anyone else in the apartment, Golub replied, "I don't think so".

[266] Sgt. Curts immediately became concerned that another suspect or other occupants might be in the apartment. The officer's public safety concerns were the safety of officers effecting the arrest and the prospect of turning the scene over to investigators with the risk of a confrontation "with someone else wielding a weapon in the apartment". At this point, ETF officers entered the dwelling without a warrant to thoroughly search, not for evidence, but for any persons who might be inside.

[267] Searching for persons, and told to secure any firearm seen in the course of the entry, the ETF officers discovered a loaded, sawed-off semi-automatic rifle under a mattress together with boxes of ammunition. The ETF emptied the gun and completed their fifteen-minute search. Investigating officers then entered the apartment and seized the rifle.

[268] In support of the constitutionality of the police conduct, the Crown in part argued the application of the police common law power referred to in the American jurisprudence as a "protective sweep".

[269] On appeal, at pages 209-210, in holding that only "exceptional circumstances" will justify a warrantless search of a residence incident to arrest, the court considered whether there was a state interest so compelling "that it must override a person's right to privacy within the home". In the circumstances, the nature of the state interest justifying the warrantless entry was "the interest in protecting the safety of those at the scene" of the arrest – an interest "which must be addressed immediately". Doherty J.A. described such a state interest in this fashion at pages 209-210:

In my opinion, searches of a home as an incident of an arrest, like entries of a home to effect an arrest, are now generally prohibited subject to exceptional circumstances where the law enforcement interest is so compelling that it overrides the individual's right to privacy within the home.

...

What will amount to exceptional circumstances justifying a warrantless search of a residence as an incident of an arrest? I will not attempt an exhaustive answer. Exceptional circumstances do not, however, refer to circumstances which rarely arise, but rather to circumstances where a state interest is so compelling that it must override a person's right to privacy within the home.

Broadly stated, the state interest upon arrest is the effective administration of justice. There are various components to that interest including the need to secure the arrested person, protect those at the scene of the arrest, and preserve evidence. In determining whether exceptional circumstances exist justifying a warrantless search, the nature of the state interest must be identified. The state interest in collecting evidence may not justify a

warrantless search, but the interest in protecting the safety of those at the scene may justify that same search.

...

I would hold that where immediate action is required to secure the safety of those at the scene of an arrest, a search conducted in a manner which is consistent with the preservation of the safety of those at the scene is justified. If, in order to secure the safety of those at the scene, entry into and search of a residence is necessary, I would hold that the risk of physical harm to those at the scene of the arrest constitutes exceptional circumstances justifying the warrantless entry and search of the residence. The search must be conducted for the purpose of protecting those at the scene and must be conducted in a reasonable manner which is consistent with that purpose.

[270] What then of the grounds for exercise of the warrantless power of entry into a dwelling to ensure the safety of those at the arrest scene? At pages 211 and 212, Doherty J.A. stated:

If the circumstances of an arrest give rise to a legitimate cause for concern with respect to the safety of those at the scene, reasonable steps to allay that concern may be taken. The nature of the apprehended risk, the potential consequences of not taking protective measures, the availability of alternative measures, and the likelihood of the contemplated danger actually existing, must all be considered. The officers making this assessment must, of course, do so on the spot with no time for careful reflection. In my opinion, a reasonable suspicion, based on the particular circumstances of the arrest, that someone is on the other side of a closed door with a loaded sub-machine gun, or that someone is lying injured on the other side of that door, creates a legitimate cause for concern justifying entry and search of the apartment for persons.

Sergeant Curts did not order entry based on some pre-set protocol which directed entry in all "gun call" situations, and he was not acting on an unsubstantiated hunch.

...

The American jurisprudence fortifies my view that reasonable grounds to believe someone else was in the apartment were not necessary to justify the protective measures taken by Sergeant Curts. The American cases recognize that, when making an arrest, the police may conduct a "protective sweep" of the place where the arrest occurs even if it is a dwelling-house. That sweep must be based on a reasonable belief of the presence of person or persons who would pose a demonstrable danger to the arresting officers. That belief must be based on specific and articulable facts, but need not amount to probable cause: *Maryland v. Buie*, 494 U.S. 325 (1990). In looking to the American cases to support my rejection of the probable cause standard, I do not intend any comment on the applicability of other aspects of the "protective sweep" doctrine. That standard was met here.

[271] For the purposes of the present case, important principles emerge from those statements in the *Golub* decision:

- (1) Reasonable suspicion, recast in *Mann*, at 323-4, as reasonable grounds to suspect, not the higher threshold of reasonable and probable grounds, must exist to believe a significant state interest is at stake justifying warrantless entry.
- (2) The grounds to suspect must be reasonable and therefore not only honestly held by the police but also such as to objectively justify the exceptional warrantless exercise of state power in a dwelling.

- (3) The reasonable grounds to suspect must be based on articulable facts particular to the circumstances of a specific arrest. In other words, the exercise of the ancillary police powers described here cannot be routine, automatic, based on an inflexible protocol, or based on merely theoretical notions of danger or risk.

[272] In *Golub*, in the result, with an arrest “right outside the door to [Golub’s] apartment”, risk to the police during their withdrawal from the scene, and with the existence of identifiable factors probative of imminent safety concerns such as the suspect’s delay in exiting his dwelling, closing of the door contrary to police direction, and an ambiguous response about the presence of anyone remaining in the apartment, the balance of interests justified the warrantless entry.

[273] Doherty J.A.’s analysis resonates with other relevant authority. Reasonable suspicion does not mean “acting solely on a hunch” but rather a “reasonable and specific inference drawn from the known facts of the situation”: *Mann*, at 326. While fears for safety of police officers and the possibility of violence may be reasons for departure from ordinary procedures, there must be a real factual foundation to support exceptional conduct: *Genest*, at 408; *Schedel* at 208; *Crampton*, at 216, 219-220.

Bedard

[274] Two assailants beat and pistol-whipped a man named Walker in his home causing him bodily harm. Before fleeing, Bedard, who was known to the victim, stated “This ain’t over yet” and further stated that they were next going to “get” an individual named Metcalfe who was known to Walker. A 9-1-1 call summoned the police to Walker’s home and other officers attended Metcalfe’s residence.

[275] As well, the police placed surveillance on Bedard’s farmhouse late at night. Soon, Bedard arrived in his vehicle and went inside. The police phoned the suspect shortly after midnight and asked that he “and any other occupants come outside”. Within minutes, Bedard exited his dwelling with his hands in the air. He was immediately handcuffed and, when asked where his friend was, stated, “What friend?” claiming to have been home all night. Asked for consent to search his home, Bedard agreed. That consent would not, it seems, meet the *Wills* criteria.

[276] The police entered and conducted a thorough search of the home discovering no one else present. The officers, however, discovered marihuana as well as ammunition, and several firearms including a loaded shotgun unsafely stored. The observations made during the warrantless entry supported the issuance of warrants to search.

[277] On appeal, in support of the warrantless actions of the police, the Crown argued authority “to enter the appellant’s residence pursuant to settled common law powers related to protective sweeps” conducted in exigent circumstances. The court, at pages 352-3, accepted this position applying the principles espoused in *Golub*. There was a reasonable basis or legitimate cause for concern for the safety of the officers at the scene of the arrest in circumstances of “articulable facts that raised a reasonable suspicion that further danger existed and that another individual, armed with a firearm might be in the appellant’s residence”. Reasonable steps were taken to allay that concern. The whereabouts of the armed accomplice with whom Bedard acted earlier in the evening was unknown and, at page 354, the court observed that, “when asked about the other suspect, the appellant denied any knowledge and lied about his whereabouts that evening giving rise to a concern that someone else was still in the premises”.

[278] The court further held (at pages 354-5) that while the police could not be criticized for their decision to retreat to obtain search warrants, they “could have seized the weapons, ammunition and narcotics, which were in plain view, had they chosen to do so”.

American authorities

Maryland v. Buie

[279] In *Maryland v. Buie*, 494 U.S. 325 (1990), referred to by Doherty J.A. in *Golub*, the court defined the contours of the protective sweep power of the police:

- (1) A search of a house is generally not reasonable without a warrant to search based upon probable cause. (p. 331)
- (2) Incidental to a lawful arrest, “as a precautionary matter and without probable cause or reasonable suspicion”, arresting officers may search “spaces immediately adjoining the place of arrest from which an attack could be immediately launched”. (p. 334)
- (3) Beyond that, the Fourth Amendment would permit a protective sweep of a broader area only if the police possess a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the belief that the area swept harboured an individual posing a danger to the officer or others. (pp. 327, 333-4)
- (4) “A “protective sweep” is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of

police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding”. (pp. 327, 335)

- (5) Reasonable, “individualized suspicion” is an essential feature of a legitimate protective sweep. There must be a level of “objective justification” arising from the particular circumstances in each case – “it is decidedly not “automatic”, but may be conducted only when justified by a reasonable, articulable suspicion that the house is harbouring a person posing a danger to those on the arrest scene”. (pp. 334-6)

additional American jurisprudence

[280] The substantial degree of American experience with the protective sweep, as a narrow specie of justifiable warrantless search, may be summarized as follows:

- (1) Warrantless entry into a home is presumptively unreasonable. A warrantless search of a dwelling, even though the authorities may have probable cause for a search, will withstand constitutional scrutiny only in an exceptional situation: *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). There exists “no general security check exception to the warrant requirement” where an arrest is effected at a dwelling: *U.S. v. Maldonado*, 472 F.3d 388, 394 (5th Cir. 2006).
- (2) While a search incident to, and contemporaneous with, an arrest is generally confined to the immediate vicinity of the arrest (*Vale v. Louisiana*, at 33), exigent circumstances may reasonably justify entry and search of a dwelling. There is no set formula for determining when exigent circumstances justify a warrantless entry: *U.S. v. Maldonado*, at 393. “Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained”: *U.S. v. Reid*, 226 F. 3d 1020, 1027 (9th Cir. 2000). The need for swift and immediate action in the context of the protective sweep described in *Buie* justifies warrantless intrusion into a dwelling – “[w]hat is missing in this record is any indication that the agents entered Thompson’s home because they believed that they were faced with a “now or never” situation”: *U.S. v. Thompson*, 700 F.2d 944, 948, 950 (5th Cir. 1983).

- (3) It is necessary to give due weight to the judgments of police officers at the scene and their experience and specialized training and deductions from the cumulative information that might elude an untrained person: *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002). The courts should avoid using hindsight or second-guessing officers' actions in dangerous situations where reasonable minds may differ as to police decision-making: *U.S. v. Winston*, 444 F.3d 115, 119-121 (1st Cir. 2006); *U.S. v. Maldonado*, at 393; *U.S. v. Gould*, 364 F.3d 578, 590-1 (5th Cir. 2004); *U.S. v. Castillo*, 866 F.2d 1071, 1079 (9th Cir. 1988).
- (4) Recognizing that the opportunity to obtain a warrant to search is a significant factor in evaluating the constitutionality of warrantless conduct, the asserted existence of urgency and danger will ring hollow where the police themselves create the purported foundational exigency: "We distinguish between cases where exigent circumstances naturally arise during a delay in obtaining a warrant and those where officers have deliberately created the exigent circumstances": *U.S. v. Maldonado*, at 392-3. In effect, a police-created exigency is itself an exception to the *Buie* exception to the need to search by warrant. Abandonment of covert surveillance with a tactical decision to confront a suspect before acquiring warrant authority "is a classic example of a police-manufactured exigency": *U.S. v. Rico*, 51 F.3d 495, 502-3 (5th Cir. 1995). Even where there is no intent to create an emergency, and accepting it is the actions the police took "not the terminology they employed" which is "what is constitutionally determinative" (*U.S. v. Mendez*, 431 F.3d 420, 426 (5th Cir. 2005)), the question becomes whether the actions of the government agents creating the exigency were sufficiently unreasonable or improper as to preclude dispensation with the warrant requirement: *U.S. v. Gould*, at 590. For example, "without reason to believe a criminal suspect was aware of police surveillance, the mere presence of firearms or destructible, incriminating evidence does not create exigent circumstances": *U.S. v. Munoz-Guerra*, 788 F.2d 295, 298-9 (5th Cir. 1986).
- (5) It is apparent that police officers are, at times, compelled by circumstances to enter dangerous environments without an adequate opportunity to take effective prophylactic measures: *U.S. v. Miller*, 430 F.3d 93, 99 (2nd Cir. 2005). Danger or risk to a police officer is "particularly heightened" during an in-house arrest: *U.S. v. Davis*, 471 F.3d 938, 944 (8th Cir. 2006). Where an arrest is made outside a dwelling, the danger to the officers

is lessened where the arrest is far removed from an open doorway: *U.S. v. Castillo*, at 1081. Although an arrest outside a residence cannot “provide its own exigent circumstance so as to justify a warrantless search of an arrestee’s home” (*Vale v. Louisiana*, at 34; *U.S. v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983)), there may, in some cases, arise specific danger to arresting officers making an arrest outside a dwelling justifying warrantless entry and search of the premises: *U.S. v. Paopao*, 469 F.3d 760, 766 (9th Cir. 2006); *U.S. v. Lawlor*, 406 F. 3d 37, 41 (1st Cir. 2005); *U.S. v. Maldonado*, at 393-4; *U.S. v. Mendez*, at 428; *U.S. v. Hoyos*, 892 F.2d 1387, 1397 (9th Cir. 1989); *U.S. v. Colbert*, 76 F.3d 773, 776-7 (6th Cir. 1996); *Sharrar v. Felsing*, 128 F.3d 810, 820 (3rd Cir. 1997).

- (6) Reasonable suspicion requires a police officer to act on “something more than an inchoate and unparticularized suspicion or hunch”: *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989). The existence of reasonable suspicion requires examination of the totality of the circumstances: *U.S. v. Maldonado*, at 395; *U.S. v. Hoyos*, at 1393. “Reasonable suspicion is just that, it is not probable cause or a more likely than not standard, and it does not exclude other reasonable possibilities”: *U.S. v. Gould*, at 593; *U.S. v. Hauk*, 412 F.3d 1179, 1193 (10th Cir. 2005).
- (7) Offensive to the Constitution are protective sweeps conducted as a matter of “standard procedure”: *U.S. v. Castillo*, at 1078-9 (“the fourth amendment was adopted for the very purpose of protecting us from “routine” intrusions by governmental agents into the privacy of our homes”); *U.S. v. Davis*, 471 F.3d 938, 947 (8th Cir. 2006) (“Four officers testified that it is their department’s policy to conduct a sweep of a house during every home arrest as a matter of course... *Buie* does not allow for a sweep in all cases...future sweeps must be similarly justified in the individual cases, and may not be conducted as a matter of course”); *Fishbein v. City of Glenwood Springs*, 469 F.3d 957, 962 (10th Cir. 2006) (“Protective sweeps are not justified as a matter of course”); *U.S. v. Gandia*, 424 F.3d 255, 263-4 (2nd Cir. 2005) (“Officers must point to facts that give rise to an individualized suspicion and cannot rely solely on generalisations that suspects are usually accompanied by dangerous third parties”); *U.S. v. Hauk* (Kansas City Police policy to conduct protective sweep of arrestee’s home in every instance – “neither the 4th amendment nor the fact-intensive question of reasonable suspicion accommodate a policy of

automatic protective sweeps”); *U.S. v. Moran-Vargas*, 376 F.3d 112, 116 (2nd Cir. 2004) (“...generalizations, without more, are insufficient to justify a protective sweep”).

- (8) Having “no information” or “no specific” basis for a belief that anyone remains in the dwelling from which the arrestee has emerged is the antithesis of reasonable suspicion based upon case-specific articulable facts: *U.S. v. Gandia*, at 264; *U.S. v. Moran-Vargas*, at 117; *U.S. v. Carter*, 360 F.3d 1235, 1242-3 (10th Cir. 2004); *Sharrar v. Felsing*, at 824-5. On this point, these authorities have adopted the reasoning in *U.S. v. Colbert*, at 778-9:

Finally, Officer Hawes testified that he “didn’t have any information at all” when asked whether he had information that anyone was inside the Lewis apartment prior to his decision to conduct the protective sweep. Lack of information cannot provide an articulable basis upon which to justify a protective sweep.

...

Indeed, this justification threatens to swallow the general rule requiring that police obtain a warrant as completely as does focusing on the dangerousness of the arrestee. In fact, allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep. Finally, and perhaps most importantly, allowing the police to justify a protective sweep on the ground that they had no information at all is directly contrary to the Supreme Court’s explicit command in *Buie* that the police have an articulable basis on which to support their reasonable suspicion of danger from inside the home. “No information” cannot be an articulable basis for a sweep that requires information to justify it in the first place.

...

Finally, we recognize that police officers have an incredibly difficult and dangerous task and are placed in life threatening situations on a regular basis. It would perhaps reduce the danger inherent in the job if we allowed the police to do whatever they felt necessary, whenever they needed to do it, in whatever manner required, in every situation in which they must act. However, there is a Fourth Amendment to the Constitution which necessarily forecloses this possibility. As long as it is in existence, police must carry out their often dangerous duties according to certain prescribed procedures, one of which has been transgressed here.

- (9) The “mere possession of a gun...no matter how grievous a crime, does not necessarily show exigent circumstances” and an arrestee’s own dangerousness is irrelevant to a protective sweep analysis once the arrestee is in custody: *Sharrar v. Felsing*, at 825. The mere physical capacity of a structure to harbour unseen occupants does not amount to an articulable

threat to officer safety: *U.S. v. Wigg*, 662 F.2d 1325, 1330 (9th Cir. 1981).

[281] On the evidence, by the time Mr. N.M. was handcuffed, searched and in the ERT officers' cruiser, the police, who were no longer positioned near the bungalow, were aware of the following:

- (1) the TRU team reconnaissance and sniper units had seen only one person in the dwelling
- (2) there was no evidence of anyone else's vehicle in the driveway
- (3) the complainant and the children were at a family shelter and no one else was known to reside in the N.M. dwelling to the knowledge of the OPP
- (4) Mr. N.M.' firearms were registered and, according to Benoit and the complainant, the guns were securely stored
- (5) N.M. quickly exited his residence following the phonecall from the police negotiator
- (6) the negotiators considered that in the phonecall Mr. N.M. sounded calm, much as he had been described by Benoit
- (7) Mr. N.M. was compliant and cooperative with the TRU team arrest unit.

[282] Although Insp. Jones and McKinnon expressed the view that the use of a stealth clear is not an automatic response in a high-risk arrest situation at a dwelling, there is no confirmation of the discretionary nature of the stealth clear in the Force's standard operating procedures materials.

[283] Sgt. Penrose's experience suggested it was "rare" that his team was not directed to execute a stealth clear. It is evident from the TRU team officers' testimony that they assume the worst, and without the need for case-specific factors, act to achieve 100% confirmation that the arrestee has no armed accomplice, that no harmed party remains within the dwelling and that no trap has been set creating a risk to anyone entering the residence subsequent to the arrest.

[284] None of the witnesses, including Insp. Jones, could point to any information, evidence or articulable facts to support a reasonable suspicion that any public safety danger lurked in the arrestee's residence or that any injured party was inside. The authorization to enter and search the residence, intrusion upon Mr. N.M.' reasonable expectations of privacy in his dwelling, was premised exclusively on theoretical notions of public safety concerns. This is exactly the

type of reasoning which *Golub*, *Bedard*, *Buie* and the relevant American cases would find to be constitutionally offensive.

[285] In the specific circumstances of this case, there was no reasonably necessary justification for the TRU team's warrantless entry into the dwelling and its ensuing and lengthy search of the entire residence. On March 20th, 2002, prior to the stealth clear, the police were possessed of no reasonable grounds to obtain a warrant to seize Mr. N.M.' firearms on account of unsafe storage. It was by virtue of the unconstitutional warrantless search that the TRU team discovered, and passed on to criminal investigators, information as to two unsafely stored firearms in the N.M. dwelling.

Consent Search

position of parties

[286] Ms. Cullen submitted that the consent given by Mr. N.M. on March 20th, 2002 to the seizure of his three registered handguns and the shotgun in the master bedroom closet was a valid and informed waiver of the accused's s. 8 *Charter* right:

- (1) Mr. N.M. was provided a timely opportunity to speak to counsel prior to the consent and exercised that right through multiple conversations with counsel
- (2) The idea of consent seizures was initiated by Mr. N.M. and his counsel.
- (3) At this point, the OPP already knew of the existence of Mr. N.M.' three handguns through registration records and the complainant. Given the domestic violence context of the assault charge, the police had an interest in curtailing Mr. N.M.' access to firearms. Given the accused's consent to seize the handgun in the bedroom closet, those executing such a consent would inevitably see the unsafely stored shotgun in the same closet.
- (4) The accused had a pre-existing back injury. He was not physically mistreated during his arrest. Although Mr. N.M.' medicine had yet to be retrieved for him at the time of the consent, the terms of the *Wills* consent and the active and cooperative participation of the accused as seen in the videotaped proceedings at the detachment, for example fine-tuning the descriptions of the locations of the relevant firearms

after drawing floor diagrams of his residence, evidences awareness and comprehension of his circumstances.

- (5) Sgt. James corrected Mr. N.M.' apparent misapprehension regarding the seizure and removal of two firearms from his residence. There was no further obligation on the officer to inform the accused of the lack of a *Feeney* warrant or of the warrantless nature of the OPP actions the night before. In all the circumstances, and knowing the unsecured condition of some of the firearms, Mr. N.M. provided his consent.

[287] The defence disagrees that the evidence supports discharge by the Crown of its onus to establish a valid and informed consent:

- (1) Although Mr. N.M. had access to counsel, he was acting under a misapprehension as to facts critical to an informed decision to give consent to seize the four firearms. He believed that the police were aware of the unsafe storage of the closet firearms, subject to any future defence regarding their unsecured condition, on account of a lawful OPP entry to his dwelling. Sgt. James, who conducted part of the consent process off-camera, failed to provide information critical to N.M.' decision-making – that no *Feeney* or other lawful warrant existed or legal warrantless searches had been made onto his property and into his dwelling.
- (2) The object of the police agreement to the consent process was an unsafe firearm storage investigation. Had the true focus been domestic violence and firearms, Sgt. James would have sought to include the accused's other long guns in the consent document. The unsafe storage information in the hands of the OPP was the direct result of the unconstitutional, warrantless entry and search of the dwelling by the TRU team. The "cat was out of the bag" and, knowing the police were preparing a warrant the accused believed to be based on legally attained observations of alleged unsafe storage, he consented.

[288] Ms. Cullen submitted that the OPP searchers, once in the N.M. residence, did not stray beyond the spatial limits of the consent provided by Mr. N.M.. Counsel submitted that the tallest police officer to look in the master bedroom closet, Const. Dudzinski, saw the cross-bow in plain view on the top shelf. The item was not searched for nor was it seized. Crown counsel expressed the view that perhaps Det. Const. Manser was confused when, in her s. 117.04

affidavit, she sourced observation of the accused's gun locker to a sighting by Sgt. James during execution of the consent seizures.

[289] Mr. Brauti submitted that James and Dudzinski did not feel restrained by the terms of the consent document and searched beyond the constraints described in the consent. Counsel argued that Const. Dudzinski would not likely confuse the officers' actions on a two-officer consent search with those of a large body of searchers acting under a s. 117.04 public safety warrant. Mr. Brauti relies on the in-house seizure of the cross-bow, while the consent was being executed, as indicative of mis-execution of the consent and not a legitimate plain view sighting. Mr. N.M. testified that the item was behind a banker's box or boxes on the shelf. Sgt. Penrose, who thoroughly searched the closet, did not note the weapon's existence. Const. Dudzinski professes no recall of seeing the cross-bow.

findings/conclusions

[290] The Crown has established on balance that Mr. N.M. was physically and mentally capable of understanding the consent process. It was the accused and his counsel who initiated the discussion of consent seizures. I do not accept that Sgt. James intentionally deprived Mr. N.M. of his medication. Assuming the accused made the request for medication, Sgt. James clearly misunderstood what he wanted. In any event, Mr. N.M. drew diagrams of the locations of the firearms, participated in fine-tuning the written descriptions of their location, read and signed the consent, and was confident, composed and alert in his on-video discussions with Sgt. James. Mr. N.M. had a pre-existing back injury and was on medical leave from his employment. Any signs of discomfort or lack of full mobility, I am satisfied, relate to that injury not the circumstances of the arrest or the absence of medication.

[291] Consent, where constitutionally valid, removes any reasonable expectation of privacy consistent with the terms of the consent or waiver. In other words, "an individual's expectation of privacy cannot be infringed by conduct that has been authorized by the individual in question": *Evans*, at para. 12.

[292] Sgt. James understood that in securing a consent to seize from Mr. N.M. she should strive to comply with the benchmark guidelines set out by Doherty J.A. in *R. v. Wills* (1992), [1992 CanLII 2780 \(ON CA\)](#), 70 C.C.C. (3d) 529 (Ont. C.A.) at 546-7. She was right to do so as the *Wills* criteria have served as a useful yardstick in ensuring government action in circumstances of an informed and valid waiver of s. 8 *Charter* rights. The *Wills* decision has received widespread acceptance: *R. v. Borden* (1994), [1994 CanLII 63 \(SCC\)](#), 92 C.C.C. (3d) 404 (S.C.C.) at 416-7; *R. v. Backhouse* (2005), [2005 CanLII 4937 \(ON CA\)](#), 194 C.C.C. (3d) 1 (Ont. C.A.) at 50-3; *R. v. Perello* (2005), [2005 SKCA 8 \(CanLII\)](#), 193 C.C.C. (3d) 151 (Sask. C.A.) at 157-8; *R. v. Nicholas* (2004), [2004 CanLII 13008 \(ON CA\)](#),

182 C.C.C. (3d) 393 (Ont. C.A.) at 407-8; *R. v. G.(M.C.)*, [2001] M.J. No. 482 (C.A.) at para. 12-4.

[293] In his testimony, Mr. N.M. acknowledged that he had not been subject to any inducements or pressures in the consent process. Mr. N.M. had full access to counsel. The consent was voluntary. He understood the consequences included use as evidence in a careless storage prosecution. As a police officer, the accused knew the condition in which he had left his firearms and whether there was compliance or not with the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations* under the *Firearms Act*. In addition, the *Wills* form made specific reference to the officer's "investigation of unsafe storage of a firearm".

[294] The question for determination then is whether the consent was informed. In *Borden*, at 417, the court stated:

In order for a waiver of the right to be secure against an unreasonable seizure to be effective, **the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful.** This is equally true whether the individual is choosing to forego consultation with counsel or choosing to relinquish to the police something which they otherwise have no right to take.

(emphasis added)

[295] In *Wills*, the A.L.E.R.T. "warn" test result was communicated to the accused by the police. Unbeknownst to the police, the testing device had not been properly calibrated and was giving an erroneous reading. The test result, not a "fail" reading, was relied upon by *Wills* in agreeing to a breathalyzer test which yielded an over .08 reading. At page 548, the court held that this amounted to "misinformation" which significantly impaired *Wills*' understanding of the consequences of taking the test.

[296] In the *Backhouse* case, the accused was asked by the police whether he would submit to a test for gunshot residue on his hands. The officer informed Backhouse that the test would tell whether he had recently fired a gun. The accused was not told that the test could be positive because of transference even if he had not fired or handled a gun. At pages 52-3, the court found that, although the "misinformation...provided by the officer was inadvertent and innocent", it sufficiently impaired the accused's understanding of the consequences of the test so as to "negative the consent".

[297] In *R. v. O'Connor* (2002), [2002 CanLII 3540 \(ON CA\)](#), 170 C.C.C. (3d) 365 (Ont. C.A.), the court reviewed consent to the search of a truck in a murder investigation. The police, who had no grounds for an arrest or a search warrant, persuaded O'Connor to consent in part by telling him that they "could apply for a warrant". At pages 389-390, the court held that the police, having raised the subject of getting a warrant without telling O'Connor they had no grounds to do so at that point, "likely misled the appellant about the consequences of refusing to

give his consent” and that he therefore gave a consent “not made on the basis of proper information”.

[298] In the present case, from provincial firearms registration records, the authorities were aware of the existence of the three handguns identified in the consent. From the complainant and Benoit, the police knew Mr. N.M. was as well in possession of long guns and understood that all weapons were securely stored. However, until the TRU team effected its unconstitutional entry and search of the dwelling, Sgt. James had no reason to believe that an unsafe storage issue existed.

[299] The exact particulars of the pre-video discussions are unclear on the evidence and unfortunately were not recorded. It is apparent that Mr. N.M. knew the TRU team had been in his residence and seen the “closet firearms”. He did not know the precise authority by which they entered but, on his evidence, which I am not prepared to reject, had been told they did so legally. He learned from Sgt. James that the police were going to obtain a warrant to search his residence. In the face of that eventuality, and the police having seen two of the firearms already, and perhaps to serve his own purposes in limiting any police search of his premises, Mr. N.M. decided to be cooperative and consent to seizure of the closet firearms as well as the other two registered firearms. James was drafting a s. 487 warrant application. Given that the consent form refers to an unsafe storage of firearms investigation and that the officer did not seek to acquire N.M.’ long guns in the consent, the accused would reasonably believe that the warrant to search related not to public safety in domestic assault cases but solely to a criminal unsafe storage investigation.

[300] Whether described as misinformation that the police had legally discovered the firearms in the closet or an omission to inform Mr. N.M. that the TRU team entry and search was not authorized by law, though unappreciated by Sgt. James, I am satisfied on balance that the accused did not have the requisite informational foundation to give an informed consent. Put differently, the Crown has not established, on balance, that the accused would have provided the consent had he been aware that the unsafe storage information had come to the attention of the authorities as a result of a s. 8 *Charter* breach. I am unable to interpret Ms. Mulchay’s in-court comments as foreclosing this conclusion.

[301] A consent search or seizure must be confined to the terms and limits of the authorizing consent: *R. v. Smith* (1998), [1998 ABCA 418 \(CanLII\)](#), 126 C.C.C. (3d) 62 (Alta. C.A.) at 70-1. The Crown’s submission that Sgt. James and Const. Dudzinski obeyed the limits of the consent is not, on balance, made out on the evidence. Leaving aside Sgt. James’ testimonial use of language of having conducted a consent search as opposed to consent seizures, and leaving aside Dudzinski’s retracted evidence, Sgt. James’ evidence that execution of the consent involved no searching activity beyond that strictly incidental to finding and removing the identified firearms is contradicted in two respects.

[302] Mr. N.M. testified that the small cross-bow was concealed behind a bankers box on the top shelf of the closet. The Crown acknowledges such a box was on the shelf. Sgt. Penrose, conducting a methodical search including for weapons, made no note of seeing a cross-bow in the closet. Const. Dudzinski claims no memory of discovering a cross-bow. Finally, Sgt. James' affidavit and in-court evidence on the point are inconsistent as to whether she observed the item on the shelf. The totality of the evidence suggests that Const. Dudzinski was searching the top shelf and not encountering something in plain view.

[303] A person has no reasonable expectation of privacy in things exposed to plain view: *R. v. Boersma* (1994), [1994 CanLII 99 \(SCC\)](#), 31 C.R. (4th) 386 (S.C.C.) at 387. A "central" feature of the plain view doctrine is "a prior justification for the intrusion into the place" where the plain view occurred: *Buhay*, at 114; *R. v. Longtin* (1983), [1983 CanLII 1746 \(ON CA\)](#), 5 C.C.C. (3d) 12 (Ont. C.A.) at 16. Inevitably, in executing a lawful consent, the police will be in a position to make plain view observations. Sgt. James and Const. Dudzinski were lawfully positioned at the master bedroom closet in order to seize two of the firearms described in the consent. The plain view doctrine confers a seizure power not a search power. It does not permit "an exploratory search to find other evidence": *R. v. Fawthrop* (2002), [2002 CanLII 45004 \(ON CA\)](#), 166 C.C.C. (3d) 97 (Ont. C.A.) at 115 (approving *R. v. Spindloe* (2001), [2001 SKCA 58 \(CanLII\)](#), 154 C.C.C. (3d) 8 (Sask. C.A.) at 37).

[304] In other words, Const. Dudzinski was not at liberty to rummage on the top shelf or move the box – such conduct would be at odds with finding an item in plain view or "immediately obvious": *Law*, at 462.

[305] Given that the firearm to be seized in the basement was at the bottom of the stairs in the rafters, the Crown agreed that the searchers should not have been in a position to make observations of the gun locker in a separate room. Sgt. James' affidavit, however, states that she saw the gun locker during the attendance at the N.M. home pursuant to the consent authorization. Det. Const. Manser's public safety warrant application states that she learned from Sgt. James' attendance that "the gun vault was locked" – some evidence that James checked the locker on March 19th.

[306] These examples, illegitimate plain view observations, tend to confirm Dudzinski's retracted testimony of a broader search conducted on March 20th, 2002. On the whole of the evidence, I am not satisfied that the limits of the consent were honoured.

Public Safety Warrant

position of parties

[307] Mr. Brauti noted that s. 117.04 of the *Code*, the enabling legislation for Det. Const. Manser's public safety warrant, was declared unconstitutional about four months after the officer's search. Counsel accepted, however, that Det. Const. Manser's affidavit was drafted in such a way as to eliminate the constitutional defect in the *Hurrell* decision. Ms. Cullen concurred with this view.

[308] The defence submitted that Det. Const. Manser, as an affiant tendering an application for a warrant, was legally obliged to present a full, fair and frank account of the relevant narrative and circumstances integral to the statement of grounds of belief. Mr. Brauti argued that Det. Const. Manser, though aware of the warrantless actions and observations of the TRU team and the absence of a *Feeney* warrant, failed to disclose those facts in her affidavit. It is argued that this amounted to material non-disclosure denying the issuing justice the opportunity to critically review the warrant application by the same police force which had engaged in unreasonable warrantless searches at the identical premises sought to be searched with the public safety warrant. Counsel submitted that without the evidence of the TRU team observations in N.M.' dwelling, and Sgt. James' discovery of the cross-bow, the complainant's information would not alone satisfy the test for issuance of a public safety warrant – otherwise, every domestic assault case with (a) registered firearm(s) in the house would attract such warrants as opposed to the less intrusive and more common measure of an ordered surrender of firearms as a condition of bail. And here, it was argued, with two unconstitutional searches of the residence already, on March 20th (TRU team) and March 21st (consent), the court would likely exercise its discretion to decline the public safety warrant.

[309] In response, Ms. Cullen noted that Det. Const. Manser disclosed the stealth clear in her affidavit. It was argued that the evidence does not clearly establish that Manser recognized that the actions of the TRU team were unconstitutional. It is unlikely she did if Insp. Jones did not. Further, assuming the TRU team conduct to have been unconstitutional, it is argued that the case cannot be made for suggesting that Manser ought to have known its conduct to have been offensive to s. 8 of the *Charter*. Crown counsel submitted that there was no obligation on Manser's part to include in her affidavit reference to the lack of a *Feeney* warrant. Finally, Ms. Cullen submitted that redacting the information the defence alleges to have been unconstitutionally obtained, the facts learned from the complainant and Benoit would have supported issuance of the public safety warrant in this case.

[310] Mr. Brauti further submitted that Det. Const. Manser's affidavit contained ambiguity, improperly sourced grounds for suggesting N.M. posed a risk, and non-disclosure of information relevant to the existence of a real or urgent public safety issue. For example, para. 28 and 29 of the affidavit, respectively referring to Mr. N.M.' preparedness to shoot any officer coming to his door and to the Kirec situation, were presented as having time-present relevance although the affiant had no idea of the exact words spoken by N.M., or their context, or the timing of

those statements. If Manser had no idea of the age of the statements by N.M. she ought to have said so. Further, the affidavit failed to disclose that as of the evening of March 19th the OPP knew Mr. N.M. was not suicidal and that at 3:30 p.m. that day, a TPS ETF officer, Benoit, considered N.M. to be calm just eight to nine hours before the accused cooperatively surrendered to the TRU team.

[311] Ms. Cullen submitted that a fair reading of Det. Const. Manser's affidavit does not reveal any representations of timelines for the utterances attributed to Mr. N.M..

[312] Mr. Brauti argued that in furtherance of her obligations as an affiant, Det. Const. Manser ought to have disclosed in her affidavit particulars of the approaches of the STF officers while she was drafting that affidavit. The Crown was not called upon to respond to this submission.

findings/conclusions

[313] Only a few months after the issuance of the public safety warrant, s. 117.04 was found to suffer from substantive constitutional defects: *R. v. Hurrell* (2002), [2002 CanLII 45007 \(ON CA\)](#), 166 C.C.C. (3d) 343 (Ont. C.A.) (notice of discontinuance filed [2002] S.C.C.A. No. 370). Apart from the fact that the police were entitled to rely on the law as it was at the date of the warrant application (*Kokesch*, at 230-1), Det. Const. Manser's affidavit met the transitional standard set by *Hurrell* during the period of the suspended declaration of invalidity.

[314] Before turning to the sufficiency of the grounds of belief for the issuance of the public safety warrant, something should be said about the appropriate scope of review.

[315] With a challenge to a warranted search, the reviewing court is not entitled to substitute its decision for the issuing justice. Rather, the court is obliged to determine whether the decision of the judicial officer is one he or she could reasonably and judicially have reached in the exercise of discretion to issue the warrant: *R. v. Garofoli* (1990), [1990 CanLII 52 \(SCC\)](#), 60 C.C.C. (3d) 161 (S.C.C.) at 188; *Quebec (Attorney General) v. Laroche* (2002), [2002 SCC 72 \(CanLII\)](#), 169 C.C.C. (3d) 97 (S.C.C.) at 126-7; *R. v. Le*, [2006] B.C.J. No. 2698 (C.A.) at para. 8-9; *R. v. Al-Maliki*, [2005 BCCA 157 \(CanLII\)](#), [2005] B.C.J. No. 568 (C.A.) at para. 19; *R. v. Budd* (2000), [2000 CanLII 17014 \(ON CA\)](#), 150 C.C.C. (3d) 108 (Ont. C.A.) at 117 (leave to appeal refused [2001] 1 S.C.R. vii); *R. v. Church of Scientology* (No. 6) (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) at 494 (leave to appeal refused [1989] 1 S.C.R. vii); *Re Print Three Inc. et al. and the Queen* (1985), [1985 CanLII 2073 \(ON CA\)](#), 20 C.C.C. (3d) 392 (Ont. C.A.) at 397-8.

[316] The appropriate approach for judicial review of the facial validity of a search warrant and related ITO is scrutiny of the whole of the document, not a limited focus upon an isolated passage or paragraph. Reference to all data within

the four corners of the information, a common sense review not line-by-line word-by-word dissection, provides the fair and reasonable context for the assertions in question: *R. v. Grant* (1999), [1999 CanLII 3694 \(ON CA\)](#), 132 C.C.C. (3d) 531 (Ont. C.A.) at 543 (leave to appeal refused [1999] S.C.C.A. No. 168); *R. v. Chan*, [1998 CanLII 5765 \(ON CA\)](#), [1998] O.J. No. 4536 (C.A.) at para. 4; *R. v. Melenchuk and Rahemtulla*, [1993] B.C.J. No. 558 (C.A.) at para. 15-18; *R. v. Sisimonyi Gindele et al. v. British Columbia (Attorney General)* (1991), [1991 CanLII 984 \(BC CA\)](#), 2 B.C.A.C. 73 at 79.

[317] I disagree with the Crown's submission that where text of grounds of belief in an ITO is sufficient to support issuance of the warrant, on the basis that the statutory prerequisites are met, that no discretion exists to decline to issue the warrant. In *Descoteaux v. Mierzewski et al.* (1982), [1982 CanLII 22 \(SCC\)](#), 70 C.C.C. (2d) 385 (S.C.C.) at 410, the court stated:

Some say that the justice of the peace has no discretion to refuse to issue a search warrant or to impose terms of execution once the requirements of form and substance in s. 443 [487] have been met. They argue that in s. 443 the word "may" means "must" and does not confer any discretion. According to this interpretation, the justice of the peace may issue a warrant only if he is satisfied that there is reasonable ground to believe that one of the things provided for in s. 443(1) is to be found in the place sought to be searched, but must do so as soon as he is so satisfied, and the only condition of execution on the premises that he may impose is set out in s. 444 of the *Code*:

444. A warrant issued under section 443 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night.

Others, on the contrary, say that generally the justice of the peace has the discretion to refuse the warrant, so long as this discretion is exercised judicially and so long as the decision to refuse the warrant is not capricious or arbitrary: R. F. Carter, *The Law Relating to Search Warrants* (1939), p. 52; J. A. Fontana, *The Law of Search Warrants in Canada* (1974), pp. 7 and 51 *et seq.*; *Re Pacific Press Ltd. and The Queen et al.* (1977), [1977 CanLII 1922 \(BC SC\)](#), 37 C.C.C. (2d) 487, 38 C.R.N.S. 295, [1977] 5 W.W.R. 507.

I come down on the side of the discretion, as it allows more effective judicial control of the police. Searches are an exception to the oldest and most fundamental principles of the common law, and as such the power to search should be strictly controlled.

[318] Similarly, in *A.-G. Quebec v. C.B.C.* (1991), [1991 CanLII 49 \(SCC\)](#), 67 C.C.C. (3d) 517 (S.C.C.) at 533, the court observed that:

Even after the statutory conditions have been met it may still be a difficult and complex process to determine whether a search warrant should be issued.

See also *C.B.C. v. A.-G. for New Brunswick et al.* (1991), [1991 CanLII 50 \(SCC\)](#), 67 C.C.C. (3d) 544 (S.C.C.) at 552, 554. The existence of "a residual discretion is a constitutional requirement": *R. v. Baron* (1993) [1993 CanLII 154 \(SCC\)](#), 78 C.C.C. (3d) 510 (S.C.C.) at 522-8. Accordingly, in the balancing of interests, individual privacy interests and an effective investigatory function, the justice cannot act as a mere "rubberstamp": *Araujo*, at 464; *Baron*, at 526.

[319] In summary form, the principal requirements of a search warrant application are as follows:

- (1) The application must disclose reasonable grounds or credibly-based probability regarding the essential statutory prerequisites. This standard of reasonable probability does not equate to proof beyond a reasonable doubt or to a *prima facie* case: *R. v. Debot* (1989), [1989 CanLII 13 \(SCC\)](#), 52 C.C.C. (3d) 193 (S.C.C.) at 213. Accordingly, reasonable grounds “are not proof absolute” though they must be more than mere suspicion: *Smith*, at 77.
- (2) In *R. v. Durling* (2006), [2006 NSCA 124 \(CanLII\)](#), 214 C.C.C. (3d) 49 (N.S.C.A.) at 56-7, the court set out a non-exhaustive list of the key elements of what must be shown to establish credibly-based probability:
 - (i) The Information to obtain the warrant must set out sworn evidence sufficient to establish reasonable grounds for believing that an offence has been committed, that the things to be searched for will afford evidence and that the things in question will be found at a specified place: (*R. v. Sanchez* (1994), [1994 CanLII 5271 \(ON SC\)](#), 93 C.C.C. (3d) 357 (Ont. Ct. Gen. Div.) at 365).
 - (ii) The Information to obtain as a whole must be considered and peace officers, who generally will prepare these documents without legal assistance, should not be held to the “specificity and legal precision expected of pleadings at the trial stage.” (*Sanchez, supra*, at 364)
 - (iii) The affiant’s reasonable belief does not have to be based on personal knowledge, but the Information to obtain must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant’s belief: *R. v. Yorke* (1992), [1992 CanLII 2521 \(NS CA\)](#), 115 N.S.R. (2d) 426 (C.A.); *aff’d* [1993 CanLII 83 \(SCC\)](#), [1993] 3 S.C.R. 647.
 - (iv) Where the affiant relies on information obtained from a police informer, the reliability of the information must be apparent and is to be assessed in light of the totality of the circumstances. The relevant principles were stated by Sopinka, J. in *R. v. Garofoli*, [1990 CanLII 52 \(SCC\)](#), [1990] 2 S.C.R. 1421 at pp. 1456-1457:
 - (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
 - (ii) The reliability of the tip is to be assessed by recourse to “the totality of the circumstances”. There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:
 - (a) the degree of detail of the “tip”;
 - (b) the informer’s source of knowledge;

- (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
- (iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

The fundamental point is that these specific propositions define the basic justification for the search: the existence of "credibly-based" probability that an offence has been committed and that there is evidence of it to be found in the place of search.

- (3) It is imperative that there exist a basis for issuance "founded on reliable information": *Araujo*, at 471.
- (4) The ITO ought to be clear and concise and "need not include every minute detail of the police investigation": *C.B.C. v. A.-G. for New Brunswick et al.*, at 562; *Araujo*, at 470.

[320] Because a search warrant application is generally an *ex parte* application, there is a "legal obligation" to provide "full and frank disclosure of material facts" with the relevant facts set out "truthfully, fully and *plainly*": *Araujo*, at 469-470 (emphasis of original). A justice can only perform the judicial function of issuing a warrant if "provided with accurate and candid information": *R. v. Hosie* (1996), [1996 CanLII 450 \(ON CA\)](#), 107 C.C.C. (3d) 385 (Ont. C.A.) at 399; *R. v. Agensys International Inc.* (2004), [2004 CanLII 17920 \(ON CA\)](#), 187 C.C.C. (3d) 481 (Ont. C.A.) at 491. The "requirement of candour is not difficult to understand; there is nothing technical about it": *R. v. Morris* (1998), [1998 NSCA 229 \(CanLII\)](#), 134 C.C.C. (3d) 539 (N.S.C.A.) at 551. An affiant for a warranted search is under a duty to avoid drafting which attempts to trick the reader, for example by the use of boiler-plate language, or which could mislead the court "by language used or strategic omissions": *Araujo*, at 470. Careless language in an ITO "deprives the judicial officer of the opportunity to fairly assess whether the requirements of a warrant have been met" and "strikes at the core of the administration of justice": *Hosie*, at 398-9.

[321] An aspect of an affiant's disclosure obligation is to reveal, not to conceal, any unconstitutional investigative step by which the authorities have secured information relevant to the ongoing investigation: *Grant* (S.C.C.), at 196-7; *R. v. Creelman*, [2007] N.S.J. No. 174 (C.A.) at para. 28-36. As a general rule, it does not lie with the police to not disclose on the basis that they are confident that the misconduct is irrelevant because of an independent source for the information, inevitable discovery or attenuation. The court considering the warrant application will itself make the determination of the relevance of the pre-application behaviour. The disclosure may be relevant not only to the discretion to issue/refuse a warrant but also to whether the justice asks for more information (*Araujo*, at 464) or considers the imposition of conditions relating to execution of the warrant: *Baron*, at 526.

[322] The existence of fraud, non-disclosure, misleading information, unconstitutionally obtained facts, new evidence, or the omission of facts material to the exercise of discretion to issue a warrant are all relevant to review of a warrant and relate to whether there continues to be any basis for the decision of the authorizing judge: *Garofoli*, at para. 56. Ordinarily, the reviewing court looks to the remaining grounds of belief in an ITO after redaction of the offensive text, or in the case of an omission with the addition of the relevant missing fact(s), in order to determine whether there is a basis upon which the court could have issued the warrant: *R. v. Bisson* (1994), 1994 CanLII 46 (SCC), 94 C.C.C. (3d) 94 (S.C.C.) at 95-6; *Araujo*, at 471-2; *R. v. Wiley* (1993), 1993 CanLII 69 (SCC), 84 C.C.C. (3d) 161 (S.C.C.) at 170-2; *R. v. Kesselring* (2000), 2000 CanLII 2457 (ON CA), 145 C.C.C. (3d) 119 (Ont. C.A.) at 123. “In this way, the state is prevented from benefitting from the illegal acts of the police officers, without being forced to sacrifice search warrants which would have been issued in any event”: *Plant*, at 215; *Smith*, at 76.

[323] That said, a reviewing judge is not foreclosed, in appropriate circumstances, “from concluding on the totality of the circumstances that the conduct of the police in seeking prior authorization was so subversive of that process that the resulting warrant must be set aside to protect the process and the preventive function it serves”: *Morris*, at 553 (passage approved in *Araujo*, at 473); *Creelman*, at para. 36; *R. v. Colbourne* (2001), 2001 CanLII 4711 (ON CA), 157 C.C.C. (3d) 273 (Ont. C.A.) at para. 40; *Kesselring*, at 127-8; *R. v. Dellapenna* (1995), 1995 CanLII 428 (BC CA), 62 B.C.A.C. 32 at para. 50; *R. v. Donaldson* (1990), 1990 CanLII 630 (BC CA), 58 C.C.C. (3d) 294 (B.C.C.A.) at 310-312.

[324] Det. Const. Manser presented as a credible witness. I did not understand either party to suggest otherwise. At one level, the officer understood that prior investigative steps, if warrantless, ought to be disclosed in a warrant application. The officer’s affidavit speaks of the police “surrounding the residence” and entering the N.M. home after the arrest for safety reasons. I have no sense that in drafting her affidavit, Manser considered that the actions of the TRU team or that Sgt. James’ consent seizures engaged any unconstitutional behaviour on the part of the police. In this sense, her omission of the warrantless character of the TRU team actions is entirely inadvertent and not an attempt to mislead the justice.

[325] I accept that Det. Const. Manser included in her affidavit the TRU team stealth clear sightings of the unsafely stored firearms in the closet, the sighting of the cross-bow “found” by Sgt. James, and the discovery of a locked gun cabinet at a location in the residence basement. All of this information, as already described, is the product of police actions infringing N.M.’ s. 8 *Charter* right. I note, however, that Manser disclosed that she learned independently of the locked gun locker in the basement from Sgt. James’ report of speaking with the complainant.

[326] In addition, Det. Const. Manser did not include the belief expressed by Sgt. James that Mr. N.M. was not suicidal. The reference to Benoit leaving the accused calm in the morning of March 19th, 2002 was incorrect as Benoit left the

N.M. home at 3:30 p.m. that day. It is not apparent that this information had been passed on, or accurately reported, to Manser. The correct information would have been relevant to the case for issuance of a s. 117.04 warrant.

[327] Det. Const. Manser included in para. 28 of her affidavit, immediately after a sentence stating that Mr. N.M. was “presently” on injury leave, that the complainant stated that the accused “made comments to her that “I am a cop. I know what to do. They will never get me out of the house””. This is in the “Synopsis” or narrative overview part of the affidavit and is not otherwise sourced to the “Witnesses” section of the affidavit commencing at para. 35. It is therefore not apparent that Manser spoke to Const. Tardiff or the complainant herself. There is no context or timing of the statement attributed to N.M. except for the possible inference of recentness arising from the text of the prior sentence. The reference to N.M.’ statement is ambiguous, potentially stale, ambiguously sourced, and as such, of little probative value on the relevant safety concerns. I do not, however, find that Manser intended to mislead the issuing justice in this respect.

[328] Again, para. 29 in the Synopsis section and in particular its reference to the Kirec incident, is not directly sourced “to the Witnesses” section of the affidavit and is without context or precision of words spoken and ambiguous as to time of utterance. I find that this was not intended as misleading drafting.

[329] In light of these comments, it is first necessary, as submitted by Ms. Cullen, to consider whether the text of Det. Const. Manser’s grounds of belief *backing out* the references to the TRU team’s observations of the unsafely stored firearms and Sgt. James’ sighting of the cross-bow, and *ignoring* the above-described statements attributed to Mr. N.M., and *adding* Sgt. James’ information about the accused not being suicidal, and *correcting* the reference to Benoit leaving in the morning, would afford a sufficient basis for concluding that the public safety warrant, in any event, could have issued. I find the answer to this narrow inquiry to be in the affirmative considering the existence of additional long guns as disclosed by Benoit and the complainant, as well as the references in Manser’s affidavit sourced to the complainant of a long history of alleged physical abuse with an assault as recently as March 4th, 2002, and the accused’s withdrawn state in the prior two weeks “holed up” in the basement suggestive of potential mental health concerns, and the undated but stark threat that if the complainant tried to leave him he would kill her, the children and her family.

[330] The further question then becomes whether it would have been a reasonable exercise of discretion to issue the protective warrant as opposed to leaving the issue of the surrender of the additional long guns (believed securely stored in the locked gun vault) to the court considering judicial interim release. Factors to consider include that Mr. N.M. was in custody, that s. 117.04 warrants are rarely used in domestic violence cases (James and Manser had never before used the procedure), bail conditions are most commonly used to secure surrender of legally possessed firearms, and that the justice was unaware of the unconstitutional infringement of privacy over the prior two days. Excluding the

unconstitutional sighting of the cross-bow, there were no grounds on March 21st to believe any other weapons beyond the long guns existed. As noted in *Buhay*, at page 113, just because privacy has been invaded once “does not mean that any subsequent violations will be permissible” unless reasonable in the circumstances. In these circumstances, even with the statutory prerequisites met for issuance of a public safety warrant, had the justice been aware of the unconstitutional entries on March 19th and 20th, he/she would not likely have exercised a discretion to issue the s. 117.04 warrant. In this case, because the answer to this question merges in many respects with the application of s. 24(2) of the *Charter* dealing with causative and temporally proximate *Charter* breaches, I intend to analyze the issue in the context of the s. 24(2) discussion.

Section 487 Code Warrant

Branton error

position of parties

[331] The defence relied upon the *Branton* error on the face of Det. Sgt. Lowry’s ITO and warrant with the ITO directed to a search for evidence regarding an alleged completed conspiracy while the warrant itself included in its scope a search respecting the suspected or intended commission of an offence.

[332] Mr. Coroza acknowledged the facial defect in the warrant materials but submitted that the severance doctrine could serve to save the warrant. Counsel emphasized that Det. Lowry, working under circumstances of urgency, did not deliberately use the defective forms – unlike the correct TPS forms, those provided by the OPP were invalid.

findings/conclusions

[333] In *R. v. Branton* (2001), [2001 CanLII 8535 \(ON CA\)](#), 154 C.C.C. (3d) 139 (Ont. C.A.) at p. 156, the court stated:

An additional ground for quashing the warrants that was argued before the motions judge was whether the search warrants were invalid on their face for failure to comply with [s. 487](#) of the [Criminal Code](#). The search warrants purport to authorize the search and seizure of “things...that are being sought as evidence in respect of the commission, **suspected commission or intended commission** of an offence against the *Radiocommunications Act*...” [Emphasis added]. The warrant was issued pursuant to [s. 487 \(1\)\(b\)](#) of the *Criminal Code*. That section limits a search to “evidence with respect to the commission of an offence”. In authorizing a search for evidence of the “suspected or intended commission” of an offence, the warrants exceeded the authority prescribed in s. 487.

[334] The Crown accepts that Det. Lowry’s warrant suffers from the same facial defect.

[335] Mr. Coroza relied on *R. v. Jacobson*, [2004] O.J. No. 933 (S.C.J.) at para. 44-57 as authority for consideration of the warrant’s validity applying the

severability doctrine to delete the words “suspected commission or intended commission”. I am not inclined to do so for the following reasons. The court in *Branton* did not raise the prospect of curing such a facial validity defect by severance. Authorized searchers read the Form 5 warrant not the ITO. Apparent conferral of searching and seizing authority exceeding what is properly supported by grounds in the ITO improperly risks overly broad conduct at the scene of the search thereby implicating Mr. N.M.’ s. 8 *Charter* right to be free from search by invalid court orders.

[336] How Det. Lowry came to use the defective warrant form, and whether its execution in fact resulted in over-seizure beyond the limits of s. 487 (1)(b), are matters properly considered on a s. 24(2) *Charter* analysis.

night search error

position of parties

[337] Mr. Brauti submitted that the s. 487 warrant to search was also facially deficient for its non-compliance with s. 488 of the *Code*. After the issuing justice signed the warrant, he endorsed authorization for a night search in the absence of sworn grounds of belief in the ITO justifying a night search.

[338] Mr. Coroza again seeks to invoke the severance principle arguing that the departure of the searchers from the N.M. property during the day means that no search by night, though authorized, ultimately occurred.

findings/conclusions

[339] Section 488 of the *Code* provides:

A warrant issued under s. 487 or 487.1 shall be executed by day, unless

- (a) the justice is satisfied that there are reasonable grounds for it to be executed by night;
- (b) the reasonable grounds are included in the information; and
- (c) the warrant authorizes that it be executed by night.

[340] Contrary to paragraph 488(b), Det. Lowry’s ITO contained no grounds attempting to justify a search at night defined in s. 2 of the *Code* as between 9:00 p.m. and 6:00 a.m. In drafting his ITO, Lowry understood that his search for a discrete list of things to be searched for would, in short order, be undertaken by a party of searching officers. The lack of a request and stated grounds for a night search was not an oversight.

[341] A s. 487 *Code* warrant “normally must be executed during the day”: *Genest*, at 405. Here no reasonable grounds existed for a night search, authority considered appropriate only in “exceptional circumstances”: *Sutherland* at 241. The reasons advanced by the issuing justice of urgency, seriousness of the situation, search of a vacant dwelling, and possible exigencies, do not amount to justifications reasonably related to the duration of the pending search or to the facts of the case. Even if reasonable grounds existed for a night search, an endorsement of such authority on the Form 5 warrant must be accompanied by sworn grounds in support in the Form 1 ITO.

[342] The authorization of a night search in non-compliance with the mandatory provisions of s. 488, and indeed without any grounds supporting such a search, amounts to a substantive facial defect in the warrant. In my view, the doctrine of severability cannot operate to save the validity of the warrant. Improper conferral of warrant authority to search the accused’s dwelling at night, and entry onto the property with such an order, amounts to a serious s. 8 *Charter* breach. Whether the police exercised the night search power is properly a s. 24(2) *Charter* consideration.

non-disclosure in ITO

position of parties

[343] The defence, as in its submissions respecting the public safety warrant, argued that Manser, now a sub-affiant for the s. 487 warrant, failed in her duty to Lowry and in turn Lowry, as the affiant, failed in his duty to be full, fair and frank with the court through non-disclosure of the full circumstances of the warrantless actions of the OPP on March 19th to 21st, 2002. Mr. Brauti points to Det. Lowry’s testimony that, had he known of these matters, he would have included them in his ITO pursuant to his understanding of his duty to the court as an affiant.

[344] Mr. Coroza, adopting much of Ms. Cullen’s argument on this point respecting the public safety warrant, submitted that there was no reason for Det. Lowry to be alerted to any potentially unconstitutional behaviour on the part of the OPP based on the information he learned from Manser. Because his was an entirely separate investigation, it is argued, he could simply have commenced the narrative in his grounds of belief at the point of Manser’s report of her observations of TPS property during the execution of the presumptively valid s. 117.04 warrant at the N.M. residence.

[345] Mr. Brauti vigorously submitted that the failure of Det. Lowry’s ITO to disclose the prior attempt of STF agents to co-opt Manser into participation in a warrantless search of the N.M. residence amounted to material non-disclosure at the level of bad faith and fraudulent behaviour. Mr. Brauti described the earlier STF actions as both unlawful and unconstitutional. In this hearing, Lowry,

recognizing the seriousness of Manser's allegations, full well knew the necessity for disclosure of significant investigative malfeasance. Counsel, however, accepts Lowry's credibility in terms of his lack of actual awareness or wilful blindness regarding the March 20th conduct of Evans and others. That said, the defence argued that Det. Const. Manser failed in her duty as a sub-affiant for the s. 487 warrant by not informing Lowry of the STF attempts to engage in a warrantless search. Mr. Brauti submitted that Evans, as a sub-affiant, certainly had a duty to disclose the STF approach to Lowry but, for self-serving reasons, failed to do so. Counsel challenges Det. Sgt. Scott's credibility as a witness arguing that he was knowledgeable of the STF interaction with Manser and, like Evans and others unknown, deliberately withheld disclosure of the unlawful conduct from Lowry. It is submitted that the STF, *qua* institution, must be held to account for the non-disclosure. Had the issuing justice been apprised of the full facts, he would have exercised his discretion not to issue the warrant.

[346] Mr. Coroza submitted that any non-disclosure by Lowry's sub-affiants did not add or detract from the existence of reasonable grounds for believing that Mr. N.M. was in possession of TPS property relevant to the alleged unlawful conspiracy. Accepting, as the defence does, that Manser did not mis-execute her public safety warrant in the sense of improperly using the authority conferred by that warrant to search for property in which the STF had an interest, and that Evans and others did not glean any investigative facts through their thwarted attempts at warrantless searches, then the actions of those STF agents are irrelevant to any statutory precondition for the issuance of the s. 487 warrant. Crown counsel maintained that Manser hid nothing – she reported the STF conduct to her supervisor and reasonably concluded from her phonecall with Scott and Scott's subsequent attendance at the detachment with Lowry, that Lowry was aware of the prior STF actions. Counsel pointed to Scott's evidence that he was unaware of the earlier STF conduct. Mr. Coroza alternatively argued that even if the Lowry ITO reflects improper, material non-disclosure, Lowry cannot be in a worse position than an affiant who has engaged in fraudulent conduct in an ITO. In other words, abuse of process arguments aside, the non-disclosure stands as one factor only in the assessment of whether the warrant could have issued.

findings/conclusions

[347] I agree with Mr. Coroza's submissions that there was nothing known to Det. Lowry about the warrantless searches/seizures by the OPP which ought to have alerted him to ask more questions about the lawfulness of that Force's evidence-gathering procedures. In terms of Manser's role as a sub-affiant, as already stated respecting the public safety warrant, she was unaware of the unconstitutional nature of any of any steps taken by other officers and accordingly engaged in no deliberate non-disclosure. Mr. Coroza is quite correct that Det. Lowry's narrative of grounds of belief could have simply commenced with Det. Const. Manser's report of her observations of TPS property during execution of the public safety warrant.

[348] Given that there are other serious problems with the s. 487 *Code* warrant, I do not intend at this point to deal further with any impact on the s. 8 *Charter* analysis of the impugned OPP conduct on the validity of Det. Lowry's warrant.

[349] The Crown did not dispute the credibility of Det. Const. Manser's account of events the evening of March 20th, 2002. Manser, as said, presented as a highly believable witness.

[350] Carlson, Evans and other STF officers arrived from Toronto unannounced and unexpectedly at the small Dufferin detachment of the OPP. It was in the evening. The reason for their presence was not apparent to Manser. Evans and a second officer came to the crime office where she was alone working on her affidavit. She was out-ranked and out-numbered. The STF had no grounds to conduct a search of the accused's home. Evans, who Det. Sgt. Scott knew to be capable of bullying and threatening, attempted to pressure Det. Const. Manser to use her warrant authority at the N.M. property to give the STF a warrantless opportunity to surreptitiously determine whether anything of interest to the STF investigation could be located in the N.M. dwelling. Evans was persistent and bullying. With Manser's steadfast resistance, the attempts to circumvent the warrant process proved unsuccessful.

[351] Det. Sgt. Scott was eager to characterize the approaches described by Manser as likely equivalent to nothing more than harmless chit-chat about investigative options or discussion of strategy by officers unversed in the law regarding search warrants. Det. Lowry, who everyone considered credible, quite accurately testified that "any investigator" would recognize the impropriety of the suggestions by Evans. Det. Const. Manser also correctly considered the actions of the STF officers to be over the line and unlawful.

[352] Manser reported the matter to her immediate supervisor. She explained to Det. Scott, in the March 21st, phonecall, the OPP opposition to using their warrant to provide the STF access to the N.M. home. As a result of that call, and Scott's presence the following day at her detachment with Lowry, Det. Const. Manser reasonably believed that Det. Lowry would be knowledgeable of the STF actions of March 20th. In these circumstances, Manser cannot be faulted for not reporting these matters to Lowry.

[353] On the totality of the evidence, I am in agreement with Mr. Brauti's submissions regarding Det. Sgt. Scott's credibility. The officer claimed to have no idea how St. Sgt. Carlson knew of the OPP preparing a warrant or whether firm arrangements had been made for a STF briefing of the OPP on March 21st. The witness was argumentative, unresponsive and consistently minimized any suggestion of misconduct attributed to the STF during questioning. Manser described her perception that Scott's phonecall was an apology of sorts. Mr. Brauti described it as a damage control manoeuvre with the taping designed in the aftermath of outrageous behaviour by STF officers to protectively record the STF

as working to keep pre-search distance from the OPP. But, in the call, Det. Const. Manser raised the subject matter of the earlier STF approach. Scott sought no clarification despite his claims that he tape-recorded the call to have a permanent record of the STF keeping distance from the OPP search. The witness unconvincingly explained his reasons for not seeking clarification.

[354] Det. Sgt. Scott selected Det. Lowry to prepare the s. 487 warrant materials on behalf of the STF. Lowry testified, and I accept, that STF colleagues had built a “wall” around him in terms of keeping information from him. To some extent, on the evidentiary record here, Lowry was promoted as a “straw man” affiant apparently deliberately kept in the dark about the attempts of other STF officers to circumvent the warrant process. Scott accepted he was a sub-affiant for Lowry. So was Evans. Neither Scott, nor Evans, nor any other STF investigator involved in the attempt to have Manser participate in actions violating Mr. N.M.’ reasonable expectations of privacy in his dwelling told Lowry of the attempt to search without warrant. On the record here, I tend to agree with Lowry that the actions of Evans and his associate(s) may well have amounted to discreditable conduct and counselling mis-execution of process contrary to s. 128 of the *Code*.

[355] As noted earlier, as a general rule, an affiant has a duty to be forthright and honest in an ITO. In turn, a peace officer sub-affiant has a similar duty with respect to the ITO affiant including disclosure of material facts relevant to the investigative history insofar as they may be relevant to the pending search warrant application. Interestingly, Det. Const. Manser’s public safety warrant affidavit contained a clause, commonly seen in ITO’s:

I believe the information provided to me by my fellow officers to be accurate as it is part of their legal and moral obligations to convey accurate information as part of their duties.

Det. Lowry stated at para. 5 of his ITO:

I have personal information of the matters here-in-after deposed to as a result of... information provided to me by other police officers. Where the information has been received by me, from those people, I truly believe such information because those individuals were acting in the execution of their duties at the time they obtained the information.

In *Debot*, at page 215, in setting out guidelines respecting information received by the police, Wilson J. asked whether the information “originating from a source outside the police, was...credible”. We presume a trust level regarding sub-affiant investigators: “A police investigation is an example of teamwork and each member of the team is entitled to take the position other team members have performed their part properly”: *R. v. Jensch*, [1999] A.J. No. 1595 (Prov. Ct.) at para. 24 (aff’d [2000] A.J. No. 1573 (C.A.)); *Agensys International Inc.*, at 493 (no requirement to independently verify information given affiant by other Revenue Canada employees).

[356] Relevant to the exercise of discretion to issue a warrant for a particular location are any improper attempts within the same investigation to participate in a warrantless and ungrounded search of the identical premises: see Hutchison and Bury, *Search and Seizure Law in Canada*, (2007) Release 3, 16-16.7. The unlawful perimeter searches are a prime example. However, where the unconstitutional pre-application conduct of which the affiant is unaware does not result in the gathering of any evidence or investigative information, then conceptually it is difficult to use the sub-affiant's misconduct, and deliberate withholding of its existence from the affiant, as a ground for invalidating the otherwise legally sufficient application of the affiant. As observed in *Clayton and Farmer* (S.C.C.), at para. 48, "Intention alone does not attract a finding of unconstitutionality. It is not until that subjective intent is accompanied by actual conduct that it becomes relevant".

[357] It is not a complete answer, however, to say that because Manser resisted the STF actions, and because Lowry did not deceive the issuing justice by a knowing omission to disclose the misconduct in his ITO, that the pre-search conduct of STF agents is irrelevant. Narrowly viewed, Det. Lowry was the direct or primary affiant. However, in the broader context, it was the STF which was the beneficiary of the issuance of the warrant. Insulating an affiant, building "a wall" around him or her, places a premium on lack of disclosure and in turn risks misleading the judicial officer.

[358] The defence did not suggest that Det. Lowry's ITO, with the non-disclosure of the STF conduct toward Manser aside, did not support issuance of the warrant for the N.M. *dwelling*. Although the non-disclosure may not have affected the discretion to issue the s. 487 *Code* warrant for the dwelling, disclosure would have been relevant to the issuance process as the judicial officer may, in the circumstances, have required notice of the warrant application to the incarcerated target, made further inquiries of the affiant, or endorsed conditions of execution, for example, excluding certain officers from participation in the execution of the warrant. I will return to the issue of the non-disclosure and the misconduct of the STF officers in the s. 24(2) *Charter* analysis.

out-buildings search

position of parties

[359] The defence submitted that Det. Lowry's ITO is facially invalid on account of the absence of any stated grounds for believing that any of the property to be searched for would be located in the out-buildings on the N.M. property. Unlike an attached garage or porch considered part of the dwelling's curtilage, the out-buildings were separate structures or buildings for which reasonable grounds must exist and be sworn to before warrant authority to search may validly issue. It is

further argued that not only were no such grounds known to Lowry but also none existed in the present case.

[360] Mr. Coroza recognized the absence of any stated grounds of belief in the ITO respecting the probable existence in the out-buildings of any of the property to be searched for. To a degree, he took refuge in a curtilage argument that the out-buildings were a “logical extension” of the dwelling itself and therefore within the scope of the stated grounds for the search of the residence:

These buildings were clearly part of the Applicant's premises and a separate warrant was not needed for each of the three out[-]buildings.

(Crown Factum, para 133)

It was argued that, in any event, as a matter of logic, reasonable grounds existed for believing that the property sought, small in size, could reasonably be discovered in the out-buildings.

findings/conclusions

[361] The relevant, and undisputed, factual context for the out-buildings search is as follows:

- (1) The M. property is a rural property about twelve acres in size. There is a dwelling-house and three outbuildings including a workshop about 70' x 30' with varying estimates of the workshop as 35' to 70' distant from the house.
- (2) The workshop contained tools and storage. The structure was ordinarily locked with a key kept in the dwelling. The building was locked on March 22nd, 2002 when the STF officers executed their warrant.
- (3) Det. Const. Manser, unaware of the existence of out-buildings on the N.M. property, did not include them in her public safety warrant application which was limited to a search of the dwelling. During her March 21st attendance at the property, Manser did not enter the out-buildings apparently being of the view that they were not within the curtilage of the dwelling.
- (4) The entirety of Det. Lowry's information as to the existence of TPS property in Mr. N.M.' possession came from Det. Const. Manser who learned of its existence in the dwelling-house during the execution of her s. 117.04 warrant in the N.M. home.

- (5) Although Det. Sgt. Scott considered the “final” decision was his to include the out-buildings in the warrant materials, Det. Lowry drafted and swore the ITO and received the signed warrant from the justice.
- (6) Det. Lowry’s ITO and the Form 5 warrant include the non-specific language of “related out[-]buildings”. There are no grounds of belief in the ITO stating why the affiant reasonably believed that any of the things to be searched for might be located in the out-buildings. It appears on the evidence that the affiant did not know the dimensions of the out-buildings. As well, he was unaware of their proximity to the dwelling but made the assumption they “were in proximity to the house”.
- (7) Detective Lowry had no “evidence” that things to be searched for would likely be found in the out-buildings. He believed the out-buildings were within the curtilage of the dwelling, an “extension” of the house, and that it was therefore unnecessary to articulate separate reasonable grounds for believing the things to be searched for would be found in the out-buildings. He could have searched the out-buildings without including any reference to them in the ITO but, as a matter “of caution”, included reference to them in his ITO.

[362] Relevant *Code* provisions include:

- s. 2 “dwelling-house” means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes
 - (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and
 - (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence;

...

487 - (1) A justice who is satisfied by information on oath in Form 1 that there are **reasonable grounds to believe that there is in a building, a receptacle or place**

- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
- (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
- (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or

(c.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(d) **to search the building, receptacle or place** for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

(emphasis added)

[363] I agree with Mr. Coroza that a single warrant can issue authorizing a search of multiple buildings at one municipal location: *Sleeth v. Hurlbert* (1896), [1896 CanLII 70 \(SCC\)](#), 25 S.C.R. 620 at 625-6.

[364] Ordinarily, as required by s. 487 of the *Code*, when a warrant issues describing buildings the police are authorized to search, the supporting ITO must establish reasonable grounds for believing the things to be searched for will likely be discovered within the described structures: *C.B.C. v. A.-G. for New Brunswick et al.*, at 552; *Morris*, at 550. In *Baron*, at 534, Sopinka J. approved the following statement in *Wiens v. The Queen* (1973), [1973 CanLII 1634 \(MB QB\)](#), 24 C.R.N.S. 341 (Man. Q.B.) at 347:

He [the justice] need only satisfy himself that there were **reasonable grounds for believing** that such documents could be of assistance in establishing the commission of the offence and **that they were in the premises in respect of which the search warrant is sought**. (emphasis added)

[365] In Det. Lowry's ITO there are no grounds of belief specific to the out-buildings and, subject to the curtilage argument, such omission would constitute a substantive and fatal facial defect in the warrant materials with the words, "and related out[-]buildings", amounting to a boiler-plate-like add on. I will return later to the issue of whether reasonable grounds did in fact exist to believe the things to be searched for would likely be discovered in a search of the out-buildings. Of course, the fact that the police had facts which could have formed a basis for issuance of a warrant does not validate the information or the warrant: *R. v. Harris and Lighthouse Video Centres Ltd.* (1987), [1987 CanLII 181 \(ON CA\)](#), 35 C.C.C. (3d) 1 (Ont. C.A.) at 15 (leave to appeal refused [1987] S.C.R. vii).

[366] Mr. Coroza of course did not suggest that Mr. N.M. did not have a reasonable expectation of privacy in the workshop and its contents because counsel and Lowry linked the workshop to a part of the dwelling itself. The structure was on private property far back from the roadway. It was a large building ordinarily locked. It contained property belonging to the accused. Like the

individual with a reasonable expectation of privacy in a drive-shed (*Moran*, at 247), Mr. N.M. had a reasonable expectation of privacy in his workshop.

[367] The Crown submitted that the out-buildings were effectively an extension of the house and properly considered a part of its curtilage. The detached buildings fall outside the definitional scope of “dwelling-house” in s. 2 of the *Code* and accordingly, using that statutory measuring stick, the buildings would not be considered part of the dwelling. A break-in of one of the out-buildings would not amount to the offence of breaking and entering a dwelling-house.

[368] At common law, “the hoary concept of “curtilage”” (*U.S. v. Arboleda*, 633 F.2d 985, 992 (2nd Cir. 1980)) relates to property considered to be an integral part of the house. In *Lauda*, at 374, the court referred to “...the house, including the area immediately surrounding it (referred to as the “curtilage”)”. In *U.S. v. Dunn*, 480 U.S. 294, 300 (1987), in a discussion of the curtilage issue, the court cited 4 W. Blackstone *Commentaries* 225, “no distant barn, warehouse or the like are under the same privileges, nor looked upon as a man’s castle of defence.” Hutchinson, in *Search and Seizure Law in Canada* (Carswell) at page 16-31, states:

As the common law consistently recognized that authority to search must be strictly limited to the precise structure or place set out in the order (which would only include the “curtilage”), **a search of a dwelling-house does not import authority to search any outbuildings**, garages, sheds, barns, receptacles, lockers, etc., at the same location as the principal residence. Accordingly, if the police want to search such outbuildings, they should be expressly included in the warrant. (emphasis added)

[369] Although the American authorities must be read with caution because of the relationship in that jurisdiction between the subject of curtilage and the “open fields” doctrine, the U.S. cases are not uninformative. Curtilage has been described as the area “immediately” surrounding a private house: *U.S. v. Dunn*, at 300; *Dow Chemical Co. v. U.S.*, 476 U.S. 227, 235, 237 (1986); *Oliver v. U.S.*, 466 U.S. 170, 178, 180 (1984). At page 180 of the *Oliver* decision, the court stated:

At common law, the curtilage is the area to which extends activity associated with the sanctity of a man’s home and the privacies of life...

[370] Similarly, in *California v. Ciraolo*, 476 U.S. 207, 212 (1986), the court stated that the curtilage of a house is essentially:

...a protection of families and personal privacy in an area intimately linked to the house, both physically and psychologically, where privacy expectations are most heightened.

[371] What have come to be known as the *Dunn* factors in the U.S. arise from the *dicta* at 301 of that case:

Drawing upon the Court’s own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home’s curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing

by. See *California v. Ciraolo*, 476 U.S. 207, 221 (1986) (POWELL, J., dissenting) (citing *Care v. United States*, 231 F.2d 22, 25 (CA10), cert. denied, 351 U.S. 932 (1956); *United States v. Van Dyke*, 643 F.2d 992, 993-994 (CA4 1981)). N4 We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a “correct” answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration - - whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection. Applying these factors to respondent’s barn and to the area immediately surrounding it, we have little difficulty in concluding that this area lay outside the curtilage of the ranch house.

[372] In support of his argument, Mr. Coroza quite properly relied on *R. v. Benz and Haley* (1986), [1986 CanLII 4641 \(ON CA\)](#), 27 C.C.C. (3d) 454 (Ont. C.A.) (notice of discontinuance, *Haley*, [1987] 1 S.C.R. ix). In that case, the police possessed a *Code* warrant to search the “premises” of Haley at “8 East 35th Street” in Hamilton. During the search, using car keys located in the dwelling, the police searched two vehicles associated with Haley. At page 465, the court stated:

Apparently at trial, Crown counsel “conceded” that the motor vehicle was “improperly searched”, although the trial judge found that the police acted without malice and with an honest but mistaken belief as to their right to search the car. The concession having been made, the Crown felt bound by that concession on the appeal. Although the concession cannot be directly disturbed now, I would not want to be taken as accepting it as necessarily legally correct. There was a valid warrant to search the premises at 8 East 35th St. The car belonging to the respondent containing the lease was out on the street in front of the house (within 100 ft.). The keys to that car were in the respondent’s residence which was being legally searched. Certainly if the car had been in the garage of the premises or even on the driveway there would be little doubt but that the search warrant would cover a search of the car. We do not have a description of the premises, so we do not know whether there was either a garage or a driveway attached to the premises. One might conclude there was neither, as neither car was on a driveway or in a garage, the unlicensed car being in an adjacent parking-lot.

[373] These points should be noted about the *Haley* decision: the warrant referred to “premises” not to a dwelling-house; and the *obiter* comments of the court relate to motor vehicles visible from the street.

[374] Apart from the *Haley* examples of a car in the garage or driveway, these examples consider instances of inclusion in the curtilage: *R. v. LeClaire* (2006), [2005 NSCA 165 \(CanLII\)](#), 208 C.C.C. (3d) 559 (N.S.C.A.) at 572 (“the open garage was like an extension of the driveway, forming part of the approach to the door”); *R. v. Tesfai*, [1995 CanLII 4153 \(NS SC\)](#), [1995] N.S.J. No. 559 (S.C.) at para. 19, 25 (patio physically touching the house equivalent to “an outdoor extension of the house”); *U.S. v. Oaxaca*, 233 F.3d 1154, 1157 (10th Cir. 2000) (attached garage part of curtilage); *U.S. v. Karagozian*, 715 F.Supp. 1160, 1164 (U.S. Dist. Conn. 1989) (rear deck of home within curtilage).

[375] Turning to decisions where the courts have considered the curtilage to not include places searched by the police: *Dunn* (barn 50’ from residence); *R. v. LaPlante* (1987), [1987 CanLII 209 \(SK CA\)](#), 40 C.C.C. (3d) 63 (Sask. C.A.) (workshop 40’ from dwelling); *Tesfai*, at para. 20, 24-5 (retaining wall a few feet distant from home’s patio).

[376] In the present case, the factual circumstances do not reasonably support the workshop being within the curtilage of the N.M. dwelling considering:

- (1) The detached out-building was at least 35' distant on Det. Lowry's estimate. He did not search the building. I find the more accurate estimate to be that of the resident, N.M., that the separation was about 70'.
- (2) The building is itself a significant size at 70' x 30' perhaps larger than the dwelling. The building was used for storage and tools. There is no evidence of uses approaching the heightened expectations of privacy associated with a personal dwelling-house.

[377] Returning to the issue as to whether reasonable grounds did exist to search the out-buildings, I am unpersuaded that such was the case given the nature of the property to be searched for and the information from Manser as to where it was located. The belief of the police that the property might be located in the out-buildings was at the level of unfounded speculation, not credibly-based probability. To borrow the words of Rosenberg J.A. in a different context in *Hosie*, at 394, the inclusion of related out[-]buildings amounted to "reliance upon ritualistic phrases without regard to the facts of the particular case".

[378] Even had reasonable grounds existed to search the out-buildings, a further facial validity issue exists as a result of the non-specific language of their descriptions in the warrant. Search warrants are highly intrusive of privacy interests: *Baron*, at 530; *CanadianOxy Chemicals Ltd. v. Canada* (1999), [1999 CanLII 680 \(SCC\)](#), 133 C.C.C. (3d) 426 (S.C.C.) at 434. As a result, there is an expectation that the "building, receptacle or place" to be searched will be described with some precision. Fontana, *The Law of Search and Seizure in Canada* (3d) (Butterworths – 1992) at page 66 notes:

Power to conduct an entry and search has by tradition and common law been limited to the place described in the instrument of search: hence the necessity for a very precise description. Many warrants have been struck down for lack of precision in the description of the place alone, since the search was to be limited to such place and the warrant gave no power to search outbuildings or conveyances at the place described unless specifically set out therein.

[379] In this case, the warrant issued for "related out-buildings". There is an ambiguity and lack of specificity about the places to be searched. Is it all out-buildings or is the warrant open to the interpretation that the police are to sort out a "related" out-building from an "unrelated" out-building once on scene – an impermissibly broad discretion departing from obedience to the prior authorization model: *R. v. Noble* (1984), [1984 CanLII 2156 \(ON CA\)](#), 16 C.C.C. (3d) 146 (Ont. C.A.) at 155 (general warrants offensive to the common law because they "leave to the discretion of the officer...what premises to search").

Admission /Exclusion of Evidence

position of parties

[380] Mr. Brauti submitted that the evidence seized pursuant to the March 20th consent, the March 21st public safety warrant, and the March 22nd s. 487 *Code* warrant ought to be excluded as evidence in the pending prosecutions. Counsel relied principally upon the discretionary authority of s. 24(2) of the *Charter* and secondarily upon the court's common law exclusionary power and abuse of process.

[381] Although the consent engaged an element of conscription, the defence argued that the admission/exclusion analysis need not concern itself with the impact of the seized evidence on the fairness of the pending trials. Mr. Brauti's stated position is that while the third prong of the *Collins* test is in play, the real "battleground" relates to the seriousness of the *Charter* breaches. Counsel accepted that while some of the s. 8 violations do not involve a "but for" causation analysis, on this record there exists a fluid investigative sequence with individual components all having proximate temporal connection to one another.

[382] Mr. Brauti submitted that the evidence supports a pattern of s. 8 breaches serious enough to warrant exclusion of the evidence. Some are said to be glaring and intrusive violations including warrantless entry to a private dwelling and a strip search. It is said that there is evidence of institutional disregard for the s. 8 *Charter* right with no clear police policy in some instances and out-dated policies in others. It was argued that there was no urgency – the actions of the TRU team amounted to state-manufactured exigency similar to Det. Lowry's haste in attempting to complete his ITO on the basis of wanting to search before Mr. N.M. received bail. There was an absence of good faith. The authorities, at a minimum, ought to have known their actions conflicted with established *Charter* values.

[383] Apart from reliance on an ITO lacking any reasonable grounds to search out-buildings, the defence further submitted that while the STF application for a search warrant on its face honoured the prior judicial authorization model, this step is countered by two factors:

- (1) the STF resorted to a warrant only after unsuccessful efforts by its agents to participate in unconstitutional warrantless searches of the N.M. dwelling
- (2) Blake's "surprise" finding of the drugs in the workshop by searching only a very limited aspect of the above-floor part of the structure smacks of a tip or pre-search knowledge and, therefore, an illegitimate plain view seizure.

[384] While Mr. Brauti recognized that exclusion of evidence in the drug case would have the effect of terminating that prosecution, counsel noted the small

quantity of seized substances and, with charges for simple possession only, given Mr. N.M.' prior good character and time spent in custody, no custodial sentence would be expected. Counsel pointed to the STF misconduct and the entire absence of grounds for searching the workshop.

[385] Mr. Brauti argued that with exclusion of seized evidence the case on the provincial indictment would still proceed although without the Crown's ability to prosecute the weapons charges leaving the disposition of the weapons to regulatory authorities. To admit the seized evidence in the provincial prosecution would associate the court with condoning continued laxness on the part of the OPP in their respect for the s. 8 *Charter* right.

[386] Ms. Cullen argued for admission of the seized evidence. It was submitted that the TRU team operated in a situation of urgency in its actions and that the motivation was public safety and as such there was no deliberate infringement of constitutional rights. Counsel submitted that the *Feeney* warrant process takes time, the containment exercise did not lead to any evidence collection, and that the law in Canada is as yet undeveloped respecting the stealth clear.

[387] While accepting that the personal search of Mr. N.M. met the *Golden* definition of a strip search, the search was more akin to a frisk search than the highly intrusive search in that case. Counsel noted that the accused expected his shirt would be lifted. As well, Ms. Cullen submitted that there was no bad faith and that the search in the present case occurred only about four months after the *Golden* case was decided.

[388] Crown counsel submitted that in the s. 24(2) analysis it is significant that Mr. N.M. gave consent knowing the unsafely stored condition of his firearms.

[389] As to the public safety warrant, Crown counsel emphasized that there was no mis-execution of that warrant alleged and that, redacting any offending text in the ITO relating to unsupported factual assertions and to unconstitutional warrantless searches, the remainder fully supported issuance of the s. 117.04 warrant. Ms. Cullen argued that while bail conditions are frequently used to effect surrender of firearms in domestic violence cases, such a court order does not lead to the voluntary handing over of illegally held weapons.

[390] Crown counsel emphasized that weapons matters are serious and may attract significant penalties. Exclusion of the seized evidence would impair the Crown's ability to prosecute all the weapons counts.

[391] Mr. Coroza submitted that if constitutional misconduct by the OPP preceded the STF search then, as in *Lauda*, the STF search would become the equivalent of "a warrantless search". Mr. Coroza submitted that if the court rejected the argument that the s. 487 *Code* warrant legally permitted a search of the workshop as part of the dwelling's curtilage, then the building would necessarily be considered as lower on the expectation of privacy scale than a residence.

[392] Crown counsel submitted that there was no pretextual search for the drugs – the police did apply for a warrant, the justice issued a warrant, and the discovery of the drugs at the N.M. property was unexpected. In other words, there was no attempt at a warrantless search. The discovery of the drugs amounted to an unexpected and valid plain view seizure. Mr. Coroza maintained that Det. Lowry was working under time pressure and, in the urgency, inadvertent mistakes may have been made but not in bad faith. The officer fully believed he possessed a valid warrant.

[393] Mr. Coroza submitted that Det. Const. Manser did not mis-execute the public safety warrant so as to search for property of interest to the STF. The STF officers obtained no evidence or investigative information as a result of the pressure brought to bear on Manser. It is said that there was, accordingly, no requirement for Lowry's ITO to recite the events of March 20th at the OPP detachment as that matter was irrelevant to issuance of the s. 487 warrant. Therefore, no evidence exclusion is possible under the *Charter* leaving only an abuse of process remedy or common law exclusion under *Buhay/Harrer*.

[394] Mr. Coroza argued that while the drug counts charge only simple possession, two of the courts involve hard drugs. Exclusion of the evidence would fatally impair prosecution.

findings/conclusions

[395] Before turning to the evaluative component of s. 24(2) of the *Charter* and applying the well-known three-part analysis of *Collins*, the accused must first establish as "a threshold requirement" that the relevant seized evidence, the weapons and drugs, were obtained "in a manner that infringed" a *Charter* right, here s. 8: *R. v. Plaha* (2004), [2004 CanLII 21043 \(ON CA\)](#), 188 C.C.C. (3d) 289 (Ont. C.A.) at 300-1.

[396] At the level of direct causation or connection, s. 8 *Charter* breaches led to these relevant seizures:

- (1) .357 calibre handgun (consent)
- (2) Glock handgun, shotgun, knives (s. 117.04 public safety warrant)
- (3) prohibited drugs (s. 487 *Code* warrant).

[397] Section 24(2) *Charter* jurisprudence has rejected strict causal analysis as the sole touchstone in the determination as to whether evidence has been obtained by a s. 8 violation: *R. v. Goldhart* (1996), [1996 CanLII 214 \(SCC\)](#), 107

C.C.C. (3d) 481 (S.C.C.) at 492-4. These considerations have emerged respecting the threshold requirement:

- (1) Because s. 24(2) is concerned with the “tainting” effect of a constitutional violation beyond “but for” causation, and in order to give adequate recognition of the intrinsic harm caused by a constitutional breach, the existence of a temporal link may, on a case-by-case basis, factor into the analysis: *R. v. Strachan* (1988), 1988 CanLII 25 (SCC), 46 C.C.C. (3d) 479 (S.C.C.) at 496-7. Even in the absence of a causal connection, the temporal link may be sufficient to justify a conclusion that the evidence was obtained as a result of the violation, i.e. *Kokesch*, *Flintoff*, *Bohn*, *Schedel*.
- (2) A causal connection and/or a temporal connection may, depending on the circumstances, establish that the evidence was obtained by the breach of the s. 8 *Charter* right. It is necessary to look at the totality of the relationship – the “entire chain of events”: *Goldhart*, at 494-6; *Strachan*, at 496, 498; *Flintoff*, at 335.
- (3) The happening of an event can be traced to a whole range of causes along a spectrum of diminishing connections to the event: *Goldhart*, at 493. The concepts of remoteness and relative proximity apply to both causal and temporal connections: *Strachan*, at 499; *Goldhart*, at 494, 496. If the connection is remote, the linkage is tenuous: *Goldhart*, at 494. In addition, s. 24(2) will not be triggered if the connection between the breach and the obtaining of the evidence is broken “by intervening events”: *Kokesch*, at 220 *per* Dickson C.J. C. (in dissent); *Goldhart*, at 496.
- (4) In looking at the constitutional violation and the evidence at issue, the cases have enunciated similar formulations as to when s. 24(2) is engaged: *Silveira*, at para. 140 (“...so intertwined in time and in their nature”); *Plant*, at 217 (“an integral part of the investigation”); *Wiley*, at 172 (“formed component parts of an ongoing investigation”); *Strachan*, at 498 (“in the course of a single transaction”); *Grant* (S.C.C.), at 198 (“an integral component in a series of investigative tactics which led to the unearthing of the evidence...”); *Goldhart*, at 494 (“an integral part of a single investigatory transaction”; “one link in the continuous chain of events involved in the investigation”). Put differently, would division or severance be unreasonable: *Silveira*, at para. 140 (“unreasonable to draw an artificial line”); *Grant* (S.C.C.), at 198 (“unrealistic to view the perimeter

searches as severable from the total investigatory process which culminated in discovery of the impugned evidence”); *Flintoff*, at 336 (“not realistic to view the strip-search as severable from the total investigatory process”).

[398] In the present case, the perimeter search action (entry on the N.M. property, observations into the dwelling, destruction of private property) and the strip search, both violations of N.M.’ s. 8 *Charter* right, did not result in the seizure of evidence the Crown seeks to tender in the pending prosecutions. Nevertheless, and recognizing there may be “a time lag” between the breach and the gathering of evidence (*Grant* (S.C.C.), at 198), this warrantless conduct of the police is sufficiently temporally connected to the ongoing investigation of the OPP so as to be connected to the consent and the public safety warrant. It would be artificial to sever the law enforcement sequence. The police had a continuing interest in Mr. N.M.’ firearms March 19th through 21st, 2002.

[399] Similarly, the stealth clear, an unjustified warrantless entry to the dwelling, is sufficiently proximate, in a temporal sense, to engage s. 24(2) consideration. As well, the TRU team observation of the closet firearms was causally connected to Sgt. James’ consent seizures.

[400] The consent and its execution had a causal connection to the public safety warrant with the “sighting” of the cross-bow and the inclusion of that information in the s. 117.04 affidavit. The investigative step is also temporally connected to the warrant phase.

[401] In turn, although more temporally attenuated, execution of the public safety warrant became the exclusive source of information for the ITO of the STF. Although the attempt of certain STF officers to circumvent the warrant process resulted in no evidence-gathering, non-disclosure of the attempt to violate N.M.’ right to be secure against unreasonable search and seizure was relevant to the warrant issuance process as described at para. 358 *supra*.

[402] A non-exhaustive catalogue of potentially relevant factors relevant to admitting unconstitutionally obtained evidence were broadly grouped in *Collins* (S.C.C.), at 19-20, as follows:

- (1) the nature of the evidence and the effect of its admission on the fairness of the trial
- (2) the relative seriousness of the constitutional violation
- (3) the effect of exclusion on the repute of the administration of justice.

[403] In *R. v. Aguirre*, [2006] O.J. No. 5071 (S.C.J.) at para. 226-7, I observed:

This “three-step inquiry”, with a “discretion...grounded in community values”, requires “a substantial amount of judgment” to determine the central question of whether admission of the evidence could bring the administration of justice into disrepute: *R. v. Buhay* (2003), 2003 SCC 30 (CanLII), 174 C.C.C. (3d) 97 (S.C.C.) at pp. 116-8. “Section 24(2) requires a balancing exercise on the facts of each particular case” (*R. v. Fliss* (2002), 2002 SCC 16 (CanLII), 161 C.C.C. (3d) 225 (S.C.C.) at p. 252) – an exercise reflecting “the interplay between the interests of the individual accused and the interests of the community”: *R. v. Grant* [(2006), 2006 CanLII 18347 (ON CA), 209 C.C.C. (3d) 250 (Ont. C.A.) (leave to appeal granted [2007] S.C.C.A. No. 99)] at p. 272. Because s. 24(2) determinations “turn entirely on the particular circumstances of each case”, “context is vital to the issue of admissibility”: *R. v. Wong* (1991), 1990 CanLII 56 (SCC), 60 C.C.C. (3d) 460 (S.C.C.) at p. 468 *per* Wilson J. (dissenting in the result).

The structure of s. 24(2), placing as it does the burden of persuasion upon the accused to establish that unconstitutionally obtained evidence ought to be excluded, in effect, as a matter of policy, promotes a presumptive model of admissibility for such evidence unless the court can be satisfied that admission of the evidence gathered in contravention of the *Charter* could bring the administration of justice into disrepute. Even the American exclusionary rule has evolved toward narrowing circumstances favouring exclusion – “Suppression of evidence, however, has always been our last resort, not our first impulse” as “[t]he exclusionary rule generates substantial social costs...which sometimes include setting the guilty free and the dangerous at large”: *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

[404] Apart from the conscriptive element of the consent provided by Mr. N.M., a matter affecting the fairness of trial, I am content to follow the approach of counsel in focusing upon the second and third prongs of the *Collins* test.

[405] I turn then to the central concern in this case, the seriousness of the s.8 *Charter* breaches. “The situation[s] in which police take evidence is complex”: *Harrer*, at para. 44. “Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights” – “What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct”: *R. v. Kitaitchik* (2002), 2002 CanLII 45000 (ON CA), 166 C.C.C. (3d) 14 (Ont. C.A.) at 26.

[406] The relative seriousness of the constitutional violation is generally assessed in light of this non-exhaustive list of factors:

- (1) whether the police action was in good faith in the sense of “inadvertent or of a merely technical nature” on the one hand or, on the other, “deliberate, wilful or flagrant”: *Collins* (S.C.C.), at 20; *Kokesch*, at 226; *Buhay*, at 119-121; *R. v. Fliss* (2002), 2002 SCC 16 (CanLII), 161 C.C.C. (3d) 225 (S.C.C.) at 250; *Feeney*, at para. 73; *R. v. Groat* (2006), 2006 BCCA 27 (CanLII), 205 C.C.C. (3d) 542 (B.C.C.A.) at paras. 18-9
- (2) the degree of departure from the relevant constitutional standard of behaviour: *Fliss*, at 250; *R. v. Donnohue Grant* (2006), 2006 CanLII 18347 (ON CA), 209 C.C.C. (3d) 250 (Ont.

C.A.) at 271 (leave to appeal granted [2007] S.C.C.A. No. 99); *Kitaitchik*, at p. 27

- (3) the availability of other investigatory techniques by which the evidence could have been obtained without violation of the *Charter*: *Collins* (S.C.C.), at 20; *Kokesch*, at 227, 229; *Buhay*, at 120
- (4) whether reasonable grounds existed supporting the conduct of the police: *Buhay*, at 120, 124-5; *R. v. Mitchell* (2006), [2005 NBCA 104 \(CanLII\)](#), 36 C.R. (6th) 289 (N.B.C.A.) at 301
- (5) whether the police action which constituted the constitutional violation was motivated by urgency or necessity or imminent danger: *Collins* (S.C.C.), at 20; *Buhay*, at 120, 123
- (6) whether the constitutional violation was isolated or an aspect of a pattern of police misconduct: *Genest* at 406-7; *Feeney*, at 170; *Grefe*, at 192; *Strachan*, at 500; *Hudson v. Michigan*, at 2171
- (7) the “strength of the relationship between the violations and the discovery of the evidence”: *R. v. Greaves* (2004), [2004 BCCA 484 \(CanLII\)](#), 189 C.C.C. (3d) 305 (B.C.C.A.) (leave to appeal refused [2004] S.C.C.A. No. 522), at 343; *R. v. Church of Scientology* (1997), [1997 CanLII 16226 \(ON CA\)](#), 33 O.R. (3d) 65 (C.A.) at 100 (leave to appeal refused [1997] S.C.C.A. No. 683).

[407] Viewed individually, some of the s.8 violations in this case are extremely serious. Viewed cumulatively, the pattern of constitutional non-compliance by the police is disturbing.

[408] The police tactical team, a paramilitary group, covertly descended on the N.M. property without a warrant. The dominant objective was to arrest the suspect. The police had inadequate information about the immediacy of any threat posed by N.M. to himself or others. It was night. Viewing the known facts objectively, N.M. was at home, posed no danger to himself or others, and was unlikely to depart the property. The scope for arguing urgency, in these circumstances, is somewhat limited. A “one size fits all” response by a police tactical team is unacceptable. There was no barricaded suspect or hostage. Warrantless police actions on private property must be proportionate to the threat at hand. Deliberate trespass and the rejection of perimeter containment from outside the property was unnecessary and unreasonable. This was not a fast-paced situation resembling the circumstances of a traffic stop or a street investigative detention. Hours of surreptitious surveillance into the residence from

positions on private property and police presence within the dwelling's curtilage, other than in circumstances of exigency, amounted to a prolonged intrusion into the occupant's reasonable expectation of privacy. The application for judicial authorization in the form of a *Feeney* warrant was relegated by the prime decision-maker to the level of an incidental task. Warrantless confrontation of the suspect, believed to be in bed asleep or nearly asleep, was patently unreasonable.

[409] Without supervisory officer authorization or reasonable grounds, the TRU arrest team conducted a strip search of Mr. N.M.. The search, of some minutes' duration in the freezing cold, departed from the frisk or field/pat-down search authorized by law incidental to a lawful arrest. In the circumstances, the search on the arrestee's front lawn was unnecessary and unreasonable. A strip search involves the humiliation of exposure and extreme violation of personal dignity. The search here was conducted on the basis of a routine, not case-specific, approach to personal search of an arrestee.

[410] The stealth clear, a serious intrusion into a dwelling-house, was conducted solely on the basis of theoretical notions of risk. Operationally assuming a worst case scenario effectively removes any case-specific discretion from the decision to undertake this extraordinary measure. The warrantless search was not cursory. No attempt was made to secure either Mr. N.M.' or the complainant's consent to enter and search.

[411] At one level, certain of the unconstitutional conduct of the police in this case appears to reflect good faith on the part of the authorities. I have in mind the testimony of the TRU team members who apparently followed direction, policy and historical protocol. Viewed in the context of the individual officer's behaviour, there may be no deliberate, flagrant or wilful violation of the s. 8 *Charter* right.

[412] However, a broader context remains to be examined – the existence of a police force's training, procedures or policy, or perhaps the absence of training or of an appropriate operational policy relevant to the actions of the individual investigator/employee. This systemic perspective may have the effect of eradicating what might otherwise appear to be a reasonable mistake or good faith decisions by particular officers.

[413] Although what is under "constitutional scrutiny is the police conduct" and not their training (*Clayton and Farmer* (S.C.C.), at para. 51), "[t]he nature of police conduct...on an institutional level, is an important consideration when calibrating the seriousness of the *Charter* breach": *Kitaichik*, at 26. In *Clayton and Farmer* (S.C.C.), at para. 52, Abella J. recognized that "police training is important" and, at para. 129, Binnie J. observed that, "A *Charter* violation caused by systemic failure would raise greater concerns for the administration of justice than an isolated act of a single misguided police officer". Similarly, as observed in *Canton v. Harris*, 489 U.S. 378, 396-8 (1989), while "adequately trained officers occasionally make mistakes", an institution's failure to train its officers "concerning a clear

constitutional duty implicated in recurrent situations” faced by its employees raises a serious issue of constitutional liability.

[414] In the present case, the warrantless night-time entry on private property with incorrect and incomplete information, the prolonged covert presence outside the dwelling, the surreptitious surveillance into the residence, and the destruction of private property demonstrate a fundamental failure to recognize that a tactical unit capable of high-risk enforcement responses must respect *Charter* values by tailoring its response to case-specific circumstances. Despite the dictates of [O/Reg. 3/99](#), there is nothing in the OPP procedural manuals to suggest perimeter containment should routinely take place without warrant on private property. While such inner perimeter containment appears to conform with OPP training, it ignores the existence of less intrusive measures to reasonably achieve the same ends while creating no intolerable risk to public safety. The Force’s procedural manuals are silent, as described at para. 93 above, respecting important features of a stealth clear. Again, on the evidence here, the training suggests that theoretical possibilities, not fact-sensitive determinations, drove the decision to execute a protective sweep.

[415] Assuming for the moment that the police approach to public safety seen in this case, that is, a failure to reasonably balance competing interests and to apply a fact-sensitive check prior to intrusion on reasonable expectations of privacy, could itself be described as a policy or protocol, that does little to warrant a finding of good faith. In any number of instances, an institutional policy of the police has attracted judicial criticism for its lack of adherence to constitutional principles: *Golden*, at 485; *Flintoff*, at 328-9, 333, 337, 341; *Caslake*, at 34; *Polashek*, at 201; *Schedel*, at 201, 230; *R. v. Lamy* (1993), [1993 CanLII 3368 \(MB CA\)](#), 80 C.C.C. (3d) 558 (Man. C.A.) at 571. In *Flintoff*, at page 341, in the face of an unconstitutional strip-search policy, the court noted that it was reviewing something other than “an isolated case where it could be said that an individual police officer was overzealous or inexperienced”. Similarly, in *Lamy*, at page 571, the court observed:

In my opinion, if the policy or procedure followed by the police is inappropriate because of its long-term consequences on the reputation of the justice system, it matters not that the individual police officers acted in good faith. It is not the motive of the individual police officers, but rather the impact of the erroneous policy which is of significance.

[416] The warrantless actions of the TRU team on the N.M. property, including the stealth clear, amounted to unreasonable mistakes as to the extent of police authority. This is so even though the primary objective of the officers was not information-gathering although that was a principal purpose in going on the property (to determine N.M.’ presence and location in the dwelling) and an incidental result of the protective sweep (sighting of the closet firearms). The law, including constitutional implications, respecting perimeter searches and trespass on private property and warrantless entry into a dwelling was extensively canvassed in *Kokesch*, *Grant* (S.C.C.), *Wiley*, *Silveira* and *Golub* several years

before the police actions here. As such, to use the language in a number of the relevant cases, the police “ought to have known” and obeyed the constitutional limits on their authority: *Kokesch*, at 230; *Feeney*, at 167; *Genest*, at 400, 406. Put differently, “s. 24(2) of the *Charter* should not be used as a matter of course to excuse conduct which has in the past been found to be unlawful” (*Silveira*, at para. 162) and, “[t]he provisions of s. 24(2) are not intended to place a premium on remaining in ignorance of proper procedures”: *Harris*, at 27.

[417] Accordingly, it appears that largely unwritten incident commanders’ training, not the procedural manuals themselves, establishes the policy of deployment and the use of the stealth clear. While, as in the case of some of the OPP documentation, ““Official” statement of law enforcement policy almost inevitably will specifically condemn...unconstitutional conduct by police” (*Spell v. McDaniel*, 824 F. 2d 1380, 1388-9 (4th Cir. 1987)), untrained or mis-trained police officers amount to institutional deficiencies threatening *Charter* rights on a systemic and ongoing basis: *Clayton and Farmer* (2005), [2005 CanLII 16569 \(ON CA\)](#), 194 C.C.C. (3d) 289 (Ont. C.A.) at 315-8 (rev’d [2007 SCC 32 \(CanLII\)](#)), [2007] S.C.J. No. 32); *Canton v. Harris*, at 388-9.

[418] Although the police need not be versed in the “minutiae of the law”, they must be aware of the essential requirements for the constitutional discharge of their basic functions: *Genest*, at 406. The *Golden* judgment was released in December of 2001, about four months prior to the personal search of N.M. and about four years after *Flintoff* and twelve years after *Cloutier*. It was a critical decision for policing defining the limits of the power to search incident to arrest. Although the courts have generally refrained from “imposing upon the police a burden of instant interpretation of court decisions” (*Kokesch*, at 230-1), the police ought to have been aware of the circumscription of police power enunciated in *Golden*. Even with a February 2002 re-issue of the OPP Order respecting personal searches, the limitations of the *Golden* decision were not included in the policy and procedures materials. In 2007, the relevant OPP Order respecting the personal search of an arrestee remains uninformed by the *Golden* decision. As well, six years after that judgment, the incident commander and a TRU team trainer in this case continued to hold the view that a strip search occurs only where the arrestee is completely naked. The picture here is one of institutional indifference to the s.8 *Charter* right.

[419] The weapons, and their condition of storage, amounted to reliable and real unscripted evidence (excepting the consent seizure of the .357 Smith and Wesson) pre-existing the s. 8 the *Charter* violations. Nevertheless, in my view, considering the temporal connection, the actions of the TRU team in the relevant three to four-hour period were sufficiently intrusive, unnecessary and unreasonable to favour exclusion of the evidence seized under the consent and the public safety warrant even if I had found no s. 8 breaches in the obtaining of the consent and the issuance of the s. 117.04 warrant. In the circumstances, these steps could not fairly be viewed as severable or as fresh steps divorced from the significant taint of the prior constitutional misconduct. The mis-execution of the consent and the

Force's continued use of *Branton*-deficient search warrant forms clearly contributes to the pattern of ongoing disregard for the need to limit police behaviour to that authorized by law. Given the issues addressed in para. 330 above, it is no answer to say that the police would in any event have obtained a public safety warrant to seize the weapons the Crown now seeks to tender into evidence. On the facts as found, with a series of proximately related unconstitutional searches preceding that warrant's issuance, the case for inevitable discovery or independent source discovery fails.

[420] Turning to the s. 487 *Code* warrant, it must be accepted that there is a degree of attenuation of the temporal connection of the unconstitutional actions of the OPP officers. That said, the causal relationship between those actions and Det. Lowry's grounds of belief is clear as the entirety of Lowry's information originated from the OPP entry into the N.M. dwelling.

[421] Because the searchers left the N.M. property before 9:00 p.m. on March 22nd, 2002, the s. 488 night-search error proved inconsequential. Det. Lowry's use of the OPP search warrant forms led him into error. It was an inadvertent transgression.

[422] Unlike the TPS warrant documentation, the OPP Form 5 warrant, nearly a year after the decision in *Branton*, still contained the *Branton* error. When Det. Lowry borrowed the OPP Dufferin detachment's computerized warrant form, he was provided an invalid Form 5. His error in using this form was entirely inadvertent. No evidence was led as to whether any of the searchers who read and acted on the authority of Det. Lowry's warrant seized evidence respecting the suspected or intended commission of a criminal offence.

[423] Det. Blake did not testify in this proceeding. On the record here, with only a transcript of examination of Blake, I am unable to determine that the discovery of the drugs in the workshop was a targetted search as opposed to an inadvertent and unexpected seizure.

[424] Leave was granted to the defence to cross-examine Det. Const. Manser as the affiant for the s. 117.04 warrant and as a sub-affiant for Det. Lowry's warrant. The cross-examination of the officer did not unduly prolong the hearing or, in my view, cast the s. 8 inquiry into irrelevancies. Properly, the focus was the issue of material non-disclosure and its impact on the discretion to issue the respective warrants. I do not read *R. v. Pires* (2005), [2005 SCC 66 \(CanLII\)](#), 201 C.C.C. (3d) 449 (S.C.C.) as excluding the relevance of the type evidence possessed by Manser to the issue of discretion to issue a search order – whether the statutory pre-condition of the “best interests of the administration of justice” in the case of a wiretap order (s. 186(1)(a)) or the recognized overarching balancing discretion in the case of a search warrant as described at para. 317-8 above.

[425] Constitutional protections may be endangered by an “absence of effective supervision” by commanding officers (*Clayton and Farmer* (Ont. C.A.), at 316-7) or

“deficient programs of police...supervision”: *Spell v. McDaniel*, at 2168. Assuming that the illegal actions of Evans and others on March 20th, 2002 were not directly or tacitly encouraged by the STF upper command structure, the conduct of these officers reflects an absence of appropriate supervision within the investigative entity which ultimately obtained a warrant to search through its “walled up” affiant and, in turn, the opportunity to effect a plain view seizure. This stands as contextual backdrop for the substantively invalid warrant obtained by Det. Lowry. As discussed at para. 358 above, non-disclosure of the misconduct of STF officers deprived the issuing justice of information which could have been relevant to the discretionary deliberation process. Because of my conclusion regarding the exclusion/admission of the drug evidence under the *Charter*, it is unnecessary to consider the application of common law exclusion of evidence or abuse of process as remedial admissibility options respecting the STF misconduct. Det. Lowry prepared his ITO in very short order. I question whether his drafting occurred in circumstances of justifiable or legally relevant urgency which, as he described it, was seen as essentially a race to the swiftest between the STF and N.M. should he obtain bail. In any event, there is no compelling evidence that the decision to search the out-buildings was other than a considered one. As discussed, despite the issuance of the s. 487 warrant by a judicial official, the warrant was overbroad and unsupported by any grounds in the ITO or otherwise for believing the things to be searched for by the STF would be located in the out-buildings. Effectively, the absence of grounds converts the search of the workshop to an unconstitutional warrantless search. This circumstance, in the aftermath of the earlier STF misconduct, favours exclusion of the drug seizure evidence despite its real, reliable and unscripted character and its discovery in a place with a lower expectation of privacy than a dwelling.

[426] On the third prong of the *Collins* model, recognizing that the court must dissociate itself from egregious police conduct (*Kokesch*, at para. 43), and that s. 24(2) is not a remedy “for police misconduct” (*Buhay*, at 126), factors favouring admission include:

- (1) the seriousness of the charge(s) – the more grave the offence, the greater the negative effect on the administration of justice should the evidence be excluded: *Buhay*, at 125; *Wise*, at 228
- (2) the impact on the prosecution case – whether the impugned evidence is crucial to proof of guilt: *Law*, at 466; *Kitaitchik*, at 28; *R. v. Calder*, [2006] A.J. No. 1303 (C.A.) at paras. 14-5
- (3) the greater the reliability of the evidence, the more the case for exclusion is diminished: *Donnohue Grant*, at 272; *Kitaitchik*, at 28.

[427] Ms. Cullen correctly submitted that firearms crimes are viewed as grave offences in contemporary Canadian society. Exclusion of the evidence would defeat the Crown's ability to prosecute all the weapons allegations. Possession of an unregistered loaded handgun by a police officer is a serious crime. That said, all but one of the firearms were lawfully possessed. The firearms were not involved in offences off the N.M. property. Three of the alleged offences involve careless storage. Exclusion of the weapons evidence will not impair the complainant's ability to testify as to the domestic violence alleged in several counts of the provincial indictment including the crime involving the .357 calibre firearm. Mr. N.M.' ownership of the .357 calibre handgun is provable through the provincial registry records.

[428] Apart from the nature of the crimes, and the effect of exclusion of the weapons evidence in the Crown's case, the repute of the administration of justice would be significantly adversely impacted by admission of the seized evidence. Given the pattern of s. 8 non-compliance, and the intrusiveness of the breaches, the court must be concerned with the long-term effects of the police conduct displayed in this case and the danger inherent in judicial condonation of constitutionally unacceptable behaviour by the police of the sort exhibited here. Balancing the interests of truth with the integrity of the judicial system, in the particular circumstances of this case, the exclusion of evidence would not exact too high a toll on the truth-seeking objective of the criminal trial process.

[429] Exclusion of the evidence relating to the seized drugs would fatally impair prosecution of the federal indictment. C.D.S.A. offences are generally regarded as serious instances of criminality and particularly so when the accused is a peace officer and some of the prohibited substances are hard drugs. The counts charge simple possession offences only. The accused, if convicted, may not be subject to additional custody, if incarceration is otherwise a fit disposition, on account of pre-sentence custody already served. Although the case is a close one, admission of the seized evidence in what was effectively a warrantless search in the absence of a valid warrant, in the context of the totality of the circumstances, would in the balance impact more negatively on the administration of justice than exclusion of the evidence.

[430] Having regard to the relative seriousness of the constitutional violations and the effect of admission of the evidence on the administration of justice, the accused has established the case for exclusion.

CONCLUSION

[431] The seized evidence is ordered excluded pursuant to s. 24(2) of the *Charter*.

HILL J.

Released: July 18, 2007

COURT FILE NOS.: CRIM J(P) 1329/03

CRIM J(F) 664/06

DATE: 20070718

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

N.M.

JUDGMENT

HILL J.

Released: July 18, 2007

TAB 51

R. v. Rajkovic, 2021 ONCA 11 (CanLII)

Source: Court of Appeal for Ontario
Date: 2021-01-11
File number: C66041
Citation: R. v. Rajkovic, 2021 ONCA 11 (CanLII),
<<https://canlii.ca/t/jcjjj>>, retrieved on 2026-03-23

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Rajkovic, 2021 ONCA 11
DATE: 20210111
DOCKET: C66041

MacPherson, Tulloch and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Boris Rajkovic

Appellant

Anthony Marchetti, for the appellant

Natalya Odorico, for the respondent

Heard: December 17, 2020 by video conference

On appeal from the sentence imposed by Justice Faye E. McWatt of the Superior Court of Justice on March 29, 2018, with reasons reported at [2018 ONSC 1501](#).

A. INTRODUCTION

[1] The appellant, Boris Rajkovic, pleaded guilty to six offences relating to a kidnapping of a bank employee and a failed bank robbery that ended in a shootout with police in which he was shot twice in the stomach.

[2] The sentencing judge imposed a global sentence of 13 years in jail. She gave the appellant credit for pre-sentence custody and onerous pre-trial lockdown conditions totalling three years and seven months, leaving a remaining sentence of nine years and five months.

[3] The appellant appeals the sentence. He challenges both the global sentence and the credit components of the sentence.

B. FACTS

(1) The parties and events

[4] The sentence hearing took six days. On the first day of the hearing, the following statement of facts was read into the record:

On Saturday, February 20th, 2016, at approximately 7:00 a.m. Justine King was leaving her residence to go to work. Ms. King at the time was employed as a customer service representative with the Toronto Dominion Bank located at 1315 the Queensway in the city of Toronto.

Upon getting into her vehicle an unidentified suspect approached Ms. King wearing a police hat and identified himself as a police officer. The unidentified suspect advised Ms. King that he was an undercover officer and that he was conducting an investigation in the area. As he did so the accused, Mr. Rajkovic, approached the passenger side and got into Ms. King's vehicle wearing a face mask in an attempt to conceal his identity.

He then produced a firearm and showed it to Ms. King and ordered her to drive to her place of employment. He

further advised Ms. King that if she didn't comply with his demands, he would kill her and her family and burn her house down.

Ms. King complied with his demands and began driving to her place of employment followed by an unknown silver vehicle.

The entire incident was captured on a nearby surveillance video system from a residence.

While on route to the bank Ms. King was holding her cellular phone. The accused ripped the phone from her hand at which point she advised the accused that one of her co-workers would be expecting her call. She was then ordered by the accused to call her co-worker and advise them that she would be bringing a trainee with her to the bank.

Ms. King complied with the accused demand, called her co-worker, Ms. Carly Tullo, and advised her accordingly.

While travelling to the bank, the accused was in possession of a two-way radio in which he would keep contact – through which, pardon me, he would keep contact with an unknown male believed to be the unidentified suspect who had initially approached Ms. King in her vehicle.

At approximately 7:30 a.m. the accused and Ms. King arrived at the bank. Upon arriving they were met by Ms. Tullo. All three parties entered the bank where the accused ordered them to disarm the alarm and open the vault; he did so at gun point.

Upon doing so the duress code alarm was activated and police were notified. Dispatched police officers attended the scene. Prior to the police arriving the accused was advised by his accomplice via the two-way radio that the police were on their way.

The accused obtained a quantity of cash from the vault and exited the bank. Prior to exiting the bank he threatened to kill both Ms. King and Ms. Tullo for tripping the hold up alarm. Upon exiting the bank he observed police arriving on scene and as a result went back inside.

The attending officers subsequently contained the scene. Shortly thereafter the accused emerged from the southwest emergency exit of the bank holding both Ms. King and Ms. Tullo hostage. The accused held Ms. Tullo with his forearm around her throat and his gun pointed at her head. He then led both parties, Ms. King and Ms. Tullo, toward Ms. King's vehicle, where he had planned to make good his escape.

Upon arriving at the vehicle, the accused let go of Ms. King and Ms. Tullo at which point they both ran towards nearby officers. The accused then pointed his gun towards the officers and discharged his firearm. As he did so responding officers returned fire and Mr. Rajkovic was struck once.

[Defence counsel]: Twice.

[Crown counsel]: Pardon me, my friend says twice. We'll satisfy that fact. He was subsequently placed under arrest and transported to St. Michael's Hospital for treatment for what was determined to be a non-life threatening injury.

At the time of his arrest a black semi-automatic American arms .22-caliber handgun was recovered. The handgun was obviously loaded. Also recovered at the scene was a large canister of pepper spray and a folding knife. Those are the facts relied upon by the Crown.

[5] When the appellant was asked if he adopted this statement of facts, he quarrelled with only one point:

[The accused]: While ... exiting the bank with hostages, I didn't put a gun to anybody's head.

[Defence counsel]: You – I take it you used them as human shields while carrying a gun?

[The accused]: No, I didn't use them as a shield. I tried to escape while having them close to me. I knew I wasn't going to receive any fire from the police.

(2) The sentence

[6] The Crown position at the sentence hearing was 20 years' incarceration, reduced to 15 years based on the totality principle. The defence position was eight years' incarceration less enhanced credit for pre-trial custody. By the time he was sentenced, the appellant had been in custody for two years and one month. The parties agreed that the appellant should receive credit of three years and two months for this period of custody.

[7] The sentencing judge imposed a global custodial sentence of 13 years, broken down as follows:

- Kidnapping with a prohibited firearm – 8 years
- Robbery with a prohibited firearm – 8 years (concurrent)
- Discharge prohibited firearm with intent to resist arrest – 5 years (consecutive)
- Unauthorized possession of a loaded prohibited firearm – 3 years (concurrent)
- Possession of a prohibited firearm – 1 year (concurrent)
- Uttering death threats – 1 year (concurrent)

[8] The sentencing judge then deducted two periods of time from this global sentence. Pursuant to *R. v. Summers*, [2014 SCC 26](#), she applied a 1.5:1 ratio and reduced the sentence by three years and two months for pre-trial custody. Pursuant to *R. v. Duncan*, [2016 ONCA 754](#), she applied a 0.5:1 ratio and further reduced the sentence by five months for harsh lockdown conditions in pre-trial custody. These two reductions left a remaining sentence to serve of nine years and five months.

[9] The sentencing judge refused to give any credit for the appellant's allegation that he received poor medical care while he was in pre-trial custody.

[10] The appellant appeals the sentence.

C. ISSUES

[11] The appellant advances three grounds of appeal:

1. The sentencing judge imposed an unfit sentence outside the range for these offences;
2. The sentencing judge erred by imposing a consecutive sentence for the discharge firearm offence; and
3. The sentencing judge erred by not giving sufficient credit for the conditions of his pre-trial custody at Toronto South Detention Centre.

D. ANALYSIS

(1) The unfit sentence issue

[12] The appellant submits that a global sentence of 13 years for these offences was “crushing” and, therefore, unfit. He asserts that, based on comparable cases, the maximum sentence should have been ten years.

[13] I do not agree. The constellation of offences in this case is both numerous (six) and serious, involving exceptionally troubling criminal activity. The sentencing judge succinctly and accurately described the appellant's carefully planned, methodical and cruel criminal activity:

He kidnapped a member of the public at her home, continued on to her place of employment and kidnapped another civilian employee of the bank. He brandished a loaded firearm and threatened their lives and their family members. He stole \$65,000 and used his hostages as human shields. He was then prepared to kill a policeman to make good his escape. It could not have got worse than these set of facts unless someone, indeed, died.

[14] I also observe that three of the offences the appellant committed have mandatory minimum sentences of five years.

[15] Finally, one of the offences the appellant committed – discharge firearm to resist arrest – warrants a very strong sanction. As Doherty J.A. said in *R. v. McArthur* (2004), [2004 CanLII 8759 \(ON CA\)](#), 182 C.C.C. (3d) 230, at para 49:

[T]he maintenance of a just, peaceful and safe society is the fundamental purpose of sentencing. Police officers play a unique and crucial role in promoting and preserving a just, peaceful and safe society. We rely on the police to put themselves in harm's way to protect the community from the criminal element. At the same time, we rely on the police to act with restraint in the execution of their duties and to avoid the use of any force, much less deadly force, unless clearly necessary. Violent attacks upon police officers who are doing their duty are attacks on the rule of law and on the safety and well-being of the community as a whole. Sentences imposed for those attacks must reflect the vulnerability of the police officers, society's dependence on the police, and society's determination to avoid a policing mentality which invites easy resort to violence in the execution of the policing function. [Citation omitted.]

[16] For these reasons, I conclude that the global sentence of 13 years for the appellant's six serious criminal offences was fit.

(2) The consecutive v. concurrent issue

[17] The appellant contends that the sentencing judge erred by imposing a consecutive sentence of five years for the offence of discharging a firearm to resist arrest. He says that this offence formed part of a continuous chain of events with other offences; there was no significant break in time and place between the bank robbery and discharge firearm to resist arrest offences.

[18] For three reasons, I do not accept this submission.

[19] First, the sentencing judge's decision in the realm of imposing consecutive and concurrent sentences is entitled to considerable deference: *R. v. McDonnell* ,

1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948, at para. 46; *R. v. Sadikov*, 2018 ONCA 609, at para. 16.

[20] Second, on the merits, I can see no error in the sentencing judge's assignment of the discharge firearm to resist offence to a different category than the bank robbery offences. As I noted earlier, the discharge firearm to resist arrest warrants a very strong sanction. Moreover, at least arguably, the appellant may have caught a break when the sentencing judge did not impose a consecutive sentence for the kidnapping but assigned the kidnapping offence to the bank robbery offences.

[21] Third, the appellant's submission on this issue makes no practical difference. Since I have determined that a global sentence of 13 years for the six offences committed by the appellant is a fit sentence, the breakdown of the time assigned to each of the offences is of no moment.

(3) The enhanced credit for medical care in custody issue

[22] The appellant asserts that, although the sentencing judge properly gave *Summers* and *Duncan* credit for his pre-trial custody, she erred by not giving additional credit for poor medical treatment he received at Toronto South Detention Centre. Once again, as at the sentence hearing, the appellant relies only on his affidavit and *viva voce* testimony at the sentence hearing to support his claim.

[23] The sentencing judge carefully considered, and rejected, this component of the appellant's claim for credit for various aspects of his pre-sentence custody. She said:

The medical records from the detention centre were filed as exhibits and were put to Mr. Rajkovic by the Crown in cross-examination. The records did not support any inference that Mr. Rajkovic was transferred out of the medical unit because of space issues. In fact, the records disclosed that it was the opinion of the doctor in the unit that the defendant was fit for discharge and for transfer to

the general prison population. The records also supported the fact that, after his transfer, the defendant was seen daily by medical staff to monitor his wound. The dressing was changed every day for two months after the transfer. He was operated on for the hernia in April of 2016. In a record from the surgeon, the doctor indicated that hernias after the type of surgery Mr. Rajkovic had undergone, were not uncommon. In other words, there is no medical evidence that an assault in the general population, although unfortunate, caused Mr. Rajkovic's hernia.

...

I am not prepared to give Mr. Rajkovic any presentence credit for any allegation of less than standard medical care at the detention centre. The medical records do not support it.

[24] I see no basis for interfering with this analysis and conclusion.

E. DISPOSITON

[25] I would dismiss the appeal.

Released: "JCM" JAN 11 2021

"J.C. MacPherson J.A."
"I agree. M. Tulloch J.A."
"I agree. P. Lauwers J.A."

TAB 52

R. v. Schertzer, 2015 ONCA 259 (CanLII)

Source: Court of Appeal for Ontario
Date: 2015-04-20
File number: C56396; C56397; C56398; C56399; C56400; C56558
Other citations: 333 OAC 308 — 20 CR (7th) 187 — 325 CCC (3d) 202 —
[2015] OJ No 2014 (QL)
Citation: R. v. Schertzer, 2015 ONCA 259 (CanLII),
<<https://canlii.ca/t/gh86h>>, retrieved on 2026-03-23

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Schertzer, 2015 ONCA 259

DATE: 20150420

DOCKET: C56396, C56397, C56398, C56399, C56400 & C56558

Watt, Tulloch and Benotto JJ.A

BETWEEN

Her Majesty the Queen

Respondent/Appellant
by way of cross-appeal

and

John Schertzer, Steven Correia, Ned Maodus, Joseph Miched
Raymond Pollard

and

Appellants/Respondents
by way of cross-appeal

Alan Gold and Melanie Webb, for the appellant/respondent by way of cross-appeal
John Schertzer

Joanne Mulcahy, for the appellant/respondent by way of cross-appeal Steven
Correia

Patrick Ducharme, for the appellant/respondent by way of cross-appeal Ned
Maodus

Peter Brauti and Maureen Salama, for the appellant/respondent by way of cross-
appeal Joseph Miched

Michael Lacy, for the appellant/respondent by way of cross-appeal Raymond
Pollard

R. W. Hubbard and M. Lai, for the respondent/appellant by way of cross-appeal

Heard: November 4-7, 2014

On appeal from the conviction entered on June 27, 2012 and the sentence imposed on January 4, 2013 by Justice Gladys I. Pardu of the Superior Court of Justice, sitting with a jury.

Benotto J.A.:

OVERVIEW

[1] The five appellants were members of the drug squad of the Toronto Police Service (TPS) Central Field Command (CFC). All were convicted of attempting to obstruct justice. Three - Pollard, Maodus and Correia – were also convicted of perjury.

[2] The central issue at trial was the timing of the search of an apartment where Ho Bing Pang resided. The Crown alleged that the appellants searched the apartment before the search warrant physically arrived at the premises. The appellants maintained that they did not search the residence until after the warrant arrived.

[3] The attempt to obstruct justice count alleged that all of the appellants practised deception, including by falsifying their notes “and/or” by testifying falsely, in order to conceal that the search of Pang’s apartment had been done without a warrant. The perjury counts particularized that Pollard, Maodus and Correia gave false evidence at Pang’s preliminary inquiry. Miched was charged on a separate perjury count but was acquitted.

[4] The appellants were each sentenced to a 45-day conditional sentence.

[5] The appellants appeal the convictions and the respondent, the Crown, cross-appeals the sentences as unfit. The Crown submits that a three-year sentence was appropriate.

FACTS

The timing of the warrant

[6] On February 18, 1998, the CFC drug squad arrested Pang and Yin Leong Chui for possession of two ounces of heroin. The team was led by Schertzer and was composed of the other four appellants and additional officers.

[7] The team had been conducting surveillance on Chui, a suspected heroin dealer, that day. At around 6:40 p.m., Pang was observed meeting with Chiu in the parking lot of a plaza. After a brief conversation, Pang drove into the underground parking garage of an apartment building next door to the plaza. Chiu drove to the front of the same apartment building and waited with his engine running.

[8] Correia followed Pang into the underground parking and then joined him in the elevator going up. Pang got out at the 14th floor. Correia got out at the 15th floor, ran down the stairs and saw someone go into Unit 1404. Correia waited in the hallway and observed Pang carrying a white plastic bag. Both men went back down to the underground parking garage.

[9] Pang's vehicle left the underground parking garage and drove to the front of the apartment building. Pang exited his vehicle, carrying the white plastic bag. He got into Chui's car and handed him the bag. Schertzer ordered a take-down.

[10] Just before 7:00 p.m., Pang and Chui were arrested in front of Pang's apartment building. The white plastic bag, containing two ounces of heroin, was seized. On the drive to the police station, Pang told an officer that there was more heroin in a nightstand in his bedroom in Unit 1404.

[11] Schertzer decided not to search Pang's apartment based on exigency. Schertzer testified that anyone inside who saw the arrest would likely have destroyed the evidence by the time the team made it to the apartment. Accordingly, Schertzer decided to get a search warrant.

[12] It was generally accepted that the evidence at trial supported two different scenarios. The appellants either entered Pang's apartment around 7 p.m. without a warrant or around 10:45 p.m. with a warrant.

[13] Miched had been sent to the police station at 53 Division to apply for warrants for Chui's and Pang's residences. Miched submitted documents to a justice of the peace by fax at 10:00 p.m. He then received a transmission at 10:32 p.m. from the justice of the peace authorizing the search of Pang's apartment. The search warrant had to be photocopied before he left the station. Miched testified that he left the third floor of 53 Division, "skipped down the stairs", and drove to the apartment building as fast as he could. On cross-examination, Miched said that he ran red lights but admitted that he was not in a marked car and had no siren or flashing lights. He went to the fourteenth floor. Schertzer and Maodus used Pang's keys to open the apartment door. Miched served the warrant on an occupant inside the apartment. Miched then immediately left to return to 53 Division where, at 10:54 p.m. he faxed an acknowledgment that the Chui warrant had been refused.

[14] The Crown's theory was Miched could not have done all of the things he said that he did, including making the trip from 53 Division to the Pang residence and back, in the 22 minutes between 10:32 and 10:54 p.m. Therefore the appellants must have entered the premises before the search warrant arrived.

[15] The Crown relied on the testimony of another officer, Detective Kerry Watkins, who conducted two one-way "time trials" from 53 Division to Pang's apartment. The time trials were conducted more than 14 years after the search of Pang's apartment, the first starting at 10:03 p.m., with the second starting at 10:55 p.m.

[16] Watkins started timing himself on the third floor of 53 Division. He walked to the parking garage and then drove at the speed-limit, 50 or 60 kilometres per hour ("kph") on the various roads, to Pang's former apartment building. He walked to the building, entered through security, took the elevator to the 14th floor, and then walked to Unit 1404. The first one-way trip took 27 minutes; the second took 20 minutes 31 seconds. The driving distance one-way was about 12 kilometres.

[17] The Crown submitted to the jury in closing submissions that, at the very least, seven of the 22 minutes would have been taken up with non-driving activities, leaving 15 minutes to travel 24 kilometres. This would have required Miched to drive, accounting for some slowing down or stopping at intersections, in excess 100 kph through the city, including through residential neighbourhoods, without lights or siren. The Crown forcefully urged the jury to conclude that it was "nonsense" that Miched actually did something so "ridiculously dangerous", especially when getting the warrant to the rest of the squad was not an emergency situation.

[18] The Crown relied on the evidence of Pang's brother Ho Zhong Pang ("Zhong") and his former sister-in-law Miao Fen Lin ("Fen"). Zhong, Fen, and their seven-year-old daughter lived in Unit 1404 with Pang. Fen testified that officers

first entered her apartment after she had prepared dinner but before she and her daughter had eaten. Upon refreshing her memory from the preliminary inquiry transcript, Fen said it was around “seven o’clockish”. Her daughter had not yet gone to bed; that usually happened around 10 p.m. Zhong was not home at the time. The officers did not present her with a search warrant. Both Fen and Zhong testified that after Zhong returned home, at some time between 11:00 p.m. and 11:45 p.m., one or two officers returned to Unit 1404 and gave Zhong a search warrant. The officer or officers took away a plastic bag that had been left near the front door of the apartment.

[19] The appellants’ memo book notes indicated that the search took place after the warrant arrived. Schertzer’s, Correia’s, and Moadus’ notes expressly stated that the search warrant was executed at 10:45 p.m. and that the officers left the apartment at 11:30 p.m. Pollard’s notes appeared to state that the search warrant was executed at 8:45 p.m., although he explained at trial that this was a mistake and he had meant to write 10:45 p.m. Pollard’s notes state that he left the apartment at 11:30 p.m. This meant that Schertzer, Pollard, Maodus and Correia waited outside of Unit 1404 for well over three hours after the arrest of Pang and Chui. The appellants’ notes are consistent in stating that only Fen and her daughter were home at the time of the search.

[20] The trial judge concluded in her sentencing reasons that the jury’s guilty verdicts indicated that it was found as fact that the appellants entered the apartment before the warrant arrived.

[21] The Crown alleged that there were other false documents produced by the appellants. Miched prepared a Supplementary Record of Arrest, dated February 18, 1998, at 11:34 p.m., which stated, “A CDSA search warrant was executed on the accused PANG’s residence...” Schertzer signed off on this document as the Officer in Charge. In her sentencing reasons, the trial judge found that with this

document Miched and Schertzer intended to conceal from Pang's defence counsel the warrantless nature of the search. On February 20, 1998, Correia swore an information to obtain ("ITO") a search warrant for Fen's safety-deposit box, which the appellants learned of during their search of the apartment. Among other potentially untrue assertions, Correia's affidavit stated, "At the time the search warrant was executed..." In her sentencing reasons, the trial judge concluded that she was satisfied beyond a reasonable doubt that this statement was deceptive as Correia knew that admitting the search was warrantless would make it unlikely that a further warrant would be granted.

[22] The basis for the obstruction of justice convictions was the misleading statements about the time of the search set out in the memo book notes, the Supplementary Record of Arrest, and the ITO for Fen's safety-deposit box. The basis for the perjury convictions against Correia, Maodus and Pollard was their testimony at the Pang preliminary inquiry that the search of the apartment occurred after the warrant arrived.

The TPS memo to employees

[23] On November 4, 2010, the TPS, at the request of Crown counsel, delivered a memo to its employees who were named as potential witnesses in the trial. The memo informed the TPS employees that defence counsel could only interview them if they were willing to be interviewed. It required the potential witnesses to advise TPS if they intended to submit to an interview or otherwise provide information to the defence so that arrangements could be made to have an officer from the Professional Standards Special Task Force present to "audio record and/or take notes of the interview".

[24] During the trial, the appellants requested a stay of the proceedings on the basis that this memo was an abuse of process. The trial judge dismissed the application.

THE CONVICTION APPEALS

[25] The appellants raise nine grounds of appeal:

- 1) The trial judge erred in leaving courtroom testimony as a possible mode of committing the attempt to obstruct justice charge in the relevant count, thereby violating s. 13 of the *Canadian Charter of Rights and Freedoms*;
- 2) The trial judge erred in instructing the jury that they could convict the appellants of attempting to obstruct justice by “other means” not particularized in the indictment;
- 3) The admission of the “experiment” evidence of Detective Watkins rendered the trial unfair;
- 4) The trial judge erred in failing to adequately instruct the jury about the corroboration requirement on the perjury offences;
- 5) The Crown’s closing address resulted in a miscarriage of justice as it was unfair and invited the jury to engage in speculative reasoning;
- 6) The trial judge failed to provide the jury with a specific instruction on the law of exigency in relation to searches and seizures;
- 7) The trial judge’s “lost evidence” instruction was in error since it allowed the jury to use the fact of the “lost evidence” as evidence of guilt;
- 8) The guilty verdicts were not ones that a properly instructed jury, acting reasonably and judicially, could have returned; and
- 9) The TPS memo to potential witnesses irreparably compromised the integrity of the proceedings, prejudiced the appellants, and amounted to an abuse of process.

Issue No. 1: Did the trial judge err in leaving courtroom testimony as a possible mode of committing the count of attempt to obstruct justice?

[26] The obstruction of justice count charged all of the accused with attempting to obstruct justice by “making false or misleading entries in their memo books, and/or by lying to the court in their testimony” (emphasis added). All of the appellants, except for Schertzer, testified at the Pang preliminary inquiry.

Appellants’ Position

[27] The appellants submit that the trial judge erred when she told the jury they could use the preliminary inquiry testimony as a basis to convict on the attempt to obstruct justice charge. They argue that their testimony at Pang’s preliminary hearing was compelled and that they are therefore entitled to the protection of [s. 13](#) of the [Charter](#). Section 13 reads:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[28] The offence of attempting to obstruct justice is not listed as an exception to the right against self-crimination in [s. 13](#). The essential elements of perjury and of attempting to obstruct justice are not the same.

[29] The circumstances in which [s. 13](#) was enacted and the legislative history of [s. 5](#) of the [Canada Evidence Act](#), R.S.C. 1985, c. C-5 (“CEA”), confirm that the offences of perjury and giving contradictory evidence are the only exceptions to the exclusionary rule. Section 5 of the CEA is similar to, and predates, [s. 13](#) of the [Charter](#). In *R. v. Chaperon* (1979), [1979 CanLII 3001 \(ON CA\)](#), 52 C.C.C. (2d) 85 (Ont. C.A.), this court held the offence of giving contradictory evidence was not contemplated by [s. 5](#) of the CEA in force at the time, which made an exception for prosecutions for perjury only. Section 13 was enacted three years after *Chaperon*

and specifically included the offences of perjury and of giving contradictory evidence in the listed exceptions to the exclusionary rule. No other offence was added. In 1997, s. 5 of the *CEA* was amended to include the offence of giving contradictory evidence as the sole additional exception. Therefore, it cannot be said that the offence of attempting to obstruct justice is excluded from the operation of s. 13. The prior testimony cannot be a basis for the obstruction of justice charges, as the evidence was tendered in violation of the appellants' *Charter* rights. This ground of appeal also applies to Schertzer even though he did not testify at the Pang preliminary inquiry. The appellants submit that the jury may have used the evidence against him since "all of the appellants were "joined at the hip" at trial."

Crown's Position

[30] The Crown submits that this ground of appeal cannot apply to Schertzer, as he did not testify at the preliminary inquiry. The other four appellants were also charged with perjury. (Miched was acquitted based on the wording of the indictment.) With respect to the other three appellants, their testimony at Pang's preliminary inquiry was properly before the jury in relation to the perjury charges against them.

[31] The instruction from the trial judge that their testimony could also be used with respect to the attempt to obstruct justice charges was harmless because they would have been convicted anyway—as was Schertzer—on the basis of their notes. As Schertzer did not perjure himself, his conviction for attempting to obstruct justice means that the jury concluded that his notes were false. Accordingly, since Schertzer's notes were falsified in the same manner as those of the four appellants who did testify, their convictions of attempting to obstruct justice were inevitable on the basis of their false notes. The instruction requested by the appellants would have unnecessarily complicated the already lengthy jury instruction. The attempt to

obstruct justice and the perjury counts all relied on the same factual finding: the accused searched Pang's apartment without a warrant and covered this up.

[32] In any event, an obstruct justice conviction may be founded on proof of perjury: *R. v. Simon* (1979), [1979 CanLII 2997 \(ON CA\)](#), 45 C.C.C. (2d) 510 (Ont. C.A.); *R. v. Moore* (1980), [1980 CanLII 314 \(BC CA\)](#), 52 C.C.C. (2d) 202 (B.C.C.A.); *R. v. Staranchuk* (1983), [1983 CanLII 2402 \(SK CA\)](#), 8 C.C.C. (3d) 150 (Sask. C.A.), *aff'd* [1985 CanLII 73 \(SCC\)](#), [1985] 1 S.C.R. 439.

Analysis of Issue No. 1

[33] I would reject the appellants' submissions for two reasons. First, s. 13 is not engaged because the testimony itself was the *actus reus* of the offence. Since the evidence was not truthful there was no *quid pro quo* as envisaged by the s. 13 jurisprudence. Second, even if section 13 did apply, the result would not have been affected because, based on the jury's findings, the convictions were inevitable.

The Actus Reus/Quid Pro Quo

[34] In *Staranchuk*, the Supreme Court held that compelled testimony forming the *actus reus* of crimes should be admissible in the prosecution of those crimes. The court endorsed, at pp. 439-40, the following passage from the reasons of the Court of Appeal for Saskatchewan:

We believe that a distinction must be drawn between those occasions where a person in the course of providing evidence under oath is required, when answering truthfully, to disclose the commission by him, previously, of an offence (in which event, generally speaking, that evidence cannot subsequently be used against him) and those occasions where a person makes false statements, while under oath, as a result of which

he is charged with giving false evidence. In the latter case the very essence of the offence, and its *actus reus*, is the giving of the false testimony. In this case the Crown sought to place the two exhibits into evidence to prove the *actus reus* of the offences charged and, if that evidence was otherwise admissible, it ought to have been received.

[35] In its reasons, the Court of Appeal for Saskatchewan stated further, at p. 153:

Even if ... the accused gave "incriminating evidence", within the meaning of s. 13 of the *Charter*... the section would still be of no avail to the accused ... because his allegedly false evidence forms the very substance of the offence with which he is now charged.

[36] That s. 13 is not available to an accused when false evidence forms the substance of the offence charged is consistent with the rationale for the s. 13 protection in the first place. This rationale has been referred to as the *quid pro quo*.

[37] In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 22, Binnie J. wrote for the court:

The consistent theme in the s. 13 jurisprudence is that "the purpose of s. 13 ... is to protect individuals from being indirectly compelled to incriminate themselves".... That same purpose was flagged in [*R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433], the Court's most recent examination of s. 13, by Arbour J., at para. 21:

Section 13 reflects a long-standing form of statutory protection against compulsory self-incrimination in Canadian law, and is best understood by reference to s. 5 of the *Canada Evidence Act*. Like the statutory protection, the constitutional one represents what Fish J.A. called a *quid pro quo*: when a witness who is compelled to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence

against the witness in exchange for his or her full and frank testimony.

[Emphasis in original]

[38] Moldaver J. also discussed this principle in his majority reasons in *R. v. Nedelcu*, 2012 SCC 59, [2012] 3 S.C.R. 311, at paras. 3, 6, and 7:

[T]he Court in *Henry* outlined “a unified approach to s. 13, one based on the historical rationale underlying s. 13 - the *quid pro quo*”....

[T]he “*quid*” that forms the critical first branch of the historical rationale, refers to “incriminating evidence” the witness has given at a prior proceeding in which the witness could not refuse to answer. The section does not refer to all manner of evidence the witness has given at the prior proceeding. It refers to “incriminating evidence” the witness has given under compulsion.

The “*quo*” refers to the state’s side of the bargain. In return for having compelled the witness to testify, to the extent the witness has provided “incriminating evidence”, the state undertakes that it will not use *that* evidence to incriminate the witness in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence. [Emphasis in original.]

[39] The *quid pro quo* is simple: the witness is offered protection in exchange for truthful incriminating testimony. This is not what happened here. The testimony of the four appellants at the Pang preliminary inquiry was not self-incriminatory. Rather, it was an attempt at self-exculpation. When it convicted them of perjury, the jury found that Pollard, Maodus, and Correia lied at the Pang preliminary inquiry. This finding, and any inference that Miched lied at the Pang preliminary inquiry in a manner that was not captured by the problematic wording of his perjury count on the indictment, was admissible evidence toward the question of whether these four appellants also attempted to obstruct justice.

[40] Section 13 reflects a *quid pro quo* where compelled testimony compels self-incrimination. In these circumstances, the state will not use the self-incriminating,

compelled testimony to prosecute the offence revealed. The accused here were not compelled to give the testimony that was subsequently used to incriminate them for attempting to obstruct justice. They were not compelled to lie. In fact, they were required to do the opposite. There is no *quid pro quo* here.

[41] The appellants' interpretation of s. 13 that would render false testimony inadmissible on a charge of attempting to obstruct justice based on that false testimony would undermine the very purpose of the s. 13 protection. Simply put: a witness does not have immunity for lying under oath.

[42] I do not agree with the appellants' submission that attempting to obstruct justice does not fall within the exceptions to s. 13. The exceptions in s. 13 are not explicitly limited to the *Criminal Code* offences of perjury and giving contradictory evidence. "A prosecution for perjury" in the context of s. 13 refers to proceedings related to offences in the nature of giving a false statement under oath; it is not limited to any particular provision of the *Criminal Code*, R.S.C. 1985, c. C-46. The prosecution of a particularized charge of attempting to obstruct justice by committing perjury is such a proceeding. Not only is this interpretation supported by the use of the word "proceedings", as opposed to "offences", in s. 13, this interpretation is the most reasonable. Although the Court of Appeal for Saskatchewan in *Staranchuk* was not required to deal with this issue, it nonetheless condoned this more flexible interpretation when it commented, at p. 153, "...and even if it could be argued that this prosecution is not one, in its nature, for 'perjury or for the giving of contradictory evidence' within the meaning of s. 13 (another questionable proposition)". The drafters of the *Charter* could not have intended to immunize a person who lies under oath from criminal prosecution for that lie.

A conviction was inevitable

[43] Even if the trial judge had instructed the jury to ignore the preliminary inquiry testimony with respect to the attempt to obstruct justice count, in my view, the result would have been the same. The appellant Schertzer was not charged with perjury as he did not testify at the Pang preliminary inquiry. Yet he was convicted of attempting to obstruct justice. The jury must have convicted on the basis of his false notes. All of the appellants made the same assertion in their memo book notes that they waited until after the search warrant arrived to enter Pang's apartment. It was this assertion that the Crown focused its prosecution on.

[44] The trial judge did not err in leaving the appellants' courtroom testimony as a possible mode of committing the attempt to obstruct justice offence. I would not give effect to this ground of appeal.

Issue No. 2: Did the trial judge err in instructing the jury that they could convict the accused of attempting to obstruct justice by "other means" not particularized in the indictment?

[45] Count 3 of the indictment read:

JOHN SCHERTZER, STEVEN CORREIA, NED MAODUS, JOSEPH MICHED and RAYMOND POLLARD stand charged that they ... did wilfully attempt to obstruct, pervert or defeat the course of justice, by practicing deception, including by making a false or misleading account of events in their memo books, and/or by lying to the court...

[46] The jury instructions in relation to this count included the following:

If the Crown has not proven beyond a reasonable doubt that the defendant practiced deception by making false or misleading entries in the memo book or by lying to the court or by other means, your final verdict is not guilty. If the Crown has proven that a defendant practiced deception by making false or misleading entries in a memo book or by lying to the court or by other means beyond a reasonable doubt, you go to the next box [in the decision tree]. [Emphasis added.]

Appellants' Position

[47] The appellants argue that where the Crown has particularized the mode of commission of the offence in the wording of the indictment, the Crown must prove those particulars unless the particulars can be regarded as “mere surplusage”: *R. v. Sadeghi-Jebelli*, [2013 ONCA 747](#), [2013] O.J. No. 5728 (C.A.), at paras. [23-24](#). The indictment particularized the attempt to obstruct justice charge as making false or misleading entries in their memo books, and/or by lying to the court in their testimony. The appellants defended themselves on this basis. The trial judge erroneously instructed the jury that the attempt to obstruct justice offence could be proven “by other means”, when this alternative was not particularized in count 3.

[48] Having given this instruction, the trial judge erred further in failing to instruct the jury as to what “other means” could be relied upon and in failing to relate the evidence to this legal instruction.

Crown's Position

[49] The indictment did not limit the scope of the attempt to obstruct justice charge. The use of the word “including” clarified that the charge was not limited to the particularized examples. The trial judge did not err by drafting jury instructions and a decision tree reflecting this language.

[50] It was not necessary for the trial judge to specify what such “other means” could be because the Crown's position was clear. The Crown's opening address referred to the memo book notes and other records “prepared for the Crown Brief in Pang”. The documents upon which the Crown relied at the appellants' trial were bound together and entered as exhibits. The Crown's closing address specifically referenced many falsified documents in addition to the memo book notes, including the Supplementary Record of Arrest and the ITO for Fen's safety deposit box. Viewed in this context, the trial judge's instructions were sufficient to ensure the jury understood what “other means” on which the Crown was relying.

Analysis of Issue No. 2

[51] The indictment, on its face, alleged in count 3 “including by making false or misleading account of events in their memo books...” The plain meaning of the word “including” indicates that the listed items do not stand alone. The Oxford Dictionary defines “including” as “containing part of the whole being considered.”

[52] In addition, the indictment goes on to articulate means in addition to the memo book notes and the false testimony. The jury would have understood that the issue was whether a single lie had been repeated by the appellants in various ways. The phrase in the indictment “by practising deception” is inclusive of the various ways the alleged lie was repeated.

[53] I would not give effect to this ground of appeal.

Issue No. 3: Did the admission of the “experiment” evidence of Detective Watkins render the trial unfair?

[54] As discussed, Detective Kerry Watkins gave evidence about two “time trials” he conducted to recreate the travel time from 53 Division to the door of Pang’s apartment. The trials were both conducted on April 4th, 2012. His testimony was that it took 27 minutes on the first trial and 20 minutes 31 seconds on the second. The distance travelled was 12 kilometres, one-way.

Appellants’ Position

[55] Watkins’s experiment evidence was not properly admitted.

[56] The experiment evidence was not logically relevant because it did not have a “tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence”: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 82, leave to appeal refused, [2010] S.C.C.A. No. 125. It was therefore inadmissible.

[57] The experiment evidence was not legally relevant because its slight probative value was outweighed by its prejudicial effect. The experiment evidence lacked the necessary degree of similarity to the driving conditions in February 1998 to support any reasonable inference as to how long it would have taken Miched to drive from 53 Division to Pang's apartment. The experiment was conducted 14 years after the events it was intended to recreate. The population density, commercial development, and intersections along the route were very different. Also, Miched drove at a high speed and ran numerous yellow and red lights, whereas Watkins drove the speed limit and obeyed all signs and signals. Where Watkins and Miched parked their cars at 53 Division, how they gained access to the apartment building, and the timing of the elevator ride also differed. Finally, Watkins was involved in the investigation and prosecution of the appellants. He was not an independent, objective party.

[58] The probative value was so slight that its prejudicial effect warranted exclusion. The manner in which the evidence was presented gave it an unwarranted aura of accuracy, authenticity, and scientific validity. There was a real risk that the jury would give the evidence more weight than it deserved.

[59] Even if the evidence was admissible, the trial judge erred by not expressly cautioning the jury about the dangers of relying on the experiment evidence. A strong cautionary instruction was necessary because of the significant risk the jury might misuse the evidence. This risk was heightened because the Crown used the evidence together with other speculative inferences and the evidence was left with the jury as potentially corroborative on the perjury offence.

Crown's Position

[60] Watkins's experiment evidence was both logically and legally relevant. It was one of several pieces of evidence capable of establishing the timing of the search of Pang's apartment. The evidence overall established that the appellants could

only have entered Pang's apartment with the warrant, at or after 10:45 pm, if Miched had completed a two-way trip between 53 Division and Pang's apartment in 22 minutes. Watkins's evidence established the distance between 53 Division and Pang's apartment, and approximated the driving time and total time to travel between the two locations.

Analysis on Issue No. 3

[61] Watkins's experiment evidence was relevant. It established distances and benchmark times that, as a matter of everyday experience and common sense, cast doubt on Miched's version of events and made it more likely that the appellants entered Pang's apartment without a search warrant before 10:45 p.m.

[62] There was no risk of reasoning prejudice. The jury knew of Watkins's limited involvement in the investigation and his objectivity was not at issue. The experiment evidence did not have an aura of expertise, scientific or otherwise. Watkins's observations were not complicated and he expressly declined to opine on whether the 12 kilometre drive could have been done in "about seven or eight minutes". Finally, the differences in driving conditions in 1998 and 2012 were made clear to the jury. These were everyday matters suited perfectly to the exercise of common sense and logic by the jury.

[63] One may also infer the lack of prejudice from the tactical decision by several very experienced defence counsel not to object to the admission of this evidence at trial. Rather, the defence chose to argue that it was representative of the prosecution's shoddy police investigation.

[64] The trial judge reviewed Watkins's experiment evidence and its flaws in detail with the jury. These flaws were also exposed by the defence and candidly acknowledged by the Crown during closing submissions. Accordingly, there was no real risk that the jury would misuse the evidence.

[65] I would not give effect to this ground of appeal.

Issue No. 4: Did the trial judge err in failing to adequately instruct the jury about the corroboration requirement on the perjury offences?

[66] [Section 133](#) of the [Criminal Code](#) requires that no person be convicted of perjury under s. 132 on the evidence of only one witness, unless that evidence is “corroborated in a material particular by evidence that implicates the accused.”

Appellants’ Position

[67] The trial judge made two legal errors. First, the trial judge failed to adequately distinguish the “corroboration” requirement under s. 133 from the “confirmatory” requirement for unsavoury witnesses, per *R. v. Vetrovec*, [1982 CanLII 20 \(SCC\)](#), [1982] 1 S.C.R. 811. The trial judge used the word “confirmed” in relation to s. 133 without clarifying that corroboration requires more than restoring “faith” in the fact that the witness was telling the truth. The trial judge also told the jury that documentary evidence or admissions could be corroborative under s. 133. However, no attempt was made to relate such evidence to the legal requirement for corroboration. Indeed, there was no such evidence that could have been corroborative under s. 133.

[68] Second, it was wrong to leave Watkins’s experiment evidence with the jury as potentially corroborative of Fen’s testimony that the search was warrantless. Given the particularization of the perjury counts on the indictment, to amount to corroboration under s. 133, the purported corroborative evidence had to go to the falsity of the testimony that the appellants “did not enter the premises ... prior to the arrival of a search warrant”. Watkins’s experiment evidence did not speak directly to this testimony impugned on the indictment. At its highest, Watkins’s experiment evidence went to the truth or falsity of the claim that Miched drove the warrant to the apartment after it was issued or to the time the officers entered the residence with the warrant.

Crown's Position

[69] The jury instructions clearly distinguished between the *Vetrovec* instruction and the corroboration requirement under s. 133. The *Vetrovec* instruction was identified in the jury charge as a special instruction that applied to the testimony of complainants unrelated to the Pang investigation. The trial judge expressly stated that Fen's testimony was not subject to a *Vetrovec* warning. The s. 133 requirement was confined to perjury and the only perjury charges related to the Pang investigation. The s. 133 requirement was applied directly to Fen's evidence and the Crown's submission that Fen's evidence was confirmed by the impossibility of Miched travelling as he said he did between 53 Division and Pang's apartment. The trial judge later clarified that the requirement could be satisfied by oral evidence, documentary evidence, or admissions. In doing so, the judge used the word "confirm" rather than "corroborate". In the context, the word was not used as a term of art. On the whole, the trial judge's instructions informed the jury that perjury must be proved by more than one source of evidence.

Analysis on Issue No. 4

[70] There was extensive evidence regarding the timing of the events surrounding the warrant. There was oral evidence, documentary evidence, and there were formal admissions regarding the telewarrant procedure undertaken by Miched. Similarly, there was evidence about the window of time available for the trip to Pang's apartment. This evidence included Watkins' experiment evidence. Based on the instructions as a whole, the jurors would have understood that they could consider this evidence to corroborate Fen's testimony.

[71] This evidence was relevant to Miched's assertion that –having received the warrant at 10:32 p.m.- he had sufficient time to i) deliver the Pang search warrant by 10:45 p.m. and ii) return to 53 Division to sign and transmit a fax at 10:54 p.m.

[72] There is no dispute that the appellants' evidence at trial was that Miched delivered the warrant, and then they entered Unit 1404 around 10:45 p.m. If Miched did not deliver the warrant by 10:45 p.m., then based on the appellants' evidence at trial, Pollard, Maodus, and Correia lied when they testified at Pang's preliminary inquiry that they did not enter Unit 1404 prior to the arrival of the search warrant. This was the prior testimony impugned on the indictment. A lie about one was a lie about the other. It was therefore evidence from which the jury could infer perjury.

[73] I would not give effect to this ground of appeal.

Issue No. 5: Did the Crown's closing address result in a miscarriage of justice as it was unfair and improperly invited the jury to engage in speculative reasoning?

[74] In closing submissions to the jury, the trial Crown referred to Miched's evidence and invited the jury to find that he could not possibly have done all of the things necessary, including driving, in the 22 minute window established by the undisputed telewarrant evidence.

[75] The Crown also made other suggestions, including that Pang's daughter would have been "in bed asleep" by 10:45 p.m., not "on the sofa" as the appellants had testified; that according to Zhong's testimony, and contrary to Correia's testimony, Fen was "frightened" by the search; and that Pang's charges carried a "maximum penalty of life in jail".

Appellants' Position

[76] Using Watkins's experiment evidence as a launch pad, the Crown's closing submissions offered speculative suggestions to the jury as to how long it would have taken Miched to do various things, in addition to driving, in the absence of an

evidentiary foundation. For instance, the Crown speculated that it would have taken one minute to photocopy the search warrant. In this manner, the trial Crown improperly narrowed the driving time available to 14 minutes, necessitating average speeds of over 100 kph.

[77] The Crown also made other improper and inflammatory statements to the jury, including:

- There was no evidence that Fen's daughter slept in a bedroom, instead of on the sofa, in the two-bedroom apartment shared with Pang;
- There was no evidence that even a hurricane is not going to wake up a seven-year-old child;
- Fen testified that she was not frightened or worried during the search;
- It was irrelevant and inflammatory to state that Pang's charges carried a maximum sentence of life imprisonment;
- Erroneous suggestions that defence counsel misstated the evidence, particularly in relation to the timing of Miched's delivery of the warrant;
- Reliance on alleged fabrications in the ITOs authored by Miched and Correia, even though this was not a mode of attempting to obstruct justice particularized in the indictment;
- Misstating evidence in relation to other counts in the indictment for which the appellants were acquitted, which undermined their credibility in relation to the counts at issue;
- Using a tone and style that ridiculed the appellants and their defence; and
- Invoking prejudicial rhetoric suggesting that the victims were the administration of justice and the larger community, that the jury should avoid the tendency to be reluctant to convict police officers, and that acquittal would undermine the work of honest police officers.

Crown's Position

[78] The Crown asked the jury to find, using common sense and logic, that Miched could not realistically have completed the necessary tasks in 22 minutes. This submission fairly arises from the evidence and so did not invite speculation. The documentary evidence, the admissions, and the testimony of the justice of the peace, Watkins, and Miched established locations, distances, and times. Miched testified that he was driving as fast as he could on a major Toronto artery, running red lights as he went, in an unmarked rental car with neither lights nor sirens. From this testimony, common sense inferences could be drawn as to how fast Miched could have been driving. It is a matter of common sense and experience that Miched's non-driving tasks would have consumed time on the order of minutes. Miched was cross-examined on this proposition. His refusal to make reasonable concessions on the issue did not immunize his evidence from the application of the jury's common sense.

[79] The Crown's theory was that Miched's testimony made no sense and was fabricated. It reasonably suggested the evidence was "nonsense", "entirely incredible, and "a big lie". The Crown, like any other advocate, is entitled to advance his or her position forcefully and effectively: *R. v. Daly* (1992), 57 O.A.C. 70 (C.A.), at para. 32.

[80] It was not improper for the Crown to address the seriousness of the charges Pang faced. This was relevant to the Crown's submission that the appellants lied to protect an important drug investigation.

[81] Nor was it improper for the Crown to caution the jury against moral prejudice against the complainants, who were drug dealers, and in favour of the appellants, who were police officers. This was not prejudicial. The Crown did not ask the jury to send a message about police corruption. It merely asked the jury to disregard any extraneous sympathies or prejudices. The appellants' claim that the jury was inflamed is belied by the fact that the jury acquitted on the majority of counts.

Analysis on Issue No. 5

[82] The trial judge cautioned the jury not to speculate, and instructed them to “come to common sense conclusions based on the evidence”. She specifically instructed that the trial Crown’s “own opinions of the time required” by Miched to complete the “individual steps” of the non-driving tasks were not evidence.

[83] The trial judge also corrected misstatements made by the Crown. She told the jury there was no evidence that Fen’s daughter slept in a bedroom. The trial judge also told the jury that Correia’s testimony regarding Fen’s calm demeanour during the search was supported by Fen’s own testimony. Finally, the trial judge corrected the Crown’s allegations, where they were mistaken, that the defence misstated the evidence.

[84] I agree with the Crown that the rhetoric in the Crown’s closing submissions at trial was not inflammatory or otherwise improper.

[85] The trial judge’s corrective actions – which are entitled to deference – reflect no error. I would not give effect to this ground of appeal.

Issue No. 6: Was the trial judge required to provide the jury with a specific instruction on the law of exigency in relation to searches and seizures?

[86] In closing submissions, the Crown suggested to the jury that the appellants had fabricated the time of the search of Pang’s apartment because otherwise the heroin seized in the apartment would likely be inadmissible against Pang at a subsequent trial. The Crown also suggested that it would be unlikely that the appellants’ could secure a search warrant for Fen’s safety-deposit box if the keys to this box had been seized during an illegal search.

Appellants’ Position

[87] The Crown's proposed motive required the trial judge to temper this submission with an instruction about exigency and s. 487.11 of the *Criminal Code*, under which the search could have been legal without a warrant. The trial judge should have also instructed the jury that absent exigent circumstances, evidence obtained without a search warrant may have been admissible under s. 24(2) of the *Charter*.

Crown's Position

[88] The trial judge was not required to provide such an instruction and the appellants did not request one at trial. Exigency did not play a significant role in the case. The Crown's theory was that the appellants obtained an *ex post facto* warrant to conceal their unconstitutional conduct. The appellants argued that there was no warrantless search because they had a warrant, not because the search was exigent. Nevertheless, Schertzer's assertion that warrantless entry might have been justified by exigency was included in the trial judge's review of the evidence. A further instruction would actually have exposed that Schertzer's understanding of exigency was dubious, and therefore would not have assisted the defence.

Analysis of Issue No. 6

[89] The very experienced defence counsel did not request that the trial judge give an instruction on exigency. This may be explained by the fact that such an instruction had the real potential to weaken the defence case.

[90] Schertzer testified that a warrantless search could have been justified by exigency. In order to establish exigency, Schertzer needed reasonable grounds to believe that: (i) evidence relating to the commission of an indictable offence is present; and (ii) entry is necessary to prevent the imminent loss or destruction of the evidence: *Criminal Code* s. 529.3. Schertzer had testified that if the occupants of the Pang apartment had seen the arrest, by the time they entered the apartment the drugs would have been gone. An instruction on exigency would have exposed

this error. In these circumstances, in light of defence counsel's position, it would have been inappropriate for the trial judge to add an instruction on exigency her own initiative.

[91] I would not give effect to this ground of appeal.

Issue No. 7: Did the trial judge err in the manner in which she instructed the jury concerning the “lost evidence”?

[92] The evidence at trial was that some of the relevant memo books, steno pad notes, search warrant notes, and surveillance notes were no longer in the CFC files. Under cross-examination by the Crown, the appellants denied that they destroyed records, including notes purportedly taken by Correia during the search of Pang's apartment. There was no direct evidence that the appellants had destroyed any records. The defence argued forcefully in closing submissions to the jury that the “lost evidence” created gaps in the Crown's case and raised questions about the Crown's integrity. This created a “fundamental failure to meet its burden”. The Crown suggested in response that the appellants destroyed the records to cover their tracks. In pre-charge discussions, the trial judge suggested a “Lost, Destroyed or Unpreserved Evidence” instruction be given.

Appellants' Position

[93] The trial judge instructed the jury that the Crown submitted “that the materials are missing because they would tend to support the Crown's allegations that the defendants are guilty of criminal offences.” This language turned what should have been a favourable instruction for the defence into an “after the fact conduct” instruction suggesting that lost evidence could be evidence of the appellants' guilt. There was no evidentiary foundation for such an inference.

Crown's Position

[94] The missing material was the cornerstone of the defence's attack on the quality of the investigation into the appellants' police work. In context, the impugned phrase in the jury instruction on "Lost, Destroyed or Unpreserved Evidence" was actually favourable for the appellants. The phrase was embedded in an instruction that highlighted the flaws in the Crown's evidence and tied those flaws to the Crown's ability to prove its case.

Analysis of Issue No. 7

[95] The trial judge reviewed the relevant evidence with the jury, instructed the jury on how "lost evidence" could raise a reasonable doubt about the appellants' guilt, and related this to the Crown's burden of proof. The trial judge was instructing the jury on the positions of the defence and the Crown on what inferences could be reasonably drawn from the fact that there was "lost evidence" with respect to the appellants' police work.

[96] The "lost evidence" instruction was not specific to the Pang investigation. The appellants were acquitted on all counts, except those related to the Pang investigation. Therefore, the only prejudice stemming from the "lost evidence" instruction that is relevant to this appeal is that related to the counts on the Pang investigation. The appellants have highlighted only one piece of "lost evidence" from that investigation, namely the notes purportedly made by Correia during the execution of the search warrant.

[97] There was no prejudice with respect to the Pang counts. The defence asked the jury to infer that the "lost evidence" meant that the Crown was hiding exculpatory evidence. The Crown asked the jury to consider whether the "lost evidence" was equally consistent with efforts by the appellants to cover their tracks. As I read the charge, the jury was not instructed that it could draw a positive inference of guilt from the fact that some of the records of the appellants'

police work were missing. Rather, the jury was presented with the Crown's explanation for why it did not disclose all of the appellants' purported records.

[98] In any event, even if the trial judge erred in law by not instructing the jury that it should draw no positive inference in favour of the Crown from the fact of the "lost evidence", there was no substantial wrong or miscarriage of justice. The Crown assembled a strong case against the appellants with respect to misdeeds during the Pang investigation. There was evidence of a warrantless search. There was extensive circumstantial evidence related to the telewarrant process that the appellants could not have had a search warrant when they entered Pang's apartment. In short, the Crown's case did not turn on the jury drawing a positive inference with respect to any purportedly lost records. Such a pallid inference would add little to the potent evidentiary record asserted by the Crown.

[99] I would not give effect to this ground of appeal.

Issue No. 8: Were the guilty verdicts ones that a reasonable jury, properly instructed and acting reasonably and judicially could have returned?

[100] The appellants present a series of facts and propositions to support the overall position that the verdicts were unreasonable. Some of these allegedly exculpatory facts and propositions have already been discussed in these reasons.

The appellants additionally submit:

- There was no motive for the appellants to enter Pang's apartment prior to the arrival of the warrant;
- If the appellants were determined to enter without prior judicial authorization, they could have maintained that exigent circumstances existed, which would have been difficult to review;
- The appellants would have known that the telewarrant process created an objective, independent, and permanent record of the timing of the warrant;

- If the appellants were at the time of their search unsure whether they would successfully obtain a warrant *ex post facto*, they would not have conducted such a disruptive search;
- Fen's evidence confirmed the search warrant was present at the time of the search. It was undisputed that Correia left behind a bag in Pang's apartment and retrieved the forgotten bag later that evening. Fen testified (and Zhong confirmed) that, before leaving for the second time, Correia took the warrant from the forgotten bag and handed it to Zhong;
- If the search started at 7:00 p.m. and lasted two hours, and the warrant drafting process started after the search was completed as suggested by the Crown, it would not have left sufficient time to draft the ITOs before they were sent to the justice of the peace;
- The evidence in relation to the searches conducted by the appellants in other investigations suggested a preference not to enter until the warrant arrived.

[101] The appellants submit further that, with respect to Correia, the jury could not reasonably find guilt of perjury because Correia was never directly asked at the Pang preliminary hearing whether he entered Pang's apartment prior to the arrival of the search warrant.

Analysis of Issue No. 8

[102] It is not necessary to review the Crown's position on this ground of appeal since the appellants' submissions do not come close to meeting the high bar necessary to support a claim that the jury verdict is unreasonable. The test for an appellant court to determine whether the verdict of a jury is unreasonable or cannot be supported by the evidence has been unequivocally expressed by the Supreme Court of Canada. In *R. v. Yebe* [1987 CanLII 17 \(SCC\)](#), [1987] S.C.J. No. 51 at para [25](#) said this:

The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

[103] Here, the evidence supported the convictions. This ground of appeal represents an attempt to re-try the entire case including credibility issues.

[104] With respect to Correia, although he was not directly asked whether he entered the apartment prior to the arrival of the search warrant, he testified that he “stayed out in the hallway with the other officers” “until the search warrant arrived”. Logically and semantically this is the same as the lie particularized in count 6 on the indictment, that “he did not enter the premises located at ... prior to the arrival of a search warrant”.

[105] I would not give effect to this ground of appeal.

Issue No. 9: Did the trial judge err in dismissing the accused’s abuse of process application based on the TPS memo?

[106] The appellants’ abuse of process application at trial was based on the TPS memo, dated November 4, 2010, to employees identified as possible witnesses in the appellants’ trial. The memo advises the employees that it is their choice whether or not to speak with defence counsel. It also orders the employees to advise a TPS official if they intend to submit to an interview or otherwise provide information to defence counsel so that arrangements could be made to have an officer from the Professional Standards Special Task Force present.

[107] The trial judge dismissed the application.

[108] The trial judge found that there was no evidence that the ability of the appellants to prepare for trial was impaired by the memo. The charges were laid in 2002. The matter had been on the verge of trial in 2007. It was highly likely that any defence interviews with willing TPS employees would have already happened by November 4, 2010. There was no evidence that as a result of this memo, any

TPS employee refused speak to defence counsel. Specifically, the trial judge stated, in her reasons:

I am not persuaded that if a TPS employee wished to participate in an interview with defence counsel, that this memo made such a course less likely, given that the oath of office prohibits such conduct unless authorized.

[109] The trial judge further concluded that the defence’s complaint was “entirely hypothetical”. It amounted, in her view, to an assertion that the “unfettered private access by defence counsel to members and employees” of the TPS is a “general principle of fundamental justice necessarily inherent in a fair trial”. She rejected this submission. Litigation privilege does not prevent a prospective witness from telling anyone else what they disclosed in a pre-trial interview. The TPS has the right to direct the work-related activities of its employees, including requiring that an interview be recorded in some fashion. The effect of the memo was to authorize officers to participate in an interview, notwithstanding their oath of secrecy with respect to information gathered in the course of their employment.

[110] The trial judge concluded that the memo would not prevent a fair trial or undermine the integrity of the justice system. She also concluded that the public interest in a trial on the merits was substantial.

Appellants’ Position

[111] The doctrine of abuse of process is broad and flexible in application. Even where the particular fair trial interests of an accused are not in jeopardy, the residual category, as subsumed by [s. 7](#) of the [Charter](#), “addresses the panoply of diverse and sometimes unforeseeable circumstances” where a prosecution is so unfair and vexatious that it “contravenes fundamental notions of justice and thus undermines the integrity of the judicial process”: *R. v. O’Connor*, [1995 CanLII 51 \(SCC\)](#), [1995] 4 S.C.R. 411, at para. [73](#).

[112] The memo contravened the fundamental principle that there is “no property in a witness”. The Crown cannot dictate the manner in which a witness will be interviewed, the circumstances of the interview, or what type of record will be maintained of any such interview.

[113] The memo also contravened the fundamental principles that the accused has a right not to be forced to assist in his prosecution and to prepare for trial as he or she sees fit without disclosing his or her strategy to the Crown. The memo interfered with the defence’s litigation privilege. The accused is entitled to interview any willing witness without fear of being compelled to produce notes of any such meeting. The Crown is not entitled to know how the defence will meet its case until it unfolds at trial.

[114] The memo had a chilling effect on the defence’s ability to meet with potential witnesses who might otherwise have been inclined to meet with the defence by intimidating potential witnesses. This chilling effect interfered with the defence’s ability to make full answer and defence. It also explains why it is difficult to establish a direct correlation between the memo and the fairness of the proceeding on a witness-by-witness basis. Nevertheless, there was unfairness, which was compounded by the Crown urging the jury to draw an adverse inference from the defence’s failure to call witnesses.

[115] This irreparably compromised the integrity of the proceedings and amounted to an abuse of process.

Crown’s Position

[116] The trial judge correctly dismissed the appellants’ request for a stay of proceedings for abuse of process. Whether under the main category or the residual category, the test to determine if a stay is warranted is the same: *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at paras. 32-33. There are three requirements to grant a stay of proceedings:

- (1) there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;
- (2) there must be no alternative remedy capable of redressing the prejudice; and
- (3) when uncertainty remains over whether a stay is warranted, the court is to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

[117] These factors have not been satisfied in this case.

Analysis of Issue No. 9

[118] The trial judge did not err in dismissing the appellants' stay application. There was similarly no error in denying the alternative remedy sought, an adjournment and revocation of the memo. Although the doctrine of abuse of process may be broad and flexible in application, it is to be used sparingly – only in the “clearest of cases” – to justify a judicial stay of proceedings: *Babos*, at para. 31.

[119] The threshold for staying proceedings for an abuse of process is a high one. In *Babos*, writing for the majority of the Supreme Court, Moldaver J. reiterated these axioms, at para. 30:

A stay of proceedings is the most drastic remedy a criminal court can order.... It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court.

[120] Whether under the main category or the residual category, the test to determine if a stay is warranted for an abuse of process is the same: *Babos*, at paras. 31-33 set out above.

[121] The appellants did not meet this test. Even if I were to assume that there might have been prejudice caused by the memo, and that there might be no alternative remedy to a stay, the appellants' cannot satisfy the third step of the test set out above.

[122] Society had an interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits. The interests that would be served by granting a stay must be balanced against the interests society has in having the final decision determined on the merits. The police misconduct alleged was serious and goes to the core of the justice system. Accordingly, society's interest in a decision on the merits was substantial. A stay was not warranted

[123] The interests that would have been served by granting the stay (or, alternatively, an adjournment coupled with revocation of the memo) were minimal. As pointed out by the trial judge, the alleged prejudice to the appellants' right to make full answer and defence was entirely hypothetical. The memo was issued many years after the charges were laid and so any potential witnesses would already have been approached by the defence. There was also no evidence that the appellants' position would have been improved by rescinding the memo and granting an adjournment. A public decision on the merits was necessary to maintain the integrity of the justice system.

[124] The litigation privilege asserted by the appellants is hypothetical only. The trial judge found that there was no evidence that any employee was reluctant to speak to the defence as a result of the memo. She was "not persuaded that if a TPS employee wished to participate in an interview with the defence counsel, that this memo made such a course less likely."

[125] The trial judge did not misdirect herself in law, commit a reviewable error of fact, or render a decision so clearly wrong that it amounts to an injustice: *Babos*, at

para 48. I would not give effect to this ground of appeal.

Disposition of the Conviction Appeals

[126] I would dismiss the appeals against the convictions.

THE SENTENCE CROSS-APPEALS

[127] The Crown seeks leave to appeal the sentences imposed on the respondents (to this cross-appeal). If leave is granted, the Crown seeks to set aside the 45-day conditional sentences imposed on each of the respondents and substitute 3-year custodial sentences.

[128] The sentencing judge agreed with the Crown that offences against the administration of justice are more serious when committed by a police officer because of their duty to uphold the law. She placed substantial weight on the objectives of deterrence and denunciation and concluded that a 45-day conditional sentence was sufficient to satisfy those objectives. She considered the significant deterrent effect of the lengthy and invasive investigation and the prolonged nature of the proceedings. She concluded that "No other police officer would willingly trade places with any of these accused." She also accepted that "incarceration would be exceptionally difficult for each of these accused" because their work "has resulted in the incarceration of hundreds of drug dealers."

[129] The sentencing judge considered mitigating factors relevant to the circumstances of the offence, such as the fact that the appellants had little to gain personally from the warrantless search. She also considered mitigating personal circumstances of each of the respondents. She noted the mitigating effect of delay, as is conceded by the Crown.

[130] In its cross-appeal, the Crown disputes that the reasonable manner in which the search - once initiated - was conducted was a mitigating feature. In addition, the Crown submits that the apparent lack of motive and the fact that the

respondents' had requisite grounds to obtain a search warrant were aggravating, not mitigating, features. But, the Crown's principal argument is not with the factors considered by the sentencing judge, but rather with their weighing. The issue is this: does a 45-day conditional sentence reflect the seriousness of the offence when police officers attempt to obstruct justice and perjure themselves?

[131] While deference is owed to the sentencing judge, the objective of denunciation requires that this Court intervene as the sentences were demonstrably unfit.

[132] Public confidence in the honesty of the police is fundamental to the integrity of the criminal justice system. As Moldaver J.A. wrote in *Schaeffer v. Wood*, [2013 SCC 71](#) at para. [52](#), citing Sir Robert Peel:

“the police are the public and...the public are the police... The wisdom of this statement lies in its recognition that public trust in the police is, and always must be, of paramount concern.”

[133] Police officers are sworn to uphold the law. In *R. v. Feeney*, [2008 ONCA 756](#), 238 C.C.C. (3d) 49, at para. [8](#), this court endorsed the following passage from *R. v. Cusack* (1978), [1978 CanLII 2283 \(NS CA\)](#), 41 C.C.C. (2d) 289 (N.S. S.C.(A.D.))::

[T]he paramount consideration in this case is the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society, and to deter such persons from acting in breach of their trust....

The commission of offences by police officers has been considered on numerous occasions by the Courts, and the unanimous finding has been that their sentence should be more severe than that of an ordinary person who commits the same crime, because of the position of public trust which they held at the time of the offence and their knowledge of the consequences of its perpetration..

[134] The convictions relate to the administration of justice. Civilian offenders who interfere with the proper investigation and prosecution of criminal offences have

received significant sentences. As the British Columbia Court of Appeal noted in *R. v. Hall*, 2001 BCCA 74, [2001] B.C.J. No. 560, at para. 12:

Obstruction of justice or attempting to obstruct justice strikes at our system of a lawful society. The message must be clear that this type of interference with the community system for handling criminal offences will not be tolerated. It is for this reason that the courts must act firmly to express society's disapproval and denunciation of such conduct.

[135] Perjury convictions must attract similar deterrent sentences. Perjury strikes “at the very root of our system of justice.” (*R. v. Glauser* (1981), 16 C.C.C. (2d) (Ont. C.A.) Time and time again courts have referred to the fact that perjury undermines the very heart of the administration of justice. (see: *R. v. Turner* (1981), 65 C.C.C. (3d) 487; *R. v. C.D.* [2000] O.J. No. 1668 (C.A.) As stated in *Glauser*:

The administration of justice is based upon the truthful testimony of those persons who are called to give evidence under oath. The freedom, or on the other hand, the incarceration of accused persons in serious criminal offences depends totally upon the truthfulness of those witnesses. (para. 288)

[136] When the perpetrators of the crime are police officers sworn to uphold the law, the objective of denunciation has heightened significance. Police officers owe a special duty to be faithful to the justice system.

[137] The sentencing judge addressed the objective of general deterrence. However, the 45-day conditional sentences do not reflect society's condemnation of the conduct. Nor do they address the need to denounce the crimes and are thus demonstratively unfit.

[138] I would grant leave and allow the Crown's cross-appeal against the sentences. With respect to each respondent, I would set aside the 45-day

conditional sentence and substitute a sentence of 3 years. However, in the light of all of the circumstances, particularly the passage of time since the sentences were first imposed and the fact that the sentences imposed have been served, I would order that the operation of the sentences be stayed.

SUMMARY

[139] I would dismiss the conviction appeals and allow the cross-appeals of sentence on the terms set out above.

Released: "D.W." April 20, 2015

"M.L. Benotto J.A."
"I agree David Watt J.A."
"I agree M. Tulloch J.A."

TAB 53

R. v. Hansen, 2018 ONCA 46 (CanLII)

Source: Court of Appeal for Ontario
Date: 2018-01-22
File number: C62143
Other citation: 140 OR (3d) 209
Citation: R. v. Hansen, 2018 ONCA 46 (CanLII),
<<https://canlii.ca/t/hpw77>>, retrieved on 2026-03-23

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hansen, 2018 ONCA 46

DATE: 20180122

DOCKET: C62143

Sharpe, Watt and Roberts JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Robert Hansen

Appellant

Gregory Lafontaine, for the appellant

Randy Schwartz, for the respondent

Heard: December 22, 2017

On appeal from the conviction entered on January 29, 2016 and the sentence imposed on May 19, 2016 by Justice Catrina D. Braid of the Superior Court of Justice, sitting without a jury.

REASONS FOR DECISION

[1] The appellant was convicted of one count of perjury and two counts of attempting to obstruct justice after a trial before a judge of the Superior Court of Justice sitting without a jury. The trial judge imposed a sentence of imprisonment for five years on each count and directed that the sentences be served concurrently.

[2] The appellant appeals both conviction and sentence.

[3] At the conclusion of argument, we dismissed both appeals. We promised to provide reasons for our decision. These reasons fulfill that promise.

THE BACKGROUND FACTS

[4] Essential to an understanding of the issues raised in this court is a description of the circumstances upon which the convictions are grounded.

The Principals

[5] During the events that provide the genesis of this prosecution, Robert Hansen was a detective constable in the Gangs and Weapons Unit of a police force. Among his duties were the investigation of drug, gang and firearms offences. Frequently these investigations involved contact with confidential informers (CIs).

[6] In May, 2012 the appellant received information from CIs designated as A, B and C. From these sources, he learned about the activities of a suspected local drug dealer. The appellant did not meet any of these CIs. He communicated with

his primary source, C, by text message using a Blackberry smart phone supplied by the police force of which he was then a member.

The Case for the Crown

[7] The case of the Crown consisted mainly of text messages between the appellant and Source C during a two-week period in the latter half of May, 2012. It also included the information to obtain a search warrant (the ITO) under s. 11 of the *Controlled Drugs and Substances Act* (the *CDSA*) prepared by the appellant based principally on information received from the three CIs. The warrant authorized the search of the residence of Darren Mork for cocaine and related drug paraphernalia.

[8] The Crown alleged that the appellant participated in a plan according to which Source C would place a gun in Mork's residence, and advise the police that he had done so. The police would then obtain and execute a search warrant at Mork's home and seize the gun. Charges against Mork arising out of the execution of the *CDSA* warrant would ensure that Mork was "put away" for some time.

The Text Messages

[9] Around the middle of May, 2012 Source C sent a text message to the appellant about Mork. Source C claimed that Mork, a drug dealer, was "fucking around" with Source A, the girlfriend of Source C. To stop Mork's involvement with his girlfriend, Source C proposed to set Mork up. The appellant agreed that Mork could "use some jail time" and asked what Source C had in mind.

[10] Source C proposed that he would set Mork up by placing a gun, used in a previous shooting, in Mork's home. The appellant agreed with the proposal, which he said would lock up Mork for several years, but told Source C that it was best that he not know all the details of the plan.

[11] Source C also negotiated with the appellant for payment in return for setting up Mork. The appellant said that the amount would be difficult to determine without the plan being executed, but “guessed” that the payment could be \$1,000 or \$1,500.

[12] In several text messages exchanged over the next few days, Source C suggested informing on other drug dealers and negotiated for payments of several thousand dollars for “ratting” on them and setting up Mork. Source C reminded the appellant that police would get Mork with a gun. The appellant described Mork and another suspected drug dealer as “good” [targets].

[13] In a text on May 23, 2012, Source C said he was angry at his girlfriend and was reconsidering his plan to set up Mork and “rat” out the other alleged drug dealers. Source C had previously asked the appellant to help with his drug addiction and said he didn’t want to disappoint the appellant. In response, the appellant encouraged Source C to carry out the plan and pointed out that setting up Mork with a gun would be “especially” helpful. Source C made it clear that he would be setting up Mork with a gun that was not his (Source C’s) own gun, rather was one he would get from his girlfriend’s (Source A’s) father.

[14] On May 24, 2012 Source C told the appellant that he planned to pick up the gun from Source A’s father and go to Mork’s house to complete a drug deal. While there, Source C would plant the gun at Mork’s house and leave. The appellant asked Source C when the mission would be accomplished, explaining that he (the appellant) would need to wait until advised by Source C that “it went ok”. Later on May 24, 2012 Source C reported to the appellant that he (Source C) had suffered a drug-related seizure and was unable to plant the gun at Mork’s home as planned on that day.

[15] On May 25, 2012 Source C texted the appellant to advise him that he had the gun and would “get it done” that day. About an hour later, Source C advised the

appellant that he had planted the gun in a secure place where Mork would not find it. Source C expressed concern about his fingerprints on the gun, but the appellant assured him that he would “take care of it”.

The ITO

[16] Less than an hour after Source C advised him that and where the gun had been planted at Mork’s house, the appellant submitted an ITO to a justice of the peace for a s. 11 CDSA search warrant for Mork’s residence. The justice of the peace issued the warrant, which authorized a search for cocaine and related drug paraphernalia. No warrant was sought to search for and seize the gun Source C claimed to have planted in a couch at Mork’s home.

[17] In the ITO the appellant recounted information he had received from Sources A, B and C.

[18] In connection with the handgun at Mork’s home, the appellant recounted several reports from Source C about having heard about, then later seen a handgun, of a specific manufacture and model, hidden in the cushions in a sofa in the basement of Mork’s house.

[19] Absent from the ITO was any mention of the origins of the gun at Mork’s home, more specifically, that it had been planted there by Source C with the express agreement, if not the urging, of the appellant, so that Mork could be taken out of circulation for a significant period of time.

[20] In the ITO, the appellant described Source C’s motivation for informing on Mork as being that he was “sick of drug dealers taking advantage of others”. The appellant omitted any reference to the nature of the relationship among Sources A and C and Mork. Further, the appellant made no mention of Source C’s specific *animus* towards Mork, his desire for revenge or his financial motivation for providing information.

[21] In connection with Source B, the appellant described his motivation as a desire to eliminate Mork as competition in the drug trafficking business. What the appellant failed to point out was that Source B's real motive was to provide information on those, such as Mork, who had ripped him off in prior drug transactions.

[22] The appellant also included in the ITO a claim that Source C had seen plastic wrap and scales at Mork's home, items commonplace in a drug trafficker's tool kit. But Source C said nothing about plastic wrap, nor about scales, apart from having left a set of his own scales behind at Mork's home.

The Execution of the Warrant

[23] The CDSA warrant authorized police to search for and seize cocaine and related drug paraphernalia. The warrant contained no mention of a handgun. Police found no handgun when they executed the warrant.

The Appellant's Explanation

[24] The appellant testified. He offered four principal explanations for the omissions and inconsistencies between the information provided by Source C and what he included in the ITO.

[25] First, innocent error. The appellant acknowledged that as the affiant in an *ex parte* application, he was required to make full, fair and frank disclosure of all material facts. He said his mistakes were innocent errors which he attributed to rushed preparation and the density and complexity of the text messages that he was required to quickly summarize in the ITO.

[26] Second, protecting the confidentiality of Source C. The omission of details about planting the gun was necessary, the appellant said, because their inclusion could have revealed the identity of Source C. But, as the appellant acknowledged in cross-examination at trial, various measures, such as sealing order and editing,

were available and used here to ensure that Source C's identity was not revealed. The appellant also conceded that many of the details provided in the ITO would furnish a basis upon which Source C could be identified. He could not explain how omission of the agreement to plant the firearm would be any more likely to identify Source C than other details already provided.

[27] Third, irrelevance. The appellant claimed that reference to the firearm was "tangential" since he sought and obtained a *CDSA* warrant to search for and seize drugs and drug paraphernalia. Yet the ITO included repeated references to the handgun at Mork's place. Among the references was this in paragraph 42:

Disturbing information is included that a handgun is being is [sic] stored in the basement and there was a suggestion it has already been used at least once in a local shooting. Police may well be negligent not to attempt to enter and search when firearms are present.

[28] Fourth, uncertainty. The appellant explained that it was not clear to him whether Source C was reporting on a gun that Mork had at his house or on a plan to plant a gun at Mork's house. In cross-examination, however, he acknowledged that two days before he completed and swore the ITO he understood that the plan was to plant the gun, an understanding that became even more clear the next day.

[29] The trial judge rejected the appellant's explanations in their entirety.

THE APPEAL FROM CONVICTION

[30] The overarching submission advanced by the appellant is that the convictions entered by the trial judge are unreasonable. The unreasonableness is said to be the product of several flaws in the trial judge's reasoning. She made palpable and overriding errors in making adverse credibility findings in connection with the appellant's testimony. She erroneously rejected a reasonable interpretation of some events in favour of an interpretation adverse to the appellant that was not reasonable. She misinterpreted the evidence about the motivation of

Source C and found guilt established on the third count in the complete absence of evidence of an essential element of that offence.

[31] In our view, as we will explain, each of these complaints fails when examined in the light of the trial judge's reasons as a whole and the overwhelming nature of the case for the Crown.

Ground # 1: Adverse Credibility Findings

[32] The appellant acknowledges that the trial judge properly approached her credibility findings by referring to the decision in *R. v. W(D)*, [1991 CanLII 93 \(SCC\)](#), [1991] 1 S.C.R. 742. Further, the appellant accepts that a trial judge's findings on credibility attract a significant degree of deference on appeal. On the other hand, the appellant says, appellate intervention is warranted, as here, where, on consideration of all the evidence adduced at trial, the trial judge's credibility determination cannot reasonably be supported by the evidence or where it depends on a misapprehension of evidence on a material issue.

[33] In our view this ground of appeal fails.

[34] After reciting the *W(D)* formula and reiterating the absence of any onus on the appellant to establish his innocence, the trial judge rejected the appellant's testimony as making no sense in light of the text messages and the ITO which constituted the case for the Crown. It is well settled that it is open to a trial judge to reject the testimony of an accused because of the cumulative force of the contrary evidence adduced by the Crown: *R. v. D(J.J.R.)*, (2006) [2006 CanLII 40088 \(ON CA\)](#), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 53.

[35] In her lengthy and thoughtful reasons, the trial judge identified ten aspects of the appellant's testimony that she found troubling and cumulatively warranted its rejection. Each of the reasons were firmly rooted in the evidence and did not involve speculation or invoke any prohibited chain of reasoning. The reasons are

internally consistent and not contradicted by any findings of fact made by the trial judge.

Ground # 2: Unreasonableness of Conviction of Perjury

[36] The perjury count involved an allegation that the appellant swore falsely in the ITO that Source C had told him that he (Source C) had heard that Mork had a handgun used in a prior shooting hidden in his residence.

[37] The appellant says that the conviction on this count is unreasonable because the trial judge wrongly rejected a reasonable interpretation of the texts of May 16, 2012 offered by the appellant in his testimony at trial. That interpretation was that Source C's text supported the appellant's conclusion that the gun was already in Mork's house.

[38] It is a commonplace that, as the trier of fact, it was open to the trial judge to draw inferences from the evidence adduced at trial. Where an item of evidence may give rise to more than one reasonable inference, a trial judge does not act unreasonably by drawing one available inference rather than another. This is what trial judges do. That an appellant disagrees with an inference drawn by a trial judge from the field of reasonable inferences available on the evidence adduced at trial, does not, on its own, establish that the verdict is unreasonable.

[39] More to the point, however, is that irrespective of the inference drawn from the May 16, 2012 text sent by Source C, the appellant acknowledged that, at the very least on May 24, 2012, the day before completing, swearing and presenting the ITO to the justice of the peace, he knew that Source C was going to plant the gun at Mork's house. With this knowledge, the inference is irresistible that he intentionally provided false information in the ITO and that he did so with the intention of misleading the issuing justice of the peace.

Ground # 3: Unreasonableness of Conviction of Obstruct Justice

(Count 2)

[40] The second count of the indictment alleged that the appellant attempted to obstruct justice by causing the justice of the peace to issue the *CDSA* search warrant on the basis of the appellant's ITO that contained false statements, material omissions and misleading information.

[41] The appellant contends that the finding of guilt was coloured by the trial judge's flawed assessment of the appellant's credibility; her misapprehension of the evidence about the provenance of the gun said be in Mork's residence and her defective rejection of the appellant's explanation about the scales and plastic wrap at Mork's house.

[42] We reject this claim of unreasonableness.

[43] First, we have already repudiated the appellant's submission that the trial judge's credibility analysis was flawed, a conclusion that removes it as a factor in the unreasonable verdict complaint about count two.

[44] Second, a conviction on count two follows inevitably from our determination that the conviction of perjury on count one stands. Submission of knowingly false ITO a with intent to mislead a justice to issue a search warrant plainly amounts to a wilful attempt to obstruct, pervert or defeat the course of justice under [s. 139\(2\)](#) of the [Criminal Code](#).

[45] Third, evidence of additional false and misleading statements in the ITO established the appellant's guilt on count two. The trial judge focused on deliberately embellished and intentionally omitted and misleading facts about:

- i. planting the gun and setting up Mork;
- ii. the motivation of Source C;
- iii. the motivation of Source B; and

iv. the presence of scales and plastic wrap.

Her conclusions on these issues were not cumbered by legal error or misapprehension or failure to consider relevant evidence and are plainly reasonable.

**Ground # 4: Unreasonableness of Conviction of Obstruct Justice
(Count 3)**

[46] The third count of the indictment alleged that the appellant attempted to obstruct justice by encouraging Source C to place a gun in Mork's home with intent that it would be used as evidence in a judicial proceeding.

[47] The appellant says that the conviction on count three was unreasonable because it was made in the absence of any evidence that the appellant intended that the gun would be used as evidence in any subsequent proceedings; in the face of evidence that the appellant's purpose was not to charge Mork for possession of the gun, rather to get the gun off the street; and without considering two earlier text messages that tended to support the appellant's claim that he considered the assistance Source C provided about Mork separate from the assistance Source C gave in surrendering the gun.

[48] We declined to give effect to this ground of appeal.

[49] In our view, the text message exchange on May 23, 2012, two days before completion and submission of the ITO, provides incontrovertible proof of the appellant's guilt on this count. Source C was getting cold feet about planting the gun. His motive – to gain revenge on Mork for “fucking around” with Source A – was fading because of a falling out Source C had with Source A. The appellant pointed out that without Source C's help, Mork would not “get done”. The appellant explained that Source C's help would “help tons...especially the heat”. By encouraging Source C to carry out the plan, the appellant abetted Source C's

proposed offence. Whether the appellant planned to use the gun as evidence in the prosecution of Mork would not seem an essential element of the offence, in light of the appellant's plan to "lock up" Mork "for several years".

[50] In the result, the appeal from conviction is dismissed.

THE APPEAL FROM SENTENCE

[51] The appellant also appeals the sentence of five years imposed by the trial judge on each count, sentences the trial judge directed were to be served concurrently, one with the others.

[52] At trial, the Crown sought a penitentiary sentence of six years, the defence a sentence of 14 months.

[53] In this court, the appellant contends that the trial judge erred in imposing a sentence that was unduly harsh, well in excess of any sentence justified by the limited sentencing precedents available. The trial judge's sentencing analysis, according to the appellant, was further flawed by inconsistent findings about aggravating factors and misapprehensions of relevant evidence.

[54] We are not persuaded that there is any basis upon which we are entitled to interfere with the sentence imposed at trial.

[55] The offence of perjury, for that matter, the crime of attempting to obstruct justice, strike at the very soul of the judicial system. Each rents the fibre of the intricate scheme that we as a society have designed to determine whether the guilt of one accused of crime has been proven beyond a reasonable doubt. Each offence is easy to commit. Both are hard to prove. Those found to have committed either must expect severe punishment.

[56] Police officers occupy a special position of trust in the community. It is all the more so in the criminal justice system. As justice system participants, they owe a

duty to the public to uphold the values of the criminal justice system. They have a duty to investigate crime in accordance with the law.

[57] The paramount sentencing objectives in this case are denunciation and deterrence. Neither the jeopardy of the loss of employment nor the likelihood of and deterrence, much less accord appropriate weight to the aggravating factor of breach of trust.

[58] The sentence imposed in this case is substantial. This is as it should be. It represents an appropriate application of the governing objectives and principles of sentencing, including the fundamental principle that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[59] In the result, leave to appeal sentence is granted, but the appeal from sentence is dismissed.

“Robert J. Sharpe J.A.”

“David Watt J.A.”

“Lois B. Roberts J.A.”

TAB 54

Koukounakis v. Reid, 1995 CanLII 621 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1995-05-12
File number:	c10137
Other citations:	23 OR (3d) 299 — 81 OAC 36 — [1995] OJ No 1369 (QL) — 12 MVR (3d) 78
Citation:	Koukounakis v. Reid, 1995 CanLII 621 (ON CA), < https://canlii.ca/t/6jhz >, retrieved on 2026-03-23

Koukounakis et al. v. Stainrod et al.
[Indexed as: Koukounakis v. Stainrod]

23 O.R. (3d) 299
[1995] O.J. No. 1369
No. C10137

Court of Appeal for Ontario,
Brooke, Doherty
and Laskin JJ.A.
May 12, 1995

Damages -- Personal injuries -- Pain and suffering -- Plaintiff suffering intense, continuous and disabling pain as result of temporomandibular joint dysfunction caused by 1983 car accident -- Jury in 1990 assessing plaintiff's non-pecuniary general damages at \$180,000 -- Award affirmed on appeal -- Reasonableness and appropriateness of award -- Approach of using date of accident as operative date in pre- 1989 cases when awarding general non-pecuniary damages in order to avoid double credit for inflation rejected.

The plaintiff was seriously injured in a car accident in 1983. The trauma from the accident caused internal derangement of the right mandibular joint, which led to temporomandibular joint dysfunction (tmj dysfunction). The plaintiff's pain was intense, extreme and continuous. She could not work. sleep or eat properly, needed housekeeping assistance, and at the time of trial had developed a variety of problems including chronic stress, depression, headaches, codeine dependency and anorexia. The jury assessed the plaintiff's non-pecuniary general damages at \$180,000. The defendants appealed that award. The plaintiff cross-appealed the award for cost of future care.

Held, the appeal and the cross-appeal should be dismissed.

Where a damage assessment was made by a jury, and there is no suggestion that the instructions to the jury were erroneous or deficient, the appellant must establish that the amount awarded is so inordinately high that it must be a wholly erroneous estimate of the damages. Appellate courts do not decide whether a jury made the correct award for general non-pecuniary damages, but only whether the award is beyond the scope of anything that could be accepted as reasonable. Review for reasonableness, as opposed to correctness, demands not only deference to the amount awarded, but also deference to the findings of fact underlying the award.

While the plaintiff suffered from a number of maladies prior to the accident, and manifested symptoms suggesting that she was predisposed to develop tmj dysfunction, it could not be said that the jury must have found as a fact that the plaintiff's pre-existing medical condition would have resulted in a significant diminution of the quality of her life had she not been injured in the accident. Accordingly, the appropriateness of the award for general non-pecuniary damages had to be considered on the assumption that the jury found as a fact that the plaintiff's pre-existing medical conditions would not have significantly impaired her ability to lead a normal life had she not been injured in the car accident.

While the upper limit on general non-pecuniary damages (which was \$225,000 at the date of the trial) may provide some small assistance in assessing the propriety of an award in a case where the maximum award is inappropriate, any attempt to use the upper limit as more than a very rough guide for comparative purposes ignores the policy reasons underlying the creation of the upper limit. The appropriateness of an award cannot be determined by comparing the level of disability or pain and suffering suffered by a particular plaintiff to that of a person entitled to the maximum award. It was open to the jury to conclude that the plaintiff's capacity to lead a normal life had been virtually destroyed by the medical and dental problems arising out of the accident. Using the upper limit of \$225,000 as a very rough guide, it could not be said that an award of \$180,000 in this case was so excessive as to warrant appellate intervention.

While awards for general non-pecuniary damages in similar cases should achieve a degree of consistency and uniformity, comparative analysis offers limited assistance. The assessment of general non-pecuniary damages ultimately depends on a mix of factors, many of which are peculiar to a particular plaintiff. While the award in this case was high compared to similar cases, it was not so high as to necessitate appellate intervention.

Since the cause of action in this case arose before October 23, 1989, the award for general non-pecuniary damages was not subject to the 5 per cent prejudgment interest rate established by the amendments to the [Courts of Justice Act](#), 1984, S.O. 1984, c. 11, proclaimed in force in December 1989. Instead, the award attracted prejudgment interest at the generally applicable rate of 12 per cent, the rate established by the terms of [s. 138](#) of the Courts of Justice Act, 1984. There was some force to the argument of counsel for the defendants that, as prejudgment interest is paid in part to compensate for the effects of inflation between the date of the accident and the date of the judgment, and that as the maximum amount awardable for general non-pecuniary damages also has an inflationary component represented by the difference between the maximum as of the date of the accident (\$165,000) and the maximum as of the date of judgment (\$225,000), measuring the appropriateness of the award for general non-pecuniary damages as of the date of trial and in trial date dollars while at the same time allowing prejudgment interest at normal rates on that amount resulted in the plaintiff receiving a double credit for inflation between the date of the accident and the date of the trial. However, the solution proposed by counsel for the defendants of using the date of the accident as the operative date when awarding general non-pecuniary damages should not be adopted. Not only did the defendants' contention swim upstream against the judicial current in so far as the relevant date for assessment of non-pecuniary damages was concerned, it also had to traverse a legislative dam in the form of the 1989 amendments to the Courts of Justice Act, 1984.

The legislature chose to leave causes of action which arose before October 23, 1989 to be decided by the then-existing law. It would be contrary to the clear intention of the legislature for the court to revisit those cases and revise the applicable law, thus disturbing the legitimate expectations of plaintiffs whose cause of action arose before October 23, 1989.

The plaintiff's submission that the jury, having found that she would incur future care expenses, had no choice on the evidence but to award the full amount claimed by her, was unacceptable. The jury was not obligated to accept any one view of the evidence, and their assessment was not unreasonable. It was also not the case that, because the jury awarded the full amount claimed for past medical expenses, consistency demanded that the jury do the same with respect to a claim for future care costs. The two heads of damage are distinct and an award made under one head of damage does not necessarily bear any relationship to an award made under the other.

Appeal from an award of non-pecuniary general damages; cross- appeal from an award of costs of future care.

Borland v. Muttersbach (1985), [1985 CanLII 2134 \(ON CA\)](#), 53 O.R. (2d) 129, 23 D.L.R. (4th) 664, [1986] I.L.R. 1-2003, 12 O.A.C. 84 (C.A.), affg (1984), [1984 CanLII 2142 \(ON SC\)](#), 49 O.R. (2d) 165, 15 D.L.R. (4th) 486, [1985] I.L.R. 1-1851 (S.C.) [supp. reasons [1985] I.L.R. 1-1939 (Ont. S.C.)]; Graham v. Persyko (1984), [1986 CanLII 4049 \(ON CA\)](#), 55 O.R. (2d) 12, 27 D.L.R. (4th) 699, 30 C.C.L.T. 85 (H.C.J.), vard (1986), [1986 CanLII 2711 \(ON CA\)](#), 55 O.R. (2d) 10, 27 D.L.R. (4th) 699 (C.A.), leave to appeal to S.C.C. dismissed (1986), [1986 CanLII 3963 \(SCC\)](#), 34 D.L.R. (4th) 160, consd Other cases referred to Andrews v. Grand & Toy Alberta Ltd., [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, 3 C.C.L.T. 225, [1978] 1 W.W.R. 577, 19 N.R. 50, 8 A.R. 182; Birkett v. Hayes, [1982] 1 W.L.R. 816, [1982] 2 All E.R. 710 (C.A.); Bunce v. Flick, [1991 CanLII 7975 \(SK CA\)](#), [1991] 5 W.W.R. 623, 93 Sask. R. 53 (C.A.); Consumers' Gas Co. v. Peterborough (City), [1981 CanLII 66 \(SCC\)](#), [1981] 2 S.C.R. 613, 129 D.L.R. (3d) 507, 40 N.R. 425, 18 C.C.L.T. 258, affg (1979), [1979 CanLII 77 \(ON CA\)](#), 25 O.R. (2d) 399, 104 D.L.R. (3d) 174, 9 C.C.L.T. 1 sub nom. Fenn v. Peterborough (City), Consumers' Gas Co. v. Fenn (C.A.); De Champlain v. Etobicoke General Hospital (1985), 34 C.C.L.T. 89 (Ont. H.C.J.); Graham v. Rourke (1990), [1990 CanLII 7005 \(ON CA\)](#), 75 O.R. (2d) 622, 74 D.L.R. (4th) 1, 40 O.A.C. 301 (C.A.); Hatton v. Henderson, [1981 CanLII 514 \(BC CA\)](#), [1981] 5 W.W.R. 624, 126 D.L.R. (3d) 50, 29 B.C.L.R. 317, 17 C.C.L.T. 252 (C.A.); Howes v. Crosby (1984), [1984 CanLII 2172 \(ON CA\)](#), 45 O.R. (2d) 449, 6 D.L.R. (4th) 698, 29 C.C.L.T. 60, 2 O.A.C. 375 (C.A.); Leischner v. West Kootenay Power & Light Co. [1986 CanLII 889 \(BC CA\)](#), [1986] 3 W.W.R. 97, 24 D.L.R. (4th) 641, 70 B.C.L.R. 145 (C.A.); Lindal v. Lindal, [1981 CanLII 35 \(SCC\)](#), [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263, 34 B.C.L.R. 273, 39 N.R. 361, [1982] 1 W.W.R. 433, 19 C.C.L.T. 1; Mulroy v. Aqua Scene (1982), 36 O.R. (2d) 653 (C.A.); Nance v. British Columbia Electric Railway Co., [1951 CanLII 374 \(UK JCPC\)](#), [1951] 3 D.L.R. 705, [1951] A.C. 601, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340, [1951] 2 All E.R. 448 (P.C.); Pickett v. British Rail Engineering Ltd., [1978] 3 W.L.R. 955, [1979] 1 All E.R. 774, [1980] A.C. 136, 122 Sol. Jo. 778, [1979] 1 Lloyd's Rep. 519 (H.L.); Vieczorek v. Piersma (1987), [1987 CanLII 4403 \(ON CA\)](#), 58 O.R. (2d) 583, 36 D.L.R. (4th) 136, 16 C.P.C. (2d) 62, 18 O.A.C. 308 (C.A.); Watkins v. Olafson, [1989 CanLII 36 \(SCC\)](#), [1989] 2 S.C.R. 750, 61 D.L.R. (4th) 577, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 100 N.R. 161, [1989] 6 W.W.R. 481, 50 C.C.L.T. 101 sub nom. Watkins v. Manitoba; Woelk v. Halvorson, [1980 CanLII 17 \(SCC\)](#), [1980] 2 S.C.R. 430, 114 D.L.R. (3d) 385, 33 N.R. 232, [1981] 1 W.W.R. 289, 14 C.C.L.T. 181; Wright v. British Railway Board, [1983] 3 W.L.R. 211, [1983] 2 All E.R. 698, [1983] 2 A.C. 773 (H.L.) Statutes referred to [Courts of Justice Act](#), 1984, S.O. 1984, c. 11, s. 138 [am. 1989, c. 67, s. 6(1)] [Courts of Justice Amendment Act](#), 1989 (No. 2), S.O. 1989, c. 67, ss. 4, 6(1), 8(1), (2) [Courts of Justice Act](#), R.S.O. 1990, c. C.43, ss. 118, 119 Rules and regulations referred to [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, rule 53.10 Authorities referred to Kerans, R.P., Standards of Review Employed by Appellate Courts (Edmonton: Juriliber, 1994), pp. 139-42 Ontario, Report of the Inquiry Into Motor Vehicle Accident Compensation in Ontario (1988), vol. 1, pp. 404-10 Ontario Law Reform Commission,

Report on Compensation for Personal Injury and Death (1987), pp. 208-12 Waddams, S., The Law of Damages, 2nd ed. (Aurora: Canada Law Book, 1994), para. 7.660ff

Earl A. Cherniak, Q.C., and Kirk Stevens, for appellants/
respondents on cross-appeal.

Stanley M. Tick, Q.C., and Janis P. Criger, for respondents/
appellants on cross-appeal.

The judgment of the court was delivered by

DOHERTY J.A.: --

I. THE APPEAL BY THE DEFENDANTS

A. Overview

In October 1983, a motor vehicle driven by the appellant Janet Stainrod struck the back of a vehicle driven by the respondent, Marion Koukounakis (Mrs. Koukounakis). Mrs. Koukounakis suffered significant injuries. In September 1990, a jury assessed Mrs. Koukounakis' damages as follows:

- i. non-pecuniary general damages: \$180,000.00
- ii. loss of past income: \$53,153.00
- iii. special damages: \$45,490.00
- iv. loss of future income: \$132,819.00
- v. future care costs: \$161,648.00
- TOTAL: \$573,110.00

After prejudgment interest at the statutory rate was added to the assessment and certain pre-trial payments were deducted, Mrs. Koukounakis received judgment in the amount of \$586,757. The appellants challenge only the assessment of general non-pecuniary damages. They do not allege misdirection or non-direction by the trial judge, but maintain that an award of \$180,000 is so high that it cannot stand and must be adjusted downward. The appellants submit that an award of \$100,000 for general non-pecuniary damages should be substituted. At trial, neither counsel suggested that the jury should be given a range within which their assessment of the general non-pecuniary damages might fall [See Note 1 below].

B. The Facts

Most of the evidence led at trial concerned the injuries suffered by Mrs. Koukounakis, her prolonged course of treatment for those injuries, the effects of those injuries on her life, and her prognosis. There is no need to detail that evidence. The appellants, quite properly, concede that the injuries were significant and their effects on Mrs. Koukounakis profound. I will, however, summarize the more salient features of the evidence.

At the time of the accident, Mrs. Koukounakis was 31 years old and had four children. She worked part-time as a bartender and waitress in a restaurant. When Mrs. Koukounakis' vehicle was hit from behind, her head struck the steering wheel, snapped back, and struck the headrest of her seat. She testified that, at the same time, her teeth banged together. Mrs. Koukounakis was taken to hospital complaining of a sore neck. She was treated and released that day.

Within a few weeks, Mrs. Koukounakis was suffering from severe pain in the lower left part of the back of her neck. She was also experiencing backaches, shoulder pain, headaches, leg pains, and soreness in the jaw. She had difficulty opening her mouth, and developed an abscessed tooth, which was associated with the trauma suffered in the accident. Mrs. Koukounakis' condition worsened, and she saw a number of dentists and doctors. According to experts called on her behalf, the trauma from the accident caused internal derangement of the right mandibular joint, which rapidly led to degeneration of that joint. The condition is referred to as temporomandibular joint dysfunction (tmj dysfunction).

Prior to trial, Mrs. Koukounakis had undergone four surgical procedures and a number of non-surgical treatments. Unfortunately, none of them produced significant improvement. Dr. Pye, who operated on the right side of Mrs. Koukounakis' jaw in March of 1989, described this joint in these terms:

We got in there and there were no -- there was nothing normal in that joint that I could see at all. I could not find the temporomandibular joint disc. All I could see were adhesions, connective tissue remnants, repair processes that were trying to be made, a lot of blood vessels that were torturing around in different directions. There didn't seem to be any order at all, compared to joints that I had done before where everything just appears normal.

So what we had was a mass, like a hole. It looked like a grenade had gone off in there. There was just nothing normal in this space.

Dr. Pye was of the opinion that Mrs. Koukounakis' case was the worst example of tmj dysfunction he had seen in 20 years of practice. He said, "nothing comes close to this".

Virtually every aspect of Mrs. Koukounakis' life has been adversely affected by the injury to her jaw. Her pain is intense, extreme, and continuous. She cannot work, sleep, or eat properly, and needs housekeeping assistance. Her energy level is very low. By the time of trial, Mrs. Koukounakis had developed a wide variety of problems including chronic stress, depression, headaches, codeine dependency, and anorexia. Mrs. Koukounakis is described as "a dental cripple" who will need ongoing and substantial dental treatment for the rest of her life. She will always have pain and will be unable to work outside of the home. Her prognosis is guarded at best. While there is a chance for improvement, there is also the distinct possibility of further deterioration as she ages. There is also the possibility that Mrs. Koukounakis will require further surgery on the left side of her jaw.

C. The Scope of Appellate Review

This court's jurisdiction to review an assessment of damages made by a jury is found in [s. 119](#) of the [Courts of Justice Act, R.S.O. 1990, c. C.43](#):

119. On an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages [See Note 2 below].

It is agreed by counsel that pre-existing, judicially imposed limits on appellate review of damage assessments govern review under this section. Where, as here, the assessment was made by a jury, and there is no suggestion that the instructions to the jury were erroneous or deficient, the appellant must establish that the amount awarded is "so inordinately high that it must be a wholly erroneous estimate of the damages": *Nance v. British Columbia Electric Railway Co.*, [1951 CanLII 374 \(UK JCPC\)](#), [1951] 3 D.L.R. 705 at p. 713, [1951] A.C. 601 (P.C.); *Woelk v. Halvorson*, [1980 CanLII 17 \(SCC\)](#), [1980] 2 S.C.R. 430 at pp. 435-36, 114 D.L.R. (3d) 385 at pp. 388-89. Appellate courts do not decide whether a jury made the "correct" award for general non-pecuniary damages, but only whether the award is "beyond the scope of anything that could be accepted as reasonable": *Vieczorek v. Piersma* (1987), [1987 CanLII 4403 \(ON CA\)](#), 58 O.R. (2d) 583 at p. 589, 36 D.L.R.

(4th) 136 (C.A.); see also R.P. Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) at pp. 139-42.

MacKinnon A.C.J.O. in *Howes v. Crosby* (1984), [1984 CanLII 2172 \(ON CA\)](#), 45 O.R. (2d) 449 at p. 459, 6 D.L.R. (4th) 698 (C.A.), quantified this limitation on appellate intervention when he said:

Normally this Court, depending on the amount of damages, takes the view that if it is of the opinion the award is too high or too low by 50 %, it concludes that the damages are inordinately high or low and varies it accordingly . . .

Review for reasonableness, as opposed to correctness, demands not only deference to the amount awarded, but also deference to the findings of fact underlying the award. Where a jury's award under other heads of damage reveals findings of fact relevant to the assessment of general non-pecuniary damages, those findings should be respected in assessing the reasonableness of the jury's award under that head. In so far as the verdict does not reveal findings of fact relevant to the assessment of general non-pecuniary damages, this court should assume that the jury made all findings of fact reasonably available to it and capable of supporting its assessment. Where, as here, the defendant claims that the award is too high, that claim must be judged by reference to the relevant factual findings, if any, implicit in the jury's verdict, combined with any other findings of fact reasonably available to the jury and capable of supporting the plaintiff's claim for general non-pecuniary damages.

D. The Arguments

Mr. Cherniak, with his usual consummate skill, advances two alternative arguments, either of which, he submits, demonstrates that the award was so excessive as to require downward adjustment. In the first argument, he relies on the combined effect of three factors. Mr. Cherniak contends that the award of \$180,000 is inordinately high having regard to Mrs. Koukounakis' pre-accident medical conditions, the upper limit on general non-pecuniary damages (\$225,000 as of the trial date), and contemporary awards in similar cases. I will consider each argument separately while bearing in mind that Mr. Cherniak relies on their cumulative effect.

Mrs. Koukounakis suffered from a number of maladies prior to the accident. Most were relatively minor and routine. She did, however, manifest symptoms, particularly in the year prior to the accident, suggesting that she was predisposed to develop tmj dysfunction. Pre-existing medical problems and a predisposition to develop the disability brought about by an accident should be considered in assessing general non-pecuniary damages. This is so because, in assessing the factors which combine to yield an award for general non-pecuniary damages, the jury must compare the individual plaintiff's anticipated lot in life after the accident with that which the plaintiff would have enjoyed but for the accident. As stated in *Graham v. Rourke* (1990), [1990 CanLII 7005 \(ON CA\)](#), 75 O.R. (2d) 622 at p. 644, 74 D.L.R. (4th) 1 (C.A.):

In arriving at a global figure which represents the non-pecuniary loss to the plaintiff, a trial judge will consider real and substantial future possibilities, both positive and negative, which could impact on the plaintiff's quality of life. These considerations will be reflected in the figure which the trial judge arrives at in his assessment of general non-pecuniary damages.

Associate Chief Justice MacKinnon made the same point in *Mulroy v. Aqua Scene* (1982), 36 O.R. (2d) 653 (C.A.) at p. 657:

. . . compensation must bear a relationship to the evidence given as to the present realities and future possibilities.

There was evidence from which the jury could find that Mrs. Koukounakis' pre-existing medical condition would have had a significant negative impact on her quality of life had she not been

injured in the accident. I cannot say, however, that a reasonable jury must inevitably have come to that conclusion. There was conflicting evidence on the point, some of which indicated that the pre-existing conditions would not have significantly affected Mrs. Koukounakis' ability to live and enjoy her life in a normal way. It was for the jury to choose between these competing views. Unless the jury's award under the other heads of damage reveals its findings of fact on this issue, this court, in reviewing the award for general non-pecuniary damages, should assume that the jury made the finding most favourable to Mrs. Koukounakis.

Mr. Cherniak submits that the jury's awards for loss of future earning capacity and future care indicate that the jury did conclude that Mrs. Koukounakis would have had significant future medical problems even if she had not been injured in the accident. He submits that the suitability of the award for general non-pecuniary damages must be judged in the light of that finding.

The jury's award for loss of future earning capacity and future care costs were considerably less than the amounts referred to in the evidence adduced on behalf of Mrs. Koukounakis. The amounts awarded are not necessarily explained, however, by a finding that Mrs. Koukounakis would have suffered significant future disabilities even if she had not been injured. The award for loss of future earning capacity may simply be a reflection of the jury's conclusion that Mrs. Koukounakis would have continued to work part-time, as she was doing at the time of the accident, and would not have gone back to work full-time. The award for future care costs is explainable by reference to the different opinions advanced as to the type, cost, and amount of future care that Mrs. Koukounakis would require. I cannot conclude that the jury must have found as a fact that Mrs. Koukounakis' pre-existing medical condition would have resulted in a significant diminution of the quality of her life had she not been injured in the accident. Accordingly, I consider the appropriateness of the award for general non-pecuniary damages on the assumption that the jury found as a fact that Mrs. Koukounakis' pre-existing medical conditions would not have significantly impaired her ability to lead a normal life had she not been injured in the car accident. The first factor relied on by the appellants does not advance their position.

I turn next to the contention that the award is inordinately high having regard to the upper limit on general non-pecuniary damages as of the date of trial (\$225,000). The judicially imposed upper limit on general non-pecuniary damages offers some assistance in determining the appropriateness of a particular award. The appropriateness of an award, however, cannot be determined by comparing the level of disability or pain and suffering suffered by a particular plaintiff to that of a person entitled to the maximum award: *Howes v. Crosby*, supra, at p. 460. The upper limit serves to cap the potential award for general non-pecuniary damages. It is in large measure an arbitrary figure fixed in response to policy concerns, and on the assumption that awards made under other heads of damage will largely achieve the compensation goal: *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at pp. 260-61, 83 D.L.R. (3d) 452. While the upper limit may also provide some small assistance in assessing the propriety of an award in a case where the maximum award is inappropriate, any attempt to use the upper limit as more than a very rough guide for comparative purposes ignores the policy reasons underlying the creation of the upper limit.

It was open to the jury to conclude that Mrs. Koukounakis' capacity to lead a normal life had been virtually destroyed by the medical and dental problems arising out of the accident. On that view of the evidence, her life had become a constant battle against pain, marked by recurring and new medical problems, dominated by seemingly endless visits to various doctors and dentists, and clouded by the very real prospect of increased pain and further medical intervention in the future. Using the upper limit of \$225,000 as a very rough guide, I am not prepared to say that an award of \$180,000 in the circumstances of this case was so excessive as to warrant this court's intervention.

The third factor relied on by the appellants engages the court in a comparison of Mrs. Koukounakis' injuries and their effect on her, with injuries and effects suffered by other plaintiffs

in similar cases. This comparative exercise is a valid one in that the fairness of the award is measured in part by comparing it to awards in similar cases. Awards for general non-pecuniary damages in similar cases should achieve a degree of consistency and uniformity: *Andrews v. Grand & Toy Alberta Ltd.*, supra, at pp. 261-64; *Mulroy v. Aqua Scene*, supra, at p. 656. Appellate review provides the opportunity to maintain that uniformity and consistency. Comparative analysis, however, offers only limited assistance. The assessment of general non-pecuniary damages ultimately depends on a mix of factors, many of which are peculiar to a particular plaintiff. When one examines other similar cases, one inevitably finds differences which distinguish those cases from the one under consideration. This is particularly so because the Canadian approach to general non-pecuniary damages does not emphasize the specific physical injury or disability suffered as much as it does the effect of that injury or disability on the particular plaintiff: *Andrews v. Grand & Toy Alberta Ltd.*, supra, at pp. 261-62; *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 S.C.R. 629 at p. 637, 129 D.L.R. (3d) 263.

Counsel have provided the court with a number of cases, all of which have some similarity to the present case. These cases tell me that the award made here is considerably higher than awards made in other cases involving similar injuries. The cases also indicate, however, that the effect of this injury on Mrs. Koukounakis has been far more severe than those experienced by plaintiffs in the other cases. For example, in *Dyke v. Ferguson*[, an unreported decision of Van Camp J., released February 14, 1991 (Ont. Gen. Div.), the plaintiff suffered injuries which were similar to, and perhaps more severe than, those suffered by Mrs. Koukounakis. For whatever reason, however, the injuries did not have the same disastrous effect on Mrs. Dyke's ability to enjoy a normal life that this injury has had on Mrs. Koukounakis. Madam Justice Van Camp, a very experienced trial judge, assessed Mrs. Dyke's general non-pecuniary damages at \$100,000.

I see no purpose in reviewing the other cases in detail. Suffice it to say that while they convince me that the award made here was high, I am not satisfied that it was so high as to necessitate appellate intervention.

Mr. Cherniak's alternative submission proceeds from a different premise. Whereas in his first submission he accepted that the upper limit for an award of general non-pecuniary damages should be taken as of the date of trial (\$225,000), his alternative submission proceeds on the basis that the upper limit should be determined as of the date of the accident. He submits that if the maximum award calculated as of the date of the accident (\$165,000) is accepted as the relevant figure, then the award of \$180,000 for a non-catastrophic injury is patently excessive.

Mr. Cherniak points out that since the cause of action arose before October 23, 1989, the \$180,000 awarded for general non-pecuniary damages was not subject to the 5 per cent prejudgment interest rate established by the amendments to the *Courts of Justice Act* proclaimed in force in December 1989. Instead, the award attracted prejudgment interest at 12 per cent, the generally applicable rate established by the terms of s. 138 of the *Courts of Justice Act*, 1984, S.O. 1984, c. 11 [See Note 3 below]. He submits that prejudgment interest is paid in part to compensate for the effects of inflation between the date of the accident and the date of the judgment. He further submits that the maximum amount awardable for general non-pecuniary damages also has an inflationary component represented by the difference between the maximum as of the date of the accident (\$165,000) and the maximum as of the date of judgment (\$225,000). Mr. Cherniak contends that measuring the appropriateness of the award for general non-pecuniary damages as of the date of trial and in trial date dollars, while at the same time allowing prejudgment interest at normal rates on that amount, results in the plaintiff receiving a double credit for inflation between the date of the accident and the date of the trial.

Counsel argues that the double credit for inflation could be avoided either by an appropriate reduction in the rate of prejudgment interest, or by using the date of the accident as the operative date when awarding general non-pecuniary damages. He submits that this court has rejected the

former approach in *Borland v. Muttersbach* (1985), [1985 CanLII 2134 \(ON CA\)](#), 53 O.R. (2d) 129 at pp. 146-48, 23 D.L.R. (4th) 664 (C.A.), affirming (1984), [1984 CanLII 2142 \(ON SC\)](#), 49 O.R. (2d) 165, 15 D.L.R. (4th) 486 (H.C.J.), and *Graham v. Persyko* (1984), [1986 CanLII 4049 \(ON CA\)](#), 55 O.R. (2d) 12, 30 C.C.L.T. 85 (H.C.J.), reversed on this point (1986), [1986 CanLII 2711 \(ON CA\)](#), 55 O.R. (2d) 10, 27 D.L.R. (4th) 699 (C.A.), leave to appeal to S.C.C. refused (1986), [1986 CanLII 3963 \(SCC\)](#), 34 D.L.R. (4th) 160, but should now adopt the latter approach. He acknowledges that should this latter approach be adopted, it would apply only to causes of action arising before October 23, 1989.

The debate with respect to the combined effect of inflation and prejudgment interest on non-pecuniary damage awards is longstanding. While some courts have denied any connection between inflation and prejudgment interest [See Note 4 below], most have come to recognize the force of the double-compensation-for-inflation argument: *Leischner v. West Kootenay Power & Light Co.*, [1986 CanLII 889 \(BC CA\)](#), [1986] 3 W.W.R. 97 at pp. 134-37, 24 D.L.R. (4th) 641 (B.C.C.A.); S. Waddams, *The Law of Damages*, 2nd ed. (Aurora: Canada Law Book, 1994) at para. 7.660ff; Ontario Law Reform Commission, *Report on Compensation for Personal Injury and Death* (1987) at pp. 208-12; Ontario, *Report of the Inquiry Into Motor Vehicle Accident Compensation in Ontario* (1988) (Osborne Report), vol. 1, at pp. 404-10.

The logic of Mr. Cherniak's argument cannot be denied. Prejudgment interest is intended in part to compensate for the effects of inflation between the date of the event giving rise to the cause of action and the date of judgment: *Watkins v. Olafson*, [1989 CanLII 36 \(SCC\)](#), [1989] 2 S.C.R. 750 at pp. 772-73, 61 D.L.R. (4th) 577. The maximum amount allowable for general non-pecuniary damages has also been adjusted upward since 1978 to take inflation into account: *Lindal v. Lindal*, *supra*, at p. 641. To the extent that awards below the maximum are fixed in part by reference to the maximum award, they also contain an inflationary component. Awards which factor inflation into the assessment of non-pecuniary damages and also provide prejudgment interest at the full rate do result in over-compensation for inflation. The exact degree of that over-compensation will vary and will be most pronounced when the award is at the maximum allowable amount.

Accepting the validity of the double-compensation-for-inflation argument, however, does not mean that the appellant's submission must prevail. The appellant must demonstrate that his solution to the double compensation problem is an appropriate one for this court to adopt at this time. In addressing that ultimate question, it must be recognized that the appellant's proposed solution constitutes a significant change in the way non-pecuniary damages are assessed. Non-pecuniary damages are calculated as of the trial date and in terms of trial date dollars: *Consumers' Gas Co. v. Peterborough (City)* (1979), [1979 CanLII 77 \(ON CA\)](#), 25 O.R. (2d) 399 at p. 457, 104 D.L.R. (3d) 174 at p. 226 (C.A.), affirmed (without reference to this point) [1981 CanLII 66 \(SCC\)](#), [1981] 2 S.C.R. 613, 129 D.L.R. (3d) 507; *Lindal v. Lindal*, *supra*, at p. 643; *Hatton v. Henderson*, [1981 CanLII 514 \(BC CA\)](#), [1981] 5 W.W.R. 624 at pp. 636-37, 126 D.L.R. (3d) 50 (B.C.C.A.); *Birkett v. Hayes*, [1982] 1 W.L.R. 816 at p. 820, [1982] 2 All E.R. 710 (C.A.); *Wright v. British Railway Board*, *supra*. If the appellant's submission is adopted, such assessments would be made by reference to the dollar value of the damages as of the date of the accident [See Note 5 below]. This method of avoiding double recovery for inflation was considered and rejected in the Osborne Report, *supra*, at p. 407. The author referred to non-pecuniary damage assessments made in terms of dollar values as of the date of the event giving rise to the cause of action as:

... impracticable and unrealistic, especially in less serious cases. Judges and juries and, more importantly, those settling cases cannot be asked to roll back the clock in assessing non-pecuniary damages. 1988 assessments of non-pecuniary damages will be assessed in 1988 dollars regardless of the date of the accident.

Not only must the appellants' contention swim upstream against the judicial current in so far as the relevant date for assessment of non-pecuniary damages is concerned, it must also traverse a

legislative dam in the form of the 1989 amendments to the [Courts of Justice Act](#): see supra, note 3.

In the early 1980s, various trial judges in Ontario considered whether plaintiffs were being over-compensated for inflation in awards for general non-pecuniary damages. Different conclusions were reached and different solutions adopted: *Borland v. Muttersbach*, supra, at p. 187; *De Champlain v. Etobicoke General Hospital* (1985), 34 C.C.L.T. 89 at pp. 109-10 (Ont. H.C.J.); *Graham v. Persyko*, supra, at p. 25 O.R., p. 103 C.C.L.T. Trial judges who accepted that there was over-compensation for inflation responded by adjusting the statutorily prescribed prejudgment interest rate downward. In *Borland*, and again in *Persyko*, this court rejected that solution. In doing so, it accepted the conclusion of Barr J. in *Borland* where he said at p. 188 O.R.:

I conclude that the fact of inflation is not a proper ground to deprive the plaintiffs of their prima facie right to receive prejudgment interest at the prime rate.

The Ontario Law Reform Commission in its 1987 Report on Compensation for Personal Injury and Death, supra, and the Osborne Report of 1988 accepted that *Borland* expressed the current state of the law in Ontario. Both found that the *Borland* approach did result in overcompensation and both recommended that non-pecuniary damages attract prejudgment interest at a rate below that generally applicable to the assessment of prejudgment interest. The Law Reform Commission recommended that the rate be set at 2.5 per cent and the Osborne Report suggested a rate of 3.5 to 4 per cent. Neither report suggested that overcompensation for inflation should be avoided by calculating non-pecuniary damages by reference to their dollar value at the time of the incident giving rise to the cause of action.

The legislative response to these reports as found in the Courts of Justice Amendment Act, 1989 (No. 2) tells us two things. First, the legislature accepted the contention that non-pecuniary damages should be subject to a lower rate of prejudgment interest than is generally applied, in order to avoid overcompensation for inflation. Second, the legislature decided that causes of action arising prior to October 23, 1989 should continue to be governed by the law which existed prior to the amendments. That law is found in *Borland* and *Persyko*. In both cases, non-pecuniary damages were assessed as of the date of trial and, subject to variation for other reasons, earned prejudgment interest at the generally applicable statutory rate.

The appellants seek to escape the clutches of *Borland* and *Persyko* by taking aim not at the inflationary component of prejudgment interest, but at the inflationary component of the award itself. The appellants submit that this aspect of overcompensation for inflation was not addressed in either *Borland* or *Persyko*. Clearly, it was not. It is, however, difficult to see why this shift in the point of attack should make any difference in the result. In *Borland*, supra, at p. 187, Barr J. rejected the submission that prejudgment interest should be significantly reduced to avoid overcompensation for inflation because, in his view, that approach would unfairly advantage the defendant and discourage timely advance payments in appropriate cases. Barr J. was content to live with an element of double compensation in order to discourage unreasonable delays in settlement and refusals to make appropriate advance payments. To Barr J., the cure for overcompensation for inflation was worse than the problem. It must be taken, given the affirmation of the trial decision in *Borland*, and the reversal of the contrary position taken in *Persyko*, supra, that this court shared the policy assessment made by Barr J. The approach advocated by the appellants would have the same effect as would the approach rejected in *Borland*. I can see no reason why the policy concerns which prompted the rejection of the submissions made in *Borland* should not also compel the rejection of the submission made by the appellants.

In any event, whatever the fate of this argument may have been had it been made in *Borland* or *Persyko*, it cannot now be accepted given the legislature's informed response to the question of overcompensation for inflation. The legislature chose to leave causes of action which arose before October 23, 1989 to be decided by the then-existing law. It would be contrary to the clear intention

of the legislature for this court to now revisit those cases and revise the applicable law. In proceeding as it did, the legislature accepted that plaintiffs whose cause of action arose before October 23, 1989 were entitled to rely on the law as declared in *Borland* and *Persyko* and to proceed with their claims on that basis. This court should not, some five years later, disturb those legitimate expectations.

E. Conclusion with Respect to the Defendants' Appeal

I would not give effect to the arguments advanced on behalf of the appellants and would dismiss the appeal with costs.

II. THE PLAINTIFFS' CROSS-APPEAL

Mr. Tick succinctly advanced Mrs. Koukounakis' position on the cross-appeal. He submitted that the jury, having found that Mrs. Koukounakis would incur future care expenses, had no choice on the evidence but to award the full amount claimed by Mrs. Koukounakis. The evidence adduced in support of that claim indicated that future care costs would be \$379,000. The jury awarded \$161,648.

I do not accept the contention that the evidence was reasonably capable of supporting only one view of Mrs. Koukounakis' future medical costs. As with any evaluation of future expenses, a number of variables were at play and different opinions were advanced by various witnesses depending on those variables. The jury was not obligated to accept any one view of that evidence. Their assessment is not unreasonable.

I also reject the submission that because the jury awarded the full amount claimed for past medical expenses, consistency demanded that the jury do the same with respect to a claim for future care costs. The two heads of damage are distinct and an award made under one head of damage does not necessarily bear any relationship to an award made under the other. Past expenses are usually subject to clear and definitive proof. Future care costs are necessarily more speculative. This jury accepted the evidence that all of the pre-trial medical expenses claimed were in fact incurred as a result of the injury suffered in the accident. Far from being determinative of the jury's assessment of the future care costs, that finding was largely irrelevant to the determination of the future care costs.

I see no basis for interfering with the jury's assessment of Mrs. Koukounakis' future care costs. I would dismiss the cross-appeal with costs.

Appeal and cross-appeal dismissed.

Note 1: [Section 118](#) of the [Courts of Justice Act, R.S.O. 1990, c. C.43](#), proclaimed in force on December 14, 1989 as part of the Courts of Justice Amendment Act, 1989 (No. 2), S.O. 1989, c. 67, s. 4, s. 8(2), and applicable to these proceedings at trial provides in part: "the court may give guidance to the jury on the amount of damages". Section 118 is made applicable to this action by s. 8(2) of the Courts of Justice Amendment Act, 1989 (No. 2).

Note 2: Like s. 118 of the [Courts of Justice Act, s. 119](#) came into force on December 14, 1989 and is also made applicable to these proceedings by the relevant transitional provision: Courts of Justice Amendment Act, 1989 (No. 2), S.O. 1989, c. 67, s. 4, s. 8(2).

Note 3: Under the terms of the [Courts of Justice Act](#), 1984, S.O. 1984, c. 11, non-pecuniary damages were subject to the generally applicable provisions with respect to prejudgment interest. The Courts of Justice Amendment Act, 1989 (No. 2), S.O. 1989, c. 67, s. 6(1) [enacting s. 138(1a)] provided that non-pecuniary damages would attract prejudgment interest at the rate set out in the [Rules of Civil Procedure](#). Rule 53.10 sets the rate at 5 per cent. Section 8(1) of the Courts of

Justice Amendment Act, 1989 (No. 2), limits the application of these amendments to causes of action arising after October 23, 1989.

Note 4: In *Pickett v. British Rail Engineering Ltd.*, [1978] 3 W.L.R. 955 at pp. 963, 975, 983-84, [1979] 1 All E.R. 774, the House of Lords rejected the claim that plaintiffs should not receive prejudgment interest on non-pecuniary damages. Lord Wilberforce, at p. 963, indicated that inflation was designed to preserve the real value of money and interest was designed as compensation for being kept out of that real value. Subsequently, the House of lord, without purporting to overrule *Pickett*, accepted the contention that prejudgment interest on non-pecuniary damages should be awarded at a substantially reduced rate to avoid over-compensation for inflation: *Wight v. British Railway Board*, [1983] 3 W.L.R. 211 at 218, [1983] 2 All E.R. 698.

Note 5: It would appear that in Saskatchewan, non-pecuniary damages are assessed as of the date of the accident giving rise to the cause of action and in date-of-the-accident dollars: *Bunce v. Flick*, [1991 CanLII 7975 \(SK CA\)](#), [1991] 5 W.W.R. 623 at p. 630, 93 Sask. R. 53 (C.A.). The court cites no authority for its position and does not refer to the contrary authority. In particular, it makes no reference to the contrary position taken by the Supreme Court of Canada in *Lindal v. Lindal*.

TAB 55

McIntyre v. Grigg, 2006 CanLII 37326 (ON CA)

Source: Court of Appeal for Ontario
 Date: 2006-11-06
 File number: C41585
 Other citations: 83 OR (3d) 161 — 274 DLR (4th) 28 —
 152 ACWS (3d) 624 — 217 OAC 217 — 43 CCLT (3d) 209 —
 [2006] OJ No 4420 (QL) — 39 MVR (5th) 39
 Citation: McIntyre v. Grigg, 2006 CanLII 37326 (ON CA),
<https://canlii.ca/t/1pxqx>, retrieved on 2026-03-23

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83 O.R. (3d) 161

**Court of Appeal for Ontario,
 McMurtry C.J.O., Weiler and Blair JJ.A.
 November 6, 2006**

Damages -- Aggravated damages -- Trial judge erring in awarding aggravated damages in amount of \$100,000 separately after awarding non-pecuniary general damages in amount of \$250,000 -- Aggravated damages are not to be awarded separately from and in addition to general damages -- General damages are to be assessed after taking into account any aggravated features of defendant's conduct.

Damages -- Apportionment -- Plaintiff injured when struck by intoxicated driver -- Jury apportioning 70 per cent of damages to driver and 30 per cent to commercial host -- Apportionment reasonable -- Appeal from apportionment dismissed.

Damages -- Personal injuries -- General damages -- Young, athletic first-year university student suffering serious physical and psychological injuries after struck by car -- Non-pecuniary general damages in amount of \$250,000 affirmed on appeal.

Damages -- Punitive damages -- Negligent conduct only attracting punitive damages if it was intentional and deliberate and if it was so extreme as to be deserving of full condemnation and punishment -- Defendant driving while his blood alcohol content was two to three times over legal limit -- Defendant striking pedestrian -- Defendant charged with criminal offences but pleading guilty to highway traffic offence and being fined \$500 -- Defendant's conduct properly attracting punitive damages -- Trial judge's award of punitive damages in amount of \$100,000 excessive -- Award reduced to \$20,000.

Torts -- Commercial host liability -- Plaintiff struck and injured by impaired driver after driver left defendant pub -- Trial judge instructing jury correctly on commercial host liability -- Defendant's appeal from finding of liability dismissed.

The plaintiff A was seriously injured when she was struck by a motor vehicle driven by the defendant AG and owned by the defendant TG. AG's blood alcohol level was two to three times the legal limit. A, her parents and her sister brought an action against AG, TG and M. Inc., which operated the pub at which AG had been drinking just before the accident. A's parents and sister sought damages under s. 61 of the [Family Law Act, R.S.O. 1990, c. F.3](#). The trial judge awarded general damages in the amount of \$250,000, payable 70 per cent by the Gs and 30 per cent by M Inc., aggravated damages in the amount of \$100,000, payable solely by the Gs and punitive damages of \$100,000, payable solely by the Gs. The Family Law Act claims were dismissed. All three defendants appealed the award of damages, and M Inc. appealed that portion of the judgment based upon the verdict of the jury that found it 30 per cent liable for the accident. A's parents and sister appealed the dismissal of the Family Law Act claims.

Held, the defendants' appeal should be allowed in part; the plaintiffs' appeal should be allowed. [page162]

In Ontario, commercial host liability may be imposed both at common law and by statute where a patron, who subsequently causes injury, has been served while intoxicated or over-served to the point of intoxication and where it is reasonably foreseeable that the patron will drive a motor vehicle upon leaving the establishment. A commercial host does not escape liability simply by not knowing that the patron became inebriated before driving; the commercial host is liable if it or its employees knew or ought reasonably to have known in the circumstances that the patron was in this condition. The trial judge properly charged the jury on the issue of M Inc.'s liability at common law and under the [Liquor Licence Act, R.S.O. 1990, c. L.19](#). The trial judge did not instruct the jury that liability under s. 39 of the Liquor Licence Act is "absolute". The liability under s. 39 is more accurately characterized as a statutory liability arising once the factual preconditions provided for therein have been found to exist. That is what the trial judge instructed the jury. There was sufficient evidence to support the jury's finding that M Inc. was liable.

A jury award assessing the degree of apportionment of damages as between defendants is to be treated with deference. In the absence of material misdirection or non-direction, appellate courts will not interfere unless the verdict is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have arrived at that conclusion. The 70-30 apportionment in this case was reasonable.

A was an active, athletic and intelligent young woman who suffered serious and permanent injuries as a result of the accident. Physically, she sustained a closed head injury, soft tissue injuries and various orthopaedic injuries. She was diagnosed as suffering from a major depressive disorder triggered by the accident, which led to two suicide attempts. The medical evidence attributed her depression to post-traumatic stress disorder and to her personal reaction to the losses in her function and self-image from her physical injuries. She would require medication and was likely to suffer from anxiety and fear on a long-term basis. The award of general damages in the amount of \$250,000 was reasonable.

Aggravated damages are not awarded in addition to general damages. Rather, general non-pecuniary damages should be assessed after taking into account any aggravated features of the defendant's conduct. There was no legal basis for a separate award of aggravated damages in this case. Moreover, the medical evidence was insufficient to establish that A's psychological harm was increased because AG was impaired at the time of the accident. Given that the upper limit at the time of the trial was \$299,000, the jury award of \$250,000 for general non-pecuniary damages was generous and should not be increased even if there was an evidentiary basis for awarding aggravated damages.

Punitive damages should only be awarded in exceptional cases, where the defendant has engaged in extreme misconduct. Negligent conduct can only attract punitive damages if the misconduct in question was intentional and deliberate and was extreme in nature and such that by any reasonable standard it is deserving of full condemnation and punishment. AG's conduct was deliberate and intentional. His decision to drink excessively and drive, his intoxication, and his speed and erratic driving were key contributors to the accident. All of those factors demonstrated that on the night of the accident, AG showed a conscious and reckless disregard for the lives and safety of others. A factor of significant importance in assessing whether it would be appropriate to award punitive damages is whether punishment has already been imposed in a separate proceeding for the same misconduct. An award of punitive damages was justified. Given that AG's sole punishment for his conduct in the criminal proceedings was a \$500 fine, [page163] punitive damages would not amount to double punishment. The quantum of the punitive damages awarded in this case was excessive. AG's lower level of moral blameworthiness given the isolated nature of the misconduct, the lack of a relationship between the parties (in comparison to a relationship of trust) and the fact that the misconduct was not specifically directed at the plaintiff, indicated that a lesser quantum of punitive damages would be rational. The quantum was reduced to \$20,000.

The jury's verdict dismissing the [Family Law Act](#) claims was so plainly unreasonable and unjust that no jury, reviewing the evidence as a whole and acting judicially, could have refused to make any award. A's parents were each awarded \$15,000 and her sister was awarded \$5,000.

Per Blair J.A. (dissenting in part): The existence of egregious conduct worthy of condemnation by the court - - while the target of an award of punitive damages -- is not in itself sufficient to justify the granting of such an exceptional remedy. The court must have regard to all of the principles underpinning a punitive damages award in order to determine whether punitive damages serve a rational purpose in the circumstances. In particular, the court must be satisfied that the granting of punitive damages in a civil tort context -- a concept foreign to the primarily compensatory rationale of tort law -- advances the objectives of the remedy (punishment, deterrence and denunciation) and outweighs the general rule that these public-oriented objectives are principally addressed by the criminal law. Punitive damages did not serve a rational purpose in the circumstances of this case and, generally, they will not serve a rational purpose in cases of a similar nature. Punitive damages, in the milieu of motor vehicle negligence, do not materially advance the objectives of punitive damages. Moreover, awarding punitive damages in what will inevitably become less than the rare and exceptional case tips the criminal law/private law balance respecting the imposition of a public sanction too far in the direction of a private law tort remedy. This will result in windfall recoveries for a large number of claimants whose compensatory entitlement has no relationship whatever to the recovery they will receive.

APPEALS from the award of damages from the judgment of Fedak J. of the Superior Court of Justice, dated March 9, 2004. Court File No. C41585:

Cases referred to Gerula v. Flores, [1995 CanLII 1096 \(ON CA\)](#), [1995] O.J. No. 2300, 126 D.L.R. (4th) 506, 83 O.A.C. 128, 56 A.C.W.S. (3d) 996 (C.A.); Kaytor v. Lion's Driving Range Ltd. (1962), [1962 CanLII 346 \(BC SC\)](#), 35 D.L.R. (2d) 426, 40 W.W.R. 173 (B.C.S.C.); Nichols v. Guiel, [1983 CanLII 460 \(BC SC\)](#), [1983] B.C.J. No. 1693, 44 B.C.L.R. 155, 145 D.L.R. (3d) 186, [1983] 4 W.W.R. 175 (S.C.); Norberg v. Wynrib, [1992 CanLII 65 \(SCC\)](#), [1992] 2 S.C.R. 226, [1992] S.C.J. No. 60, 68 B.C.L.R. (2d) 29, 92 D.L.R. (4th) 449, 138 N.R. 81, [1992] 4 W.W.R. 577, 12 C.C.L.T. (2d) 1; Vlcek v. Koshel, [1988 CanLII 3116 \(BC SC\)](#), [1988] B.C.J. No. 1062, 30 B.C.L.R. (2d) 97, 52 D.L.R. (4th) 371, [1989] 1 W.W.R. 469, 44 C.C.L.T. 314 (S.C.); Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 209 D.L.R. (4th) 257, 283 N.R. 1, [2002] I.L.R. ÂI-4048, [2002 SCC 18](#), 20 B.L.R. (3d) 165, consd Other cases referred to Andrews v. Grand & Toy Alberta Ltd., [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229, [1978] S.C.J. No. 6, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, [1978] 1 A.C.W.S. 218; Arnold v. Teno, [1978 CanLII 2 \(SCC\)](#), [1978] 2 S.C.R. 287, [1978] S.C.J. No. 8, 83 D.L.R. (3d) 609, 19 N.R. 1, 3 C.C.L.T. 272, [1978] 1 A.C.W.S. 231; Cassell & Co. Ltd. v. Broome, [1972] A.C. 1027, [1972] 1 All E.R. 801, [1972] 2 W.L.R. 645 (H.L.); Childs v. Desormeaux, [2006] 1 S.C.R. 643, [2006] S.C.J. No. 18, 210 O.A.C. 315, 347 N.R. 328, [2006 SCC 18](#), 39 C.C.L.T. (3d) 163, 30 M.V.R. (5th) 1, affg (2004), [2004 CanLII 15701 \(ON CA\)](#), 71 O.R. (3d) 195, [2004] O.J. No. 2065, 187 O.A.C. 111, 239 D.L.R. (4th) 61, 23 C.C.L.T. (3d) 216, 4 M.V.R. (5th) 1 (C.A.); Doobay (c.o.b. Venus Fashions) v. York Gate Mall Ltd., [2000] O.J. No. 2219 (C.A.); [page164] Dryden (Litigation Guardian of) v. Campbell Estate, [2001] O.J. No. 829, [2001] O.T.C. 143, 11 M.V.R. (4th) 247, 103 A.C.W.S. (3d) 1070 (S.C.J.); Ferenczy v. MCI Medical Clinics, [2005 CanLII 18186 \(ON CA\)](#), [2005] O.J. No. 2076, 198 O.A.C. 254 (C.A.); Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co. (2002), [2002 CanLII 45070 \(ON CA\)](#), 61 O.R. (3d) 481, [2002] O.J. No. 3588, 217 D.L.R. (4th) 34, [2003] I.L.R. ÂI-4149, 24 C.P.C. (5th) 216 (C.A.); Fidler v. Sun Life Assurance Co. of Canada, [2006] 2 S.C.R. 3, [2006] S.C.J. No. 30, [2006] 8 W.W.R. 1, [2006] I.L.R. ÂI- 4521, [2006 SCC 30](#), 53 C.C.E.L. (3d) 1, 57 B.C.L.R. (4th) 1, 39 C.C.L.I. (4th) 1; Fleury v. Fleury, [2001 CanLII 294 \(ON CA\)](#), [2001] O.J. No. 1720, 144 O.A.C. 372, 9 C.P.C. (5th) 222, 105 A.C.W.S. (3d) 154 (C.A.); Francescucci v. Gilker, [1996] O.J. No. 474 (C.A.); Hague v. Billings (1993), [1993 CanLII 8581 \(ON CA\)](#), 13 O.R. (3d) 298, [1993] O.J. No. 945, 102 D.L.R. (4th) 44, 15 C.C.L.T. (2d) 264, 46 M.V.R. (2d) 254 (C.A.); Hamilton v. Canadian National Railway Co., [1991 CanLII 8348 \(ON CA\)](#), [1991] O.J. No. 614, 47 O.A.C. 329, 80 D.L.R. (4th) 470, 50 C.P.C. (2d) 271 (C.A.); Hill v. Church of Scientology of Toronto, [1995 CanLII 59 \(SCC\)](#), [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, 24 O.R. (3d) 865n, 126 D.L.R. (4th) 129, 184 N.R. 1, 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89; Howes v. Crosby (1984), [1984 CanLII 2172 \(ON CA\)](#), 45 O.R. (2d) 449, [1984] O.J. No. 3127, 2 O.A.C. 375, 6 D.L.R. (4th) 698, 29 C.C.L.T. 60 (C.A.); Koukounakis v. Stainrod (1995), [1995 CanLII 621 \(ON CA\)](#), 23 O.R. (3d) 299, [1995] O.J. No. 1369, 12 M.V.R. (3d) 78 (C.A.); Mason v. Peters (1982), [1982 CanLII 1969 \(ON CA\)](#), 39 O.R. (2d) 27, [1982] O.J. No. 3486, 139 D.L.R. (3d) 104, 22 C.C.L.T. 21 (C.A.); McCannell v. McLean, [1937 CanLII 1 \(SCC\)](#), [1937] S.C.R. 341, [1937] 2 D.L.R. 639; Menow v. Jordan House Ltd., [1973 CanLII 16 \(SCC\)](#), [1974] S.C.R. 239, [1973] S.C.J. No. 80, 38 D.L.R. (3d) 105; Mizzi v. Hopkins (2003), [2003 CanLII 52145 \(ON CA\)](#), 64 O.R. (3d) 365, [2003] O.J. No. 1671, 37 M.V.R. (4th) 50 (C.A.); Mortimer v. Cameron (1994), [1994 CanLII 10998 \(ON CA\)](#), 17 O.R. (3d) 1, [1994] O.J. No. 277, 111 D.L.R. (4th) 428, 1 L.W.R. 57, 19 M.P.L.R. (2d) 286 (C.A.), revg in part [1992] O.J. No. 764, 9 M.P.L.R. (2d) 185 (Gen. Div.) [Leave to appeal to S.C.C. refused (1994)], 19 O.R. (3d) xvi, 178 N.R. 146n; Nelson v. Welsh, [1985 CanLII 5838 \(NS SC\)](#), [1985] N.S.J. No. 412, 422 70 N.S.R. (2d) 422, 166 A.P.R. 422 (S.C.); Olmstead v. Vancouver- Fraser Park District, [1974 CanLII 196 \(SCC\)](#), [1975] 2 S.C.R. 831, [1974] S.C.J. No. 129, 51 D.L.R. (3d) 416, 3 N.R. 326; R. v. Bernshaw, [1995 CanLII 150 \(SCC\)](#), [1995] 1 S.C.R. 254, [1994] S.C.J. No. 87, 176 N.R. 81, [1995] 3 W.W.R. 457, 26 C.R.R. (2d) 132, 95 C.C.C. (3d) 193, 35 C.R. (4th) 201, 8 M.V.R. (3d) 75; R. v. Biancofiore (1997), [1997 CanLII 3420 \(ON CA\)](#), 35 O.R. (3d) 782, [1997] O.J. 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No. 415, 15 O.A.C. 200, 27 D.L.R. (4th) 317, 36 C.C.L.T. 307 (C.A.); Robitaille v. Vancouver Hockey Club Ltd., [1981 CanLII 532 \(BC CA\)](#), [1981] B.C.J. No. 555, 30 B.C.L.R. 286, 124 D.L.R. (3d) 228, [1981] 3 W.W.R. 481, 16 C.C.L.T. 225, 20 C.P.C. 293 (C.A.); Roose v. Hollett, [1996 CanLII 5288 \(NS CA\)](#), [1996] N.S.J. No. 345, 154 N.S.R. (2d) 161, 139 D.L.R. (4th) 260, 452 A.P.R. 161, 30 C.C.L.T. (2d) 215 (C.A.) [Leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 541] (sub nom. R. (G.B.) v. Hollett); Sambell v. Hudago Enterprises Ltd., [1990] O.J. No. 2494 (Gen. Div.); Snushall v. Fulsang (2005), [2005 CanLII 34561 \(ON CA\)](#), 78 O.R. (3d) 142, [2005] O.J. No. 4069, 202 O.A.C. 297, 258 D.L.R. (4th) 425, 36 C.C.L.T. (3d) 63, 25 M.V.R. (5th) 180 (C.A.); Starkman v. Delhi Court Ltd., [1961 CanLII 195 \(ON CA\)](#), [1961] O.R. 467, [1961] O.J. No. 559, 28 D.L.R. (2d) 269 (C.A.); Stewart v. Pettie, [1995 CanLII 147 \(SCC\)](#), [1995] 1 S.C.R. 131, [1995] S.C.J. 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O.J. No. 2467, 256 D.L.R. (4th) 1, 199 O.A.C. 172, 140 A.C.W.S. (3d) 400 (C.A.); Van Oirschot v. Dow Chemical Canada Inc., 1995 ABCA 264 (CanLII), [1995] A.J. No. 611, 31 Alta. L.R. (3d) 212, 174 A.R. 157, 56 A.C.W.S. (3d) 300 (C.A.), affg 1993 CanLII 7088 (AB KB), [1993] A.J. No. 480, 10 Alta. L.R. (3d) 380, 142 A.R. 149, 41 A.C.W.S. (3d) 9 (Q.B.); Vorvis v. Insurance Corp. of British Columbia, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085, [1989] S.C.J. No. 46, 36 B.C.L.R. (2d) 273, 58 D.L.R. (4th) 193, 94 N.R. 321, [1989] 4 W.W.R. 218, 42 B.L.R. 111, 25 C.C.E.L. 81, 90 C.L.L.C. 14,035 Statutes referred to Courts of Justice Act, R.S.O. 1990, c. C.43, s. 119 Criminal Code, R.S.C. 1985, c. C-46 Family Law Act, R.S.O. 1990, c. F.3, s. 61 [as am.] Liquor Licence Act, R.S.O. 1990, c. L.19, s. 39 Authorities referred to Ontario, Financial Services Commission, Ontario Automobile Policy (OAP 1), Owner's Policy, online: Financial Services Commission of Ontario, . Ontario Law Reform Commission, Report on Exemplary Damages (Toronto: Ontario Law Reform Commission, 1991) Task Force on Sexual Abuse of Patients, Final Report of the Task Force on Sexual Abuse of Patients (Toronto: Ontario College of Physicians and Surgeons, 1991) Traffic Injury Research Foundation of Canada, The Alcohol-Crash Problem in Canada: 2003 by D.R. Mayhew, S.W. Brown & H.M. Simpson (Ottawa: Transport Canada and the Canadian Council of Motor Transport Administrators, 2005) Veilleux, D.R., "Intoxication of Automobile Driver as Basis for Awarding Punitive Damages" (1995) 33 A.L.R. (5th) 303

David F. Smye, Q.C. and Michael J. Winward, for respondent.

Patrick J. Monaghan, for appellant McMaster Student Union Incorporated.
Court File No. C41663:

David F. Smye, Q.C. and Michael J. Winward, for respondent.

Sheldon A. Gilbert, Q.C. and Shawn R. Stringer, for appellants Thomas Grigg and Andrew Grigg.
Court File No. C41674:

David F. Smye, Q.C. and Michael J. Winward, for appellants.
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Patrick J. Monaghan, for respondent McMaster Student Union Incorporated.

Sheldon A. Gilbert, Q.C. and Shawn R. Stringer, for respondents Thomas Grigg and Andrew Grigg.

BY THE COURT(BLAIR J.A. dissenting in part): --

A. Overview

[1] The reasons in these appeals are unanimous with the exception of a dissent by Blair J.A. with respect to the issue of punitive damages. The reasons in the By the Court section of this judgment regarding punitive damages are those of McMurtry C.J.O. and Weiler J.A.

[2] The appellants Thomas Grigg and Andrew Grigg and McMaster Student Union Incorporated, carrying on business as "The Downstairs John", appeal the awards of damages set out in the judgment of Justice Fedak dated March 9, 2004, at Hamilton pursuant to answers given by a jury, wherein the plaintiff respondent Andrea McIntyre was awarded the following amounts:

(a) General damages of \$250,000 payable 70 per cent by the appellants Thomas Grigg and Andrew Grigg and 30 per cent by McMaster Student Union Incorporated;

(b) Aggravated damages of \$100,000 payable solely by the appellants Grigg;

(c) Punitive damages of \$100,000 payable solely by the appellants Grigg.

[3] The appellant McMaster Student Union Incorporated also appeals that portion of the judgment of the trial judge based upon the verdict of the jury that found it 30 per cent liable for the subject motor vehicle accident.

[4] The appellants Duncan McIntyre, Darlene McIntyre and Alexis McIntyre appeal the jury verdict which dismissed their claims for damages pursuant to s. 61 of the Family Law Act, R.S.O. 1990, c. F.3, relative to the losses they claimed following the personal injuries sustained by Andrea McIntyre.

[5] These appeals involve a motor vehicle accident, which occurred on September 13, 1996, at approximately 2:15 a.m. in the City of Hamilton. Earlier that night Andrea McIntyre (hereafter referred to as "Andrea"), a first year student at McMaster University, had attended a campus bar operated by McMaster Student Union Incorporated (hereafter referred to as "McMaster") [page167] known as "The Downstairs John". Andrea was walking home with her friends when she was struck and injured by a motor vehicle owned by Thomas Grigg and operated by Andrew Grigg.

[6] Andrew Grigg had also consumed alcohol at "The Downstairs John" shortly before the accident. It was alleged in the action against McMaster that Andrew Grigg was either over-served by McMaster or served while apparently intoxicated.

B. The Facts

(a) The accident

[7] On September 13, 1996, Andrea and several of her friends were walking along the curb of Forsythe Avenue in Hamilton, Ontario after leaving the McMaster pub when the vehicle operated by an impaired driver, Andrew Grigg, struck her.

[8] At the time, Andrew Grigg was a Hamilton Tiger-Cat football player. After a football practice, he had attended at two drinking establishments, Kelsey's and the Crowbar, before ending up at the Downstairs John with some [of] his friends. After he left, one of his passengers realized that she had forgotten her purse, and so he began driving back to the pub. At the corner of King Street and Forsythe Avenue, Andrew Grigg failed to stop his vehicle at the stop sign and made a reckless wide right-hand turn to proceed northbound on Forsythe Avenue. The vehicle sheared off a lamp post and struck Andrea.

[9] Numerous witnesses testified at trial that Andrew Grigg was speeding and that he took no evasive measures such as braking or turning before hitting Andrea. He testified that he did not see Andrea or any of her friends before the accident and he admitted that even if Andrea had been on the sidewalk, instead of walking along the curb, his vehicle would still have collided with her.

[10] Andrew Grigg failed a breathalyzer test shortly after the accident. At trial, testimony indicated that his blood alcohol level was two to three times over the legal limit. He was initially charged with "operating a motor vehicle, having consumed alcohol in such a quantity that the concentration in the person's blood exceeds 80 milligrams of alcohol in 100 millilitres of blood" in contravention of the [Criminal Code, R.S.C. 1985, c. C-46](#). Later, counts of "impaired driving causing bodily harm" and the "operation of a motor vehicle in a manner dangerous to the public causing bodily harm" were added.

[11] Ultimately, the Crown Attorney decided to proceed only with a charge of careless driving and withdrew the other charges. The prosecution made this decision because before the breathalyzer test was administered, Andrew Grigg had not been [page168] informed of his right to counsel. The Crown Attorney testified at the trial that had Andrew Grigg been convicted, he would have asked for and would have expected that Andrew Grigg would have received a period of incarceration. Andrew Grigg pled guilty to careless driving and received a fine of \$500. No licence suspension was imposed.

(b) The injuries sustained by Andrea McIntyre

[12] At the time of accident, Andrea was a first-year student at McMaster University and was an outstanding athlete. Among her many athletic interests, she was exceptionally passionate about rugby and played on the intercollegiate team. Andrea's former teachers and coaches described her as "very positive", "easy to coach", and "a very skilled athlete" with "a great disposition". She intended to pursue a post-secondary degree with the goal of becoming a chiropractor.

[13] As a result of the accident, Andrea suffered both physical and psychological injuries. Her physical injuries included a closed head injury, soft tissue and orthopaedic injuries. The primary orthopaedic injury was a comminuted fracture of her right femur.

[14] Six years after the accident, Andrea was still suffering from lower back pain, right lateral thigh numbness, numbness on the inner aspect of her thigh, right knee discomfort with locking, right ankle and lower shin discomfort and right large toe pain. At the time of the trial she also had a reduced range of motion in her right hip, her right hemi-pelvis is tipped down (potentially the cause of her back pain), and she has permanent scarring in two places on her right leg. She also has a very probable increased risk of arthritis in her hip, right knee, foot and ankle.

[15] Andrea's physical injuries are such that she will never be able to resume the level of athletic activity and competitive skill that she had demonstrated prior to the accident. She testified that this has had a "devastating" effect on her given the importance of athletics in her life.

[16] Furthermore, Andrea has also suffered serious psychological injury, which one medical expert testified was the result of mild brain trauma. As a result, she has had problems with depression, most notably two major depressive episodes during which she attempted suicide. During the first episode on October 21, 1996, Andrea became psychotic, delusional, and required hospitalization. She was diagnosed as having a major depressive episode and had become catatonic with severe psychomotor retardation. She also believed that her family was being [page169] hunted or persecuted in some manner. In the opinion of one psychiatrist, when Andrea's sister Jennifer had a motor vehicle accident, it led Andrea to attempt suicide so that the "hunt" would be over. All of the expert psychiatric evidence at the trial confirmed that Andrea's depression leading to the suicide attempt was accident-related.

[17] There was a second suicide attempt by Andrea in 2000, which medical testimony called on her behalf also attributed to the accident.

[18] Several of the medical experts expressed the opinion that there is a significant instance of recurrence for persons who have suffered major depressive episodes. One expert testified that individuals such as Andrea who have had two episodes have a 70 per cent chance of having a third episode and individuals who have had three episodes have a 90 per cent chance of having a fourth.

[19] In order to attempt to prevent a recurrence of serious depression, Andrea has been advised to remain on medication for the rest of her life and several of the medical experts testified that she should continue psychiatric counselling as well. Andrea testified that the thought of any recurrence of her depression is "just so terrifying" and that she fears her depression may affect her ability to get married and have a family. She also testified that she has ongoing battles with anxiety and as such, has had to limit her career choices to accommodate both her physical injuries and her inability to handle stress. A psychiatrist testified that he shared this concern and expressed the opinion that Andrea will have to tailor her lifestyle to minimize anxiety and stress, in an attempt to prevent her depression from recurring. An economist also testified that Andrea has suffered a reduction in lifetime earning potential as a result of the accident.

C. Issues on Appeal

[20] The parties brought three separate appeals from the proceeding below. In the interest of clarity, we have grouped similar issues together in our analysis below. The issues raised by the appeals are:

- (1) The liability and apportionment of liability regarding McMaster;
- (2) The apportionment of costs at trial;
- (3) The awards of damages, including:
 - (a) the award of general damages; [page170]
 - (b) the award of aggravated damages; and
 - (c) the award of punitive damages;
- (4) The [Family Law Act](#) claim.

D. Analysis

I. Liability and apportionment of liability regarding McMaster

[21] McMaster appeals the finding of liability, as well as the jury's 30 per cent apportionment of that liability, against it. For the reasons that follow, we would not interfere with either finding.

(a) Liability of McMaster

[22] McMaster submitted that the trial judge erred by instructing the jury that a taverner's liability was a matter of absolute liability rather than negligence and, further, he erred because there was no evidence Andrew Grigg was either over-served at the Pub or served while apparently intoxicated. In addition, McMaster argued that the trial judge failed to give a proper charge on the use of similar fact evidence and, in any event, unfairly admitted the similar fact evidence when it had not been disclosed to the appellants prior to trial. McMaster could therefore not be liable at law for the injuries to Andrea.

i. Commercial host liability

[23] In Ontario, commercial host liability may be imposed both at common law and by statute where a patron, who subsequently causes injury, has been served while intoxicated or over-served to the point of intoxication, and where it is reasonably foreseeable that the patron will drive a motor vehicle upon leaving the establishment. Commercial vendors of alcohol have an obligation to monitor a patron's consumption of alcohol and should have protocols in place to ensure that all reasonable precautions are taken to prevent such patrons who subsequently drive from becoming intoxicated to the point where they cannot safely operate a motor vehicle. Moreover, a commercial host does not escape liability simply by not knowing that the patron became inebriated before driving; the commercial host is liable if it or its employees knew or ought reasonably to have known in the circumstances that the patron was in such a condition. See *Stewart v. Pettie*, 1995 CanLII 147 (SCC), [1995] 1 S.C.R. 131, [1995] S.C.J. No. 3; *Childs v. Desmoreaux* (2004), 2004 CanLII 15701 (ON CA), 71 O.R. (3d) 195, [2004] O.J. No. 2065 (C.A.), at paras. 52, 55, 66 and 70; and the *Liquor Licence Act*, R.S.O. 1990, c. L.19, s. 39. [page171]

[24] The relevant portion of s. 39 of the [Liquor Licence Act](#) states:

39. The following rules apply if a person or an agent or employee of a person sells liquor to or for a person whose condition is such that the consumption of liquor would apparently intoxicate the person or increase the person's intoxication so that he or she would be in danger of causing injury to himself or herself or injury or damage to another person or the property of another person:

.....

2. If the person to or for whom the liquor is sold causes injury or damage to another person or the property of another person while so intoxicated, the other person is entitled to recover an amount as compensation for the injury or damage from the person who or whose employee or agent sold the liquor.

[25] McMaster alleges that the trial judge erred by instructing the jury that liability under s. 39 is "absolute" without telling them about the necessary "fault" or negligence component of such liability. We do not read the trial judge's charge in that fashion. In our view, the trial judge carefully and properly instructed the jury on the issue of the taverner's liability. In this regard, the trial judge said:

At common law commercial vendors of alcohol owe a general duty of care to persons who might reasonably be expected to come into contact with an intoxicated person and to whom the patron may pose some risk. That duty of care arises if there is some foreseeable risk of harm to the patron or to the third party.

Society has also provided guidelines for the standard of care in the provisions of the [Ontario Liquor Licence Act](#) [citation omitted]. Given that catastrophic injuries can result from operation of a motor vehicle by an inebriated person, a high standard is imposed on commercial establishments which supply alcohol. This is to ensure that they do not create a danger to users of the highway. The Ontario Liquor Licence Act imposes liability as a result of findings of fact in its relevant parts as follows:

[The trial judge then read to the jury the relevant portions of s. 39 of the Act as outlined above, and continued:]

Common law and statutory law therefore impose a duty on taverns to its patrons and others to ensure that the tavern does not serve alcohol which would either intoxicate or increase the patron's intoxication. They do not escape liability simply because a patron does not exhibit any visible signs of intoxication if in the circumstances the tavern knew or ought to have known that the patron was becoming intoxicated. Likewise, commercial vendors of alcohol cannot avoid liability where the establishment has intentionally structured the environment in such a way as to make it impossible to know whether intervention is necessary. This therefore imposes a very high or heavy responsibility upon owners and managers of drinking establishments.

A tavern's standards are too low if drinks are only refused if a patron exhibits signs of impairment such as being too loud, starting arguments, knocking [page 172] over drinks, falling down, creating problems for the staff, or upsetting other patrons. Taverns have a duty also to take affirmative action to prevent intoxicated patrons from driving. In circumstances where it is reasonable to expect that a patron has come by car, there is a heavier duty on the tavern staff to keep an eye on the patron when they depart to check to see if the patron is driving and to arrange safe transportation, if necessary.

[26] Having regard to the provisions of the Act and to the common law as established by the Supreme Court of Canada and in this court, we see no error in this direction. The trial judge does not use the term "absolute liability" (although he may have expressed the view during pre-charge submissions by counsel that the statutory provision involved absolute liability). While that expression has been used in conjunction with a predecessor to s. 39 in the context of the notion of causation -- see *Hague v. Billings* (1993), [1993 CanLII 8581 \(ON CA\)](#), 13 O.R. (3d) 298, [1993] O.J. No. 945 (C.A.) -- it is more accurate to characterize the liability under s. 39 as a statutory liability arising once the factual pre-conditions provided for therein have been found to exist. That is what the trial judge instructed the jury was the case in this instance.

[27] In our view, the trial judge's instructions indicate that he properly charged the jury on the issue of McMaster's liability at common law and under the [Liquor Licence Act](#). Read as a whole, the charge fairly put the position of the defence to the jury.

[28] The jury's answers to Questions 3 and 4 relevant to their verdict demonstrate that they understood and followed the trial judge's direction. Those questions, and the jury's answers to them, were as follows:

Question 3: Have the Plaintiffs or the Defendant Andrew Grigg satisfied you that there was negligence or breach of the statutory duty pursuant to the provisions of the [Liquor Licence Act](#) on the part of the Defendant McMaster Student Union Incorporated, carrying on business as "The Downstairs John", which caused or contributed to the accident in question?

Answer: Yes.

Question 4: If the answer to question 3 is yes, state fully of what the negligence or breach of the statutory duty of the Defendant McMaster Student Union Incorporated, carrying on business as "The Downstairs John" consisted.

Answer: Increased person's intoxication so that he was in danger of causing injury to himself and others.

Serving to point of intoxication.

Poor enforcement of Smart Serve protocol.

No changes to enforcement of Smart Serve protocol post- accident. [page173]

[29] We reject McMaster's submission that there was insufficient evidence to support these findings. In this respect, McMaster relies upon the evidence indicating that Andrew Grigg had an unusual capacity to display little sign of intoxication, in spite of significant blood alcohol levels and that there were no visible signals of intoxication on his part before or after the accident.

[30] Amongst other things, this evidence included the testimony of Susan Board, a McMaster employee, who said that she shook hands with Andrew Grigg when he entered the Pub at about 12:30 a.m., watched him walk down the stairs with no difficulty and did not notice a whisp of alcohol on his breath at the time. Ms. Board's evidence was that she observed Andrew Grigg before he left the Pub and had no concerns about signs of intoxication. Further, with the exception of the evidence of one witness, Gwen Farrell, no other witnesses were able to provide any indication that he was showing apparent signs of impairment, other than the smell of alcohol on his breath. These witnesses included the police officers who attended the scene and took Andrew Grigg into custody, as well as at least one witness who had seen him in the Pub and several persons who were accompanying Andrea at the time of the accident. In addition, the two expert witnesses who observed the video that was taken when the breathalyzer test was administered approximately two hours after the event acknowledged that Andrew Grigg displayed no outward signs of intoxication.

[31] In spite of the foregoing testimony, however, there was evidence upon which the members of the jury were entitled to make the findings they made. First, Gwen Farrell, who was herself admittedly quite intoxicated at the time and who observed Andrew Grigg just after the accident, thought he was intoxicated. Ms. Farrell testified that he was stumbling, he was weaving back and forth, he looked kind of "spacey", and he smelled of alcohol. Notwithstanding the obvious frailties of her testimony, it was open to the jury to accept it. Second, there was evidence that McMaster's "Smart Serve" protocols -- designed to minimize the risk of patrons becoming intoxicated -- were not followed. Finally, there was the evidence of Andrew Grigg's blood alcohol level and expert testimony to the effect that at those levels he would have shown visible signs of impairment before leaving the Pub.

[32] The breathalyzer results demonstrated that Andrew Grigg's blood alcohol level was 178 and 174 milligrams/100 millilitres of blood two hours after the accident. Significantly, the experts were all consistent in their testimony that at the time of the accident his blood alcohol level would have been around 218 milligrams of alcohol/100 millilitres of blood -- nearly three [page174] times the legal limit. In the opinion of the plaintiffs' expert, Professor Kalant, there was "no conceivable way" that Andrew Grigg had consumed only the six drinks over the entire night that he claimed to have consumed. Moreover, if the jury accepted that Andrew Grigg had consumed only the three beers he claimed to have had prior to arrival, and showed no signs of impairment on arrival (as Ms. Board testified), it is possible (given his tolerance and blood alcohol levels) that he was served up to 18 drinks at the Pub -- a rate of approximately eight one-ounce drinks per hour. Dr. Kalant testified that, if such were the case, Andrew Grigg would have been "very drunk" and he would have been "visibly impaired at the time of the accident". Dr. Kalant had "no doubt whatsoever" that, to someone trained to detect the effects of the consumption of alcohol on persons leaving a bar, the signs of whether the person leaving was capable of driving an automobile safely would have been apparent. It was his opinion that the employees of the Pub should have been able to observe Andrew Grigg for impairment. McMaster called no evidence from any employees other than Ms. Board, or from the companions of Andrew Grigg at the time, to refute the opinion of Dr. Kalant that he would have been showing signs of impairment when he left the Pub.

[33] All of the foregoing was sufficient to support the jury's findings on liability.

[34] McMaster complains that the trial was unfair because the plaintiffs called and relied upon "similar fact" evidence not disclosed prior to trial and that the trial judge failed to charge the jury on the proper use of that evidence. This evidence consisted of the testimony of a number of individuals who frequented the Pub and who testified that they occasionally had been served, and had observed others being served, to the point of intoxication in spite of the "Smart Serve" protocol. These instances were said to have occurred before, on, and after the night in question. We agree with the respondent that the evidence was not "similar fact" evidence called to buttress the claim for punitive damages, but rather evidence led to rebut McMaster's position that the Pub had policies and procedures in effect such that it would not over-serve alcohol to its patrons. There was therefore no need for the trial judge to instruct the jury on the limited use to which similar fact evidence may be put. We see no reason to interfere with the trial judge's decision to admit such evidence in the circumstances.

[35] Nor would we give effect to the argument that the trial was unfair because plaintiffs' counsel referred, in closing, to the fact that McMaster called no employees to establish the Pub was following its own procedures, in spite of the judge's ruling that no [page175] comments ought to be made in the addresses about adverse inferences. Counsel for the plaintiffs was entitled to comment on the submissions of counsel for McMaster that everything had been done properly, when no evidence was called to prove its policies and procedures were actually followed.

[36] For all of the foregoing reasons, we would not interfere with the jury's finding of liability on the part of McMaster.

(b) Apportionment of liability

[37] The jury apportioned liability 70 per cent to the Grigg appellants and 30 per cent to McMaster. McMaster contests this finding, arguing that the charge to the jury contained no instructions with respect to liability and that the trial judge should have told the jury -- as some other judges have done -- that in circumstances such as the case at bar "the lion's share of culpability, both morally and legally, should attach to the drinking driver": Dryden (Litigation Guardian of) v. Campbell Estate, [2001] O.J. No. 829, 11 M.V.R. (4th) 247 (S.C.J.), at para. 215. See also Hague v. Billings, supra, at p. 303 O.R. It also submits that the jury's finding was not in keeping with findings on proportionate liability as established in those cases. McMaster's counsel repeatedly requested a charge on apportionment, but to no avail.

[38] While it may have been preferable had the trial judge acceded to this request, we see no basis for interfering with the jury's findings respecting the apportionment of liability. Just as a jury award assessing the degree of contributory negligence is to be approached in the same way as a jury verdict respecting damages generally -- see Snushall v. Fulsang (2005), 2005 CanLII 34561 (ON CA), 78 O.R. (3d) 142, [2005] O.J. No. 4069 (C.A.), at paras. 19-22 -- so too is a jury award assessing the degree of apportionment of damages as between defendants. In the absence of material misdirection or non-direction, appellate courts will not interfere unless the verdict is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have arrived at that conclusion: McCannell v. McLean, 1937 CanLII 1 (SCC), [1937] S.C.R. 341, [1937] 2 D.L.R. 639; Olmstead v. Vancouver-Fraser Park District, 1974 CanLII 196 (SCC), [1975] 2 S.C.R. 831, [1974] S.C.J. No. 129; Ferenczy v. MCI Medical Clinics, 2005 CanLII 18186 (ON CA), [2005] O.J. No. 2076, 198 O.A.C. 254 (C.A.); Snushall v. Fulsang, supra. See also Mizzi v. Hopkins (2003), 2003 CanLII 52145 (ON CA), 64 O.R. (3d) 365, [2003] O.J. No. 1671 (C.A.), at para. 52. Some courts have suggested that an appellate court may conclude the damages awarded are inordinately high or low if it takes the view that they are too high or too low by 50 per cent: Howes v. Crosby (1984), 1984 CanLII 2172 (ON CA), 45 O.R. (2d) 449, [1984] O.J. No. 3127 (C.A.); Koukounakis v. Stainrod (1995), 1995 CanLII 621 (ON CA), 23 O.R. (3d) 299, [1995] O.J. No. 1369 (C.A.). [page176]

[39] The jury's apportionment of damages as between the Grigg appellants (70 per cent) and McMaster (30 per cent) cannot be said to fall into that category. Although the trial judge did not charge the jury on apportionment, in fact the jury did attribute the "lion's share" of responsibility to Andrew Grigg, thus reflecting his significant moral blameworthiness for the accident. Moreover, the apportionment -- while perhaps at the high end -- is not out of the range of findings in other cases involving commercial host liability: see, for example, Hague v. Billings, supra (driver 85 per cent; tavern 15 per cent); Sambell v. Hudago Enterprises Ltd., [1990] O.J. No. 2494 (Gen. Div.) (driver 71.5 per cent; tavern 28.5 per cent); Francescucci v. Gilker, [1996] O.J. No. 474 (C.A.) (driver 22 per cent/tavern 78 per cent). In the seminal case involving commercial host liability for damages suffered by a patron who had been permitted to become intoxicated and then to leave the establishment to walk home on a busy roadway, the Supreme Court of Canada upheld an apportionment of 30 per cent as against the tavern: Menow v. Jordan House Ltd., 1973 CanLII 16 (SCC), [1974] S.C.R. 239, [1974] S.C.J. No. 80. Thus, the jury was entitled, on the record before it, to arrive at the verdict regarding apportionment that it did.

[40] We would not give effect to this ground of appeal.

II. Apportionment of costs at trial

[41] In its factum, McMaster submitted: "In the circumstances of this case, Andrew Grigg ought to have borne the great majority of the plaintiffs' legal costs." We do not read para. 12 of the trial judge's order as apportioning the costs at trial equally between McMaster and the Griggs so that McMaster was responsible for 50 per cent of the costs. Rather, our understanding of the order is that each of the appellants (Andrew Grigg, Thomas Grigg and McMaster) is responsible for 33 1/3 per cent of the costs. Inasmuch as we have not changed the apportionment of liability, we see no reason to alter the trial judge's award of costs.

III. Damages

(a) General damages

[42] McMaster and the Grigg appellants both appealed the award of general damages of \$250,000. For the reasons that follow, we would not interfere with that award.

[43] An active, athletic and intelligent young woman, Andrea suffered serious and permanent injuries as a result of the accident. Physically, she sustained a closed head injury, soft tissue injuries and various orthopaedic injuries. She was diagnosed as suffering from a major depressive disorder triggered by the accident, which [page177] led to her attempts to commit suicide on two occasions several years apart. The medical evidence attributed her depression to post-traumatic stress disorder and to her personal reaction to the losses in her function and self-image from her physical injuries. She will require medication and she is likely to suffer from anxiety and fear on a long-term basis. In spite of the fact that she has been able to return to university and to perform well, as well as to travel and mix with her friends, most aspects of her life have been dramatically affected by the accident and, in one fashion or another, may continue to be for the rest of her life.

[44] In these circumstances, while the jury's award of general damages is perhaps generous and at the high end of the range -- given that the "cap" on personal injuries established by the Supreme Court of Canada in the trilogy of cases [See Note 1 below] (hereinafter referred to as the "Trilogy") stood at approximately \$300,000 at the time -- it cannot be said to be so beyond the scope of anything that could be accepted as reasonable, or to be so inordinately high as to amount to a wholly erroneous estimate of general damages.

[45] Accordingly, we would not interfere with the jury's verdict of general damages.

(b) Aggravated damages

i. Overview

[46] The appellants Grigg brought motions at both the beginning and the end of the trial to dismiss the claim for aggravated and punitive damages. Fedak J. dismissed both motions, finding that aggravated damages could be founded on the fact that the respondent's post-traumatic stress disorder was related to Andrew Grigg's impaired driving, and punitive damages could be awarded by reason of the fact that when he embarked on his course of driving, he knew or should have known that his driving presented a very high risk of injury to others. In making his rulings, Fedak J. did not specifically refer to any reported cases. [See Note 2 below] [page178]

[47] On appeal, the appellants Grigg submit that the jury had no grounds upon which to award aggravated damages, and in the alternative, that the award of \$100,000 for aggravated damages is excessive. Additionally, they argue that the quantum of aggravated damages must be reduced, as they are properly part of general non-pecuniary damages and subject to the upper limit in personal injury cases laid out by the Supreme Court of Canada in the Trilogy. They argue that there was insufficient evidence to ground an award of aggravated damages.

[48] For the reasons that follow, we agree with the appellants. The expert medical evidence was not sufficient to establish that Andrea's psychological harm was increased because Andrew Grigg was impaired at the time of the accident. Even if it could be said that aggravated damages were properly awarded as being supported by the evidence, such damages are part of the general non-pecuniary award and subject to the upper limit for personal injury set by the Trilogy. In our view, given that the upper limit at the time of the trial was \$299,000, the jury award of \$250,000 for general non-pecuniary damages was generous and should not be increased even if there is an evidentiary basis for awarding aggravated damages.

ii. The nature of aggravated damages

[49] Aggravated damages are awarded because of the nature of the defendant's conduct. They are designed to compensate the plaintiff specifically for the "additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant". [Whiten v. Pilot Insurance Co., 2002 SCC 18 \(CanLII\)](#), [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, at para. 116.

[50] Aggravated damages are awarded then when the reprehensible or outrageous nature of the defendant's conduct causes a loss of dignity, humiliation, additional psychological injury, or harm to the plaintiff's feelings. In [Norberg v. Wynrib, 1992 CanLII 65 \(SCC\)](#), [1992] 2 S.C.R. 226, [1992] S.C.J. No. 60, the Supreme Court of Canada awarded both aggravated and punitive damages against the defendant doctor who exchanged painkillers for sexual favours from the drug-addicted plaintiff. At p. 263 S.C.R., the majority found that aggravated damages are awarded if the tort, in that case a battery, occurred in humiliating or undignified circumstances. Aggravated damages are not awarded in addition to general damages, but the general damages are to be assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded". [page179]

[51] This court has taken the same view with respect to aggravated damage being part of general non-pecuniary damages. See [T.W. v. Seo, 2005 CanLII 21356 \(ON CA\)](#), [2005] O.J. No. 2467, 199 O.A.C. 172 (C.A.). At para. 69, [Hennessy J.](#) (ad hoc) held "[g]eneral non-pecuniary damage should be assessed after taking into account any aggravating features of the defendant's conduct. The court may separately identify the aggravated damages, however, in principle they are not to be assessed separately."

iii. Conclusion with respect to aggravated damages

[52] In our view, for the reasons stated above, there was no legal basis for a separate award of aggravated damages. We therefore allow the appeal on this issue.

(c) Punitive damages

[53] Blair J.A. dissents from this portion of the reasons dealing with punitive damages.

[54] The appellants Grigg also submit that the jury had no grounds on which to award punitive damages, and in the alternative, that the award of \$100,000 for punitive damages is excessive.

[55] This is a novel case. The parties were unable to produce any Canadian case law in which punitive damages were awarded as a result of injuries sustained in a motor vehicle accident caused by an impaired driver nor were they able to produce any appellate authority that prohibited such damages in this context.

[See Note 3 below] This is in stark contrast to the United States, where punitive damages have been routinely awarded in a majority of the [page180] states for injuries caused by impaired drivers. [See Note 4 below] For this reason, we believe it necessary to conduct a careful analysis of the principles surrounding punitive damages in the context of negligence actions and the applicability of such principles to motor vehicle accidents involving impaired drivers. Subject to our further analysis it might be helpful if we state briefly, at the onset, a summary of our conclusions.

[56] The appellants Grigg argued that Andrew Grigg did not act in a high-handed, malicious or oppressive manner, and thus there is no basis upon which the jury could have properly awarded punitive damages. We disagree. In *Norberg v. Wynrib*, supra, La Forest J., writing for the majority, observed at p. 268 S.C.R. that the conduct of Dr. Wynrib, a doctor who prescribed drugs to Norberg in return for sexual favours, was not harsh, vindictive or malicious, to use the terms cited in *Vorvis v. Insurance Corp. of British Columbia*, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085, [1989] S.C.J. No. 46. Nevertheless, the doctor's conduct was reprehensible; it offended the ordinary standards of decent conduct in the community and La Forest J. was of the opinion that an award of punitive damages was appropriate. The type of conduct in which Dr. Wynrib engaged cried out for deterrence. In a separate opinion, [See Note 5 below] concurring on the issue of punitive damages, McLachlin J. also commented at p. 300 S.C.R. on the need for general deterrence of sexual exploitation, and the fact that punitive damages would signal the community's disapprobation.

[57] By making the deliberate choice to drink excessively and then drive, Andrew Grigg's misconduct was more than mere negligence. It demonstrated a conscious and reckless disregard for the lives and safety of others. There was evidence he was two to three times over the legal limit for alcohol consumption and was speeding and driving recklessly. In our view, this was sufficient evidence for the jury to find that an award of punitive damages was warranted. The appellants Grigg also argued an award of [page181] punitive damages would be inappropriate and unnecessary given that the driver Grigg had already been punished, i.e., a \$500 fine for careless driving. In our view, analyzing the principles articulated by the Supreme Court of Canada in *Whiten*, and given the fact that the misconduct in question was much more serious than careless driving, it was open to the jury to find that punitive damages did not amount to double punishment, that others would not be deterred by the fine imposed on Andrew Grigg, and that punitive damages were appropriate.

[58] However, we agree with the appellant's submission that the quantum of punitive damages was too high to meet the rationality test. The quantum must be proportionate in relation to several dimensions, none of which would support the high award of \$100,000 as being proportionate to the misconduct in this case. We would therefore reduce the quantum to \$20,000.

i. General principles of punitive damages

[59] Punitive damages are awarded to meet the objective of punishment, deterrence and denunciation of the defendant's conduct and not to compensate the plaintiff. *Whiten*, supra, at paras. 43 and 68. Punitive damages should only be awarded in exceptional cases. They should be awarded with restraint. *Whiten* at para. 69; *Gerula v. Flores*, 1995 CanLII 1096 (ON CA), [1995] O.J. No. 2300, 83 O.A.C. 128 (C.A.), at paras. 57-58.

[60] An award of punitive damages therefore requires the defendant to have engaged in extreme misconduct. The type of conduct required to attract punitive damages has been described in many ways, such as: malicious, oppressive, arbitrary and high-handed that offends the court's sense of decency (*Whiten* at paras. 36 and 94; see also *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, at para. 196); a marked departure from ordinary standards of decent behaviour (*Whiten*, *ibid.*); harsh, vindictive, reprehensible and malicious (*Vorvis*, supra, at para. 16); offends the ordinary standards of morality or decency (*Norberg*, supra, at paras. 57-58); arrogant and callous (*ibid.*); egregious (*Hill* at para. 196); high-handed and callous (*Doobay (c.o.b. Venus Fashions) v. York Gate Mall Ltd.*, [2000] O.J. No. 2219 (C.A.), at para. 3; arrogant, callous of the plaintiff's rights and deliberate (*Starkman v. Delhi Court Ltd.*, 1961 CanLII 195 (ON CA), [1961] O.R. 467, [1961] O.J. No. 559 (C.A.); harsh, reprehensible and malicious (*Fleury v. Fleury*, 2001 CanLII 294 (ON CA), [2001] O.J. No. 1720, 144 O.A.C. 372 (C.A.), at para. 11); outrageous or extreme (*Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.* (2002), 2002 CanLII 45070 (ON CA), 61 O.R. (3d) 481, [2002] O.J. No. 3588 (C.A.), at para. 86); highly unethical conduct which disregards the plaintiff's [page182] rights (*Gerula*, supra, at para. 72); and recklessly exposing a vulnerable plaintiff to substantial risk of harm without any justification (*Roose v. Hollett*, 1996 CanLII 5288 (NS CA), [1996] N.S.J. No. 345, 154 N.S.R. (2d) 161 (C.A.), at para. 237).

ii. Punitive damages in a negligence action

[61] The nature and character of the wide range of descriptors suggest that punitive damages would only be justified in the most extreme cases. Punitive damages are designed to express the repugnance of the public, which is represented by the jury, towards the outrageous and heinous conduct of the defendant. As Cory J. stated in *Hill* at para. 196, punitive damages are "the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant".

[62] In our view, negligent conduct can only attract punitive damages if the misconduct in question was intentional and deliberate and was "extreme in nature and such that by any reasonable standard it is deserving of full condemnation and punishment". See *Vorvis* at p. 1108 S.C.R. This requirement for

deliberate action or omission is clear from the relatively few cases in which courts have awarded punitive damages for negligent conduct.

[63] For example, in *Gerula v. Flores*, supra, this court found the trial judge erred in not awarding punitive damages against the defendant doctor who had operated on the plaintiff's wrong spinal disc. After the operation the doctor discovered the error, he failed to inform the defendant, altered his notes to cover up his error and persuaded the plaintiff to consent to further surgery to correct his mistake. At para. 72, Weiler J.A. found that the doctor's conduct was more than mere negligence because of his "deliberate non-disclosure" of his error (emphasis added).

[64] Weiler J.A. further found that this non-disclosure represented a misrepresentation by omission and that a reasonable person in the position of the appellant would not have chosen to have the same doctor perform the second surgery, had he known about the error and subsequent non-disclosure. Such conduct demonstrates a "deliberate and flagrant disregard" of the plaintiff's rights. Weiler J.A. also noted that the doctor's "highly unethical conduct and disregard" of the plaintiff's rights had gone unpunished. As such it was an appropriate case to make an award of punitive damages.

[65] In Canadian decisions outside of Ontario, the negligence actions in which punitive damages have been awarded have all required intentional or deliberate conduct. In *Robitaille v. Vancouver Hockey Club Ltd.*, 1981 CanLII 532 (BC CA), [1981] B.C.J. No. 555, 124 D.L.R. (3d) 228 (C.A.), [page183] punitive damages were awarded against a professional hockey club that was negligent in failing to subject the plaintiff to thorough medical examinations after he sustained an injury, and then ordering him to play in subsequent games. This intentional conduct of the Club "showed a callous disregard for his feelings and his well-being - they ignored the dictates of common decency as well as common sense" (at p. 248 D.L.R.). The British Columbia Court of Appeal held that punitive damages were available in negligence cases where the "defendant has done more than inflict injury on others by his negligence or intentional acts" (at p. 250 D.L.R.). The court further held that the defendant must have acted with malice, or with recklessness that indicates an indifference to the safety of others, or alternatively engaged in conduct that is so socially reprehensible that it justifies the award of punitive damages.

[66] Several courts have rejected claims for punitive damages in negligence cases on the basis that the defendant's misconduct was not specifically directed at the plaintiff. For example, in *Kaytor v. Lion's Driving Range Ltd.* (1962), 1962 CanLII 346 (BC SC), 35 D.L.R. (2d) 426, 40 W.W.R. 173 (B.C.S.C.), the owners of a driving range kept an extremely vicious dog on site to prevent people from stealing golf balls at night. The dog became loose accidentally and injured the plaintiff. The trial judge found at p. 431 D.L.R. that the defendants were negligent but held that to award punitive damages, the act complained of must be intentionally directed to the person or property injured. Similarly, in *Nichols v. Guel*, 1983 CanLII 460 (BC SC), [1983] B.C.J. No. 1693, 145 D.L.R. (3d) 186 (S.C.), the trial judge refused to award punitive damages for a motor vehicle accident that had injured the plaintiff and killed her husband. The defendant was accused of racing on the wrong side of the highway at a speed of 100 m.p.h. or more. The trial judge, relying on *Kaytor*, supra, found that the conduct of the defendant, although deliberately reckless, was not specifically directed at the plaintiff or her late husband and that this precluded an award of punitive damages.

[67] At the end of the trial, during the motion to strike the claim for punitive damages, the appellants Grigg argued that an award of punitive damages required the defendant's conduct to be specifically directed at the plaintiff. We disagree with this submission and with the reasoning in both *Kaytor*, supra, and *Nichols*, supra, insofar as they would require the misconduct to be deliberately directed at the injured party.

[68] Such a requirement could well bar punitive damages in product liability cases, where punitive damages may be awarded depending on the level of indifference or recklessness of the [page184] defendant. See for example *Van Oirschot v. Dow Chemical Canada Inc.*, 1993 CanLII 7088 (AB KB), [1993] A.J. No. 480, 142 A.R. 149 (Q.B.), aff'd 1995 ABCA 264 (CanLII), [1995] A.J. No. 611, 174 A.R. 157 (C.A.). In that case, the defendant was aware of the dangers with respect to the product and did not provide appropriate warnings to its customers. The trial judge found the defendant had acted in a high-handed and oppressive manner. The Court of Appeal found that the \$10,000 awarded by the trial judge for "high-handed conduct" was an appropriate award for punitive damages.

[69] In *Vlcek v. Koshel*, 1988 CanLII 3116 (BC SC), [1988] B.C.J. No. 1062, 52 D.L.R. (4th) 371 (B.C.S.C.), at p. 375 D.L.R., *Gallaghan J.*, in review of the holdings of previous British Columbia cases, including *Kaytor* and *Nichols*, concluded:

While negligence or an intentional act, can trigger an award of exemplary damages, it does not follow that the act must be directed towards a specific individual. But the act must be malicious or reckless to such a degree as to indicate complete indifference to the consequences that might flow therefrom, including the welfare and safety of others. In other words, intention to cause the injury need not be present; it will suffice if there was an intention to do the act which eventually caused the injury. The act alleged in this case was the manufacturing of inherently dangerous and unstable machines which were sold and used by the general public.

(Emphasis added)

[70] In *Vlcek*, supra, the British Columbia Supreme Court moved away from a strict application of the holding in *Kaytor*. We agree with this reasoning. It would, in our view, be inappropriate to narrow the scope

of punitive damages by specifically requiring that the defendant's conduct be directed at the plaintiff. Rather, it is sufficient if there was an intention to do the act or combination of acts that eventually caused the injury.

iii. Punitive damages in this case

[71] We do not agree with the submission of the appellants Grigg that punitive damages are not available because Andrew Grigg's conduct was not high-handed, malicious or oppressive and that this was "no more than a motor vehicle accident resulting from excessive consumption of alcohol". In *Norberg v. Wynrib*, supra, at p. 268 S.C.R., La Forest J. held that while the misconduct of the defendant doctor was not "harsh, vindictive or malicious" it was reprehensible and that type of conduct which offends the "ordinary standards of decent conduct in the community". Further, La Forest J. held that punitive damages were appropriate because of the nature of the misconduct in question: "[T]he exchange of drugs for sex by a doctor in a position of power is conduct that cries out for deterrence", and as McLachlin J. [page185] stated at p. 300 S.C.R., "[it] is more widespread than it is comfortable to contemplate". [See Note 6 below]

[72] In our view, this is also such a case. The Supreme Court of Canada has described drinking and driving as a "social evil" in the context of screening provisions in the [Criminal Code](#). See *R. v. Orbanski*, 2005 SCC 37 (CanLII), [2005] 2 S.C.R. 3, [2005] S.C.J. No. 37, 196 C.C.C. (3d) 481, at para. 3. As Justice Cory articulated in *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254, [1994] S.C.J. No. 87, 95 C.C.C. (3d) 193, at para. 16:

Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalizations, drunk driving is clearly the crime which causes the most significant social loss to the country.

[73] Lamer C.J.C. emphasized the need for general deterrence for impaired driving in *R. v. Proulx*, 2000 SCC 5 (CanLII), [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 140 C.C.C. (3d) 449, at para. 129:

Moreover, dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons with good employment records and families. Arguably such persons are the ones most likely to be deterred by the threat of severe penalties.

(Footnotes omitted)

[74] This court has repeatedly emphasized the need for general deterrence in impaired driving offences and the significant losses caused by impaired driving. See *R. v. Dharamdeo*, 2000 CanLII 17018 (ON CA), [2000] O.J. No. 4546, 149 C.C.C. (3d) 489 (C.A.), at paras. 23-26 citing *R. v. McVeigh*, 1985 CanLII 115 (ON CA), [1985] O.J. No. 207, 22 C.C.C. (3d) 145 (C.A.), at p. 150 C.C.C., and *R. v. Biancofiore* (1997), 1997 CanLII 3420 (ON CA), 35 O.R. (3d) 782, [1997] O.J. No. 3865, 119 C.C.C. (3d) 344 (C.A.), at paras. 22-24.

[75] In our view, the evidence before the jury was sufficient to meet the requirements that Andrew Grigg's conduct was deliberate and intentional. His decision to drink excessively and drive, his intoxication and the evidence that he was speeding and driving erratically were key contributors to the cause of the accident. All of these factors demonstrate that on that night, Andrew Grigg showed a conscious and reckless disregard for the lives and safety of others.

[76] Counsel for the appellants Grigg argued that punitive damages would be inappropriate in this case, as Andrew Grigg's conduct had already been punished by his conviction for careless [page186] driving and the imposition of a \$500 fine. We agree that a factor of significant importance in assessing whether it would be appropriate to award punitive damages is whether punishment has already been imposed in a separate proceeding for the same misconduct. Binnie J. noted at para. 69 in *Whiten*, supra, that the Ontario Law Reform Commission, in its Report on Exemplary Damages (Toronto: The Commission, 1991) had recommended that the "court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant" (at p. 46). At para. 123 of *Whiten*, Binnie J. made the following comments:

In Canada, unlike some other common law jurisdictions, such "other" punishment is relevant but it is not necessarily a bar to the award of punitive damages. The prescribed fine, for example, may be disproportionately small to the level of outrage the jury wishes to express. The misconduct in question may be broader than the misconduct proven in evidence in the criminal or regulatory proceeding. The legislative judgment fixing the amount of the potential fine may be based on policy considerations other than pure punishment. The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.

(Emphasis added)

[77] While this statement of Binnie J. might appear to be obiter in the context of the issues to be determined in *Whiten*, we are of the view that we are bound [to] his observations. In *R. v. Henry*, 2005 SCC 76 (CanLII),

[2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, at paras. 53-57, the Supreme Court of Canada held that the closer the relationship between the obiter and the legal issue in question, the more likely the obiter is binding.

[78] For the purposes of this appeal we regard Binnie J.'s comments in *Whiten*, supra, as authoritative and binding. In *Whiten*, the entire case focused both on the circumstances in which punitive damages would be available, and more importantly the factors to be considered in assessing the proportionality of the damages. In both this appeal and in *Whiten*, the jury's assessment of punitive damages was a central issue. In *Whiten*, the intervenor, the Insurance Council of Canada, argued that discipline of insurance companies should be left to the regulator; Binnie J. rejected this argument at para. 123, noting that the regulator had not taken an interest in that case prior to the jury's award of punitive damages.

[79] While the driver Grigg pleaded guilty to, and received a fine for, careless driving, the evidence in the civil trial established that he was significantly impaired and that his conduct should normally warrant a serious punishment. Where a wrongdoer has [page187] already been punished for an offence and the same conduct is in question at a civil trial, punitive damages generally will not serve a rational purpose as the sentence imposed in the criminal or regulatory environment will have already met the necessary objectives of retribution, deterrence and denunciation. In our view, there are sound policy reasons for generally not attempting to re-try those proceedings in a civil action. As this court held in *Fleury v. Fleury*, supra, at para. 11:

Where tortious acts have already been sanctioned by the imposition of a criminal sentence, it is inappropriate to award punitive damages in a civil lawsuit. To do so is to punish twice for the same offence.... Where, however, the civil proceedings establish that ... the sentence does not fully sanction the tortfeasor's behaviour... punitive damages may be awarded.

(Footnotes omitted)

[80] In our view, a court in a civil proceeding should generally demonstrate deference to the decision of the other court. Otherwise, the review of the appropriateness of a penalty administered in a criminal court, for example, could be viewed as a collateral attack on that decision. In our opinion, the "disproportionality" test enunciated by Binnie J. in *Whiten* in relation to the wrongful conduct and the penalty imposed is one that should be approached with considerable caution.

[81] We believe that the facts in the present case present one of those rare instances where the disproportionality test applies. It was rational for the jury to conclude that punitive damages would denounce Andrew Grigg's conduct and signal the need for general deterrence of impaired driving. Given Andrew Grigg's fine of \$500, punitive damages would not amount to double punishment and indeed would be more appropriate punishment.

iv. Was the quantum awarded by the jury proportionate?

[82] In comparison to compensatory damages, courts have a much greater scope and discretion in reviewing the quantum of punitive damages. See *Hill v. Church of Scientology*, supra, at para. 197 and *Whiten*, supra, at paras. 100-01. The "rationality test" asks whether the misconduct of the defendant was so outrageous that punitive damages were rationally required to act as deterrence. See *Hill*, *ibid*. Both the award of punitive damages and the quantum must be rational. As discussed above, we believe the jury's award of punitive damages was a rational response to the defendant's deliberate misconduct, which resulted in serious injury to the plaintiff and which had only been punished in part. [page188]

[83] In *Whiten*, the Supreme Court of Canada held that the proportionality of the quantum of damages must be examined in several dimensions. First, the quantum must be proportionate to the blameworthiness of the defendant's conduct. See paras. 112-13. While Andrew Grigg's misconduct was reprehensible and recklessly disregarded the plaintiff's rights, it was apparently an isolated event. Furthermore, he did not flee the scene of the accident or profit from his misconduct.

[84] Second, the quantum must be proportionate to the degree of vulnerability of the plaintiff. See *Whiten* at paras. 114-16. In this case, there had not been a relationship between the parties where it could be submitted that there was an abuse of power over a vulnerable plaintiff. The plaintiff was most regrettably in the wrong place at the wrong time. However, a person who chooses to drive while impaired takes on an increased risk of injuring others who have no ability to adjust their behaviour to account for this increased risk. In this respect, impaired drivers increase the vulnerability of all users of the road, especially pedestrians.

[85] Third, the quantum must be proportionate to the harm or potential harm directed specifically at the plaintiff. See *Whiten* at para. 117. In this case, the harm was not directed specifically at the plaintiff and in our view, this is an important factor that militates towards a lower award.

[86] Fourth, the quantum must be proportionate to the need for deterrence. See *Whiten* at paras. 118-22. While in *Whiten* this factor was considered in the context of a large and wealthy insurance company defendant profiting at the expense of a vulnerable plaintiff, there is also clearly a need for deterrence in impaired and reckless driving accidents. As *La Forest J.* stated at pp. 267-68 and *McLachlin J.* stated at pp. 300-01 S.C.R. in *Norberg v. Wynrib*, supra, egregiously blameworthy conduct that is prevalent in our society creates a consequent need for deterrence. The very fact that the conduct is prevalent merits a higher award of damages.

[87] Fifth, the quantum must be proportionate, after taking into account the other penalties, both civil and criminal, which have been inflicted on the defendant for the same misconduct. See Whiten at para. 123. As previously discussed, while Andrew Grigg had already been punished for his conduct, having pleaded guilty to careless driving, it was open to the jury to determine that the punishment was inadequate and that an award of punitive damages was necessary to meet the objectives of retribution, deterrence and denunciation.

[88] In our view, the jury award of \$100,000 is not rational to meet the objectives of retribution, deterrence and denunciation. [page189] The lower level of moral blameworthiness given the isolated nature of the misconduct, the lack of a relationship between the parties (in comparison to a relationship of trust) and the fact that the misconduct was not specifically directed at the plaintiff, indicates that a lesser quantum of punitive damages would be rational. In light of this, as stated above, we would reduce the quantum awarded by the jury to \$20,000.

v. Conclusion with respect to punitive damages

[89] We conclude that it was rational for the jury to determine that the circumstances of this case warranted an award of punitive damages in order to further the objectives of the law. However, for the reasons stated above, the assessment of punitive damages in this case was not the appropriate award to serve these objectives. We therefore reduce the amount of punitive damages to the amount of \$20,000.

IV. Family Law Act claim

(a) Overview

[90] Pursuant to s. 61(1) of the [Family Law Act](#), parents and siblings of a person who is injured and entitled to recover damages due to the fault or negligence of another may recover their pecuniary loss from the person causing the injury. In this case, Andrea was injured when a truck operated by Andrew Grigg struck her. At trial, Andrea's parents, Duncan McIntyre (hereafter "Duncan") and Darlene McIntyre (hereafter "Darlene"), and her younger sister, Alexis McIntyre (hereafter "Alexis"), claimed damages pursuant to s. 61(1). The jury dismissed their claim. Duncan, Darlene, and Alexis are appealing the dismissal of their claim. They do not allege any error in the judge's charge to the jury. Rather, they appeal the dismissal on the basis that the jury's verdict is contrary to all of the evidence and therefore ought to be set aside as being unreasonable.

[91] As noted in para. 38 above, courts accord great deference to a jury's findings in civil negligence proceedings. The verdict of a civil jury will not be set aside as against the weight of the evidence unless it is so plainly unreasonable and unjust as to satisfy the court that no jury, reviewing the evidence as a whole and acting judicially, could have reached it: McLean v. McCannell, supra; Olmstead v. Vancouver-Fraser Park District, supra; Ferenczy v. MCI Medical Clinics, supra; Snushall v. Fulsang, supra. See also Mizzi v. Hopkins (2003), 2003 CanLII 52145 (ON CA), 64 O.R. (3d) 365, [2003] O.J. No. 1671, at para. 52.

[92] For the reasons that follow, we are satisfied that these appellants have met this high standard of review. Consequently, [page190] we would allow their appeal, set aside the dismissal of their claim and award \$15,000 to Darlene McIntyre, \$15,000 to Duncan McIntyre and \$5,000 to Alexis McIntyre.

(b) Additional facts

[93] A general review of the facts has already been provided. We propose to review and to supplement those facts where necessary having regard to the damages that may be included as part a claim for pecuniary loss pursuant to s. 61(2) of the [Family Law Act](#). These include:

- (a) actual expenses reasonably incurred for the benefit of the person injured . . . ;
- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury . . . had not occurred.

[94] After being hit by the Grigg vehicle, Andrea was taken to hospital on September 13, 1996, and released on September 18, after which she returned to live with her parents in Lindsay. At that time she was depressed and in a wheelchair because of her fractured leg. Her parents put a bed in the den for her and Darlene initially took time off work and helped her with her toileting. They eventually hired a nurse to stay with her.

[95] Andrea attempted suicide on October 21, 1996. She was rushed to the Ross Memorial Hospital in Lindsay, transferred to Oshawa General Hospital and then admitted to St. Joseph's Hospital in Hamilton. She stayed at St. Joseph's until January 15, 1997. [See Note 7 below] During this time Duncan travelled from Lindsay to Hamilton approximately four times a week to be with her. Darlene was in British Columbia visiting Andrea's older sister, Jennifer, who had fractured her back in a motor vehicle accident on October 17, 1996.

[96] After Andrea was discharged from St. Joseph's Hospital, she lived at home with her parents in Lindsay. In September 1997, she enrolled in Brock University. [page191]

[97] Duncan testified that during this time he was not able to enjoy Andrea's company. He was unable to think of a single episode of laughs or fun leading up to Andrea's commencement at Brock. The family dynamics had changed. Darlene and Alexis testified to the same effect and, at trial, their testimony was not challenged by either defence counsel.

[98] In 1999, Andrea transferred to the University of Manitoba. In the fall of 1999, Darlene, who had retired from teaching in Ontario in 1998, took a teaching position in Kuwait and brought Alexis to live with her. She returned to Kuwait for the next school year in the fall of 2000. Duncan, who had also retired from teaching in Ontario, took up a teaching position in Frankfurt, Germany in September 2000.

[99] Andrea travelled to Florida and Japan with her boyfriend in 2000. While at university, in December 2000, Andrea again became depressed and sought professional help. She was later admitted to the University of Manitoba Hospital for depression. Darlene flew home from Kuwait to be with her. When Andrea was discharged from hospital, they flew to Kuwait. Duncan flew to Kuwait and stayed for about a week before returning to Germany.

[100] While in Kuwait, Andrea attempted to take her life again by way of an overdose of medication. She was hospitalized in Kuwait until she was stabilized. She then flew with Darlene to Germany where Duncan joined them. They all flew back to Canada and Andrea was again admitted to St. Joseph's Hospital. Duncan quit his job in Germany in April and moved back to Lindsay. During this hospitalization he saw Andrea almost every day. Darlene returned to Kuwait because Alexis was still in school there. When discharged from St. Joseph's Hospital, Andrea moved to her aunt's house in Hamilton where she was seen as an out-patient for a period of time before briefly returning to live at her parents' home in Lindsay. She then moved to Toronto.

[101] In August of 2001, Andrea travelled with a friend to Portugal, Spain and Italy. She then returned to the University of Manitoba in September. She entered an easier academic program from which she graduated in 2002. She returned home then moved out to live with friends closer to her job at Angus Glen Golf Club. After travelling in Thailand and Laos in 2003, she moved to Winnipeg.

[102] Duncan advanced a claim for \$53,920.52 for his pecuniary loss relating to the difference between what he could have earned working in Frankfurt, Germany and what he eventually earned working part-time in Ontario for the academic year 2001-2002. The respondents challenged this claim. Duncan testified [page192] that he could only teach one semester in Ontario without his pension being affected. However, he also testified that the kind of work he did at Sir Sanford Fleming College as a temporary replacement for an individual on sick leave did not affect his pension. Nevertheless, he took only one such placement.

(c) Analysis

i. Are the appellants entitled to damages pursuant to [s. 61](#) of the [Family Law Act](#)?

[103] In relation to the first factor for which compensation may be awarded pursuant to s. 61 (expenses actually incurred for Andrea's benefit), no claim was made for the expenses paid for professional nursing services provided to Andrea. The second factor is a reasonable allowance for travel expenses. The jury has already awarded the appellants damages in the amount of \$9,926.96 for out-of-pocket losses, which included itemized expenses for air travel and for their travel to and from various hospitals. As a result, it cannot be said that the jury did not consider the evidence regarding this factor in determining whether a claim for damages under s. 61 ought to be awarded.

[104] Compensation may also be awarded for loss of income. The respondents submit that it was open to the jury to reject Duncan McIntyre's claim for loss of income. We agree. The evidence indicates that he did not pursue employment similar to that which he had at Sandford Fleming, which would not have affected his pension.

[105] The third factor is compensation for housekeeping and care provided to Andrea by her parents. Neither parent was challenged in cross-examination with respect to the nursing and housekeeping services they provided to Andrea. It is clear that Darlene provided nursing and housekeeping services to her and that Duncan left his job in Germany, in April, prior to the end of the school year to be with her in Ontario. While this factor cannot be ignored in assessing the reasonableness of the jury's decision to dismiss the appellants' claim, the focus of their claim at trial and on appeal is for loss of Andrea's care, guidance and companionship to her family.

[106] Insofar as the claim for loss of care, guidance and companionship is concerned, we note that "companionship" has been defined as the loss of the rewards of association which flow from the family relationship: *To v. Toronto Board of Education* (2001), [2001 CanLII 11304 \(ON CA\)](#), 55 O.R. (3d) 641, [2001] O.J. No. 3490 (C.A.), at para. 25, citing *Mason v. Peters* (1982), [1982 CanLII 1969 \(ON CA\)](#), 39 O.R. (2d) 27, [1982] O.J. No. 3486 (C.A.), at p. 33 O.R. "Guidance" includes such things as education, [page193] training, discipline and moral teaching and usually goes from older members to younger members of the family: *Thornborrow v. MacKinnon* (1981), [1981 CanLII 1945 \(ON SC\)](#), 32 O.R. (2d) 740, [1981]

O.J. No. 3004 (H.C.J.), at p. 747 O.R. "Care" includes such things as feeding, clothing, cleaning, transportation, helping and protecting another person: *Thornborrow*, *supra*.

[107] In each case, compensation for loss of guidance, care and companionship must be assessed in an objective and unemotional way: *Hamilton v. Canadian National Railway Co.*, 1991 CanLII 8348 (ON CA), [1991] O.J. No. 614, 80 D.L.R. (4th) 470 (C.A.), at para. 11, citing *Reidy v. McLeod* (1986), 1986 CanLII 2556 (ON CA), 54 O.R. (2d) 661, [1986] O.J. No. 415 (C.A.), at p. 662 O.R. The cardinal factors in fixing the precise amount are the extent and duration of the claimant's loss: *Mortimer v. Cameron*, [1992] O.J. No. 764, 9 M.P.L.R. (2d) 185 (Gen Div.), at p. 310 M.P.L.R.

[108] Andrea's mother, father and sister all testified that following the accident Andrea was not the same person that she was prior to the accident. It was not contested at trial that her depression was causally linked to the accident and her resulting injuries. Andrea's relationship with her parents was negatively affected by the depressive episodes in which she tried to take her own life. Darlene testified that they watched her like a hawk; Duncan testified that they felt guilty because they couldn't seem to cure her; Alexis lost her role model. They all missed the fun times that they had together. The family felt they had to tread carefully with Andrea for fear of upsetting her. They were walking on eggshells around her.

[109] By the time of trial (March 2004), the family dynamics were returning to normal. The evidence was that Andrea talks sports with Duncan and bets on football pools with him. Andrea has engaged in some sporting activities with her family. Alexis believes that her relationship with her sister has improved and that she could now seek Andrea's advice and take it into consideration in making a decision. According to Alexis, the family seems to be having fun together again and is not afraid to say something or do something wrong. There was, however, evidence that there is a chance of Andrea going back into a depression.

[110] The respondents submit that any loss in the quality of the family relations was transitory rather than permanent. However, the wording of s. 61 and existing jurisprudence indicate that it does not require that the loss be permanent in order for an award to be made (see e.g.: *Till v. Walker*, [2000] O.J. No. 84, [2000] O.T.C. 51 (S.C.J.)). It is clear that the quality of the family relationship was affected in a way that was more than a fleeting or token loss. [page194]

[111] McMaster also submits that the physical separation of Andrea from her parents during the years following the accident precludes an award for loss of her companionship being made. For the same reason, it submits that no award for loss of guidance to her younger sister can be made. We disagree. Certainly Andrea lived at home for extended periods following the accident. In addition, companionship is not limited to physical presence. Because companionship involves sharing interests and ideas with another person, communication of interests and ideas by email and telephone is a form of companionship. The evidence is undisputed that such communication was frequent with Andrea. The jury also heard unchallenged evidence as to the change in the dynamics of the family relationships and how it affected their companionship with Andrea. Thus, the only reasonable conclusion that the jury could have come to was that the quality of the family's companionship with Andrea was significantly affected. In our opinion, the jury's verdict is so plainly unreasonable and unjust that we are satisfied that no jury, reviewing the evidence as a whole and acting judicially, could have refused to make any award.

ii. Who should assess the damages to be awarded?

[112] As we have concluded that the jury's verdict with respect to the s. 61 *Family Law Act* claim cannot stand, the issue becomes whether a new trial for the assessment of these damages should be ordered or whether we should substitute our own assessment as permitted by s. 119 of the *Courts of Justice Act, R.S.O. 1990, c. C.43*.

[113] In this case we consider it just to substitute our own assessment. All of the evidence relating to this claim is before the court. There is no suggestion that any of that evidence was improperly admitted and, as we have indicated, no issue is taken with the judge's charge. Thus, the fairness of the trial is not in issue. The appellants have asked us to substitute our own assessment. Having asked us to dismiss the claim, the respondents made no submission in this regard. In view of our decision respecting the other issues on this appeal, we are reluctant to force the parties to incur the expense and delay of a new trial on a corollary issue.

[114] Accordingly, having regard to the evidence, we would allow the appeal; set aside the jury's dismissal of the appellants' claim; and assess the amount of damages pursuant to s. 61 of the *Family Law Act* at \$15,000 to Darlene McIntyre, \$15,000 to Duncan McIntyre and \$5,000 to Alexis McIntyre. [page195]

E. Conclusion

[115] To conclude, the results of these appeals are as follows:

- (1) On the issue of the liability and apportionment of liability regarding McMaster, the appeal is dismissed;
- (2) On the issue of the apportionment of costs at trial, the appeal is dismissed;
- (3) On the issue of the awards of damages:
 - (a) The appeal on the issue of general damages is dismissed;

(b) The appeal on the issue of aggravated damages is allowed;

(c) The appeal on the issue of punitive damages is allowed in part: the award of damages will stand, but the quantum is reduced to \$20,000;

(4) On the issue of the [Family Law Act](#) claim, the appeal is allowed, the jury's dismissal of the appellant's claim is set aside, and damages are payable by the respondents, assessed at \$15,000 payable to Duncan McIntyre, \$15,000 payable to Darlene McIntyre, and \$5,000 payable to Alexis McIntyre.

[116] BLAIR J.A. (dissenting in part): -- I agree with the foregoing reasons, including the proposed dispositions, in all respects except for that portion pertaining to the award of punitive damages. Respectfully, I am unable to agree that such damages are appropriate in this case.

A. General Principles Relating to Punitive Damages

[117] The principles underpinning an award of punitive damages in tort and in contract have been examined exhaustively by the Supreme Court of Canada in a number of cases over the past two decades: see *Vorvis v. Insurance Corp. of British Columbia*, 1989 [CanLII 93 \(SCC\)](#), [1989] 1 S.C.R. 1085, [1989] S.C.J. No. 46; *Norberg v. Wynrib*, 1992 [CanLII 65 \(SCC\)](#), [1992] 2 S.C.R. 226, [1992] S.C.J. No. 60; *Hill v. Church of Scientology of Toronto*, 1995 [CanLII 59 \(SCC\)](#), [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64; *Whiten v. Pilot Insurance Co.*, 2002 [SCC 18 \(CanLII\)](#), [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19; and *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, [2006] S.C.J. No. 30, 2006 [SCC 30](#). It is unnecessary to re-examine these authorities in detail. [page196]

[118] In *Hill*, at paras. 196-97, Cory J. summarized the general principles as follows:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

(Emphasis added)

[119] In *Whiten*, supra, Justice Binnie conducted a comprehensive review of the jurisprudence in the United States and in the Commonwealth countries. From that review he drew a number of principles which he concluded were consistent with Canadian practice and precedent. Those pertinent to this appeal are found at paras. 67-71 and 101, and are reproduced below:

[T]he attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada The control mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action

[T]he general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation

[T]he primary vehicle of punishment is the criminal law (and regulatory offences) and . . . punitive damages should be resorted to only in exceptional cases and with restraint. Where punishment has actually been imposed by a criminal court for an offence arising out of substantially the same facts, some jurisdictions, such as Australia and New Zealand, bar punitive damages in certain contexts . . . but the dominant approach in other jurisdictions, including Canada, is to treat it as another factor, albeit a factor of potentially great importance

[T]he incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock in *Cassell*, supra, at p. 1129, called these the "whole gamut of dyslogistic judicial epithets". A more principled and less exhortatory approach is desirable

[A]ll jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the [page197] underlying purposes of punitive damages and ask itself how, in

particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.

The "rationality" test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum.

(Emphasis added)

[120] I consider the following two principles, extracted from the foregoing review, to be particularly significant for the purposes of this case:

(a) The existence of egregious conduct worthy of condemnation by the court -- while the target of an award of punitive damages -- is not, in itself, sufficient to justify the granting of such an exceptional remedy; and

(b) The court must have regard to all of the principles underpinning a punitive damages award in order to determine whether punitive damages serve a rational purpose in the circumstances. In particular, the court must be satisfied that the granting of punitive damages in a civil tort context -- a concept foreign to the primarily compensatory rationale of tort law -- advances the objectives of the remedy (punishment, deterrence, and denunciation), and outweighs the general rule that these public-oriented objectives are principally addressed by the criminal law.

B. Analysis

[121] Cases of this nature -- which are, unfortunately, neither rare nor exceptional in our society -- pose a dilemma in the punitive damages context. On the one hand, the conduct of an intoxicated driver, whose actions cause death or serious injury, readily fits the rhetoric of punitive damages. On the other hand, visiting that conduct with punitive damages does not readily fit with the rationality underpinning of the punitive damages remedy and has significant implications for the compensatory foundation of the law of torts. In addition, as I shall outline below, punitive damages, in the milieu of motor vehicle negligence, do not materially advance the objectives of punitive damages. Moreover, awarding punitive damages in what will inevitably become less than the rare and exceptional case tips the criminal law/private law balance respecting the imposition of a public sanction too far in the direction of a private law tort remedy. This will result in [page198] windfall recoveries for a large number of claimants whose compensatory entitlement has no relationship whatever to the recovery they will receive.

[122] Respectfully, unlike my colleagues, I would resolve this dilemma by concluding that punitive damages do not serve a rational purpose in the circumstances of this case, and, generally, in cases of this particular nature.

(a) Impaired driving is unacceptable but, regrettably, not rare

[123] Here, Andrew Grigg's conduct is clearly deserving of condemnation. I agree with my colleagues that his decision to drive a motor vehicle after drinking excessively, and the manner of his driving (speeding and manoeuvring erratically) -- both resulting in serious personal injury to an innocent pedestrian -- support a finding that his conduct was deliberate and intentional, and that it showed a reckless disregard for the lives and safety of others on the road. However, these facts, while surely justifying criminal sanctions by the state, do not distinguish this case from many other similar factual situations.

[124] There is no question impaired driving is a phenomenon in our society that cannot be tolerated. Many authorities have expressed this sentiment, perhaps none more eloquently than Cory J. in *R v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254, [1994] S.C.J. No. 87, 95 C.C.C. (3d) 193, at p. 269 S.C.R., p. 204 C.C.C., cited above by the Chief Justice and Justice Weiler:

Every year drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

[125] For these very reasons, however, impaired driving cases readily lend themselves to the type of pejorative descriptors which courts frequently employ in awarding punitive damages: "wanton or reckless", "contumelious", "deserving of the court's censure", "offending the court's sense of decency", "malicious", "high-handed and heinous", "reckless disregard for the lives and safety of others", etc. Nonetheless, as I have said, the fact that the impugned conduct may attract such descriptors is not sufficient, in itself, to support an award of punitive damages.

[126] When conduct can be described with what Binnie J., in *Whiten*, supra, at para. 70, called "the incantation of the time-honoured pejoratives" and with what Lord Diplock, in *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027, [1972] 1 All E.R. 801 (H.L.), [page199] at p. 1129 A.C., referred to as "the whole gamut of dyslogistic judicial epithets", it becomes all the more easy to lose sight of the important admonition that punitive damages are to be reserved for what is described in *Whiten*, at para. 105, as "[the] exceptional case

that justifie[s] an exceptional remedy". In *Whiten*, and more recently in *Fidler*, the Supreme Court of Canada has reinforced this cautionary golden thread that runs through all of the jurisprudence surrounding punitive damages -- they are to be imposed in rare and exceptional cases and even then only with restraint. The admonition should not be thrown to the four winds.

[127] As deplorable as the reality is, personal injuries arising from impaired driving cases are far from exceptional in our society. Thousands die or are injured each year. In Canada in 2003, for example, approximately 2,939 drivers were involved in alcohol-related motor vehicle accidents in which someone was seriously injured and an estimated 902 people died in motor vehicle accidents in which at least one of the drivers had been drinking. [See Note 8 below] By resisting the application of punitive damages to the circumstances of this case, I do not for one moment seek to minimize or to dishonour the injuries suffered by Ms. McIntyre, or to condone the conduct of Mr. Grigg.

[128] However, there is simply nothing on the record to distinguish this case from hundreds, if not thousands, of other similar situations. If punitive damages can be awarded on the facts of this case, they can be awarded in a great number of others where alcohol-induced motor vehicle accidents lead to death or injury -- and, they will be. As I explain below, an award of punitive damages in this case, and others like it, will have significant implications for the law of torts, and for the relationship between the law of torts and the criminal law.

[129] I turn first, however, to a consideration of whether an award of punitive damages advances the underlying objectives of that remedy in the circumstances of this case.

(b) The objectives of punitive damages are not advanced

[130] I am not persuaded that an award of punitive damages in this case, and more generally, in the context of impaired driving and motor vehicle negligence, advances either the objectives of punishment or deterrence. [page200]

[131] Mr. Grigg is required by law in Ontario to be insured. Although the details of his insurance are not before the court, the Standard Automobile Owner's Policy provides that where the insured is legally responsible for the bodily injury to, or death, of others, or for damage to the property of others, as a result of owning, using or operating the insured automobile, the insurer "will make any payment [on the insured's behalf] that the law requires, up to the limits of the policy". [See Note 9 below] Nothing in the Standard Policy terms exclude punitive damages from this provision, and nothing negatives coverage vis-à-vis third parties as a result of intoxication. Thus, it is unlikely that Mr. Grigg -- or other impaired drivers in similar situations -- will have to pay the punitive damages awarded (subject to policy limits).

[132] What, then, is accomplished in the way of punishment or deterrence by such an award? An award of punitive damages in these circumstances does little to advance the objectives of punitive damages, in my opinion, particularly when weighed against the injunction that such awards are to be reserved for exceptional cases that justify an exceptional remedy: *Whiten*, para. 105.

[133] Moreover, if punitive damages are to be awarded in such circumstances, the social cost of such a development may be significant as well. Drivers in Ontario are insured. If insurers are to become exposed to an increasing risk of indemnifying for punitive damage awards, they will naturally be required to increase their reserves for losses accordingly. Even if coverage for punitive damages becomes optional, insurance premiums across the board will inevitably rise. In that sense, then, all automobile-owning members of society will effectively be "punished" for the conduct of Mr. Grigg and comparable drivers. Similar concerns underlie the "cap" on non-pecuniary damages imposed by the Supreme Court of Canada in the trilogy of cases referred to in the reasons of the Chief Justice and Justice Weiler: see, for example, *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287, [1978] S.C.J. No. 8, at p. 333 S.C.R.

(c) The implications of eroding the "rarity" principle

[134] Erosion of the "rarity" principle drives other considerations that also militate against an award of punitive damages. Although he did acknowledge that such damages may be awarded in negligence in a proper case, Binnie J. noted, in *Whiten*, supra, at para. 67, [page201] that punitive damages by their very nature "will largely be restricted to intentional torts". I think there can be no doubt, however, that if punitive damages are found to be available in this case, they will be found to be available -- and will be awarded -- in many other personal injury or fatal accident cases arising out of alcohol-related motor vehicle accidents. In my opinion, such a development would distort the core rationale of tort law, namely, compensation, in fundamental ways.

[135] As the jurisprudence makes clear, punitive damages are not compensatory and have nothing to do with a plaintiff's injuries; they are designed to punish, to deter and to denounce a defendant's egregious conduct. Thus, an award of punitive damages is a complete windfall for the plaintiff. While this may be of marginal concern where the award is made in the isolated rare and exceptional case, it becomes more disquieting if the award is made in a broader range of "less exceptional" circumstances. What is the rational purpose served by encouraging judges and juries -- who may be emotionally "outraged" by the "impaired driving" aspect of a case -- to make damage awards that are completely divorced from any injuries sustained by the plaintiff and thus unrelated to the compensatory *raison d'être* of tort law, on a more frequent basis? In my opinion, there is none.

[136] There is another troubling way in which an award of punitive damages in circumstances such as these warps the compensatory rationale that undergirds the tort system. I question the wisdom of a legal policy which has the effect of engrafting the criminal law functions of punishment, deterrence and denunciation upon a compensatory tort system in anything but the truly shocking and exceptional case -- particularly in the negligence framework. As the Supreme Court of Canada has most recently noted, in *Fidler*, supra, at para. 62:

As stated in *Whiten*, at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

(Emphasis added)

[137] Justice LeBel touched on this problem in *Whiten*, supra, albeit in dissent. [See Note 10 below] Stating that he agreed with Binnie J. on the [page202] core principles governing the award of punitive damages -- the rationality and proportionality of the award remaining the key considerations -- he noted, at para. 151, that,

[t]he concept of rationality remains grounded in the nature of tort law, its historical development and the functions it is now playing in modern society.

Later, at para. 158, he observed that,

[a]n overriding objective of general deterrence remains problematic, if punitive damages are to remain a useful incident of tort law. Otherwise, their use may turn some parts of the law of tort into a sort of private criminal law, devoid of all the procedural and evidentiary constraints which have come to be associated with the criminal justice system.

(Emphasis added)

[138] In their reasons, the Chief Justice and Justice Weiler recognize the danger of judges and juries in civil cases second-guessing what has transpired in parallel criminal proceedings. Indeed, I agree with the following opinion expressed by them at para. 79:

Where a wrongdoer has already been punished for an offence and the same conduct is in question at a civil trial, punitive damages will not generally serve a rational purpose as the sentence imposed in the criminal or regulatory environment will have already met the necessary objectives of retribution, deterrence and denunciation. In our view, there are sound policy reasons not to attempt to re-try those proceedings in a civil action.

[139] Unlike my colleagues, however, I am not persuaded that the circumstances of this case constitute an exception to those sound policy reasons.

[140] The factual foundation for their conclusion lies in Mr. Grigg's conviction for careless driving only, after a plea of guilty, and the \$500 fine that was imposed on him. Other alcohol-related charges were withdrawn by the Crown, apparently because the police had omitted to advise Mr. Grigg of his right to counsel at the time of the accident, thereby, rendering inadmissible the breathalyser test results that would have demonstrated a high level of legal impairment on his part. The jury here, however, had the breathalyser results in evidence, as well as much expert and other testimony concerning Mr. Grigg's impaired condition.

[141] The legal foundation for my colleagues' conclusion rests on the "disproportionality" test, enunciated by Binnie J. in *Whiten*, supra, at para. 123, in relation to the wrongful conduct and the penalty imposed. For ease of reference, I reproduce the relevant portions of Binnie J.'s comments underlining the portion of his remarks on which my colleagues particularly rely: [page203]

Compensatory damages also punish. In many cases they will be all the "punishment" required. To the extent a defendant has suffered other retribution, denunciation or deterrence, either civil or criminal, for the misconduct in question, the need for additional punishment in the case before the court is lessened and may be eliminated. In Canada, unlike some other common law jurisdictions, such "other" punishment is relevant but it is not necessarily a bar to the award of punitive damages. The prescribed fine, for example, may be disproportionately small to the level of outrage the jury wishes to express. The misconduct in question may be broader than the misconduct proven in evidence in the criminal or regulatory proceeding. The legislative judgment fixing the amount of the potential fine may be based on policy considerations other than pure punishment. The key point is that punitive damages are awarded "if, but only if" all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retributions, deterrence, and denunciation

(Italics in original, underlining added)

[142] I agree with the view of the Chief Justice and Justice Weiler that this "disproportionality" test -- which is expressed in obiter in *Whiten* -- should be approached with caution. Where I respectfully disagree is on the

weight that should be attributed to the examples given by Binnie J. in the underlined portion of the above passage.

[143] I read those comments as providing general examples of the legal principle being enunciated, not as binding legal principles themselves. The legal principle is that in Canada, unlike in some other common law jurisdictions, "other" punishment in parallel criminal proceedings is relevant but is not necessarily a bar to the award of punitive damages. I do not understand Justice Binnie as intending to elevate to the level of binding legal principle the notion that it should be open to judges and juries, in the many alcohol-related negligence cases that come before them, to second-guess the punishment imposed in parallel criminal proceedings on the basis (a) that the fine imposed was not consistent with their "level of outrage" or (b) that they may feel the civil case encompassed more wrongful conduct than what was addressed in the criminal proceeding.

[144] "Outrage" is not a sound yardstick for measuring legal policy (although it may form a basis for applying it). In this case, for example, the jury's level of outrage led them to make a punitive damage award of \$100,000. It is hard to conceive of an impaired driving offence where a fine of that dimension, or even a fine of \$20,000 (the amount of punitive damages upheld by the majority here), would be imposed. Would it follow that judges or juries in civil cases such as this are entitled to superimpose their version of a "fine" on the defendant even though the defendant was required to pay a fine perfectly in keeping with the [page204] principles of sentencing in criminal law, and to do so just because the fine imposed does not accord with their "level of outrage"? Or, because they felt that the misconduct in question before them was broader than the misconduct proved in the criminal proceeding?

[145] A judge or jury in the civil proceeding cannot know the answer to this latter question -- or, indeed, to the question of whether the fine imposed in the criminal proceeding was appropriate for that proceeding -- without knowing all of the evidence and all of the factors underlying the disposition of the criminal proceeding. They cannot know these dynamics of the parallel criminal case without having tried it. There is a well-founded policy against the duplication of legal proceedings. I do not see how the preservation of public order and the tempering of harm done to the public good -- the objectives of punitive damages -- are advanced by allowing judges or juries in civil cases to override what they may perceive to be imperfections in the criminal proceedings, except in the truly rarest of cases.

C. Conclusion

[146] I recognize the wisdom of Binnie J.'s counsel in Whiten, that punitive damages are not to be limited by "categories" -- either to certain classes of cases, or by exclusion from certain classes of cases. However, there may be types of cases where, as a general rule, punitive damage awards are inappropriate for policy or other reasons. Accordingly, while I would not say that there can never be an award of punitive damages in impaired driving cases involving death or serious personal injury, I would put such cases in this latter category. Having regard to the factors outlined above, and the rationality principle that underlies an award of punitive damages, the circumstances of this case do not -- again, borrowing the words of Binnie J. in Whiten, at para. 67 -- "warrant the addition of punishment to compensation in a civil action".

[147] I would allow the appeal with respect to punitive damages and set aside the award in that regard.

[148] If I am wrong in this conclusion, I agree with the Chief Justice and Justice Weiler that the quantum of the punitive damages award should be reduced from \$100,000 to \$20,000. With respect to the other issues on the appeal, I agree with them and with the disposition of those issues in the manner set out in the reasons of the court. [page205]

D. Costs

[149] The parties can make written submissions on the appropriate disposition of costs in these appeals. Those submissions should be no more than 15 pages and should be filed within three weeks of the release of these reasons.

Notes

Note 1: *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229, [1978] S.C.J. No. 6; *Thornton (Next friend of) v. Prince George School District 57*, 1978 CanLII 12 (SCC), [1978] 2 S.C.R. 267, [1978] S.C.J. No. 7; *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287, [1978] S.C.J. No. 8.

Note 2: Counsel for McMaster also brought motions to strike the claim for aggravated and punitive damages at the beginning and end of the trial; the trial judge also dismissed those motions. However, the jury did not award aggravated or punitive damages against McMaster and as such, the issue of aggravated or punitive damages in relation to the conduct of McMaster is outside of the scope of this appeal.

Note 3: But see *Nelson v. Welsh*, 1985 CanLII 5838 (NS SC), [1985] N.S.J. No. 412, 70 N.S.R. (2d) 422 (S.C.), where Richard J. rejected a claim for punitive damages in an impaired driving case. Richard J. found that when the only factor that is beyond negligence is the driver's intoxication or impairment, punitive damages should not be awarded. In coming to this conclusion the trial judge relied on decisions refusing punitive damages in cases involving the negligence of a surgeon and the defective manufacture of a product. As noted elsewhere in our decision in this case, the law has evolved such that punitive damages have now been awarded in these types of cases. The trial judge was also of the opinion that the driver's insurance company pays the damage award and punitive damages would have no deterrent value. Our understanding is that the terms of the policy will dictate whether or not punitive damages would be included. Furthermore, while doctors are covered by insurance, punitive damages have nevertheless been awarded against them when they have breached the doctor-patient relationship. See *Norberg v. Weinrib*, supra and *Gerula v. Flores*, infra. The analysis in *Nelson* is therefore not helpful as it is not based on the current state of the law.

Note 4: For a summary of American case law see Danny R. Veilleux, "Intoxication of automobile driver as basis for awarding punitive damages" (1995) 33 A.L.R. (5th) 303.

Note 5: In *Norberg*, La Forest J. on behalf of himself, Gonthier and Cory JJ. founded liability on the unequal distribution of power in the doctor-patient relationship and exploitation or abuse of that power; McLachlin J., with whom L'Heureux Dubé J. agreed, grounded liability on breach of fiduciary duty. The five judges agreed that punitive damages should be awarded. Sopinka J. held that the sexual acts were causally connected to the doctor's failure to treat and were a breach of his professional duty, but held punitive damages should not be awarded. Stevenson J. took no part in the judgment.

Note 6: In this regard, both La Forest J. and McLachlin J. cited The Report of the Task Force of the Ontario College of Physicians and Surgeons.

Note 7: Andrea's release date is drawn from the appellants' compendium, at Tab 1, p. 24. It is the court's understanding that the release date mentioned in the appellants' factum at para. 25 is incorrect.

Note 8: The Traffic Injury Research Foundation of Canada, *The Alcohol-Crash Problem in Canada: 2003* by D.R. Mayhew, S.W. Brown & H.M. Simpson (Ottawa: Transport Canada and the Canadian Council of Motor Transport Administrators, 2005) at pp. 35, 40.

Note 9: Ontario, Financial Services Commission, Ontario Automobile Policy (OAP 1), Owner's Policy, online: Financial Services Commission of Ontario, (date viewed: September 29, 2006) at 16 (emphasis added).

Note 10: LeBel J. was in dissent, but not on the question of whether punitive damages should be awarded. At para. 143, he agreed such an award was justified in the circumstances, but felt that \$1 million in punitive damages went far beyond the appropriate use of this kind of remedy.

TAB 56

Rizzi v. Marvos, 2008 ONCA 172 (CanLII)

Source: Court of Appeal for Ontario
Date: 2008-03-11
File number: C44688
Other citation: 236 OAC 4
Citation: Rizzi v. Marvos, 2008 ONCA 172 (CanLII),
<<https://canlii.ca/t/1w17c>>, retrieved on 2026-03-23

CITATION: Rizzi v. Marvos, 2008 ONCA 172
DATE: 20080311
DOCKET: C44688

COURT OF APPEAL FOR ONTARIO

LASKIN, LANG and JURIANSZ JJ.A.

BETWEEN:

DEBBIE RIZZI and DELIO RIZZI

Plaintiffs
(Appellant)

and

GEORGE MARVOS and THOMAS PARTALAS

Defendants
(Respondents)

Karl Arvai and Chris Nicolis for the appellant

Douglas A. Wallace for the respondents

Heard: October 30, 2007

On appeal from the judgment and order of Justice T. David Little of the Superior Court of Justice dated December 2, 2005 and January 6, 2006 respectively.

LANG J.A.:

OVERVIEW

[1] The appellant, Debbie Rizzi, appeals from the judgment of Little J. following a seventeen-day jury trial. The jury assessed damages against the respondents, George Mavros and Thomas Partalas, who were Ms. Rizzi's landlords, on the basis that their improper storage of construction materials in the storage/laundry room of the apartment building led to^[1] the appellant's accident and consequent injuries.

[2] The appellant was awarded damages of \$236,494.91, including pre-judgment interest. The award included \$41,000 for general or non-pecuniary damages, \$17,400 for special damages, \$660,500 for loss of past and future income and \$160,000 for future care costs. The jury found the appellant seventy-five per cent contributorily negligent in attempting to move the materials and her award was reduced accordingly.

[3] The appellant challenges the trial judge's instructions to the jury on the law regarding non-pecuniary damages, contributory negligence and the apportionment of fault. Alternatively, the appellant argues that the jury's finding on each of these issues is unreasonable. The appellant also appeals the costs order. The respondents argue that the trial judge correctly instructed the jury regarding the relevant law, the jury awards were supported by the evidence and the trial judge made no error in exercising his discretion regarding costs.

[4] In my view and for the reasons that follow, I conclude that the trial judge erred in instructing the jury to assess the appellant's non-pecuniary damages on a scale using the upper limit or cap as a maximum. However, I would find no error in the charge regarding contributory negligence or apportionment.

[5] The erroneous instruction regarding the cap would ordinarily require a new trial. However, in this case, the jury award indicates the jury accepted the appellant's credibility. Since this makes possible an assessment of the extent of her pain and suffering, I would not order a new trial. Rather, I would substitute a damages assessment of \$80,000 for non-pecuniary damages. I would reduce the challenged costs award by \$5,500.

FACTS

[6] The appellant was a thirty-two-year old dental hygienist who alleged that a leg injury caused neuropathic pain that evolved first into complex regional pain syndrome and

later into fibromyalgia. The appellant alleged that the fibromyalgia eventually prevented her from continuing any employment.

[7] The injury occurred on April 2, 1995. The appellant was attempting to store paint cans in her locker located in the storage room of the respondent's apartment building. When the appellant first entered the storage room, she observed the metal sheets, each the approximate size of an apartment door, as well as several boxes of construction materials that were lying on the floor between the two rows of lockers. Although there was no urgency, the appellant decided she could store the paint cans by moving the sheets away from the lockers.

[8] The appellant testified that she had some initial concern about cutting her fingers on the sharp, jagged edges of the sheets, but despite this concern, she decided that she could move them safely. Indeed, she succeeded in moving the first sheet easily, but had trouble with the remaining sheets because they were stacked tightly together. She tried to separate them by pulling the sheets towards her, but she was unable to control their weight. They forced her backwards until the heels of her feet came into contact with a surface. She mistakenly assumed this surface to be the second row of lockers. She leaned back for support. Since the surface was actually a box of construction materials, the appellant lost her balance and fell backwards. The metal sheets landed on her legs. She was able to remove her left leg without injury, but as she tried to extricate her right leg, the sharp-edged sheets scraped her shin, causing immediate pain.

[9] The appellant was taken to hospital, where she was treated for her injuries and instructed to take two days of rest. She subsequently consulted her family doctor. The appellant could not bear weight on her leg for about two weeks. She developed pain in her leg and an area of extreme sensitivity to touch, a condition known as allodynia.

[10] After two weeks, the appellant returned to work, but she found it necessary to bear much of her weight on her left leg, which led to low back pain. The appellant started to suffer from fatigue because she was unable to sleep properly. She pursued treatment, including consultations with physiatrists, an orthopaedic surgeon, physiotherapists, chiropractors, a shiatsu specialist, an acupuncturist and a naturopath.

[11] A year after the accident, Dr. Teasell, a physiatrist, diagnosed neuropathic pain in the appellant's leg, which resulted from damage to the appellant's peripheral nerves. This diagnosis was subsequently confirmed by a neurologist, but no treatment was available.

[12] The appellant testified that she eventually developed generalized pain throughout her entire body resulting in continued sleeplessness, fatigue and ultimately depression. By the end of 1997, the appellant had stopped working and has not resumed employment since, except for her unsuccessful efforts to do so on a part-time basis from 2000 to 2003.

[13] In 2003, Dr. Teasell diagnosed post-traumatic fibromyalgia, a diagnosis confirmed by other specialists. Dr. Chaiton, a rheumatologist, also diagnosed the appellant with complex regional pain syndrome. The medical evidence called by the appellant indicated that she was "quite significantly impaired" and that her condition would likely get worse with age.

[14] The respondents' expert physiatrist and rheumatologist, Dr. Gyenes, testified that, in her opinion, the appellant did not meet the criteria for a diagnosis of either complex regional pain syndrome or fibromyalgia. She pointed to inconsistencies in the appellant's presentation, including the unexplained absence of muscle atrophy in her right leg. It was

Dr. Gyenes' view that profound muscle atrophy would normally be evident in light of the appellant's clinical history and the severity of her reported symptoms. Dr. Gyenes also questioned the extent of the appellant's reported allodynia because the appellant was able to wear trousers and apply a depilatory cream to her leg.

[15] It was the appellant's position at trial that she had led a full and satisfying life before the accident, including active participation in sports. She attributed all her post-accident difficulties to the injury to her shin. However, evidence presented at trial indicated that the appellant suffered a pre-existing wrist injury. A week before the accident, she reported to her physiotherapist that she was experiencing "more pain" in her right arm and wrist and that the right wrist had become hypersensitive to touch. The physiotherapist made a treatment note querying whether the appellant was suffering from complex regional pain disorder. However, the evidence at trial indicated the appellant had sufficient use of her wrist around the time of the accident to paint her apartment.

[16] Although treatment for the leg injury was suspended some months after the incident, the appellant reported ongoing wrist pain that had spread to her right arm, shoulder and neck. Physiotherapy for her upper body complaints continued for a further year. After that, the appellant related her ongoing complaints exclusively to the shin injury.

JURY VERDICT

[17] At trial, the appellant urged the jury to award pecuniary damages in the amount of \$1,484,862, plus an unspecified amount for non-pecuniary damages. The respondents argued that any ongoing injury was related to the wrist injury and damages for the leg injury should be assessed at \$10,000 to \$15,000. The jury assessed non-pecuniary damages at \$41,000 and pecuniary damages at \$837,900.

[18] The jury answered the questions put to them as follows:

1. Did the defendants take such care as in all the circumstances of the case was reasonable to see that the plaintiff was reasonably safe?

Answer: No

2. If the answer to Question 1 is "No" list clearly the particulars of the defendants' failure to care.

Answer:

- Failed to store the sheets where the tenants could not access them
- Failed to give tenants warning that the locker room will be closed for a certain length of time
- Failed to restrict the access of the locker area.

3. If your answer to Question 1 is "No" did the plaintiff use reasonable care on her own part for her own safety?

Answer: No

4. If your answer to Question 3 is “No” list clearly the particulars of her contributory negligence.

Answer:

- She was negligent by trying to move the panels
- She should have been aware of her own physical limitations – (received 20 treatments for physio for wrist) – prior
- She could of asked for help
- There was no urgency

5. If both plaintiff and defendants are at fault, how do you apportion the degree of fault between the parties?

Answer:

Plaintiff	75%
Defendant	<u>25%</u>
Total	100%

[19] In addition, the jury specifically found the incident caused or materially contributed to the appellant’s condition of fibromyalgia/diffuse pain.

ISSUES

[20] The appellant raises the following issues on this appeal:

1. Did the trial judge correctly charge the jury regarding the assessment of *non-pecuniary damages* and, if so, was the jury’s assessment so inordinately low as to be unreasonable?
2. Did the trial judge correctly charge the jury regarding *contributory negligence* and, if so, was the jury’s finding of contributory negligence unreasonable?
3. Did the trial judge correctly charge the jury regarding the *apportionment* of fault and, if so, was the jury’s apportionment unreasonable?
4. Did the trial judge fail to consider relevant factors or reach an unreasonable conclusion with respect to the *costs* award?

ANALYSIS

[21] Before examining each of these issues in turn, it is helpful to consider the standard of review.

[22] In this case, the appellants argue that the charge to the jury contained material misdirection or non-direction on the issues of non-pecuniary damages, contributory

negligence and allocation of fault. Since the challenged directions involve points of law, the standard of review is one of correctness, bearing in mind that any misdirection or non-direction must be material to the jury's decision. Jury charges are not to be parsed to a standard of perfection; rather, the question is whether, at the end of the charge, the jury would have properly understood the law: *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.*, 2006 CanLII 12284 (ON CA), [2006] O.J. No. 1508 at para. 51 (C.A.).

[23] If there is no error of law, the standard of review dictates that a jury verdict will only be set aside as against the weight of the evidence where it is so plainly unreasonable and unjust that no jury, reviewing the evidence as a whole and acting judicially could have reached it: *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 at para. 30.

1. NON-PECUNIARY DAMAGES

[24] On the contentious issue of the cap, the trial judge instructed the jury:

She is only coming once. It has got to be decided. But you would also say when you look at that, the maximum awards in Canada for a young person who is made a quadriplegic for pain and suffering is just less than \$300,000.00. So your range would be somewhere between zero and \$300,000.00 for her pain on that item only. That is the maximum. *You would have to scale it.* [Emphasis added.]

[25] The Supreme Court of Canada has provided direction on the approach to a jury charge about the cap. In *ter Neuzen v. Korn*, 1995 CanLII 72 (SCC), [1995] 3 S.C.R. 674, Sopinka J., speaking for the majority, noted that the trial judge should not charge the jury on the cap where he or she is of the opinion that the injuries “will not likely produce an award approaching the rough upper limit.” (para. 113) However, the trial judge should instruct the jury about the cap, after considering counsels' submissions and the type of injury sustained, if he or she is of the opinion that damages may be assessed in a range exceeding that amount. In such circumstances, the instructions “may include an explanation of the reason for the cap.” (para. 112)

[26] David Griffiths, J.W. O'Brien & James D. Carnwath, “General Comments on Conduct of a Civil Jury Trial” in *Civil Jury Charges: Draft* [unpublished] at 24, distils the principles set out in *ter Neuzen* for a trial judge preparing a civil jury charge:

- i) If the trial judge is of the view that damages are of the type that may be assessed in the range of, or exceeding, the upper limit the jury should be advised of it and instructed that their assessment for non pecuniary damages should not exceed that amount.
- ii) If the charge is to instruct on the upper limit, it should include an explanation of why there is such a limit. He [Sopinka J.] suggests the jury be told the imposition of an upper limit may seem somewhat arbitrary, but it has been established by the courts to deal with those cases in which there will be full compensation for lost income, future care and future income loss the award for non

pecuniary damages has been limited to include compensation for the misfortune suffered, loss of enjoyment of life and for the pain and suffering involved.

- iii) If the judge is of the view the injuries will not likely approach that upper limit, it is best that the judge not charge the jury on that matter.

[27] Accordingly, the first question is whether the damages in this case could have been assessed at or near the cap. This is somewhat difficult to answer contextually because this court was not provided with either a transcript of any pre-charge conference or with trial counsels' submissions to the jury.

[28] However, we do know that, although the appellant's counsel did not suggest any particular amount or range for non-pecuniary damages, he argued that the appellant's injuries included fibromyalgia that prevented her from working and precluded her from engaging in many of her normal physical and social activities. Further, in his objection to the charge about using the cap as a scale, the appellant's counsel argued that the jury could decide that the appellant's damages exceeded the cap.

[29] If the trial judge did not accept that damages could be awarded at or near the cap, the proper position would have been to refrain from charging the jury regarding that limit. However, in light of the evidence and the position of the appellant's trial counsel, I conclude that the trial judge was of the view that non-pecuniary damages could be awarded at or near the cap and, for this reason, decided to instruct the jury on that issue.

[30] In providing this instruction, the appellant argues that the trial judge erred in directing the jury to use the cap as a *scale* from which to measure damages. In support of this objection, he relies on the decision of this court in *Koukounakis v. Stainrod* (1995), [1995 CanLII 621 \(ON CA\)](#), 23 O.R. (3d) 299. In that case, the appellants challenged a jury assessment of non-pecuniary damages arguing that it was so high as to be unreasonable. In explaining the reasons why non-pecuniary damages cannot be assessed on a scale using the cap as a maximum, Doherty J.A. said:

The judicially imposed upper limit on general non-pecuniary damages offers some assistance in determining the appropriateness of a particular award. *The appropriateness of an award, however, cannot be determined by comparing the level of disability or pain and suffering suffered by a particular plaintiff to that of a person entitled to the maximum award:* *Howes v. Crosby*, supra, at p. 460. The upper limit serves to cap the potential award for general non-pecuniary damages. It is in large measure an arbitrary figure fixed in response to policy concerns, and on the assumption that awards made under other heads of damage will largely achieve the compensation goal: *Andrews v. Grand & Toy Alberta Ltd.*, [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229 at pp. 260-61, 83 D.L.R. (3d) 452. (at p. 308) [Emphasis added.]

[31] In *Howes v. Crosby* (1984), 1984 CanLII 2172 (ON CA), 45 O.R. (2d) 449 at 460 (C.A.), MacKinnon A.C.J.O., in concluding that the cap would have no relevance in the non-pecuniary damages assessment for most jury trials, emphasized that the cap “is not to be used as a scale against which all non-pecuniary claims for other injuries are to be measured.”

[32] Assuming that it is appropriate to instruct a jury on the cap, and recognizing that such an instruction runs the risk of a direct comparison between the damages in the particular case with those that merit an award at the cap, a trial judge must explain to the jury that such a comparison is not appropriate. In particular, the trial judge must explain that the cap is not to be seen as the upper end of a range of damages awards, but rather that the cap was established for the policy reasons discussed in *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at pp. 260-61^[2]. In that case, Dickson J. explained that a jury will not attempt to set a value on the loss of a plaintiff’s function, because that function cannot be restored. Nor, for the same reason, will the award be assessed on the basis of the value of lost happiness. Rather, an award will be determined that provides the plaintiff with the ability to make more general arrangements, beyond those relating directly to the injuries, so that his or her life will be more endurable. Those arrangements will aim to alleviate the plaintiff’s misfortune by allowing him or her to live as tolerably as possible.

[33] In quantifying non-pecuniary damages, the jury should understand that the rough upper limit reflects the reality that no amount of money can compensate for the plaintiff’s loss of quality of life or his or her pain and suffering. A cap on non-pecuniary damages was imposed for policy reasons relating to the heavy financial burden that otherwise would result from excessive awards. In these circumstances, it would be wrong to use the cap to compare a particular plaintiff’s injuries to that of a person entitled to the cap.

[34] Further, a jury told about the cap generally must also be told that its assessment of pecuniary damages is paramount, because it is those damages that give the plaintiff the funds to compensate for lost income and to provide for future care. The assessment of the plaintiff’s non-pecuniary damages differs because it is a philosophical and policy exercise that, although necessarily arbitrary, must be in an amount that is reasonable and fair both to the plaintiff and to society as a whole.

[35] In this case, the jury was not instructed on the policy reasons for the cap. Moreover, it was told to use the cap as a scale and to compare the appellant’s injuries to those of a young quadriplegic. This instruction was in error, as was the trial judge’s refusal to re-instruct the jury after the appellant’s objection to this aspect of the charge.

[36] I will consider the appropriate remedy after considering the other grounds of appeal.

2. CONTRIBUTORY NEGLIGENCE

[37] On the question of contributory negligence, the trial judge charged the jury as follows:

Now, you have to decide that she would be negligent in failing to take reasonable care for her own safety. This time the onus rests on the Defendants. Negligence here means doing something that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do; and you have to look at the circumstances of this

case. The standard of care upon which you base that is the conduct of an average person. It is not an extraordinary conscientious person, it is not an excessively skilled person, but a reasonable person exercising average ordinary prudence. You must decide if – whether a reasonably prudent person would have exercised or taken care of her own safety in the circumstance – in that matter.

[38] The appellant’s counsel did not object to this part of the charge at trial. The absence of an objection suggests that the issue was not seen as central to the jury’s deliberations. However, on appeal, the appellant argues the trial judge ought to have instructed the jury to consider whether the appellant *subjectively* foresaw the consequences of her action, including the mechanism by which the accident would occur and the risk of the injury that she would suffer. The appellant argues that this was important because, while the appellant recognized the risk of cutting her fingers on the sheets, she did not foresee either the possibility of the sheets knocking her over or the injury to her shin.

[39] The appellant’s argument rests on *Avco Financial Services Realty Ltd. v. Norman* (2003), 2003 CanLII 47436 (ON CA), 64 O.R. (3d) 239 (C.A.). At para. 26 of that decision, Charron J. quotes *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, 1997 CanLII 307 (SCC), [1997] 3 S.C.R. 1210 at para. 76 regarding the foreseeability element for contributory negligence:

The test ... was summarized by Denning L.J. in *Jones v. Livox Quarries Ltd.*, [1952] 2 Q.B. 608 (C.A.), at p. 615:

Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.
[Emphasis added.]

[40] The appellant relies on the emphasized sentence to argue that subjective foreseeability is an essential component of contributory negligence.

[41] The flaw in the appellant’s argument is that the reference to foreseeability of harm to oneself is immediately qualified by reference to the standard of a “reasonable, prudent” individual. Considered together, it is clear that the court endorses an objective and not a subjective analysis of foreseeability.

[42] Further, in *Bow Valley*, McLachlin J. specifically provides that foreseeability of the “precise type of damage or sequence of events” resulting from the negligence is not necessary (at para. 76).^[3] This point is reinforced in *Avco*, at paragraph 32, where the

court notes that “the injured party will be guilty of contributory negligence if it ought to have foreseen that it may harm itself by failing to act reasonably and prudently”.

[43] Accordingly, a party is negligent (in this case, contributorily negligent) if she objectively ought to have foreseen that she might injure herself. The objective test is implicit in the trial judge’s charge, which included a number of references to the reasonable person and to reasonable care. A reasonably prudent person, by definition, considers whether a course of action might result in harm.

[44] Since the appellant specifically acknowledged that she subjectively appreciated there was a risk of cutting her fingers on the metal sheets while moving them, it was not necessary for the respondents to establish that she also foresaw either the mechanism by which the accident would occur or the nature of the injury that could result. Accordingly, I cannot accept this ground of appeal.

APPORTIONMENT OF FAULT

[45] The trial judge charged the jury regarding apportionment of fault in these words:

Then you get down to Question Number Five and you say, if both the plaintiff and the defendants are at fault, how do you apportion the degree of fault between the parties? That can go from zero to 100 in each case, and you would decide. *You would say that this incident would not have occurred but for, and you would apportion it.* The total has to come to 100. So you would total it right in there and it would total 100 and you would attribute it. [Emphasis added.]

Once you have done that, that is all for “who is responsible”. You forget about that now. The Court will deal with the apportionment of percentages that you find.

[46] The appellant argues that this “but for” reference imports a causation analysis into the instruction, rather than one based on the parties’ respective degrees of fault or blameworthiness.

[47] The *Negligence Act*, R.S.O. 1990, c. N.1, s. 3 provides:

In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

[48] A plain reading of this provision requires apportionment based on the “fault or negligence” of each party, rather than on the basis of causation. It would be in error to apportion liability on the degree to which the appellant or the respondents caused the damages.

[49] The appellant relies on *Snushall v. Fulsang* (2005), [2005 CanLII 34561 \(ON CA\)](#), 78 O.R. (3d) 142 (C.A.), which discussed the distinct issue of the difference between active and passive faults. At paragraph 29 of his reasons, in distinguishing between fault and causation, Juriansz J.A. refers to *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), [1997 CanLII 2374 \(BC CA\)](#), 43 B.C.L.R. (3d) 219 (B.C.C.A.) at para. 19, where Lambert J.A.

emphasized that the *Negligence Act* “does not say that the apportionment should be on the basis of degree to which each person’s fault caused the damage”. Lambert J.A. concluded “we are not assessing degrees of causation, we are assessing degrees of fault. In this context, “fault” means blameworthiness.”

[50] Since apportionment relates to fault or blameworthiness, it would have been preferable if the trial judge had avoided “but for” terminology, which evokes causation principles for those familiar with tort principles. However, a jury is not familiar with tort principles. Moreover, the challenged charge must be considered in its context and not subject to abundant parsing.

[51] Importantly, the trial judge specifically instructed the jury to “apportion the degree of fault.” He did not direct the jury about causation in respect of apportionment. Indeed, causation was a matter separately addressed in another part of the charge using the different language of material contribution. In this context, the jury would have taken the “but for” reference to refer to the negligence of the parties and not to the causation of the injuries.

[52] Further, after the “but for” terminology, the trial judge immediately told the jury to attribute “it” out of 100, referring back to his instruction about the parties’ relative degrees of fault.

[53] Moreover, the question put to the jury was both correctly phrased and specific: “If both plaintiff and defendants are at fault, how do you apportion the degree of fault between the parties?” Importantly, the jury had this precise question with it in written form in the jury room when it assessed the parties’ respective degrees of fault and determined that the moral blameworthiness of the appellant was greater than that of the respondents.

[54] Finally, I am not persuaded that the jury’s apportionment of seventy-five per cent of blame to the appellant indicates that it was misled by the trial judge’s charge. The appellant has submitted a number of cases where contributory negligence is assessed at twenty-five per cent. However, each of these cases involves circumstances in which the defendant was the “prime cause” of all the damage or “wholly responsible” for the negligent act and the injured plaintiff only “contributed” to the damages he or she suffered. This is consistent with *Snushall v. Fulsang* at para. 35, in which Juriansz J.A. concluded that, “contributory negligence, solely for failing to wear a seatbelt, should not exceed 25 per cent.” See also *Heeney v. Best* (1979), 1979 CanLII 2084 (ON CA), 28 O.R. (2d) 71 (C.A.).

[55] While high, seventy-five per cent is not outside the range available on the evidence. The same apportionment was allotted in *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2001), 2001 CanLII 28027 (ON SC), 52 O.R. (3d) 425 (S.C.J.), on the basis that the plaintiff was largely the author of her or his own misfortune for drinking and driving, and in *Kennedy v. Waterloo County Board of Education* (1999), 1999 CanLII 3746 (ON CA), 45 O.R. (3d) 1 (C.A.), for the negligent operation of a motorcycle in a schoolyard. See also *Rutherford v. Niekrawietz*, [1994] O.J. No. 2439 (Gen Div.) and *Brown v. Gravenhurst*, [1995] O.J. No. 561 (Gen. Div.).

[56] Importantly in this case, the jury made specific findings about the negligence of both the appellant and the respondents. The jury determined that the respondents were negligent in failing to restrict access to the room in which the sheets were stored and in failing to warn the tenants that they would not have access to that room. However, the jury found that the appellant was negligent in trying to move the sheets when aware of her own limitations and in a situation where there was no urgency and where she could have asked

for help. These findings support the jury's determination that the appellant was the author or her own misfortune and that her blameworthiness was greater than that of the respondents'.

[57] Accordingly, in my view, at the end of the charge the jury properly understood the law. Although another jury may have assessed the degrees of negligence differently, this jury's verdict is entitled to deference. I see no basis to interfere with its conclusion.

REMEDY

(a) *Discretion to substitute damages award*

[58] Since I have concluded that the award for non-pecuniary damages cannot stand based on an error of law, I must now determine the appropriate remedy. The appellant asks this court to substitute its own assessment of damages as permitted by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 119, which provides that "[o]n an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages." In arguing that it is in the interests of justice for this court to substitute its own assessment of damages, the appellant emphasizes the amount of time that has passed since the date of the accident. In oral argument, the respondent took the position that a new trial is necessary.

[59] In *Padfield v. Martin* (2003), 2003 CanLII 36239 (ON CA), 64 O.R. (3d) 577 at para. 56 (C.A.), Borins J.A. observed that an appellate court may refuse to substitute its own assessment and instead order a new trial where there has been an error of law. He noted that an appellate court would likely substitute its own assessment of damages where the fairness of the trial is not an issue and the jury simply reached an inappropriate assessment. However, a new trial is likely where errors in the conduct of the trial may have affected the outcome. Often, he said, it would not be just for an appellate court to substitute its own assessment if the error constitutes a substantial wrong or miscarriage of justice that otherwise warrants a new trial. Finally, Borins J.A. concluded that "an appeal court ultimately maintains the wide discretion under ss. 119 and 134 to grant whatever relief is sought by the successful party."

[60] In my view, the error in this case, while an error of law, is not one that precludes our assessment of damages, particularly when balanced against the difficulties that would be posed by ordering a new trial so many years after the event.

[61] In *Pilon v. Janveaux*, [2005] O.J. No. 4672 at para. 31, a case regarding the apportionment of liability, this court observed: "[T]he interests of justice require that a new trial be avoided if possible. Memories will be stale, and the cost is prohibitive. Instead, this court should perform the apportionment task that the jury ought to have been instructed to and did not perform." (para. 31) Similarly in this case, where the incident occurred more than twelve years ago, memories will be stale and a new trial may well not be feasible. In addition to the difficulties inherent in assembling the lay witnesses, the medical witnesses or their records may no longer be available and their recollections of the appellant and her injuries will have faded. In addition, the costs of a new trial are simply not merited in the circumstances of this case.

[62] Moreover, the error in this case, while one of law, does not affect the fairness of the trial or its outcome. Rather, the error goes solely to the amount of the appellant's non-pecuniary damages. In addition, the jury's award of pecuniary damages, which is not

tainted by any error, provides substantial guidance because it is apparent that the jury believed the appellant's evidence about the extent of her injuries. As well, it is apparent that the jury rejected the evidence of the respondents that attempted to undermine the appellant's testimony about her symptoms and condition. In all the circumstances of this case, since credibility is not an issue, a new trial is not necessary.

[63] The jury specifically found that the appellant's fibromyalgia was caused by the incident. The significant impact of the appellant's injury is reflected in the award of \$660,500 for loss of past and future income and \$160,000 for future care costs. Even though the jury did not award the full amount of the appellant's claim for either category of damages, the damages awarded are still substantial.

[64] In these circumstances, it is just for this court to exercise the wide discretion granted under s. 119 to determine the non-pecuniary damage award.

(b) Assessment of Non-Pecuniary Damage Award

[65] Regarding the amount of non-pecuniary damages, the appellant relies on appellate court authorities from British Columbia, Alberta and Nova Scotia, which upheld jury awards in the range of \$100,000 to \$200,000^[4]. However, those authorities represent unusually high trial awards to which an appellate court will accord deference.

[66] The respondents argue that the jury award of \$41,000 falls within the general assessments of damages for fibromyalgia. For this proposition, they refer to Ontario cases where the awards ranged from \$40,000 to \$50,000^[5].

[67] However, other Ontario trial decisions have imposed higher damage awards for fibromyalgia. In *Deschamps v. Chu*, [1997] O.J. No. 2593 (Gen. Div.), the plaintiff was awarded \$65,000 non-pecuniary damages following a motor vehicle accident that caused fibromyalgia and chronic pain. In *Britt v. Zagjo Holdings Ltd.*, [1996] O.J. No. 1014 (Gen. Div.), the plaintiff developed fibromyalgia following a slip and fall accident. She was awarded \$75,000 in non-pecuniary damages, subject to a twenty-five per cent reduction for her contributory negligence. The court identified the following factors in support of this award: "permanent work disability, constant pain, a disastrous loss of amenities of life, and the prospect of a future life in which she will have to fight to control and cope with her disabled condition." (para. 46)

[68] A review of more recent Ontario trial decisions indicates awards of non-pecuniary damages for fibromyalgia or chronic pain (a comparable affliction) in a wider range of \$55,000 to \$120,000. In *Latta v. Ontario*, [2004] O.J. No. 3751 (S.C.J.), the plaintiff, who was twenty-nine years old at the time of the accident, developed chronic pain syndrome after falling down a flight of stairs. As a result of the injury, he was in pain throughout the day and his activities were seriously restricted. He received an award of \$120,000 in addition to his claim for loss of income. That award was upheld on appeal.^[6]

[69] In *Peloso v. 778561 Ontario Inc. (c.o.b. J.L. Maintenance Services)*, 2005 CanLII 21543 (ON SC), [2005] O.J. No. 2489 (S.C.J.), the plaintiff was involved in a motor vehicle accident in which she suffered injuries creating pain and discomfort throughout her body, including a lack of sensation down her leg. General damages were globally assessed at \$80,000, although they were reduced to \$56,000 for reasons relating to a pre-existing condition and mitigation.

[70] In *Hartwick v. Simser*, [2004] O.J. No. 4315 (S.C.J.), the plaintiff was awarded general damages of \$85,000, following a motor vehicle accident in which she claimed to have suffered permanent and disabling chronic pain in her spine.^[7] The award was subsequently reduced to \$63,750 because of a pre-existing condition.

[71] In *Nusinowitz v. Ontario (Superintendent of Financial Services)*, [2005] O.J. No. 2069 (S.C.J.), an eighty-six year old plaintiff was awarded \$55,000 in general damages following a motor vehicle accident in which he developed chronic pain syndrome.

[72] Based on these awards, the evidence regarding the impact of the appellant's injuries, and in light of the guidance I take from the jury's determination about the appellant's credibility, I would assess the appellant's damages at \$80,000. This award is consistent with the jury's credibility findings that the fibromyalgia was caused by the leg injury and that the appellant's description of her condition was credible. The award I propose is slightly above the mid-range of awards for debilitating conditions of this nature for a previously active young adult whose employment has been compromised and whose overall life has been seriously affected. This amount must be reduced by seventy-five percent, in accordance with the jury's findings regarding apportionment of fault. This leaves the appellant with a \$20,000 award for non-pecuniary damages.

COSTS

[73] In the event that the costs appeal has not been rendered moot by the increased award for non-pecuniary damages, I turn to consider the appellant's appeal of the costs awarded to the respondents for the period subsequent to their offer of settlement.

[74] I begin by noting that a court will not interfere with a costs award unless there is an error in principle or the award is plainly wrong. See *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303 at para. 27. In this case, I see no basis upon which to interfere with the trial judge's costs award with one exception regarding a disbursement for an expert report. In my view, the \$5,500 disbursement for the PriceWaterhouseCooper report must be disallowed because the report was not supplied to the appellant as contemplated by item 26 of Tariff A.

[75] I cannot accept the appellant's other challenges to the award. The appellant argues that the award effectively allowed costs on a substantial indemnity scale contrary to the decision of this court in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291. While there was not a significant difference between the substantial and partial indemnity rates put forward by counsel in this case, the situation is not akin to *Boucher*, where counsel charged the same rate for both scales of costs.

[76] Nor do I see any basis upon which to interfere with the trial judge's careful conclusion on the other issues raised by the appellant. In particular, I see no error in the trial judge's decision that the trial was not unnecessarily prolonged by the defence or that the *voir dire* regarding the causal link between the leg injury and fibromyalgia was necessary. Clearly the question about the connection between the injury and the appellant's complaints was the primary point of controversy at trial and it was entirely within the discretion of the trial judge to include costs for the *voir dire* and the defence expert witnesses in his award to the respondents.

RESULT

[77] In the result, I would allow the appeal and vary paragraph 1 of the judgment to accord with an assessment of non-pecuniary damages of \$80,000. I would reduce the costs of the trial awarded to the respondents by \$5,500. I would otherwise dismiss the appeal. The appellant, who was successful on the significant issue of the charge on non-pecuniary damages would be entitled to costs of the appeal, which I would fix at \$15,000, inclusive of disbursements and Goods and Services Tax.

“S.E. Lang J.A.”

“I agree R.G. Juriansz J.A.”

LASKIN J.A. (dissenting in part)

A. OVERVIEW

[78] I agree with the judgment of Lang J.A. except on one issue: the trial judge’s charge to the jury on apportionment of fault. The jury found the respondents (the “landlord”) negligent and the appellant Debbie Rizzi contributorily negligent. The jury was therefore required to apportion their respective degrees of fault. In my opinion, the trial judge’s instruction on apportionment amounted to a legal error because he invited the jury to apportion fault on the basis of causation instead of blameworthiness. That error was material and thus warrants appellate intervention.

[79] The jury apportioned fault for the accident seventy-five per cent to Debbie Rizzi and twenty-five per cent to the landlord. I would reverse those percentages and apportion fault twenty-five per cent to Debbie Rizzi and seventy-five per cent to the landlord.

B. BACKGROUND

[80] Lang J.A. has thoroughly reviewed the facts, so I need not discuss them in detail here. In brief, the landlord left seven to ten thin, large metal sheets and some construction material lying on the floor in the storage area of its apartment building. The top edge of the sheets was sharp and jagged and the sheets themselves blocked access to Ms. Rizzi’s locker. Ms. Rizzi tried to move the metal sheets in order to return some paint supplies to her locker. However, the sheets proved too heavy for her to control. She fell backward against the construction material, and as she tried to extricate herself, the sharp edge of the sheets scraped her right shin. She suffered severe pain, which progressed into a regional pain in her right lower leg, and eventually into disabling fibromyalgia.

[81] On the question of liability, only Ms. Rizzi testified. The defence called no evidence. The jury found both the landlord and Ms. Rizzi negligent and particularized the negligence of each as follows:

(a) The Landlord

- Failed to store the sheets where the tenants could not access them;
- Failed to give tenants warning that the locker room will be closed for a certain length of time; and
- Failed to restrict the access of the locker area.

(b) Ms. Rizzi

- She was negligent by trying to move the panels;
- She should have been aware of her own prior physical limitations (received twenty treatments for physio for wrist);
- She could have asked for help; and
- There was no urgency.

C. THE TRIAL JUDGE’S CHARGE ON APPORTIONMENT

[82] Where both the plaintiff and the defendant are found negligent, s. 3 of the *Negligence Act*, R.S.O. 1990, c. N.1 requires the court to apportion fault:

In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

[83] The trial judge’s charge to the jury on how to apportion fault according to the Act was brief:

Then you get down to Question Number Five and you say, if both the plaintiff and the defendants are at fault, how do you apportion the degree of fault between the parties? That can go from zero to 100 in each case, and you would decide. *You would say that this incident would not have occurred but for*, and you would apportion it. The total has to come to 100. So you would total it right in there and it would total 100 and you would attribute it.

Once you have done that, that is all for “who is responsible”. You forget about that now. [Emphasis added.]

[84] Ms. Rizzi submits that the trial judge’s “but for” instruction was wrong because it told the jury to apportion fault on the basis of degrees of causation instead of degrees of blameworthiness. I agree with her submission.

[85] Lang J.A. agrees that fault should be apportioned on the basis of comparative blameworthiness, that is the degree to which each party fell short of the standard of care required of that party. And, she acknowledges, “it would have been preferable if the trial judge had avoided ‘but for’ terminology”. But then she excuses this reference by concluding that the jury would still have correctly understood its task. In my view, in the context of this charge, the “but for” instruction was a reversible legal error because it likely misled the jury on the proper approach to apportionment.

[86] The principle of apportioning fault on the basis of comparative blameworthiness, not comparative causation, has been approved by this court, by most academics, and by

other provincial appellate courts in Canada. See for example *Martin v. Listowel Memorial Hospital* (2000), 2000 CanLII 16947 (ON CA), 51 O.R. (3d) 384 (C.A.); *Mortimer v. Cameron* (1994), 1994 CanLII 10998 (ON CA), 17 O.R. (3d) 1 (C.A.); Lewis N. Klar, *Tort Law*, 3d ed. (Toronto: Thomson Carswell, 2003) at 467; John G. Fleming, *The Law of Torts*, 9th ed. (North Ryde, NSW: LBC Information Services, 1998) at 306-309; *Alberta Wheat Pool v. Northwest Pile Driving Ltd.* (2000), 2000 BCCA 505 (CanLII), 80 B.C.L.R. (3d) 153 (C.A.); *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 1997 CanLII 2374 (BC CA), 43 B.C.L.R. (3d) 219 (C.A.); *Heller v. Martens* (2002), 2002 ABCA 122 (CanLII), 4 Alta. L.R. (4th) 51 (C.A.); *Clyke v. Blenkhorn* (1958), 1958 CanLII 347 (NS CA), 13 D.L.R. (2d) 293 (N.S.C.A.).

[87] Our court's most recent affirmation of this principle is found in the judgment of my colleague Juriansz J.A. in *Snushall v. Fulsang* (2005), 78 O.R. (3d) 412. There, at para. 29, he quotes with approval the following paragraph from the reasons of Lambert J.A. writing for the majority of the British Columbia Court of Appeal in *Cempel*:

I think that such an approach to apportionment [a comparative causation approach] is wrong in law. The *Negligence Act* requires that the apportionment must be made on the basis of "the degree to which each person was at fault". It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness.

[88] Thus, Lang J.A. and I agree on the principle. What divides us is whether the trial judge accurately instructed the jury on it. For ease of reference, I repeat his brief charge on apportionment:

Then you get down to Question Number Five and you say, if both the plaintiff and the defendants are at fault, how do you apportion the degree of fault between the parties? That can go from zero to 100 in each case, and you would decide. *You would say that this incident would not have occurred but for*, and you would apportion it. The total has to come to 100. So you would total it right in there and it would total 100 and you would attribute it.

Once you have done that, that is all for "who is responsible". You forget about that now. [Emphasis added.]

[89] In explaining to the jury how to apportion fault, the trial judge posed the question: "[H]ow do you apportion the degree of fault between the parties?" One sentence later, he answered it: "You would say that this incident would not have occurred but for, and you apportion it."

[90] In finding no reversible error in the charge, my colleague says that the "but for" reference would not invite the jurors to apportion on the basis of causation because they are not familiar with tort principles; that the trial judge properly asked them to apportion the degrees of "fault"; and that the jury's apportionment of seventy-five per cent of the blame

to Ms. Rizzi does not indicate it was misled as the evidence shows Ms. Rizzi was “the author of her own misfortune”.

[91] I take a different view for there reasons. First, “but for” is the classic and familiar language of causation, recognized as such not just by lawyers but by lay people too.

[92] Second, although the trial judge used the word “fault”, he did not tell the jurors what the word meant. He did not tell them to assess comparative blameworthiness, or explain what that term means. Instead, on the trial judge’s instructions, the jury’s sole focus would have been on apportioning the degrees of causation. The trial judge buttressed that focus with the concluding sentence of his charge on apportionment: “Once you have done that, that is all for who is ‘responsible’.” Directing the jurors to allocate responsibility invited them to consider who “caused” the accident.

[93] And finally, instructing the jury to answer whether the incident would have occurred but for each party’s fault improperly invites the jury to allocate the major share of fault to the party who had the “last chance” to avoid the accident – in this case to Ms. Rizzi because her actions occurred later in time. However, we have abolished the “last clear chance” doctrine: see *Treaty Group Inc. v. Drake International Inc.* (2007), 2007 ONCA 450 (CanLII), 86 O.R. (3d) 366 at para. 28 (C.A.). We should not resurrect it under the rubric of apportioning fault. Fruman J.A. made this very point in *Heller* at para. 25:

The doctrine of last clear chance can appear in many guises, often couched in the language of causation, or confused with remoteness. But it always fails to recognize that “each component of liability is only a facet of the whole, and judgment must be on the entirety, not piecemeal on refractions from each facet”: *Abbott v. Kasza* (1976), 1976 ALTASCAD 80 (CanLII), 71 D.L.R. (3d) 581 at 589 (Alta. S.C. App. Div.). In this case, for example, Martens argues that Heller’s injuries were entirely caused by his failure to wear a seat belt, and therefore his damages should be reduced by 100%. This approach ignores Martens’ failure to stop at a stop sign and instead penalizes Heller, who, by wearing a seat belt, might have had the last chance to avoid injury. Courts should not resurrect the last clear chance doctrine, abolished by legislative choice, by masquerading it as an apportionment theory.

[94] Here, because of the trial judge’s instruction, I think there was a real risk the jury approached the apportionment of fault by asking who had the last chance to avoid the accident. How else can the jury’s allocating seventy-five per cent of the fault to Ms. Rizzi be explained when the landlord created the hazard in the first place, and was best positioned to warn its tenants of the danger or eliminate the danger altogether? Even suggesting, as my colleague does, that Ms. Rizzi “was the author of her own misfortune”, respectfully, is simply another way of saying that Ms. Rizzi caused her own injuries because she had the last chance to avoid them by waiting until the landlord removed the metal sheets before returning the paint supplies to her locker: see *Cempel* at paras. 18, 20.

[95] For these reasons, in my view, the trial judge’s charge on apportionment constitutes a legal error calling for this court’s intervention.

D. REMEDY

(a) Apportionment

[96] Largely for the reasons given by Lang J.A., this court should reapportion fault rather than ordering a new trial. The error is an error of law; no real issue of credibility arises; and the accident occurred over twelve years ago.

[97] As I said at the outset, I would reapportion fault by reversing the percentages awarded by the jury. In my view, fault should be apportioned seventy-five per cent to the landlord and twenty-five per cent to Ms. Rizzi. The landlord should bear the greater share of fault because, as I have said, it created the danger and then failed to take steps either to eliminate or at least warn its tenants of it. Indeed, though Ms. Rizzi was negligent, it was understandable that she would want to use her locker when she did. Accordingly, the landlord ought to have appreciated the immediacy of the danger it created.

(b) Amount

[98] The jury assessed Ms. Rizzi's damages (including prejudgment interest) at \$945,979.65. After the jury's apportionment, Ms. Rizzi would have recovered \$236,494.91. Lang J.A. would increase the jury's award for general non-pecuniary damages from \$41,000 to \$80,000. On her assessment and leaving the jury's apportionment intact, Ms. Rizzi would receive an additional \$9,750 (plus prejudgment interest on that amount). Her total recovery would therefore be \$246,244.91 (plus prejudgment interest on the additional amount).

[99] On my apportionment Ms. Rizzi would recover seventy-five per cent of the damages ordered by Lang J.A., which would amount to \$738,734.73, plus an additional adjustment for prejudgment interest.

RELEASED: March 11, 2008

"JL"
J.A."

"John Laskin

[1] I use the words "led to" because the trial judge charged the jury on the "material contribution" causation test rather than the "but for" test. After the subsequent release of *Resurface Corp v. Hanke*, 2007 SCC 7 (CanLII), [2007 1

S.C.R. 333 (confirming the “but for” test and concluding that the “material contribution” test applies only in exceptional circumstances), the respondents moved to extend the time to cross-appeal in order to challenge the causation test used by the trial judge. In the end, the extension was refused. Accordingly, the proper test for causation is not an issue in this appeal.

[2] See also the other two cases in the trilogy: *Thornton (Next friend of) v. Prince George School District No. 57*, 1978 CanLII 12 (SCC), [1978] 2 S.C.R. 267 and *Arnold v. Teno (Next friend of)*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287 at 333. In the latter case, Spence J. explained the policy logic of the cap, including that there is a reason “to fear a situation where none but the very wealthy could own or drive automobiles because none but the very wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards.”

[3] The following decisions are cited in support of this principle: *Hughes v. Lord Advocate*, [1963] A.C. 837 (H.L.), and *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.*, [1967] 1 A.C. 617 (P.C.) (Wagon Mound No. 2).

[4] *Binder v. Mardo Construction Ltd.* (1994), 1994 CanLII 3953 (NS CA), 136 N.S.R. (2d) 20 (C.A.); *Alden v. Spooner* (200), 2002 BCCA 592 (CanLII), 6 B.C.L.R. (4th) 308 (C.A.); *Courdin v. Meyers* (2005), 2005 BCCA 91 (CanLII), 37 B.C.L.R. (4th) 222 (C.A.); *Dushynski v. Rumsey* (2003), 2003 ABCA 164 (CanLII), 327 A.R. 373 (C.A.).

[5] *Westervelt v. Frappier Estate*, [1998] O.J. No. 4830 (Gen. Div.); *Hana-Harik v. Waters*, [2001] O.J. No. 2303 (S.C.J.); *Jones v. Mazolla*, [2004] O.J. No. 366 (S.C.J.).

[6] See also *Gorman v. Faladreau*, 2005 CanLII 18837 (ON CA), [2005] O.J. No. 2213 (C.A.)

[7] Some experts had diagnosed the plaintiff in that case with fibromyalgia; however, this diagnosis was largely not substantiated by the other trial evidence.

Tab 57

Nissen v. Durham Regional Police Services Board, 2017 ONCA 10 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2017-01-09
File number:	C60205
Other citation:	134 OR (3d) 81
Citation:	Nissen v. Durham Regional Police Services Board, 2017 ONCA 10 (CanLII), < https://canlii.ca/t/gwspc >, retrieved on 2026-03-23

Nissen et al. v. Durham Regional Police Services Board et al. [Indexed as: Nissen v. Durham Regional Police Services Board]

Ontario Reports

Court of Appeal for Ontario,
Sharpe, Pepall and van Rensburg JJ.A.
January 9, 2017

134 O.R. (3d) 81 | 2017 ONCA 10

Case Summary

Police — Liability — Plaintiff reporting criminal activity by neighbours' son to police — Police officer promising plaintiff confidentiality — Officer not telling plaintiff that her police interview was being videotaped — Neighbours' sons arrested — Plaintiff's identity and videotaped interview included in Crown disclosure — Neighbours harassing plaintiff to extent that she was diagnosed as having post-traumatic stress disorder — Trial judge not erring in finding that police were liable to plaintiff for breach of confidence — Plaintiff awarded general damages in amount of \$345,000 — Damage award not excessive.

The plaintiff informed the police that her neighbours' teenaged son had broken into another neighbour's house and stolen guns. She claimed that she was promised that her report and her identity would be kept confidential. The police officer who took her report did not tell her that her interview was being videotaped. Her neighbours' two sons were arrested. The plaintiff's identity and her videotaped interview were included in the Crown disclosure provided to defence counsel. As a result, the plaintiff was harassed and threatened by her neighbours. She and her family were

so distressed that they sold their home and moved to another community, and the plaintiff was diagnosed as having post-traumatic stress disorder. She sued the police for damages. The trial judge found as a fact that the plaintiff was given a promise of confidentiality and anonymity and that the police were liable in damages for breaching that promise. He awarded the plaintiff general damages for emotional and psychological injury. He found that the failure of the police to act after they learned of the neighbours' harassing behaviour was an aggravating factor. He fixed the general damages at \$345,000. He also awarded *Family Law Act*, R.S.O. 1990, c. F.3 damages to the plaintiff's husband in the amount of \$65,000 and to her children in the amount of \$25,000 each. The defendants appealed.

Held, the appeal should be dismissed.

The trial judge's finding that the plaintiff was promised confidentiality was supported by the evidence and was entitled to deference.

This case should be decided as a civil claim for damages for breach of confidence. The plaintiff was entitled to recover on the basis that the police officer made her a promise of confidentiality and anonymity in exchange for the information she provided, that the promise was breached, and that she suffered damages as a result. She was not required to establish that the information she provided was not readily available from other sources. Nor was it relevant that the police did not follow their own directive for confidential informants.

While the damages awarded by the trial judge were very generous, his reasons did not reveal any error of law or principle that would justify appellate intervention. It was open to the trial judge to find that the failure of the police to take any meaningful steps to protect the plaintiff and her family from the harm they suffered as a result of the wrongful disclosure of her identity aggravated her damages. [page82]

Cases referred to

Bisaillon v. Keable, 1983 CanLII 26 (SCC), [1983] 2 S.C.R. 60, [1983] S.C.J. No. 65, 2 D.L.R. (4th) 193, 51 N.R. 81, 4 Admin. L.R. 205, 7 C.C.C. (3d) 385, 37 C.R. (3d) 289, 10 W.C.B. 359; *Cinar Corp. v. Robinson*, [2013] 3 S.C.R. 1168, [2013] S.C.J. No. 73, 2013 SCC 73, 452 N.R. 123, 2014EXP-62, 118 C.P.R. (4th) 1, J.E. 2014-32, 366 D.L.R. (4th) 193, 8 C.C.L.T. (4th) 1, EYB 2013-230908, 235 A.C.W.S. (3d) 495; *R. v. Basi*, [2009] 3 S.C.R. 389, [2009] S.C.J. No. 52, 2009 SCC 52; *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979, [1990] S.C.J. No. 132, 116 N.R. 361, J.E. 91-48, 43 O.A.C. 277, 61 C.C.C. (3d) 300, 2 C.R. (4th) 153, 1 C.R.R. (2d) 82, 11 W.C.B. (2d) 358; *W. (T.) v. Seo*, 2005 CanLII 21356 (ON CA), [2005] O.J. No. 2467, 256 D.L.R. (4th) 1, 199 O.A.C. 172, 140 A.C.W.S. (3d) 400 (C.A.); *Young v. Bella*, [2006] 1 S.C.R. 108, [2006] S.C.J. No. 2, 2006 SCC 3, 261 D.L.R. (4th) 516, 343 N.R. 360, J.E. 2006-290, 254 Nfld. & P.E.I.R. 26, [2006] R.R.A. 1, 37 C.C.L.T. (3d) 161, 21 C.P.C. (6th) 1, EYB 2006-100404, 145 A.C.W.S. (3d) 343

Statutes referred to

Canadian Charter of Rights and Freedoms

Family Law Act, R.S.O. 1990, c. F.3 [as am.]

Authorities referred to

Hubbard, Robert W., Susan Magotiaux and Suzanne M. Duncan, *The Law of Privilege in Canada*, looseleaf (Aurora, Ont.: Canada Law Book Inc., 2006)

APPEAL from the judgment of Gray J., [2015] O.J. No. 924, [2015 ONSC 1268 \(S.C.J.\)](#) for the plaintiffs.

Roger Horst, Rafal Szymanski and Lisa Bruni, for appellants.

Margaret A. Hoy, for respondents.

The judgment of the court was delivered by

[1] **SHARPE J.A.**: — The central issue on this appeal is: what are the required elements for a claim for damages against the police for breach of a promise of confidentiality made to a citizen reporting criminal wrongdoing?

[2] Margaret Stack, respondent in this appeal, was awarded damages against the appellants, the Durham Regional Police Services Board and certain named officers (the "police"), for what was pleaded as breach of informer privilege. Ms. Stack went to the police to tell them that she had learned that P.E., the teenaged son of her neighbours, had broken into another neighbour's house and stolen some guns. Ms. Stack asserted that she had asked the police and been promised by them that her identity and the fact that she had reported the theft of the guns would be treated as confidential. Unbeknownst to Ms. Stack, the police videotaped her interview. P.E. and his brother S.E. were charged. A recording of Ms. Stack's interview was included in the disclosure provided to P.E. and S.E. in the criminal proceedings. Ms. Stack was subsequently subjected to threatening and harassing conduct by the parents of P.E. and S.E. Ms. Stack and her [page83]family were so distressed by this conduct that they sold their home and moved to another community. As a result of these events, Ms. Stack has felt hopeless, depressed, anxious and fearful. She has been diagnosed as having post-traumatic stress disorder.

[3] The police denied that Ms. Stack was promised confidentiality or that she enjoyed the status of a confidential informant.

[4] Following a ten-day trial, the trial judge gave detailed reasons in which he found that the police had promised Ms. Stack confidentiality and that Ms. Stack, her husband and her children were entitled to substantial damages.

[5] Before this court, the police argue that the trial judge erred in finding that they promised Ms. Stack confidentiality, that the elements necessary for a claim of damages for breach of informer privilege were not made out, and that the damages awarded were excessive.

[6] For the following reasons, I would dismiss the appeal.

Facts

[7] Ms. Stack lived with her husband, Chad Nissen, and their two children on a quiet street in Whitby. They had invested considerable time and money on improving their home, and they enjoyed good relationships with their neighbours.

[8] Ms. Stack sometimes asked P.E., the teenaged son of one of her neighbours, to babysit her children. One day, when Ms. Stack asked the child of another neighbour to babysit, P.E. became angry. Ms. Stack was disturbed by what she regarded as his irrational and frightening behaviour. Ms. Stack subsequently learned from another neighbour that P.E. had broken into the neighbour's home, stolen guns, and with his brother, S.E., taken the guns to school and threatened students.

[9] Ms. Stack decided that she should inform the police but she did not wish to have her name associated with any investigation. A friend offered to call a police officer he knew without identifying Ms. Stack. She subsequently received a call from Officer Liepsig of the Durham Regional Police, who wanted to talk to her immediately. She was upset that her friend had disclosed her name, but the friend explained that Officer Liepsig had insisted. She called Officer Liepsig, who offered to

come to her home. She told him no, that she felt unsafe as the people they were going to talk about lived across the street. In her evidence, Ms. Stack insisted that she emphasized to Officer Liepsig that she did not wish to be identified, that she was frightened of P.E. and S.E., and that the officer promised her over the telephone that her identity would not be disclosed. She said that [page84]Officer Liepsig told her that if she came to the police station to discuss the matter he would keep her identity secret, and that she would remain totally anonymous.

[10] Ms. Stack testified that she was given further assurances of confidentiality when she attended at the station. Officer Liepsig asked her if he could take some notes but did not disclose to her that the interview was being recorded on videotape. At the end of the interview, Ms. Stack asked Officer Liepsig not to let anyone know about their conversation. The videotape confirms that he replied: "[T]his is between you and I. Of course, I have to keep records of this for ourselves. . . That stuff does not get disclosed. It is not made available to the public. You don't have to worry about that." Ms. Stack testified that before leaving the station she again asked to be reassured that no one would know she had made her report, and that again Officer Liepsig told her that it was impossible, even if a request was made under freedom of information legislation. Ms. Stack acknowledged in cross-examination that Officer Liepsig never used the term "confidential informer".

[11] Officer Liepsig testified that he did not recall Ms. Stack expressing any concerns about confidentiality or anonymity, and denied that he gave her any assurances. He stated that if there had been any assurances of confidentiality, he would not have met Ms. Stack at the police station and he would not have recorded her statement. Officer Liepsig explained the Durham Regional Police Criminal Informant and Agent Management Directive (the "directive"), and testified that he had not followed the steps required to make Ms. Stack a confidential informant within the meaning of the directive. Officer Liepsig testified that he considered Ms. Stack to be a regular witness, not a confidential informer.

[12] Within a few days of Ms. Stack's police interview, P.E. and S.E. were arrested. Soon after, Officer Liepsig was reassigned, and the task of preparing the Crown brief was assigned to other officers who were unaware that Ms. Stack had been given any assurance of confidentiality. Ms. Stack later learned that her identity and her videotaped interview were included in the Crown's disclosure to P.E. and S.E.'s defence counsel. This disclosure provoked an angry reaction from P.E. and S.E.'s parents, Mr. and Mrs. E. Ms. Stack testified that Mr. E. drove his truck at her causing her to leap from the sidewalk onto the grass behind a tree to avoid being hit by the truck. He then sped away, spinning his wheels so that gravel from the road was propelled towards her. [page85]

[13] Ms. Stack immediately called Officer Liepsig to report the incident and express her concern that a mistake had been made and her identity disclosed, but he did not return her call. Mr. Nissen spoke to Mr. E., who expressed his anger and intention to pay Ms. Stack back for having gone to the police. Mr. Nissen also complained to the police about Mr. E.'s conduct. A police officer, who had not himself spoken with Mr. Nissen, responded by calling Mr. E. to caution him not to contact or tamper with witnesses, and to not say anything that might be interpreted as a threat. The police did not report back to Mr. Nissen.

[14] Ms. Stack and Mr. Nissen testified that following the truck incident, Mr. and Mrs. E. subjected them to ongoing harassment. They would come to their living room window, driveway or to the front step of their house and glare over at the Stack-Nissen home in a threatening manner. There were also other incidents. P.E. arranged to have a young girl run through Ms. Stack's backyard, screaming and waving her arms. On other occasions, Mr. E. clucked and behaved like a chicken towards Mr. Nissen and Ms. Stack. The harassment became unbearable and, ultimately, Ms. Stack and Mr. Nissen decided to sell their home and move.

[15] Ms. Stack complained of feeling hopeless and depressed following these events, and she has been diagnosed with post-traumatic stress disorder. Evidence of the significant change in her

behaviour and enjoyment of life was provided by her family, friends and Dr. Silver, a psychiatrist who had examined her for the purposes of this case.

Trial Judgment

[16] The trial judge found as a fact that Officer Liepsig had promised Ms. Stack anonymity and confidentiality. He noted that Officer Liepsig denied giving any such assurances, but observed that Officer Liepsig's notes about his interaction with Ms. Stack were sparse. The trial judge stated, at para. 289:

I think it is highly unlikely that the discussion about anonymity at the end of the interview was the first time the subject was raised. In context, I think it is unlikely that the issue would have been raised for the first time in such a casual way at the end of the interview. It is more likely, in my view, that that discussion was the culmination of an earlier discussion about anonymity. Otherwise, there was no context and the discussion, coming out of the blue, would be unusual. If anonymity was promised before Ms. Stack came to the police station, it is difficult to think of any reason for doing it except as a means to persuade her to come to the station and tell what she knew.

[17] The trial judge noted that Ms. Stack's concern for confidentiality was confirmed by her friend who had made the initial [page86]call to Officer Liepsig and by her complaint to Officer Liepsig immediately upon learning that her identity had been disclosed. He noted that Officer Liepsig did not deny receiving that message, nor having failed to respond. Mr. Nissen also corroborated Ms. Stack's concern about confidentiality. The police did not refute his evidence that he went to the station to complain about the disclosure, and that an officer had apologized to him and said that the disclosure was unacceptable.

[18] The trial judge noted that the fact that the police did not follow their policy regarding confidential informants suggested that Officer Liepsig had not intended to grant Ms. Stack informer status. However, Officer Liepsig had failed to make that clear to Ms. Stack. The trial judge concluded, at para. 298:

On a balance of probabilities, I hold that Officer Liepsig promised Ms. Stack that her identity would be preserved, and not disclosed, if she came to the police station and provided information about suspected criminal activity. He did not qualify that promise in any way. Thus, both expressly and by implication Ms. Stack became entitled to informer privilege, that is, she was entitled to have her anonymity preserved with respect to her involvement in conveying information to the police.

[19] The trial judge found that the police owed a common law duty not to disclose the identity of an informer, and that even if the duty was not absolute, reasonable care had not been taken in the circumstances of this case.

[20] He reviewed the law relating to informer privilege in detail and concluded, at para. 280:

[I]nformer privilege arises if information is provided to the police in exchange for a promise of confidentiality. Mere expectation of confidentiality is not enough. There must be a promise, either express or implied, that confidentiality will be maintained. Where the privilege properly arises, anonymity must be observed absolutely, save only where innocence is at stake. The purpose of the privilege is two-fold: to encourage citizens to report suspected criminal activity; and to protect informers from retribution. Formality is not required. All that is required is a promise of confidentiality in exchange for information. While policies and procedures exist with respect to informer privilege, they do not themselves create it.

[21] The trial judge rejected the claim for damages arising from the sale of the Whitby home and purchase of the new home, as no expert evidence was called as to loss of value. He also rejected a claim for *Canadian Charter of Rights and Freedom* ("[Charter](#)") damages, and the claims Ms. Stack and Mr. Nissen had asserted for lost income or lost opportunity.

[22] The trial judge did, however, award Ms. Stack general damages for emotional and psychological injury. That claim was supported by her own evidence, that of her family and friends, and that of Dr. Silver, who had diagnosed her with [page87]post-traumatic stress disorder, an opinion that was not contradicted by the expert retained by the police. The trial judge found that the psychological injury Ms. Stack had suffered rose above the level of ordinary upset or anxiety, and was therefore compensable at law. The trial judge found that the failure of the police to act after they learned of Mr. E.'s harassing behaviour, other than the one brief telephone conversation, was an aggravating factor. He rejected the claim for punitive damages and fixed the general damages in the amount of \$345,000. The trial judge also awarded [Family Law Act](#), R.S.O. 1990, c. F.3 damages for loss of guidance, care and companionship, in the amount of \$65,000 to Mr. Nissen and \$25,000 to each child.

Issues

[23] The appellants raise the following issues on appeal:

- (1) Did the trial judge err in finding that Ms. Stack was promised confidentiality?
- (2) Did the trial judge err in finding that Ms. Stack established the necessary elements for a claim for damages?
- (3) Were the damages awarded excessive?

Analysis

1. Did the trial judge err in finding that the Ms. Stack was promised confidentiality?

[24] The police argue that the trial judge made a palpable and overriding error in finding that Ms. Stack was promised confidentiality. They argue that it would make no sense for Officer Liepsig to ask Ms. Stack to come to the police station for an interview if she were being treated as a confidential informant.

[25] We did not call upon counsel for the respondent to address this submission in oral argument, as it is without merit. The trial judge thoroughly reviewed the evidence of Ms. Stack, Officer Liepsig and other witnesses and clearly explained the basis for his finding. He considered and rejected the very point raised by the police on this appeal, namely, that Officer Liepsig would not have conducted the interview at the police station if he considered Ms. Stack to be a confidential informant. The trial judge's finding that Officer Liepsig did promise Ms. Stack confidentiality and anonymity was based upon his assessment of her credibility and reliability as a witness. His finding was supported by the conversation between Ms. Stack and Officer Liepsig at the conclusion of the videotaped statement and by [page88]other evidence, including that given by other police officers. It attracts deference in this court, and I see no basis upon which we could interfere.

2. Did the trial judge err in finding that Ms. Stack established the necessary elements for a claim for damages?

[26] We were not referred to any case in which damages for breach of informer privilege had been awarded. However, in *Bisaillon v. Keable*, [1983 CanLII 26 \(SCC\)](#), [1983] 2 S.C.R. 60, [1983] S.C.J. No. 65, Beetz J. stated, at p. 96 S.C.R., that although there was no precedent on the point, he would have no difficulty in finding that an action for damages for such a breach would lie. On this appeal, the police do not dispute that proposition.

[27] However, the police do argue that the trial judge erred by finding that a plaintiff only need prove that the police made a promise of confidentiality in exchange for information in order to establish the privilege. They submit that the elements for a civil claim for damages for breach of a promise of confidentiality by the police will not lie without proof of two other elements, namely, (1) that the information provided must be difficult or impossible to obtain; and (2) that the informer

must be likely to suffer harm or danger if his or her identity is disclosed. They also submit that the claim cannot be sustained as the directive relating to confidential informers was not followed.

[28] In support of the first proposition, the police rely on the following passage from the judgment of the Supreme Court of Canada in *R. v. Basi*, [2009] 3 S.C.R. 389, [2009] S.C.J. No. 52, [2009 SCC 52](#), at para. 36:

The privilege arises where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain. In appropriate circumstances, a bargain of this sort has long been accepted as an indispensable tool in the detection, prevention and prosecution of crime.

[29] In support of the second proposition, they rely on *R. v. Scott*, [1990 CanLII 27 \(SCC\)](#), [1990] 3 S.C.R. 979, [1990] S.C.J. No. 132, at para. 31, where Cory J. stated: "Whatever their motives, the position of informers is always precarious and their role is fraught with danger."

[30] The police submit that as the information Ms. Stack provided was readily available to the police from other sources, that as they had no reason to suspect that she would be in any danger should her identity be revealed and that as they did not follow policy and procedures for creating confidential informer [page89]privilege, Ms. Stack has failed to make out the necessary elements for her claim.

[31] I disagree with the police submission that the trial judge erred with respect to the necessary elements for this claim.

[32] In my view, this case can and should be decided as a civil claim for damages for breach of confidence. The fundamental point is that, on the findings of the trial judge, Officer Liepsig made a promise of confidentiality and anonymity to Ms. Stack in exchange for the information she provided. The trial judge found that the promise was breached and Ms. Stack suffered damages as a result. Those findings bring this case squarely within the long-recognized cause of action for breach of confidence, and Ms. Stack is accordingly entitled to recover on that basis.

[33] While other considerations may come into play in a criminal case where the prosecution is resisting disclosure of the identity of a confidential informer to an accused, this is a civil case between the police and an individual who was promised confidentiality. That promise gave rise to a common law and equitable right entitling Ms. Stack to have her identity kept confidential. Her right was not contingent upon other ways the police may have had to get the information she provided, or on what the police thought about the danger she faced.

[34] Difficulty in obtaining the information and fear of harm to the witness may well be the rationales underlying the doctrine of informer privilege in criminal law, but I am not persuaded that they are necessary elements to sustain the privilege, even in a criminal case. There is no suggestion to that effect in the lengthy discussion of the doctrine in Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, loose-leaf (Aurora, Ont.: Canada Law Book, 2006). For the purposes of this appeal, I need go no further than saying that there is no reason to qualify the right to sue for breach of confidence by adding additional elements necessary to establish a civil claim for damages. To do so would put the citizen interacting with the police in an impossible situation. Ms. Stack had no way of determining whether the police could obtain from another source the information she was offering. Nor did she have any way of gauging what the police considered to be the risk of harm she faced should her identity be disclosed. She explained her fear of harm to Officer Liepsig, and that fear ultimately proved to be well founded. She was entitled to rely on Officer Liepsig's promise of confidentiality in exchange for her co-operation in giving him the information she had.

[35] It is, of course, for the police to decide whether or not to make a promise of confidentiality. In making that decision, they [page90]will no doubt make an assessment of the value of the information the witness may have to offer, whether they can get the information through other

means, and the danger the witness may face if his or her identity is revealed. If the police tell the witness that they will not reveal his or her identity or involvement in order to get information, they should keep their promise, or face the ordinary consequences of violating the assurance they have given. If the police decide that the witness does not deserve or warrant the requested assurance of confidentiality and anonymity, they should clearly say so and refuse to give the witness the requested assurance. That would allow the witness to decide whether to nonetheless give the information and accept the risk of disclosure. Simply put, a citizen in Ms. Stack's situation should be able to rely upon what the police tell her.

[36] Nor do I accept the submission that because the police did not follow their own directive for confidential informers, Ms. Stack's civil claim for damages is defeated. While I accept that Officer Liepsig may have thought that Ms. Stack was not a confidential informer within the meaning of the directive, I fail to see how that can affect her right to claim for breach of confidence. Her claim rests upon the promise of confidentiality that Officer Liepsig made, and the exchange of information that followed as a result. She had no way of determining whether she fit within the terms of the directive, and it would be obviously unfair to deny her claim on the basis of a directive that had never been explained or brought to her attention.

3. *Were the damages awarded excessive?*

[37] The police submit that the damages awarded by the trial judge were excessive. They submit that the trial judge made three errors: (1) he assessed Ms. Stack's damages with reference to awards made in cases that are not analogous; (2) he failed to consider the fact that Ms. Stack had already suffered psychological harm before her identity was disclosed; and (3) he erred in awarding aggravated damages.

Analogous cases

[38] The trial judge observed, at para. 368, that it was difficult to fix a reasonable amount for the damages Ms. Stack and her family had suffered. He found that the effect on Ms. Stack had been "severe", that her life had been "irretrievably altered" and he was satisfied by the evidence of Dr. Silver "that it is unlikely that she will ever be the same as she was before these incidents".

[39] In argument, the trial judge raised the issue of whether the "cap" on personal injury damages applied to damages for [page91] psychological injury. Ms. Stack's counsel cited two Supreme Court of Canada decisions in which damages for psychological injury were claimed: *Cinar Corp. v. Robinson*, [2013] 3 S.C.R. 1168, [2013] S.C.J. No. 73, [2013 SCC 73](#) and *Young v. Bella*, [2006] 1 S.C.R. 108, [2006] S.C.J. No. 2, [2006 SCC 3](#). In both those cases, the Supreme Court held that the "cap" did not apply and awarded damages for psychological injury of \$400,000 in *Cinar* and \$430,000 in *Young*. The trial judge stated that the damages in this case were not as severe as the damages in these two decisions, that something less would be appropriate, and awarded \$345,000. As that amount was below the cap, the issue of whether the cap applies did not have to be decided.

[40] The police submit that the trial judge placed too much reliance on *Cinar* and *Young*, as the harm suffered by the plaintiffs in both *Cinar* and *Young* involved more than just psychological injury. *Cinar* involved a violation of copyright, and *Young* was a defamation case involving injury to reputation.

[41] I am not persuaded by this submission.

[42] First, the trial judge explicitly recognized that the harm suffered in this case was less than that suffered in *Cinar* and *Young*.

[43] Second, in *Cinar*, the damage award consisted of several components, including a compensatory award of over \$600,000 for pecuniary loss and over \$1.7 million in disgorgement of profits, both awards for the copyright infringement, and \$500,000 in punitive damages. An additional \$400,000 was awarded for psychological injury. The award for psychological injury was

a discrete award in addition to the damages awarded for the breach of copyright. While the Supreme Court agreed that the damages for psychological injury were analogous to those claimed by the victim of defamation, it is clear that the award was not for loss of reputation. See para. 108: "The product of Robinson's artistic exertions was taken from him and the integrity of his personal creative process was violated, causing deep psychological suffering." I do not see why an award for psychological harm resulting from a copyright infringement could not shed some light on an award for a similar harm arising under a different cause of action.

[44] Third, while *Young* was pleaded as both a defamation and negligence action, the claim for defamation was struck and the action proceeded as one for negligence. The psychological injury complained of was not unlike that suffered by Ms. Stack. I do not agree that the fact that a similar harm was caused by a different wrongful act makes *Young* so different in quality that the [page92] trial judge erred in using it as a reference point when assessing damages in this case.

[45] The trial judge was faced with what he properly recognized to be a difficult task. On the evidence, he found that Ms. Stack had suffered a severe psychological injury that had radically affected her outlook and enjoyment of life. Her friends and her family testified that she was a different person since the injury, and she presented unchallenged expert evidence that she had suffered from post-traumatic stress disorder that was difficult to treat and likely to be permanent. While I view the damages awarded by the trial judge to be very generous, I am not persuaded that his reasons reveal any error of law or principle that would justify appellate intervention.

Pre-existing condition

[46] Dr. Silver testified that Ms. Stack's post-traumatic stress disorder was the product of a series of events, including being upset over P.E.'s anger concerning the babysitting assignment, the breakdown of her relationship with P.E., learning that P.E. and his brother had stolen guns and taken them to school to threaten fellow students, and finally the disclosure of her identity as the person who had gone to the police and the resulting threatening and harassing behaviour of Mr. and Mrs. E. The police submit that the trial judge failed to consider the evidence that Ms. Stack's post-traumatic stress disorder was the product of a series of events. They submit that this shows that Ms. Stack is a "crumbling skull" plaintiff, and that the general and [Family Law Act](#) damages should be reduced by 10 per cent to 20 per cent on account of the fact that she had already experienced some anxiety and distress before her identity was revealed, and before Mr. and Mrs. E. started their campaign of threats and harassment.

[47] I am not persuaded by this submission.

[48] In her closing submissions at trial, counsel for the police made brief reference to the fact that Ms. Stack was upset by earlier events, but did not advance the submission made before us that Ms. Stack should be treated as a "crumbling skull" plaintiff.

[49] In any event, at para. 255 of his reasons, the trial judge asked himself the following question:

In a case such as this, where psychological injuries are alleged, the question is, as a result of pre-existing conditions, was there a material risk that the plaintiff would have developed her current problems notwithstanding the defendants' conduct? [page93]

[50] At para. 341, he made the following finding in answer to that question:

Had Ms. Stack's identity not been disclosed, she and her family, in all likelihood, would still be living in their dream home on their quiet street in Whitby. Retribution at the hands of the [E.'s] would not have occurred. Ms. Stack would not have suffered post-traumatic stress disorder, the symptoms of which still plague her today. She and her family would not have sold their home and moved to a strange community. Her family would not have suffered along with her.

[51] In my view, it was open to the trial judge to conclude that the psychological harm Ms. Stack suffered could fairly be entirely attributed to the disclosure of her identity, which in turn led to the

retributive conduct of Mr. and Mrs. E. The disclosure and the threats and harassment that followed were the key events that pushed Ms. Stack and her family to the point where they felt they had to move from the neighbourhood, and that caused her severe mental distress. The trial judge was entitled to award damages accordingly.

Aggravated damages

[52] The police submit that the trial judge erred in awarding aggravated damages without making a finding of "reprehensible or outrageous conduct".

[53] The trial judge rejected the claim for punitive damages. He found, at para. 374:

[T]his is not one of those exceptional cases that requires an award of punitive damages for malicious, oppressive and high-handed misconduct that offends the court's sense of decency . . . The conduct of the defendants does not remotely approach that standard.

(Citation omitted)

[54] He did, however, note that a damages award must take into account aggravating features, which he described, at para. 367:

First, as noted, the police did nothing whatsoever to preserve Ms. Stack's anonymity. Second, once they became aware of the harassing behaviour by [Mr. E.] they did almost nothing about it. Apart from one brief conversation with [Mr. E.], in which it is doubtful that the importance of the problem was impressed on [Mr. E.], the police did nothing. There was no evidence of any follow-up with [Mr. E.]. Indeed, somewhat inexplicably, no one even followed up with Mr. Nissen or Ms. Stack to advise them that [Mr. E.] had been spoken to.

[55] I am not persuaded by the police argument that this passage reveals an error of law. Aggravated damages aim not at punishing wrongful behaviour, but at compensating the injured plaintiff for the full extent of the plaintiff's loss. Very often, [page94] aggravation of the plaintiff's loss will be caused by outrageous or reprehensible conduct, as it is that quality of the defendant's conduct that causes additional distress or humiliation that calls for compensation not captured by a purely conventional award. I am not persuaded, however, that a trial judge can only take aggravating features into account where there has been outrageous or reprehensible conduct. I agree with the observation made by this court in *W. (T.) v. Seo*, 2005 CanLII 21356 (ON CA), [2005] O.J. No. 2467, 256 D.L.R. (4th) 1 (C.A.), at para. 70, that "post-incident conduct which aggravates the harm to the victim" may also be taken into account.

[56] I agree with the police that the first factor mentioned by the trial judge, failure to protect Ms. Stack's anonymity, was not aggravating. However, I agree with the respondents that it was open to the trial judge to find that the failure of the police to take any meaningful steps to protect Ms. Stack and her family from the harm they were suffering as a result of the wrongful disclosure of her identity did aggravate the damages she suffered. The police had promised Ms. Stack confidentiality in order to gain her co-operation. Their duty to her did not cease once they broke that promise. The promise they made as police officers included a duty to protect Ms. Stack from the consequences of wrongful disclosure.

[57] The police failed to carry out that duty. When Mr. Nissen complained to the police that Mr. E. had driven his truck at Ms. Stack and that Mr. and Mrs. E. were leering at them in a threatening manner, the response of the police was to have an officer who had not himself spoken with Ms. Stack or Mr. Nissen call Mr. E. to tell him that he should not communicate or interfere with witnesses. The officer charged with calling Mr. E. was not told about the truck incident or the threatening behaviour, and did not caution Mr. E. in that regard. Following this brief conversation, the police did not call Ms. Stack or her husband to reassure them that they had spoken to Mr. E. In my view, the trial judge did not err by taking this conduct into account when determining the damages to which Ms. Stack and her family were entitled.

Disposition

[58] For these reasons, I would dismiss the appeal with costs to the respondents fixed in the amount agreed to by the parties, namely, \$40,000, inclusive of disbursements and taxes.

Appeal dismissed.

[page95]

End of Document

TAB 58

Nissen v. Durham Regional Police, 2015 ONSC 1268 (CanLII)

Source: Superior Court of Justice
 Date: 2015-02-26
 File number: 2602/02
 Other citation: [2015] OJ No 924 (QL)
 Citation: Nissen v. Durham Regional Police, 2015 ONSC 1268 (CanLII), <<https://canlii.ca/t/ggh2b>>, retrieved on 2026-03-23

CITATION: Nissen v. Durham Regional Police, 2015 ONSC 1268
COURT FILE NO.: 2602/02
DATE: 2015-02-26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHAD NISSEN, MARGARET STACK, both personally and as litigation guardians of CHRISTIAN NISSEN and MORGAN NISSEN

Plaintiffs

Margaret A. Hoy, for the Plaintiffs

– and –

DURHAM REGIONAL POLICE SERVICES BOARD, JAMES LIEPSIG, MARK PRICE, AL SIRIZZOTTI, SEAN FITZGERALD, JOHN DOE OR JANE DOE, BRENDA COWIE, ISABEL PARGANA, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

Andra Maxwell-Baker and Nadia Marotta, for the Defendants Durham Regional Police Services Board, James Liepsig, Mark Price, Al Sirizzotti, and Sean Fitzgerald.

REASONS FOR JUDGMENT

GRAY J.

[1] In a criminal law context, “informer” privilege is almost absolute. What this means is that a person who provides information to police about actual or suspected criminal activity, in exchange for a promise of anonymity, is guaranteed that anonymity will be preserved. It is only where innocence is at stake that the privilege must give way. In any litigation, whether civil or criminal, the police, the Crown and the courts must protect the privilege. Even the right to full disclosure, which is part of the constitutional right to make full answer and defence, will not override the privilege.

[2] In this case, the court is confronted with the civil consequences of a breach of the privilege. Where the privilege is not observed, is the now-disclosed informer entitled to civil damages? That is the issue confronting the court in this case.

[3] The action was originally against the Crown and certain Crown attorneys as well as the Durham Regional Police Services Board and certain police officers. The action as against the Crown and the Crown attorneys was resolved before trial.

Background

[4] Margaret Stack, and her husband, Chad Nissen, together with their children, lived on a quiet street in Whitby. Life was good. Mr. Nissen had a good job. They lived in a small house, but for them it was more than satisfactory. Indeed, it was exactly what they wanted. They spent considerable sums of money making it their ideal home.

[5] The street on which they lived had amiable neighbours. They got along with all of them and, as is often the case, they became good friends with some of them.

[6] The street on which they lived was Warden Wilson Avenue in Whitby. They lived at number 220. Next door, at 222 Warden Wilson were the Eckers, John and Helen. They had become good friends.

[7] Across the road, at number 215 Warden Wilson, were the Whitneys, Byron and Cathy. They were not close friends, but were good neighbours.

[8] Next door to the Whitneys were the Ellisons, Jim and Aline. They had twin boys, Sean and Patrick. The Ellisons were not friends, but they were cordial neighbours.

[9] Ms. Stack is a professional engineer, but has not worked for many years. She left the workforce in 1996 when her mother died, and she began trying to have children. Once she had children, it was her intention to return to the workforce in 2010 or 2011. She has not done so.

[10] Mr. Nissen is also a professional engineer. He works for a company called Stonecore as a salesperson. He has been very successful and earns a good income.

[11] Both Ms. Stack and Mr. Nissen described their time living on Warden Wilson as one of immense satisfaction. They had a normal, everyday life. Ms. Stack would spend her days walking, going to the library, engaged in crafts, church activities, the local hockey league and volunteering at school.

[12] As noted earlier, they loved their house. They invested time and money on improvements, including a finished basement, and a terraced walkout. They estimate that they spent approximately \$85,000 in doing so.

[13] When their own children were young, they would sometimes ask the Ellison boys to babysit. Once, in February, 2002, Ms. Stack asked Patrick to babysit but he was not interested. Accordingly, Ms. Stack asked another girl in the neighbourhood. For some reason, Patrick became angry.

[14] Ms. Stack asked Patrick's brother Sean why Patrick was angry. Sean recommended that Ms. Stack not discuss it with Patrick.

[15] Notwithstanding Sean's advice, Ms. Stack called Patrick and asked him to drop over. He did so.

[16] Ms. Stack testified that she found Patrick's behaviour startling and disturbing. When asked what was the matter, Patrick said "I've been lied to." Discussion did not change Patrick's approach. He was angry and could not be consoled. He seemed irrational and entrenched. Ms. Stack testified that Patrick gave her a cold stare, which was frightening.

[17] Ms. Stack thanked Patrick for coming over and escorted him out. She decided that Patrick could not babysit again.

[18] Ms. Stack testified that after this encounter with Patrick, she recalled a conversation that she had had with Cathy Whitney, during which Ms. Whitney asked her how babysitting was going with Patrick and Sean. Ms. Stack went across the road to talk to Ms. Whitney, and she asked Ms. Whitney about their earlier conversation. She told Ms. Whitney that she would not be using Patrick as a babysitter anymore.

[19] Ms. Stack testified that Ms. Whitney was upset, and stated "It's so much more than that – the police have to be called." Ms. Whitney was crying and speaking rapidly. Ms. Whitney said she was frightened. She was tearful and she was not composed. She said Patrick had broken into

her home and stolen guns that were in her house, and took them to the school and threatened students.

[20] Ms. Stack testified that she urged Ms. Whitney to call the police. Ms. Whitney said she would call the police as soon as her husband got home.

[21] Ms. Stack testified that she returned to her own home and called her husband. She asked her husband to go to Ms. Whitney's home.

[22] Mr. Nissen went to Ms. Whitney's home. When he returned he said Ms. Whitney had relayed the same story to him.

[23] Ms. Stack testified that she called a friend, Jackie Rooks, and asked her if she knew anyone in the police force that she could trust. She said she did not want to be associated with any investigation. She told Ms. Rooks that she knew the people involved and that there were guns. She called her husband, who was by then on a business trip, and said she had spoken to Ms. Rooks.

[24] The next day, Ms. Stack noticed that there had been no police who had attended at the Whitneys' home. She said Ms. Rooks called her and said she did not have the name of a police contact.

[25] Ms. Stack testified that she then called another friend, Ken Rumak. She told him she was trying to find a police officer to whom some information could be conveyed, but she did not want to be involved or be identified. She said the matter was terrifying and her safety was at risk.

[26] Mr. Rumak told her that he had the name of a police officer. He said he would call the officer and would not identify Ms. Stack.

[27] Shortly after her discussion with Mr. Rumak, Ms. Stack was shocked to receive a message on her answering machine from an Officer Liepsig with the Durham Police. She realized that Mr. Rumak had disclosed her name, contrary to his promise not to do so. The message from Officer Liepsig was to the effect that he had to talk to her right away.

[28] Ms. Stack testified that she called Mr. Rumak who said he had called the officer and the officer had become "heavy" with him. Mr. Rumak he said he felt he had no option but to give the officer Ms. Stack's name and telephone number. Mr. Rumak told her that he had told the officer that he would not identify Ms. Stack, but the officer insisted.

[29] Ms. Stack testified that she called Officer Liepsig. He said he wanted to come to Ms. Stack's home to talk to her. Ms. Stack said no, he could not come. She told him that she was at risk. The people involved live across the street. Officer Liepsig said he would come in an unmarked car. Ms. Stack testified that she told him that would not be appropriate. She did not want to be involved. She testified that she told Officer Liepsig that he had all the information he

needed, and that she could add nothing. He offered to meet in a coffee shop, to which Ms. Stack said no.

[30] Finally, Officer Liepsig said Ms. Stack should come to the police station. Ms. Stack testified that Officer Liepsig said that if she came to the police station and talked to him, he would keep her identity secret. He said he would protect her and she would be totally anonymous.

[31] Ms. Stack testified that she emphasised to Officer Liepsig that she could not be identified. She said she was vulnerable and that there were two kids with guns who lived across the street. She said Officer Liepsig made her an absolute promise that she would never be identified. Based on that promise, she agreed to go to the police station to talk to Officer Liepsig.

[32] Ms. Stack testified that she asked Mr. Rumak if he would take her to the police station. He agreed to do so.

[33] On February 8, 2002, Ms. Stack and Mr. Rumak arrived at the police station. Ms. Stack asked for Officer Liepsig. Ms. Stack testified that when he came out, she said to him "No one can ever know I've been here", to which Officer Liepsig said "Yes". They went into a small room.

[34] At the outset of the interview, Officer Liepsig asked if it was all right that he take some notes, to which Ms. Stack assented. In fact, the interview was recorded on videotape. Ms. Stack was not told that the interview would be videotaped, or asked if that would be acceptable. Apparently there are signs in the lobby of the police station that state that videotaping may occur within the police station. I will not go through the interview in detail. It is sufficient to say that Ms. Stack went through what she had been told by Ms. Whitney about Patrick Ellison and the guns.

[35] At the end of the interview, there was some discussion about confidentiality. I have viewed and listened to the videotape several times. What follows is my best reproduction of that discussion. I have put in brackets portions that are unclear.

Police Officer:	Alrighty. If I need anything else I will give you a call (inaudible).
Ms. Stack:	(try not to) or (don't) let anybody know please
Police Officer:	This is between you and I. Of course, I have to keep records of this for ourselves.
Ms. Stack:	No, I understand that but...
Police Officer:	That stuff does not get disclosed. It is not made available to the public. You don't have to worry about that.
Ms. Stack:	O.K.
Ms. Stack:	My only concern is that I have two little boys.
Police Officer:	That is everybody's concern.
Ms. Stack:	That is why I am here because I have two little boys. I really hope that somebody would make a responsible decision if my kids got into that kind of behaviour.

[36] Ms. Stack testified that after the interview, she and Officer Liepsig left the interview room. Before leaving the station, she stopped and again asked Officer Liepsig whether there was any way anyone could find out that she had done this. Ms. Stack testified that Officer Liepsig said it was impossible, even if a request was made under Freedom of Information legislation.

[37] Ms. Stack testified that she believed that her identity would never be released. She testified that Officer Liepsig never suggested that her identity would be revealed. She was afraid that the Ellison family might retaliate against her and could cause her harm.

[38] Ms. Stack testified that after the interview things seemed to be all right. She said a few days later, Ms. Whitney told her that Patrick and Sean had been arrested, and Ms. Whitney anticipated that she and her husband Byron would be charged.

[39] Ms. Stack testified that sometime later, she began to notice some changes in the behaviour of the Ellisons. She testified that when she was walking on the street, Aline Ellison would look the other way or glare at her. At some point, she thought Jim Ellison swore at her.

[40] Ms. Stack testified that on April 3, 2002, she was walking home and she saw Jim Ellison come out the side door of his house and get in his truck. He said something loud.

[41] Ms. Stack testified that she increased her walking speed. She heard Mr. Ellison rev the engine of his truck. She continued walking on the sidewalk.

[42] Ms. Stack testified that Mr. Ellison's truck came at her up the street, straight towards her. She ran. She leapt from the sidewalk onto the grass behind a tree. The truck came onto the sidewalk, and would have hit her if she had been on the sidewalk. She was terrified. She testified that Mr. Ellison reversed the truck, and backed onto the road. The truck turned south and the tires spun. She testified that she was hit by a number of stones that were thrown up by the tires.

[43] Ms. Stack testified that she felt weak. She ran to her house and collapsed on the landing. She was in shock. She told her husband "Jim tried to kill me." "They must know". She told her husband what had happened.

[44] Ms. Stack testified that she telephoned Officer Liepsig and left a message. She said something terrible had happened and she believed her identity had been released. She testified that the call was never returned.

[45] Ms. Stack testified that her husband called Jim Ellison. She could hear her husband's side of the conversation. Mr. Nissen recited the full contents of the conversation in his evidence, and I will not relate it in detail here. It is sufficient to say that Ms. Stack understood from the conversation that Mr. Ellison knew that Ms. Stack had gone to the police, and that as a result, Mr. Ellison's son had been arrested. Mr. Ellison said he would escalate the matter and would cause

Ms. Stack pain. Mr. Ellison said he had seen a videotape of the interview Ms. Stack had had with the police, because Mr. Ellison's lawyer had given it to him.

[46] Ms. Stack testified that after this exchange with Mr. Ellison, their lives changed dramatically. She testified that the Ellisons started to watch them constantly. The Ellisons would come to their living room window or onto the front step of their house or onto their driveway, and glare at them. She said the watching was relentless.

[47] Ms. Stack testified that the watching would occur every time she came to or went from her house. She said that they closed the blinds on their windows, and never opened them. She said they closed the gaps in the fence around their house. She testified that she could not eat or sleep properly and she felt she was being watched constantly. She was sick and terrified.

[48] Ms. Stack testified that her husband called the police about the harassment. The police did not speak to her, and nothing happened. In order to get a meeting with the police, her husband had to speak to the office of her local MPP. Finally, a meeting was set up for her husband to talk to the police.

[49] Ms. Stack testified that she was not aware of any steps the police took to protect her, and Officer Liepsig, with whom she had left a message, never got back to her.

[50] Ms. Stack testified that the harassment became unbearable, to the point that they did not want to go in and out of the house through the front door. She said they made an arrangement with the neighbour to the rear that they could use their backyard and go through their property.

[51] She testified that if she saw Jim Ellison outside his home, he would make chicken sounds, clucking and flapping his arms.

[52] In the middle of April, 2002, they decided they could no longer live in their home. They listed their property for \$240,000, and accepted an offer for \$235,000. The deal closed in August, 2002.

[53] They looked for a new home, and found one in Seagrave, Ontario, and paid \$227,000. They moved in in July, 2002.

[54] Ms. Stack testified the new home in Seagrave was a "fixer-upper". She does not like the home, even though it is somewhat larger than the home they sold in Whitby.

[55] Ms. Stack testified that since these events she feels hopeless, and depressed. She saw Dr. Silver, a psychiatrist, who diagnosed her as having post-traumatic stress disorder.

[56] Ms. Stack testified that there are "triggers" that increase her symptoms of terror and cause her to recall the events. The revving of a motor vehicle is one. If she sees a teenager with a

hoodie, it causes nightmares. She is paralysed with fear. She has extreme anxiety. She wakes up terrified, at least weekly. If she hears a gun fired on television, it acts as a trigger.

[57] Ms. Stack testified that she tried counselling in 2005. She has taken courses to increase her skills. She had done volunteer work. She became a school trustee, as a replacement for a trustee who did not finish out his or her term. She was not re-elected.

[58] She testified that there was one committee on which she sat as a school trustee that particularly affected her. It is a committee that deals with vulnerable students. Students appear before the committee and talk about why they are at risk. She heard about violence and abuse, which acted as a trigger. She took days to recover after committee meetings.

[59] Ms. Stack testified that it had been her intention to return to work in 2010 or 2011 as a professional engineer. She said that at this point, she hopes she can still do so but that it would be difficult.

[60] She testified that when they sold their home, they lost the benefit of all of the upgrades they had done to the house. They also had to spend a considerable amount on the new home to bring it up to some level of comfort.

[61] On cross-examination, Ms. Stack acknowledged that they had not retained an expert to provide an opinion as to the value of their Whitby home with or without the improvements, or the value of their new Seagrave home. She confirmed that the last time she worked was in 1996, and that she has not applied for any positions other than the position as a school trustee. When she sought re-election as a trustee, she had a website and a Twitter account. As a trustee she had contact with ratepayers and communicated with them.

[62] Ms. Stack acknowledged, on cross-examination, that she had not produced any records from her family physician or records as to her counselling. She agreed that she had never been provided with anti-depressants, nor had she sought psychiatric treatment.

[63] Ms. Stack acknowledged that she did not call Crimestoppers or leave an anonymous tip.

[64] She acknowledged that Officer Liepsig had never used the term “confidential informer” or “confidential informant”. He never said that Ms. Stack had a “handler”.

[65] Chad Nissen testified.

[66] Mr. Nissen testified that before these events, his wife was happy, outgoing, confident and well-liked. This changed dramatically after these events.

[67] Mr. Nissen has been employed by Stonecore since 1990. He is still employed there. He is what is called a “Territory Manager”. For three years, he was a District Manager, but since these

events he has lost that position. As District Manager he had an expense allowance of \$400 per month, and he earned a small percentage of the sales of one person who reported to him.

[68] Before these events, his income had been declining, from \$191,000 in 1998, to \$130,000 in 2002. He earns straight commission.

[69] Mr. Nissen testified that before these events, life had been very satisfactory. He and his wife were involved in the church, and they had a great marriage.

[70] Mr. Nissen testified as to the discussion with Patrick about babysitting. He said the next day, his wife told him about the conversation she had had with Ms. Whitney, and said that he needed to talk to her. As a result, he went across the road and talked to Ms. Whitney.

[71] Ms. Whitney was very upset. She said she thought Patrick had taken guns from her home, and took them to school to scare other children.

[72] Mr. Nissen testified that he told Ms. Whitney that she had to call the police. She said she was scared to do so, because it might get Byron in trouble. She said there might be trouble with Patrick and Sean, and their parents don't react well. Notwithstanding, she said she would call the police. She said she had gone to a creek and found one of the guns.

[73] Mr. Nissen testified that he went home and told his wife about the conversation. He said he was sure Ms. Whitney would call the police.

[74] Mr. Nissen testified that he noticed a change in the behaviour of the Ellisons. On April 3rd, Ms. Stack came home in hysterics. She was crying and beside herself. She said Mr. Ellison had driven a truck at her and she jumped behind a tree. She figured that somehow the police had let her identity slip. He said his wife had called the officer and left a message but received no response.

[75] Mr. Nissen testified that he called Mr. Ellison and had a conversation with him. The conversation was very upsetting. He wrote it down immediately. Rather than paraphrase, I will simply reproduce his written account of the conversation:

C – Jim, What's going on?

J – You tell me what's going on?

C – you swore at my wife this morning

J – no I did not, I would not stoop to her level

C – you know what you said

J – what did I say

C – you called her a f'n bitch

J – I did not, I called her Judis, that's her new nick name

C – what's going on

J – your wife took certain information and went to certain people with it

C – what are talking about

J – I have a signed deposition and it's on video tape

C – that's not true and I don't believe it
 J – I think your name is mentioned in here some place
 J – well you better talk to your wife, you mean to tell me you don't know what's going on
 J – I'll be real short with you
 J – my son has five charges against him, Cathy and Byron have numerous charges against them, people I talked to have said my son is guaranteed some jail time for one of them
 j – I'm really mad
 J – I'm going to watch you and your family under a microscope and when you screw up I will return the courtesey.
 J – I will pay her back ten fold
 C – Jim watch what you say
 J – Cathy and Byron don't know yet, and he's nuts, you picked the wrong people to piss off.
 J – I'm going to do certain things until it's time to escalate it.
 J – you'd better talk to your wife

[76] Mr. Nissen decided that he would go to the police. He had difficulty arranging a meeting. Ultimately, he called the office of James Flaherty, who was their MPP at the time. Mr. Flaherty's office arranged a meeting with the police. Mr. Nissen testified he went to the station and met with an officer, Mr. Sirizzotti. He took the note of his conversation with Mr. Ellison and showed it to the officer. He told him the whole story.

[77] Mr. Nissen testified that he was taken into another room and spoke to Detective Price. He went through the same story. He said his wife had been assured that her identity would be preserved. He wanted to know if a videotape of the interview had been given to Mr. Ellison. He also wanted to know what the police were going to do about it.

[78] Mr. Nissen testified that the officers said they would talk to Mr. Ellison. They would check into the making of a videotape and the reported release of it.

[79] Mr. Nissen testified that Officer Price called the next day. Officer Price told him that there had been a videotape of the interview and that her name was in a report. Officer Price apologized and said it was unacceptable. He said he would speak to Mr. Ellison. Mr. Nissen did not hear from the police again. Specifically he never heard from anyone about any protection from Mr. Ellison or that the police did anything.

[80] Mr. Nissen testified that the Ellisons watched their every move. Mr. Ellison would make noises like a chicken clucking when he saw them.

[81] Mr. Nissen testified that they had to board up their fence, close the shutters in the kitchen, and close the curtains in the living room. They arranged to go through the backyard of their neighbour in the rear. He said they did not feel safe.

[82] Mr. Nissen testified that they decided they had to move. They sold their house quietly. The only people who knew were John and Helen Ecker. They rented a B&B outside Port Perry

while they waited to move into their new home, which they bought in Seagrave. That house needed a lot of work. His commute to and from work is now much longer.

[83] Mr. Nissen testified that his wife is not the same person as she was. She is scared all the time. She is not happy. She is depressed. She is not outgoing or confident.

[84] Mr. Nissen testified that his wife's situation affects their children. They do not have their mother's full attention, or her drive.

[85] Mr. Nissen testified that his wife's sleep is affected. It is hard for her to fall asleep, and when she does she does not sleep soundly. Sometimes she panics if he comes into the room. Socially, she does not want to go anywhere in Whitby. She does not want to meet new people, including her neighbours.

[86] There are triggers that set off a reaction for Ms. Stack. They include loud noises, a ticking motor or the backfire of a car.

[87] Mr. Nissen testified that his own life has been affected. There is a great strain on him. He is afraid for the safety of his family. He is depressed. There has been the loss of his home and his neighbourhood. There is stress in their relationship.

[88] On cross-examination, Mr. Nissen acknowledged that he could not say how much time he has lost from work as a result of the events, or that he has lost any income. At most, he has lost \$400 per month as an expense allowance, and an undefined amount as a result of losing the override from the sales of another employee.

[89] Ken Rumak testified. He said he was contacted by Ms. Stack on or about February 8, 2002. She asked him if he knew anybody on the law enforcement side. She said some neighbour's kids had some guns and they were taking them to school. He told her he knew someone on the police force.

[90] Mr. Rumak testified that Ms. Stack said "Look, I don't wanna get my name out; I don't wanna get involved in, in that, but if you can find out and get some advice then, you know, that would be great."

[91] Mr. Rumak testified that he called Officer Liepsig, who was someone on the force that he had some dealings with. He told the officer that a friend of his had come across a situation where there were two kids that had guns and they were going to school with the guns. He told the officer that this person had said "Don't tell anybody my name. I don't want to get involved and have my name going around."

[92] Mr. Rumak testified that Officer Liepsig said he had to talk to Mr. Rumak's friend. He said "Well, she doesn't want to be known. She doesn't, you know, want her name to get around." The officer said when you're dealing with guns, this is a serious matter, and he said Mr. Rumak

had to tell him her name. Mr. Rumak felt that he was betraying Ms. Stack but felt he had no choice and so he gave the officer her name.

[93] Mr. Rumak called Ms. Stack and told her about the conversation. Ms. Stack was upset that Mr. Rumak had given out her name but she understood that he was in a situation where he had no choice.

[94] Mr. Rumak testified that Ms. Stack asked him to drive her to the police station, which he did. Mr. Rumak confirmed that he was not privy to any conversations between Officer Liepsig and Ms. Stack.

[95] John Ecker testified. He used to live next door to the plaintiffs, at 222 Warden Wilson Avenue. He testified that they became good friends, and still are. He testified that he knew the Ellisons, but not well.

[96] Mr. Ecker testified that Ms. Stack's personality, before these events, was engaging and friendly. She was involved in her church. She was trusting, helpful, happy, and outgoing. After the incidents in question, Mr. Ecker noticed a difference in the behaviour of the Ellisons. He noticed an unusual, constant presence of the Ellisons on the street. He testified that they would stand in front of their home and look in the direction of the plaintiffs' home. He said it was overly frequent and not friendly. He said they were making a point and wanted to be seen. He did not know to what it should be attributed. He testified that the activity included standing and staring, at the front step of their home, or they would walk out to the end of their driveway, fold their arms and stare.

[97] Mr. Ecker testified that after the plaintiffs moved away, he and his wife lied to their children about where the plaintiffs had moved. He said this had to be kept secret. The plaintiffs harboured a fear that the Ellisons would seek reprisals against them.

[98] Mr. Ecker testified that Ms. Stack was much different after these events. It was noticeable. She was under stress, she was guarded, and she was not happy. She was less inclined to take things at face value.

[99] Mr. Ecker testified that after the plaintiffs moved out of the neighbourhood, there was a loss. Before these incidents, there was no suggestion that the plaintiffs would move out of the neighbourhood.

[100] On cross-examination, Mr. Ecker confirmed that he did not report the staring by the Ellisons to the police. He also testified that the police did not contact him or his wife for a statement. He reiterated that the long term effect on Ms. Stack has been marked. She is not happy. She does not trust people. This has left a strong impression on her character.

[101] Helen Ecker testified. Because of her work requirements, Ms. Ecker was not living at home when the events involving Mr. Ellison occurred. Later, after she had moved home, she learned that the plaintiffs would be moving. She said she was devastated. It was only many months later that she learned where they had moved to.

[102] Ms. Ecker testified that before these events, Ms. Stack was warm, trusting, caring, friendly and gregarious. She was welcoming and she was the heart and soul of the community.

[103] After these events, Ms. Stack became fearful and anxious. Her faith in humanity had been damaged. She was down and depressed. She still suffers. She is depressed, anxious and cannot enjoy daily activities such as cooking, cleaning, and communicating with friends.

[104] On cross-examination, she confirmed that she has not observed the effect on Ms. Stack on a daily basis, because she does not see her on a daily basis.

[105] Cathy Whitney testified. She currently lives in Campbellford, but at the time of the events in question she lived at 215 Warden Wilson Avenue, across the road from the plaintiffs and next door to the Ellisons.

[106] Ms. Whitney testified that in February, 2002, some guns were stolen from her home. She said her son told her that the guns had been taken by Patrick Ellison. She was frightened and beside herself.

[107] Ms. Whitney testified that she did not recall talking to Ms. Stack, although she said she could have. She said the police became involved. The Whitneys had not called the police. They were charged and ultimately pled guilty.

[108] Ms. Whitney testified that as a result of disclosure made to her lawyer she found out that Ms. Stack had disclosed the theft of the guns by Patrick Ellison. She said she was relieved. She said she was shocked that Ms. Stack's name had been revealed. She never harboured any ill-will towards Ms. Stack.

[109] She testified that Mr. Ellison never spoke to her again after these events.

[110] On cross-examination, Ms. Whitney testified that the police came within a couple of days. She said she already had retrieved one of the guns, but the other one was in a creek. She said she did not know how the police got the information. She assumed that her husband had gone to the police. She said she did not see the Ellisons threatening the plaintiffs, or leering at them or driving a truck at Ms. Stack.

[111] Christian Nissen testified. He is the son of the two adult plaintiffs. He is now 19 years of age, and is in university.

[112] Christian was about seven years old when the events giving rise to this action occurred. His memory of the events themselves is understandably hazy, but he does recall that there was an incident regarding a boy who had guns that did not belong to him. He recalls the Ellisons watching their home and that it was unnerving.

[113] Christian testified that his mother became very different after the events. She became distant and distraught. She did not want to leave her house, and she does not want to go to Whitby, even now. She becomes quiet when she goes near Whitby. She has sudden adverse reactions if certain triggering events occur, such as loud noises or seemingly innocent events.

[114] Christian testified that his mother goes through depression regularly. She becomes distant and she is not talkative. She is not open and she is not motivated. She goes through periods where she does not sleep well.

[115] Christian testified that his mother is nervous in public. She overreacts to events. She is difficult in crowds and is not relaxed. She has diminished confidence. She is suspicious of strangers although she is friendly towards them. She does not go out often. When she does she is nervous. She does not want to answer the door and she would prefer that one of her family members do so.

[116] Christian testified that his mother's situation has affected him detrimentally. He is reluctant to bring things up with his mother. He does not know how she will take certain subjects. There is a strain on their relationship. There is not as much openness as there should be. As a result, Christian tries to deal with matters alone or discuss them with his father.

[117] Christian testified that his mother is not able to do normal housekeeping tasks such as cleaning, washing dishes and things of a similar nature. He testified that if someone gives his mother bad news, it produces an excessive reaction.

[118] On cross-examination, Christian acknowledged that when the events in question occurred he only knows what his mother was like in general terms. He is not able to give details. He recalls that she was generally active and talkative, and was not depressed all the time. He recalls that she volunteered, and she still does. She was involved in church, and she still is.

[119] Morgan Nissen testified. He is currently in grade 10 and is 15 years old. He was two years old when the events in question occurred.

[120] Morgan testified that his mother is often depressed and in despair. Ordinary events can produce much stress. For example, if she is late for church she becomes frantic and in a panic.

[121] Morgan testified that on one occasion he slipped on the stairs causing a loud noise. His mother went into a panic, she was crying and hyperventilating. Morgan had to sit her down to recover. In fact, Morgan was fine.

[122] Morgan testified that his mother has a deep fear of being followed or watched, and is subject to much suspicion. She always thinks she is in danger.

[123] Morgan testified that his mother has adverse reactions to loud noises, such as screeching tires. Stressful situations can produce adverse reactions.

[124] Morgan testified that his mother does not sleep well. She appears to get only about four hours or less per night.

[125] Morgan testified that his mother seldom does things by herself. She does not go out alone and engage in social events. She could not campaign for re-election as a trustee by herself.

[126] Morgan testified that his life would be better if his mother was not affected by depression and insomnia. He testified that his father's life would also be better. His father works very hard, and then must do chores outside the home and laundry and prepare dinner if his mother is depressed.

[127] Morgan testified that his mother is never happy for extended periods. He is afraid that she will overreact to ordinary events. He is careful to not do things that might set her off, and he is careful about what he says to her. He generally does not tell her about problems he may be having at school.

[128] On cross-examination, Morgan confirmed that he is unable to say how his mother was before the events in question.

[129] Dr. Daniel Silver testified. He is a psychiatrist, and for more than three decades was head of both the in-patient and out-patient departments of psychiatry affiliated with McGill University and the University of Toronto. Currently, he is a consultant to the Department of Psychiatry of Mount Sinai Hospital. He has an extensive curriculum vitae. There was no challenge to his qualifications to give opinion evidence.

[130] Dr. Silver examined Ms. Stack on August 4, 2013. He provided a report, and he testified at this trial. His opinion was based on his interview with Ms. Stack and he also reviewed the pleadings in this action. His opinion is also based on his experience with patients having similar experiences to those of Ms. Stack.

[131] Dr. Silver is of the opinion that Ms. Stack demonstrates symptoms of high anxiety. She has signs of post-traumatic stress syndrome or disorder. She is subject to intrusive thoughts arising from traumatic events. She has a high degree of suspicion and a low degree of trust. She has an increased arousal system arising from noises and somewhat ordinary events.

[132] Dr. Silver testified as to the symptoms of post-traumatic stress syndrome or disorder. He testified that traumatic experiences can give rise to those symptoms. They include depressive episodes, anxiety, flashbacks, intrusive thoughts, and a high degree of suspicion without good

reason. He testified that other events can trigger these symptoms. The disorder or syndrome does not easily go away. The subject can appear to be all right, but any trauma can trigger the symptoms. He testified that even his examination of Ms. Stack triggered symptoms. It appeared to cause a re-traumatization of her.

[133] Dr. Silver testified that the disorder or syndrome is difficult to treat. Some techniques have been developed, but none are extraordinarily effective. None of the treatments attempted so far have met with very high success. The issue is how reasonably a person can achieve a normal life without re-traumatization.

[134] Dr. Silver described the specific symptoms for Ms. Stack. She has a high degree of anxiety. She has a high degree of suspicion and distrust. There are repeated flashbacks, particularly with respect to issues of young boys causing threats. She is concerned that people may be talking about her. She thinks she is being watched. This borders on a paranoid state. Ms. Stack's experience of being watched by her neighbours has spread to a suspicion of being watched by others. When out of her home in town, she is afraid that people are watching her or talking about her.

[135] Dr. Silver testified that Ms. Stack is distrustful of police. She is reluctant to go to them when it might be necessary. Her experience of being identified when she did not want to be identified was very traumatic and led to a dissociated episode. In such a state, the subject appears to be outside himself or herself, and the situation appears unreal. Dr. Silver testified that the incident involving being chased by a neighbour's truck also produced a dissociated state and a feeling of being unreal.

[136] Dr. Silver testified that it is difficult to know what prognosis is reasonable for Ms. Stack. It is hard to know whether her symptoms will disappear or perhaps go underground. He testified that it is not something that a person can simply put away and assume it is gone.

[137] Dr. Silver testified that he reviewed the report of Dr. Jeffries, the expert retained by the defendants. He testified that Dr. Jeffries is highly respected. He noted that there is no real difference of opinion between himself and Dr. Jeffries, and both he and Dr. Jeffries are concerned about potential re-traumatization of Ms. Stack.

[138] On cross-examination, Dr. Silver acknowledged that his opinion is based on one interview with Ms. Stack. He did not review any of her medical records and is not aware of whether she has had counselling or therapy. He acknowledged it would have been preferable to have assessed her closer to the events in question. He also acknowledged that his assessment was based on what Ms. Stack had told him, and obviously it is dependent on the accuracy of what she told him.

[139] Jackie Rooks testified. She has been a friend of Ms. Stack for a long time.

[140] Ms. Rooks testified that on February 7, 2002, she received a call from Ms. Stack, who described the incident during which she discovered that two neighbourhood boys apparently had guns. Ms. Rooks encouraged Ms. Stack to speak to the police. Ms. Stack asked her if she knew anyone in the police force that Ms. Rooks could speak to. Ms. Rooks did not know anyone. She understood that Ms. Stack ultimately went to another friend for a police contact and then spoke to the police.

[141] Ms. Rooks testified that subsequently things were not good. Ms. Rooks testified that Ms. Stack was afraid of a neighbour, Mr. Ellison.

[142] Ms. Rooks testified that she herself observed one particular incident involving the Ellisons. She drove to Ms. Stack's residence and when she arrived she herself was watched by the Ellisons. They were at the end of their driveway watching Ms. Stack's house. Ms. Rooks looked out the window and could see them. She said they were there watching the Stacks' residence for about two or three hours.

[143] Ms. Rooks testified that Ms. Stack's personality before these events was outgoing. She was well-liked by the neighbours, and she participated in school and church activities.

[144] After the events, Ms. Stack became fearful and had low self-esteem. Ms. Rooks testified that she has observed Ms. Stack for over 12 years since the events. She has never seen her get back the "spark" she once had.

[145] Ms. Rooks testified that Ms. Stack and her family had to move away, and Ms. Stack hates her new home even now.

[146] Ms. Rooks testified that there are things that set Ms. Stack off. She becomes anxious if she comes near to her old area. She is afraid she is being followed. If she sees a police officer she freezes and takes deep breaths. She does not trust strangers. She is often anxious and quiet.

[147] Alan Brooks testified. He is the President of Stonecore Group, and has been for 35 years. It is now a company with \$90 million in sales annually.

[148] Mr. Brooks testified that Chad Nissen joined Stonecore 22 or 23 years ago as an engineer. He is now a salesperson with a territory that runs approximately from Barrie to the Durham region. The company has about 90 salespeople, and Mr. Nissen is one of the top five or ten.

[149] Mr. Brooks testified that in the spring of 2002, Mr. Nissen came to his home, visibly upset. He described an incident involving children in the neighbourhood and stolen guns. He testified that Mr. Nissen told him his wife was very upset because she had had a discussion with the police on the understanding that she would be anonymous. The affected neighbours discovered that she had spoken to the police and began to intimidate her by verbal means and staring at the

house. The neighbour had run at her with a truck. They did not feel safe in their home and were thinking of moving away.

[150] Mr. Brooks testified that they had a long conversation. He suggested Mr. Nissen not move from Whitby and that it would be more difficult for him if he moved to Seagrave. He was more valuable where he was.

[151] Mr. Brooks testified that ultimately the plaintiffs moved. Mr. Brooks had made Mr. Nissen a District Manager but after the move it did not work out. Thus, he changed him back to his old job in 2003. He testified that it is possible that he might become a District Manager again if Mr. Nissen is ready.

[152] Mr. Brooks testified that there are differences in Ms. Stack since these incidents. Before they occurred, she was successful, outgoing, friendly and confident. After, she has become insecure.

[153] On cross-examination, Mr. Brooks acknowledged that Mr. Nissen has done well with the company since these incidents occurred. Since he has moved to Seagrave, he remains in the top five salespeople. He earns straight commission, so the more he sells, the more he earns.

[154] Isabel Pargana testified. She has been an Assistant Crown Attorney since January, 2000.

[155] Ms. Pargana testified that she vetted the Crown brief that gave rise to the prosecution of Patrick Ellison in March, 2002. There was nothing in the Crown brief respecting any promises made by the police regarding confidentiality for Ms. Stack. She testified that no police officer brought to her attention the fact that Ms. Stack had said the police should not let anyone know, or that a police officer said that the matter was between him and Ms. Stack. No one told her that the police officer said that stuff does not get disclosed and the public does not get to see it.

[156] Ms. Pargana testified that if she had known that any such statements had been made, she would have consulted someone for advice. However, no one pointed this out to her. She testified that it is the police who decide what is in the brief.

[157] Ms. Pargana testified that with respect to video statements, the police deal with them through a video unit. She testified that the police never told her that Ms. Stack did not want anyone to know about the discussion with the police. She said it was impractical for the Crown to review the videotape before disclosure.

[158] On cross-examination, Ms. Pargana testified that there was nothing in the Crown brief that would have suggested that there was any issue about Ms. Stack's safety nor was there anything that would have suggested that she had any concern about her neighbours. There was nothing that would have indicated that there was an issue about confidentiality. She testified that it is the obligation of the police to disclose all information to the Crown.

[159] Ms. Pargana testified that members of the public cannot get copies of the Crown brief, though she acknowledged that she does not know whether it can be obtained through Freedom of Information legislation. She is not familiar with the practice of the police regarding confidential informant status. She agreed that it is not unusual to have witnesses that are reluctant to testify.

[160] Brenda Cowie testified. She was an Assistant Crown Attorney in Durham from 2001 to 2006. She was involved in the case involving Sean and Patrick Ellison and reviewed the Crown worksheet and screening brief. She testified that there was no note in the brief regarding any issue as to confidentiality of Ms. Stack.

[161] Ms. Cowie testified that she did not review Ms. Stack's video statement. Nothing was drawn to her attention as to Officer Liepsig making any promises to Ms. Stack. There was nothing to indicate that Ms. Stack wanted to remain anonymous. She testified that any such issue would be dealt with by the police.

[162] On cross-examination, Ms. Cowie testified that there were no concerns as to Ms. Stack's safety, and there was nothing in the brief about it. She testified that the fact that some neighbours were involved in the suspected crime did not change anything, as this is not unusual. She testified that she has vetted many Crown briefs, and the existence of formal confidential informants is rare.

[163] The evidence for the defendants commenced with the testimony of Officer James Liepsig. He has been with Durham Police since June, 1986. He became a detective in 2003, and in February of 2002 he was a detective constable.

[164] On February 8, 2002, Officer Liepsig spoke to Ms. Stack. He had had a call from Ken Rumak at 12:45 p.m. Officer Liepsig had had some previous dealings with Mr. Rumak.

[165] Officer Liepsig testified that Mr. Rumak told him he knows a person who has a very upset friend, who had had some handguns stolen from her home and that a 15 year old child was involved. He said Mr. Rumak told him that this person would not be available until later in the afternoon. Mr. Rumak gave him Ms. Stack's telephone number.

[166] Officer Liepsig testified he did a reverse telephone look-up and discovered Ms. Stack's address. He said he called her number at 1:22 p.m. and left a message asking her to call him.

[167] Officer Liepsig testified that Ms. Stack called at 1:30 p.m., as a result of which she agreed to come to the police station to talk to him. Officer Liepsig did not recall that Ms. Stack raised any concerns. He testified he gave her no assurances and did not recall that there were any requests from her. He said it was her decision to come.

[168] Ms. Stack came to the front desk at the police station and from there she and Officer Liepsig walked to an interview room. Officer Liepsig did not recall any conversation during that

period and particularly did not recall any conversation regarding confidentiality or anonymity. He testified that he gave Ms. Stack no assurances.

[169] Officer Liepsig testified that there are signs in the police station that indicate that people are subject to video recording.

[170] Officer Liepsig testified that if any assurances of confidentiality or anonymity had been given, he would not have met Ms. Stack at the police station and she would not have been videotaped. He testified that if Ms. Stack had not come to the station to speak to him, he would have got other officers to do door knocking and speak to others.

[171] Officer Liepsig testified that Ms. Stack's demeanour was fine when they met. He testified that she told him that guns had gone missing and that Sean and Patrick Ellison may be responsible. She said they were nice boys but there had been issues about babysitting. She said she liked the Ellisons, and there was nothing negative to say about them. She understood the guns were from the Whitneys' gun safe. They had been taken out of the house and disposed of in a creek.

[172] Officer Liepsig testified that there was no discussion about informant status for Ms. Stack or confidentiality. He testified she asked for no assurances in exchange for giving the interview.

[173] Officer Liepsig testified that at the end of the interview Ms. Stack raised a concern about her husband finding out about the interview, and some information becoming public. He testified that because a young offender was involved the only people who would know would be the people directly involved, that is, the Ellisons and the Whitneys. He said the public could conceivably find out through freedom of information legislation.

[174] Officer Liepsig testified that that Ms. Stack appeared to be concerned about information going outside her neighbourhood. Officer Liepsig testified that he conveyed to her that any information beyond the people involved would not be "out there". He testified that there was no other discussion regarding confidentiality. In any event, confidentiality did not appear to be an issue because Ms. Stack had spoken to Mr. Rumak already.

[175] Officer Liepsig testified that he has been involved in cases involving confidential informants. That involves getting information from a person regarding criminal activities. He said that there are certain ground rules regarding a confidential informant that must be spelled out ahead of time. That includes that the fact that a confidential informant must not tell anyone else that he or she is a confidential informant. Secondly, such a person cannot be a witness in any proceedings.

[176] Officer Liepsig testified that the Durham Regional Police have a formal policy regarding confidential informants. He testified that the policy spells out different types of informants, and

Ms. Stack does not fit any of them. Typically, an informant is a person who provides information in exchange for money or for consideration in dealing with outstanding charges against that person.

[177] Officer Liepsig testified that there is a pre-approval process for someone to become a confidential informant. It includes signing a contract. The police Intelligence Branch is involved. The informant is assigned a specific number.

[178] Officer Liepsig testified that he interviewed Patrick Ellison at 8:47 p.m. on the same day he had interviewed Ms. Stack. Ultimately, Patrick gave a statement and he was released on a Promise to Appear. One gun had been recovered from the creek, and the next day he and Officer Price picked Patrick up so that he could show them where the other gun was.

[179] Officer Liepsig testified that he was subsequently reassigned, so Officer Price or Officer Fitzgerald prepared a synopsis of Ms. Stack's interview. The synopsis did not convey any concerns about Ms. Stack or confidentiality.

[180] Officer Liepsig testified that sometime later, either Officer Price or Officer Fitzgerald told him that Mr. Ellison had to be spoken to regarding an issue that had come up involving Ms. Stack. Officer Liepsig testified that he had no involvement in this. He had no further contact with respect to this matter.

[181] I should note that Office Liepsig did not dispute the fact that he had not told Ms. Stack that she was being videotaped. His notes are very sketchy, and contain no reference to the discussion that was held with Ms. Stack, that was captured on videotape, about some level of confidentiality. Nor do his notes contain any details about his telephone conversation with Ms. Stack, nor do they mention anything about any conversation he may have had with Ms. Stack when she arrived at the police station. His evidence as to what was discussed with Ms. Stack about confidentiality, and why, does not accord with what is on the videotape.

[182] On cross-examination, Officer Liepsig acknowledged that his notes are not detailed, and he does not have a very good recollection of the details. He had no recollection of the conversation with Ms. Stack when she telephoned, nor does he have any recollection of the conversation with her after she arrived at the police station.

[183] Officer Liepsig was questioned about his evidence in chief that Ms. Stack was concerned about her husband finding out about the interview, and being concerned about the information getting out in the community. He agreed that none of this was in his notes. He testified that he recalled this from the interview. He did not recall some of the statements that were recorded on the video. He did not recall Ms. Stack saying anything about not letting anyone know. He acknowledged that when it was recorded on the video that he said "This is between you and I", there was no indication that he said the information would only go to people involved in the case. He did not recall saying "This stuff doesn't get disclosed." He said he understood that Ms. Stack

was concerned about information being out in the media. He acknowledged, however, that Ms. Stack never said anything about that.

[184] Officer Liepsig testified that he did not see the disclosure that was furnished to the Ellisons. He acknowledged that Ms. Stack's name was in the disclosure, and he assumes that the videotape was disclosed.

[185] Officer Liepsig acknowledged that he took no steps to protect the identity of Ms. Stack, or to ensure that the information remained between Officer Liepsig and Ms. Stack, or that it would not be disclosed. He acknowledged that he did not keep his promise that the information would be maintained between himself and Ms. Stack, and that it would not be disclosed.

[186] Officer Liepsig acknowledged that while the police have specific regulations about confidential informants, he would not expect ordinary people to know what those regulations are. He would not expect Ms. Stack to use the word "informant" in discussing confidentiality.

[187] Officer Liepsig insisted that there could be no confidentiality for Ms. Stack because she had already told Ken Rumak about the matter.

[188] Officer Liepsig acknowledged that he did not tell Officer Price or Officer Fitzgerald about the promise that he had made that was captured on videotape. Nor did he tell the Crown Attorneys or the videotape unit in the police station.

[189] Officer Liepsig insisted that he understood that Ms. Stack had a concern that she did not want her husband to know that she had come to the police station, although there was nothing on the videotape about the matter.

[190] Officer Liepsig testified that there were incidents involving Ms. Stack and Mr. Ellison, that he heard about subsequently. One of them involved Ms. Stack and a vehicle operated by Mr. Ellison.

[191] Officer Liepsig testified that this would have been a serious matter and there should have been a thorough investigation. He said he would have interviewed the complainant and would have spoken to the driver. He understood that one of the officers spoke to the person involved. He acknowledged that he never got back to Ms. Stack after he heard about the matter.

[192] Officer Sean Fitzgerald testified. He has been with Durham Police for 25 years. He is a staff sergeant, and in 2002 was a detective.

[193] Before 2002, he was with the Intelligence Branch. While there, he dealt with confidential informants. He testified that a confidential informant provides confidential information to the police in exchange for cash or for consideration regarding outstanding charges. A confidential informant will not testify.

[194] Officer Fitzgerald testified that there are specific policies regarding confidential informants that must be followed in order for a person to become one. Approval must be given by the Intelligence Branch for a person to become a confidential informant. Information is submitted to the Intelligence Branch, who will do an assessment. Ultimately, there will be a specific manager for a confidential informant.

[195] Officer Fitzgerald was involved in the case at hand. He testified that on February 11, 2002, he was assisting Officers Liepsig and Price investigating handguns. He drafted the warrant involved in the case.

[196] Officer Fitzgerald reviewed the witness statements, including the videotape. He made summaries of the witness statements.

[197] They ultimately appeared in the Information to Obtain that was used for the warrant. He had no concerns about Ms. Stack's safety, as it appeared to be an issue between neighbours.

[198] Officer Fitzgerald was involved in preparing the Crown brief and the checklist for it. He said the videotaped statements were run through the disclosure unit. No consideration was given to redacting or not disclosing the video statement involving Ms. Stack. He said if he had known that Ms. Stack wanted anonymity, he could have sealed the Information to Obtain.

[199] Officer Fitzgerald testified that he was involved in talking to Mr. Ellison after hearing about the concern raised by Ms. Stack and her husband. He said he called Mr. Ellison, who said Mr. Nissen had already called him. He said he told Mr. Ellison that he should not be talking to potential witnesses and should not be saying anything that might be interpreted as a threat. He said Mr. Ellison understood, and it did not seem to be an issue. He said Mr. Ellison was cooperative.

[200] On cross-examination, Officer Fitzgerald said he never himself spoke to Mr. Nissen about the issue involving Mr. Ellison. He said he got the relevant information from Officer Price.

[201] Officer Fitzgerald could not recall if he had been told the Ellisons had been constantly watching Ms. Stack's home. He said he had never heard of a threat given by Mr. Ellison. He said it would have been of concern. He said he was not told that Mr. Ellison was really angry at the plaintiffs. It would have been important to know that. He said that if he had known these details, he would have had Officer Price follow up or he would have seen Mr. Ellison personally as well as Ms. Stack. He did not do this because he did not know the details.

[202] Officer Fitzgerald acknowledged that Ms. Stack's name and address were provided as part of the disclosure. He acknowledged that he did not tell the Crown that Ms. Stack had asked for no disclosure. If he had known it had been asked for he would have spoken to Officer Liepsig about it.

[203] Officer Fitzgerald was shown the typewritten notes of the conversation between Mr. Nissen and Mr. Ellison, that occurred on April 3, 2002. He testified that Officer Price did not show him this document. He testified that Officer Price did not tell him that there had been any threat made by Mr. Ellison.

[204] Officer Fitzgerald acknowledged that he prepared a written incident report regarding his conversation with Mr. Ellison. He agreed that his report contained the statement "Mr. Nissen indicated that Mr. Ellison was leering at Mr. Nissen's wife and he felt intimidated by Mr. Ellison's presence." He said he got the information about Mr. Ellison "leering" from Officer Price.

[205] Officer Fitzgerald also acknowledged that his report contains the statement "During my conversation with Mr. Ellison he indicated that Mr. Nissen had called him on April 3, 2002, and Mr. Nissen accused him of a number of things related to Mrs. Stack providing the police with information relating to an ongoing investigation." Officer Fitzgerald did not recall what that related to.

[206] Officer Fitzgerald did not recall if he had told Mr. Ellison to stop leering. He testified that he did not know that the Ellisons were watching on a daily basis, nor did he know the extent of any leering. He did not know that Mr. Ellison had driven his vehicle at Ms. Stack. No one had told him. He said he relied on Officer Price for the information.

[207] On re-examination, Officer Fitzgerald stated that he found it noteworthy that Mr. Nissen had called Mr. Ellison before calling the police. He said that if Mr. Nissen was really concerned, it was surprising that he did not contact the police first.

[208] Officer Mark Price testified. He has been with the Durham Police for 27 years, and he became a detective in March, 2000.

[209] Officer Price testified that he attended the police station on February 8, 2002 and was told there was an issue about stolen guns and Patrick Ellison. He and Officer Liepsig attended at Warden Wilson Avenue. While there, he saw two boys coming from the Ellison's residence. At the rear of the school, he saw them smoking marijuana. He apprehended them. Ultimately, they gave statements.

[210] Officer Price prepared an incident report dated February 11, 2002. No consideration was given to redacting any of it.

[211] Officer Price prepared the checklist for the Crown brief. A check mark appears beside the video statement as something to be included.

[212] Officer Price testified that he met Mr. Nissen on April 4, 2002. Mr. Nissen came into the station. He said he was having a problem with Mr. Ellison. He wanted to record the interview, but Officer Price declined to allow it. Mr. Nissen said his wife was concerned about intimidation on

the street, and Mr. Nissen wanted someone to speak to Mr. Ellison. Officer Price testified that he arranged for Officer Fitzgerald to do. He said Mr. Nissen did not give him anything to look at.

[213] Officer Price testified that he told Mr. Nissen he would take care of it. He contacted Officer Fitzgerald and explained the “rules of engagement” regarding any discussion with Mr. Ellison.

[214] On cross-examination, Officer Price acknowledged that Mr. Nissen was upset when he spoke to him. He said he did not make notes of the conversation. He said he understood that Mr. Ellison was driving up and down the street and living his life and looking intimidating. He made scanty notes. He said he did not recall any allegations of threats. He did not recall any allegations that the Ellisons were watching. He made no notes about it. He made no notes about any allegations that Mr. Ellison had driven his truck, that gravel had been thrown at Ms. Stack when the truck’s tires spun.

[215] Officer Price acknowledged that he did not speak to Mr. Nissen about his conversation with Mr. Ellison to tell him what happened, nor did he direct anyone else to do so.

[216] Officer Price acknowledged that he did not review the videotaped statement given by Ms. Stack. He was not aware that Officer Liepsig had said that it would not be disclosed or that it was between him and Ms. Stack. He was not aware of any promises.

[217] Before leaving the defendants’ evidence, I should note that during the trial, counsel for the plaintiffs told me that she had been advised by counsel for the defendants that Mr. Ellison might be called as a witness for the defendants. This was not contradicted by counsel for the defendants. Mr. Ellison was not, in fact, called as a witness.

[218] I also note that Dr. Jeffries, the expert retained by the defendants, was not called as a witness. Dr. Silver’s evidence that there is no real difference of opinion between himself and Dr. Jeffries was not refuted.

Submissions

[219] Ms. Hoy, counsel for the plaintiffs, submits that the defendants should be found liable to the plaintiffs, and should be required to pay substantial damages.

[220] Ms. Hoy submits that Ms. Stack was promised confidentiality by the police, and it was not observed.

[221] Ms. Stack had become aware, from Cathy Whitney, that one of the Ellison boys may have stolen guns from the Whitneys and may be threatening students at school. Because the suspected criminal activity involved a close neighbour, Ms. Stack did not want to be involved and did not want her name to be out there as the source of any information.

[222] For this reason, Ms. Stack approached a friend, Ken Rumak, and asked if he knew anyone in the police force. She specifically told him that she did not want her name known. Mr. Rumak said he would talk to a contact at the police force.

[223] Ms. Stack was shocked to receive a message from Officer Liepsig, because it meant that Mr. Rumak had disclosed her name.

[224] When Ms. Stack talked to Officer Liepsig on the phone, she made it clear that she did not want to be involved or her name to be known. It was only on the basis of a promise of confidentiality that she agreed to go to the police station and talk to Officer Liepsig.

[225] Unbeknownst to Ms. Stack, her interview with Officer Liepsig was videotaped. It is clear from the videotape and a transcript of the interview that the promise of confidentiality was repeated at the end of the interview. Officer Liepsig stated “This is between you and I”, and “That stuff doesn’t get disclosed. It’s not made available to the public so you don’t have to worry about that.”

[226] Ms. Stack testified that the promise of confidentiality had been repeated by Officer Liepsig when she arrived at the police station, and was repeated again when she left the police station.

[227] Ms. Hoy submits that to the extent that there are any differences between the evidence given by Ms. Stack and the evidence given by Officer Liepsig, the evidence of Ms. Stack should be preferred.

[228] It makes no sense, Ms. Hoy submits, that any discussion of confidentiality would have occurred in a casual way only at the end of the interview. In context, it is clear that that discussion was part of a more extensive discussion of confidentiality that had occurred earlier.

[229] Furthermore, Officer Liepsig’s explanation for what he said during the interview is not credible. His evidence that Ms. Stack was concerned about her husband finding out about the interview and being concerned about the information getting out in the community is not reflected on the videotape or in the transcript. Nor is it in his notes. His explanation that “This is between you and I” meant that the information would only go to people involved in the case is also not reflected in the videotape or in the transcript. His evidence that he understood that Ms. Stack was concerned about information being out in the media was not the subject of any discussion by Ms. Stack in the interview.

[230] Ms. Hoy submits that it is far more logical to conclude that what was captured on the videotape reflects exactly what it appears to be – a promise of confidentiality. Ms. Stack testified that she would not have gone to the police station to be interviewed unless such a promise had been made.

[231] Ms. Stack's desire for confidentiality has been manifested throughout, from the point at which she discovered the possibility of criminal activity until the day she discovered that her confidentiality had not been observed. After her name and involvement were disclosed, her worst fears were realized.

[232] On a balance of probabilities, Ms. Hoy submits that a promise of confidentiality was given to Ms. Stack in exchange for her providing information about suspected criminal activity by a neighbour.

[233] Ms. Hoy submits that no particular formalities are required in order to create informer privilege. All that is required is a promise of confidentiality in exchange for information. The fact that police forces have detailed policies and procedures regarding confidential informants is not relevant. Ordinary citizens, such as Ms. Stack, cannot be expected to know about such policies and procedures. Neither is it relevant that Ms. Stack does not fit the normal profile of a confidential informant, who is often a criminal who provides information in exchange for cash or consideration regarding outstanding charges.

[234] Ms. Hoy submits that the purpose of the privilege is two-fold: to encourage people to come forward with information about criminal activity, and thus further society's interest in combating crime; and to protect the informer from retribution.

[235] Ms. Stack was not protected from retribution. She was intimidated and harassed by the very people she was afraid might cause her harm if her identity was disclosed. Jim Ellison drove at her with his truck, causing her serious emotional harm. Furthermore, the Ellisons intimidated and harassed Ms. Stack and her family by leering and staring at them relentlessly. Ultimately, the situation became so bad that Ms. Stack and her family had to move away. They sold their dream home and moved to another home in Seagrave that, while larger, was not what they wanted. They lost the benefit of all of the improvements in their dream home and had to spend money to make the new home liveable. Ms. Hoy submits that Ms. Stack suffered serious emotional and psychological harm as a result of the disclosure of her identity. In addition, she lost opportunities for employment, and her husband's employment was adversely affected.

[236] Ms. Hoy submits that Ms. Stack and her husband have suffered a loss on the sale of their home in Whitby, and have been required to expend money in the course of purchasing their new home and in upgrading it. She submits that Ms. Stack has lost money as a result of lost opportunities for employment, and Mr. Nissen has lost money in his employment.

[237] Ms. Hoy submits that as a result of the emotional and psychological harm to Ms. Stack, there should be significant general damages awarded, including aggravated damages. Furthermore, Mr. Nissen and the parties' two children, Christian and Morgan, have suffered a loss of guidance, care and companionship and are entitled to damages pursuant to the *Family Law Act*. Ms. Hoy submits that in the circumstances, there is a breach of [s.7](#) of the *Canadian Charter of*

Rights and Freedoms and damages for that breach are appropriate. Furthermore, punitive damages are appropriate.

[238] Ms. Maxwell-Baker, counsel for the defendants, submits that the action should be dismissed.

[239] Ms. Maxwell-Baker submits that to become a confidential informant, the informant must request the privilege and receive an assurance of confidentiality from a police officer. She submits that the promise of confidentiality is, essentially, a condition precedent to the informant agreeing to provide information to the police.

[240] Ms. Maxwell-Baker submits that the only concrete evidence of any assurances is on the videotape of the interview. There is conflicting evidence as to whether any other assurances were given. Officer Liepsig testified that no such assurances were given. He testified that if Ms. Stack wanted informant status he would not have met her at the police station or videotaped the interview. Furthermore, he would have had to obtain approval from the Intelligence Branch to grant informant status.

[241] Ms. Maxwell-Baker submits that the mere fact that a person wishes to remain anonymous does not create a duty on the part of the police to treat the person as a confidential informant. That status arises only where the police agree to maintain confidentiality in exchange for information.

[242] Ms. Maxwell-Baker submits that at no point during the interview did Officer Liepsig expressly tell Ms. Stack that she would be a confidential informant. Furthermore, the assurances he gave were not designed to elicit information. Ms. Stack had already told him what she had to disclose.

[243] Officer Liepsig testified that because Ms. Stack had already spoken to Mr. Rumak and Ms. Whitney, the information was no longer confidential.

[244] Ms. Maxwell-Baker acknowledges that confidential informant status may arise by implication. However, that is not the case here. One must examine all the circumstances, including the actions of all parties and their respective perceptions. In this case, having regard to Ms. Stack's subsequent interactions with others, including her neighbours, she was not behaving as if she had a subjective belief that her identity was confidential.

[245] Ms. Maxwell-Baker submits that confidential informant status is rarely granted. A specific protocol must be followed, including performing a CPIC search, the assignment of a code, the assignment of a handler, and the signing of a contract. None of these steps were taken. The fact that they were not taken suggests that the police did not intend to regard Ms. Stack as a confidential informant, and did not promise her confidentiality in exchange for information.

[246] None of the police or Crown attorneys had any concerns about Ms. Stack's safety.

[247] In the circumstances, a reasonable person in the position of Ms. Stack could not have believed that she was a confidential informant. The police did not believe she was. Thus, there is no basis for a finding of implied privilege.

[248] Ms. Maxwell-Baker submits that even if Ms. Stack was entitled to confidential informant privilege, a breach of the privilege does not give rise to an action at common law. She points out that there is no reported decision in which monetary damages have been awarded. The only authority is an obiter comment in one Supreme Court of Canada decision.

[249] Ms. Maxwell-Baker submits that in these circumstances there is no private law duty of care. In order to succeed, in a case where such a duty of care has not been previously recognized, a plaintiff must satisfy both prongs of the two-stage *Anns/Cooper* test:

(a) is there a sufficiently close relationship between the parties such that it was reasonably foreseeable that negligence on the part of the police would cause harm to Ms. Stack?

(b) if the answer to (a) is in the affirmative, are there any residual policy considerations that ought to negate or limit the *prima facie* duty of care?

[250] Ms. Maxwell-Baker submits that there was no sufficiently close relationship between the parties. Officer Liepsig had one interaction with Ms. Stack. There was nothing unique about his dealings with Ms. Stack. There was nothing more than a general relationship between the police and Ms. Stack. This is not sufficiently proximate to give rise to a private law duty of care.

[251] Furthermore, there is no evidence that the defendants were aware that if Ms. Stack's identity was not protected, she would be exposed to harm. The police and the Crown attorneys did not think this situation was unusual, and did not think any harm might result.

[252] Even if the parties are sufficiently proximate, broader policy considerations would negate the imposition of a duty. This is particularly so given that confidential informer privilege can arise by implication. The task of the police will be undermined if the police fear lawsuits and, before receiving information from a complainant, feel compelled to explain the privilege and explain that providing information may place the person at risk if their identity is disclosed. This would inevitably deter people from reporting crimes and providing police with information. It would also lead more people to insist on a guarantee of confidentiality. This would obstruct the free flow of information between the public and the police, thereby jeopardizing efforts to encourage investigation of crime and the public interest in preventing crime.

[253] Ms. Maxwell-Baker submits, in any event, that there is no evidence as to the appropriate standard of care in a case such as this. There must be evidence to show what a reasonable police officer would be expected to do in similar circumstances. None was called.

[254] Ms. Maxwell-Baker submits that even if there is a private law duty of care, and the standard of care was breached, there must be evidence that any damages and losses were caused by the breach. A plaintiff must show on a balance of probabilities that “but for” the defendants’ breach of duty, the injury would not have occurred.

[255] In a case such as this, where psychological injuries are alleged, the question is, as a result of pre-existing conditions, was there a material risk that the plaintiff would have developed her current problems notwithstanding the defendants’ conduct? There is an issue as to whether Ms. Stack’s condition was caused by the Ellisons as opposed to any conduct by the police. Finally, the plaintiffs must show that the damage suffered was not too remote. In other words, it must be shown that the harm suffered was reasonably foreseeable in the circumstances. It must be the kind of harm that would be suffered by a reasonable person in the position of the plaintiff. Where psychological injuries are alleged, the plaintiff must show that it was foreseeable that a person of ordinary fortitude would suffer psychological injury in the circumstances.

[256] Ms. Maxwell-Baker submits that the damages alleged in this case are too remote.

[257] In any event, Ms. Maxwell-Baker submits that the plaintiffs have not proven their damages.

[258] Ms. Maxwell-Baker submits that the only evidence as to the claimed psychological damages, arising from post-traumatic stress disorder, was the evidence of Dr. Silver. Ms. Maxwell-Baker submits that his evidence and opinions should be given limited weight. His opinion was based on a single interview, and he did not obtain any medical records. Nor is there any evidence that Ms. Stack received treatment for her psychological injuries. No medical records or counselling records were produced.

[259] Ms. Maxwell-Baker submits that the plaintiffs have not proven that they lost anything as a result of their decision to move from 220 Warden Wilson Avenue. The plaintiffs called no expert evidence to establish that the price they obtained for that property did not include the value of the improvements, nor have they produced sufficient evidence to show that they actually spent \$83,300 on the improvements. Furthermore, there is no evidence that they overpaid for the house that they bought in Seagrave. No expert evidence has been called. Furthermore, they have had the use and enjoyment of any upgrades they have made.

[260] Ms. Maxwell-Baker submits that there is no evidence that Ms. Stack was unable to pursue career opportunities. She had not been employed outside the home since 1996, and she did not intend to re-enter the workforce until at least 2010. It is highly speculative to say that she could have obtained a job as a professional engineer. She would have been at a competitive disadvantage due to her choice to withdraw from the profession of engineering so long ago.

[261] Ms. Maxwell-Baker submits that Ms. Stack’s tenure as a school board trustee in 2013, and a candidate for the position in 2014, belies her inability to obtain work and interact with

others.

[262] Ms. Maxwell-Baker submits that Mr. Nissen has simply not proven that he lost any income. He could not say how much time he lost from work in 2002, nor could he say how much money he lost by not remaining District Manager. He is a highly successful salesperson who derives his income based on performance. He has not disclosed his relevant income information since these events occurred.

[263] Ms. Maxwell-Baker submits that this is not the type of case that warrants punitive damages. Among other things, there is no evidence of bad faith or high-handed conduct. For the same reason, even assuming a breach of s.7 of the *Charter* (and she submits there was not), no damages are appropriate.

[264] I requested written submissions from counsel as to whether the “cap” on general damages that is in place for personal injury cases applies in cases such as this. Ms. Hoy submitted that the cap does not apply. Ms. Maxwell-Baker submitted that it does.

[265] Relevant authorities referred to by the parties and independently considered by me include *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725; *P.(D.) v. Wagg* (2002), 2002 CanLII 23611 (ON SCDC), 61 O.R. (3d) 746 (Div. Ct.); varied 71 O.R. (3d) 299 (C.A.); *R. v. Blain* (1960), 1960 CanLII 218 (SK CA), 127 C.C.C. 267 (Sask. C.A.); *Worthington v. Scribner* (1872), 109 Mass. 487; *Bisaillon v. Keable*, 1983 CanLII 26 (SCC), [1983] 2 S.C.R. 60; *R. v. Hunter* (1987), 1987 CanLII 123 (ON CA), 59 O.R. (2d) 364 (C.A.); *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979; *R. v. Leipert*, 1997 CanLII 367 (SCC), [1997] 1 S.C.R. 281; *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records)*, 1981 CanLII 33 (SCC), [1981] 2 S.C.R. 494; *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421; *R. v. Parmar* (1987), 1987 CanLII 6867 (ON SC), 34 C.C.C. (3d) 260 (Ont. H.C.J.); *R. v. Nguyen*, [2001] O.J. No.1578 (S.C.J.); *Named Person v. Vancouver Sun*, 2007 SCC 43 (CanLII), [2007] 3 S.C. R. 253; *R. v. Named Person B*, 2013 SCC 9 (CanLII), [2013] 1 S.C.R. 405; *R. v. Barros*, 2011 SCC 51 (CanLII), [2011] 3 S.C.R. 368; *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311; *K.T. v. Vranich*, 2011 ONSC 683 (CanLII), [2011] O.J. No. 361 (S.C.J.); *Felix v. Hearne*, [2011] B.C.J. No. 1734 (B.C.S.C.); *Chowdhry v. Burnaby (City)*, [2008] B.C.J. No. 1920 (B.C.S.C.); *James v. Harper*, [2010 O.J. No. 4373 (S.C.J.); *St. Prix-Alexander v. Home Depot of Canada Inc.*, [2008] O.J. No. 25 (S.C.J.); *R. v. Brown*, [1990] O.J. No. 4870 (S.C.J.); *R. v. Basi*, 2009 SCC 52 (CanLII), [2009] 3 S.C.R. 389; *R. v. Kaboni*, [2010] O.J. No. 1163 (O.C.J.); *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 (CanLII), [2007] 3 S.C.R. 129; *Wellington v. Ontario* (2011), 2011 ONCA 274 (CanLII), 105 O.R. (3d) 81 (C.A.); *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537; *Norris v. Gatien* (2001), 2001 CanLII 2486 (ON CA), 56 O.R. (3d) 441 (C.A.); *Project 360 Investments Ltd. (c.o.b. Sound Emporium Nightclub) v. Toronto Police Services Board*, 2009 CanLII 36380 (ON SC), [2009] O.J. No. 2473 (S.C.J.); *Garratt v. Orillia Power Distribution Corp.* (2008), 2008 ONCA 422 (CanLII),

90 O.R. (3d) 161 (C.A.); *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1998), [1998 CanLII 14826 \(ON SC\)](#), 39 O.R. (3d) 487 (Gen. Div.); *Patrong v. Banks* (2013), 5 C.C.L.T. (4th) 126 (Ont. S.C.J.); *Wong v. Kyriacou*, [2009 CanLII 66385 \(ON SC\)](#), [2009] O.J. No. 5067 (S.C.J.); *Meady v. Greyhound Canada Transportation Corp.* (2010), 14 C.P.C. (7th) 361 (Ont. S.C.J.); *Burbank v. R.T.B.* (2007), [2007 BCCA 215 \(CanLII\)](#), 279 D.L.R. (4th) 573 (B.C.C.A.); *Clements v. Clements*, [2012 SCC 32 \(CanLII\)](#), [2012] 2 S.C.R. 181; *M.B. v. 2014052 Ontario Ltd. (c.o.b. Deluxe Windows of Canada)* (2012), [2012 ONCA 135 \(CanLII\)](#), 109 O.R. (3d) 351 (C.A.); *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27 \(CanLII\)](#), [2008] 2 S.C.R. 114; *Vancouver (City) v. Ward*, [2010 SCC 27 \(CanLII\)](#), [2010] 2 S.C.R. 28; *Janiak v. Ippolito*, [1985 CanLII 62 \(SCC\)](#), [1985] 1 S.C.R. 146; *Chaudhry v. Falconer Charney LLP*, [2014] O.J. No. 2502 (C.A.); *Levesque v. Comeau*, [1970 CanLII 4 \(SCC\)](#), [1970] S.C.R. 1010; *Whiten v. Pilot Insurance Co.*, [2002 SCC 18 \(CanLII\)](#), [2002] 1 S.C.R. 595; *McIntyre v. Grigg* (2006), [2006 CanLII 37326 \(ON CA\)](#), 83 O.R. (3d) 161 (C.A.); *Andrews v. Grand & Toy Alberta Ltd.*, [1978 CanLII 1 \(SCC\)](#), [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George)*, [1978 CanLII 12 \(SCC\)](#), [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978 CanLII 2 \(SCC\)](#), [1978] 2 S.C.R. 287; *ter Neuzen v. Korn*, [1995 CanLII 72 \(SCC\)](#), [1995] 3 S.C.R. 674; *Cinar Corporation v. Robinson*, [2013 SCC 73 \(CanLII\)](#), [2013] 3 S.C.R. 1168; *Young v. Bella*, [2006 SCC 3 \(CanLII\)](#), [2006] 1 S.C.R. 108; *S.Y. v. F.G.C.* (1996), [1996 CanLII 6597 \(BC CA\)](#), 30 C.C.L.T. (2d) 82 (B.C.C.A.); *R. v. Y.(X.)* (2011), [2011 ONCA 259 \(CanLII\)](#), 105 O.R. (3d) 433 (C.A.); *Fiddler v. Chiavetti* (2010), [2010 ONCA 210 \(CanLII\)](#), 317 D.L.R. (4th) 385 (Ont. C.A.); *Ashby v. White* (1790), 2 Ld. Raym. 938; 92 E.R. 126; *Simmons v. Consolidated Brokers Ltd.*, [1948 CanLII 250 \(BC CA\)](#), [1948] 2 D.L.R. 458 (B.C.C.A.); *Freeman-Maloy v. Marsden* (2006), [2006 CanLII 9693 \(ON CA\)](#), 79 O.R. (3d) 401 (C.A.); *Degennaro v. Oakville Trafalgar Memorial Hospital* (2011), 81 C.C.L.T. (3d) 165 (Ont. C.A.); and *Hanke v. Resurface Corp.*, [2007 SCC 7 \(CanLII\)](#), [2007] 1 S.C.R. 333.

Analysis

[266] Legally, this case is not one that is easy to resolve. It raises issues that are somewhat fundamental in tort law. Assuming Ms. Stack is an informer, and is entitled to informer privilege, does she have a civil cause of action against the police if the privilege is breached? Is there any duty owed to her personally that can give rise to a civil cause of action? Or, is the duty one that is owed to the public and to the administration of justice only, in order to encourage people to disclose criminal activity?

[267] I will consider the issues in dispute under the following headings:

- a) What is the nature of informer privilege and how does it arise?
- b) Was Ms. Stack entitled to informer privilege?
- c) Does informer privilege give rise to a private law duty to the informer?
- d) Do the *Anns/Cooper* tests require that a private law duty be negated on policy grounds?

e) What damages, if any, are appropriate?

[268] I will consider each of these issues in turn.

a) What is the nature of informer privilege and how does it arise?

[269] Informer privilege is of ancient origin. In *Bisaillon v. Keable*, *supra*, the principle was described by Beetz J. for the Supreme Court of Canada, at p.105, as follows:

The rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed.

[270] In *R. v. Leipert*, *supra*, McLachlin J., as she then was, stated at para. 9:

A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same.

[271] In *Vancouver Sun*, *supra*, at para. 4, Bastarache J. stated:

In my view, informer privilege must remain absolute. Information which might tend to identify a confidential informant cannot be revealed, except where the innocence of a criminal accused is at stake.

[272] The privilege applies in both criminal and civil proceedings. In *Bisaillon v. Keable*, at p.93, Beetz J. stated:

The rule was developed in criminal proceedings apparently in trials for high treason, but it also applies in civil matters, and in both cases it has been established for reasons which relate to the essential effectiveness of the criminal law.

[273] It is clear from *Named Person B*, *supra*, that informer privilege can arise both expressly and by implication. In that case, an informer was granted privilege by one police force expressly. The responsibility for that person was subsequently transferred to another police force. That other police force did not specifically grant or recognize any privilege. However, that force continued to deal with the person as if the privilege was in place. The person had no reason to believe it was not in place.

[274] The Supreme Court of Canada held that in these circumstances, privilege existed with respect to the second police force by implication.

[275] The relevant principles as to when privilege can be said to exist were summarized by Justice Trafford in *R. v. Brown*, *supra*. A number of passages from his reasons are helpful.

[276] At para. 2, Trafford J. stated:

Where a person discloses to a peace officer acting in the course of duty any information about criminal activity and is given an assurance of confidentiality by the officer, the person is a confidential informant. The identity of a confidential informant is privileged as a matter of law – the name of the person and/or any information tending to identify the person may not be disclosed by anyone absent a waiver or other legal dissolution of the privilege. The disclosure of the identity of a confidential informant is not a matter of judicial discretion. Nor is it a matter of prosecutorial or investigative discretion. It is only where the disclosure of the identity of the person is necessary to demonstrate the innocence of a defendant that an exception to the rule exists.

[277] At para. 3, he stated:

It is worth emphasizing the two aspects of the purpose of the privilege – the need to protect confidential informants and like individuals at risk in the community because they gave information to the police and the need to promote the effective prevention and detection of crime.

[278] At para. 4, he stated:

Not everyone who gives information to the police is a confidential informant. It is one thing to be an informant – it is another thing to be a confidential informant. To be a confidential informant an informant must request the privilege, expressly or by necessary implication, and receive an assurance of confidentiality, expressly or by necessary implication, from the officer. Regard must be had for all the circumstances of the case. A would be confidential informant does not begin with a right of confidentiality but does have a right to silence. One need not give information to the police. But, if the privilege attaches to the relationship, a right of confidentiality in the confidential informant is created and must be recognized by everyone.

[279] At paras. 5 and 6, he stated:

One must distinguish the privilege of a confidential informant, and the right of confidentiality attendant to it, from the practice of a police officer treating all information received in the course of duty as confidential information. Such practices are not in all cases to be equated with an assurance of confidentiality necessary to constitute the privilege. Absent such an assurance, all information collected during an investigation that is not clearly irrelevant must be disclosed by the Crown to the defence. [Citation of caselaw omitted.]

Accordingly, in determining the existence of the privilege all of the circumstances of the delivery of the information must be considered. The perception of the informant who is giving information to the police is a significant factor. The status and motivation of the person at the material time as a complainant, suspect, arrestee, accomplice or otherwise are also relevant. See *Tipene v. Apperley*, [1978] 1 N.Z.L.R. 761 at 768 (C.A.). Regard must also be had for the conduct of the officer receiving the information and the history of their relationship with one another, if any.

[280] To summarize, it is clear that informer privilege arises if information is provided to the police in exchange for a promise of confidentiality. Mere expectation of confidentiality is not enough. There must be a promise, either express or implied, that confidentiality will be maintained. Where the privilege properly arises, anonymity must be observed absolutely, save only where innocence is at stake. The purpose of the privilege is two-fold: to encourage citizens to report suspected criminal activity; and to protect informers from retribution. Formality is not required. All that is required is a promise of confidentiality in exchange for information. While policies and procedures exist with respect to informer privilege, they do not themselves create it.

b. Was Ms. Stack entitled to informer privilege?

[281] Ms. Stack says she provided information in exchange for a promise of confidentiality. She must establish this on a balance of probabilities.

[282] In essence, this is a factual issue: was Ms. Stack promised anonymity in exchange for information? Ms. Stack says she was, and the defendants say she was not.

[283] In order to resolve this factual dispute, I must consider all the relevant evidence and decide whether, on a balance of probabilities, it is more likely than not that Ms. Stack was promised anonymity in exchange for information.

[284] If a promise of anonymity was given, it was given by Officer Liepsig. He was the only police officer who spoke to Ms. Stack before she gave her interview.

[285] Ms. Stack was very clear in her evidence that she did not want to be involved. She had only hearsay evidence of any crime. She had no direct evidence. She was also very clear that had a promise of anonymity not been given, she would not have gone to the police station and provided the information she did to Officer Liepsig.

[286] Ms. Stack's desire for anonymity was confirmed by Ken Rumak. He testified that Ms. Stack made it clear to him that she did not want her name to be known and she did not want to be involved. Consistent with this understanding, Mr. Rumak testified that he conveyed Ms. Stack's desire for anonymity to Officer Liepsig.

[287] Officer Liepsig's notes were sketchy at best. He had virtually no notes about his conversation with Mr. Rumak. All he said about that conversation was that Mr. Rumak said he had a friend who could give information about stolen handguns, and a 15 year old was involved, and he gave the friend's phone number. He did not specifically deny that Mr. Rumak said the friend did not want to be involved or known. Officer Liepsig's notes of his conversations with Ms. Stack were sparse.

[288] Officer Liepsig testified that he gave no assurances of confidentiality to Ms. Stack, apart from the brief discussion at the end of the interview. He testified that that discussion was primarily

concerned with Ms. Stack not wanting her husband to find out about the interview, and her concern about the information getting out in the community. He agreed, however, that none of this was in his notes. He did not recall Ms. Stack saying anything about not letting anyone know.

[289] I think it is highly unlikely that the discussion about anonymity at the end of the interview was the first time the subject was raised. In context, I think it is unlikely that the issue would have been raised for the first time in such a casual way at the end of the interview. It is more likely, in my view, that that discussion was the culmination of an earlier discussion about anonymity. Otherwise, there was no context and the discussion, coming out of the blue, would be unusual. If anonymity was promised before Ms. Stack came to the police station, it is difficult to think of any reason for doing it except as a means to persuade her to come to the station and tell what she knew.

[290] I think Ms. Stack's conduct after her identity was disclosed is consistent with her belief that anonymity had been guaranteed. As soon as the incident involving Mr. Ellison occurred, she telephoned Officer Liepsig and left a message to the effect that a mistake had been made, and her identity had somehow been disclosed. Officer Liepsig did not deny receiving that message. He did not return the call.

[291] Mr. Nissen attended at the police station and spoke to Officer Sirizzotti and Officer Price. He showed Officer Sirizzotti the note of his conversation with Mr. Ellison, and told him the whole story. He was ushered into another room where he told Officer Price the same story.

[292] Mr. Nissen testified that he told Officer Price that Ms. Stack had been promised her identity would be preserved, and wanted to know what the police were going to do about it. Officer Price said he would look into it.

[293] Mr. Nissen testified that Officer Price called him the next day and told him that there had been a videotape of the interview with Ms. Stack, and her name had appeared in a report. Mr. Nissen testified that Officer Price apologized and said it was unacceptable.

[294] Officer Sirizzotti was not called as a witness to contradict Mr. Nissen. Officer Price made no notes of the conversation. He did not specifically deny it.

[295] The surrounding circumstances would appear to support Ms. Stack's subjective recollection that she was promised anonymity in exchange for the provision of information.

[296] Supporting Officer's Liepsig's subjective recollection, to some extent, is the fact that the police force has a specific, detailed policy regarding confidential informants. In order to be granted informer status, according to the policy, certain practices consistent with secrecy must be followed. The fact that they were not followed in this case could suggest that the police, through Officer Liepsig, did not intend to grant informer status.

[297] It may be that Officer Liepsig intended to convey to Ms. Stack only that the police would try to keep her out of it, without guaranteeing that her involvement might have to be disclosed. If that was the case, Officer Liepsig did not make that clear. He certainly did not make that clear in the conversation captured on videotape. He said “This is between you and I.” and “That stuff does not get disclosed. It is not made available to the public. You don’t have to worry about that.” With those statements, which I find were made in the context of a broader discussion that started before Ms. Stack went to the police station, there are no qualifiers. There is nothing to suggest that Ms. Stack’s identity might have to be disclosed.

[298] On a balance of probabilities, I hold that Officer Liepsig promised Ms. Stack that her identity would be preserved, and not disclosed, if she came to the police station and provided information about suspected criminal activity. He did not qualify that promise in any way. Thus, both expressly and by implication Ms. Stack became entitled to informer privilege, that is, she was entitled to have her anonymity preserved with respect to her involvement in conveying information to the police.

[299] It is clear, and this is not disputed, that Ms. Stack’s anonymity was not preserved. The videotape of the conversation between Ms. Stack and Officer Liepsig was furnished to counsel for the Ellisons. Reports were prepared in which her name appears. No attempt was made to redact or edit the videotape or the reports. The conversation between Ms. Stack and Officer Liepsig was disclosed in the Information to Obtain that was prepared for a search warrant. No attempt was made to redact any part of it. Officer Liepsig did not advise any of the other police officers that he had made a promise of anonymity. As it happens, he did not even advise them of the statements he made that were captured on videotape. No one told the assistant Crown attorneys who were responsible for prosecuting Patrick Ellison of any promises of anonymity.

[300] I reject the argument that just because Ms. Stack told Mr. Rumak, and perhaps others, about the suspected criminal activity, that this somehow constitutes a waiver of privilege or that the privilege never came into effect. A similar argument was rejected by Archibald J. in *Nguyen, supra*. He held that any waiver must be clear and unequivocal, and merely telling others about the criminal activity does not constitute a waiver. In principle, I do not see how consulting with a friend to seek advice about conveying information to the police anonymously can constitute waiver of a privilege that has not yet come into existence.

[301] For these reasons, I hold that Ms. Stack was entitled to informer privilege.

c) Does informer privilege give rise to a private law duty to the informer?

[302] To some extent, this issue plumbs the depths of tort law theory. Is there a private law duty at all, or is it a duty owed to the public and the administration of justice? If there is a private law duty to the informer, what is it? Is it an absolute duty, the breach of which gives rise to a right to damages? Or is it a duty to take reasonable care to ensure that anonymity is preserved?

[303] As noted earlier, in a criminal law context informer privilege has been held to have two purposes: to encourage citizens to provide information to the police; and to protect the informer from reprisal.

[304] On its face, the privilege gives rise to a duty to the informer. The duty is to protect his or her identity from disclosure. He or she is to be protected from reprisal. In a criminal law context, this purpose goes hand in hand with the other purpose of the privilege, that is, to encourage people to provide information to the police. If informers are not protected from reprisal, people will be less willing to provide information to the police. Society's interest in combating crime could be adversely affected.

[305] While the privilege is clearly grounded in a criminal law context, I see no reason in principle, subject to *Anns/Cooper* considerations, why the privilege cannot give rise to a private law duty to the informer. If the informer is harmed by a failure to observe the privilege, *prima facie* the informer should have a remedy.

[306] To return to the question I posed earlier, what is the duty? Is it absolute, or is it a duty to take reasonable care?

[307] In a criminal law context, the duty to preserve the privilege is said to be almost absolute. Only innocence at stake will require that the privilege give way. Thus, an argument can be made that in a civil context a breach of the duty to maintain the privilege, however it arises, can result in a valid claim.

[308] Liability on that basis can be supported by the seminal case of *Ashby v. White, supra*. It was ultimately held in that case that the deprivation of the right to vote in an election to serve in Parliament gave rise to a right to sue for damages. Chief Justice Holt was in dissent in the Court of King's Bench, but his view ultimately prevailed in the House of Lords.

[309] Chief Justice Holt, at p. 950 Ld. Raym., p.134 E.R., stated:

The single question in this case is, whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in Parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer.

But to proceed, I will do these two things: first, I will maintain that the plaintiff has a right and privilege to give his vote; secondly, in consequence therefore, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

[310] At p. 953 Ld. Raym., p. 135 E.R. he stated:

But from hence it appears that every man, that is to give his vote on the election of members to serve in Parliament, has a several and particular right in his private capacity, as a citizen or burgess. And surely it cannot be said, that this is so

inconsiderable a right, as to apply that maxim to it, *di minimus non curat lex*. A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of such an high nature, and the law takes notice of it such in diverse statutes.

[311] On the same page, in a passage that has been quoted with approval dozens of times, he stated:

If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.

[312] Based on this reasoning, if the informer has a right to have his or her anonymity preserved, and that right is infringed, there must be a means to vindicate and maintain it.

[313] In my view, if the reasoning of Chief Justice Holt prevailed in 1790 to uphold a right to damages for being deprived of the right to vote, it prevails equally to provide a right to damages where an informer's right to anonymity is not preserved. The right to vote has an overarching public dimension, but to be deprived of it gives rise to a private right of action. Similarly, informer privilege has an overarching public purpose, but breach of it, resulting in harm, gives rise to a private right of action. The only qualifier, in my view, is whether it must prevail after an analysis based on *Anns/Cooper*. While the *Anns/Cooper* analysis has been conducted where a novel duty of care is asserted in a negligence context, I see no reason why a similar analysis should not be conducted where a novel cause of action in tort based on *Ashby v. White* is being considered. I will conduct that analysis after I have considered the alternative basis of liability in negligence.

[314] Even if liability is not absolute, at the very least there must be a duty to take reasonable care to preserve anonymity. In this case, it is clear that reasonable care was not taken.

[315] I do not accept Ms. Maxwell-Baker's argument that there must be evidence of what a reasonable police officer would do in these circumstances. Expert evidence is not required, at least in this case, as to the appropriate standard of care. Whatever the standard of care may be, the police did not meet it. No steps whatsoever were taken to preserve anonymity. Indeed, the videotaped interview was released to the Ellisons deliberately. Officer Liepsig took no steps to advise other police officers or the Crown that he had given promises of anonymity.

[316] Thus, subject only to an analysis based on *Anns/Cooper*, informer privilege gives rise to a private law duty to Ms. Stack, and a breach of that duty gives rise to a claim for damages.

d) Do the *Anns/Cooper* tests require that a private law duty be negated on policy grounds?

[317] In Canada, the analysis in *Anns v. Merton London Borough Council*, *supra*, is subsumed in the judgment of the Supreme Court of Canada in *Cooper v. Hobart*, *supra*. That case involved

an allegation of negligence against the Registrar of Mortgage Brokers in British Columbia for failing to oversee the conduct of an investment company which was licenced by the Registrar.

[318] As I indicated earlier, the *Anns/Cooper* analysis has been applied in a negligence context. I think it is also appropriate to apply it where any novel cause of action in tort is considered, and I will apply it here to both theories of liability as I have discussed them above.

[319] The Supreme Court of Canada held that there are two stages of the *Anns/Cooper* analysis: first, whether there is sufficient proximity to give rise to a duty of care; and second, whether there are any residual policy considerations that should negative that duty of care. The Supreme Court of Canada held that policy considerations play a role in resolving both questions.

[320] At para. 30, McLachlin C.J.C. and Major J. for the court, stated:

In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

[321] Ultimately, the court held that the plaintiff failed both aspects of the *Anns/Cooper* test. The court held that there was insufficient proximity to give rise to a *prima facie* duty of care, and held that in any event there were residual policy considerations that would negative such a duty.

[322] In defining "proximity", the court, at para.33, found assistance in the judgment of La Forest J. in *Hercules Management Ltd. v. Ernst & Young*, [1997 CanLII 345 \(SCC\)](#), [1997] 2 S.C.R. 165, at para. 24:

The label "proximity", as it was used by Lord Wilburforce in *Anns*, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

[323] At para. 34 of *Cooper*, McLachlin C.J.C. and Major J. stated:

Defining the relationship may involve looking at expectations, representations, reliance and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[324] In discussing the second stage of the *Anns* test, they stated, at para. 37:

This brings us to the second stage of the *Anns* test. As the majority of this court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[325] At para. 39, they stated:

The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does we may be satisfied that there are not overriding policy considerations that would negative the duty of care. ...However, where a duty of care in a novel situation is alleged, as here, we believe it necessary to consider both steps of the *Anns* test as discussed above. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise.

[326] After setting out the tests, the court ultimately concluded that there was insufficient proximity to recognize a new duty of care. At para. 44, the court noted that the statute did not impose a duty of care on the Registrar to investors; the Registrar's duty was to the public as a whole rather than individual investors; and a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public.

[327] The court held that having found insufficient proximity to support a duty of care, strictly speaking it was not necessary to proceed to the second branch of the *Anns* test. However, the court held that residual policy considerations in that case would negate a duty of care in any event. At para. 52, the court noted that the Registrar must act fairly to a broker, which is inconsistent with a duty of care to investors. At para. 53, the court noted that the Registrar must make difficult discretionary decisions in the area of public policy, decisions which would command deference. At para. 54, the court noted that the spectre of indeterminate liability would loom large if a duty of care was recognized. At para. 55, the court stated that to impose a duty of care would be to effectively create an insurance scheme for investors at great cost to the tax-paying public.

[328] In this case, I must consider whether there is sufficient proximity between the parties to recognize a private law duty to the plaintiff, taking into account any relevant policy considerations. In my view, there is.

[329] The privilege is not simply in place to advance the public's interest in combating crime. One of its purposes is to protect the informer from retribution. While that purpose itself has a policy dimension, nevertheless the informer has a private interest in being protected from retribution which is furthered by the privilege. If the privilege is breached and the informer suffers harm, the informer has a private interest in recompense. In my view, there are no policy

considerations that would suggest that the parties are not sufficiently proximate so as to give rise to a private law duty at the first stage of the *Anns* test.

[330] The question, then, is whether there are residual policy considerations that should negative a private law duty. In my view, there are not.

[331] None of the specific policy considerations examined by the court in *Cooper* are applicable here. The police are not required to balance public and private interests. Where the privilege exists, it is almost absolute. There is no spectre of indeterminate liability. In the annals of the jurisprudence, this case is unique. Counsel were unable to furnish me with any other case of a similar nature. There is no spectre of indeterminate liability that could result in great cost to the tax-paying public.

[332] I do not agree with Ms. Maxwell-Baker's submission that there will be a chilling effect if liability for damages is recognized. While the police may be required to be more careful in what they promise to potential informers, I do not see that as a reason to not recognize a private law duty to the informer. Indeed, I think the policy considerations are in the other direction. In *Ashby v. White* itself, Chief Justice Holt, at p. 956 Ld. Raym., p. 137 E.R., stated:

To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation.

This passage was cited with approval by the Court of Appeal in *Freeman-Maloy, supra*, at para. 22.

[333] I am not persuaded by any floodgates considerations. As noted, I am not aware of any case similar to this one. Furthermore, Chief Justice Holt rejected a floodgates argument in *Ashby v. White*. At p. 955 Ld. Raym., p. 137 E.R., he stated:

So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too; for every man that is injured ought to have his recompense.

[334] For these reasons, I am not persuaded that the *Anns/Cooper* tests require that a private law duty be negated on policy grounds.

[335] Before leaving the issue of liability, I should add that I have placed no reliance on the *obiter* statement by Beetz J. in *Bisaillon v. Keable, supra*, at p.96:

I would accordingly have no difficulty in finding, although I know of no precedent on the point, that a peace officer who for example gave the media a list of his informers would be liable to severe disciplinary action and could be liable to pay damages.

[336] This statement was clearly *obiter*, and was made without any legal analysis.

[337] I should also mention that I have found only one case in which informer privilege was actually breached, and where there is discussion of what consequence, in a criminal context, should follow: *R. v. Y. (X)*, *supra*. In that case, an accused, during an interview with the police, disclosed his activities as an informer. Unknown to him the interview was recorded. A full transcript of the interview was disclosed to several defence counsel. While in detention, another inmate learned that the accused was a “rat”, and attacked him and threatened future harm. The trial judge dismissed an application to stay the proceedings, holding that the conduct of the police and the prosecutor was inadvertent and unintentional.

[338] The Court of Appeal disagreed, and ordered that the proceedings be stayed. The Court characterized the conduct of the police and the Crown as “gross negligence” (para. 18). At para. 22, the Court stated:

Informer privilege is a class privilege. The ban on revealing an informer’s identity protects not only an individual informer from possible retribution, but also signals to potential informers that their identity too will be protected. Courts have emphasized the general protection afforded by the rule to all informers, past and present.

[339] While a criminal case, the case emphasizes, in my view, that the privilege is in place to protect informers from retribution, and that the courts must take very seriously any breach of the privilege.

e) What damages, if any, are appropriate?

[340] The plaintiffs claim damages under the following heads:

- a) General damages for Ms. Stack;
- b) Losses and expenses on the sale of the Whitby home;
- c) Expenses on the purchase and upgrading of the Seagrave home;
- d) Employment losses for Ms. Stack and Mr. Nissen; and
- e) Damages under the *Family Law Act* for Mr. Nissen and the children.

[341] It is not disputed that the “but for” test applies to any claim for damages in tort: the plaintiff must show that but for the defendants’ breach of duty, the damages would not have occurred: see *Hanke v. Resurfice Corp.*, *supra*, at paras. 19-23. In my view, subject to proof of actual damages, the plaintiffs’ damages would not have occurred but for the defendants’ breach of duty. Had Ms. Stack’s identity not been disclosed, she and her family, in all likelihood, would still be living in their dream home on their quiet street in Whitby. Retribution at the hands of the Ellisons would not have occurred. Ms. Stack would not have suffered post-traumatic stress disorder, the symptoms of which still plague her today. She and her family would not have sold their home and moved to a strange community. Her family would not have suffered along with her.

[342] Thus, subject to proof of actual damages, the “but for” test has been met.

[343] I am not persuaded that the plaintiffs are entitled to damages arising from the sale of their Whitby home. Of importance, the plaintiffs called no expert evidence to show that they did not receive market value for their home. I have heard no evidence that the price they received for their home did not include compensation for the improvements they made to it.

[344] Nor am I persuaded that the plaintiffs are entitled to any damages arising out of their purchase of their new home in Seagrave. Once again, they called no expert evidence to show that they overpaid for that home. They have had the use and enjoyment of any improvements they made.

[345] In the final analysis, the plaintiffs have simply called insufficient evidence to show that they have suffered any loss arising out of the sale of their Whitby home or the purchase of their Seagrave home.

[346] Nor am I persuaded that either Ms. Stack or Mr. Nissen are entitled to any damages for lost income or loss of opportunity.

[347] Mr. Nissen’s income is derived entirely through commission. The only difference in his job as a salesperson and the job as a District Manager was a \$400 per month expense allowance and a small override on the sales effected by a subordinate. Mr. Nissen is still one of the top salespeople in the company. He has not shown that he lost any income as a result of what happened to Ms. Stack.

[348] Ms. Stack was not working at the time of the events complained of in 2002, and it was not her intention to work until at least 2010. There is no reasonable ground for concluding that she has lost any income or suffered any lost opportunity.

[349] Accordingly, the claims for losses on the real estate and for employment losses are dismissed.

[350] In terms of Ms. Stack’s claim for general damages, it is a claim for emotional and psychological injury. Her evidence in support of such a claim is substantial.

[351] Ms. Stack herself described the effect on her of the disclosure of her identity and the harassment that she and her family suffered at the hands of the Ellisons. She said the harassment was unbearable, to the point that the family could no longer go in and out of the house through the front door, and ultimately they had to sell their home. Since these events, she feels hopeless and depressed. There are triggers that increase her symptoms of terror. She is paralyzed with fear. She has extreme anxiety. She wakes up terrified, at least weekly.

[352] These effects were testified to by many other witnesses. Mr. Nissen testified that his wife is not the same person. She is scared all the time, she is not happy, she is depressed, and she

is not outgoing or confident. Her sleep is affected. She panics easily. He testified that his own life has been affected. There is a strain on him and he is afraid for the safety of his family. He is depressed, and there is a strain on their relationship.

[353] John Ecker testified that Ms. Stack, before these events, was engaging and friendly. She was trusting, helpful, happy and outgoing. She is now much different. She is guarded and she is not happy. Helen Ecker testified that Ms. Stack was warm, trusting, caring, friendly and gregarious. After these events, she became fearful and anxious. She has been down and depressed. She cannot enjoy daily activities.

[354] Christian and Morgan Nissen testified that since these events their mother has been distant and distraught. She has adverse reactions if certain triggering events occur, such as loud noises. Their mother goes through depression. She becomes distant and is not talkative. She does not sleep well. She is nervous in public. She is difficult in crowds. She has diminished confidence. She is suspicious of strangers. They both testified that their mother's situation has affected them adversely.

[355] Allan Brooks testified that before these events, Ms. Stack was successful, outgoing, friendly and confident. Since they occurred, she has become insecure.

[356] Of significance, Dr. Silver testified that Ms. Stack has signs of post-traumatic stress disorder. She demonstrates symptoms of high anxiety. She has a high degree of suspicion and a low degree of trust. She has an increased arousal system arising from noises and ordinary events. There are repeated flash backs. She is concerned that people may be talking about her, and she thinks she is being watched. This borders on a paranoid state.

[357] Dr. Silver testified that post-traumatic stress disorder is difficult to treat. Techniques of treatment are not extraordinarily effective. No treatments so far have met with very high success.

[358] Dr. Silver testified that Dr. Jeffries, the expert retained by the defendants, is of the same opinion as he is. Both he and Dr. Jeffries are concerned about potential re-traumatization of Ms. Stack.

[359] Ms. Maxwell-Baker complains that Ms. Stack's medical records were not produced, nor were her counselling records. I accept that it would have been preferable that they be produced and I will discount the evidence called by the plaintiffs to some extent. However, the evidence of the effect on Ms. Stack is substantial, and the psychiatric evidence called was un-contradicted.

[360] In order to claim for psychological injury, it must rise above ordinary upset or anxiety. As stated by McLachlin C.J.C. in *Mustapha, supra*, at para. 9:

This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v.*

Smith, at p.189; *Linden and Feldthusen* at pp. 425-427. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept.

[361] Based on the evidence called in this case, I have no hesitation in concluding that the psychological injury caused to Ms. Stack meets this test. It is serious and prolonged and rises above the ordinary annoyances, anxieties and fears that people living in society routinely accept. The injury is severe and debilitating and has had a significant impact on Ms. Stack's life. It is compensable at law.

[362] What must next be considered is whether the injuries suffered by Ms. Stack were too remote, in the sense that it was not reasonably foreseeable that they might occur in a person of ordinary fortitude.

[363] In *Mustapha*, the plaintiff developed a major depressive disorder with associated phobia and anxiety as a result of seeing flies in a bottle of water. The Supreme Court of Canada held that a person of ordinary fortitude would not suffer serious injury from seeing flies in a bottle of water, and that such a consequence would not reasonably be foreseen by a defendant.

[364] This case is not analogous to seeing flies in a bottle of water. This case has to do with a breach of a privilege, which is said to be almost absolute, one purpose of which is to prevent retribution to an informer. If retribution occurs, psychological injury might well occur. Where the privilege is breached and retribution occurs, I have no difficulty concluding that a defendant would reasonably foresee that a person of ordinary fortitude could suffer psychological damage. Once that is established, the defendant must take the plaintiff as it finds him or her for purposes of the extent of damage. As stated by McLachlin C.J.C. in *Mustapha* at para. 16:

Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damage. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability is "not to be confused with the 'eggshell skull' situation where as a result of breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damages at law.

[365] As stated by Rouleau J.A. in *Degennaro v. Oakville Trafalgar Memorial Hospital*, *supra*, at para. 27, "The defendant needs to reasonably foresee damages suffered by a person of reasonable fortitude. Where, as here, the damages suffered are more extensive because the plaintiff was "thin-skulled", the defendant is nonetheless liable."

[366] It is difficult to fix a reasonable amount for the damages suffered in this case. Any damages awarded must take into account any aggravating features. There is no separate head of "aggravated" damages; rather any aggravating features are taken into account in fixing an amount for general damages: see *McIntyre v. Grigg*, *supra*, at para. 50.

[367] There are certain aggravating features here. First, as noted, the police did nothing whatsoever to preserve Ms. Stack's anonymity. Second, once they became aware of the harassing behaviour by Mr. Ellison, they did almost nothing about it. Apart from one brief conversation with Mr. Ellison, in which it is doubtful that the importance of the problem was impressed on Mr. Ellison, the police did nothing. There was no evidence of any follow-up with Mr. Ellison. Indeed, somewhat inexplicably, no one even followed up with Mr. Nissen or Ms. Stack to advise them that Mr. Ellison had been spoken to.

[368] The effect on Ms. Stack has been severe. Her life has been irretrievably altered. On a balance of probabilities, I am satisfied, based on the evidence of Dr. Silver, that it is unlikely that she will ever be the same as she was before these incidents.

[369] General damages for psychological injury were upheld by the Supreme Court of Canada, in the amount of \$400,000 in *Cinar Corporation, supra*, and in the amount of \$430,000 in *Young v. Bella, supra*. In both cases, the court held that damages in those amounts were not barred by the "cap" on general damages in personal injury cases. That cap is approximately \$350,000 at present, having regard to inflation.

[370] In my view, the psychological injury in this case is not as severe as those in issue in *Cinar* and *Young v. Bella*. I think something less in this case would be appropriate. The issue of whether the cap applies is moot because I do not intend to award damages that would exceed the cap.

[371] In the final analysis, I think the amount of \$345,000 is an appropriate amount for general damages for Ms. Stack, and I so award.

[372] I am not persuaded that damages for an alleged breach of the *Canadian Charter of Rights and Freedoms*, or punitive damages, are appropriate.

[373] As for damages under the *Charter*, assuming a breach (a point I do not decide), it is clear that any damages would simply duplicate tort damages, and are thus not separately awardable: see *Vancouver (City) v. Ward, supra*, at para. 55.

[374] As for punitive damages, this is not one of those exceptional cases that requires an award of punitive damages for malicious, oppressive and high-handed misconduct that offends the court's sense of decency: see *Whiten, supra*, at para. 36. The conduct of the defendants does not remotely approach that standard.

[375] That leaves the claims of Mr. Nissen and the children for loss of guidance, care and companionship. Each of them has clearly lost a measure of guidance, care and companionship as a result of what happened to Ms. Stack. In *Fiddler v. Chiavetti, supra*, the Court of Appeal reduced an award of \$200,000 for loss of guidance, care and companionship to \$125,000. Generally speaking, awards of this nature tend to be somewhat modest.

[376] I will award Mr. Nissen \$65,000 for loss of guidance, care and companionship and I will award \$25,000 to each child.

Disposition

[377] For the foregoing reasons, I award damages as follows:

a) Margaret Stack	\$345,000;
b) Chad Nissen	\$ 65,000;
c) Christian Nissen	\$ 25,000;
d) Morgan Nissen	<u>\$ 25,000;</u>
TOTAL	\$460,000

[378] This action was started almost 13 years ago. There may be reasons why the ordinary rule as to the calculation of pre-judgment interest ought to be modified. If necessary, I will entertain written submissions, both as to the method of calculation and the calculation itself.

[379] If the parties cannot agree, I will entertain written submissions with respect to pre-judgment interest and costs, not to exceed ten pages, together with a bill of costs and any caselaw. Ms. Hoy will have 15 days to file her submissions, and Ms. Maxwell-Baker will have 15 days to respond. Ms. Hoy will have five days to reply.

Gray J.

Released: February 26, 2015

CITATION: Nissen v. Durham Regional Police, 2015 ONSC 1268
COURT FILE NO.: 2602/02
DATE: 2015-02-26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHAD NISSEN, MARGARET STACK, both personally and as litigation guardians of CHRISTIAN NISSEN and MORGAN NISSEN

Plaintiffs

– and –

DURHAM REGIONAL POLICE SERVICES BOARD,
JAMES LIEPSIG, MARK PRICE, AL SIRIZZOTTI, S

EAN FITZGERALD, JOHN DOE OR JANE DOE, BR
ENDA COWIE, ISABEL PARGANA, HER MAJESTY
THE QUEEN IN RIGHT OF ONTARIO

Defendants

REASONS FOR JUDGMENT

GRAY J.

Released: February 26, 2015

TAB 59

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11



Notice Regarding the French Version: The *Constitution Act, 1982* provides that « A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible [...] ». The French Constitutional Drafting Committee was established in 1984 to assist the Minister in this task. The Committee submitted its final report, which includes forty-two constitutional enactments, to Parliament in December 1990. The English version of the final report is available on the Department of Justice website at <https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/index.html>.

Current version: in force since 1993-03-12

Link to this version: <https://canlii.ca/t/ldsx>

Citation to this version: The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <<https://canlii.ca/t/ldsx>> retrieved on 2026-03-23

Currency: Last updated from the [Justice Laws Web Site](#) on 2026-03-19

CANADA ACT 1982⁽⁸⁰⁾

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1 The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2 No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3 So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4 This Act may be cited as the *Canada Act 1982*.

CONSTITUTION ACT, 1982⁽⁸¹⁾

PART I

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Democratic Rights

Democratic rights of citizens

3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4 (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.⁽⁸²⁾

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.⁽⁸³⁾

Annual sitting of legislative bodies

5 There shall be a sitting of Parliament and of each legislature at least once every twelve months.⁽⁸⁴⁾

Mobility Rights

Mobility of citizens

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

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

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10 Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

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

Treatment or punishment

12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13 A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14 A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁽⁸⁵⁾

Official Languages of Canada

Official languages of Canada

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.⁽⁸⁶⁾

Proceedings of Parliament

17 (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.⁽⁸⁷⁾

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.⁽⁸⁸⁾

Parliamentary statutes and records

18 (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.⁽⁸⁹⁾

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.⁽⁹⁰⁾

Proceedings in courts established by Parliament

19 (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.⁽⁹¹⁾

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.⁽⁹²⁾

Communications by public with federal institutions

20 (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21 Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.⁽⁹³⁾

Rights and privileges preserved

22 Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23 (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.⁽⁹⁴⁾

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.⁽⁹⁵⁾

Other rights and freedoms not affected by Charter

26 The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

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

Rights guaranteed equally to both sexes

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29 Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.⁽⁹⁶⁾

Application to territories and territorial authorities

30 A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31 Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34 This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

Rights of the Aboriginal Peoples of Canada

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, ***aboriginal peoples of Canada*** includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) ***treaty rights*** includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.⁽⁹⁷⁾

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867*, to section 25 of this Act or to this Part,

- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
- (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.⁽⁹⁸⁾

PART III

Equalization and Regional Disparities

Commitment to promote equal opportunities

36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.⁽⁹⁹⁾

PART IV

Constitutional Conference

37 Repealed.⁽¹⁰⁰⁾

PART IV.I

Constitutional Conferences

37.1 Repealed.⁽¹⁰¹⁾

PART V

Procedure for Amending Constitution of Canada⁽¹⁰²⁾

General procedure for amending Constitution of Canada

38 (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

- (a) resolutions of the Senate and House of Commons; and
- (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

39 (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

40 Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41 An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

- (a)** the office of the Queen, the Governor General and the Lieutenant Governor of a province;
- (b)** the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
- (c)** subject to section 43, the use of the English or the French language;
- (d)** the composition of the Supreme Court of Canada; and
- (e)** an amendment to this Part.

Amendment by general procedure

42 (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

- (a)** the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
- (b)** the powers of the Senate and the method of selecting Senators;
- (c)** the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- (d)** subject to paragraph 41(d), the Supreme Court of Canada;
- (e)** the extension of existing provinces into the territories; and
- (f)** notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

43 An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(a) any alteration to boundaries between provinces, and

(b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments by Parliament

44 Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendments by provincial legislatures

45 Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Initiation of amendment procedures

46 (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments without Senate resolution

47 (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House

of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

48 The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49 A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.⁽¹⁰³⁾

PART VI

Amendment to the *Constitution Act, 1867*

50 ⁽¹⁰⁴⁾

51 ⁽¹⁰⁵⁾

PART VII

General

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

- (a)** the *Canada Act 1982*, including this Act;
- (b)** the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53 (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

Repeal and consequential amendments

54 Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.⁽¹⁰⁶⁾

54.1 Repealed.⁽¹⁰⁷⁾

French version of Constitution of Canada

55 A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.⁽¹⁰⁸⁾

English and French versions of certain constitutional texts

56 Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

English and French versions of this Act

57 The English and French versions of this Act are equally authoritative.

Commencement

58 Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.⁽¹⁰⁹⁾

Commencement of paragraph 23(1)(a) in respect of Quebec

59 (1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Authorization of Quebec

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.⁽¹¹⁰⁾

Repeal of this section

(3) This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Short title and citations

60 This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

References

61 A reference to the *Constitution Acts, 1867 to 1982* shall be deemed to include a reference to the *Constitution Amendment Proclamation, 1983*.⁽¹¹¹⁾

Schedule to the Constitution Act, 1982

(Section 53)

MODERNIZATION OF THE CONSTITUTION

Column I		Column II	Column III
Item	Act Affected	Amendment	New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: “1 This Act may be cited as the <i>Constitution Act, 1867.</i>” (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: <i>“Manitoba Act, 1870.”</i> (2) Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert’s Land and the North-Western Territory into the Union, dated the 23rd day of June, 1870		Rupert’s Land and North-Western Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871.		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: “1 This Act may be cited as the <i>Constitution Act, 1871.</i>”	Constitution Act, 1871

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875
8.	Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.		Adjacent Territories Order
9.	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: “3 This Act may be cited as the <i>Constitution Act</i>, 1886.”	Constitution Act, 1886
10.	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: “2 This Act may be cited as the <i>Constitution Act</i>, 1907.”	Constitution Act, 1907

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: “3 This Act may be cited as the <i>Constitution Act, 1915.</i>”	Constitution Act, 1915
16.	British North America Act, 1930, 20-21, Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: “3 This Act may be cited as the <i>Constitution Act, 1930.</i>”	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, (a) section 4 is repealed; and (b) subsection 7(1) is repealed.	Statute of Westminster, 1931
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: “2 This Act may be cited as the <i>Constitution Act, 1940.</i>”	Constitution Act, 1940
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor: “ 3 This Act may be cited as the <i>Newfoundland Act</i> .”	Newfoundland Act
22.	British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed.	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: “ 2 This Act may be cited as the <i>Constitution Act, 1960</i> .”	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: “ 2 This Act may be cited as the <i>Constitution Act, 1964</i> .”	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: “ 2 This Part may be cited as the <i>Constitution Act, 1965</i> .”	Constitution Act, 1965

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.) ⁽¹¹²⁾	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the following substituted therefor: “3 This Part may be cited as the <i>Constitution Act</i> , 1974.”	Constitution Act, 1974
29.	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor: “3 This Part may be cited as the <i>Constitution Act</i> (No. 1), 1975.”	Constitution Act (No. 1), 1975
30.	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: “3 This Act may be cited as the <i>Constitution Act</i> (No. 2), 1975.”	Constitution Act (No. 2), 1975

ENDNOTES

(80)	French version enacted as Schedule A to the <i>Canada Act 1982</i> , 1982, c. 11 (U.K.).
(81)	Enacted as Schedule B to the <i>Canada Act 1982</i> , 1982, c. 11 (U.K.), which came into force on April 17, 1982.
(82)	See section 50, and endnotes (40) and (42) to sections 85 and 88, of the <i>Constitution Act, 1867</i> .
(83)	Replaces part of Class 1 of section 91 of the <i>Constitution Act, 1867</i> , which was repealed as set out in subitem 1(3) of the Schedule to the <i>Constitution Act, 1982</i> .
(84)	See endnotes (10), (41) and (42) to sections 20, 86 and 88 of the <i>Constitution Act, 1867</i> .

-
- (85) Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.
-
- (86) Section 16.1 was added by the *Constitution Amendment, 1993 (New Brunswick)* (see SI/93-54).
-
- (87) See section 133 of the *Constitution Act, 1867*, and endnote (67).
-
- (88) *Ibid.*
-
- (89) *Ibid.*
-
- (90) *Ibid.*
-
- (91) *Ibid.*
-
- (92) *Ibid.*
-
- (93) See, for example, section 133 of the *Constitution Act, 1867* and the reference to the *Manitoba Act, 1870*, in endnote (67) to that section.
-
- (94) Paragraph 23(1)(a) is not in force in respect of Quebec. See section 59 of the *Constitution Act, 1982*.
-
- (95) Paragraph 25(b) was repealed and re-enacted by the *Constitution Amendment Proclamation, 1983* (see SI/84-102). Paragraph 25(b) originally read as follows:
- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
-
- (96) See section 93 of the *Constitution Act, 1867* and endnote (50).
-
- (97) Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (see SI/84-102).
-
- (98) Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (see SI/84-102).
-
- (99) See endnotes (58) and (59) to sections 114 and 118 of the *Constitution Act, 1867*.
-

(100)

Section 54 of the *Constitution Act, 1982* provided for the repeal of Part IV (section 37) one year after Part VII came into force. Part VII came into force on April 17, 1982 thereby repealing Part IV on April 17, 1983. Section 37 read as follows:

37 (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(101)

Part IV.1 (section 37.1), which was added by the *Constitution Amendment Proclamation, 1983* (see SI/84-102), was repealed on April 18, 1987 by section 54.1 of the *Constitution Act, 1982*. Section 37.1 read as follows:

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

-
- (102) Prior to the enactment of Part V, certain provisions of the Constitution of Canada and the provincial constitutions could be amended pursuant to the *Constitution Act, 1867*. See endnotes (44) and (48) to section 91, Class 1 and section 92, Class 1 of that Act, respectively. Other amendments to the Constitution could only be made by enactment of the Parliament of the United Kingdom.
-
- (103) A First Ministers Meeting was held June 20-21, 1996.
-
- (104) The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.
-
- (105) The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.
-
- (106) Part VII came into force on April 17, 1982 (see SI/82-97).
-
- (107) Section 54.1, which was added by the *Constitution Amendment Proclamation, 1983* (see SI/84-102), provided for the repeal of Part IV.1 and section 54.1 on April 18, 1987. Section 54.1 read as follows:
- 54.1 Part IV.1 and this section are repealed on April 18, 1987.
-
- (108) The French Constitutional Drafting Committee was established in 1984 with a mandate to assist the Minister of Justice in that task. The Committee's Final Report was tabled in Parliament in December 1990.
-
- (109) The Act, with the exception of paragraph 23(1)(a) in respect of Quebec, came into force on April 17, 1982 by proclamation issued by the Queen (see SI/82-97).
-
- (110) No proclamation has been issued under section 59.
-
- (111) Section 61 was added by the *Constitution Amendment Proclamation, 1983* (see SI/84-102). See also section 3 of the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I and the *Constitution Amendment, 1987 (Newfoundland Act)* (see SI/88-11).
-
- (112) See subsection 38(1) of the *Miscellaneous Statute Law Amendment Act, 1977*, L.C. 1976-77, c. 28.

Tab 60

The Constitution Act, 1867, 30 & 31 Vict, c 3



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CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3 (U.K.)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(29th March 1867)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:⁽¹⁾

I. Preliminary

Short title

1 This Act may be cited as the *Constitution Act, 1867*.⁽²⁾

2 Repealed.⁽³⁾

II. Union

Declaration of Union

3 It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.⁽⁴⁾

Construction of subsequent Provisions of Act

4 Unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.⁽⁵⁾

Four Provinces

5 Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.⁽⁶⁾

Provinces of Ontario and Quebec

6 The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form Two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick

7 The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

Decennial Census

8 In the general Census of the Population of Canada which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III. Executive Power

Declaration of Executive Power in the Queen

9 The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

Application of Provisions referring to Governor General

10 The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.

Constitution of Privy Council for Canada

11 There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

All Powers under Acts to be exercised by Governor General with Advice of Privy Council, or alone

12 All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to

such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.⁽⁷⁾

Application of Provisions referring to Governor General in Council

13 The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

Power to Her Majesty to authorize Governor General to appoint Deputies

14 It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor General himself of any Power, Authority, or Function.

Command of Armed Forces to continue to be vested in the Queen

15 The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

Seat of Government of Canada

16 Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.

IV. Legislative Power

Constitution of Parliament of Canada

17 There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Privileges, etc., of Houses

18 The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers

shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.⁽⁸⁾

First Session of the Parliament of Canada

19 The Parliament of Canada shall be called together not later than Six Months after the Union.⁽⁹⁾

20 Repealed.⁽¹⁰⁾

The Senate

Number of Senators

21 The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators.⁽¹¹⁾

Representation of Provinces in Senate

22 In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:

1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented in the Senate by one member each.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.⁽¹²⁾

Qualifications of Senator

23 The Qualifications of a Senator shall be as follows:

1. He shall be of the full age of Thirty Years;
 2. He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;
 3. He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alieu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;
 4. His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;
 5. He shall be resident in the Province for which he is appointed;
 6. In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.
- (13)

Summons of Senator

24 The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

25 Repealed.⁽¹⁴⁾

Addition of Senators in certain cases

26 If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.⁽¹⁵⁾

Reduction of Senate to normal Number

27 In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more.⁽¹⁶⁾

Maximum Number of Senators

28 The Number of Senators shall not at any Time exceed One Hundred and thirteen.⁽¹⁷⁾

Tenure of Place in Senate

29 (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Retirement upon attaining age of seventy-five years

(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years.⁽¹⁸⁾

Resignation of Place in Senate

30 A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators

31 The Place of a Senator shall become vacant in any of the following Cases:

- 1.** If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;
- 2.** If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;
- 3.** If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;
- 4.** If he is attainted of Treason or convicted of Felony or of any infamous Crime;
- 5.** If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

Summons on Vacancy in Senate

32 When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Questions as to Qualifications and Vacancies in Senate

33 If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate

34 The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead.⁽¹⁹⁾

Quorum of Senate

35 Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

Voting in Senate

36 Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons

Constitution of House of Commons in Canada

37 The House of Commons shall, subject to the Provisions of this Act, consist of three hundred and eight members of whom one hundred and six shall be elected for Ontario, seventy-five for Quebec, eleven for Nova Scotia, ten for New Brunswick, fourteen for Manitoba, thirty-six for British Columbia, four for Prince Edward Island, twenty-eight for Alberta, fourteen for Saskatchewan, seven for Newfoundland, one for the Yukon Territory, two for the Northwest Territories and one for Nunavut.⁽²⁰⁾

Summoning of House of Commons

38 The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Senators not to sit in House of Commons

39 A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Electoral districts of the four Provinces

40 Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:

1. ONTARIO

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2. QUEBEC

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

3. NOVA SCOTIA

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

4. NEW BRUNSWICK

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.⁽²¹⁾

Continuance of existing Election Laws until Parliament of Canada otherwise provides

41 Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely, — the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their

Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution, — shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.⁽²²⁾

42 Repealed.⁽²³⁾

43 Repealed.⁽²⁴⁾

As to Election of Speaker of House of Commons

44 The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

As to filling up Vacancy in Office of Speaker

45 In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

Speaker to preside

46 The Speaker shall preside at all Meetings of the House of Commons.

Provision in case of Absence of Speaker

47 Until the Parliament of Canada otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a Period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker.⁽²⁵⁾

Quorum of House of Commons

48 The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers, and for that Purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons

49 Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

Duration of House of Commons

50 Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.⁽²⁶⁾

Readjustment of representation in Commons

51 (1) The number of members of the House of Commons and the representation of the provinces therein shall, on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time, subject and according to the following rules:

Rules

- 1.** There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the population of the province by the electoral quotient and rounding up any fractional remainder to one.
- 2.** If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province during the 43rd Parliament, there shall be added to the number of members so assigned the number of members that will result in the province having the same number of members as were assigned during that Parliament.⁽²⁷⁾
- 3.** After the application of rules 1 and 2 and section 51A, there shall, in respect of each province that meets the condition set out in rule 4, be added, if necessary, a number of members such that, on the completion of the readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces is as close as possible to, without being below, the number obtained by dividing the population of that province by the total population of all the provinces.
- 4.** Rule 3 applies to a province if, on the completion of the preceding readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces was equal to or greater than the number obtained by dividing the population of that province by the total population of all the provinces, the population of each province being its population as at July 1 of the year of the decennial census that preceded that readjustment according to the estimates prepared for the purpose of that readjustment.

5. Unless the context indicates otherwise, in these rules, the population of a province is the estimate of its population as at July 1 of the year of the most recent decennial census.
6. In these rules, ***electoral quotient*** means
 - (a) 111,166, in relation to the readjustment following the completion of the 2011 decennial census, and
 - (b) in relation to the readjustment following the completion of any subsequent decennial census, the number obtained by multiplying the electoral quotient that was applied in the preceding readjustment by the number that is the average of the numbers obtained by dividing the population of each province by the population of the province as at July 1 of the year of the preceding decennial census according to the estimates prepared for the purpose of the preceding readjustment, and rounding up any fractional remainder of that multiplication to one.

Population estimates

(1.1) For the purpose of the rules in subsection (1), there is required to be prepared an estimate of the population of Canada and of each province as at July 1, 2001 and July 1, 2011 — and, in each year following the 2011 decennial census in which a decennial census is taken, as at July 1 of that year — by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time.⁽²⁷⁾

Yukon Territory, Northwest Territories and Nunavut

(2) The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1985, shall be entitled to one member, the Northwest Territories as bounded and described in section 2 of chapter N-27 of the Revised Statutes of Canada, 1985, as amended by section 77 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member, and Nunavut as bounded and described in section 3 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member.⁽²⁸⁾

Constitution of House of Commons

51A Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.⁽²⁹⁾

Increase of Number of House of Commons

52 The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes; Royal Assent

Appropriation and Tax Bills

53 Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of Money Votes

54 It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Royal Assent to Bills, etc.

55 Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

Disallowance by Order in Council of Act assented to by Governor General

56 Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of Queen's Pleasure on Bill reserved

57 A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

V. Provincial Constitutions

Executive Power

Appointment of Lieutenant Governors of Provinces

58 For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.

Tenure of Office of Lieutenant Governor

59 A Lieutenant Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of Canada shall not be removeable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

Salaries of Lieutenant Governors

60 The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.⁽³⁰⁾

Oaths, etc., of Lieutenant Governor

61 Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor General or some Person authorized by him Oaths of Allegiance and Office similar to those taken by the Governor General.

Application of Provisions referring to Lieutenant Governor

62 The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

Appointment of Executive Officers for Ontario and Quebec

63 The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely, — the Attorney General, the Secretary and Registrar of the

Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec the Speaker of the Legislative Council and the Solicitor General.⁽³¹⁾

Executive Government of Nova Scotia and New Brunswick

64 The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.⁽³²⁾

Powers to be exercised by Lieutenant Governor of Ontario or Quebec with Advice, or alone

65 All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.⁽³³⁾

Application of Provisions referring to Lieutenant Governor in Council

66 The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

Administration in Absence, etc., of Lieutenant Governor

67 The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

Seats of Provincial Governments

68 Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely, — of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power

1. Ontario

Legislature for Ontario

69 There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

Electoral districts

70 The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.⁽³⁴⁾

2. Quebec

Legislature for Quebec

71 There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.⁽³⁵⁾

Constitution of Legislative Council

72 The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

Qualification of Legislative Councillors

73 The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation, Disqualification, etc.

74 The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant.

Vacancies

75 When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

Questions as to Vacancies, etc.

76 If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of Legislative Council

77 The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

Quorum of Legislative Council

78 Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

Voting in Legislative Council

79 Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

Constitution of Legislative Assembly of Quebec

80 The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.⁽³⁶⁾

3. Ontario and Quebec

81 Repealed.⁽³⁷⁾

Summoning of Legislative Assemblies

82 The Lieutenant Governor of Ontario and of Quebec shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on election of Holders of offices

83 Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or Profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.⁽³⁸⁾

Continuance of existing Election Laws

84 Until the legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely, — the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution, — shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that, until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.⁽³⁹⁾

Duration of Legislative Assemblies

85 Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer.⁽⁴⁰⁾

Yearly Session of Legislature

86 There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.⁽⁴¹⁾

Speaker, Quorum, etc.

87 The following Provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say, — the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

4. Nova Scotia and New Brunswick

Constitutions of Legislatures of Nova Scotia and New Brunswick

88 The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.⁽⁴²⁾

5. Ontario, Quebec, and Nova Scotia

89 Repealed.⁽⁴³⁾

6. The Four Provinces

Application to Legislatures of Provisions respecting Money Votes, etc.

90 The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

Fundamental Characteristics of Quebec

Quebec

90Q.1 *Quebecers form a nation.*

Quebec

90Q.2 *French shall be the only official language of Quebec. It is also the common language of the Quebec nation.*⁽¹¹³⁾

7. Saskatchewan

Saskatchewan

90S.1 (1) *Saskatchewan has autonomy with respect to all of the matters falling under its exclusive legislative jurisdiction pursuant to this Act.*

(2) *Saskatchewan is and always has been dependent on agriculture, and on the development of its non-renewable natural resources, forestry resources and electrical energy generation and production.*

(3) *Saskatchewan's ability to control the development of its non-renewable natural resources, its forestry resources and its electrical energy generation and production is critical to the future well-being and prosperity of Saskatchewan and its people.*⁽¹¹⁴⁾

VI. Distribution of Legislative Powers

Powers of the Parliament

Legislative Authority of Parliament of Canada

91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

- 1.** Repealed.⁽⁴⁴⁾
- 1A.** The Public Debt and Property.⁽⁴⁵⁾
- 2.** The Regulation of Trade and Commerce.

- 2A.** Unemployment insurance.⁽⁴⁶⁾
- 3.** The raising of Money by any Mode or System of Taxation.
- 4.** The borrowing of Money on the Public Credit.
- 5.** Postal Service.
- 6.** The Census and Statistics.
- 7.** Militia, Military and Naval Service, and Defence.
- 8.** The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
- 9.** Beacons, Buoys, Lighthouses, and Sable Island.
- 10.** Navigation and Shipping.
- 11.** Quarantine and the Establishment and Maintenance of Marine Hospitals.
- 12.** Sea Coast and Inland Fisheries.
- 13.** Ferries between a Province and any British or Foreign Country or between Two Provinces.
- 14.** Currency and Coinage.
- 15.** Banking, Incorporation of Banks, and the Issue of Paper Money.
- 16.** Savings Banks.
- 17.** Weights and Measures.
- 18.** Bills of Exchange and Promissory Notes.
- 19.** Interest.
- 20.** Legal Tender.
- 21.** Bankruptcy and Insolvency.
- 22.** Patents of Invention and Discovery.
- 23.** Copyrights.
- 24.** Indians, and Lands reserved for the Indians.
- 25.** Naturalization and Aliens.
- 26.** Marriage and Divorce.
- 27.** The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
- 28.** The Establishment, Maintenance, and Management of Penitentiaries.

- 29.** Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.⁽⁴⁷⁾

Exclusive Powers of Provincial Legislatures

Subjects of exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

- 1.** Repealed.⁽⁴⁸⁾
- 2.** Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
- 3.** The borrowing of Money on the sole Credit of the Province.
- 4.** The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
- 5.** The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
- 6.** The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
- 7.** The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
- 8.** Municipal Institutions in the Province.
- 9.** Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
- 10.** Local Works and Undertakings other than such as are of the following Classes:
 - (a)** Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
 - (b)** Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Primary production

(5) The expression ***primary production*** has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

(49)

Education

Legislation respecting Education

93 In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

1. Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;
2. All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;

3. Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;
4. In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.⁽⁵⁰⁾

Quebec

93A Paragraphs (1) to (4) of section 93 do not apply to Quebec.⁽⁵¹⁾

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick

Legislation for Uniformity of Laws in Three Provinces

94 Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Old Age Pensions

Legislation respecting old age pensions and supplementary benefits

94A The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.⁽⁵²⁾

Agriculture and Immigration

Concurrent Powers of Legislation respecting Agriculture, etc.

95 In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII. Judicature

Appointment of Judges

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, etc.

97 Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98 The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

(53)

Salaries, etc., of Judges

100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.⁽⁵⁴⁾

General Court of Appeal, etc.

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.⁽⁵⁵⁾

VIII. Revenues; Debts; Assets; Taxation

Creation of Consolidated Revenue Fund

102 All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

Expenses of Collection, etc.

103 The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

Interest of Provincial Public Debts

104 The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

Salary of Governor General

105 Unless altered by the Parliament of Canada, the Salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall

form the Third Charge thereon.⁽⁵⁶⁾

Appropriation from Time to Time

106 Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

Transfer of Stocks, etc.

107 All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

Transfer of Property in Schedule

108 The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

Property in Lands, Mines, etc.

109 All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.⁽⁵⁷⁾

Assets connected with Provincial Debts

110 All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable for Provincial Debts

111 Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

Debts of Ontario and Quebec

112 Ontario and Quebec conjointly shall be liable to Canada for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Assets of Ontario and Quebec

113 The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the Property of Ontario and Quebec conjointly.

Debt of Nova Scotia

114 Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.⁽⁵⁸⁾

Debt of New Brunswick

115 New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Payment of interest to Nova Scotia and New Brunswick

116 In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly Payments in advance from the Government of Canada Interest at Five per Centum per Annum on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial Public Property

117 The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

118 Repealed.⁽⁵⁹⁾

Further Grant to New Brunswick

119 New Brunswick shall receive by half-yearly Payments in advance from Canada for the Period of Ten Years from the Union an additional Allowance of Sixty-three thousand Dollars per Annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five per Centum per Annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.⁽⁶⁰⁾

Form of Payments

120 All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.

Canadian Manufactures, etc.

121 All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Continuance of Customs and Excise Laws

122 The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.⁽⁶¹⁾

Exportation and Importation as between Two Provinces

123 Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.⁽⁶²⁾

Lumber Dues in New Brunswick

124 Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.⁽⁶³⁾

Exemption of Public Lands, etc.

125 No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

Provincial Consolidated Revenue Fund

126 Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX. Miscellaneous Provisions

General

127 Repealed.⁽⁶⁴⁾

Oath of Allegiance, etc.

128 Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

Quebec

128Q.1 *Section 128 does not apply to Quebec.*⁽¹¹⁵⁾

Continuance of existing Laws, Courts, Officers, etc.

129 Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.⁽⁶⁵⁾

Transfer of Officers to Canada

130 Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.⁽⁶⁶⁾

Appointment of new Officers

131 Until the Parliament of Canada otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

Treaty Obligations

132 The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Use of English and French Languages

133 Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.⁽⁶⁷⁾

Ontario and Quebec

Appointment of Executive Officers for Ontario and Quebec

134 Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say, — the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of Quebec the Solicitor General, and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.⁽⁶⁸⁾

Powers, Duties, etc. of Executive Officers

135 Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute, or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.⁽⁶⁹⁾

Great Seals

136 Until altered by the Lieutenant Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

Construction of temporary Acts

137 The words ***and from thence to the End of the then next ensuing Session of the Legislature***, or Words to the same Effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada if the Subject Matter of the Act is within the Powers of the same as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

As to Errors in Names

138 From and after the Union the Use of the Words ***Upper Canada*** instead of ***Ontario***, or ***Lower Canada*** instead of ***Quebec***, in any Deed, Writ, Process, Pleading, Document, Matter, or Thing shall not invalidate the same.

As to issue of Proclamations before Union, to commence after Union

139 Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several Matters and Things therein proclaimed, shall be and continue of like Force and Effect as if the Union had not been made.⁽⁷⁰⁾

As to issue of Proclamations after Union

140 Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant Governor of Ontario or of Quebec, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in Ontario or Quebec as if the Union had not been made.⁽⁷¹⁾

Penitentiary

141 The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.⁽⁷²⁾

Arbitration respecting Debts, etc.

142 The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a Resident either in Ontario or in Quebec.⁽⁷³⁾

Division of Records

143 The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.⁽⁷⁴⁾

Constitution of Townships in Quebec

144 The Lieutenant Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a Day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X. Intercolonial Railway

145 Repealed.⁽⁷⁵⁾

XI. Admission of Other Colonies

Power to admit Newfoundland, etc., into the Union

146 It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.⁽⁷⁶⁾

As to Representation of Newfoundland and Prince Edward Island in Senate

147 In case of the Admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a Representation in the Senate of Canada of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the Three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.⁽⁷⁷⁾

THE FIRST SCHEDULE⁽⁷⁸⁾

Electoral Districts of Ontario

A. EXISTING ELECTORAL DIVISIONS.

Counties

- 1.** Prescott.
- 2.** Glengarry.

3. Stormont.
4. Dundas.
5. Russell.
6. Carleton.
7. Prince Edward.
8. Halton.
9. Essex.

Ridings of Counties

10. North Riding of Lanark.
11. South Riding of Lanark.
12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.
21. East Riding of York.
22. West Riding of York.
23. North Riding of York.
24. North Riding of Wentworth.
25. South Riding of Wentworth.
26. East Riding of Elgin.
27. West Riding of Elgin.
28. North Riding of Waterloo.
29. South Riding of Waterloo.
30. North Riding of Brant.

- 31.** South Riding of Brant.
- 32.** North Riding of Oxford.
- 33.** South Riding of Oxford.
- 34.** East Riding of Middlesex.

Cities, Parts of Cities, and Towns

- 35.** West Toronto.
- 36.** East Toronto.
- 37.** Hamilton.
- 38.** Ottawa.
- 39.** Kingston.
- 40.** London.
- 41.** Town of Brockville, with the Township of Elizabethtown thereto attached.
- 42.** Town of Niagara, with the Township of Niagara thereto attached.
- 43.** Town of Cornwall, with the Township of Cornwall thereto attached.

B. NEW ELECTORAL DIVISIONS

- 44.** The Provisional Judicial District of Algoma.

The County of BRUCE, divided into Two Ridings, to be called respectively the North and South Ridings:

- 45.** The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albermarle, Amable, Arran, Bruce, Elderslie, and Saugeen, and the Village of Southampton.
- 46.** The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinloss, Culross, and Carrick.

The County of HURON, divided into Two Ridings, to be called respectively the North and South Ridings:

- 47.** The North Riding to consist of the Townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne, Hullett, including the Village of Clinton, and McKillop.
- 48.** The South Riding to consist of the Town of Goderich and the Townships of Goderich, Tuckersmith, Stanley, Hay, Usborne, and Stephen.

The County of MIDDLESEX, divided into three Ridings, to be called respectively the North, West, and East Ridings:

- 49.** The North Riding to consist of the Townships of McGillivray and Biddulph (taken from the County of Huron), and Williams East, Williams West, Adelaide, and Lobo.
- 50.** The West Riding to consist of the Townships of Delaware, Carradoc, Metcalfe, Mosa and Ekfrid, and the Village of Strathroy.

[The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.]
- 51.** The County of LAMBTON to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen, and Brooke, and the Town of Sarnia.
- 52.** The County of KENT to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.
- 53.** The County of BOTHWELL to consist of the Townships of Sombra, Dawn, and Euphemia (taken from the County of Lambton), and the Townships of Zone, Camden with the Gore thereof, Orford, and Howard (taken from the County of Kent).

The County of GREY divided into Two Ridings to be called respectively the South and North Ridings:

- 54.** The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton, and Melancthon.
- 55.** The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, Saint-Vincent, Sydenham, Sullivan, Derby, and Keppel, Sarawak and Brooke, and the Town of Owen Sound.

The County of PERTH divided into Two Ridings, to be called respectively the South and North Ridings:

- 56.** The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.
- 57.** The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the Villages of Mitchell and Ste. Marys.

The County of WELLINGTON divided into Three Ridings to be called respectively North, South and Centre Ridings:

- 58.** The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.

- 59.** The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the Villages of Fergus and Elora.
- 60.** The South Riding to consist of the Town of Guelph, and the Townships of Guelph and Puslinch.

The County of NORFOLK, divided into Two Ridings, to be called respectively the South and North Ridings:

- 61.** The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham, and Woodhouse, and with the Gore thereof.
- 62.** The North Riding to consist of the Townships of Middleton, Townsend, and Windham, and the Town of Simcoe.
- 63.** The County of HALDIMAND to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Raynham, Walpole, and Dunn.
- 64.** The County of MONCK to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caister and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).
- 65.** The County of LINCOLN to consist of the Townships of Clinton, Grantham, Grimsby, and Louth, and the Town of St. Catherines.
- 66.** The County of WELLAND to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.
- 67.** The County of PEEL to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.
- 68.** The County of CARDWELL to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of SIMCOE, divided into Two Ridings, to be called respectively the South and North Ridings:

- 69.** The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tosorontio, Mulmur, and the Village of Bradford.
- 70.** The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of VICTORIA, divided into Two Ridings, to be called respectively the South and North Ridings:

- 71.** The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.
- 72.** The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Sommerville, and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of PETERBOROUGH, divided into Two Ridings, to be called respectively the West and East Ridings:

- 73.** The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith, and Ennismore, and the Town of Peterborough.
- 74.** The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee, and Snowden, and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The County of HASTINGS, divided into Three Ridings, to be called respectively the West, East, and North Ridings:

- 75.** The West Riding to consist of the Town of Belleville, the Township of Sydney, and the Village of Trenton.
- 76.** The East Riding to consist of the Townships of Thurlow, Tyendinaga, and Hungerford.
- 77.** The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora, and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.
- 78.** The County of LENNOX to consist of the Townships of Richmond, Adolphustown, North Fredericksburg, South Fredericksburg, Ernest Town, and Amherst Island, and the Village of Napanee.
- 79.** The County of ADDINGTON to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough, and Bedford.
- 80.** The County of FRONTENAC to consist of the Townships of Kingston, Wolfe Island, Pittsburg and Howe Island, and Storrington.

The County of RENFREW, divided into Two Ridings, to be called respectively the South and North Ridings:

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.
82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed Townships lying North-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not especially mentioned in this Schedule, is to be taken as Part of the County or Riding within which it is locally situate.

THE SECOND SCHEDULE

Electoral Districts of Quebec specially fixed

COUNTIES OF —

Pontiac.

Ottawa.

Argenteuil.

Huntingdon.

Missisquoi.

Brome.

Shefford.

Stanstead.

Compton.

Wolfe and Richmond.

Megantic.

Town of Sherbrooke.

THE THIRD SCHEDULE

Provincial Public Works and Property to be the Property of Canada

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

THE FOURTH SCHEDULE

Assets to be the Property of Ontario and Quebec conjointly

Upper Canada Building Fund.

Lunatic Asylums.

Normal School.

Court Houses in Aylmer, Montreal, Kamouraska, } Lower Canada.

Law Society, Upper Canada.

Montreal Turnpike Trust.

University Permanent Fund.

Royal Institution.

Consolidated Municipal Loan Fund, Upper Canada.

Consolidated Municipal Loan Fund, Lower Canada.

Agricultural Society, Upper Canada.

Lower Canada Legislative Grant.

Quebec Fire Loan.

Temiscouata Advance Account.

Quebec Turnpike Trust.

Education — East.

Building and Jury Fund, Lower Canada.

Municipalities Fund.

Lower Canada Superior Education Income Fund.

THE FIFTH SCHEDULE

OATH OF ALLEGIANCE

I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note. — The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.

DECLARATION OF QUALIFICATION

I A.B. do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the Case may be*], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alieu or in Roture (as the Case may be),*] in the Province of Nova Scotia [*or as the Case may be*] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the Case may be*], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

THE SIXTH SCHEDULE⁽⁷⁹⁾

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1 For the purposes of section 92A of this Act,

(a) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

ENDNOTES

(1) **The enacting clause was repealed by the *Statute Law Revision Act, 1893, 56-57 Vict., c. 14 (U.K.)*. It read as follows:**

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

(2) **As amended by the *Constitution Act, 1982*, which came into force on April 17, 1982. The section originally read as follows:**

1 This Act may be cited as *The British North America Act, 1867*.

(3) **Section 2, repealed by the *Statute Law Revision Act, 1893, 56-57 Vict., c. 14 (U.K.)*, read as follows:**

2 The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

(4) **The first day of July, 1867, was fixed by proclamation dated May 22, 1867.**

(5)

**Partially repealed by the *Statute Law Revision Act, 1893, 56-57 Vict., c. 14*
(U.K.). The section originally read as follows:**

4 The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

(6)

Canada now consists of ten provinces (Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland and Labrador) and three territories (Yukon, the Northwest Territories and Nunavut).

The first territories added to the Union were Rupert's Land and the North-Western Territory, (subsequently designated the Northwest Territories), which were admitted pursuant to section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.), by the *Rupert's Land and North-Western Territory Order* of June 23, 1870, effective July 15, 1870. Prior to the admission of those territories, the Parliament of Canada enacted *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada* (32-33 Vict., c. 3), and the *Manitoba Act, 1870*, (33 Vict., c. 3), which provided for the formation of the Province of Manitoba.

British Columbia was admitted into the Union pursuant to section 146 of the *Constitution Act, 1867*, by the *British Columbia Terms of Union*, being Order in Council of May 16, 1871, effective July 20, 1871.

Prince Edward Island was admitted pursuant to section 146 of the *Constitution Act, 1867*, by the *Prince Edward Island Terms of Union*, being Order in Council of June 26, 1873, effective July 1, 1873.

On June 29, 1871, the United Kingdom Parliament enacted the *Constitution Act, 1871* (34-35 Vict., c. 28) authorizing the creation of additional provinces out of territories not included in any province. Pursuant to this statute, the Parliament of Canada enacted the *Alberta Act*, (July 20, 1905, 4-5 Edw. VII, c. 3) and the *Saskatchewan Act*, (July 20, 1905, 4-5 Edw. VII, c. 42), providing for the creation of the provinces of Alberta and Saskatchewan, respectively. Both of these Acts came into force on September 1, 1905.

Meanwhile, all remaining British possessions and territories in North America and the islands adjacent thereto, except the colony of Newfoundland and its dependencies, were admitted into the Canadian Confederation by the *Adjacent Territories Order*, dated July 31, 1880.

The Parliament of Canada added portions of the Northwest Territories to the adjoining provinces in 1912 by *The Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40, *The Quebec Boundaries Extension Act*, 1912, 2 Geo. V, c. 45 and *The Manitoba Boundaries Extension Act*, 1912, 2 Geo. V, c. 32, and further additions were made to Manitoba by *The Manitoba Boundaries Extension Act*, 1930, 20-21 Geo. V, c. 28.

The Yukon Territory was created out of the Northwest Territories in 1898 by *The Yukon Territory Act*, 61 Vict., c. 6 (Can.).

Newfoundland was added on March 31, 1949, by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), which ratified the Terms of Union of Newfoundland with Canada.

Nunavut was created out of the Northwest Territories in 1999 by the *Nunavut Act*, S.C. 1993, c. 28.

(7) See endnote (65) to section 129, below.

(8) Repealed and re-enacted by the *Parliament of Canada Act, 1875*, 38-39 Vict., c. 38 (U.K.). The original section read as follows:

18 The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

(9) Spent. The first session of the first Parliament began on November 6, 1867.

(10) Section 20, repealed by the *Constitution Act, 1982*, read as follows:

20 There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first sitting in the next Session.

Section 20 has been replaced by section 5 of the *Constitution Act, 1982*, which provides that there shall be a sitting of Parliament at least once every twelve months.

(11) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.) and modified by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), the *Constitution Act (No. 2)*, 1975, S.C. 1974-75-76, c. 53, and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:

21 The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

The *Manitoba Act, 1870*, added two senators for Manitoba; the *British Columbia Terms of Union* added three; upon admission of Prince Edward Island four more were provided by section 147 of the *Constitution Act, 1867*; the *Alberta Act* and the *Saskatchewan Act* each added four. The Senate was reconstituted at 96 by the *Constitution Act, 1915*. Six more senators were added upon union with Newfoundland, and one senator each was added for the Yukon Territory and the Northwest Territories by the *Constitution Act (No. 2)*, 1975. One senator was added for Nunavut by the *Constitution Act, 1999 (Nunavut)*.

(12) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), the *Constitution Act (No. 2)*, 1975, S.C. 1974-75-76, c. 53 and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:

22 In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:

1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick;

which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators; Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.

In the case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

The reference in section 22 to the Consolidated Statutes of Canada is a reference to the Consolidated Statutes of 1859.

(13) Section 44 of the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2, provided that, for the purposes of that Part (which added one senator for Nunavut), the word “Province” in section 23 of the *Constitution Act, 1867* has the same meaning as is assigned to the word “province” by section 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended, which provides that the term “province” means “a province of Canada, and includes Yukon, the Northwest Territories and Nunavut”.

Section 2 of the *Constitution Act (No. 2)*, 1975, S.C. 1974-75-76, c. 53, provided that for the purposes of that Act (which added one senator each for the Yukon Territory and the Northwest Territories) the term “Province” in section 23 of the *Constitution Act, 1867* has the same meaning as is assigned to the term “province” by section 28 of the *Interpretation Act*, R.S.C. 1970, c. I-23, which provides that the term “province” means “a province of Canada, and includes the Yukon Territory and the Northwest Territories”.

(14) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

25 Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty’s Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen’s Proclamation of Union.

(15) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:**

26 If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

(16) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:**

27 In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

(17) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), the *Constitution Act (No. 2)*, 1975, S.C. 1974-75-76, c. 53, and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:**

28 The Number of Senators shall not at any Time exceed Seventy-eight.

(18) **As enacted by the *Constitution Act, 1965*, S.C. 1965, c. 4, which came into force on June 2, 1965. The original section read as follows:**

29 A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

(19) **Provision for exercising the functions of Speaker during his or her absence is made by Part II of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 (formerly the *Speaker of the Senate Act*, R.S.C. 1970, c. S-14). Doubts as to the power of Parliament to enact the *Speaker of the Senate Act* were removed by the *Canadian Speaker (Appointment of Deputy) Act, 1895*, 2nd Sess., 59 Vict., c. 3 (U.K.), which was repealed by the *Constitution Act, 1982*.**

(20) **The figures given here result from the application of section 51, as enacted by the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I, and amended by the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2, and readjustments made pursuant to the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3. The original section (which was altered from time to time as the result of the addition of new provinces and changes in population) read as follows:**

37 The House of Commons shall, subject to the Provisions of this Act, consist of one hundred and eighty-one members, of whom Eighty-two shall be elected for Ontario, Sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick.

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- (21) Spent. The electoral districts are now established by proclamations issued from time to time under the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3, as amended for particular districts by Acts of Parliament (see the most recent *Table of Public Statutes and Responsible Ministers*).
-
- (22) Spent. Elections are now provided for by the *Canada Elections Act*, S.C. 2000, c. 9; qualifications and disqualifications of members by the *Parliament of Canada Act*, R.S.C. 1985, c. P-1. The right of citizens to vote and hold office is provided for in section 3 of the *Constitution Act, 1982*.
-
- (23) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:
- 42 For the First Election of Members to serve in the House of Commons the Governor General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.
- The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.
-
- (24) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:
- 43 In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such Vacant District.
-
- (25) Provision for exercising the functions of Speaker during his or her absence is now made by Part III of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1.
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- (26) The term of the twelfth Parliament was extended by the *British North America Act, 1916*, 6-7 Geo. V., c. 19 (U.K.), which Act was repealed by the *Statute Law Revision Act, 1927*, 17-18 Geo. V, c. 42 (U.K.). See also the *Constitution Act, 1982*, subsection 4(1), which provides that no House of Commons shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members, and subsection 4(2), which provides for continuation of the House of Commons in special circumstances.
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(27)

As enacted by *An Act to amend the Constitution Act, 1867 (electoral representation)*, S.C. 2022, c. 6, which came into force on royal assent on June 23, 2022. This amendment replaces rule 2 of subsection 51(1) of the *Constitution Act, 1867*. Section 1 of the amending Act provides an alternative title, *Preserving Provincial Representation in the House of Commons Act*. The Act provides rules for the readjustment of the number of members and the representation of provinces in the House of Commons. It also sets out transitional measures at sections 4 and 5, providing for the application of the amendment to the readjustment of electoral boundaries under the *Electoral Boundaries Readjustment Act* (R.S.C. 1985, c. E-3).

Rule 2 of subsection 51(1) of the *Constitution Act, 1867* as amended by s. 2 of the *Fair Representation Act* (S.C. 2011, c. 26) read as follows:

If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province on the date of the coming into force of the *Constitution Act, 1985 (Representation)*, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

The section, as originally enacted, read as follows:

51 On the Completion of the Census in the Year One Thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such Manner, and from such Time, as the Parliament of Canada from Time to Time provides, subject and according to the following Rules:

1. Quebec shall have the fixed Number of Sixty-five Members:
2. There shall be assigned to each of the other Provinces such a Number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of Quebec (so ascertained):
3. In the Computation of the Number of Members for a Province a fractional Part not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One Half of that Number shall be equivalent to the whole Number:
4. On any such Re-adjustment the Number of Members for a Province shall not be reduced unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of Canada at the then last preceding Re-adjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One Twentieth Part or upwards:
5. Such Re-adjustment shall not take effect until the Termination of the then existing Parliament.

Section 51 was amended by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.) by repealing the words after “of the census” to “seventy-one and” and the word “subsequent”.

By the *British North America Act, 1943*, 6-7 Geo. VI, c. 30 (U.K.), which Act was repealed by the *Constitution Act, 1982*, redistribution of seats following the 1941 census was postponed until the first session of Parliament after the war. The section was re-enacted by the *British North America Act, 1946*, 9-10 Geo. VI, c. 63 (U.K.), which Act was also repealed by the *Constitution Act, 1982*, to read as follows:

51(1) The number of members of the House of Commons shall be two hundred and fifty-five and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. Subject as hereinafter provided, there shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and fifty-four and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.
2. If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and fifty-four, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and fifty-four.
3. Notwithstanding anything in this section, if upon completion of a computation under rules one and two, the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.
4. In the event that rules one and two cease to apply in respect of a province then, for the purpose of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and fifty-four shall be reduced by the number of members assigned to such province pursuant to rule three.
5. Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by Chapter forty-one of the Statutes of Canada, 1901, together with any Part of Canada not comprised within a province which may from time to time be included therein by the Parliament of Canada for the purposes of representation in Parliament, shall be entitled to one member.

The section was re-enacted as follows by the *British North America Act, 1952*, S.C. 1952, c. 15 (which Act was also repealed by the *Constitution Act, 1982*):

51(1) Subject as hereinafter provided, the number of members of the House of Commons shall be two hundred and sixty-three and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and sixty-one and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.
2. If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and sixty-one, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and sixty-one.
3. Notwithstanding anything in this section, if upon completion of a computation under rules one and two the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.
4. In the event that rules one and two cease to apply in respect of a province then, for the purposes of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and sixty-one shall be reduced by the number of members assigned to such province pursuant to rule three.
5. On any such readjustment the number of members for any province shall not be reduced by more than fifteen per cent below the representation to which such province was entitled under rules one to four of this subsection at the last preceding readjustment of the representation of that province, and there shall be no reduction in the representation of any province as a result of which that province would have a smaller number of members than any other

province that according to the results of the then last decennial census did not have a larger population; but for the purposes of any subsequent readjustment of representation under this section any increase in the number of members of the House of Commons resulting from the application of this rule shall not be included in the divisor mentioned in rules one to four of this subsection.

6. Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by chapter forty-one of the statutes of Canada, 1901, shall be entitled to one member, and such other part of Canada not comprised within a province as may from time to time be defined by the Parliament of Canada shall be entitled to one member.

Subsection 51(1) was re-enacted by the *Constitution Act, 1974*, S.C. 1974-75-76, c. 13, to read as follows:

51(1) The number of members of the House of Commons and the representation of the provinces therein shall upon the coming into force of this subsection and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following Rules:

1. There shall be assigned to Quebec seventy-five members in the readjustment following the completion of the decennial census taken in the year 1971, and thereafter four additional members in each subsequent readjustment.

2. Subject to Rules 5(2) and (3), there shall be assigned to a large province a number of members equal to the number obtained by dividing the population of the large province by the electoral quotient of Quebec.

3. Subject to Rules 5(2) and (3), there shall be assigned to a small province a number of members equal to the number obtained by dividing

(a) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces (other than Quebec) having populations of less than one and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census; and

(b) the population of the small province by the quotient obtained under paragraph (a).

4. Subject to Rules 5(1)(a), (2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained

(a) by dividing the sum of the populations of the provinces (other than Quebec) having populations of less than one and a half million by the sum of the number of members assigned to those provinces under any of Rules

3, 5(1)(b), (2) and (3);

(b) by dividing the population of the intermediate province by the quotient obtained under paragraph (a); and

(c) by adding to the number of members assigned to the intermediate province in the readjustment following the completion of the penultimate decennial census one-half of the difference resulting from the subtraction of that number from the quotient obtained under paragraph (b).

5.(1) On any readjustment,

(a) if no province (other than Quebec) has a population of less than one and a half million, Rule 4 shall not be applied and, subject to Rules 5(2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained by dividing

(i) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces, (other than Quebec) having populations of not less than one and a half million and not more than two and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census, and

(ii) the population of the intermediate province by the quotient obtained under subparagraph (i);

(b) if a province (other than Quebec) having a population of

(i) less than one and a half million, or

(ii) not less than one and a half million and not more than two and a half million

does not have a population greater than its population determined according to the results of the penultimate decennial census, it shall, subject to Rules 5(2) and (3), be assigned the number of members assigned to it in the readjustment following the completion of that census.

(2) On any readjustment,

(a) if, under any of Rules 2 to 5(1), the number of members to be assigned to a province (in this paragraph referred to as “the first province”) is smaller than the number of members to be assigned to any other province not having a population greater than that of the first province, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the largest number of members to be assigned to any other province not having a population greater than that of the first province;

(b) if, under any of Rules 2 to 5(1)(a), the number of members to be assigned to a province is smaller than the number of members assigned to it in the readjustment following the completion of the penultimate decennial census, those Rules shall not be applied to it and it shall be assigned the latter number of members;

(c) if both paragraphs (a) and (b) apply to a province, it shall be assigned a number of members equal to the greater of the numbers produced under those paragraphs.

(3) On any readjustment,

(a) if the electoral quotient of a province (in this paragraph referred to as “the first province”) obtained by dividing its population by the number of members to be assigned to it under any of Rules 2 to 5(2) is greater than the electoral quotient of Quebec, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the number obtained by dividing its population by the electoral quotient of Quebec;

(b) if, as a result of the application of Rule 6(2)(a), the number of members assigned to a province under paragraph (a) equals the number of members to be assigned to it under any of Rules 2 to 5(2), it shall be assigned that number of members and paragraph (a) shall cease to apply to that province.

6. (1) In these Rules,

electoral quotient means, in respect of a province, the quotient obtained by dividing its population, determined according to the results of the then most recent decennial census, by the number of members to be assigned to it under any of Rules 1 to 5(3) in the readjustment following the completion of that census;

intermediate province means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census but not more than two and a half million and not less than one and a half million;

large province means a province (other than Quebec) having a population greater than two and a half million;

penultimate decennial census means the decennial census that preceded the then most recent decennial census;

population means, except where otherwise specified, the population determined according to the results of the then most recent decennial census;

small province means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census and less than one and half million.

(2) For the purposes of these Rules,

(a) if any fraction less than one remains upon completion of the final calculation that produces the number of members to be assigned to a province, that number of members shall equal the number so produced disregarding the fraction;

(b) if more than one readjustment follows the completion of a decennial census, the most recent of those readjustments shall, upon taking effect, be deemed to be the only readjustment following the completion of that census;

(c) a readjustment shall not take effect until the termination of the then existing Parliament.

Subsection 51(1) was re-enacted by the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I, as follows:

51(1) The number of members of the House of Commons and the representation of the provinces therein shall, on the coming into force of this subsection and thereafter on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the total population of the provinces by two hundred and seventy-nine and by dividing the population of each province by the quotient so obtained, counting any remainder in excess of 0.50 as one after the said process of division.

2. If the total number of members that would be assigned to a province by the application of rule 1 is less than the total number assigned to that province on the date of coming into force of this subsection, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

Subsection 51(1) was re-enacted by the *Fair Representation Act*, S.C. 2011, c. 26, s. 2, as follows:

51(1) The number of members of the House of Commons and the representation of the provinces therein shall, on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the population of the province by the electoral quotient and rounding up any fractional remainder to one.

2. If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province on the date of the coming into force of the *Constitution Act, 1985*

(*Representation*), there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

3. After the application of rules 1 and 2 and section 51A, there shall, in respect of each province that meets the condition set out in rule 4, be added, if necessary, a number of members such that, on the completion of the readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces is as close as possible to, without being below, the number obtained by dividing the population of that province by the total population of all the provinces.

4. Rule 3 applies to a province if, on the completion of the preceding readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces was equal to or greater than the number obtained by dividing the population of that province by the total population of all the provinces, the population of each province being its population as at July 1 of the year of the decennial census that preceded that readjustment according to the estimates prepared for the purpose of that readjustment.

5. Unless the context indicates otherwise, in these rules, the population of a province is the estimate of its population as at July 1 of the year of the most recent decennial census.

6. In these rules, ***electoral quotient*** means

(a) 111,166, in relation to the readjustment following the completion of the 2011 decennial census, and

(b) in relation to the readjustment following the completion of any subsequent decennial census, the number obtained by multiplying the electoral quotient that was applied in the preceding readjustment by the number that is the average of the numbers obtained by dividing the population of each province by the population of the province as at July 1 of the year of the preceding decennial census according to the estimates prepared for the purpose of the preceding readjustment, and rounding up any fractional remainder of that multiplication to one.

(1.1) For the purpose of the rules in subsection (1), there is required to be prepared an estimate of the population of Canada and of each province as at July 1, 2001 and July 1, 2011 — and, in each year following the 2011 decennial census in which a decennial census is taken, as at July 1 of that year — by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time.

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- (28) As enacted by the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. Note that the description of the territory of Yukon is now set out in Schedule 1 to the *Yukon Act*, S.C. 2002, c. 7, which replaced R.S.C. 1985, c. Y-2. Subsection 51(2) was previously amended by the *Constitution Act (No. 1)*, 1975, S.C. 1974-75-76, c. 28, and read as follows:
- (2) The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1970, shall be entitled to one member, and the Northwest Territories as bounded and described in section 2 of chapter N-22 of the Revised Statutes of Canada, 1970, shall be entitled to two members.
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- (29) As enacted by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.).
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- (30) Provided for by the *Salaries Act*, R.S.C. 1985, c. S-3.
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- (31) Now provided for in Ontario by the *Executive Council Act*, R.S.O. 1990, c. E.25, and in Quebec by the *Executive Power Act*, R.S.Q. c. E-18.
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- (32) A similar provision was included in each of the instruments admitting British Columbia, Prince Edward Island, and Newfoundland. The Executive Authorities for Manitoba, Alberta and Saskatchewan were established by the statutes creating those provinces. See endnote (6) to section 5, above.
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- (33) See endnote (65) to section 129, below.
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- (34) Spent. Now covered by the *Representation Act, 2005*, S.O. 2005, c. 35, Schedule 1.
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- (35) *An Act respecting the Legislative Council of Quebec*, S.Q. 1968, c. 9, provided that the Legislature for Quebec shall consist of the Lieutenant Governor and the National Assembly of Quebec, and repealed the provisions of the *Legislature Act*, R.S.Q. 1964, c. 6, relating to the Legislative Council of Quebec. Now covered by the *National Assembly Act*, R.S.Q. c. A-23.1. Sections 72 to 79 following are therefore completely spent.
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- (36) *An Act respecting the electoral districts*, S.Q. 1970, c. 7, provides that this section no longer has effect.
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- (37) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:
- 81 The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.
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- (38) Probably spent. The subject-matter of this section is now covered in Ontario by the *Legislative Assembly Act*, R.S.O. 1990, c. L.10, and in Quebec by the *National Assembly Act*, R.S.Q. c. A-23.1.
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- (39) Probably spent. The subject-matter of this section is now covered in Ontario by the *Election Act*, R.S.O. 1990, c. E.6, and the *Legislative Assembly Act*, R.S.O. 1990, c. L.10, and in Quebec by the *Elections Act*, R.S.Q. 1977, c. E-3.3 and the *National Assembly Act*, R.S.Q. 1977, c. A-23.1.
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(40) The maximum duration of the Legislative Assembly of Quebec has been changed to five years. See the *National Assembly Act*, R.S.Q. 1977, c. A-23.1. See also section 4 of the *Constitution Act, 1982*, which provides a maximum duration for a legislative assembly of five years but also authorizes continuation in special circumstances.

(41) See also section 5 of the *Constitution Act, 1982*, which provides that there shall be a sitting of each legislature at least once every twelve months.

(42) Partially repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), which deleted the following concluding words of the original enactment:

and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the Period for which it was elected.

A similar provision was included in each of the instruments admitting British Columbia, Prince Edward Island and Newfoundland. The Legislatures of Manitoba, Alberta and Saskatchewan were established by the statutes creating those provinces. See endnote (6) to section 5, above.

See also sections 3 to 5 of the *Constitution Act, 1982*, which prescribe democratic rights applicable to all provinces, and subitem 2(2) of the Schedule to that Act, which sets out the repeal of section 20 of the *Manitoba Act, 1870*. Section 20 of the *Manitoba Act, 1870* has been replaced by section 5 of the *Constitution Act, 1982*. Section 20 reads as follows:

20 There shall be a Session of the Legislature once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in one Session and its first sitting in the next Session.

(43) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

89 Each of the Lieutenant Governors of Ontario, Quebec and Nova Scotia shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

(44) **A new class 1 was added by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.). That Act and class 1 were repealed by the *Constitution Act, 1982*. The matters referred to in class 1 are provided for in subsection 4(2) and Part V of the *Constitution Act, 1982*. As enacted, class 1 read as follows:**

1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

(45) **The original class 1 was re-numbered by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.), as class 1A.**

(46) **Added by the *Constitution Act, 1940*, 3-4 Geo. VI, c. 36 (U.K.).**

Legislative authority has been conferred on Parliament by other Acts as follows:

1. The *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.):

2 The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3 The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4 The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

5 The following Acts passed by the said Parliament of Canada, and intitled respectively, — “An Act for the temporary government of Rupert’s Land and the North Western Territory when united with Canada”; and “An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of “the Province of Manitoba”, shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen’s name, of the Governor General of the said Dominion of Canada.

6 Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert’s Land Act, 1868*, 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.)) had previously conferred similar authority in relation to Rupert’s Land and the North–Western Territory upon admission of those areas.

2. The *Constitution Act, 1886*, 49-50 Vict., c. 35 (U.K.):

1 The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of

Canada, but are not included in any province thereof.

3. The *Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.):*

3 It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. Under section 44 of the *Constitution Act, 1982*, Parliament has exclusive authority to amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. Sections 38, 41, 42 and 43 of that Act authorize the Senate and House of Commons to give their approval to certain other constitutional amendments by resolution.

(48)

Class 1 was repealed by the *Constitution Act, 1982*. As enacted, it read as follows:

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 45 of the *Constitution Act, 1982* now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of that Act authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada.

(49)

Added by section 50 of the *Constitution Act, 1982*.

(50)

Alternative provisions have been enacted for four provinces. An alternative was provided for Manitoba by section 22 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.)), which section reads as follows:

22 In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege, of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:

(3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.

An alternative was provided for Alberta by section 17 of the *Alberta Act, 1905*, 4-5 Edw. VII, c. 3, which section reads as follows:

17 Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:

“(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.”

(2) In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression **by law** is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression **at the Union** is employed, in the said

paragraph 3, it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Saskatchewan by section 17 of the *Saskatchewan Act, 1905*, 4-5 Edw. VII, c. 42, which section reads as follows:

17 Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:

“(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.”

(2) In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression **by law** is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression **at the Union** is employed in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Newfoundland by Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.)). Term 17 of the Terms of Union of Newfoundland with Canada, set out in the penultimate paragraph of this note, was amended by the *Constitution Amendment, 1998 (Newfoundland Act)*, (see SI/98-25) and the *Constitution Amendment, 2001 (Newfoundland and Labrador)* (see SI/2001-117), and now reads as follows:

17 (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this term shall apply in respect of the Province of Newfoundland and Labrador.

(2) In and for the Province of Newfoundland and Labrador, the Legislature shall have exclusive authority to make laws in relation to education, but shall provide for courses in religion that are not specific to a religious denomination.

(3) Religious observances shall be permitted in a school where requested by parents.

Prior to the *Constitution Amendment, 1998 (Newfoundland Act)*, Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the *Constitution Amendment, 1997 (Newfoundland Act)* (see SI/97-55) to read as follows:

17 In lieu of section ninety-three of the *Constitution Act, 1867*, the following shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland, the Legislature shall have exclusive authority to make laws in relation to education but

(a) except as provided in paragraphs (b) and (c), schools established, maintained and operated with public funds shall be denominational schools, and any class of persons having rights under this Term as it read on January 1, 1995 shall continue to have the right to provide for religious education, activities and observances for the children of that class in those schools, and the group of classes that formed one integrated school system by agreement in 1969 may exercise the same rights under this Term as a single class of persons;

(b) subject to provincial legislation that is uniformly applicable to all schools specifying conditions for the establishment or continued operation of schools,

(i) any class of persons referred to in paragraph (a) shall have the right to have a publicly funded denominational school established, maintained and operated especially for that class, and

(ii) the Legislature may approve the establishment, maintenance and operation of a publicly funded school, whether denominational or non-denominational;

(c) where a school is established, maintained and operated pursuant to subparagraph (b) (i), the class of persons referred to in that subparagraph shall continue to have the right to provide for religious education, activities and observances and to direct the teaching of aspects of curriculum affecting religious beliefs, student admission policy and the assignment and dismissal of teachers in that school;

(d) all schools referred to in paragraphs (a) and (b) shall receive their share of public funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature; and

(e) if the classes of persons having rights under this Term so desire, they shall have the right to elect in total not less than two thirds of the members of a school board, and any class so desiring shall have the right to elect the portion of that total that is proportionate to the population of that class in the area under the board's jurisdiction.

Prior to the *Constitution Amendment, 1997 (Newfoundland Act)*, Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the *Constitution Amendment, 1987 (Newfoundland Act)* (see SI/88-11) to read as follows:

17(1) In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

(2) For the purposes of paragraph one of this Term, the Pentecostal Assemblies of Newfoundland have in Newfoundland all the same rights and privileges with respect to denominational schools and denominational colleges as any other class or classes of persons had by law in Newfoundland at the date of Union, and the words **all such schools** in paragraph (a) of paragraph one of this Term and the words **all such colleges** in paragraph (b) of paragraph one of this Term include, respectively, the schools and the colleges of the Pentecostal Assemblies of Newfoundland.

Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the Newfoundland Act, 12-13 Geo. VI, c. 22 (U.K.)), which Term provided an alternative for Newfoundland, originally read as follows:

17 In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

See also sections 23, 29 and 59 of the *Constitution Act, 1982*. Section 23 provides for new minority language educational rights and section 59 permits a delay in respect of the coming into force in Quebec of one aspect of those rights. Section 29 provides that nothing in the *Canadian Charter of Rights and Freedoms* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

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- (51) Added by the *Constitution Amendment, 1997 (Quebec)* (see SI/97-141).
-
- (52) Amended by the *Constitution Act, 1964*, 12-13 Eliz. II, c. 73 (U.K.). As originally enacted by the *British North America Act, 1951*, 14-15 Geo. VI, c. 32 (U.K.), which was repealed by the *Constitution Act, 1982*, section 94A read as follows:
- 94A** It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.
-
- (53) Amended by the *Constitution Act, 1960*, 9 Eliz. II, c. 2 (U.K.), which came into force on March 1, 1961. The original section read as follows:
- 99** The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
-
- (54) Now provided for in the *Judges Act*, R.S.C. 1985, c. J-1.
-
- (55) See the *Supreme Court Act*, R.S.C. 1985, c. S-26, the *Federal Court Act*, R.S.C. 1985, c. F-7 and the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.
-
- (56) Now covered by the *Governor General's Act*, R.S.C. 1985, c. G-9.
-
- (57) Manitoba, Alberta and Saskatchewan were placed in the same position as the original provinces by the *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.).
- These matters were dealt with in respect of British Columbia by the *British Columbia Terms of Union* and also in part by the *Constitution Act, 1930*.
- Newfoundland was also placed in the same position by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.).
- With respect to Prince Edward Island, see the Schedule to the *Prince Edward Island Terms of Union*.
-
- (58) The obligations imposed by sections 114, 115 and 116, and similar obligations under the instruments creating or admitting other provinces, are now to be found in the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26.
-

The section originally read as follows:

118 The following Sums shall be paid yearly by Canada to the several Provinces for the Support of their Governments and Legislatures:

	Dollars.
Ontario	Eighty thousand.
.....	
Quebec	Seventy thousand.
.....	
Nova Scotia	Sixty thousand.
.....	
New Brunswick	Fifty thousand.
.....	
	Two hundred and sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents per Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

The section was made obsolete by the *Constitution Act, 1907*, 7 Edw. VII, c. 11 (U.K.), which provided:

1. (1) The following grants shall be made yearly by Canada to every province, which at the commencement of this Act is a province of the Dominion, for its local purposes and the support of its Government and Legislature:

(a) A fixed grant

where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

where the population of the province is two hundred thousand, but does not exceed four hundred thousand, of one hundred and eighty thousand dollars;

where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and

(b) Subject to the special provisions of this Act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the province of British Columbia for a period of ten years from the commencement of this Act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively by the last quinquennial census or statutory estimate of population made under the Acts establishing those provinces or any other Act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this Act shall be paid half-yearly in advance to each province.

(5) The grants payable under this Act shall be substituted for the grants or subsidies (in this Act referred to as existing grants) payable for the like purposes at the commencement of this Act to the several provinces of the Dominion under the provisions of section one hundred and eighteen of the *Constitution Act, 1867*, or of any Order in Council establishing a province, or of any Act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

(6) The Government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this Act to the province as they have in the case of the existing grant.

(7) Nothing in this Act shall affect the obligation of the Government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this Act is substituted.

(8) In the case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces under this Act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this Act, and if it is found on any decennial census that the population of the province has decreased since

the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

See the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26, and the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.

See also Part III of the *Constitution Act, 1982*, which sets out commitments by Parliament and the provincial legislatures respecting equal opportunities, economic development and the provision of essential public services and a commitment by Parliament and the government of Canada to the principle of making equalization payments.

-
(60)	Spent.
-
(61)	Spent. Now covered by the <i>Customs Act</i> , R.S.C. 1985, c. 1 (2nd Supp.), the <i>Customs Tariff</i> , S.C. 1997, c. 36, the <i>Excise Act</i> , R.S.C. 1985, c. E-14, the <i>Excise Act, 2001</i> , S.C. 2002, c. 22 and the <i>Excise Tax Act</i> , R.S.C. 1985, c. E-15.
-
(62)	Spent.
-
(63)	These dues were repealed in 1873 by 36 Vict., c. 16 (N.B.). Also, see <i>An Act respecting the Export Duties imposed on Lumber</i> , etc. (1873) 36 Vict., c. 41 (Canada), and section 2 of the <i>Provincial Subsidies Act</i> , R.S.C. 1985, c. P-26.
-
(64)	Repealed by the <i>Statute Law Revision Act, 1893</i>, 56-57 Vict., c. 14 (U.K.). The section read as follows: 127 If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of Canada or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate shall thereby vacate his Seat in such Legislative Council.
-
(65)	The restriction against altering or repealing laws enacted by or existing under statutes of the United Kingdom was removed by the <i>Statute of Westminster, 1931</i> , 22 Geo. V, c. 4 (U.K.), except in respect of certain constitutional documents. Comprehensive procedures for amending enactments forming part of the Constitution of Canada were provided by Part V of the <i>Constitution Act, 1982</i> .
-
(66)	Spent.
-

(67) A similar provision was enacted for Manitoba by section 23 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.)). Section 23 read as follows:

23 Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both these languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *British North America Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Sections 17 to 19 of the *Constitution Act, 1982* restate the language rights set out in section 133 in respect of Parliament and the courts established under the *Constitution Act, 1867*, and also guarantee those rights in respect of the legislature of New Brunswick and the courts of that province.

Sections 16, 20, 21 and 23 of the *Constitution Act, 1982* recognize additional language rights in respect of the English and French languages. Section 22 preserves language rights and privileges of languages other than English and French.

(68) Spent. Now covered in Ontario by the *Executive Council Act*, R.S.O. 1990, c. E.25 and in Quebec by the *Executive Power Act*, R.S.Q. c. E-18.

(69) Probably spent.

(70) Probably spent.

(71) Probably spent.

(72) Spent. Penitentiaries are now provided for by the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

(73) Spent. See pages (xi) and (xii) of the Public Accounts, 1902-1903.

(74) Probably spent. Two orders were made under this section on January 24, 1868.

(75) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14, (U.K.). The section read as follows:

145 Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada; Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

(76)	All territories mentioned in section 146 are now part of Canada. See endnote (6) to section 5, above.
(77)	Spent. See endnotes (11), (12), (15), (16) and (17) to sections 21, 22, 26, 27 and 28, above.
(78)	Spent. See <i>Representation Act</i> , R.S.O. 1990, c. R.26.
(79)	As enacted by section 51 of the <i>Constitution Act, 1982</i> .
(113)	Added by <i>An Act respecting French, the official and common language of Québec</i> , S.Q. 2022, c. 14. These provisions aim to amend the constitution of the province under the unilateral amending procedure set out in section 45 of the <i>Constitution Act, 1982</i> .
(114)	Added by <i>The Saskatchewan First Act</i> , S.S. 2023, c. 9. This provision aims to amend the constitution of the province under the unilateral amending procedure set out in section 45 of the <i>Constitution Act, 1982</i> .
(115)	Added by <i>An Act to recognize the oath provided in the Act respecting the National Assembly as the sole oath required in order to sit in the Assembly</i> , S.Q. 2022, c. 30. This provision aims to amend the constitution of the province under the unilateral amending procedure set out in section 45 of the <i>Constitution Act, 1982</i> .

Tab 61

Courts of Justice Act, RSO 1990, c C.43



An amendment made by SO 2021, c 34 and enacted on 2021-12-02 came into force retroactively on 2021-09-01. This may affect one or more past versions of this Act.

Current version: in force since 2025-12-11

Link to this version: <https://canlii.ca/t/56mjs>

Citation to this version: Courts of Justice Act, RSO 1990, c C.43, <<https://canlii.ca/t/56mjs>> retrieved on 2026-03-23

Currency: Last updated from the [e-Laws](#) site on 2026-03-16

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From December 11, 2025 to the e-Laws currency date.

Last amendment: [2025, c. 24](#), Sched. 7.

Definitions

1 (1) In this Act,

“action” means a civil proceeding that is not an application and includes a proceeding commenced by,

(a) claim,

(b) statement of claim,

- (c) notice of action,
- (d) counterclaim,
- (e) crossclaim,
- (f) third or subsequent party claim, or
- (g) divorce petition or counterpetition; (“action”)

“application” means a civil proceeding that is commenced by notice of application or by application; (“requête”)

“defendant” means a person against whom an action is commenced; (“défendeur”)

“hearing” includes a trial; (“audience”)

“motion” means a motion in a proceeding or an intended proceeding; (“motion”)

“order” includes a judgment or decree; (“ordonnance”)

“plaintiff” means a person who commences an action; (“demandeur”)

“region” means a region prescribed under [section 79.1](#). (“région”) R.S.O. 1990, c. C.43, s. 1; 1993, c. 27, Sched.; [2006, c. 21](#), Sched. A, s. 1.

Interpretation, judge not to include associate judge

(1.1) A reference made to a judge under this Act does not include a reference to an associate judge. [2021, c. 4](#), Sched. 3, s. 1.

Application to other Acts

(2) This section applies to all other Acts affecting or relating to the courts and the administration of justice. [2006, c. 21](#), Sched. F, s. 106.

References to former names of courts

In English

1.1 (1) A reference in the English version of an Act, rule or regulation to a court or official by the former name of that court or the former title of that official set out in Column 1 of the following table or by a shortened version of that name or title is deemed, unless a contrary intention appears, to be a reference to the new name of that court or the new title of that official set out in Column 2.

TABLE

Column 1 Former names and titles	Column 2 New names and titles
Ontario Court of Justice	Court of Ontario
Ontario Court (General Division)	Superior Court of Justice
Ontario Court (Provincial Division)	Ontario Court of Justice
Chief Justice of the Ontario Court of Justice	Chief Justice of the Superior Court of Justice
Associate Chief Justice of the Ontario Court of Justice	Associate Chief Justice of the Superior Court of Justice
Associate Chief Justice (Family Court) of the Ontario Court of Justice	Associate Chief Justice (Family Court) of the Superior Court of Justice
Chief Judge of the Ontario Court (Provincial Division)	Chief Justice of the Ontario Court of Justice
Associate Chief Judge of the Ontario Court (Provincial Division)	Associate Chief Justice of the Ontario Court of Justice
Associate Chief Judge-Co-ordinator of Justices of the Peace	Associate Chief Justice Co-ordinator of Justices of the Peace
Accountant of the Ontario Court	Accountant of the Superior Court of Justice

[2017, c. 20](#), Sched. 11, s. 7.

In French

(2) A reference in the French version of an Act, rule or regulation to a court or official by the former name of that court or the former title of that official set out in Column 1 of the following table or by a shortened version of that name or title is deemed, unless a contrary intention appears, to be a reference to the new name of that court or the new title of that official set out in Column 2.

TABLE

Column 1 Former names and titles	Column 2 New names and titles
Cour de justice de l'Ontario	Cour de l'Ontario
Cour de l'Ontario (Division générale)	Cour supérieure de justice
Cour de l'Ontario (Division provinciale)	Cour de justice de l'Ontario
Juge en chef de la Cour de justice de l'Ontario	Juge en chef de la Cour supérieure de justice
Juge en chef adjoint de la Cour de justice de l'Ontario	Juge en chef adjoint de la Cour supérieure de justice
Juge en chef adjoint (Cour de la famille) de la Cour de justice de l'Ontario	Juge en chef adjoint (Cour de la famille) de la Cour supérieure de justice
Juge en chef de la Cour de l'Ontario (Division provinciale)	Juge en chef de la Cour de justice de l'Ontario
Juge en chef adjoint de la Cour de l'Ontario (Division provinciale)	Juge en chef adjoint de la Cour de justice de l'Ontario
Juge en chef adjoint-coordonnateur des juges de paix	Juge en chef adjoint et coordonnateur des juges de paix
Comptable de la Cour de l'Ontario	Comptable de la Cour supérieure de justice

[2017, c. 20](#), Sched. 11, s. 7.

Newer references to Ontario Court of Justice

(3) Subsections (1) and (2) do not apply to references to the Ontario Court of Justice enacted or made on or after April 19, 1999. [2017, c. 20](#), Sched. 11, s. 7.

PART I
COURT OF APPEAL FOR ONTARIO

Court of Appeal

2 (1) The Court of Appeal for Ontario is continued as a superior court of record under the name Court of Appeal for Ontario in English and Cour d'appel de l'Ontario in French.

Same

(2) The Court of Appeal has the jurisdiction conferred on it by this or any other Act, and in the exercise of its jurisdiction has all the powers historically exercised by the Court of Appeal for Ontario. R.S.O. 1990, c. C.43, s. 2.

Composition of court

3 (1) The Court of Appeal shall consist of,

- (a) the Chief Justice of Ontario, who shall be president of the court;
- (b) the Associate Chief Justice of Ontario; and
- (c) fourteen other judges.

Same

(2) The Lieutenant Governor in Council may by regulation increase the number of judges of the Court of Appeal who are in addition to the Chief Justice and the Associate Chief Justice.

Additional judges

(3) There shall be such additional offices of judge of the Court of Appeal as are from time to time required, to be held by Chief Justices of Ontario and Associate Chief Justices of Ontario who have elected under the [Judges Act](#) (Canada) to perform only the duties of a judge of the Court of Appeal.

Supernumerary judges

(4) There shall be such additional offices of supernumerary judge of the Court of Appeal as are from time to time required, to be held by judges of the Court of Appeal who have elected under the [Judges Act](#) (Canada) to hold office only as a supernumerary judge of the court. R.S.O. 1990, c. C.43, s. 3.

Assignment of judges from Superior Court of Justice

4 (1) The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Superior Court of Justice, may assign a judge of the Superior Court of Justice to perform the work of a judge of the Court of Appeal. R.S.O. 1990, c. C.43, s. 4 (1); 1996, c. 25, s. 9 (14, 17).

Superior Court of Justice judges

(2) A judge of the Superior Court of Justice is, by virtue of his or her office, a judge of the Court of Appeal and has all the jurisdiction, power and authority of a judge of the Court of Appeal. R.S.O. 1990, c. C.43, s. 4 (2); 1996, c. 25, s. 9 (17).

Powers and duties of Chief Justice

5 (1) The Chief Justice of Ontario has general supervision and direction over the sittings of the Court of Appeal and the assignment of the judicial duties of the court.

Absence of Chief Justice

(2) If the Chief Justice of Ontario is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by the Associate Chief Justice of Ontario.

Absence of Associate Chief Justice

(3) If the Chief Justice of Ontario and the Associate Chief Justice of Ontario are both absent from Ontario or for any reason unable to act, the powers and duties of the Chief Justice shall be exercised and performed by a judge of the Court of Appeal designated by the Chief Justice or Associate Chief Justice. R.S.O. 1990, c. C.43, s. 5.

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in [clause 19 \(1\)](#) (a) or [\(a.1\)](#), or

- (ii) an order from which an appeal lies to the Divisional Court under another Act;
- (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;
- (d) an order made under [section 137.1](#). R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); [2015, c. 23, s. 1](#); [2020, c. 25](#), Sched. 2, s. 1 (1).

Leave not required for second appeal

(1.0.1) Despite clause (1) (a), leave of the Court of Appeal is not required in the case of an order of the Divisional Court on an appeal under Part V or VIII of the [Child, Youth and Family Services Act, 2017](#). [2020, c. 25](#), Sched. 2, s. 1 (2); [2021, c. 34](#), Sched. 4, s. 1.

Leave required for second appeal

(1.1) Despite clause (1) (b), a final order of a judge of the Superior Court of Justice made on a first appeal from an order described in subsection (1.2) may be appealed to the Court of Appeal only with leave from the Court of Appeal, as provided in the rules of court. [2020, c. 25](#), Sched. 2, s. 1 (3).

Same

(1.2) The orders mentioned in subsection (1.1) are orders of the Ontario Court of Justice under any of the following statutes or statutory provisions:

1. The *Change of Name Act*.
2. The [Children's Law Reform Act](#), except [sections 59](#) and [60](#).
3. [Section 6](#) of the [Marriage Act](#). [2020, c. 25](#), Sched. 2, s. 1 (3).

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Same

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to

the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

Transition

(4) This section, as it read immediately before the day subsection 1 (1) of Schedule 2 to the *Moving Ontario Family Law Forward Act, 2020* came into force, continues to apply to,

- (a) any case in which a notice of appeal was filed before that day; and
- (b) any further appeals or proceedings arising from a case described in clause (a). [2020, c. 25](#), Sched. 2, s. 1 (4).

Composition of court

Hearings

7 (1) A proceeding in the Court of Appeal shall be heard and determined by not fewer than three judges sitting together, and always by an uneven number of judges.

Motions

(2) A motion in the Court of Appeal and an appeal under [clause 6 \(1\)](#) (c) shall be heard and determined by one judge.

Same

(3) Subsection (2) does not apply to a motion for leave to appeal, a motion to quash an appeal or any other motion that is specified by the rules of court.

Same

(4) A judge assigned to hear and determine a motion may adjourn the motion to a panel of the Court of Appeal.

Same

(5) A panel of the Court of Appeal may, on motion, set aside or vary the decision of a judge who hears and determines a motion. R.S.O. 1990, c. C.43, s. 7.

References to Court of Appeal

8 (1) The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration. R.S.O. 1990, c. C.43, s. 8 (1).

Opinion of court

(2) The court shall certify its opinion to the Lieutenant Governor in Council, accompanied by a statement of the reasons for it, and any judge who differs from the opinion may certify his or her opinion and reasons in the same manner. R.S.O. 1990, c. C.43, s. 8 (2).

Submissions by Attorney General

(3) On the hearing of the question, the Attorney General of Ontario is entitled to make submissions to the court. R.S.O. 1990, c. C.43, s. 8 (3).

Same

(4) The Attorney General of Canada shall be notified and is entitled to make submissions to the court if the question relates to the constitutional validity or constitutional applicability of an Act, or of a regulation or by-law made under an Act, of the Parliament of Canada or the Legislature. R.S.O. 1990, c. C.43, s. 8 (4).

Notice

(5) The court may direct that any person interested, or any one or more persons as representatives of a class of persons interested, be notified of the hearing and be entitled to make submissions to the court. R.S.O. 1990, c. C.43, s. 8 (5).

Appointment of counsel

(6) If an interest affected is not represented by counsel, the court may request counsel to argue on behalf of the interest and the reasonable expenses of counsel shall be paid by the Minister of Finance. R.S.O. 1990, c. C.43, s. 8 (6); [2006, c. 21](#), Sched. A, s. 2.

Appeal

(7) The opinion of the court shall be deemed to be a judgment of the court and an appeal lies from it as from a judgment in an action. R.S.O. 1990, c. C.43, s. 8 (7).

Meeting of judges

9 (1) The judges of the Court of Appeal shall meet at least once in each year, on a day fixed by the Chief Justice of Ontario, in order to consider this Act, the rules of court and the administration of justice generally. R.S.O. 1990, c. C.43, s. 9 (1).

(2) REPEALED: [2009, c. 33](#), Sched. 2, s. 20 (1).

PART II

COURT OF ONTARIO

Court of Ontario

10 (1) The Ontario Court of Justice is continued under the name Court of Ontario in English and Cour de l'Ontario in French.

Divisions

(2) The Court of Ontario shall consist of two divisions, the Superior Court of Justice (formerly the Ontario Court (General Division)) and the Ontario Court of Justice (formerly the Ontario Court (Provincial Division)).

President

(3) The person who is the Chief Justice of the Superior Court of Justice shall also be the president of the Court of Ontario. 1996, c. 25, s. 9 (2).

SUPERIOR COURT OF JUSTICE

Superior Court of Justice

11 (1) The Ontario Court (General Division) is continued as a superior court of record under the name Superior Court of Justice in English and Cour supérieure de justice in French. 1996, c. 25, s. 9 (3).

Same

(2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario. R.S.O. 1990, c. C.43, s. 11 (2); 1996, c. 25, s. 9 (17).

Composition of Superior Court of Justice

12 (1) The Superior Court of Justice consists of,

- (a) the Chief Justice of the Superior Court of Justice, who shall be president of the Superior Court of Justice;
- (b) the Associate Chief Justice of the Superior Court of Justice;
- (c) a regional senior judge of the Superior Court of Justice for each region;
- (d) the Senior Judge of the Family Court; and

(e) such number of judges of the Superior Court of Justice as is fixed under [clause 53 \(1\)](#) (a). 1998, c. 20, Sched. A, s. 22 (2).

(1.1) Repealed: 1998, c. 20, Sched. A, s. 1 (2).

(1.2) Repealed: 1998, c. 20, Sched. A, s. 1 (2).

(1.3) Repealed: 1998, c. 20, Sched. A, s. 1 (2).

Additional judges

(2) There shall be such additional offices of judge of the Superior Court of Justice as are from time to time required, to be held by Chief Justices of the Superior Court of Justice, Associate Chief Justices of the Superior Court of Justice and regional senior judges of the Superior Court of Justice who have elected under the [Judges Act](#) (Canada) to perform only the duties of a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 12 (2); 1996, c. 25, s. 9 (14, 17).

Supernumerary judges

(3) There shall be such additional offices of supernumerary judge of the Superior Court of Justice as are from time to time required, to be held by judges of the Superior Court of Justice who have elected under the [Judges Act](#) (Canada) to hold office only as a supernumerary judge of that court. R.S.O. 1990, c. C.43, s. 12 (3); 1996, c. 25, s. 9 (15, 17).

Assignment of judges from Court of Appeal

13 (1) The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Superior Court of Justice, may assign a judge of the Court of Appeal to perform the work of a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 13 (1); 1996, c. 25, s. 9 (14, 17).

Court of Appeal judges

(2) A judge of the Court of Appeal is, by virtue of his or her office, a judge of the Superior Court of Justice and has all the jurisdiction, power and authority of a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 13 (2); 1996, c. 25, s. 9 (17).

Chief Justice, Associate Chief Justice and regional senior judges of Superior Court of Justice; Senior Judge of Family Court

Powers and duties of Chief Justice

14 (1) The Chief Justice of the Superior Court of Justice shall direct and supervise the sittings of the Superior Court of Justice and the assignment of its judicial duties. 1998, c. 20, Sched. A, s. 22 (3).

Regional senior judges

(2) A regional senior judge of the Superior Court of Justice shall, subject to the authority of the Chief Justice of the Superior Court of Justice, exercise the powers and perform the duties of the Chief Justice in respect of the Superior Court of Justice in his or her region. 1998, c. 20, Sched. A, s. 22 (3).

Delegation

(3) A regional senior judge of the Superior Court of Justice may delegate to a judge of the Superior Court of Justice in his or her region the authority to exercise specified functions. 1998, c. 20, Sched. A, s. 22 (3).

Absence of Chief Justice

(4) If the Chief Justice of the Superior Court of Justice is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by the Associate Chief Justice of the Superior Court of Justice. 1998, c. 20, Sched. A, s. 22 (3).

Senior Judge of Family Court

(5) The Senior Judge of the Family Court shall,

(a) advise the Chief Justice of the Superior Court of Justice with regard to,

(i) the education of judges sitting in the Family Court,

(ii) practice and procedure, including mediation, in the Family Court,

(iii) the expansion of the Family Court, and

(iv) the expenditure of funds budgeted for the Family Court;

(b) meet from time to time with the community liaison committees and community resources committees established under [sections 21.13](#) and

[21.14](#); and

(c) perform other duties relating to the Family Court assigned to the Senior Judge of the Family Court by the Chief Justice. 1998, c. 20, Sched. A, s. 22 (3).

Small Claims Court Administrative Judge

(5.1) The Chief Justice of the Superior Court of Justice may delegate to the Small Claims Court Administrative Judge appointed under [section 87.2](#) his or her powers and duties under subsection (1) in respect of the Small Claims Court, subject to such conditions or restrictions as he or she may specify. [2017, c. 2](#), Sched. 2, s. 1.

Absence of regional senior judge or Senior Judge of Family Court

(6) The powers and duties of a regional senior judge of the Superior Court of Justice and the Senior Judge of the Family Court when he or she is absent from Ontario or is for any reason unable to act shall be exercised and performed by a judge of the Superior Court of Justice designated by the Chief Justice of the Superior Court of Justice. 1998, c. 20, Sched. A, s. 22 (3).

Meetings with Associate Chief Justice, regional senior judges and Senior Judge of Family Court

(7) The Chief Justice of the Superior Court of Justice may hold meetings with the Associate Chief Justice, the regional senior judges and the Senior Judge of the Family Court in order to consider any matters concerning sittings of the Superior Court of Justice and the assignment of its judicial duties. 1998, c. 20, Sched. A, s. 22 (3); [2015, c. 27](#), Sched. 1, s. 1 (1).

Judges assigned to regions

15 (1) The Chief Justice of the Superior Court of Justice shall assign every judge of the Superior Court of Justice to a region and may re-assign a judge from one region to another. R.S.O. 1990, c. C.43, s. 15 (1); 1996, c. 25, s. 9 (14, 17).

At least one judge in each county

(2) There shall be at least one judge of the Superior Court of Justice assigned to each county and district. R.S.O. 1990, c. C.43, s. 15 (2); 1996, c. 25,

s. 9 (17).

High Court and District Court judges

(3) No judge of the Superior Court of Justice who was a judge of the High Court of Justice or the District Court of Ontario before the 1st day of September, 1990 shall be assigned without his or her consent to a region other than the region in which he or she resided immediately before that day. R.S.O. 1990, c. C.43, s. 15 (3); 1996, c. 25, s. 9 (17).

Same

(4) Subsections (1) to (3) do not prevent the temporary assignment of a judge to a location anywhere in Ontario. R.S.O. 1990, c. C.43, s. 15 (4).

Composition of court for hearings

16 A proceeding in the Superior Court of Justice shall be heard and determined by one judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 16; 1994, c. 12, s. 4; 1996, c. 25, s. 9 (16, 17).

Appeals to Superior Court of Justice

17 An appeal lies to the Superior Court of Justice from,

(a) an interlocutory order of a master, case management master or associate judge;

Note: On a day to be named by proclamation of the Lieutenant Governor, [clause 17](#) (a) of the Act is amended by striking out “a master, case management master or associate judge” at the end and substituting “an associate judge”. (See: [2021, c. 34](#), Sched. 4, s. 3 (2))

(b) a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 17; 1996, c. 25, ss. 1 (1), 9 (17); [2021, c. 34](#), Sched. 4, s. 3 (1).

DIVISIONAL COURT

Divisional Court

18 (1) The branch of the Superior Court of Justice known as the Divisional Court is continued under the name Divisional Court in English and Cour divisionnaire in French. R.S.O. 1990, c. C.43, s. 18 (1); 1996, c. 25, s. 9 (17).

Same

(2) The Divisional Court consists of the Chief Justice of the Superior Court of Justice, who is president of the Divisional Court, the associate chief justice and such other judges as the Chief Justice designates from time to time. 1994, c. 12, s. 5; 1996, c. 25, s. 9 (14); 1998, c. 20, Sched. A, s. 3.

Jurisdiction of judges

(3) Every judge of the Superior Court of Justice is also a judge of the Divisional Court. R.S.O. 1990, c. C.43, s. 18 (3); 1996, c. 25, s. 9 (17).

Divisional Court jurisdiction

19 (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(a.1) a final order of a judge of the Family Court made only under a provision of an Act or regulation of Ontario;

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master, case management master or associate judge. 2006, c. 21, Sched. A, s. 3; 2020, c. 25, Sched. 2, s. 2 (1); 2021, c. 4, Sched. 3, s. 2 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, [clause 19 \(1\)](#) (c) of the Act, as amended by subsection (1), is amended by striking out “a master, case management master or associate judge” and substituting “an associate judge”. (See: [2021, c. 4, Sched. 3, s. 2 \(2\)](#))

Same

(1.0.1) Clauses (1) (a) and (b) do not apply to orders made under [section 137.1](#). 2015, c. 23, s. 2.

Same

(1.1) If the notice of appeal is filed before October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than \$25,000, exclusive of costs;

(b) for periodic payments that amount to not more than \$25,000, exclusive of costs, in the 12 months commencing on the date the first

payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b). [2006, c. 21](#), Sched. A, s. 3; [2009, c. 33](#), Sched. 2, s. 20 (2).

Same

(1.2) If the notice of appeal is filed on or after October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than \$50,000, exclusive of costs;

(b) for periodic payments that amount to not more than \$50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b). [2006, c. 21](#), Sched. A, s. 3; [2009, c. 33](#), Sched. 2, s. 20 (3).

Combining of appeals from Superior Court of Justice

(2) The Divisional Court has jurisdiction to hear and determine an appeal that lies to the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Divisional Court. R.S.O. 1990, c. C.43, s. 19 (2); 1996, c. 25, s. 9 (17).

Same

(3) The Divisional Court may, on motion, transfer an appeal that has already been commenced in the Superior Court of Justice to the Divisional Court for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 19 (3); 1996, c. 25, s. 9 (17).

Appeal from interlocutory orders

(4) No appeal lies from an interlocutory order of a judge of the Superior Court of Justice made on an appeal from an interlocutory order of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 19 (4); 1996, c. 25, s. 9 (17, 18).

Transition

(5) This section, as it read immediately before the day subsection 2 (1) of Schedule 2 to the *Moving Ontario Family Law Forward Act, 2020* came into force, continues to apply to,

- (a) any case in which a notice of appeal was filed before that day; and
- (b) any further appeals or proceedings arising from a case described in clause (a). [2020, c. 25](#), Sched. 2, s. 2 (2).

Place for hearing

Appeals

20 (1) An appeal to the Divisional Court shall be heard in the region where the hearing or other process that led to the decision appealed from took place, unless the parties agree otherwise or the Chief Justice of the Superior Court of Justice orders otherwise because it is necessary to do so in the interests of justice. 1994, c. 12, s. 7; 1996, c. 25, s. 9 (14).

Other proceedings

(2) Any other proceeding in the Divisional Court may be brought in any region. R.S.O. 1990, c. C.43, s. 20 (2).

Composition of court for hearings

21 (1) A proceeding in the Divisional Court shall be heard and determined by three judges sitting together. R.S.O. 1990, c. C.43, s. 21 (1).

Same

(2) A proceeding in the Divisional Court may be heard and determined by one judge where the proceeding,

- (a) is an appeal under [clause 19 \(1\) \(c\)](#);
- (b) is an appeal under [section 31](#) from a person referred to in [subsection 24 \(2\)](#) presiding over the Small Claims Court; or

(c) is in a matter or class of matters that the Chief Justice of the Superior Court of Justice or a judge designated by the Chief Justice is satisfied, from the nature of the issues involved or the necessity for expedition, can and ought to be heard and determined by one judge. R.S.O. 1990, c. C.43, s. 21 (2); 1996, c. 25, s. 9 (14); [2017, c. 2](#), Sched. 2, s. 2; [2025, c. 24](#), Sched. 7, s. 1.

Same, motions

(3) A motion in the Divisional Court shall be heard and determined by one judge, unless otherwise provided by the rules of court. R.S.O. 1990, c. C.43, s. 21 (3).

Same

(4) A judge assigned to hear and determine a motion may adjourn it to a panel of the Divisional Court. R.S.O. 1990, c. C.43, s. 21 (4).

Same

(5) A panel of the Divisional Court may, on motion, set aside or vary the decision of a judge who hears and determines a motion. R.S.O. 1990, c. C.43, s. 21 (5).

FAMILY COURT

Family Court

21.1 (1) There shall be a branch of the Superior Court of Justice known as the Family Court in English and Cour de la famille in French. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17).

Unified Family Court

(2) The Unified Family Court is amalgamated with and continued as part of the Family Court. 1994, c. 12, s. 8.

Same

(3) The Family Court has the jurisdiction conferred on it by this or any other Act. 1994, c. 12, s. 8.

Jurisdiction

(4) The Family Court has jurisdiction in the City of Hamilton and in the additional areas named in accordance with subsection (5). 1994, c. 12, s. 8; [2002, c. 17](#), Sched. F, Table.

Proclamation

(5) The Lieutenant Governor in Council may, by proclamation, name additional areas in which the Family Court has jurisdiction. 1994, c. 12, s. 8.

Composition of Family Court

21.2 (1) The Family Court consists of,

- (a) the Chief Justice of the Superior Court of Justice, who shall be president of the Family Court;
- (b) the Associate Chief Justice;
- (c) the Senior Judge of the Family Court;
- (d) the five judges and one supernumerary judge of the Superior Court of Justice assigned to the Unified Family Court on June 30, 1993;
- (e) the judges of the Superior Court of Justice appointed to be members of the Family Court, the number of whom is fixed by regulation under [clause 53 \(1\) \(a.1\)](#);
- (f) the judges of the Superior Court of Justice assigned to the Family Court by the Chief Justice from time to time. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (14, 17); 1998, c. 20, Sched. A, s. 4 (1).

Supernumerary judges

(2) There shall be such additional offices of supernumerary judge of the Superior Court of Justice and member of the Family Court as are from time to time required, to be held by judges referred to in clauses (1) (d) and (e) who have elected under the [Judges Act](#) (Canada) to hold office only as supernumerary judges. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17).

Jurisdiction of judges

(3) Every judge of the Superior Court of Justice is also a judge of the Family Court. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17).

Temporary assignments

(4) The Chief Justice of the Superior Court of Justice may, from time to time, temporarily assign a judge referred to in clause (1) (d) or (e) to hear matters outside the jurisdiction of the Family Court. 1998, c. 20, Sched. A, s. 22 (4).

(5) Repealed: 1998, c. 20, Sched. A, s. 4 (2).

(6) Repealed: 1998, c. 20, Sched. A, s. 4 (2).

Transitional measure

21.3 (1) All proceedings referred to in the Schedule to section 21.8 or in [section 21.12](#) that are pending in the Superior Court of Justice or the Ontario Court of Justice in an area named under [subsection 21.1 \(5\)](#) as an area in which the Family Court has jurisdiction shall be transferred to and continued in the Family Court.

Same

(2) If a judge sitting in the Ontario Court of Justice is seized of a matter in a proceeding that is the subject of a transfer under subsection (1), the judge may complete that matter. 1998, c. 20, Sched. A, s. 22 (5).

21.4 Repealed: 1998, c. 20, Sched. A, s. 5.

21.5 Repealed: 1998, c. 20, Sched. A, s. 5.

21.6 Repealed: 1998, c. 20, Sched. A, s. 5.

Composition of court for hearings

21.7 A proceeding in the Family Court shall be heard and determined by one judge. 1994, c. 12, s. 8; [2009, c. 33](#), Sched. 2, s. 20 (4).

Proceedings in Family Court

21.8 (1) In the parts of Ontario where the Family Court has jurisdiction, proceedings referred to in the Schedule to this section, except appeals and prosecutions, shall be commenced, heard and determined in the Family Court. 1994, c. 12, s. 8.

Motions for interlocutory relief

(2) A motion for interim or other interlocutory relief in a proceeding referred to in the Schedule that is required or permitted by the rules or an order of a court to be heard and determined in a part of Ontario where the Family Court has jurisdiction shall be heard and determined in the Family Court. 1994, c. 12, s. 8.

Same

(3) A motion for interim or other interlocutory relief in a proceeding referred to in the Schedule that is required or permitted by the rules or an order of the Family Court to be heard and determined in a part of Ontario where the Family Court does not have jurisdiction shall be heard and determined in the

court that would have had jurisdiction if the proceeding had been commenced in that part of Ontario. 1994, c. 12, s. 8.

SCHEDULE

1. Proceedings under the following statutory provisions:

Change of Name Act

Child, Youth and Family Services Act, 2017, Parts V, VII and VIII

Children's Law Reform Act, except sections 59 and 60

Civil Marriage Act (Canada)

Divorce Act (Canada)

Family Homes on Reserves and Matrimonial Interests or Rights Act (Canada)

Family Law Act, except Part V

Family Responsibility and Support Arrears Enforcement Act, 1996

International Recovery of Child Support and Family Maintenance Convention Act, 2023

Interjurisdictional Support Orders Act, 2002

Marriage Act, section 6.

2. Proceedings for the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement, paternity agreement, family arbitration agreement or family arbitration award.

3. Proceedings for relief by way of constructive or resulting trust or a monetary award as compensation for unjust enrichment between persons who have cohabited.

4. Proceedings for annulment of a marriage or for a declaration of validity or invalidity of a marriage.

5. Appeals of family arbitration awards under the [Arbitration Act, 1991](#).

6. Proceedings under First Nation laws made under,

i. the [Family Homes on Reserves and Matrimonial Interests or Rights Act](#) (Canada), or

ii. the [First Nations Land Management Act](#) (Canada), with respect to the effect of relationship breakdown on matrimonial real property.

7. Any other family law proceedings that may be prescribed by the regulations.

1994, c. 12, s. 8; 1996, c. 31, s. 65; 1999, c. 6, s. 18 (1); [2002, c. 13, s. 56](#); [2002, c. 14](#), Sched., s. 9; [2005, c. 5, s. 17 \(1\)](#); [2006, c. 1, s. 4](#); [2015, c. 27](#), Sched. 1, s. 1 (2, 3); [2017, c. 14](#), Sched. 4, s. 10 (1); [2023, c. 9](#), Sched. 16, s. 23.

Other jurisdiction

21.9 Where a proceeding referred to in the Schedule to section 21.8 is commenced in the Family Court and is combined with a related matter that is in the judge's jurisdiction but is not referred to in the Schedule, the court may, with leave of the judge, hear and determine the combined matters. 1994, c. 12, s. 8.

21.9.1 REPEALED: [2020, c. 25](#), Sched. 2, s. 3.

Orders of predecessor court

21.10 (1) The Family Court may hear and determine an application under an Act to discharge, vary or suspend an order made by the Provincial Court (Family Division), the Ontario Court of Justice, the Superior Court of Justice or the Unified Family Court. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17, 18).

Same

(2) The Family Court may enforce orders made by the Provincial Court (Family Division), the Ontario Court of Justice, the Superior Court of Justice or the Unified Family Court. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17, 18).

Place where proceeding commenced

21.11 (1) Proceedings referred to in the Schedule to section 21.8 may be commenced in the Family Court if the applicant or the respondent resides in a part of Ontario where the Family Court has jurisdiction. 1994, c. 12, s. 8.

Part III, *Children's Law Reform Act* application

(2) An application under Part III of the *Children's Law Reform Act* in respect of a child who habitually resides in a part of Ontario where the Family Court has jurisdiction may be commenced in the Family Court in that part of Ontario. 1994, c. 12, s. 8; [2020, c. 25](#), Sched. 1, s. 27 (1).

Transfer to other court

(3) A judge presiding over the Family Court may, on motion, order that a proceeding commenced in the Family Court be transferred to the appropriate court in a place where the Family Court does not have jurisdiction if, in the

judge's opinion, the preponderance of convenience favours having the matter dealt with by that court in that place. 1994, c. 12, s. 8.

Transfer from other court

(4) A judge of a court having jurisdiction in a proceeding referred to in the Schedule to section 21.8 in an area where the Family Court does not have jurisdiction may, on motion, order that the proceeding be transferred to the Family Court in a particular place if, in the judge's opinion, the preponderance of convenience favours having the matter dealt with by that court in that place. 1994, c. 12, s. 8.

Directions

(5) A judge making an order under subsection (3) or (4) may give such directions for the transfer as are considered just. 1994, c. 12, s. 8.

Enforcement of orders

21.12 (1) A judge presiding over the Family Court shall be deemed to be a judge of the Ontario Court of Justice for the purpose of prosecutions under Part V (Child Protection) and Part VIII (Adoption and Adoption Licensing) of the *Child, Youth and Family Services Act, 2017*, the *Children's Law Reform Act*, the *Family Law Act* and the *Family Responsibility and Support Arrears Enforcement Act, 1996*. 2017, c. 14, Sched. 4, s. 10 (2).

(2), (3) REPEALED: 2009, c. 33, Sched. 2, s. 20 (5).

Community liaison committee

21.13 (1) There shall be one or more community liaison committees, as determined by the Chief Justice of the Superior Court of Justice, or by a person he or she designates for the purpose, for each area in which the Family Court has jurisdiction. 1998, c. 20, Sched. A, s. 22 (7); 2009, c. 33, Sched. 2, s. 20 (6).

Composition

(2) A community liaison committee consists of judges, lawyers, persons employed in court administration and other residents of the community, appointed by the Chief Justice of the Superior Court of Justice or by a person he or she designates for the purpose. 1998, c. 20, Sched. A, s. 22 (7).

Function

(3) A community liaison committee shall consider matters affecting the general operations of the court in the municipality and make recommendations to the appropriate authorities. 1994, c. 12, s. 8.

Community resources committee

21.14 (1) There shall be one or more community resources committees, as determined by the Chief Justice of the Superior Court of Justice, or by a person he or she designates for the purpose, for each area in which the Family Court has jurisdiction. 1998, c. 20, Sched. A, s. 22 (8); 2009, c. 33, Sched. 2, s. 20 (7).

Composition

(2) A community resources committee consists of judges, lawyers, members of social service agencies, persons employed in court administration and other residents of the community, appointed by the Chief Justice of the Superior Court of Justice or by a person whom he or she designates for the purpose. 1998, c. 20, Sched. A, s. 22 (8).

Function

(3) A community resources committee shall develop links between the court and social service resources available in the community, identify needed resources and develop strategies for putting them in place. 1994, c. 12, s. 8.

Dispute resolution service

21.15 A service for the resolution of disputes by alternatives to litigation may be established, maintained and operated as part of the Family Court. 1994, c. 12, s. 8.

SMALL CLAIMS COURT

Small Claims Court

22 (1) The Small Claims Court is continued as a branch of the Superior Court of Justice under the name Small Claims Court in English and Cour des petites créances in French. R.S.O. 1990, c. C.43, s. 22 (1); 1996, c. 25, s. 9 (17).

Same

(2) The Small Claims Court consists of the Chief Justice of the Superior Court of Justice who shall be president of the court and such other judges of the

Superior Court of Justice as the Chief Justice designates from time to time. R.S.O. 1990, c. C.43, s. 22 (2); 1996, c. 25, s. 9 (14, 17).

Jurisdiction of judges

(3) Every judge of the Superior Court of Justice is also a judge of the Small Claims Court. R.S.O. 1990, c. C.43, s. 22 (3); 1996, c. 25, s. 9 (17).

Jurisdiction

23 (1) The Small Claims Court,

(a) has jurisdiction in any action for the payment of money where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and

(b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount. R.S.O. 1990, c. C.43, s. 23 (1).

Commencement of actions in Small Claims Court

(1.1) An action that is within the Small Claims Court's jurisdiction shall not, despite [subsection 11 \(2\)](#), be commenced in the Superior Court of Justice except with leave of the Superior Court of Justice as provided in the rules of court. [2023, c. 12](#), Sched. 3, s. 1.

Same

(1.2) Subsection (1.1) does not apply with respect to a counterclaim, crossclaim or third or subsequent party claim, where the main action was commenced in the Superior Court of Justice. [2023, c. 12](#), Sched. 3, s. 1.

Transfer from Superior Court of Justice

(2) An action in the Superior Court of Justice may be transferred to the Small Claims Court by the local registrar of the Superior Court of Justice on requisition with the consent of all parties filed before the trial commences if,

(a) the only claim is for the payment of money or the recovery of possession of personal property; and

(b) the claim is within the jurisdiction of the Small Claims Court. R.S.O. 1990, c. C.43, s. 23 (2); 1996, c. 25, s. 9 (17).

Same

(3) An action transferred to the Small Claims Court shall be titled and continued as if it had been commenced in that court. R.S.O. 1990, c. C.43, s. 23 (3).

Composition of court for hearings

24 (1) A proceeding in the Small Claims Court shall be heard and determined by one judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 24 (1); 1996, c. 25, s. 9 (17).

Other judicial officials who may preside

(2) Despite subsection (1), a proceeding in the Small Claims Court may also be heard and determined by,

- (a) REPEALED: [2023, c. 2](#), Sched. 2, s. 1.
- (b) a deputy judge appointed under [section 32](#); or
- (c) the Small Claims Court Administrative Judge appointed under [section 87.2](#). [2017, c. 2](#), Sched. 2, s. 3; [2023, c. 2](#), Sched. 2, s. 1.

Where deputy judge not to preside

(3) A deputy judge shall not hear and determine an action,

- (a) for the payment of money in excess of the prescribed amount; or
- (b) for the recovery of possession of personal property exceeding the prescribed amount in value. R.S.O. 1990, c. C.43, s. 24 (3).

Summary hearings

25 The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience. R.S.O. 1990, c. C.43, s. 25.

Representation

26 A party may be represented in a proceeding in the Small Claims Court by a person authorized under the [Law Society Act](#) to represent the party, but the court may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of the party if it finds that such person is not competent properly to represent the party, or does not understand and comply at the hearing with the duties and responsibilities of an advocate. [2006, c. 21](#), Sched. C, s. 105 (1).

Evidence

27 (1) Subject to subsections (3) and (4), the Small Claims Court may admit as evidence at a hearing and act upon any oral testimony and any document or other thing so long as the evidence is relevant to the subject-matter of the proceeding, but the court may exclude anything unduly repetitious.

Same

(2) Subsection (1) applies whether or not the evidence is given or proven under oath or affirmation or admissible as evidence in any other court.

Same

- (3) Nothing is admissible in evidence at a hearing,
- (a) that would be inadmissible by reason of any privilege under the law of evidence; or
 - (b) that is inadmissible by any Act.

Conflicts

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(5) A copy of a document or any other thing may be admitted as evidence at a hearing if the presiding judge is satisfied as to its authenticity. R.S.O. 1990, c. C.43, s. 27.

Instalment orders

28 The Small Claims Court may order the times and the proportions in which money payable under an order of the court shall be paid. R.S.O. 1990, c. C.43, s. 28.

Limit on costs

29 An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding. R.S.O. 1990, c. C.43, s. 29; [2006, c. 21](#), Sched. C, s. 105 (2).

Contempt hearing for failure to attend examination

30 (1) The Small Claims Court may, in accordance with the rules of court, order a debtor or other person who is required to and fails to attend an examination respecting a default by the debtor under an order of the court for the payment or recovery of money, to attend before the court for a contempt hearing. [2009, c. 33](#), Sched. 2, s. 20 (8).

Finding of contempt

(2) The Small Claims Court may find a person to be in contempt of court at a hearing referred to in subsection (1), if the court is satisfied that,

- (a) the person was required to attend the examination;
- (b) the person was served, in accordance with the rules of court, with a notice to attend the examination;
- (c) the person failed to attend the examination; and
- (d) the failure to attend was wilful. [2009, c. 33](#), Sched. 2, s. 20 (8).

Power conferred

(3) For greater certainty, the power of the Small Claims Court to order, hear and determine a contempt hearing under this section is conferred on and may be exercised by the persons referred to in [clauses 24 \(2\)](#) (a) and (b). [2009, c. 33](#), Sched. 2, s. 20 (8).

Limit on imprisonment in certain cases

(4) If a contempt hearing under subsection (1) is heard and determined by a person referred to in [clause 24 \(2\)](#) (a) or (b), the court may make such orders respecting the person in contempt as are specified by the rules of court, but the court shall not make an order that the person be imprisoned for a period of more than five days. [2009, c. 33](#), Sched. 2, s. 20 (8).

Authority unaffected

(5) Nothing in this section affects the authority of the Small Claims Court to order, hear and determine contempt hearings where it is otherwise authorized by law. [2009, c. 33](#), Sched. 2, s. 20 (8).

Appeals

31 An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action,

- (a) for the payment of money in excess of the prescribed amount, excluding costs; or
- (b) for the recovery of possession of personal property exceeding the prescribed amount in value. R.S.O. 1990, c. C.43, s. 31; [2009, c. 33](#), Sched. 2, s. 20 (9, 10).

Deputy judges

32 (1) A regional senior judge of the Superior Court of Justice may, with the approval of the Attorney General, appoint a lawyer to act as a deputy judge of the Small Claims Court. [2009, c. 33](#), Sched. 2, s. 20 (11).

Term of appointment

(2) The appointment of a deputy judge is for a term of three years, subject to subsections (3) and (7). [2009, c. 33](#), Sched. 2, s. 20 (11).

Annual appointment if 65 or older

(3) If the deputy judge is 65 years of age or older and under 75 years of age, the appointment shall be for a term of one year, subject to subsection (8). [2009, c. 33](#), Sched. 2, s. 20 (11).

Renewal before age 65

(4) The appointment of a deputy judge who is under 65 years of age may be renewed by a regional senior judge of the Superior Court of Justice for a term of three years, subject to subsection (7). [2009, c. 33](#), Sched. 2, s. 20 (11).

Annual renewal if 65 or older

(5) The appointment of a deputy judge who is 65 years of age or older and under 75 years of age may be renewed by a regional senior judge of the Superior Court of Justice for a term of one year, subject to subsection (8). [2009, c. 33](#), Sched. 2, s. 20 (11).

No limit, renewals

(6) Subject to subsections (7) to (9), there is no limit to the number of times the appointment of a deputy judge can be renewed under subsection (4) or (5). [2009, c. 33](#), Sched. 2, s. 20 (11).

Expiry of term at age 65

(7) If the deputy judge is 63 years of age or older and under 65 years of age, an appointment under subsection (2) or a renewal under subsection (4) shall provide for a term that expires when he or she reaches 65 years of age. [2009, c. 33](#), Sched. 2, s. 20 (11).

Expiry of term at age 75

(8) If the deputy judge is 74 years of age, an appointment under subsection (3) or a renewal under subsection (5) shall provide for a term that expires when he or she reaches 75 years of age. [2009, c. 33](#), Sched. 2, s. 20 (11).

Age limit

(9) No person shall be appointed as a deputy judge, or have an appointment renewed, once he or she reaches 75 years of age. [2009, c. 33](#), Sched. 2, s. 20 (11).

Current appointments

(10) For greater certainty, nothing in this section shortens or otherwise affects an appointment or renewed appointment that is in effect immediately before December 15, 2009, but any renewals of the appointment on and after that day are subject to this section. [2009, c. 33](#), Sched. 2, s. 20 (11); [2015, c. 27](#), Sched. 1, s. 1 (4).

Deputy Judges Council

33 (1) A council known as the Deputy Judges Council in English and as Conseil des juges suppléants in French is established. 1994, c. 12, s. 13.

Composition

(2) The Deputy Judges Council is composed of,

- (a) the Chief Justice of the Superior Court of Justice, or another judge of the Superior Court of Justice designated by the Chief Justice;
- (b) a regional senior judge of the Superior Court of Justice, appointed by the Chief Justice;
- (c) a judge of the Superior Court of Justice, appointed by the Chief Justice;
- (d) the Small Claims Court Administrative Judge appointed under [section 87.2](#) or a deputy judge, as appointed by the Chief Justice; and;

(e) three persons who are neither judges nor lawyers, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (14, 17); [2017, c. 2](#), Sched. 2, s. 4.

Criteria

(3) In the appointment of members under clause (2) (e), the importance of reflecting, in the composition of the Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized. 1994, c. 12, s. 13.

Chair

(4) The Chief Justice of the Superior Court of Justice, or his or her designate, shall chair the meetings of the Deputy Judges Council. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (14).

Same

(5) The chair is entitled to vote, and may cast a second deciding vote if there is a tie. 1994, c. 12, s. 13.

Functions

- (6) The functions of the Deputy Judges Council are,
- (a) to review and approve standards of conduct for deputy judges as established by the Chief Justice;
 - (b) to review and approve a plan for the continuing education of deputy judges as established by the Chief Justice; and
 - (c) to make recommendations on matters affecting deputy judges. 1994, c. 12, s. 13.

Duty of Chief Justice

(7) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Deputy Judges Council. [2006, c. 21](#), Sched. A, s. 4.

Complaint

33.1 (1) Any person may make a complaint alleging misconduct by a deputy judge, by writing to the judge of the Superior Court of Justice designated by the regional senior judge in the region where the deputy judge sits. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (17).

Dismissal

(2) The judge shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it falls outside the jurisdiction of the regional senior judge, is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given. 1994, c. 12, s. 13.

Notice of dismissal

(3) The judge shall notify the regional senior judge, the complainant and the deputy judge in writing of a dismissal under subsection (2), giving brief reasons for it. 1994, c. 12, s. 13.

Committee

(4) If the complaint is not dismissed, the judge shall refer it to a committee consisting of three persons chosen by the regional senior judge. 1994, c. 12, s. 13.

Same

(5) The three persons shall be a judge of the Superior Court of Justice, a deputy judge and a person who is neither a judge nor a lawyer, all of whom reside or work in the region where the deputy judge who is the subject of the complaint sits. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (17).

Investigation

(6) The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and deputy judge shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally. 1994, c. 12, s. 13.

Recommendation

(7) The committee shall make a report to the regional senior judge, recommending a disposition in accordance with subsections (8), (9) and (10). 1994, c. 12, s. 13.

Disposition

(8) The regional senior judge may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the deputy judge's conduct presents grounds for imposing a sanction, may,

- (a) warn the deputy judge;
- (b) reprimand the deputy judge;
- (c) order the deputy judge to apologize to the complainant or to any other person;
- (d) order that the deputy judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a deputy judge;
- (e) suspend the deputy judge for a period of up to 30 days;
- (f) inform the deputy judge that his or her appointment will not be renewed under [subsection 32 \(2\)](#);
- (g) direct that no judicial duties or only specified judicial duties be assigned to the deputy judge; or
- (h) remove the deputy judge from office. 1994, c. 12, s. 13.

Same

(9) The regional senior judge may adopt any combination of the dispositions set out in clauses (8) (a) to (g). 1994, c. 12, s. 13.

Disability

(10) If the regional senior judge finds that the deputy judge is unable, because of a disability, to perform the essential duties of the office, but would be able to perform them if his or her needs were accommodated, the regional senior judge shall order that the deputy judge's needs be accommodated to the extent necessary to enable him or her to perform those duties. 1994, c. 12, s. 13.

Application of subs. (10)

- (11) Subsection (10) applies if,
- (a) the effect of the disability on the deputy judge's performance of the essential duties of the office was a factor in the complaint; and
 - (b) the regional senior judge dismisses the complaint or makes a disposition under clauses (8) (a), (b), (c), (d), (e) or (g). 1994, c. 12, s. 13.

Undue hardship

(12) Subsection (10) does not apply if the regional senior judge is satisfied that making an order would impose undue hardship on the person responsible

for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. 1994, c. 12, s. 13.

Opportunity to participate

(13) The regional senior judge shall not make an order under subsection (10) against a person without ensuring that the person has had an opportunity to participate and make submissions. 1994, c. 12, s. 13.

Crown bound

(14) An order made under subsection (10) binds the Crown. 1994, c. 12, s. 13.

Compensation

(15) The regional senior judge shall consider whether the deputy judge should be compensated for all or part of his or her costs for legal services incurred in connection with all the steps taken under this section in relation to the complaint. 1994, c. 12, s. 13.

Recommendation

(16) If the regional senior judge is of the opinion that the deputy judge should be compensated, he or she shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 1994, c. 12, s. 13.

Same

(17) If the complaint is dismissed with a finding that it is unfounded, the regional senior judge shall recommend to the Attorney General that the deputy judge be compensated for his or her costs for legal services and shall indicate the amount of compensation. 1994, c. 12, s. 13.

Exception

(17.1) If the regional senior judge makes a disposition under clause (8) (h) in relation to a complaint made on or after the day section 1 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (15) does not apply and compensation shall not be recommended under subsection (16). 2020, c. 11, Sched. 5, s. 1.

Maximum

(18) The amount of compensation recommended under subsection (16) or (17) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar legal services. 1994, c. 12, s. 13.

Payment

(19) The Attorney General shall pay compensation to the judge in accordance with the recommendation. 1994, c. 12, s. 13.

Non-application of SPPA

(20) The *Statutory Powers Procedure Act* does not apply to a judge, regional senior judge or member of a committee acting under this section. 1994, c. 12, s. 13.

Personal liability

(21) No action or other proceeding for damages shall be instituted against a judge, regional senior judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person, or for any neglect or default in the exercise or performance in good faith of such power or duty. 1994, c. 12, s. 13; 2017, c. 2, Sched. 2, s. 5.

ONTARIO COURT OF JUSTICE

Ontario Court of Justice

34 The Ontario Court (Provincial Division) is continued as a court of record under the name Ontario Court of Justice in English and Cour de justice de l'Ontario in French. 1996, c. 25, s. 9 (5).

Composition of Ontario Court of Justice

35 The Ontario Court of Justice shall consist of,

(a) the Chief Justice of the Ontario Court of Justice appointed under [subsection 42 \(3\)](#), who shall be president of the Ontario Court of Justice;

(a.1) the Associate Chief Justice and the Associate Chief Justice-Coordinator of Justices of the Peace of the Ontario Court of Justice appointed under [subsections 42 \(4\) and \(5\)](#);

(b) a regional senior judge of the Ontario Court of Justice appointed under [subsection 42 \(6\)](#) for each region;

(b.1) the Senior Advisory Family Judge of the Ontario Court of Justice appointed under [subsection 42 \(6.2\)](#);

(c) such provincial judges as are appointed under [subsection 42 \(1\)](#); and

(d) such provincial judges as were assigned to the Provincial Court (Criminal Division) or the Provincial Court (Family Division) on the 31st day of December, 1989. R.S.O. 1990, c. C.43, s. 35; 1994, c. 12, s. 14; 1996, c. 25, s. 9 (18, 20); [2015, c. 27](#), Sched. 1, s. 1 (5).

Chief Justice, Associate Chief Justice and regional senior judges of Ontario Court of Justice

Powers and duties of Chief Justice

36 (1) The Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings of the Ontario Court of Justice and the assignment of its judicial duties. R.S.O. 1990, c. C.43, s. 36 (1); 1996, c. 25, s. 9 (16, 18, 20).

Regional senior judges

(2) A regional senior judge of the Ontario Court of Justice shall, subject to the authority of the Chief Justice of the Ontario Court of Justice, exercise the powers and perform the duties of the Chief Justice of the Ontario Court of Justice in his or her region. R.S.O. 1990, c. C.43, s. 36 (2); 1993, c. 27, Sched.; 1996, c. 25, s. 9 (18, 20).

Delegation

(3) A regional senior judge of the Ontario Court of Justice may delegate to a judge of the Ontario Court of Justice in his or her region the authority to exercise specified functions. R.S.O. 1990, c. C.43, s. 36 (3); 1996, c. 25, s. 9 (18).

Absence of Chief Justice

(4) If the Chief Justice of the Ontario Court of Justice is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by an associate chief justice of the Ontario Court of Justice designated by the Chief Justice of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 36 (4); 1994, c. 12, s. 15; 1996, c. 25, s. 9 (18, 20).

Senior Advisory Family Judge

- (5) The Senior Advisory Family Judge of the Ontario Court of Justice shall,
- (a) advise the Chief Justice of the Ontario Court of Justice with regard to,
 - (i) the education of judges with respect to family law matters, and
 - (ii) practices, procedures and programs relating to family law matters;
 - (b) preside over the Ontario Court of Justice Advisory Committee on Family Law;
 - (c) attend such meetings as the Chief Justice directs; and
 - (d) perform other duties respecting family law matters assigned to the Senior Advisory Family Judge by the Chief Justice. [2015, c. 27](#), Sched. 1, s. 1 (6).

Absence of regional senior judge or Senior Advisory Family Judge

- (6) The powers and duties of a regional senior judge of the Ontario Court of Justice or of the Senior Advisory Family Judge when he or she is absent from Ontario or is for any reason unable to act shall be exercised and performed by a judge of the Ontario Court of Justice designated by the Chief Justice of the Ontario Court of Justice. [2015, c. 27](#), Sched. 1, s. 1 (6).

Meetings

- (7) The Chief Justice of the Ontario Court of Justice may hold meetings with the associate chief justices, the regional senior judges of the Ontario Court of Justice and the Senior Advisory Family Judge in order to consider any matters concerning sittings of the Ontario Court of Justice and the assignment of its judicial duties. [2015, c. 27](#), Sched. 1, s. 1 (6).

Judges assigned to regions

- 37** (1) The Chief Justice of the Ontario Court of Justice shall assign every provincial judge to a region and may re-assign a judge from one region to another. R.S.O. 1990, c. C.43, s. 37 (1); 1996, c. 25, s. 9 (18, 20).

Same

- (2) Subsection (1) does not prevent the temporary assignment of a provincial judge to a location anywhere in Ontario. R.S.O. 1990, c. C.43, s. 37 (2).

Jurisdiction of Ontario Court of Justice

Criminal matters

38 (1) A provincial judge has the power and authority of two or more justices of the peace when sitting in the Ontario Court of Justice and shall exercise the powers and perform the duties that any Act of the Parliament of Canada confers on a provincial court judge when sitting in the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 38 (1); 1996, c. 25, s. 9 (18).

Provincial offences and family matters

(2) The Ontario Court of Justice shall perform any function assigned to it by or under the [Provincial Offences Act](#), the [Family Law Act](#), the [Children's Law Reform Act](#), the [Child, Youth and Family Services Act, 2017](#) or any other Act. R.S.O. 1990, c. C.43, s. 38 (2); 1996, c. 25, s. 9 (18); [2017, c. 14](#), Sched. 4, s. 10 (3).

Youth court and youth justice court

(3) The Ontario Court of Justice is a youth court for the purposes of the [Young Offenders Act](#) (Canada) and a youth justice court for the purposes of the [Youth Criminal Justice Act](#) (Canada). [2006, c. 19](#), Sched. D, s. 5 (1).

Judge to preside

39 (1) A proceeding in the Ontario Court of Justice shall be heard and determined by one judge of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 39 (1); 1996, c. 25, s. 9 (18).

Justice of the peace may preside

(2) A justice of the peace may preside over the Ontario Court of Justice in a proceeding under the [Provincial Offences Act](#). R.S.O. 1990, c. C.43, s. 39 (2); 1996, c. 25, s. 9 (18).

Appeals

40 (1) If no provision is made concerning an appeal from an order of the Ontario Court of Justice, an appeal lies to the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 40 (1); 1993, c. 27, Sched.; 1996, c. 25, s. 9 (17, 18).

Exception

(2) Subsection (1) does not apply to a proceeding under the [Criminal Code](#) (Canada) or the [Provincial Offences Act](#). R.S.O. 1990, c. C.43, s. 40 (2).

Penalty for disturbance outside courtroom

41 Any person who knowingly disturbs or interferes with a proceeding in the Ontario Court of Justice without reasonable justification while outside the courtroom is guilty of an offence and on conviction is liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than thirty days, or to both. R.S.O. 1990, c. C.43, s. 41; 1996, c. 25, s. 9 (18).

PROVINCIAL JUDGES

Appointment of provincial judges

42 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such provincial judges as are considered necessary. 1994, c. 12, s. 16.

Qualification

(2) No person shall be appointed as a provincial judge unless the person satisfies the following criteria:

1. The person has,
 - i. been a member of the bar of one of the provinces or territories of Canada for at least 10 years, or
 - ii. for an aggregate of at least 10 years, been a member of a bar mentioned in subparagraph i and, after becoming a member of such a bar, exercised powers and performed duties of a judicial nature on a full-time basis in respect of a position held under a law of Canada or of one of its provinces or territories.
2. The person undertakes to participate in such courses as may be designated for newly appointed judges by the Chief Justice of the Ontario Court of Justice under [subsection 51.10.1 \(3\)](#).
3. The person undertakes to not request a transfer to a different court location during the first five years following appointment unless extenuating circumstances apply. [2023, c. 12](#), Sched. 3, s. 2; [2025, c. 6](#), Sched. 5, s. 1.

Chief Justice

(3) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a provincial judge as Chief Justice of the Ontario Court of Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20); [2006, c. 21](#), Sched. A, s. 5 (2).

Associate chief justices

(4) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint two provincial judges as associate chief justices of the Ontario Court of Justice. [2006, c. 21](#), Sched. A, s. 5 (3).

Same

(5) One of the associate chief justices shall be appointed to the office of Associate Chief Justice-Co-ordinator of Justices of the Peace, which is created for the purposes of the *Justices of the Peace Act*. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Regional senior judges

(6) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a provincial judge to be the regional senior judge of the Ontario Court of Justice for each region. [2006, c. 21](#), Sched. A, s. 5 (4).

Same

(6.1) Before making a recommendation referred to in subsection (4) or (6), the Attorney General shall consult with the Chief Justice of the Ontario Court of Justice. [2006, c. 21](#), Sched. A, s. 5 (4).

Senior Advisory Family Judge

(6.2) The Chief Justice of the Ontario Court of Justice may appoint a provincial judge to be the Senior Advisory Family Judge of the Ontario Court of Justice. [2015, c. 27](#), Sched. 1, s. 1 (7).

Terms of office

(7) The associate chief justices each hold office for six years, and regional senior judges each hold office for three years. 1994, c. 12, s. 16; 1996, c. 25, ss. 1 (5), 9 (20).

Same

(7.1) The Chief Justice holds office for eight years from the time of his or her appointment. If a successor has not yet been appointed on the day the term expires, the Chief Justice continues in office until a successor is appointed, but shall not hold office for more than nine years in any event. 1996, c. 25, ss. 1 (6), 9 (20).

Same

(7.2) The Senior Advisory Family Judge holds office for three years. [2015, c. 27](#), Sched. 1, s. 1 (7).

Reappointment

(8) The Chief Justice and associate chief justices shall not be reappointed. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Same

(9) A regional senior judge may be reappointed once, for a further three years, on the Chief Justice's recommendation; if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the regional senior judge. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Same

(9.1) The Senior Advisory Family Judge may be reappointed once, for a term of three years. [2015, c. 27](#), Sched. 1, s. 1 (7).

Transitional salary

(9.2) Until and subject to the determination of his or her salary by the Provincial Judges Remuneration Commission, the Senior Advisory Family Judge is entitled to receive as an annual salary the annual salary of a regional senior judge appointed on or after November 12, 2013. [2015, c. 27](#), Sched. 1, s. 1 (7).

Status at end of term

(10) A Chief Justice, associate chief justice, Senior Advisory Family Judge or regional senior judge whose term expires continues to be a provincial judge. [2016, c. 5](#), Sched. 7, s. 1.

Information to be maintained in confidence

(11) Any records or other information collected, prepared, maintained or used by the Attorney General in relation to the appointment or consideration of an individual as a provincial judge, including any such records or other information provided to the Attorney General by the Judicial Appointments Advisory Committee, shall be maintained in confidence and shall not be disclosed except as authorized by the Attorney General. [2021, c. 4](#), Sched. 3, s. 3.

Prevails over *FIPPA*

(12) Subsection (11) prevails over the *Freedom of Information and Protection of Privacy Act*. [2021, c. 4](#), Sched. 3, s. 3.

Judicial Appointments Advisory Committee

43 (1) The committee known as the Judicial Appointments Advisory Committee in English and Comité consultatif sur les nominations à la magistrature in French is continued. [2021, c. 4](#), Sched. 3, s. 4.

Composition

(2) The Committee is composed of,

(a) two provincial judges, appointed by the Chief Justice of the Ontario Court of Justice;

(b) three lawyers appointed by the Attorney General, one appointed from a list of three names submitted by the Law Society of Ontario, one appointed from a list of three names submitted by the Ontario Bar Association and one appointed from a list of three names submitted by the Federation of Ontario Law Associations;

(c) seven persons who are not judges, appointed by the Attorney General; and

(d) a member of the Judicial Council, appointed by it. [2021, c. 4](#), Sched. 3, s. 4; [2025, c. 6](#), Sched. 5, s. 2.

Criteria

(3) In the appointment of members under clauses (2) (b) and (c), the importance of reflecting, in the composition of the Committee as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized. [2021, c. 4](#), Sched. 3, s. 4.

Term of office

(4) The members hold office for three-year terms and may be reappointed. [2021, c. 4](#), Sched. 3, s. 4.

Chair

(5) The Attorney General shall designate one of the members to chair the Committee for a term of up to three years. [2021, c. 4](#), Sched. 3, s. 4.

Term of office

(6) The same person may serve as chair for two or more terms. [2021, c. 4](#), Sched. 3, s. 4.

Meetings

(7) The Committee may hold its meetings and conduct interviews in person or through electronic means, including telephone conferencing and video conferencing. [2021, c. 4](#), Sched. 3, s. 4.

Annual report

(8) The Committee shall prepare an annual report, provide it to the Attorney General and make it available to the public. [2021, c. 4](#), Sched. 3, s. 4.

Same

(9) The annual report must include,

(a) statistics about the sex, gender, gender identity, sexual orientation, race, ethnicity, disability status and ability to speak French of candidates who volunteer that information, including whether the candidates identify as Indigenous or as a member of a Francophone community, at each stage of the process, as specified by the Attorney General; and

(b) such other content as the Attorney General may require. [2021, c. 4](#), Sched. 3, s. 4; [2024, c. 2](#), Sched. 6, s. 1.

Tabling of annual report

(10) The Attorney General shall table the Committee's annual report in the Assembly. [2021, c. 4](#), Sched. 3, s. 4.

Personal liability

(11) No action or other proceeding for damages shall be instituted against any member or former member of the Committee for any act done in good faith in

the execution or intended execution of any power or duty that he or she has or had as a member of the Committee, or for any neglect or default in the exercise or performance in good faith of such power or duty. [2021, c. 4](#), Sched. 3, s. 4.

Crown liability

(12) Subsection (11) does not, by reason of [subsection 8 \(3\)](#) of the *Crown Liability and Proceedings Act, 2019*, relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (11) to which it would otherwise be subject. [2021, c. 4](#), Sched. 3, s. 4.

Transition

(13) Despite subsection (2), the appointment of every person who was a member of the Judicial Appointments Advisory Committee on the day before the day section 4 of Schedule 3 to the *Accelerating Access to Justice Act, 2021* came into force is continued. [2021, c. 4](#), Sched. 3, s. 4.

Candidate recommendation process

Definition

43.1 (0.1) In this section,

“classification period” means, in respect of a candidate, the period beginning on the day the candidate submits an application for candidacy to be appointed as a provincial judge and ending on the third anniversary of that day. [2025, c. 6](#), Sched. 5, s. 3 (1).

Committee functions

- (1) The functions of the Judicial Appointments Advisory Committee are to,
- (a) recommend candidates to the Attorney General for the appointment of provincial judges; and
 - (b) provide advice to the Attorney General respecting the process for appointing provincial judges in accordance with this Act. [2021, c. 4](#), Sched. 3, s. 4.

Manner of operating

- (2) The Committee shall perform its functions in the following manner:
1. It shall, on the Attorney General’s request, advertise for applications for candidacy to be appointed as a provincial judge.

2. It shall review and evaluate all applications received in response to the advertisement.

3. REPEALED: [2025, c. 6](#), Sched. 5, s. 3 (2).

4. It may interview any of the candidates in conducting its review and evaluation.

5. It shall conduct the advertising, review and evaluation process in accordance with criteria it establishes, which must,

i. provide for an assessment that, at minimum,

A. assesses the candidates' professional excellence, community awareness and personal characteristics, and

B. recognizes the desirability of reflecting the diversity of Ontario society in judicial appointments, and

ii. include any criteria specified to the Committee by the Attorney General for the purposes of this paragraph.

6. It shall make the criteria it established under paragraph 5 available to the public.

7. For each candidate, it shall classify the candidate as "not recommended", "recommended" or "highly recommended".

8. It shall provide a list of the candidates classified as "recommended" or "highly recommended" to the Attorney General, with brief supporting reasons and the following information respecting each candidate:

i. Whether the classification applies to the candidate's qualification to preside over bilingual proceedings.

ii. The court locations in which the candidate is willing to sit. [2021, c. 4](#), Sched. 3, s. 4; [2025, c. 6](#), Sched. 5, s. 3 (2-4).

Majority required

(2.1) The Committee shall determine matters under subsection (2) by a majority vote of the members present. [2025, c. 6](#), Sched. 5, s. 3 (5).

Chair may vote

(2.2) For the purposes of subsection (2.1), the chair is entitled to vote and may cast a second, deciding vote if there is a tie. [2025, c. 6](#), Sched. 5, s. 3 (5).

Qualifications

- (3) The Committee shall not consider an application by a candidate,
- (a) who does not meet the qualifications set out in [subsection 42 \(2\)](#);
 - (b) who is or was a member of the Committee within the previous three years; or
 - (c) who previously applied for candidacy, if more than six months remain in the candidate's classification period under that application. [2021, c. 4, Sched. 3, s. 4](#); [2025, c. 6, Sched. 5, s. 3 \(6\)](#).

Information to be provided to Attorney

General on request

- (4) The Committee shall provide the Attorney General with any information about the application, review and evaluation process that the Attorney General requests, other than,
- (a) the names or identifying information of candidates who are classified as "not recommended";
 - (b) the names or identifying information of candidates who are being assessed but have not yet been classified; and
 - (c) information collected or prepared by the Committee through a discreet inquiry. [2021, c. 4, Sched. 3, s. 4](#); [2025, c. 6, Sched. 5, s. 3 \(7\)](#).

Same

- (5) The Committee shall provide any information requested by the Attorney General under subsection (4) within 30 days of the request unless otherwise directed by the Attorney General. [2021, c. 4, Sched. 3, s. 4](#).

Meaning of discreet inquiry

- (6) For the purposes of clause (4) (c), a discreet inquiry is a confidential inquiry conducted by the Committee into the views or opinions of individuals with knowledge of a candidate's suitability for appointment. [2021, c. 4, Sched. 3, s. 4](#).

Recommendation by Attorney General

- (7) The Attorney General may only recommend a candidate to the Lieutenant Governor in Council for appointment to fill a judicial vacancy if,

- (a) the candidate was classified by the Committee as “recommended” or “highly recommended”;
- (b) the classification applies to the candidate’s qualification to preside over bilingual proceedings, if the vacancy is for a bilingual judicial position;
- (c) the information provided under subparagraph 8 ii of subsection (2) with respect to the candidate indicates that the candidate is willing to sit in the court location to which the vacancy relates; and
- (d) the candidate’s classification period has not expired. [2025, c. 6](#), Sched. 5, s. 3 (8).

Reclassification

(8) If, during the classification period of a candidate who was classified as “not recommended”, the Committee receives or becomes aware of information respecting the candidate that the Committee believes may affect the candidate’s classification, the Committee may re-evaluate and reclassify the candidate. [2025, c. 6](#), Sched. 5, s. 3 (8).

Same, notification

(9) The Committee shall promptly notify the Attorney General in writing of the reclassification of a candidate under subsection (8), with brief supporting reasons. [2025, c. 6](#), Sched. 5, s. 3 (8).

Same, no effect on classification period

(10) The reclassification of a candidate has no effect on the candidate’s classification period. [2025, c. 6](#), Sched. 5, s. 3 (8).

Other information

(11) If, during the classification period of a candidate who was classified as “recommended” or “highly recommended”, the Committee receives or becomes aware of information respecting the candidate that the Committee believes may be material to whether the Attorney General recommends the candidate to the Lieutenant Governor in Council, the Committee shall promptly notify the Attorney General in writing respecting the information. [2025, c. 6](#), Sched. 5, s. 3 (8).

Transition

(12) This section, as it read immediately before the day the [Protect Ontario Through Safer Streets and Stronger Communities Act, 2025](#) received Royal

Assent, continues to apply with respect to a judicial vacancy that was advertised by the Committee before that day. 2025, c. 6, Sched. 5, s. 3 (8).

Full and part-time service

44 (1) A provincial judge may, at his or her option and with the Chief Justice's consent, change from full-time to part-time service or the reverse, or increase or decrease the amount of part-time service. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Part-time judges

(2) The Chief Justice, with the Attorney General's consent, may designate a former provincial judge who has retired from office to serve as a provincial judge on a part-time basis, not to exceed the limits specified by the regulations made under this Act. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20); [2023, c. 2](#), Sched. 2, s. 2; [2024, c. 27](#), Sched. 7, s. 1.

Same

(3) A person designated under subsection (2) is a provincial judge and a member of the Ontario Court of Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18).

Same

(4) A judge who is serving on a part-time basis under subsection (1) or (2) shall not engage in any other remunerative occupation. 1994, c. 12, s. 16.

Application for order that needs be accommodated

45 (1) A provincial judge who believes that he or she is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated may apply to the Judicial Council for an order under subsection (2).

Duty of Judicial Council

(2) If the Judicial Council finds that the judge is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated, it shall order that the judge's needs be accommodated to the extent necessary to enable him or her to perform those duties.

Undue hardship

(3) Subsection (2) does not apply if the Judicial Council is satisfied that making an order would impose undue hardship on the person responsible for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Guidelines and rules of procedure

(4) In dealing with applications under this section, the Judicial Council shall follow its guidelines and rules of procedure established under [subsection 51.1 \(1\)](#).

Opportunity to participate

(5) The Judicial Council shall not make an order under subsection (2) against a person without ensuring that the person has had an opportunity to participate and make submissions.

Crown bound

(6) The order binds the Crown. 1994, c. 12, s. 16.

Outside activities

46 (1) A provincial judge may act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator only if expressly authorized by an Act of the Parliament of Canada or the Legislature or appointed or authorized by the Governor in Council or Lieutenant Governor in Council.

Same

(2) A judge who, before January 1, 1985, had the consent of the Attorney General to act as an arbitrator or conciliator may continue to do so.

Remuneration

(3) A judge acting under subsection (1) shall not receive remuneration but shall be reimbursed for reasonable travelling and other expenses incurred while so acting. 1994, c. 12, s. 16.

Retirement

47 (1) Every provincial judge shall retire upon attaining the age of sixty-five years. 1994, c. 12, s. 16.

Same

(2) Despite subsection (1), a judge appointed as a full-time magistrate, judge of a juvenile and family court or master before December 2, 1968 shall retire upon attaining the age of seventy years. 1994, c. 12, s. 16.

Continuation of judges in office

(3) A judge who has attained retirement age may, subject to the annual approval of the Chief Justice of the Ontario Court of Justice, continue in office as a full-time or part-time judge until he or she attains the age of seventy-five years. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Same, regional senior judges

(4) A regional senior judge of the Ontario Court of Justice who is in office at the time of attaining retirement age may, subject to the annual approval of the Chief Justice, continue in that office until his or her term (including any renewal under [subsection 42 \(9\)](#)) expires, or until he or she attains the age of seventy-five years, whichever comes first. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Same, Chief Justice and associate chief justices

(5) A Chief Justice or associate chief justice of the Ontario Court of Justice who is in office at the time of attaining retirement age may, subject to the annual approval of the Judicial Council, continue in that office until his or her term expires, or until he or she attains the age of seventy-five years, whichever comes first. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Same

(6) If the Judicial Council does not approve a Chief Justice's or associate chief justice's continuation in that office under subsection (5), his or her continuation in the office of provincial judge is subject to the approval of the Judicial Council and not as set out in subsection (3). 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Criteria

(7) Decisions under subsections (3), (4), (5) and (6) shall be made in accordance with criteria developed by the Chief Justice and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Appointment after reaching 65 years

(8) This section applies, with necessary modifications, to a person appointed as a provincial judge, or as a Chief Justice, associate chief justice or regional senior judge, after reaching 65 years of age. [2017, c. 20](#), Sched. 2, s. 3.

Resignation and election

Resignation

48. (1) A provincial judge may at any time resign from his or her office by delivering a signed letter of resignation to the Chief Justice of the Ontario Court of Justice or, in the case of the Chief Justice, to the Attorney General. [2017, c. 2](#), Sched. 2, s. 8 (1).

Election

(2) A Chief Justice, an associate chief justice or a regional senior judge may, before the expiry of his or her term of office under [section 42](#), elect to hold the office of a provincial judge only, by delivering a signed letter to that effect to the Attorney General in the case of a Chief Justice, or to the Chief Justice of the Ontario Court of Justice in any other case. [2017, c. 2](#), Sched. 2, s. 8 (1).

(3) REPEALED: [2016, c. 5](#), Sched. 7, s. 2.

Effective date

(4) A resignation or election under this section takes effect on the day the letter is delivered to the Chief Justice or the Attorney General, as the case may be or, if the letter specifies a later day, on that day. 1994, c. 12, s. 16; [2017, c. 2](#), Sched. 2, s. 8 (2).

(5) SPENT: 1994, c. 12, s. 16.

ONTARIO JUDICIAL COUNCIL

Judicial Council

49 (1) The Ontario Judicial Council is continued under the name Ontario Judicial Council in English and Conseil de la magistrature de l'Ontario in French. 1994, c. 12, s. 16.

Composition

(2) The Judicial Council is composed of,

- (a) the Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice;

(b) the Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice, and the Associate Chief Justice of the Ontario Court of Justice;

(c) a regional senior judge of the Ontario Court of Justice, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation;

(d) two judges of the Ontario Court of Justice, appointed by the Chief Justice;

(e) the Treasurer of the Law Society of Ontario, or another bencher of the Law Society who is a lawyer, designated by the Treasurer;

(f) a lawyer who is not a bencher of the Law Society of Ontario, appointed by the Law Society;

(g) four persons who are neither judges nor lawyers, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20); 2018, c. 8, Sched. 15, s. 8 (1).

Temporary members

(3) The Chief Justice of the Ontario Court of Justice may appoint a judge of that court to be a temporary member of the Judicial Council in the place of another provincial judge, for the purposes of dealing with a complaint, if the requirements of subsections (13), (15), (17), (19) and (20) cannot otherwise be met. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20).

Criteria

(4) In the appointment of members under clauses (2) (d), (f) and (g), the importance of reflecting, in the composition of the Judicial Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized. 1994, c. 12, s. 16.

Term of office

(5) The regional senior judge who is appointed under clause (2) (c) remains a member of the Judicial Council until he or she ceases to hold office as a regional senior judge. 1994, c. 12, s. 16.

Same

(6) The members who are appointed under clauses (2) (d), (f) and (g) hold office for four-year terms and shall not be reappointed. 1994, c. 12, s. 16.

(7) REPEALED: [2017, c. 2](#), Sched. 2, s. 9 (1).

Chair

(8) The Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice, shall chair the meetings and hearings of the Judicial Council that deal with complaints against particular judges and its meetings held for the purposes of [section 45](#) and [subsection 47 \(5\)](#). 1994, c. 12, s. 16.

Same

(9) The Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice, shall chair all other meetings and hearings of the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20).

Same

(10) The chair is entitled to vote, and may cast a second deciding vote if there is a tie. 1994, c. 12, s. 16.

Open and closed hearings and meetings

(11) The Judicial Council's hearings and meetings under [sections 51.6](#) and [51.7](#) shall be open to the public, unless [subsection 51.6 \(7\)](#) applies; its other hearings and meetings may be conducted in private, unless this Act provides otherwise. 1994, c. 12, s. 16.

Vacancies

(12) Where a vacancy occurs among the members appointed under clause (2) (d), (f) or (g), a new member similarly qualified may be appointed for the remainder of the term. 1994, c. 12, s. 16.

Quorum

(13) The following quorum rules apply, subject to subsections (15) and (17):

1. Eight members, including the chair, constitute a quorum.
2. At least half the members present must be judges and at least four must be persons who are not judges. 1994, c. 12, s. 16.

Review panels

(14) The Judicial Council may establish a panel for the purpose of dealing with a complaint under [subsection 51.4 \(17\)](#) or [\(18\)](#) or [subsection 51.5 \(8\)](#) or [\(10\)](#)

and considering the question of compensation under [section 51.7](#), and the panel has all the powers of the Judicial Council for that purpose. 1994, c. 12, s. 16.

Same

(15) The following rules apply to a panel established under subsection (14):

1. The panel shall consist of two provincial judges other than the Chief Justice, a lawyer and a person who is neither a judge nor a lawyer.
2. One of the judges, as designated by the Judicial Council, shall chair the panel.
3. Four members constitute a quorum. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Hearing panels

(16) The Judicial Council may establish a panel for the purpose of holding a hearing under [section 51.6](#) and considering the question of compensation under [section 51.7](#), and the panel has all the powers of the Judicial Council for that purpose. 1994, c. 12, s. 16.

Same

(17) The following rules apply to a panel established under subsection (16):

1. Half the members of the panel, including the chair, must be judges, and half must be persons who are not judges.
2. At least one member must be a person who is neither a judge nor a lawyer.
3. The Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice, shall chair the panel.
4. Subject to paragraphs 1, 2 and 3, the Judicial Council may determine the size and composition of the panel.
5. All the members of the panel constitute a quorum. 1994, c. 12, s. 16.

Chair

(18) The chair of a panel established under subsection (14) or (16) is entitled to vote, and may cast a second deciding vote if there is a tie. 1994, c. 12, s. 16.

Participation in stages of process

(19) The members of the subcommittee that investigated a complaint shall not,

(a) deal with the complaint under [subsection 51.4 \(17\)](#) or [\(18\)](#) or [subsection 51.5 \(8\)](#) or [\(10\)](#); or

(b) participate in a hearing of the complaint under [section 51.6](#). 1994, c. 12, s. 16.

Same

(20) The members of the Judicial Council who dealt with a complaint under [subsection 51.4 \(17\)](#) or [\(18\)](#) or [subsection 51.5 \(8\)](#) or [\(10\)](#) shall not participate in a hearing of the complaint under [section 51.6](#). 1994, c. 12, s. 16.

Expert assistance

(21) The Judicial Council may engage persons, including counsel, to assist it. 1994, c. 12, s. 16.

Support services

(22) The Judicial Council shall provide support services, including initial orientation and continuing education, to enable its members to participate effectively, devoting particular attention to the needs of the members who are neither judges nor lawyers and administering a part of its budget for support services separately for that purpose. 1994, c. 12, s. 16.

Same

(23) The Judicial Council shall administer a part of its budget for support services separately for the purpose of accommodating the needs of any members who have disabilities. 1994, c. 12, s. 16.

Confidential records

(24) The Judicial Council or a subcommittee may order that any information or documents relating to a mediation or a Council meeting or hearing that was not held in public are confidential and shall not be disclosed or made public. 1994, c. 12, s. 16.

Same

(25) Subsection (24) applies whether the information or documents are in the possession of the Judicial Council, the Attorney General or any other person. 1994, c. 12, s. 16.

Exceptions

(26) Subsection (24) does not apply to information and documents,

(a) that this Act requires the Judicial Council to disclose; or

(b) that have not been treated as confidential and were not prepared exclusively for the purposes of the mediation or Council meeting or hearing. 1994, c. 12, s. 16.

Personal liability

(27) No action or other proceeding for damages shall be instituted against the Judicial Council, any of its members or employees or any person acting under its authority for any act done in good faith in the execution or intended execution of any power or duty of the Council or person, or for any neglect or default in the exercise or performance in good faith of such power or duty. 1994, c. 12, s. 16; [2017, c. 2](#), Sched. 2, s. 9 (2).

Remuneration

(28) The members who are appointed under clause (2) (g) are entitled to receive the daily remuneration that is fixed by the Lieutenant Governor in Council. 1994, c. 12, s. 16.

Complaint against Chief Justice, Associate Chief Justice or regional senior judge of the Ontario Court of Justice

Complaint against Chief Justice

50 (1) If the Chief Justice of the Ontario Court of Justice is the subject of a complaint,

(a) the Chief Justice of Ontario shall appoint another judge of the Ontario Court of Justice to be a member of the Judicial Council instead of the Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of;

(b) the Associate Chief Justice of the Ontario Court of Justice shall chair meetings and hearings of the Council instead of the Chief Justice of the Ontario Court of Justice, and make appointments under [subsection 49 \(3\)](#) instead of the Chief Justice, until the complaint is finally disposed of; and

(c) any reference of the complaint that would otherwise be made to the Chief Justice of the Ontario Court of Justice under [clause 51.4 \(13\) \(b\)](#) or [51.4 \(18\) \(c\)](#), [subclause 51.5 \(8\) \(b\) \(ii\)](#) or clause 51.5 (10) (b) shall be made to the Chief Justice of the Superior Court of Justice instead of to the Chief Justice of the Ontario Court of Justice.

Suspension of Chief Justice

(2) If the Chief Justice of the Ontario Court of Justice is suspended under [subsection 51.4 \(12\)](#),

(a) complaints that would otherwise be referred to the Chief Justice of the Ontario Court of Justice under [clauses 51.4 \(13\) \(b\)](#) and [51.4 \(18\) \(c\)](#), [subclause 51.5 \(8\) \(b\) \(ii\)](#) and clause 51.5 (10) (b) shall be referred to the Associate Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of; and

(b) annual approvals that would otherwise be granted or refused by the Chief Justice of the Ontario Court of Justice shall be granted or refused by the Associate Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of.

Complaint against Associate Chief Justice or regional senior judge

(3) If the Associate Chief Justice of the Ontario Court of Justice or the regional senior judge appointed under [clause 49 \(2\) \(c\)](#) is the subject of a complaint, the Chief Justice of the Ontario Court of Justice shall appoint another judge of the Ontario Court of Justice to be a member of the Judicial Council instead of the Associate Chief Justice or regional senior judge, as the case may be, until the complaint is finally disposed of. 1996, c. 25, s. 9 (6).

Other duties of Judicial Council

Provision of information to public

51 (1) The Judicial Council shall provide, in courthouses and elsewhere, information about itself and about the justice system, including information about how members of the public may obtain assistance in making complaints.

Same

(2) In providing information, the Judicial Council shall emphasize the elimination of cultural and linguistic barriers and the accommodation of the needs of persons with disabilities.

Assistance to public

(3) Where necessary, the Judicial Council shall arrange for the provision of assistance to members of the public in the preparation of documents for making complaints.

Telephone access

(4) The Judicial Council shall provide province-wide free telephone access, including telephone access for the deaf, to information about itself and its role in the justice system.

Persons with disabilities

(5) To enable persons with disabilities to participate effectively in the complaints process, the Judicial Council shall ensure that their needs are accommodated, at the Council's expense, unless it would impose undue hardship on the Council to do so, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Annual report

(6) After the end of each year, the Judicial Council shall make an annual report to the Attorney General on its affairs, in English and French, including, with respect to all complaints received or dealt with during the year, a summary of the complaint, the findings and a statement of the disposition, but the report shall not include information that might identify the judge or the complainant.

Same, publication

(7) The Judicial Council shall, no earlier than 15 but no later than 30 days after making the report, publish it in English and French on its website. [2019, c. 7](#), Sched. 15, s. 1.

Rules

51.1 (1) The Judicial Council shall establish and make public rules governing its own procedures, including the following:

1. Guidelines and rules of procedure for the purpose of [section 45](#).
2. Guidelines and rules of procedure for the purpose of [subsection 51.4 \(21\)](#).
3. Guidelines and rules of procedure for the purpose of [subsection 51.4 \(22\)](#).
4. If applicable, criteria for the purpose of [subsection 51.5 \(2\)](#).
5. If applicable, guidelines and rules of procedure for the purpose of [subsection 51.5 \(13\)](#).
6. Rules of procedure for the purpose of [subsection 51.6 \(3\)](#).
7. Criteria for the purpose of [subsection 51.6 \(7\)](#).
8. Criteria for the purpose of [subsection 51.6 \(8\)](#).
9. Criteria for the purpose of [subsection 51.6 \(10\)](#). 1994, c. 12, s. 16.

Legislation Act, 2006, Part III

(2) Part III (Regulations) of the [Legislation Act, 2006](#) does not apply to rules, guidelines or criteria established by the Judicial Council. 1994, c. 12, s. 16; [2006, c. 21](#), Sched. F, s. 136 (1).

Sections 28, 29 and 33 of SPPA

(3) [Sections 28, 29 and 33](#) of the [Statutory Powers Procedure Act](#) do not apply to the Judicial Council. 1994, c. 12, s. 16.

Use of official languages of courts

51.2 (1) The information provided under [subsections 51 \(1\), \(3\) and \(4\)](#) and the matters made public under [subsection 51.1 \(1\)](#) shall be made available in English and French.

Same

(2) Complaints against provincial judges may be made in English or French.

Same

(3) A hearing under [section 51.6](#) shall be conducted in English, but a complainant or witness who speaks French or a judge who is the subject of a complaint and who speaks French is entitled, on request,

- (a) to be given, before the hearing, French translations of documents that are written in English and are to be considered at the hearing;

(b) to be provided with the assistance of an interpreter at the hearing;
and

(c) to be provided with simultaneous interpretation into French of the English portions of the hearing.

Same

(4) Subsection (3) also applies to mediations conducted under [section 51.5](#) and to the Judicial Council's consideration of the question of compensation under [section 51.7](#), if [subsection 51.7 \(2\)](#) applies.

Bilingual hearing or mediation

(5) The Judicial Council may direct that a hearing or mediation to which subsection (3) applies be conducted bilingually, if the Council is of the opinion that it can be properly conducted in that manner.

Part of hearing or mediation

(6) A directive under subsection (5) may apply to a part of the hearing or mediation, and in that case subsections (7) and (8) apply with necessary modifications.

Same

(7) In a bilingual hearing or mediation,

(a) oral evidence and submissions may be given or made in English or French, and shall be recorded in the language in which they are given or made;

(b) documents may be filed in either language;

(c) in the case of a mediation, discussions may take place in either language;

(d) the reasons for a decision or the mediator's report, as the case may be, may be written in either language.

Same

(8) In a bilingual hearing or mediation, if the complainant or the judge who is the subject of the complaint does not speak both languages, he or she is entitled, on request, to have simultaneous interpretation of any evidence, submissions or discussions spoken in the other language and translation of any document filed or reasons or report written in the other language. 1994, c. 12, s. 16.

Complaint re provincial judge

51.3 (1) Any person may make a complaint to the Judicial Council alleging misconduct by a provincial judge.

Same

(2) If an allegation of misconduct against a provincial judge is made to a member of the Judicial Council, it shall be treated as a complaint made to the Judicial Council.

Same

(3) If an allegation of misconduct against a provincial judge is made to any other judge or to the Attorney General, the other judge, or the Attorney General, as the case may be, shall provide the person making the allegation with information about the Judicial Council's role in the justice system and about how a complaint may be made, and shall refer the person to the Judicial Council.

Carriage of matter

(4) Once a complaint has been made to the Judicial Council, the Council has carriage of the matter.

Information re complaint

(5) At any person's request, the Judicial Council may confirm or deny that a particular complaint has been made to it. 1994, c. 12, s. 16.

Role of subcommittee

Review

51.4 (1) A complaint received by the Judicial Council shall be reviewed by a subcommittee of the Council consisting of a provincial judge other than the Chief Justice and a person who is neither a judge nor a lawyer. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Rotation of members

(2) The eligible members of the Judicial Council shall all serve on the subcommittee on a rotating basis.

Dismissal

(3) The subcommittee shall dismiss the complaint without further investigation if, in the subcommittee's opinion, it falls outside the Judicial Council's jurisdiction or is frivolous or an abuse of process.

Investigation

(4) If the complaint is not dismissed under subsection (3), the subcommittee shall conduct such investigation as it considers appropriate.

Expert assistance

(5) The subcommittee may engage persons, including counsel, to assist it in its investigation.

Investigation private

(6) The investigation shall be conducted in private.

Non-application of SPPA

(7) The *Statutory Powers Procedure Act* does not apply to the subcommittee's activities.

Interim recommendations

(8) The subcommittee may recommend to a regional senior judge the suspension, with pay, of the judge who is the subject of the complaint, or the judge's reassignment to a different location, until the complaint is finally disposed of.

Same

(9) The recommendation shall be made to the regional senior judge appointed for the region to which the judge is assigned, unless that regional senior judge is a member of the Judicial Council, in which case the recommendation shall be made to another regional senior judge.

Power of regional senior judge

(10) The regional senior judge may suspend or reassign the judge as the subcommittee recommends. 1994, c. 12, s. 16.

Discretion

(11) The regional senior judge's discretion to accept or reject the subcommittee's recommendation is not subject to the direction and

supervision of the Chief Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Exception: complaints against certain judges

(12) If the complaint is against the Chief Justice of the Ontario Court of Justice, an associate chief justice of the Ontario Court of Justice or the regional senior judge who is a member of the Judicial Council, any recommendation under subsection (8) in connection with the complaint shall be made to the Chief Justice of the Superior Court of Justice, who may suspend or reassign the judge as the subcommittee recommends. 1996, c. 25, s. 9 (7).

Subcommittee's decision

(13) When its investigation is complete, the subcommittee shall,

- (a) dismiss the complaint;
- (b) refer the complaint to the Chief Justice;
- (c) refer the complaint to a mediator in accordance with [section 51.5](#); or
- (d) refer the complaint to the Judicial Council, with or without recommending that it hold a hearing under [section 51.6](#). 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Same

(14) The subcommittee may dismiss the complaint or refer it to the Chief Justice or to a mediator only if both members agree; otherwise, the complaint shall be referred to the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Conditions, reference to Chief Justice

(15) The subcommittee may, if the judge who is the subject of the complaint agrees, impose conditions on a decision to refer the complaint to the Chief Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Report

(16) The subcommittee shall report to the Judicial Council, without identifying the complainant or the judge who is the subject of the complaint, its disposition of any complaint that is dismissed or referred to the Chief Justice or to a mediator. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Power of Judicial Council

(17) The Judicial Council shall consider the report, in private, and may approve the subcommittee's disposition or may require the subcommittee to refer the complaint to the Council. 1994, c. 12, s. 16.

Same

(18) The Judicial Council shall consider, in private, every complaint referred to it by the subcommittee, and may,

- (a) hold a hearing under [section 51.6](#);
- (b) dismiss the complaint;
- (c) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in subsection (15); or
- (d) refer the complaint to a mediator in accordance with [section 51.5](#). 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Non-application of SPPA

(19) The [Statutory Powers Procedure Act](#) does not apply to the Judicial Council's activities under subsections (17) and (18).

Notice to judge and complainant

(20) After making its decision under subsection (17) or (18), the Judicial Council shall communicate it to the judge and the complainant, giving brief reasons in the case of a dismissal.

Guidelines and rules of procedure

(21) In conducting investigations, in making recommendations under subsection (8) and in making decisions under subsections (13) and (15), the subcommittee shall follow the Judicial Council's guidelines and rules of procedure established under [subsection 51.1 \(1\)](#).

Same

(22) In considering reports and complaints and making decisions under subsections (17) and (18), the Judicial Council shall follow its guidelines and rules of procedure established under [subsection 51.1 \(1\)](#). 1994, c. 12, s. 16.

Mediation

51.5 (1) The Judicial Council may establish a mediation process for complainants and for judges who are the subject of complaints.

Criteria

(2) If the Judicial Council establishes a mediation process, it must also establish criteria to exclude from the process complaints that are inappropriate for mediation.

Same

(3) Without limiting the generality of subsection (2), the criteria must ensure that complaints are excluded from the mediation process in the following circumstances:

1. There is a significant power imbalance between the complainant and the judge, or there is such a significant disparity between the complainant's and the judge's accounts of the event with which the complaint is concerned that mediation would be unworkable.
2. The complaint involves an allegation of sexual misconduct or an allegation of discrimination or harassment because of a prohibited ground of discrimination or harassment referred to in any provision of the [Human Rights Code](#).
3. The public interest requires a hearing of the complaint.

Legal advice

(4) A complaint may be referred to a mediator only if the complainant and the judge consent to the referral, are able to obtain independent legal advice and have had an opportunity to do so.

Trained mediator

(5) The mediator shall be a person who has been trained in mediation and who is not a judge, and if the mediation is conducted by two or more persons acting together, at least one of them must meet those requirements.

Impartiality

(6) The mediator shall be impartial.

Exclusion

(7) No member of the subcommittee that investigated the complaint and no member of the Judicial Council who dealt with the complaint under [subsection 51.4 \(17\)](#) or [\(18\)](#) shall participate in the mediation. 1994, c. 12, s. 16.

Review by Council

(8) The mediator shall report the results of the mediation, without identifying the complainant or the judge who is the subject of the complaint, to the Judicial Council, which shall review the report, in private, and may,

- (a) approve the disposition of the complaint; or
- (b) if the mediation does not result in a disposition or if the Council is of the opinion that the disposition is not in the public interest,
 - (i) dismiss the complaint,
 - (ii) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in [subsection 51.4 \(15\)](#), or
 - (iii) hold a hearing under [section 51.6](#). 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Report

(9) If the Judicial Council approves the disposition of the complaint, it may make the results of the mediation public, providing a summary of the complaint but not identifying the complainant or the judge. 1994, c. 12, s. 16.

Referral to Council

(10) At any time during or after the mediation, the complainant or the judge may refer the complaint to the Judicial Council, which shall consider the matter, in private, and may,

- (a) dismiss the complaint;
- (b) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in [subsection 51.4 \(15\)](#); or
- (c) hold a hearing under [section 51.6](#). 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Non-application of SPPA

(11) The *Statutory Powers Procedure Act* does not apply to the Judicial Council's activities under subsections (8) and (10).

Notice to judge and complainant

(12) After making its decision under subsection (8) or (10), the Judicial Council shall communicate it to the judge and the complainant, giving brief reasons in the case of a dismissal.

Guidelines and rules of procedure

(13) In reviewing reports, considering matters and making decisions under subsections (8) and (10), the Judicial Council shall follow its guidelines and rules of procedure established under [subsection 51.1 \(1\)](#). 1994, c. 12, s. 16.

Adjudication by Council

51.6 (1) When the Judicial Council decides to hold a hearing, it shall do so in accordance with this section. 1994, c. 12, s. 16.

Application of SPPA

(2) The *Statutory Powers Procedure Act*, except [section 4](#) and [subsection 9 \(1\)](#), applies to the hearing. 1994, c. 12, s. 16.

Rules of procedure

(3) The Judicial Council's rules of procedure established under [subsection 51.1 \(1\)](#) apply to the hearing. 1994, c. 12, s. 16.

Communication re subject-matter of hearing

(4) The members of the Judicial Council participating in the hearing shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person, unless all the parties and the persons representing the parties under the authority of the *Law Society Act* receive notice and have an opportunity to participate. [2006, c. 21](#), Sched. C, s. 105 (3).

Exception

(5) Subsection (4) does not preclude the Judicial Council from engaging counsel to assist it in accordance with [subsection 49 \(21\)](#), and in that case the nature of the advice given by counsel shall be communicated to the parties so that they may make submissions as to the law. 1994, c. 12, s. 16.

Parties

(6) The Judicial Council shall determine who are the parties to the hearing. 1994, c. 12, s. 16.

Exception, closed hearing

(7) In exceptional circumstances, if the Judicial Council determines, in accordance with the criteria established under [subsection 51.1 \(1\)](#), that the desirability of holding open hearings is outweighed by the desirability of maintaining confidentiality, it may hold all or part of the hearing in private. 1994, c. 12, s. 16.

Disclosure in exceptional circumstances

(8) If the hearing was held in private, the Judicial Council shall, unless it determines in accordance with the criteria established under [subsection 51.1 \(1\)](#) that there are exceptional circumstances, order that the judge's name not be disclosed or made public. 1994, c. 12, s. 16.

Orders prohibiting publication

(9) If the complaint involves allegations of sexual misconduct or sexual harassment, the Judicial Council shall, at the request of a complainant or of another witness who testifies to having been the victim of similar conduct by the judge, prohibit the publication of information that might identify the complainant or witness, as the case may be. 1994, c. 12, s. 16.

Publication ban

(10) In exceptional circumstances and in accordance with the criteria established under [subsection 51.1 \(1\)](#), the Judicial Council may make an order prohibiting, pending the disposition of a complaint, the publication of information that might identify the judge who is the subject of the complaint. 1994, c. 12, s. 16.

Dispositions

(11) After completing the hearing, the Judicial Council may dismiss the complaint, with or without a finding that it is unfounded or, if it finds that there has been misconduct by the judge, may,

- (a) warn the judge;
- (b) reprimand the judge;

- (c) order the judge to apologize to the complainant or to any other person;
- (d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;
- (e) suspend the judge with pay, for any period;
- (f) suspend the judge without pay, but with benefits, for a period up to thirty days; or
- (g) recommend to the Attorney General that the judge be removed from office in accordance with [section 51.8](#). 1994, c. 12, s. 16.

Same

(12) The Judicial Council may adopt any combination of the dispositions set out in clauses (11) (a) to (f). 1994, c. 12, s. 16.

Disability

(13) If the Judicial Council finds that the judge is unable, because of a disability, to perform the essential duties of the office, but would be able to perform them if his or her needs were accommodated, the Council shall order that the judge's needs be accommodated to the extent necessary to enable him or her to perform those duties. 1994, c. 12, s. 16.

Application of subs. (13)

(14) Subsection (13) applies if,

- (a) the effect of the disability on the judge's performance of the essential duties of the office was a factor in the complaint; and
- (b) the Judicial Council dismisses the complaint or makes a disposition under clauses (11) (a) to (f). 1994, c. 12, s. 16.

Undue hardship

(15) Subsection (13) does not apply if the Judicial Council is satisfied that making an order would impose undue hardship on the person responsible for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. 1994, c. 12, s. 16.

Opportunity to participate

(16) The Judicial Council shall not make an order under subsection (13) against a person without ensuring that the person has had an opportunity to participate and make submissions. 1994, c. 12, s. 16.

Crown bound

(17) An order made under subsection (13) binds the Crown. 1994, c. 12, s. 16.

Report to Attorney General

(18) The Judicial Council may make a report to the Attorney General about the complaint, investigation, hearing and disposition, subject to any order made under [subsection 49 \(24\)](#), and the Attorney General may make the report public if of the opinion that this would be in the public interest. 1994, c. 12, s. 16.

Non-identification of persons

(19) The following persons shall not be identified in the report:

1. A complainant or witness at whose request an order was made under subsection (9).
2. The judge, if the hearing was conducted in private, unless the Judicial Council orders that the judge's name be disclosed. 1994, c. 12, s. 16.

Continuing publication ban

(20) If an order was made under subsection (10) and the Judicial Council dismisses the complaint with a finding that it was unfounded, the judge shall not be identified in the report without his or her consent and the Council shall order that information that relates to the complaint and might identify the judge shall never be made public without his or her consent. 1994, c. 12, s. 16.

Compensation

51.7 (1) When the Judicial Council has dealt with a complaint against a provincial judge, it shall consider whether the judge should be compensated for his or her costs for legal services incurred in connection with all the steps taken under [sections 51.4](#), [51.5](#) and [51.6](#) and this section in relation to the complaint. 1994, c. 12, s. 16.

Consideration of question combined with hearing

(2) If the Judicial Council holds a hearing into the complaint, its consideration of the question of compensation shall be combined with the hearing. 1994, c. 12, s. 16.

Public or private consideration of question

(3) The Judicial Council's consideration of the question of compensation shall take place in public if there was a public hearing into the complaint, and otherwise shall take place in private. 1994, c. 12, s. 16.

Recommendation

(4) If the Judicial Council is of the opinion that the judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 1994, c. 12, s. 16.

Same

(5) If the complaint is dismissed after a hearing, the Judicial Council shall recommend to the Attorney General that the judge be compensated for his or her costs for legal services and shall indicate the amount. 1994, c. 12, s. 16.

Exception

(5.1) If the Judicial Council makes a recommendation under [clause 51.6 \(11\)](#) (g) in relation to a complaint made on or after the day section 2 of Schedule 5 to the [Smarter and Stronger Justice Act, 2020](#) comes into force, subsections (1) to (3) do not apply and compensation shall not be recommended under subsection (4). 2020, c. 11, Sched. 5, s. 2.

Disclosure of name

(6) The Judicial Council's recommendation to the Attorney General shall name the judge, but the Attorney General shall not disclose the name unless there was a public hearing into the complaint or the Council has otherwise made the judge's name public. 1994, c. 12, s. 16.

Amount of compensation

(7) The amount of compensation recommended under subsection (4) or (5) may relate to all or part of the judge's costs for legal services, and shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services. 1994, c. 12, s. 16.

Payment

(8) The Attorney General shall pay compensation to the judge in accordance with the recommendation. 1994, c. 12, s. 16.

Removal for cause

51.8 (1) A provincial judge may be removed from office only if,

(a) a complaint about the judge has been made to the Judicial Council; and

(b) the Judicial Council, after a hearing under [section 51.6](#), recommends to the Attorney General that the judge be removed on the ground that he or she has become incapacitated or disabled from the due execution of his or her office by reason of,

(i) inability, because of a disability, to perform the essential duties of his or her office (if an order to accommodate the judge's needs would not remedy the inability, or could not be made because it would impose undue hardship on the person responsible for meeting those needs, or was made but did not remedy the inability),

(ii) conduct that is incompatible with the due execution of his or her office, or

(iii) failure to perform the duties of his or her office. 1994, c. 12, s. 16.

Tabling of recommendation

(2) The Attorney General shall table the recommendation in the Assembly if it is in session or, if not, within fifteen days after the commencement of the next session. 1994, c. 12, s. 16.

Order for removal

(3) An order removing a provincial judge from office under this section may be made by the Lieutenant Governor on the address of the Assembly. 1994, c. 12, s. 16.

Application

(4) This section applies to provincial judges who have not yet attained retirement age and to provincial judges whose continuation in office after attaining retirement age has been approved under [subsection 47 \(3\)](#), [\(4\)](#) or [\(5\)](#). 1994, c. 12, s. 16.

(5) REPEALED: [2017, c. 2](#), Sched. 2, s. 10.

Standards of conduct

51.9 (1) The Chief Justice of the Ontario Court of Justice may establish standards of conduct for provincial judges, including a plan for bringing the standards into effect, and may implement the standards and plan when they have been reviewed and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Duty of Chief Justice

(2) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20); [2006, c. 21](#), Sched. A, s. 6.

Goals

(3) The following are among the goals that the Chief Justice may seek to achieve by implementing standards of conduct for judges:

1. Recognizing the independence of the judiciary.
2. Maintaining the high quality of the justice system and ensuring the efficient administration of justice.
3. Enhancing equality and a sense of inclusiveness in the justice system.
4. Ensuring that judges' conduct is consistent with the respect accorded to them.
5. Emphasizing the need to ensure the professional and personal development of judges and the growth of their social awareness through continuing education. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Continuing education

51.10 (1) The Chief Justice of the Ontario Court of Justice shall establish a plan for the continuing education of provincial judges, and shall implement the plan when it has been reviewed and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Duty of Chief Justice

(2) The Chief Justice shall ensure that the plan for continuing education is made available to the public, in English and French, when it has been approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Goals

(3) Continuing education of judges has the following goals:

1. Maintaining and developing professional competence.
2. Maintaining and developing social awareness.
3. Encouraging personal growth. 1994, c. 12, s. 16.

Establishment of courses

51.10.1 (1) The Chief Justice of the Ontario Court of Justice may establish courses for newly appointed judges and for the continuing education of judges, which may include courses respecting,

- (a) sexual assault law;
- (b) intimate partner violence;
- (c) coercive control in intimate partner and family relationships; and
- (d) social context, which includes systemic racism and systemic discrimination. 2023, c. 12, Sched. 3, s. 3.

Courses re sexual assault and intimate partner violence, consultation

(2) The Chief Justice may, in establishing courses respecting matters mentioned in clauses (1) (a) to (d), consult with such persons, groups and organizations as the Chief Justice considers appropriate, which may include survivors of sexual assault, survivors of intimate partner violence and persons, groups and organizations that support these survivors, including Indigenous leaders and representatives of Indigenous communities. 2023, c. 12, Sched. 3, s. 3.

Designated courses

(3) The Chief Justice may designate courses, including courses established under subsection (1), for newly appointed judges. 2023, c. 12, Sched. 3, s. 3.

Report

(4) No later than February 28 in each year, the Chief Justice shall submit to the Attorney General a report setting out the following information:

1. The title, duration and dates of each course established by the Chief Justice respecting matters mentioned in clauses (1) (a) to (d) that was offered to judges during the previous calendar year.

2. A description of the topics covered in each course.
3. The number of judges who attended each course. [2023, c. 12](#), Sched. 3, s. 3.

Tabling of report

(5) The Attorney General shall cause a copy of a report submitted under subsection (4) to be tabled in the Legislative Assembly on any of the first 10 days on which that House is sitting after the Attorney General receives the report. [2023, c. 12](#), Sched. 3, s. 3.

Performance evaluation

51.11 (1) The Chief Justice of the Ontario Court of Justice may establish a program of performance evaluation for provincial judges, and may implement the program when it has been reviewed and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Duty of Chief Justice

(2) The Chief Justice shall make the existence of the program of performance evaluation public when it has been approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Goals

(3) The following are among the goals that the Chief Justice may seek to achieve by establishing a program of performance evaluation for judges:

1. Enhancing the performance of individual judges and of judges in general.
2. Identifying continuing education needs.
3. Assisting in the assignment of judges.
4. Identifying potential for professional development. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Scope of evaluation

(4) In a judge's performance evaluation, a decision made in a particular case shall not be considered.

Confidentiality

(5) A judge's performance evaluation is confidential and shall be disclosed only to the judge, his or her regional senior judge, and the person or persons

conducting the evaluation.

Inadmissibility, exception

(6) A judge's performance evaluation shall not be admitted in evidence before the Judicial Council or any court or other tribunal unless the judge consents.

Application of subss. (5), (6)

(7) Subsections (5) and (6) apply to everything contained in a judge's performance evaluation and to all information collected in connection with the evaluation. 1994, c. 12, s. 16.

Consultation

51.12 In establishing standards of conduct under [section 51.9](#), a plan for continuing education under [section 51.10](#) and a program of performance evaluation under [section 51.11](#), the Chief Justice of the Ontario Court of Justice shall consult with judges of that court and with such other persons as he or she considers appropriate. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20).

PROVINCIAL JUDGES' REMUNERATION

Remuneration and framework agreement

Provincial Judges Remuneration Commission

51.13 (1) The committee known as the Provincial Judges Remuneration Commission in English and as Commission de rémunération des juges provinciaux in French is continued. 1994, c. 12, s. 16.

Composition and functions

(2) The composition and functions of the Commission are as set out in Appendix A of the framework agreement set out in the Schedule to this Act. 1994, c. 12, s. 16.

Framework agreement

(3) The framework agreement forms part of this Act. 1994, c. 12, s. 16.

Same

(4) The reference in paragraph 11 of the framework agreement to public servants as defined in the *Public Service Act* is deemed to be a reference to

public servants employed under Part III of the *Public Service of Ontario Act, 2006*. [2006, c. 35](#), Sched. C, s. 20 (1).

MISCELLANEOUS

Meetings of judges

Superior Court of Justice

52 (1) The judges of the Superior Court of Justice shall meet at least once in each year, on a day fixed by the Chief Justice of the Superior Court of Justice, in order to consider this Act, the rules of court and the administration of justice generally. 1994, c. 12, s. 17; 1996, c. 25, s. 9 (14, 17).

Family Court

(2) The judges of the Family Court shall meet at least once in each year, on a day fixed by the Chief Justice of the Superior Court of Justice, in order to consider this Act, the rules of court and the administration of justice generally. 1998, c. 20, Sched. A, s. 22 (9).

(2.1) REPEALED: [2009, c. 33](#), Sched. 2, s. 20 (12).

Regional senior judges, Superior Court of Justice

(2.2) The regional senior judges of the Superior Court of Justice and the Senior Judge of the Family Court shall meet at least once in each year with the Chief Justice and the Associate Chief Justice of the Superior Court of Justice, on a day fixed by the Chief Justice, in order to consider this Act, the rules of court and the administration of justice generally. 1998, c. 20, Sched. A, s. 22 (10).

(3) REPEALED: [2009, c. 33](#), Sched. 2, s. 20 (13).

Regional meeting of judges

(4) The judges of the Court of Ontario in each region shall meet at least once in each year in order to consider this Act, the rules of court and the administration of justice in the region generally, on a day fixed jointly by the regional senior judge of the Superior Court of Justice and the regional senior judge of the Ontario Court of Justice. [2006, c. 21](#), Sched. A, s. 7.

(5) REPEALED: [2009, c. 33](#), Sched. 2, s. 20 (14).

Regulations

- 53** (1) The Lieutenant Governor in Council may make regulations,
- (a) fixing the number of judges of the Superior Court of Justice for the purpose of [clause 12 \(1\)](#) (e);
 - (a.1) fixing the number of judges of the Superior Court of Justice who are members of the Family Court appointed under [clause 21.2 \(1\)](#) (e);
 - (a.2) fixing the remuneration of provincial judges;
 - (a.3) providing for the benefits to which provincial judges are entitled, including benefits respecting,
 - (i) leave of absence and vacations,
 - (ii) sick leave credits and payments in respect of those credits, and
 - (iii) pension benefits for provincial judges and their surviving spouses and children;
 - (a.4) providing for the matters referred to in clauses (a.2) and (a.3) with respect to the Small Claims Court Administrative Judge appointed under [section 87.2](#);
 - (b) fixing the remuneration of associate judges and providing for the benefits to which they are entitled;
 - (b.1) fixing the remuneration of deputy judges of the Small Claims Court;
 - (c) prescribing a period of time for the purposes of [subsection 86.1 \(2\)](#);
 - (d) prescribing family law proceedings for the purposes of the Schedule to section 21.8;
 - (e) prescribing the maximum amount of a claim in the Small Claims Court for the purposes of [subsection 23 \(1\)](#);
 - (f) prescribing the maximum amount of a claim over which a deputy judge may preside for the purposes of [subsection 24 \(3\)](#);
 - (g) prescribing the minimum amount of a claim that may be appealed to the Divisional Court for the purposes of [section 31](#);
 - (h) providing for the limits to which service as a provincial judge on a part-time basis is subject for the purposes of [subsection 44 \(2\)](#);
 - (i) prescribing for each region the minimum number of judges of the Superior Court of Justice and of the Ontario Court of Justice who are to be assigned to that region;

(j) prescribing for each region the minimum number of judges of the Superior Court of Justice who are members of the Family Court and to be assigned to that region. R.S.O. 1990, c. C.43, s. 53 (1); 1994, c. 12, s. 18 (1, 3-5); 1996, c. 25, ss. 1 (8), 9 (17, 18); 1998, c. 20, s. 2 (1); 1998, c. 20, Sched. A, s. 22 (11); 1999, c. 6, s. 18 (2); [2002, c. 18](#), Sched. A, s. 4 (1); [2005, c. 5, s. 17 \(2\)](#); [2006, c. 21](#), Sched. A, s. 8; [2009, c. 33](#), Sched. 2, s. 20 (15); [2015, c. 27](#), Sched. 1, s. 1 (8); [2017, c. 2](#), Sched. 2, s. 11 (1); [2021, c. 4](#), Sched. 3, s. 5; [2024, c. 27](#), Sched. 7, s. 2.

Same

(2) A reduction in the number of judges of the Superior Court of Justice under clause (1) (a) does not affect appointments existing at the time of the reduction. R.S.O. 1990, c. C.43, s. 53 (2); 1996, c. 25, s. 9 (17).

Same

(3) If there is a conflict between a regulation made under clause (1) ([a.2](#)), ([a.3](#)) or ([a.4](#)) and the Framework Agreement set out in the Schedule, the Framework Agreement prevails. 1998, c. 20, s. 2 (2); [2017, c. 2](#), Sched. 2, s. 11 (2).

Application of regulations

(4) A regulation made under subsection (1) may be general or particular in its application. R.S.O. 1990, c. C.43, s. 53 (4).

Definition

(5) In clause (1) ([a.3](#)),

“spouse” means,

(a) a spouse as defined in [section 1](#) of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. 1999, c. 6, s. 18 (3); [2005, c. 5, s. 17 \(3, 4\)](#).

PART III (SS. 54-64, SCHED.) REPEALED: 1994, C. 12, S. 19.

54-64

PART IV
RULES OF COURT

Civil Rules Committee

65 (1) The committee known as the Civil Rules Committee is continued under the name Civil Rules Committee in English and Comité des règles en matière civile in French. R.S.O. 1990, c. C.43, s. 65 (1).

Composition

(2) The Civil Rules Committee shall be composed of,

(a) the Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice;

(a.1) the Associate Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice of Ontario;

(a.2) the Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice;

(a.3) the Associate Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice of that court;

(b) two judges of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(c) eight judges of the Superior Court of Justice, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(d) the Small Claims Court Administrative Judge appointed under [section 87.2](#);

(d.1) one associate judge, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(e) the Attorney General or a person designated by the Attorney General;

(f) one law officer of the Crown, who shall be appointed by the Attorney General;

(g) two persons employed in the administration of the courts, who shall be appointed by the Attorney General;

(h) four lawyers, who shall be appointed by the Law Society of Ontario;

(i) one lawyer, who shall be appointed by the Chief Justice of Ontario;

(j) four lawyers, who shall be appointed by the Chief Justice of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 65 (2); 1994, c. 12, s. 20; 1996, c. 25, s. 9 (14, 17, 18, 20); 1998, c. 20, Sched. A, s. 12;

2006, c. 21, Sched. A, s. 9; 2017, c. 2, Sched. 2, s. 12; 2018, c. 8, Sched. 15, s. 8 (1); 2024, c. 2, Sched. 6, s. 2 (1, 2); 2024, c. 28, Sched. 4, s. 1 (1).

Presiding member

- (3) The Civil Rules Committee shall be presided over,
- (a) by the Chief Justice of Ontario; or
 - (b) if the Chief Justice of Ontario is absent or so requests, or is not serving as a member under clause (2) (a), by another member designated by the Chief Justice. 2024, c. 28, Sched. 4, s. 1 (2).

Tenure of office

- (4) Each of the members of the Civil Rules Committee appointed under clauses (2) (b), (c), (d.1), (f), (g), (h), (i) and (j) shall hold office for a period of three years and is eligible for reappointment. R.S.O. 1990, c. C.43, s. 65 (4); 2024, c. 2, Sched. 6, s. 2 (3).

Vacancies

- (5) Where a vacancy occurs among the members appointed under clause (2) (b), (c), (d.1), (f), (g), (h), (i) or (j), a new member similarly qualified may be appointed for the remainder of the unexpired term. R.S.O. 1990, c. C.43, s. 65 (5); 2024, c. 2, Sched. 6, s. 2 (3).

Quorum

- (6) One-third of the members of the Civil Rules Committee constitutes a quorum. R.S.O. 1990, c. C.43, s. 65 (6).

Information to be maintained in confidence

- (7) The Ministry of the Attorney General shall maintain in confidence any records or other information collected, prepared, maintained or used by the Ministry in relation to the business of the Civil Rules Committee and shall not disclose any such records or information unless the disclosure has been authorized by the Attorney General and approved by the chair of the Committee. 2024, c. 2, Sched. 6, s. 2 (4).

Prevails over *FIPPA*

- (8) Subsection (7) prevails over the *Freedom of Information and Protection of Privacy Act*. 2024, c. 2, Sched. 6, s. 2 (4).

Delegation

(9) The Attorney General may, in writing, delegate the power to authorize disclosures in subsection (7) to the Deputy Attorney General or to any other employee of the Ministry, subject to any limitations, restrictions, conditions and requirements that are set out in the delegation. [2024, c. 2](#), Sched. 6, s. 2 (4).

Transition

(10) If a request for access to a record described in subsection (7) was made to the Attorney General under the [Freedom of Information and Protection of Privacy Act](#) on or after the day the [Enhancing Access to Justice Act, 2024](#) received first reading and a decision about disclosure of the record has not been made by the date on which subsection 2 (4) of Schedule 6 to the [Enhancing Access to Justice Act, 2024](#) comes into force, subsections (7) to (9) of this section apply to the request. [2024, c. 2](#), Sched. 6, s. 2 (4).

Civil Rules

66 (1) Subject to the approval of the Attorney General, the Civil Rules Committee may make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, except for proceedings in relation to which the Family Rules Committee may make rules under [section 68](#). [2006, c. 21](#), Sched. A, s. 10 (1).

Same

(2) The Civil Rules Committee may make rules under subsection (1), even though they alter or conform to the substantive law, in relation to,

- (a) conduct of proceedings in the courts;
- (b) joinder of claims and parties, settlement of claims by or against persons under disability, whether or not a proceeding has been commenced in respect of the claim, the binding effect of orders and representation of parties;
- (c) commencement of proceedings, representation of parties and service of process in or outside Ontario;
- (d) disposition of proceedings without a hearing and its effect and authorizing the Court of Appeal to determine in the first instance a special case arising in a proceeding commenced in the Superior Court of Justice;
- (e) pleadings;

(f) discovery and other forms of disclosure before hearing, including their scope and the admissibility and use of that discovery and disclosure in a proceeding;

(g) examination of witnesses in or out of court;

(h) jurisdiction of associate judges, including the conferral on associate judges of any jurisdiction of the Superior Court of Justice, including jurisdiction under an Act, but not including the trial of actions or jurisdiction conferred by an Act on a judge;

(i) jurisdiction and duties of officers;

(j) motions and applications, including the hearing of motions and applications in the absence of the public and prohibiting a party from making motions without leave;

(k) preservation of rights of parties pending the outcome of litigation, including sale, recovery of possession or preservation of property;

(l) interpleader;

(m) preparation for trial and offers to settle and their legal consequences;

(n) the mode and conduct of trials;

(o) the appointment by the court of independent experts, their remuneration and the admissibility and use of their reports;

(p) the discount rate to be used in determining the amount of an award in respect of future pecuniary damages;

(q) references of proceedings or issues in a proceeding and the powers of a person conducting a reference;

(r) costs of proceedings, including security for costs and, in the case of a person representing a party or other person, the representative's liability for, or disentitlement to, costs;

(s) enforcement of orders and process or obligations under the rules;

(t) the time for and procedure on appeals and stays pending appeal;

(u) payment into and out of court;

(v) the method of calculating the amount to be included in an award of damages to offset any liability for income tax on income from investment of the award;

(w) the prejudgment interest rate with respect to the rate of interest on damages for non-pecuniary loss;

(w.1) the issuance, service, filing and storage of documents by electronic means, including methods of completing and signing documents for those purposes;

(x) any matter that is referred to in an Act as provided for by rules of court. R.S.O. 1990, c. C.43, s. 66 (2); 1994, c. 12, s. 21; 1996, c. 25, ss. 1 (9), 9 (17); 1998, c. 18, Sched. B, s. 5 (1); [2006, c. 21](#), Sched. A, s. 10 (2); 2006, c. 21, Sched. C, s. 105 (4); [2020, c. 11](#), Sched. 5, s. 3; [2021, c. 4](#), Sched. 3, s. 6.

Same

(3) Nothing in subsection (1) or (2) authorizes the making of rules that conflict with an Act, but rules may be made under subsection (1) supplementing the provisions of an Act in respect of practice and procedure. [2006, c. 21](#), Sched. A, s. 10 (3).

Same

(4) Rules made under subsection (1) in relation to the matters described in clauses (2) (p), (v) and (w) shall be reviewed at least once in every four-year period. [2006, c. 21](#), Sched. A, s. 10 (3).

Application

(5) A rule made under this section may be general or particular in its application. [2006, c. 21](#), Sched. A, s. 10 (3).

Family Rules Committee

67 (1) The committee known as the Family Rules Committee is continued under the name Family Rules Committee in English and Comité des règles en matière de droit de la famille in French. R.S.O. 1990, c. C.43, s. 67 (1).

Composition

(2) The Family Rules Committee is composed of,

(a) the Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice;

(b) the Associate Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice of Ontario;

(b.1) the Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice;

- (b.2) the Associate Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice of that court;
- (c) the Senior Judge of the Family Court;
- (d) the Chief Justice of the Ontario Court of Justice or another judge of that court designated by the Chief Justice;
- (e) one judge of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;
- (f) four judges of the Superior Court of Justice appointed by the Chief Justice of the Superior Court of Justice, at least two of whom shall be judges of the Family Court referred to in [clause 21.2 \(1\)](#) (d) or (e);
- (g) the Senior Advisory Family Judge of the Ontario Court of Justice, and two other judges of the Ontario Court of Justice who shall be appointed by the Chief Justice of the Ontario Court of Justice;
- (h) the Attorney General or a person designated by the Attorney General;
- (i) one law officer of the Crown, who shall be appointed by the Attorney General;
- (j) two persons employed in the administration of the courts, who shall be appointed by the Attorney General;
- (k) four lawyers, who shall be appointed by the Law Society of Ontario;
- (l) four lawyers, who shall be appointed by the Chief Justice of the Superior Court of Justice; and
- (m) two lawyers, who shall be appointed by the Chief Justice of the Ontario Court of Justice. 1998, c. 20, Sched. A, s. 22 (12); [2006, c. 21](#), Sched. A, s. 11; [2015, c. 27](#), Sched. 1, s. 1 (9); [2018, c. 8](#), Sched. 15, s. 8 (3); [2024, c. 28](#), Sched. 4, s. 2 (1).

Presiding member

- (3) The Family Rules Committee shall be presided over,
 - (a) by the Chief Justice of Ontario; or
 - (b) if the Chief Justice of Ontario is absent or so requests, or is not serving as a member under clause (2) (a), by another member designated by the Chief Justice. [2024, c. 28](#), Sched. 4, s. 2 (2)

Tenure of office

- (4) Each of the members of the Family Rules Committee appointed under clauses (2) (e), (f), (g), (i), (j), (k), (l) and (m) shall hold office for a period

of three years and is eligible for reappointment. 1998, c. 20, Sched. A, s. 13 (2).

Vacancies

(5) Where a vacancy occurs among the members appointed under clause (2) (e), (f), (g), (i), (j), (k), (l) or (m), a new member similarly qualified may be appointed for the remainder of the unexpired term. 1998, c. 20, Sched. A, s. 13 (2).

Quorum

(6) One-third of the members of the Family Rules Committee constitutes a quorum. R.S.O. 1990, c. C.43, s. 67 (6).

Information to be maintained in confidence

(7) The Ministry of the Attorney General shall maintain in confidence any records or other information collected, prepared, maintained or used by the Ministry in relation to the business of the Family Rules Committee and shall not disclose any such records or information unless the disclosure has been authorized by the Attorney General and approved by the chair of the Committee. 2024, c. 2, Sched. 6, s. 3.

Prevails over *FIPPA*

(8) Subsection (7) prevails over the *Freedom of Information and Protection of Privacy Act*. 2024, c. 2, Sched. 6, s. 3.

Delegation

(9) The Attorney General may, in writing, delegate the power to authorize disclosures in subsection (7) to the Deputy Attorney General or to any other employee of the Ministry, subject to any limitations, restrictions, conditions and requirements that are set out in the delegation. 2024, c. 2, Sched. 6, s. 3.

Transition

(10) If a request for access to a record described in subsection (7) was made to the Attorney General under the *Freedom of Information and Protection of Privacy Act* on or after the day the *Enhancing Access to Justice Act, 2024* received first reading and a decision about disclosure of the record has not been made by the date on which section 3 of Schedule 6 to the *Enhancing Access to Justice Act, 2024* comes into force, subsections (7) to (9) of this section apply to the request. 2024, c. 2, Sched. 6, s. 3.

Family rules

68 (1) Subject to the approval of the Attorney General, the Family Rules Committee may make rules for the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in relation to the practice and procedure of those courts in the proceedings referred to in the Schedule to section 21.8. [2006, c. 21](#), Sched. A, s. 12.

Same

(2) [Subsections 66 \(2\), \(3\) and \(5\)](#) apply with necessary modifications to the Family Rules Committee making rules under subsection (1). [2006, c. 21](#), Sched. A, s. 12.

(3) REPEALED: [2006, c. 21](#), Sched. A, s. 12.

(4) REPEALED: [2006, c. 19](#), Sched. D, s. 5 (2).

Civil, family rules made by the Attorney General

Civil rules

68.1 (1) Subject to subsection (3), the Attorney General may make rules respecting any matter about which the Civil Rules Committee has authority to make rules under [section 66](#), and may amend or revoke any rule made by the Civil Rules Committee under that section. [2024, c. 28](#), Sched. 4, s. 3.

Family rules

(2) Subject to subsection (3), the Attorney General may make rules respecting any matter about which the Family Rules Committee has authority to make rules under [section 68](#), and may amend or revoke any rule made by the Family Rules Committee under that section. [2024, c. 28](#), Sched. 4, s. 3.

Prior consultation

(3) Before a rule may be made under subsection (1) or (2), the Attorney General shall consult with,

- (a) one or more of the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice, as the Attorney General considers appropriate given the proceedings to which the rule would apply; and

(b) the presiding member of the Civil Rules Committee or the Family Rules Committee, as the case may be. [2024, c. 28](#), Sched. 4, s. 3.

(4) REPEALED: [2025, c. 24](#), Sched. 7, s. 2.

Criminal Rules Committee

69 (1) The committee known as the Criminal Rules Committee is continued under the name Criminal Rules Committee in English and Comité des règles en matière criminelle in French. R.S.O. 1990, c. C.43, s. 69 (1).

Same

(2) The Criminal Rules Committee shall be composed of,

(a) the Chief Justice and Associate Chief Justice of Ontario, the Chief Justice and Associate Chief Justice of the Superior Court of Justice and the Chief Justice and associate chief justices of the Ontario Court of Justice;

(b) one judge of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(c) three judges of the Superior Court of Justice, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(d) four judges of the Ontario Court of Justice, who shall be appointed by the Chief Justice of the Ontario Court of Justice;

(e) Repealed: 1994, c. 12, s. 23 (2).

(f) the Attorney General or a person designated by the Attorney General;

(g) one law officer of the Crown, who shall be appointed by the Attorney General;

(h) four Crown attorneys, deputy Crown attorneys or assistant Crown attorneys, who shall be appointed by the Attorney General;

(i) two persons employed in court administration, who shall be appointed by the Attorney General;

(j) two lawyers, who shall be appointed by the Law Society of Ontario;

(k) one lawyer, who shall be appointed by the Chief Justice of Ontario;

(l) one lawyer, who shall be appointed by the Chief Justice of the Superior Court of Justice; and

(m) two lawyers, who shall be appointed by the Chief Justice of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 69 (2); 1994, c. 12, s. 23; 1996, c. 25, s. 9 (14, 17, 18, 20); [2018, c. 8](#), Sched. 15, s. 8 (1).

Same

(3) The Chief Justice of Ontario shall preside over the Criminal Rules Committee but, if the Chief Justice of Ontario is absent or so requests, another member designated by the Chief Justice of Ontario shall preside.

Tenure of office

(4) Each of the members of the Criminal Rules Committee appointed under clauses (2) (b), (c), (d), (e), (g), (h), (i), (j), (k), (l) and (m) shall hold office for a period of three years and is eligible for reappointment.

Vacancies

(5) Where a vacancy occurs among the members appointed under clause (2) (b), (c), (d), (e), (g), (h), (i), (j), (k), (l) or (m), a new member similarly qualified may be appointed for the remainder of the unexpired term.

Quorum

(6) One-third of the members of the Criminal Rules Committee constitutes a quorum. R.S.O. 1990, c. C.43, s. 69 (3-6).

Criminal rules

70 (1) At the request of the Court of Appeal, the Superior Court of Justice or the Ontario Court of Justice, the Criminal Rules Committee may prepare rules for the purposes of [section 482](#) of the [Criminal Code](#) (Canada) for consideration by the relevant court. 1994, c. 12, s. 24; 1996, c. 25, s. 9 (17, 18).

(2), (3) REPEALED: [2017, c. 2](#), Sched. 2, s. 13.

Provincial offences rules

70.1 (1) Subject to subsection (2), the Attorney General may make rules in relation to the practice and procedure of the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in proceedings under the [Provincial Offences Act](#), including rules,

- (a) regulating any matters relating to the practice and procedure of proceedings under the [Provincial Offences Act](#);
- (b) prescribing forms;
- (c) regulating the duties of the employees of the courts;

(d) regulating the duties of municipal employees and other persons who act under the authority of agreements made under Part X of the *Provincial Offences Act*;

(e) prescribing and regulating the procedures under any Act that confers jurisdiction under the *Provincial Offences Act* on the Ontario Court of Justice or a judge or justice of the peace sitting in it;

(f) prescribing any matter relating to proceedings under the *Provincial Offences Act* that is referred to in an Act as provided for by the rules of court. 2017, c. 2, Sched. 2, s. 14.

Prior approval of courts

(2) Before a rule may be made under subsection (1), the Attorney General shall obtain the approval of one or more of the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice, as the Attorney General considers appropriate given the proceedings to which the rule would apply. 2017, c. 2, Sched. 2, s. 14

Recommendations, proposals by courts

(3) The Attorney General shall consider any recommendations or proposals given to him or her by the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice or the Chief Justice of the Ontario Court of Justice respecting rules that may be made under subsection (1). 2017, c. 2, Sched. 2, s. 14.

PART V ADMINISTRATION OF THE COURTS

Goals

71 The administration of the courts shall be carried on so as to,

(a) maintain the independence of the judiciary as a separate branch of government;

(b) recognize the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice;

(c) encourage public access to the courts and public confidence in the administration of justice;

(d) further the provision of high-quality services to the public; and

(e) promote the efficient use of public resources. 2006, c. 21, Sched. A, s. 14.

Role of Attorney General

72 The Attorney General shall superintend all matters connected with the administration of the courts, other than the following:

1. Matters that are assigned by law to the judiciary, including authority to direct and supervise the sittings and the assignment of the judicial duties of the court.
2. Matters related to the education, conduct and discipline of judges and justices of the peace, which are governed by other provisions of this Act, the *Justices of the Peace Act* and Acts of the Parliament of Canada.
3. Matters assigned to the judiciary by a memorandum of understanding under [section 77](#). [2006, c. 21](#), Sched. A, s. 14.

Court officers and staff

Appointment

73 (1) Registrars, sheriffs, court clerks, assessment officers and any other administrative officers and employees that are considered necessary for the administration of the courts in Ontario may be appointed under Part III of the *Public Service of Ontario Act, 2006*. [2006, c. 21](#), Sched. A, s. 14; [2006, c. 35](#), Sched. C, s. 20 (3); [2015, c. 27](#), Sched. 1, s. 1 (10).

Assignment of powers, duties

(2) The Deputy Attorney General or a person designated by the Deputy Attorney General may, in writing, assign to any person or class of persons a power or duty given to a registrar, sheriff, court clerk, bailiff, assessment officer, Small Claims Court referee or official examiner under an Act, regulation or rule of court, subject to any conditions or restrictions set out in the assignment. [2017, c. 2](#), Sched. 2, s. 15.

Same

(2.1) For greater certainty, a power or duty may be assigned to a person or class of persons under subsection (2) regardless of whether or not the person or persons are appointed under Part III of the *Public Service of Ontario Act, 2006*. [2017, c. 2](#), Sched. 2, s. 15.

Same

(3) Subsection (2) applies in respect of an Act, regulation or rule of court made under the authority of the Legislature or of the Parliament of Canada.

[2006, c. 21](#), Sched. A, s. 14.

Destruction of documents

74 Documents and other materials that are no longer required in a court office shall be disposed of in accordance with the directions of the Deputy Attorney General, subject to the approval of,

- (a) in the Court of Appeal, the Chief Justice of Ontario;
- (b) in the Superior Court of Justice, the Chief Justice of the Superior Court of Justice;
- (c) in the Ontario Court of Justice, the Chief Justice of the Ontario Court of Justice. [2006, c. 21](#), Sched. A, s. 14.

Powers re sittings and assignment of judicial duties

75 (1) The powers and duties of a judge who has authority to direct and supervise the sittings and the assignment of the judicial duties of his or her court include the following:

1. Determining the sittings of the court.
2. Assigning judges to the sittings.
3. Assigning cases and other judicial duties to individual judges.
4. Determining the sitting schedules and places of sittings for individual judges.
5. Determining the total annual, monthly and weekly workload of individual judges.
6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

[2006, c. 21](#), Sched. A, s. 14.

Powers re associate judges

(2) Subsection (1) applies, with necessary modifications, in respect of directing and supervising the sittings and assigning the judicial duties of associate judges. [2020, c. 11](#), Sched. 5, s. 4; [2021, c. 4](#), Sched. 3, s. 7.

Direction of court staff

76 (1) In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff shall act at the

direction of the chief justice of the court. [2006, c. 21](#), Sched. A, s. 14.

Same

(2) Court personnel referred to in subsection (1) who are assigned to and present in a courtroom shall act at the direction of the presiding judge, justice of the peace or associate judge while the court is in session. [2006, c. 21](#), Sched. A, s. 14; [2009, c. 33](#), Sched. 2, s. 20 (16); [2020, c. 11](#), Sched. 5, s. 5; [2021, c. 4](#), Sched. 3, s. 8.

Memoranda of understanding between Attorney General and Chief Justices

Court of Appeal

77 (1) The Attorney General and the Chief Justice of Ontario may enter into a memorandum of understanding governing any matter relating to the administration of the Court of Appeal. [2006, c. 21](#), Sched. A, s. 14.

Superior Court of Justice

(2) The Attorney General and the Chief Justice of the Superior Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court. [2006, c. 21](#), Sched. A, s. 14.

Ontario Court of Justice

(3) The Attorney General and the Chief Justice of the Ontario Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court. [2006, c. 21](#), Sched. A, s. 14.

Scope

(4) A memorandum of understanding under this section may deal with the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice, but shall not deal with any matter assigned by law to the judiciary. [2006, c. 21](#), Sched. A, s. 14.

Publication

(5) The Attorney General shall ensure that each memorandum of understanding entered into under this section is made available to the public, in English and French. [2006, c. 21](#), Sched. A, s. 14.

Ontario Courts Advisory Council

78 (1) The council known as the Ontario Courts Advisory Council is continued under the name Ontario Courts Advisory Council in English and Conseil consultatif des tribunaux de l'Ontario in French. [2006, c. 21](#), Sched. A, s. 14.

Same

- (2) The Ontario Courts Advisory Council is composed of,
- (a) the Chief Justice of Ontario, who shall preside, and the Associate Chief Justice of Ontario;
 - (b) the Chief Justice and the Associate Chief Justice of the Superior Court of Justice and the Senior Judge of the Family Court;
 - (c) the Chief Justice and the associate chief justices of the Ontario Court of Justice; and
 - (d) the regional senior judges of the Superior Court of Justice and of the Ontario Court of Justice. [2006, c. 21](#), Sched. A, s. 14.

Mandate

(3) The Ontario Courts Advisory Council shall meet to consider any matter relating to the administration of the courts that is referred to it by the Attorney General or that it considers appropriate on its own initiative, and shall make recommendations on the matter to the Attorney General and to its members. [2006, c. 21](#), Sched. A, s. 14.

79 REPEALED: [2024, c. 28](#), Sched. 4, s.4.

Regions

79.1 (1) For administrative purposes related to the administration of justice in the province, Ontario is divided into the regions prescribed under subsection (2). [2006, c. 21](#), Sched. A, s. 14.

Regulations

(2) The Lieutenant Governor in Council may make regulations prescribing regions for the purposes of this Act. [2006, c. 21](#), Sched. A, s. 14.

79.2 REPEALED: [2024, c. 28](#), Sched. 4, s.4.

Annual report on administration of courts

79.3 (1) Within six months after the end of every fiscal year, the Attorney General shall cause a report to be prepared on the administration of the

courts during that fiscal year, in consultation with the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice. [2006, c. 21](#), Sched. A, s. 14.

Same

(2) The annual report shall provide information about progress in meeting the goals set out in [section 71](#) and shall be made available to the public in English and French. [2006, c. 21](#), Sched. A, s. 14.

Inclusion in Ministry’s annual report

(3) The Attorney General may cause all or part of the annual report on the administration of the courts to be incorporated into the corresponding annual report referred to in the [Ministry of the Attorney General Act](#). [2006, c. 21](#), Sched. A, s. 14.

**PART VI
JUDGES AND OFFICERS**

Oath of office

80 Every judge or officer of a court in Ontario, including a deputy judge of the Small Claims Court, shall, before entering on the duties of office, take and sign the following oath or affirmation in either the English or French language:

I solemnly swear (affirm) that I will faithfully, impartially and to the best of my skill and knowledge execute the duties of

So help me God. (*Omit this line in an affirmation.*)

1994, c. 12, s. 30.

***Persona designata* abolished**

81 Where an adjudicative function is given by an Act to a judge or officer of a court in Ontario, the jurisdiction shall be deemed to be given to the court. 1994, c. 12, s. 31.

Liability of judges and other officers

82 The following persons have the same immunity from liability as judges of the Superior Court of Justice:

- 1. Judges of all courts in Ontario, including judges presiding in the Small Claims Court and deputy judges of that court.
- 2. Masters.

3. Associate judges. 1996, c. 25, ss. 1 (15), 9 (17); [2021, c. 4](#), Sched. 3, s. 9.

Attendance at meetings, conferences and seminars

83 For the purposes of [subsection 41 \(1\)](#) of the *Judges Act* (Canada), a judge of the Court of Appeal, the Superior Court of Justice or the Family Court may, in that capacity, attend a meeting, conference or seminar that is held for a purpose relating to the administration of justice, with the approval of,

(a) the Chief Justice of Ontario, in the case of a judge of the Court of Appeal; or

(b) the Chief Justice of the Superior Court of Justice, in any other case. [2024, c. 2](#), Sched. 6, s. 4.

Extra-judicial services

84 (1) A judge of the Court of Appeal or the Superior Court of Justice may act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator or on a commission of inquiry under an Act of the Legislature or under an agreement made under any such Act. R.S.O. 1990, c. C.43, s. 84 (1); 1996, c. 25, ss. 1 (17), 9 (17).

Remuneration

(2) A judge acting under subsection (1) shall not receive any remuneration but shall be reimbursed for reasonable travelling and other expenses incurred while so acting. R.S.O. 1990, c. C.43, s. 84 (2).

Judges' gowns

85 The Lieutenant Governor in Council may make regulations respecting the form of the gown to be worn in court by all judges appointed after the 1st day of September, 1990. R.S.O. 1990, c. C.43, s. 85.

How certain judges to be addressed

86 (1) Every judge of the Court of Ontario may be addressed as "Your Honour" or as "(*Mr. or Madam*) Justice (*naming the judge*)" in English or as "Votre Honneur" or "(*M. ou M^{me}*) le/la Juge (*nom du juge*)" in French. R.S.O. 1990, c. C.43, s. 86 (1); 1996, c. 25, s. 9 (10); 1998, c. 20, Sched. A, s. 19 (1); [2021, c. 34](#), Sched. 4, s. 4.

Same

(2) A judge appointed to the High Court of Justice before the 1st day of September, 1990 may elect to be addressed according to the practice in existence before that day. R.S.O. 1990, c. C.43, s. 86 (2).

Associate judge

(3) Every associate judge of the Court of Ontario may be addressed as “Your Honour” or “Associate Justice (naming the associate judge)” in English or as “Votre Honneur” or “(M. ou M^{me}) le/la Juge associé(e) (nom du juge associé)” in French. [2021, c. 4](#), Sched. 3, s. 10.

(4) Repealed: 1998, c. 20, Sched. A, s. 19 (2).

Associate judges

Appointment

86.1 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such associate judges as are considered necessary. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 11 (1).

Qualification

(2) No person shall be appointed as an associate judge unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least the period of time prescribed in the regulations or, for an aggregate of at least that period, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 11 (2).

Retirement

(3) Every associate judge shall retire when he or she reaches the age of 65. [2020, c. 11](#), Sched. 5, s. 6 (1); [2021, c. 4](#), Sched. 3, s. 11 (3).

Transition, previous appointments

(4) The appointment of an associate judge who had not reached the age of 65 before the day subsection 6 (1) of Schedule 5 to the [Smarter and Stronger Justice Act, 2020](#) came into force and whose appointment was in effect immediately before that day is deemed to specify a term of office that expires when the associate judge reaches the age of 65. 2020, c. 11, Sched. 5, s. 6 (1); [2021, c. 4](#), Sched. 3, s. 11 (4).

(5), (5.1) REPEALED: [2020, c. 11](#), Sched. 5, s. 6 (1).

Annual reappointments

(5.2) Despite subsections (3) and (4), an associate judge who has reached the age of 65 may be reappointed by the Lieutenant Governor in Council, on the recommendation of the Chief Justice, for a one-year term, subject to subsection (5.3); if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the associate judge. [2015, c. 27](#), Sched. 1, s. 1 (12); [2020, c. 11](#), Sched. 5, s. 6 (2); [2021, c. 4](#), Sched. 3, s. 11 (5).

Expiry of term at age of 75

(5.3) If the associate judge is 74 years of age or older, the reappointment under subsection (5.2) shall provide for a term that expires when he or she reaches the age of 75. [2002, c. 18](#), Sched. A, s. 4 (2); [2021, c. 4](#), Sched. 3, s. 11 (6).

No limit

(5.4) Subject to subsection (5.3), there is no limit to the number of times an associate judge can be reappointed under subsection (5.2). [2020, c. 11](#), Sched. 5, s. 6 (3); [2021, c. 4](#), Sched. 3, s. 11 (7).

Jurisdiction

(6) An associate judge has the jurisdiction conferred by the rules of court. [2020, c. 11](#), Sched. 5, s. 6 (4); [2021, c. 4](#), Sched. 3, s. 11 (8).

Application of [ss. 46 to 48](#)

(7) [Sections 46 to 48](#) apply to associate judges, with necessary modifications, in the same manner as to provincial judges, with the following exceptions:

1. [Section 46](#) does not apply in circumstances in which the rules of court require participation in alternative dispute resolution.
2. [Subsection 47 \(3\)](#) does not apply.
3. Letters of resignation under [section 48](#) shall be delivered to the Attorney General instead of to the Chief Justice of the Ontario Court of Justice. [2017, c. 2](#), Sched. 2, s. 16; [2021, c. 4](#), Sched. 3, s. 11 (9).

(8) REPEALED: [2017, c. 2](#), Sched. 2, s. 16.

Standards of conduct

(9) The Chief Justice may establish standards of conduct for associate judges. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 11 (10).

Duty of Chief Justice

(10) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French. [2006, c. 21](#), Sched. A, s. 15.

Complaint re associate judge

86.2 (1) Any person may make a complaint alleging misconduct by an associate judge, by writing to the Chief Justice of the Superior Court of Justice. 1996, c. 25, ss. 1 (18), 9 (14); [2021, c. 4](#), Sched. 3, s. 12 (1).

Dismissal

(2) The Chief Justice shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given. 1996, c. 25, s. 1 (18).

Notice of dismissal

(3) The Chief Justice shall notify the complainant and the associate judge in writing of a dismissal under subsection (2), giving brief reasons for it. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (2).

Committee

(4) If the complaint is not dismissed, the Chief Justice shall refer it to a committee consisting of three persons chosen by him or her. 1996, c. 25, s. 1 (18).

Same

(5) The three persons shall be a judge of the Superior Court of Justice, an associate judge and a person who is neither a judge nor a lawyer. 1996, c. 25, ss. 1 (18), 9 (17); [2021, c. 4](#), Sched. 3, s. 12 (3).

Investigation

(6) The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and the associate judge shall be given an opportunity to make representations to the committee, in writing or, at the

committee's option, orally. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (4).

Recommendation

(7) The committee shall make a report to the Chief Justice, recommending a disposition in accordance with subsections (8), (9) and (10). 1996, c. 25, s. 1 (18).

Disposition

(8) The Chief Justice may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the associate judge's conduct presents grounds for imposing a sanction, may,

- (a) warn the associate judge;
- (b) reprimand the associate judge;
- (c) order the associate judge to apologize to the complainant or to any other person;
- (d) order that the associate judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as an associate judge;
- (e) suspend the associate judge for a period of up to 30 days;
- (f) direct that no judicial duties or only specified judicial duties be assigned to the associate judge; or
- (g) remove the associate judge from office. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (5-8).

Same

(9) The Chief Justice may adopt any combination of the dispositions set out in clauses (8) (a) to (f). 1996, c. 25, s. 1 (18).

Appeal

(9.1) The Chief Justice's decision may be appealed to the Court of Appeal,

- (a) by the associate judge, as of right; or
- (b) by the complainant, with leave of the Court of Appeal. [2002, c. 18](#), Sched. A, s. 4 (3); [2021, c. 4](#), Sched. 3, s. 12 (9).

Parties

(9.2) The associate judge and the complainant are parties to any appeal and the Attorney General is the respondent. [2002, c. 18](#), Sched. A, s. 4 (3); [2021, c. 4](#), Sched. 3, s. 12 (9).

Power of Court of Appeal

(9.3) The Court of Appeal may substitute its opinion for that of the Chief Justice on all questions of fact and law. [2002, c. 18](#), Sched. A, s. 4 (3).

Time for appeal

(9.4) The notice of appeal or motion for leave to appeal shall be filed within 30 days after the date of the Chief Justice's decision. [2002, c. 18](#), Sched. A, s. 4 (3).

Stay

(9.5) On the filing of a notice of appeal, the imposition of any sanction is stayed until the final disposition of the appeal. [2002, c. 18](#), Sched. A, s. 4 (3).

Compensation

(10) The Chief Justice shall consider whether the associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (9).

Recommendation

(11) If the Chief Justice is of the opinion that the associate judge should be compensated, he or she shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (9).

Same

(12) If the complaint is dismissed with a finding that it is unfounded, the Chief Justice shall recommend to the Attorney General that the associate judge be compensated for his or her costs for legal services and shall indicate the amount of compensation. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (9).

Exception

(12.0.1) If the Chief Justice makes a disposition under clause (8) (g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (10) does not apply and compensation shall not be recommended under subsection (11). 2020, c. 11, Sched. 5, s. 7.

Compensation

(12.1) When there is an appeal or motion for leave to appeal under subsection (9.1), the Court of Appeal shall consider whether the associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the appeal or motion. 2002, c. 18, Sched. A, s. 4 (4); 2021, c. 4, Sched. 3, s. 12 (9).

Recommendation

(12.2) If the Court of Appeal is of the opinion that the associate judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 2002, c. 18, Sched. A, s. 4 (4); 2021, c. 4, Sched. 3, s. 12 (9).

Same

(12.3) If a complainant's motion for leave to appeal is dismissed, the Court of Appeal shall recommend to the Attorney General that the associate judge be compensated for his or her costs for legal services and shall indicate the amount of compensation. 2002, c. 18, Sched. A, s. 4 (4); 2021, c. 4, Sched. 3, s. 12 (9).

Removal from office upheld

(12.4) If the Court of Appeal upholds a disposition of the Chief Justice made under clause (8) (g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (12.1) does not apply and compensation shall not be recommended under subsection (12.2). 2020, c. 11, Sched. 5, s. 7.

Removal from office not upheld

(12.5) If the Court of Appeal does not uphold a disposition of the Chief Justice made under clause (8) (g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, the Court shall, under subsection (12.1), also consider whether the

associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint. 2020, c. 11, Sched. 5, s. 7; [2021, c. 4](#), Sched. 3, s. 12 (9).

Maximum

(13) The amount of compensation recommended under subsection (11), (12), (12.2) or (12.3) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar legal services. 1996, c. 25, s. 1 (18); [2002, c. 18](#), Sched. A, s. 4 (5).

Payment

(14) The Attorney General shall pay compensation to the associate judge in accordance with the recommendation. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (9).

Confidential records

(15) The committee may order that any information or documents relating to a complaint that was not dealt with in a manner that was open to the public are confidential and shall not be disclosed or made public. 1996, c. 25, s. 1 (18).

Same

(16) Subsection (15) applies whether the information or documents are in the possession of the committee, the Chief Justice, the Attorney General or any other person. 1996, c. 25, s. 1 (18).

Limitation

(17) Subsection (15) applies only to information and documents that have been treated as confidential or were prepared exclusively for the committee, or for submission to the committee, in relation to its investigation. 1996, c. 25, s. 1 (18).

Non-application of SPPA

(18) The [Statutory Powers Procedure Act](#) does not apply to a judge, associate judge or member of a committee acting under this section. 1996, c. 25, s. 1 (18); [2021, c. 4](#), Sched. 3, s. 12 (9).

Personal liability

(19) No action or other proceeding for damages shall be instituted against a judge, associate judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person, or for any neglect or default in the exercise or performance in good faith of such power or duty. 1996, c. 25, s. 1 (18); [2017, c. 2](#), Sched. 2, s. 17; [2021, c. 4](#), Sched. 3, s. 12 (9).

87 REPEALED: [2020, c. 11](#), Sched. 5, s. 8.

87.1 REPEALED: [2023, c. 2](#), Sched. 2, s. 3.

Small Claims Court Administrative Judge

87.2 (1) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint as Small Claims Court Administrative Judge a person who has,

(a) been a member of the bar of one of the provinces or territories of Canada for at least 10 years; or

(b) for an aggregate of at least 10 years, been a member of a bar mentioned in clause (a) and, after becoming a member of such a bar, exercised powers and performed duties of a judicial nature on a full-time basis in respect of a position held under a law of Canada or of one of its provinces or territories. [2025, c. 6](#), Sched. 5, s. 4.

Prior consultation

(2) Before making a recommendation under subsection (1), the Attorney General shall consult with the Chief Justice of the Superior Court of Justice. [2017, c. 2](#), Sched. 2, s. 18.

Term

(3) The appointment of a person as Small Claims Court Administrative Judge is for a term of five years, subject to subsection (5). [2017, c. 2](#), Sched. 2, s. 18.

Reappointment

(4) The Lieutenant Governor in Council shall reappoint a person as Small Claims Court Administrative Judge for one further term of five years, subject to subsection (5), if the Chief Justice of the Superior Court of Justice recommends the reappointment. [2017, c. 2](#), Sched. 2, s. 18.

On reaching 65

(5) The completion of any portion of a term during which a person serving as Small Claims Court Administrative Judge is over 64 years of age and under 75 years of age is subject to the annual approval of the Chief Justice of the Superior Court of Justice. [2017, c. 2](#), Sched. 2, s. 18.

On reaching 75

(6) If a person reaches 75 years of age while serving as Small Claims Court Administrative Judge, his or her term is deemed to expire on that day. [2017, c. 2](#), Sched. 2, s. 18.

Compensation

(7) The salary, pension benefits, other benefits and allowances of the Small Claims Court Administrative Judge are subject to the recommendations of the Provincial Judges Remuneration Commission and, for the purpose, the Small Claims Court Administrative Judge is deemed to be a provincial judge under the framework agreement set out in the Schedule to this Act. [2017, c. 2](#), Sched. 2, s. 18.

Same

(8) Until and subject to the first recommendations of the Provincial Judges Remuneration Commission respecting the Small Claims Court Administrative Judge, he or she is entitled to receive the same salary, pension benefits, other benefits and allowances a provincial judge receives under the framework agreement. [2017, c. 2](#), Sched. 2, s. 18.

Application of [ss. 44 to 46](#)

(9) [Subsections 44 \(1\) and \(4\)](#), and [sections 45 and 46](#), apply with necessary modifications to the Small Claims Court Administrative Judge as if he or she were a provincial judge, subject to the following:

1. For the purposes of [subsection 44 \(1\)](#), the consent of the Chief Justice of the Superior Court of Justice is required.
2. For the purposes of an application under [section 45](#), one of the members of the Judicial Council who is a provincial judge shall be replaced by a judge of the Superior Court of Justice. The Chief Justice of the Ontario Court of Justice shall determine which judge is to be replaced and the Chief Justice of the Superior Court of Justice shall designate the judge who is to replace that judge. [2017, c. 2](#), Sched. 2, s. 18.

Resignation

(10) The Small Claims Court Administrative Judge may at any time resign from his or her office by delivering a signed letter of resignation to the Attorney General. [2017, c. 2](#), Sched. 2, s. 18.

(11), (12) REPEALED: [2017, c. 20](#), Sched. 2, s. 4.

Standards, education, evaluation

(13) Subject to the consent of the Chief Justice of the Superior Court of Justice, [sections 51.9](#), [51.10](#) and [51.11](#) apply with necessary modifications to the Small Claims Court Administrative Judge. [2017, c. 2](#), Sched. 2, s. 18.

Complaint

87.3 (1) Any person may make a complaint alleging misconduct by the Small Claims Court Administrative Judge to the Chief Justice of the Superior Court of Justice. [2017, c. 20](#), Sched. 2, s. 5.

Dismissal

(2) The Chief Justice shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given. [2017, c. 20](#), Sched. 2, s. 5.

Notice of dismissal

(3) The Chief Justice shall notify the Small Claims Court Administrative Judge and the complainant in writing of a dismissal under subsection (2), giving brief reasons for it. [2017, c. 20](#), Sched. 2, s. 5.

Committee

(4) If the complaint is not dismissed, the Chief Justice shall refer it to a committee consisting of three persons determined in accordance with subsection (5). [2017, c. 20](#), Sched. 2, s. 5.

Same

(5) The three persons shall be chosen by the Chief Justice, and shall be a judge of the Superior Court of Justice, a deputy judge and a person who is neither a judge nor a lawyer. [2017, c. 20](#), Sched. 2, s. 5.

Investigation

(6) The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and the Small Claims Court Administrative Judge shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally. [2017, c. 20](#), Sched. 2, s. 5.

Recommendation

(7) The committee shall make a report to the Chief Justice, recommending a disposition in accordance with subsection (8). [2017, c. 20](#), Sched. 2, s. 5.

Disposition

(8) The Chief Justice may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the Small Claims Court Administrative Judge's conduct presents grounds for imposing a sanction, may,

- (a) warn the Small Claims Court Administrative Judge;
 - (b) reprimand the Small Claims Court Administrative Judge;
 - (c) order the Small Claims Court Administrative Judge to apologize to the complainant or to any other person;
 - (d) order that the Small Claims Court Administrative Judge take specified measures, such as receiving education or treatment;
 - (e) suspend the Small Claims Court Administrative Judge for a period of up to 30 days;
 - (f) direct that no judicial duties or only specified judicial duties be assigned to the Small Claims Court Administrative Judge;
 - (g) recommend to the Attorney General that the Small Claims Court Administrative Judge be removed from office; or
 - (h) adopt any combination of the dispositions set out in clauses (a) to (g).
- [2017, c. 20](#), Sched. 2, s. 5.

Cause for removal

(9) A recommendation for removal may only be made on the basis of a ground listed in [clause 51.8 \(1\) \(b\)](#), and any such recommendation shall specify the ground on which it is made. [2017, c. 20](#), Sched. 2, s. 5.

Recommendation for removal

(10) In making a recommendation for removal to the Attorney General, the Chief Justice shall include with the recommendation,

- (a) a copy of the committee's report; and
- (b) if the recommendation of the Chief Justice does not accord with the report, reasons for his or her recommendation. [2017, c. 20](#), Sched. 2, s. 5.

Non-identification

(11) If the complaint involves an allegation of sexual misconduct or sexual harassment, an alleged victim of the misconduct or harassment shall not, on that person's request, be identified in the report provided to the Attorney General under clause (10) (a) or in any reasons provided under clause (10) (b). [2017, c. 20](#), Sched. 2, s. 5.

Report, reasons may be made public

(12) The Attorney General may make the report and any reasons public if he or she is of the opinion that it is in the public interest. [2017, c. 20](#), Sched. 2, s. 5.

Tabling

(13) If the Chief Justice makes a recommendation for removal under clause (8) (g), the Attorney General shall table the recommendation, including the ground on which the recommendation is made, in the Assembly. [2017, c. 20](#), Sched. 2, s. 5.

Order for removal

(14) The Lieutenant Governor may, on the basis of a recommendation for removal, order the removal of the Small Claims Court Administrative Judge from office on the address of the Assembly. [2017, c. 20](#), Sched. 2, s. 5.

Compensation

(15) [Subsections 86.2 \(10\), \(11\), \(12\), \(12.0.1\), \(13\) and \(14\)](#) apply with necessary modifications with respect to the compensation of costs incurred by the Small Claims Court Administrative Judge for legal services in relation to a complaint. [2017, c. 20](#), Sched. 2, s. 5; [2020, c. 11](#), Sched. 5, s. 9.

Delegation

(16) The Chief Justice may delegate his or her powers, duties and functions under this section to the Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice, or the Senior Judge of the Family Court. [2017, c. 20](#), Sched. 2, s. 5.

Same

(17) The Chief Justice may delegate his or her powers, duties and functions under subsections (2), (3) and (4) to a judge of the Superior Court of Justice, but a judge who acts under any of those subsections in relation to a complaint may not be chosen under subsection (5) to be part of a committee to investigate the complaint. [2017, c. 20](#), Sched. 2, s. 5.

Non-application of SPPA

(18) The *Statutory Powers Procedure Act* does not apply to a judge or member of a committee acting under this section. [2017, c. 20](#), Sched. 2, s. 5.

Personal liability

(19) No action or other proceeding for damages shall be instituted against a judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person under this section, or for any neglect or default in the exercise or performance in good faith of such power or duty. [2017, c. 20](#), Sched. 2, s. 5.

Regulations

88 (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing the officer or employee to whom money paid into the Superior Court of Justice shall be paid and providing for the vesting of that money and any securities in which that money is invested in that officer or employee;

(b) governing the management and investment of money paid into a court;

(c) providing for the payment of interest on money paid into a court and fixing the rate of interest so paid;

(d) prescribing the officer or employee in whose name mortgages and other securities taken under an order of the Superior Court of Justice and instruments taken as security in respect of a proceeding in the Superior Court of Justice shall be taken;

(e) respecting the deposit of the mortgages, securities and instruments and the duty or obligation, if any, in respect of them of the officer or employee in whose name they are taken. R.S.O. 1990, c. C.43, s. 88; 1994, c. 12, s. 36; 1996, c. 25, s. 9 (17).

Regulations under *Public Guardian and Trustee Act*

(2) With respect to all functions performed by the Public Guardian and Trustee in his or her capacity as Accountant of the Superior Court of Justice, the *Public Guardian and Trustee Act* and the regulations made under that Act prevail over subsection (1) and the regulations made under it. 1997, c. 23, s. 5; 1996, c. 25, s. 9 (12); 2000, c. 26, Sched. A, s. 5.

Children's Lawyer

89 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a Children's Lawyer for Ontario. 1994, c. 27, s. 43 (1).

Qualification

(2) No person shall be appointed as Children's Lawyer unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least ten years or, for an aggregate of at least ten years, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar. 1994, c. 12, s. 37; 1994, c. 27, s. 43 (2).

Duties

(3) Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding. 1994, c. 12, s. 37; 1994, c. 27, s. 43 (2).

Same

(3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding. 1994, c. 12, s. 37; 1999, c. 12, Sched. B, s. 4 (1).

Costs

(4) The same costs as are payable to litigation guardians are payable to the Children's Lawyer and costs recovered by the Children's Lawyer shall be paid

into the Consolidated Revenue Fund. R.S.O. 1990, c. C.43, s. 89 (4); 1994, c. 27, s. 43 (2).

Security for costs

(5) The Children's Lawyer shall not be required to give security for costs in any proceeding. R.S.O. 1990, c. C.43, s. 89 (5); 1994, c. 27, s. 43 (2).

Mortgages held by Accountant

(6) Where a person for whom the Children's Lawyer has acted is interested in a mortgage held by the Accountant of the Superior Court of Justice, the Children's Lawyer shall take reasonable care to ensure that,

- (a) money payable on the mortgage is promptly paid;
- (b) the mortgaged property is kept properly insured; and
- (c) taxes on the mortgaged property are promptly paid. R.S.O. 1990, c. C.43, s. 89 (6); 1994, c. 27, s. 43 (2); 1996, c. 25, s. 9 (13).

Payment into court

(7) Money received by the Children's Lawyer on behalf of a person for whom he or she acts shall, unless the court orders otherwise, be paid into court to the credit of the person entitled. R.S.O. 1990, c. C.43, s. 89 (7); 1994, c. 27, s. 43 (2).

Assessment of costs

(8) Where the amount payable into court under subsection (7) is to be ascertained by the deduction of unassessed costs from a fund, the Children's Lawyer may require the costs to be assessed forthwith. R.S.O. 1990, c. C.43, s. 89 (8); 1994, c. 27, s. 43 (2).

(9) REPEALED: [2023, c. 9](#), Sched. 11, s. 1.

Assessment officers

90 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint assessment officers. R.S.O. 1990, c. C.43, s. 90 (1); 1999, c. 12, Sched. B, s. 4 (2).

(2) REPEALED: [2020, c. 11](#), Sched. 5, s. 10.

Jurisdiction

(3) Every assessment officer has jurisdiction to assess costs in a proceeding in any court. R.S.O. 1990, c. C.43, s. 90 (3); 1996, c. 25, s. 1 (19).

Appeal from assessment of costs before tribunal

(4) Where costs of a proceeding before a tribunal other than a court are to be assessed by an assessment officer,

(a) the rules of court governing the procedure on an assessment of costs apply with necessary modifications; and

(b) an appeal lies to the Superior Court of Justice from a certificate of assessment of the costs if an objection was served in respect of the issue appealed in accordance with the rules of court. R.S.O. 1990, c. C.43, s. 90 (4); 1996, c. 25, s. 9 (17).

Officers of court

91 Every official examiner and deputy official examiner is an officer of every court in Ontario. R.S.O. 1990, c. C.43, s. 91.

Administration of oaths

92 Every officer of a court has, for the purposes of any matter before him or her, power to administer oaths and affirmations and to examine parties and witnesses. R.S.O. 1990, c. C.43, s. 92.

Money held by officer of court

93 Money or property vested in or held by an officer of a court shall be deemed to be vested in the officer in trust for the Crown in right of Ontario, subject to being disposed of in accordance with any Act, rule of court or order. R.S.O. 1990, c. C.43, s. 93; [2024, c. 2](#), Sched. 19, s. 3 (1).

Disposition of court fees

94 (1) All fees payable to a salaried officer of a court in respect of a proceeding in the court shall be paid into the Consolidated Revenue Fund. R.S.O. 1990, c. C.43, s. 94 (1).

(2) REPEALED: [2024, c. 2](#), Sched. 6, s. 5.

PART VII
COURT PROCEEDINGS

Application of Part

Civil proceedings

95 (1) This Part applies to civil proceedings in courts of Ontario.

Criminal proceedings

(2) [Sections 109](#) (constitutional questions) and 123 (giving decisions), [section 125](#) and paragraph 2 of [subsection 126 \(1\)](#) (documents that may be written in French) and [sections 132](#) (judge sitting on appeal), 136 (prohibition against photography at court hearing) and 146 (where procedures not provided) also apply to proceedings under the [Criminal Code](#) (Canada), except in so far as they are inconsistent with that Act. R.S.O. 1990, c. C.43, s. 95 (1, 2); [2021, c. 4](#), Sched. 3, s. 13.

Provincial offences proceedings

(3) [Sections 109](#) (constitutional questions), 125, 126 (language of proceedings), 132 (judge sitting on appeal), 136 (prohibition against photography at court hearings), 144 (arrest and committal warrants enforceable by police) and 146 (where procedures not provided) also apply to proceedings under the [Provincial Offences Act](#) and, for the purpose, a reference in one of those sections to a judge includes a justice of the peace presiding in the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 95 (3); 1996, c. 25, s. 9 (18).

COMMON LAW AND EQUITY

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law. R.S.O. 1990, c. C.43, s. 96 (1); 1993, c. 27, Sched.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails. R.S.O. 1990, c. C.43, s. 96 (2); 1993, c. 27, Sched.

Jurisdiction for equitable relief

(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise

provided. 1994, c. 12, s. 38; 1996, c. 25, s. 9 (17).

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed. 1994, c. 12, s. 39; 1996, c. 25, s. 9 (17).

Relief against penalties

98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. R.S.O. 1990, c. C.43, s. 98; 1993, c. 27, Sched.

Damages in substitution for injunction or specific performance

99 A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance. R.S.O. 1990, c. C.43, s. 99.

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

INTERLOCUTORY ORDERS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Injunction in labour dispute

Definition

102 (1) In this section,

“labour dispute” means a dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. R.S.O. 1990, c. C.43, s. 102 (1).

Notice

(2) Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice. R.S.O. 1990, c. C.43, s. 102 (2).

Steps before injunction proceeding

(3) In a motion or proceeding for an injunction to restrain a person from an act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful. R.S.O. 1990, c. C.43, s. 102 (3).

Evidence

(4) Subject to subsection (8), affidavit evidence in support of a motion for an injunction to restrain a person from an act in connection with a labour dispute shall be confined to statements of facts within the knowledge of the deponent, but any party may by notice to the party filing such affidavit, and payment of the proper attendance money, require the attendance of the deponent to be cross-examined at the hearing. R.S.O. 1990, c. C.43, s. 102 (4).

Interim injunction

(5) An interim injunction to restrain a person from an act in connection with a labour dispute may be granted for a period of not longer than four days. R.S.O. 1990, c. C.43, s. 102 (5).

Notice

(6) Subject to subsection (8), at least two days notice of a motion for an interim injunction to restrain a person from any act in connection with a labour dispute shall be given to the responding party and to any other person affected thereby but not named in the notice of motion. R.S.O. 1990, c. C.43, s. 102 (6).

Same

(7) Notice required by subsection (6) to persons other than the responding party may be given,

(a) where such persons are members of a labour organization, by personal service on an officer or agent of the labour organization; and

(b) where such persons are not members of a labour organization, by posting the notice in a conspicuous place at the location of the activity sought to be restrained where it can be read by any persons affected,

and service and posting under this subsection shall be deemed to be sufficient notice to all such persons. R.S.O. 1990, c. C.43, s. 102 (7).

Interim injunction without notice

(8) Where notice as required by subsection (6) is not given, the court may grant an interim injunction where,

(a) the case is otherwise a proper one for the granting of an interim injunction;

(b) notice as required by subsection (6) could not be given because the delay necessary to do so would result in irreparable damage or injury, a breach of the peace or an interruption in an essential public service;

(c) reasonable notification, by telephone or otherwise, has been given to the persons to be affected or, where any of such persons are members of a labour organization, to an officer of that labour organization or to the person authorized under [section 94](#) of the [Labour Relations Act, 1995](#) to accept service of process under that Act on behalf of that labour organization or trade union, or where it is shown that such notice could not have been given; and

(d) proof of all material facts for the purpose of clauses (a), (b) and (c) is established by oral evidence. R.S.O. 1990, c. C.43 s. 102 (8); [2017, c. 2, Sched. 2](#), s. 19.

Misrepresentation as contempt of court

(9) The misrepresentation of any fact or the withholding of any qualifying relevant matter, directly or indirectly, in a proceeding for an injunction under this section, constitutes a contempt of court. R.S.O. 1990, c. C.43, s. 102 (9).

Appeal

(10) An appeal from an order under this section lies to the Court of Appeal without leave. R.S.O. 1990, c. C.43, s. 102 (10).

Certificate of pending litigation

103 (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2). R.S.O. 1990, c. C.43, s. 103 (1).

Registration

(2) Where a certificate of pending litigation is issued under subsection (1) it may be registered whether the land is registered under the [Land Titles Act](#) or the [Registry Act](#). R.S.O. 1990, c. C.43, s. 103 (2).

Exception

(3) Subsections (1) and (2) do not apply to a proceeding for foreclosure or sale on a registered mortgage or to enforce a lien under the [Construction Act](#). R.S.O. 1990, c. C.43, s. 103 (3); [2017, c. 24, s. 75](#).

Liability where no reasonable claim

(4) A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration. R.S.O. 1990, c. C.43, s. 103 (4).

Recovery of damages

(5) The liability for damages under subsection (4) and the amount thereof may be determined in the proceeding in respect of which the certificate was registered or in a separate proceeding. R.S.O. 1990, c. C.43, s. 103 (5).

Order discharging certificate

(6) The court may make an order discharging a certificate,

- (a) where the party at whose instance it was issued,
 - (i) claims a sum of money in place of or as an alternative to the interest in the land claimed,
 - (ii) does not have a reasonable claim to the interest in the land claimed, or
 - (iii) does not prosecute the proceeding with reasonable diligence;
- (b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or
- (c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just. R.S.O. 1990, c. C.43, s. 103 (6).

Effect

(7) Where a certificate is discharged, any person may deal with the land as fully as if the certificate had not been registered. R.S.O. 1990, c. C.43, s. 103 (7).

Interim order for recovery of personal property

104 (1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

- (a) was unlawfully taken from the possession of the plaintiff; or
- (b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

Damages

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property. R.S.O. 1990, c. C.43, s. 104.

Physical or mental examination

Definition

105 (1) In this section,

“health practitioner” means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction. R.S.O. 1990, c. C.43, s. 105 (1); 1998, c. 18, Sched. G, s. 48.

Order

(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Same

(3) Where the question of a party’s physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

Further examinations

(4) The court may, on motion, order further physical or mental examinations.

Examiner may ask questions

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence. R.S.O. 1990, c. C.43, s. 105 (2-5).

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

Consolidation of proceedings in different courts

107 (1) Where two or more proceedings are pending in two or more different courts, and the proceedings,

(a) have a question of law or fact in common;

(b) claim relief arising out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason ought to be the subject of an order under this section,

an order may, on motion, be made,

(d) transferring any of the proceedings to another court and requiring the proceedings to be consolidated, or to be heard at the same time, or one immediately after the other; or

(e) requiring any of the proceedings to be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them. R.S.O. 1990, c. C.43, s. 107 (1).

Transfer from Small Claims Court

(2) A proceeding in the Small Claims Court shall not be transferred under clause (1) (d) to the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court. R.S.O. 1990, c. C.43, s. 107 (2); 1996, c. 25, s. 9 (17).

Same

(3) A proceeding in the Small Claims Court shall not be required under subclause (1) (e) (ii) to be asserted by way of counterclaim in a proceeding in the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court. R.S.O. 1990, c. C.43, s. 107 (3); 1996, c. 25, s. 9 (17).

Motions

(4) The motion shall be made to a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 107 (4); 1996, c. 25, s. 9 (17).

Directions

(5) An order under subsection (1) may impose such terms and give such directions as are considered just, including dispensing with service of a notice of readiness or listing for trial and abridging the time for placing an action on the trial list.

Transfer

(6) A proceeding that is transferred to another court under clause (1) (d) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court.

Discretion at hearing

(7) Where an order has been made that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise. R.S.O. 1990, c. C.43, s. 107 (5-7).

PROCEDURAL MATTERS

Jury trials

108 (1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided. R.S.O. 1990, c. C.43, s. 108 (1); 1996, c. 25, s. 9 (17).

Trials without jury

(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in the following circumstances:

1. The action involves a claim for any of the following kinds of relief:
 - i. Injunction or mandatory order.
 - ii. Partition or sale of real property.
 - iii. Relief in proceedings referred to in the Schedule to section 21.8.
 - iv. Dissolution of a partnership or taking of partnership or other accounts.
 - v. Foreclosure or redemption of a mortgage.
 - vi. Sale and distribution of the proceeds of property subject to any lien or charge.
 - vii. Execution of a trust.
 - viii. Rectification, setting aside or cancellation of a deed or other written instrument.
 - ix. Specific performance of a contract.
 - x. Declaratory relief.
 - xi. Other equitable relief.
 - xii. Relief against a municipality.
2. The action is proceeding under Rule 76 of the [Rules of Civil Procedure, 2019, c. 7](#), Sched. 15, s. 2.

Same

(2.1) Paragraph 2 of subsection (2) does not apply to an action in respect of which a jury notice has been delivered in accordance with the [Rules of Civil Procedure](#) before January 1, 2020. [2019, c. 7](#), Sched. 15, s. 2.

Same

(3) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury. R.S.O. 1990, c. C.43, s. 108 (3).

Composition of jury

(4) Where a proceeding is tried with a jury, the jury shall be composed of six persons selected in accordance with the [Juries Act](#). R.S.O. 1990, c. C.43, s. 108 (4).

Verdicts or questions

- (5) Where a proceeding is tried with a jury,
- (a) the judge may require the jury to give a general verdict or to answer specific questions, subject to [section 15](#) of the [Libel and Slander Act](#); and
 - (b) judgment may be entered in accordance with the verdict or the answers to the questions. R.S.O. 1990, c. C.43, s. 108 (5).

Same

(6) It is sufficient if five of the jurors agree on the verdict or the answer to a question, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer. R.S.O. 1990, c. C.43, s. 108 (6).

Discharge of juror at trial

(7) The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause. R.S.O. 1990, c. C.43, s. 108 (7).

Continuation with five jurors

(8) Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous. R.S.O. 1990, c. C.43, s. 108 (8).

Specifying negligent acts

(9) Where a proceeding to which [subsection 193 \(1\)](#) of the *Highway Traffic Act* applies is tried with a jury, the judge may direct the jury to specify negligent acts or omissions that caused the damages or injuries in respect of which the proceeding is brought. R.S.O. 1990, c. C.43, s. 108 (9).

Malicious prosecution

(10) In an action for malicious prosecution, the trier of fact shall determine whether or not there was reasonable and probable cause for instituting the prosecution. R.S.O. 1990, c. C.43, s. 108 (10).

Notice of constitutional question

109 (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under [subsection 24 \(1\)](#) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings. 1994, c. 12, s. 42 (2).

Proceeding in wrong forum

110 (1) Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer.

Continuation of proceeding

(2) A proceeding that is transferred to another court under subsection (1) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court. R.S.O. 1990, c. C.43, s. 110.

Set off

111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

Judgment for defendant

(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance. R.S.O. 1990, c. C.43, s. 111.

Report of Children's Lawyer

Investigation

112 (1) In a proceeding under the [Divorce Act](#) (Canada) or the [Children's Law Reform Act](#) in which a question concerning decision-making responsibility, parenting time or contact with respect to a child is before the court, the Children's Lawyer may,

- (a) cause an investigation to be made on all matters concerning decision-making responsibility, parenting time or contact with respect to the child;
- (b) cause an investigation to be made on matters specified by the court related to decision-making responsibility, parenting time or contact with respect to the child; or
- (c) meet with the child to determine the child's views and preferences with respect to matters that may include decision-making responsibility, parenting time or contact. [2021, c. 4](#), Sched. 3, s. 14.

Report

(2) The Children's Lawyer may report and make recommendations to the court on the results of an investigation or meeting conducted under subsection (1). [2021, c. 4](#), Sched. 3, s. 14.

Authority to act

(3) The Children's Lawyer may act under subsection (1) or (2) on his or her own initiative, at the request of a court or at the request of any person. [2021, c. 4](#), Sched. 3, s. 14.

Affidavit

(4) The person who prepares a report under subsection (2) shall execute an affidavit verifying the facts in the report that are within the person's knowledge and setting out the source of the person's information and belief respecting facts that are not within their knowledge. [2021, c. 4](#), Sched. 3, s. 14.

Service

(5) The person who prepares a report under subsection (2) shall serve the affidavit, along with a copy of the report attached as an exhibit, on the parties and file the affidavit and report with the court. [2021, c. 4](#), Sched. 3, s. 14.

Evidence

(6) The filed affidavit and report shall form part of the evidence at the hearing of the proceeding. [2021, c. 4](#), Sched. 3, s. 14.

Attendance on report

(7) Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who conducted the investigation or meeting under subsection (1) to attend as a witness. [2021, c. 4](#), Sched. 3, s. 14.

Agreement preventing third party claim or crossclaim

113 Rules of court permitting a defendant to make a third party claim or crossclaim apply despite any agreement that provides that no action may be brought until after judgment against the defendant. R.S.O. 1990, c. C.43, s. 113.

Agreement as to place of hearing

114 Where a party moves to change the place of hearing in a proceeding, an agreement as to the place of hearing is not binding, but may be taken into account. R.S.O. 1990, c. C.43, s. 114.

Security

115 Where a person is required to give security in respect of a proceeding in a court, a bond of an insurer licensed under the [Insurance Act](#) to write surety and fidelity insurance is sufficient, unless the court orders otherwise. R.S.O. 1990, c. C.43, s. 115; 1997, c. 19, s. 32.

Periodic payment and review of damages

116 (1) In a proceeding where damages are claimed for personal injuries or under Part V of the [Family Law Act](#) for loss resulting from the injury to or death of a person, the court,

(a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and

(b) if the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just. R.S.O. 1990, c. C.43, s. 116 (1); 1996, c. 25, s. 1 (20).

No order

(2) An order under clause (1) (b) shall not be made if the parties otherwise consent or if the court is of the opinion that the order would not be in the best interests of the plaintiff, having regard to all the circumstances of the case.

Best interests

(3) In considering the best interests of the plaintiff, the court shall take into account,

(a) whether the defendant has sufficient means to fund an adequate scheme of periodic payments;

(b) whether the plaintiff has a plan or a method of payment that is better able to meet the interests of the plaintiff than periodic payments by the defendant; and

(c) whether a scheme of periodic payments is practicable having regard to all the circumstances of the case.

Future review

(4) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

Amount to offset liability for income tax

(5) If the court does not make an order for periodic payment under subsection (1), it shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award. R.S.O. 1990, c. C.43, s. 116 (2-5).

Periodic payment, medical malpractice actions

116.1 (1) Despite [section 116](#), in a medical malpractice action where the court determines that the award for the future care costs of the plaintiff exceeds the prescribed amount, the court shall, on a motion by the plaintiff or a defendant that is liable to pay the plaintiff's future care costs, order that the damages for the future care costs of the plaintiff be satisfied by way of periodic payments. [2006, c. 21](#), Sched. A, s. 17.

The order

(2) If the court makes an order under subsection (1), the court shall determine the amount and frequency of the periodic payments without regard to inflation and shall order the defendant to provide security for those payments in the form of an annuity contract that satisfies the criteria set out in subsection (3). [2006, c. 21](#), Sched. A, s. 17.

Form of security

(3) The annuity contract shall satisfy the following criteria:

1. The annuity contract must be issued by a life insurer.
2. The annuity must be designed to generate payments in respect of which the beneficiary is not required to pay income taxes.
3. The annuity must include protection from inflation to a degree reasonably available in the market for such annuities. [2006, c. 21](#), Sched. A, s. 17.

Directions from the court

(4) If the parties are unable to agree on the terms of the annuity, either party may seek directions from the court about the terms. [2006, c. 21](#), Sched. A, s. 17.

Filing and approval of plan

(5) Unless the court orders otherwise, a proposed plan to provide security required by an order under subsection (2) shall be filed with the court within 30 days of the judgment or within another period that the court may specify, and the court may approve the proposed plan, with or without modifications. [2006, c. 21](#), Sched. A, s. 17.

Effect of providing security

(6) If security is provided in accordance with a plan approved by the court, the defendant by whom or on whose behalf the security is provided is discharged from all liability to the plaintiff in respect of damages that are to be paid by periodic payments, but the owner of the security remains liable for the periodic payments until they are paid. [2006, c. 21](#), Sched. A, s. 17.

Effect of not providing security

(7) If a proposed plan is not filed in accordance with subsection (5) or is not approved by the court, the court shall, at the request of any party to the proceeding, vacate the portions of the judgment in which periodic payments are awarded and substitute a lump sum award. [2006, c. 21](#), Sched. A, s. 17.

Application for lump sum

(8) The court may order that the future care costs be paid in whole or in part by way of a lump sum payment to the extent that the plaintiff satisfies the court that a periodic payment award is unjust, having regard to the capacity of the periodic payment award to meet the needs for which the damages award for future care costs is intended to provide compensation. [2006, c. 21](#), Sched. A, s. 17.

Amount to offset liability for income tax

(9) If the court does not make an order for periodic payments under subsection (1) or makes an order for a lump sum payment under subsection (7) or (8), the court shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award except to the extent that the evidence shows that the plaintiff will not derive taxable income from investing the award. [2006, c. 21](#), Sched. A, s. 17.

Periodic payments exempt from garnishment, etc.

(10) Periodic payments of damages for future care costs are exempt from seizure or garnishment to the same extent that wages are exempt under [section 7](#) of the [Wages Act](#), unless the seizure or garnishment is made by a provider of care to the plaintiff and the seizure or garnishment is to pay for the costs of products, services or accommodations or any one of them with respect to the plaintiff. [2006, c. 21](#), Sched. A, s. 17.

Future review

(11) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

[2006, c. 21](#), Sched. A, s. 17.

Regulations

(12) The Lieutenant Governor in Council may make regulations prescribing or calculating the amount of future care costs for the purpose of subsection (1).

[2006, c. 21](#), Sched. A, s. 17.

Definitions

(13) In this section,

“future care costs” means the cost of medical care or treatment, rehabilitation services or other care, treatment, services, products or accommodations that is incurred at a time after judgment; (“coûts des soins futurs”)

“medical malpractice action” means an action for personal injuries alleged to have arisen from negligence or malpractice in respect of professional services requested of, or rendered by, a health professional who is a member of a health profession as defined in the [Regulated Health Professions Act, 1991](#) or an employee of the health professional or for which a hospital as defined in the [Public Hospitals Act](#) is held liable; (“action pour faute professionnelle médicale”)

“prescribed amount” means \$250,000 or such greater amount as may be prescribed by regulation, calculated as a present value at the time of judgment in accordance with the [Rules of Civil Procedure](#). (“montant prescrit”) [2006, c. 21](#), Sched. A, s. 17.

Transition

(14) This section applies to all proceedings in which a final judgment at trial or final settlement has not been made on the day the [Access to Justice Act, 2006](#) receives Royal Assent. [2006, c. 21](#), Sched. A, s. 17.

Assessment of damages

117 Where damages are to be assessed in respect of,

(a) a continuing cause of action;

(b) repeated breaches of a recurring obligation; or

(c) intermittent breaches of a continuing obligation,

the damages, including damages for breaches occurring after the commencement of the proceeding, shall be assessed down to the time of the assessment. R.S.O. 1990, c. C.43, s. 117.

Guidance and submissions

118 In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages. R.S.O. 1990, c. C.43, s. 118.

Power of court on appeal

119 On an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages. R.S.O. 1990, c. C.43, s. 119.

Advance payments

120 (1) If a defendant makes a payment to a plaintiff who is or alleges to be entitled to recover from the defendant, the payment constitutes, to the extent of the payment, a release by the plaintiff or the plaintiff's personal representative of any claim that the plaintiff or the plaintiff's personal representative or any person claiming through or under the plaintiff or by virtue of Part V of the [Family Law Act](#) may have against the defendant.

Same

(2) Nothing in this section precludes the defendant making the payment from demanding, as a condition precedent to such payment, a release from the plaintiff or the plaintiff's personal representative or any other person to the extent of such payment.

Payment to be taken into account

(3) The court shall adjudicate upon the matter first without reference to the payment but, in giving judgment, the payment shall be taken into account and the plaintiff shall only be entitled to judgment for the net amount, if any.

Disclosure

(4) The fact of any payment shall not be disclosed to the judge or jury until after judgment but shall be disclosed before formal entry thereof. R.S.O. 1990, c. C.43, s. 120.

Foreign money obligations

121 (1) Subject to subsections (3) and (4), where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a bank in Ontario listed in Schedule I to the [Bank Act](#) (Canada) at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the creditor.

Multiple payments

(2) Where more than one payment is made under an order referred to in subsection (1), the rate of conversion shall be the rate determined as provided in subsection (1) for each payment.

Discretion of court

(3) Subject to subsection (4), where, in a proceeding to enforce an obligation in a foreign currency, the court is satisfied that conversion of the amount of the obligation to Canadian currency as provided in subsection (1) would be inequitable to any party, the order may require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a bank in Ontario on such other day as the court considers equitable in the circumstances.

Other obligations that include conversion

(4) Where an obligation enforceable in Ontario provides for a manner of conversion to Canadian currency of an amount in a foreign currency, the court shall give effect to the manner of conversion in the obligation.

Enforcement by seizure or garnishment

(5) Where a writ of seizure and sale or notice of garnishment is issued under an order to enforce an obligation in a foreign currency, the day the sheriff, bailiff or clerk of the court receives money under the writ or notice shall be deemed, for the purposes of this section and any obligation referred to in subsection (4), to be the day payment is received by the creditor. R.S.O. 1990, c. C.43, s. 121.

Actions for accounting

122 (1) Where an action for an accounting could have been brought against a person, the action may be brought against the person's personal

representative. R.S.O. 1990, c. C.43, s. 122 (1).

Same

(2) An action for an accounting may be brought by a joint tenant or tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenant's just share. R.S.O. 1990, c. C.43, s. 122 (2); 1993, c. 27, Sched.

Judge's retirement, etc., inability or failure to give decision

Definition

123 (1) In this section,

"chief judge" means a person having authority to assign duties to the judge. ("juge en chef") R.S.O. 1990, c. C.43, s. 123 (1); 1996, c. 25, s. 1 (21); [2015, c. 27](#), Sched. 1, s. 1 (13).

Application

(1.1) This section also applies, with necessary modifications, in respect of deputy judges and associate judges. [2015, c. 27](#), Sched. 1, s. 1 (14); [2020, c. 11](#), Sched. 5, s. 11; [2021, c. 4](#), Sched. 3, s. 15.

Decision after retirement, etc.

(2) A judge may, within ninety days of,

- (a) reaching retirement age;
- (b) resigning; or
- (c) being appointed to another court,

give a decision or participate in the giving of a decision in any matter previously tried or heard before the judge. R.S.O. 1990, c. C.43, s. 123 (2).

Inability to give decision; panel of judges

(3) Where a judge has commenced a hearing together with other judges and,

- (a) dies before the decision is given;
- (b) is for any reason unable to participate in the giving of the decision; or
- (c) does not participate in the giving of the decision under subsection (2),

the remaining judges may complete the hearing and give the decision of the court but, if the remaining judges are equally divided, a party may make a

motion to the chief judge for an order that the matter be reheard. R.S.O. 1990, c. C.43, s. 123 (3).

Inability to give decision; sitting alone

(4) Where a judge has commenced hearing a matter sitting alone and,

- (a) dies without giving a decision;
- (b) is for any reason unable to make a decision; or
- (c) does not give a decision under subsection (2),

a party may make a motion to the chief judge for an order that the matter be reheard. R.S.O. 1990, c. C.43, s. 123 (4).

Failure to give decision

(5) Where a judge has heard a matter and fails to give a decision,

- (a) in the case of a judgment, within six months; or
- (b) in any other case, within three months,

the chief judge may extend the time in which the decision may be given and, if necessary, relieve the judge of his or her other duties until the decision is given. R.S.O. 1990, c. C.43, s. 123 (5).

Continued failure

(6) Where time has been extended under subsection (5) but the judge fails to give the decision within that time, unless the chief judge grants a further extension,

- (a) the chief judge shall report the failure and the surrounding circumstances to the appropriate judicial council; and
- (b) a party may make a motion to the chief judge for an order that the matter be reheard. R.S.O. 1990, c. C.43, s. 123 (6).

Rehearing

(7) Where an order is made under subsection (3), (4) or (6) for the rehearing of a matter, the chief judge may,

- (a) dispose of the costs of the original hearing or refer the question of those costs to the judge or judges presiding at the rehearing;
- (b) direct that the rehearing be conducted on the transcript of evidence taken at the original hearing, subject to the discretion of the court at the rehearing to recall a witness or require further evidence; and

(c) give such other directions as are considered just. R.S.O. 1990, c. C.43, s. 123 (7).

Certain hearings under the *Child, Youth and Family Services Act, 2017*

(8) If a judge in the Ontario Court of Justice who is presiding over a hearing under Part V, VII or VIII of the *Child, Youth and Family Services Act, 2017* for a final order respecting a matter is appointed to another court, the judge continues to have jurisdiction to complete the hearing and give a decision in the matter. 2024, c. 2, Sched. 6, s. 6.

124 REPEALED: 2009, c. 33, Sched. 2, s. 20 (17).

LANGUAGE

Official languages of the courts

125 (1) The official languages of the courts of Ontario are English and French.

Proceedings in English unless otherwise provided

(2) Except as otherwise provided with respect to the use of the French language,

(a) hearings in courts shall be conducted in the English language and evidence adduced in a language other than English shall be interpreted into the English language; and

(b) documents filed in courts shall be in the English language or shall be accompanied by a translation of the document into the English language certified by affidavit of the translator. R.S.O. 1990, c. C.43, s. 125.

Use of French

Documents that may be written in French

126 (1) The following documents may be written in French:

1. Pleadings or other documents filed by a party.
2. A process issued in or giving rise to the proceeding. 2021, c. 4, Sched. 3, s. 16.

Translation of documents

(2) On a party's request, the court shall provide a translation into English or French of a document described in paragraph 1 or 2 of subsection (1) that is written in the other language. [2021, c. 4](#), Sched. 3, s. 16.

Interpretation

(3) If a party acting in person makes submissions in French or a witness gives oral evidence in French, the court shall provide interpretation of the submissions or evidence into English. This subsection does not apply to a hearing in a bilingual proceeding to which paragraph 3 of subsection (4) applies. [2021, c. 4](#), Sched. 3, s. 16.

Bilingual proceedings

(4) A party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding, and the following rules apply if the party does so:

1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.
2. If a hearing that the party has specified is held before a judge and jury in an area described in subsection (5), the jury shall consist of persons who speak English and French.
3. If a hearing that the party has specified is held without a jury, or with a jury in an area described in subsection (5), evidence given and submissions made in English or French shall be received, recorded and transcribed in the language in which they are given.
4. Any other part of the hearing may be conducted in French if, in the opinion of the presiding judge or officer, it can be so conducted.
5. Oral evidence given in English or French at an examination out of court shall be received, recorded and transcribed in the language in which it is given.
6. On the request of a party, if the party or their counsel speaks English or French but not both, the court shall provide interpretation of anything given orally in the other language at hearings referred to in paragraph 3 and at examinations out of court.
7. The reasons for a decision may be written in English or French, but the court shall provide a translation into the other language on the request of a party. [2021, c. 4](#), Sched. 3, s. 16.

Bilingual juries

(5) The areas referred to in paragraphs 2 and 3 of subsection (4) are the following:

1. Counties:

- i. Essex.
- ii. Middlesex.
- iii. Prescott and Russell.
- iv. Renfrew.
- v. Simcoe.
- vi. Stormont, Dundas and Glengarry.

2. Territorial districts:

- i. Algoma.
- ii. Cochrane.
- iii. Kenora.
- iv. Nipissing.
- v. Sudbury.
- vi. Thunder Bay.
- vii. Timiskaming.

3. The area of the County of Welland as it existed on December 31, 1969.

4. The Municipality of Chatham Kent.

5. The City of Hamilton.

6. The City of Ottawa.

7. The Regional Municipality of Peel.

8. The City of Greater Sudbury.

9. The City of Toronto.

10. Such other areas as are prescribed. [2021, c. 4](#), Sched. 3, s. 16.

Prosecutions

(6) If a prosecution under the [Provincial Offences Act](#) is to be conducted as a bilingual proceeding by a prosecutor referred to in paragraph 1 or 2 of the definition of “prosecutor” in [subsection 1 \(1\)](#) of that Act or an agent acting on

behalf of that person, the prosecutor assigned to the case must speak English and French. [2021, c. 4](#), Sched. 3, s. 16.

Appeals

(7) When an appeal is taken in a proceeding that is being conducted as a bilingual proceeding, a party who speaks French has the right to require that the appeal be heard by a judge or judges who speak English and French; in that case subsection (4) applies to the appeal, with necessary modifications. [2021, c. 4](#), Sched. 3, s. 16.

Parties who are not natural persons

(8) A corporation, partnership or sole proprietorship may exercise the rights conferred by this section in the same way as a natural person, unless the court orders otherwise. [2021, c. 4](#), Sched. 3, s. 16.

Regulations

(9) The Lieutenant Governor in Council may make regulations,
(a) prescribing procedures for the purpose of this section;
(b) prescribing areas for the purpose of paragraph 10 of subsection (5).
[2021, c. 4](#), Sched. 3, s. 16.

Transition

(10) This section, as it read immediately before section 17 of Schedule 3 to the [Accelerating Access to Justice Act, 2021](#) came into force, continues to apply to proceedings commenced before the day that section came into force. [2021, c. 4](#), Sched. 3, s. 16.

SCHEDULE 1

Bilingual Juries

Paragraphs 2 and 3 of [subsection 126 \(2\)](#)

The following counties:

Essex

Middlesex

Prescott and Russell

Renfrew

Simcoe

Stormont, Dundas and Glengarry

The following territorial districts:

Algoma

Cochrane

Kenora

Nipissing

Sudbury

Thunder Bay

Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Municipality of Chatham Kent.

The City of Hamilton.

The City of Ottawa.

The Regional Municipality of Peel.

The City of Greater Sudbury.

The City of Toronto.

1994, c. 12, s. 43 (3); 1997, c. 26, Sched.; O. Reg. 441/97, s. 1; [2002, c. 17](#),
Sched. F, Table.

SCHEDULE 2

Bilingual Documents

Paragraph 6 of [subsection 126 \(2\)](#)

The following counties:

Essex

Middlesex

Prescott and Russell

Renfrew

Simcoe

Stormont, Dundas and Glengarry

The following territorial districts:

Algoma

Cochrane

Kenora

Nipissing

Sudbury

Thunder Bay

Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Municipality of Chatham Kent.

The City of Hamilton.

The City of Ottawa.

The Regional Municipality of Peel.

The City of Greater Sudbury.

The City of Toronto.

1994, c. 12, s. 43 (3); 1997, c. 26, Sched.; O. Reg. 441/97, s. 2; [2002, c. 17](#),
Sched. F, Table.

INTEREST AND COSTS

Prejudgment and postjudgment interest rates

Definitions

127 (1) In this section and in [sections 128](#) and [129](#),

“bank rate” means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the [Bank Act](#) (Canada); (“taux d’escompte”)

“date of the order” means the date the order is made, even if the order is not entered or enforceable on that date, or the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed; (“date de l’ordonnance”)

“postjudgment interest rate” means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent; (“taux d’intérêt postérieur au jugement”)

“prejudgment interest rate” means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the

proceeding was commenced, rounded to the nearest tenth of a percentage point; (“taux d’intérêt antérieur au jugement”)

“quarter” means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December. (“trimestre”) R.S.O. 1990, c. C.43, s. 127 (1).

Calculation and publication of interest rates

(2) After the first day of the last month of each quarter, a person designated by the Deputy Attorney General shall forthwith,

(a) determine the prejudgment and postjudgment interest rate for the next quarter; and

(b) publish in the prescribed manner a table showing the rate determined under clause (a) for the next quarter and the rates determined under clause (a) or under a predecessor of that clause for all the previous quarters during the preceding 10 years. [2006, c. 21](#), Sched. A, s. 18.

Regulations

(3) The Attorney General may, by regulation, prescribe the manner in which the table described in clause (2) (b) is to be published. [2006, c. 21](#), Sched. A, s. 18.

Prejudgment interest

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order. R.S.O. 1990, c. C.43, s. 128 (1).

Exception for non-pecuniary loss on personal injury

(2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under [clause 66 \(2\)](#) (w). R.S.O. 1990, c. C.43, s. 128 (2); 1994, c. 12, s. 44.

Special damages

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

Exclusion

- (4) Interest shall not be awarded under subsection (1),
- (a) on exemplary or punitive damages;
 - (b) on interest accruing under this section;
 - (c) on an award of costs in the proceeding;
 - (d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;
 - (e) with respect to the amount of any advance payment that has been made towards settlement of the claim, for the period after the advance payment has been made;
 - (f) where the order is made on consent, except by consent of the debtor;
or
 - (g) where interest is payable by a right other than under this section.
- R.S.O. 1990, c. C.43, s. 128 (3, 4).

Postjudgment interest

129 (1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

Interest on periodic payments

(2) Where an order provides for periodic payments, each payment in default shall bear interest only from the date of default.

Interest on orders originating outside Ontario

(3) Where an order is based on an order given outside Ontario or an order of a court outside Ontario is filed with a court in Ontario for the purpose of enforcement, money owing under the order bears interest at the rate, if any, applicable to the order given outside Ontario by the law of the place where it was given.

Costs assessed without order

(4) Where costs are assessed without an order, the costs bear interest at the postjudgment interest rate in the same manner as if an order were made for the payment of costs on the date the person to whom the costs are payable became entitled to the costs.

Other provision for interest

(5) Interest shall not be awarded under this section where interest is payable by a right other than under this section. R.S.O. 1990, c. C.43, s. 129.

Discretion of court

130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under [section 128](#) or [129](#),

- (a) disallow interest under either section;
- (b) allow interest at a rate higher or lower than that provided in either section;
- (c) allow interest for a period other than that provided in either section.

Same

(2) For the purpose of subsection (1), the court shall take into account,

- (a) changes in market interest rates;
- (b) the circumstances of the case;
- (c) the fact that an advance payment was made;
- (d) the circumstances of medical disclosure by the plaintiff;
- (e) the amount claimed and the amount recovered in the proceeding;
- (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
- (g) any other relevant consideration. R.S.O. 1990, c. C.43, s. 130.

Costs

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Crown costs

(2) In a proceeding to which the Crown is a party, costs awarded to the Crown shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of the Crown shall be paid into the Consolidated Revenue Fund. [2024, c. 2](#), Sched. 19, s. 3 (2).

Same

(3) In subsection (2),

“Crown” means the Crown in right of Ontario. [2024, c. 2](#), Sched. 19, s. 3 (2)

APPEALS

Judge not to hear appeal from own decision

132 A judge shall not sit as a member of a court hearing an appeal from his or her own decision. R.S.O. 1990, c. C.43, s. 132.

Leave to appeal required

133 No appeal lies without leave of the court to which the appeal is to be taken,

- (a) from an order made with the consent of the parties; or
- (b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs. R.S.O. 1990, c. C.43, s. 133.

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

- (a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

- (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

- (c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

Same

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

PUBLIC ACCESS

Public hearings

135 (1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.

Exception

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from

the general principle that court hearings should be open to the public.

Disclosure of information

(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information. R.S.O. 1990, c. C.43, s. 135.

Prohibition against photography, etc., at court hearing

136 (1) Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2) (b). R.S.O. 1990, c. C.43, s. 136 (1).

Exceptions

(2) Nothing in subsection (1),

(a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or

(b) prohibits a lawyer, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge, for the sole purpose of supplementing or replacing handwritten notes. R.S.O. 1990, c. C.43, s. 136 (2); 1996, c. 25, s. 1 (22).

Exceptions

(3) Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves.

Offence

(4) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. C.43, s. 136 (3, 4).

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

Dismissal of proceeding that limits debate

Purposes

- 137.1** (1) The purposes of this section and [sections 137.2 to 137.5](#) are,
- (a) to encourage individuals to express themselves on matters of public interest;
 - (b) to promote broad participation in debates on matters of public interest;
 - (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
 - (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. [2015, c. 23, s. 3.](#)

Definition, “expression”

- (2) In this section,
- “expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. [2015, c. 23, s. 3.](#)

Order to dismiss

- (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. [2015, c. 23, s. 3.](#)

No dismissal

- (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
- (a) there are grounds to believe that,
 - (i) the proceeding has substantial merit, and
 - (ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. [2015, c. 23, s. 3.](#)

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. [2015, c. 23, s. 3.](#)

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. [2015, c. 23, s. 3.](#)

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. [2015, c. 23, s. 3.](#)

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. [2015, c. 23, s. 3.](#)

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. [2015, c. 23, s. 3.](#)

Procedural matters

Commencement

137.2 (1) A motion to dismiss a proceeding under [section 137.1](#) shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. [2015, c. 23, s. 3.](#)

Motion to be heard within 60 days

(2) A motion under [section 137.1](#) shall be heard no later than 60 days after notice of the motion is filed with the court. [2015, c. 23, s. 3.](#)

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. [2015, c. 23, s. 3.](#)

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. [2015, c. 23, s. 3.](#)

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. [2015, c. 23, s. 3.](#)

Appeal to be heard as soon as practicable

137.3 An appeal of an order under [section 137.1](#) shall be heard as soon as practicable after the appellant perfects the appeal. [2015, c. 23, s. 3.](#)

Stay of related tribunal proceeding

137.4 (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the [Statutory Powers Procedure Act](#), and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under [section 137.1](#), the moving party may file with the tribunal a copy of the notice of the motion that was filed with the

court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal. [2015, c. 23, s. 3.](#)

Notice

(2) The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal. [2015, c. 23, s. 3.](#)

Duration

(3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4). [2015, c. 23, s. 3.](#)

Stay may be lifted

(4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

(a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or

(b) the proceeding that is the subject of the motion under [section 137.1](#) and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay. [2015, c. 23, s. 3.](#)

Same

(5) A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under [section 137.1](#) is under appeal, a judge of the Court of Appeal. [2015, c. 23, s. 3.](#)

Statutory Powers Procedure Act

(6) This section applies despite anything to the contrary in the [Statutory Powers Procedure Act](#). [2015, c. 23, s. 3.](#)

Application

137.5 Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the [Protection of Public Participation Act, 2015](#) received first reading. [2015, c. 23, s. 3.](#)

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided. R.S.O. 1990, c. C.43, s. 138.

Joint liability not affected by judgment or release

139 (1) Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding. R.S.O. 1990, c. C.43, s. 139 (1); 1993, c. 27, Sched.

Two proceedings in respect of same damage

(2) Where a person who has suffered damage brings two or more proceedings in respect of the damage, the person is not entitled to costs in any of the proceedings, except the first proceeding in which judgment is obtained, unless the court is of the opinion that there were reasonable grounds for bringing more than one proceeding. R.S.O. 1990, c. C.43, s. 139 (2).

Vexatious litigant orders

140 (1) If a judge of the Superior Court of Justice or of the Court of Appeal is satisfied that a person has persistently and without reasonable grounds instituted vexatious proceedings in any court or conducted a proceeding in any court in a vexatious manner, the judge may make an order that includes any of the following terms:

1. No further proceeding may be instituted by the person in any court, except by leave of a judge of the Superior Court of Justice.
2. No proceeding previously instituted by the person in any court shall be continued, except by leave of a judge of the Superior Court of Justice.
3. Any other term that is just. [2024, c. 2](#), Sched. 6, s. 7 (1).

Procedure

(2) An order under subsection (1) may be made on a judge's own initiative or on motion or application by any person, as provided in the rules of court. [2024, c. 2](#), Sched. 6, s. 7 (1); [2024, c. 28](#), Sched. 4, s. 5.

Notice required

(2.1) An order under subsection (1) may only be made on notice to the person who is the subject of the order, as provided in the rules of court. [2024, c. 2](#), Sched. 6, s. 7 (1).

Branches of the Superior Court of Justice

(2.2) An order of the Superior Court of Justice under subsection (1) may be made by a judge presiding in any branch of that court. [2024, c. 2](#), Sched. 6, s. 7 (1).

Appeals and reviews

(2.3) The following rules apply with respect to an order made under subsection (1):

1. If the order was made by a judge of the Superior Court of Justice, an appeal of the order lies to a panel of the Court of Appeal.
2. If the order was made by a judge of the Court of Appeal, a panel of the Court of Appeal may, on motion, set aside or vary the decision.
3. For greater certainty, leave is not required to bring an appeal under paragraph 1 or a motion under paragraph 2, unless the court orders otherwise. [2024, c. 2](#), Sched. 6, s. 7 (1).

Application for leave to proceed

(3) Where a person against whom an order under subsection (1) has been made seeks leave to institute or continue a proceeding, the person shall do so by way of an application in the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 140 (3); 1996, c. 25, s. 9 (17).

Leave to proceed

(4) Where an application for leave is made under subsection (3),

- (a) leave shall be granted only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding;
- (b) the person making the application for leave may seek the rescission of the order made under subsection (1) but may not seek any other relief on the application;
- (c) the court may rescind the order made under subsection (1);
- (d) the Attorney General is entitled to be heard on the application; and

(e) no appeal lies from a refusal to grant relief to the applicant. R.S.O. 1990, c. C.43, s. 140 (4).

Abuse of process

(5) Nothing in this section limits the authority of a court to stay or dismiss a proceeding as an abuse of process or on any other ground. R.S.O. 1990, c. C.43, s. 140 (5).

Deputy judges

(6) For greater certainty, a reference to a judge of the Superior Court of Justice in this section does not include a reference to a deputy judge. [2024, c. 2](#), Sched. 6, s. 7 (2).

Civil orders directed to sheriffs

141 (1) Unless an Act provides otherwise, orders of a court arising out of a civil proceeding and enforceable in Ontario shall be directed to a sheriff for enforcement.

Police to assist sheriff

(2) A sheriff who believes that the execution of an order may give rise to a breach of the peace may require a police officer to accompany the sheriff and assist in the execution of the order. R.S.O. 1990, c. C.43, s. 141.

Protection for acting under court order

142 A person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario. R.S.O. 1990, c. C.43, s. 142.

Enforcement

Bonds and recognizances

143 (1) A bond or recognizance arising out of a civil proceeding may be enforced in the same manner as an order for the payment of money by leave of a judge on motion by the Attorney General or any other person entitled to enforcement.

Fines for contempt

(2) A fine for contempt of court may be enforced by the Attorney General in the same manner as an order for the payment of money or in any other manner permitted by law.

Sheriff

(3) The sheriff to whom a writ obtained under subsection (1) or (2) is directed shall proceed immediately to carry out the writ without a direction to enforce. R.S.O. 1990, c. C.43, s. 143.

143.1 REPEALED: 1999, c. 12, Sched. B, s. 4 (4).

Orders enforceable by police

144 Warrants of committal, warrants for arrest and any other orders requiring persons to be apprehended or taken into custody shall be directed to police officers for enforcement. R.S.O. 1990, c. C.43, s. 144.

Consul as official representative

145 Where a person who is ordinarily resident in a foreign country is entitled to money or property that is in the hands of a court or an executor or administrator, and if the foreign country has a consul in Canada who is authorized to act as the person's official representative, the money or property may be paid or delivered to the consul. R.S.O. 1990, c. C.43, s. 145.

Where procedures not provided

146 Jurisdiction conferred on a court, a judge or a justice of the peace shall, in the absence of express provision for procedures for its exercise in any Act, regulation or rule, be exercised in any manner consistent with the due administration of justice. R.S.O. 1990, c. C.43, s. 146.

Seal of court

147 (1) The courts shall have such seals as are approved by the Attorney General.

Same

(2) Every document issued out of a court in a civil proceeding shall bear the seal of the court. R.S.O. 1990, c. C.43, s. 147.

Jurisdiction of Federal Court

148 The Federal Court of Canada has jurisdiction,

- (a) in controversies between Canada and Ontario;
- (b) in controversies between Ontario and any other province in which an enactment similar to this section is in force,

in accordance with [section 19](#) of the *Federal Courts Act* (Canada). R.S.O. 1990, c. C.43, s. 148.

PART VII.1

ENFORCEMENT OF CERTAIN TRADE AGREEMENTS

Application

148.1 This Part applies to the following agreements:

1. The Agreement on Internal Trade, signed in 1994 by the governments of Canada, the provinces of Canada, the Northwest Territories and the Yukon Territory, as amended from time to time.
2. The Canadian Free Trade Agreement, signed in 2017 by the governments of Canada and the provinces and territories of Canada, as amended from time to time.
3. Other prescribed domestic trade agreements that the Government of Ontario has entered into with the government of another province or territory of Canada, the Government of Canada or any combination of those governments. [2017, c. 20](#), Sched. 2, s. 6.

Enforcement of order to pay tariff costs

148.2 (1) An order against a person to pay tariff costs to a party to an agreement listed in [section 148.1](#) may, for the purpose of its enforcement only, be made an order of the Superior Court of Justice if the order is against,

- (a) a person who initiated the complaint; or
- (b) a person who was added to the complaint as a co-party with a person who initiated the complaint. [2017, c. 20](#), Sched. 2, s. 6.

Procedure

(2) To enforce an order described in subsection (1), a party in whose favour the order is made shall file a certified copy of the order with the Superior Court of Justice. [2017, c. 20](#), Sched. 2, s. 6.

Effect

(3) From the date of filing, the order has the same effect as an order of the Superior Court of Justice for the purpose of enforcement to the extent that it is authorized by the applicable agreement. [2017, c. 20](#), Sched. 2, s. 6.

Date of order

(4) For the purposes of [section 129](#), the date on which the order is filed with the Superior Court of Justice shall be deemed to be the date of the order. [2017, c. 20](#), Sched. 2, s. 6.

Regulations

148.3 The Lieutenant Governor in Council may make regulations prescribing agreements as domestic trade agreements for the purposes of this Part. [2017, c. 20](#), Sched. 2, s. 6.

PART VIII MISCELLANEOUS

Family law mediation and information services

149 (1) In this section,

“agreement” includes a contract or other instrument; (“accord”)

“service provider” means a person or entity that has entered into an agreement with the Crown in right of Ontario under subsection (2).

(“fournisseur de services”) [2018, c. 17](#), Sched. 10, s. 1.

Agreements with service providers

(2) The Attorney General may, on behalf of the Crown in right of Ontario, enter into agreements with one or more persons or entities for the provision of mediation and information services in relation to family law matters, as specified in the agreements. [2018, c. 17](#), Sched. 10, s. 1.

Fees

(3) Fees for the provision of the mediation services may be collected by or on behalf of a service provider to the extent permitted and in accordance with the agreement entered into by the service provider under subsection (2). [2018, c. 17](#), Sched. 10, s. 1.

Same

(4) Fees collected by or on behalf of a service provider in accordance with subsection (3) are not public money within the meaning of the [Financial Administration Act](#), but the fees must be used by the service provider only for or in relation to the provision of the mediation and information services, as specified in the agreement, or for any other purpose specified in the agreement. [2018, c. 17](#), Sched. 10, s. 1.

Same, publication

(5) The Ministry of the Attorney General shall publish the fees payable under subsection (3) on a Government of Ontario website. [2018, c. 17](#), Sched. 10, s. 1.

Renewal of writs of execution issued before January 1, 1985

150 A writ of execution that was issued before the 1st day of January, 1985 may be renewed in the same manner and with the same effect as a writ of execution issued on or after that day. R.S.O. 1990, c. C.43, s. 150.

References to counties for judicial purposes

151 (1) A reference in this Act or any other Act, rule or regulation to a county or district for judicial purposes is deemed to be a reference to the corresponding area that, for municipal or territorial purposes, comprises the county, district, union of counties or regional, district or metropolitan municipality.

Separated municipalities

(2) For the purpose of subsection (1), every city, town and other municipality is united to and forms part of the county in which it is situate.

Exceptions

(3) Subsection (1) is subject to the following:

1. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Haldimand-Norfolk, deemed to be a reference to the following areas:
 - i. All the area of the County of Haldimand as it existed on the 31st day of March, 1974.
 - ii. All the area of the County of Norfolk as it existed on the 31st day of March, 1974.
2. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Niagara, deemed to be a reference to the following areas:
 - i. All the area of the County of Lincoln as it existed on the 31st day of December, 1969.

- ii. All the area of the County of Welland as it existed on the 31st day of December, 1969.
- 3. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Sudbury and the Territorial District of Sudbury, deemed to be a reference to all the area in The Regional Municipality of Sudbury and in the Territorial District of Sudbury.
- 4. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of an area described below, deemed to be a reference to all the area in the areas described below:
 - i. All the area in the County of Victoria.
 - ii. All the area in the County of Haliburton.
 - iii. All the area in any part of the townships of Sherborne, McClintock, Livingstone, Lawrence and Nightingale located in Algonquin Park, so long as the part remains part of Algonquin Park. R.S.O. 1990, c. C.43, s. 151.

Meaning unchanged

151.1 Despite the repeal of the *Municipal Act*, for the purposes of this Act and any provision of another Act or regulation that relates to the operation of the courts or the administration of justice, the terms “county”, “district”, “union of counties”, “regional municipality” and “district municipality” have the same meaning as they did on December 31, 2002, unless the context otherwise requires. [2002, c. 17](#), Sched. F, Table.

SCHEDULE

APPENDIX A OF FRAMEWORK AGREEMENT

BETWEEN:

Her Majesty the Queen in right of the Province of Ontario represented by the Chair of Management Board

(“the Minister”)

and

the Judges of the Ontario Court (Provincial Division) and the former Provincial Court (Civil Division) represented by the respective Presidents of The Ontario Judges Association, The Ontario Family Law Judges Association, and the Ontario Provincial Court (Civil Division) Judges’ Association

(“the Judges”)

These are the terms to which the Minister and the Judges agree:

Definitions

1 In this agreement,

“Commission” means the Provincial Judges’ Remuneration Commission;
 (“Commission”)

“Crown” means Her Majesty the Queen in right of the Province of Ontario;
 (“Couronne”)

“judges’ associations” means the associations representing the Judges of the Ontario Court (Provincial Division) and the former Provincial Court (Civil Division); (“associations de juges”)

“parties” means the Crown and the judges’ associations. (“parties”)

Introduction

2 The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges’ compensation. It is intended that both the process of decision-making and the decisions made by the Commission shall contribute to securing and maintaining the independence of the Provincial Judges. Further, the agreement is intended to promote co-operation between the executive branch of the government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice.

3 It is the intention of the parties that the binding process created by this document will take effect with respect to the 1995 Provincial Judges Remuneration Commission, and thereafter.

4 The Minister or the Judges may designate one or more persons to act on their behalf under this agreement.

Commission and Appointments

5 The parties agree that the Provincial Judges Remuneration Commission is continued.

6 The parties agree that the Commission shall consist of the following three members:

1. One appointed jointly by the associations representing provincial judges.

2. One appointed by the Lieutenant Governor in Council.

3. One, who shall head the Commission, appointed jointly by the parties referred to in paragraphs 1 and 2.

7 The parties agree that the members of the Commission shall serve for a term of three years beginning on the first day of July in the year their inquiry under paragraph 13 is to be conducted.

8 The parties agree that the term of office of the persons who are members of the Commission on May 1, 1991 shall expire on June 30, 1995.

9 The parties agree that the members of the Commission may be reappointed when their term of office expires.

10 The parties agree that if a vacancy occurs on the Commission, a replacement may be appointed for the unexpired part of the term.

11 The parties agree that judges and public servants, as defined in the *Public Service Act*, shall not be members of the Commission.

12 The parties agree that the members of the Commission shall be paid the remuneration fixed by the Management Board of Cabinet and, subject to Management Board's approval, the reasonable expenses actually incurred in carrying out their duties.

Scope

13 The parties agree that in 1995, and in every third year after 1995, the Commission shall conduct an inquiry respecting:

(a) the appropriate base level of salaries,

(b) the appropriate design and level of pension benefits, and

(c) the appropriate level of and kind of benefits and allowances of provincial judges.

14 The parties agree that in addition to the inquiry referred to in paragraph 13, the Commission may, in its discretion, conduct any further inquiries into any matter relating to salary levels, allowances and benefits of provincial judges that are mutually agreed by the judges and the Government of Ontario.

15 The parties agree that the Commission whose term begins on July 1, 1995 and all subsequent Commissions shall begin their inquiry under paragraph 13 immediately after their term begins and shall, on or before the thirty-first day of December in the year the inquiry began, present recommendations and a report to the Chair of the Management Board of Cabinet.

16 The parties agree that the Commission shall make an annual report of its activities to the Chair of Management Board and the Chair shall table the report in the Legislature.

Powers and Procedures

17 The parties agree that the Commission may retain support services and professional services, including the services of counsel, as it considers necessary, subject to the approval of the Management Board.

18 The parties agree that the representatives of the Judges and the Lieutenant Governor in Council may confer prior to, during or following the conduct of an inquiry and may file such agreements with the Commission as they may be advised.

19 The parties agree that the Commission may participate in joint working committees with the judges and the government on specific items related to the inquiry of the Commission mentioned in paragraphs 13 and 14.

20 The parties agree that in conducting its inquiries, the Commission shall consider written and oral submissions made by provincial judges' associations and by the Government of Ontario.

21 The parties agree that the following rules govern the presentation to the Commission of submissions by provincial judges' associations and by the Government of Ontario, and their consideration by the Commission:

1. Each judges' association is entitled to receive advance disclosure of written submissions by the Government of Ontario and is entitled to make a written submission in reply.
2. The Government of Ontario is likewise entitled to receive advance disclosure of written submissions by provincial judges' associations and is entitled to make a written submission in reply.
3. When a representative of the Government of Ontario or of a judges' association makes an oral submission, the Commission may exclude from the hearing all persons except representatives of the Government of Ontario and of the judges' associations.
4. The representatives of the Government of Ontario and of the judges' associations are entitled to reply to each other's oral submissions.
5. If people have been excluded from the hearing under paragraph 3, the submissions of the Government of Ontario and of the judges' associations shall not be made public except to the extent that they are mentioned in the Commission's report.

22 The parties agree that the Commission may hold hearings, and may consider written and oral submissions from other interested persons and groups.

23 The parties agree that the Government of Ontario and the provincial judges' associations are entitled to be present when other persons make oral submissions to the Commission and are entitled to receive copies of other persons' written submissions.

24 Despite the repeal of the *Public Inquiries Act*, in connection with, and for the purposes of, any inquiry, the Commission or any member thereof has the powers of a commission under that Act.

Criteria

25 The parties agree that the Commission in making its recommendation on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:

- (a) the laws of Ontario,
- (b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial economy,
- (c) the growth or decline in real per capita income,
- (d) the parameters set by any joint working committees established by the parties,
- (e) that the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence,
- (f) any other factor which it considers relevant to the matters in issue.

Report

26 The parties agree that they may jointly submit a letter to the Commission requesting that it attempt, in the course of its deliberations under paragraph 13, to produce a unanimous report, but in the event that the Commission cannot deliver a majority report, the Report of the Chair shall be the Report of the Commission for the purpose of paragraphs 13 and 14.

Binding and Implementation

27 The recommendations of the Commission under paragraph 13, except those related to pensions, shall come into effect on the first day of April in the

year following the year the Commission began its inquiry, except in the case of salary recommendations which shall come into effect on the first of April in the year in which the Commission began its inquiry and shall have the same force and effect as if enacted by the Legislature and are in substitution for the provisions of any schedule made pursuant to this Agreement and shall be implemented by the Lieutenant Governor in Council by order-in-council within sixty days of the delivery of the Commission's report pursuant to paragraph 15.

28 The parties agree that the Commission may, within thirty days, upon application by the Crown or the judges' associations made within ten days after the delivery of its recommendations and report pursuant to paragraph 15, subject to affording the Crown and the judges' associations the opportunity to make representations thereupon to the Commission, amend, alter or vary its recommendations and report where it is shown to the satisfaction of the Commission that it has failed to deal with any matter properly arising from the inquiry under paragraph 13 or that an error relating to a matter properly under paragraph 13 is apparent on the report, and such decision is final and binding on the Crown and the judges' associations, except those related to pensions.

29 Where a difference arises between the Crown and the judges' associations relating to the implementation of recommendations properly within the scope of issues set out in paragraph 13, except those related to pensions, the difference shall be referred to the Commission and, subject to affording the Crown and the judges' associations the opportunity to make representation thereupon to the Commission, its decision is final and binding on the Crown and the judges' associations.

30 The parties agree that the recommendations with respect to pensions, or any reconsideration under paragraph 28 of a matter relating to pensions, shall be presented to the Management Board of Cabinet for consideration.

31 The parties agree the recommendations and report of the Commission following a discretionary inquiry pursuant to paragraph 14 shall be presented to the Chair of Management Board of Cabinet.

32 The parties agree that the recommendations of the Commission in consequence of an inquiry pursuant to paragraph 14 shall be given every consideration by Management Board of Cabinet, but shall not have the same force and effect as recommendations referred to in paragraph 13.

33 The parties agree that if the Management Board of Cabinet endorses recommendations referenced in paragraph 30 or 31, or some variation of those recommendations, the Chair of Management Board shall make every

effort to implement them at the earliest possible date, following subsequent approval from Cabinet.

Disputes

34 The parties agree that if disputes arise as to whether a recommendation is properly the subject of an inquiry referenced in paragraph 13, or whether the recommendation falls within the parameters of paragraph 27 or 30, or with respect to the process, either party may require the Commission to consider the matter further.

35 The parties agree that requests by either party, made under paragraph 34, shall be presented to the Commission for consideration within one month of the presentation of the report to the Chair of Management Board.

36 The parties agree that the Commission, upon receiving notice from either party as set out in paragraph 34, shall present to the Chair of Management Board a decision with respect to the said matter, within one month of receiving such notice.

37 The parties may, during the course of the Commission's inquiry set out in paragraph 34, present either written or oral positions to the Commission for consideration on the said matter, which shall be disclosed to either party.

38 The parties agree that the decision of the Commission, as set out in paragraph 36, shall be given every consideration and very great weight by the Management Board of Cabinet.

39 Neither party can utilize the dispute clauses to limit, or to narrow, the scope of the Commission's review as set out under paragraph 13, or the binding effect of recommendations within its scope as set out under paragraphs 27 and 28.

40 The parties agree that in the event that an item(s) is referred to the Commission under paragraph 34, the Minister will proceed to implement the other recommendations of the Commission as set out in paragraphs 27, 28 and 33, except where the matter in dispute under paragraph 34 directly impacts the remaining items.

Review

41 The parties agree that either party may, at any time, request the other party to meet and discuss improvements to the process.

42 The parties agree that any amendments agreed to by the parties in paragraph 41 shall have the same force and effect as if enacted by the

Legislature and are in substitution for the provisions of this Act or any schedule made pursuant to this Act.

Communication

43 The parties agree that all provincial judges should be made aware of any changes to their compensation package as a result of recommendations of the Commission.

44 The parties agree that all provincial judges should receive updated copies of legislation, regulations or schedules as necessary, related to compensation changes.

Salaries and Indexing

45 The parties agree that effective on the first day of April in every year after 1995, the annual salaries for full-time provincial judges shall be adjusted as follows:

1. Determine the Industrial Aggregate for the twelve-month period that most recently precedes the first day of April of the year for which the salaries are to be calculated.
2. Determine the Industrial Aggregate for the twelve-month period immediately preceding the period referred to in paragraph 1.
3. Calculate the percentage that the Industrial Aggregate under paragraph 1 is of the Industrial Aggregate under paragraph 2.
4. If the percentage calculated under paragraph 3 exceeds 100 per cent, the salaries are to be calculated by multiplying the appropriate salaries for the year preceding the year for which the salaries are to be calculated by the lesser of that percentage and 107 per cent.
5. If the percentage calculated under paragraph 3 does not exceed 100 per cent, the salaries shall remain unchanged.

46 In paragraph 45, "Industrial Aggregate" for a twelve-month period is the average for the twelve-month period of the weekly wages and salaries of the Industrial Aggregate in Canada as published by Statistics Canada under the authority of the [Statistics Act](#) (Canada).

47 The salaries, allowances and benefits of provincial judges shall be paid out of the Consolidated Revenue Fund.

Additional Provisions

48 This agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and assigns.

APPENDIX B OF FRAMEWORK AGREEMENT
JUDICIAL SALARIES

Date	Formula
April 1, 1991	\$124,250
April 1, 1992	0%
April 1, 1993	AIW (Note: See paragraph 46 of Appendix "A")
April 1, 1994	AIW (Note: See paragraph 46 of Appendix "A")

1994, c. 12, s. 48; [2009, c. 33](#), Sched. 6, s. 50.

Note: A reference in a court seal or printed court form to the name of a court or the title of an official changed by the Statutes of Ontario, 1996, chapter 25, section 8 does not prevent the form or seal from being used during the one year period following April 19, 1999. This section applies only to court seals and printed court forms in existence on that date. See: 1996, c. 25, ss. 10, 11 (2).

Tab 62

Interpretation Act, RSC 1985, c I-21



Current version: in force since 2024-11-27

Link to this version: <https://canlii.ca/t/56fd8>

Citation to this version: Interpretation Act, RSC 1985, c I-21, <<https://canlii.ca/t/56fd8>> retrieved on 2026-03-23

Currency: This statute is current to 2026-03-02 according to the [Justice Laws Web Site](#)

Interpretation Act

R.S.C., 1985, c. I-21

An [Act respecting the interpretation of statutes](#) and regulations

Short Title

Short title

1 This Act may be cited as the *Interpretation Act*.

R.S., c. I-23, s. 1.

Interpretation

Definitions

2 (1) In this Act,

Act means an Act of Parliament; (*loi*)

enact includes to issue, make or establish; (*Version anglaise seulement*)

enactment means an Act or regulation or any portion of an Act or regulation; (*texte*)

public officer includes any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a

power, or on whom a duty is imposed by or under an enactment; (*fonctionnaire public*)

regulation includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(a) in the execution of a power conferred by or under the authority of an Act, or

(b) by or under the authority of the Governor in Council; (*règlement*)

repeal includes revoke or cancel. (*Version anglaise seulement*)

Expired and replaced enactments

(2) For the purposes of this Act, an enactment that has been replaced is repealed and an enactment that has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed.

R.S., 1985, c. I-21, s. 2; 1993, c. 34, s. 88; 1999, c. 31, s. 146; [2003, c. 22, s. 224\(E\)](#).

Application

Application

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

Application to this Act

(2) The provisions of this Act apply to the interpretation of this Act.

Rules of construction not excluded

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act.

R.S., c. I-23, s. 3.

Enacting Clause of Acts

Enacting clause

4 (1) The enacting clause of an Act may be in the following form:

“Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:”.

Order of clauses

(2) The enacting clause of an Act shall follow the preamble, if any, and the various provisions within the purview or body of the Act shall follow in a concise and enunciative form.

Operation

Royal Assent

Royal assent

5 (1) The Clerk of the Parliaments shall endorse on every Act, immediately after its title, the day, month and year when the Act was assented to in Her Majesty's name and the endorsement shall be a part of the Act.

Date of commencement

(2) If no date of commencement is provided for in an Act, the date of commencement of that Act is the date of assent to the Act.

Commencement provision

(3) Where an Act contains a provision that the Act or any portion thereof is to come into force on a day later than the date of assent to the Act, that provision is deemed to have come into force on the date of assent to the Act.

Commencement when no date fixed

(4) Where an Act provides that certain provisions thereof are to come or are deemed to have come into force on a day other than the date of assent to the Act, the remaining provisions of the Act are deemed to have come into force on the date of assent to the Act.

R.S., c. I-23, s. 5.

Day Fixed for Commencement or Repeal

Operation when date fixed for commencement or repeal

6 (1) Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force on the expiration of the previous day, and where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect on the commencement of the following day.

When no date fixed

(2) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force

(a) in the case of an Act, on the expiration of the day immediately before the day the Act was assented to in Her Majesty's name; and

(b) in the case of a regulation, on the expiration of the day immediately before the day the regulation was registered pursuant to [section 6](#) of the *Statutory Instruments Act* or, if the regulation is of a class that is exempted from the application of [subsection 5\(1\)](#) of that Act, on the expiration of the day immediately before the day the regulation was made.

Judicial notice

(3) Judicial notice shall be taken of a day for the coming into force of an enactment that is fixed by a regulation that has been published in the *Canada Gazette*.

R.S., 1985, c. I-21, s. 6; 1992, c. 1, s. 87.

Regulation Prior to Commencement

Preliminary proceedings

7 Where an enactment is not in force and it contains provisions conferring power to make regulations or do any other thing, that power may, for the purpose of making the enactment effective on its commencement, be exercised at any time before its commencement, but a regulation so made or a thing so done has no effect until the commencement of the enactment, except in so far as may be necessary to make the enactment effective on its commencement.

R.S., c. I-23, s. 7.

Territorial Operation

Territorial operation

8 (1) Every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment.

Amending enactment

(2) Where an enactment that does not apply to the whole of Canada is amended, no provision in the amending enactment applies to any part of Canada to which the amended enactment does not apply, unless it is provided in the amending enactment that it applies to that part of Canada or to the whole of Canada.

Exclusive economic zone of Canada

(2.1) Every enactment that applies in respect of exploring or exploiting, conserving or managing natural resources, whether living or non-living, applies, in addition to its application to Canada, to the exclusive economic zone of Canada, unless a contrary intention is expressed in the enactment.

Continental shelf of Canada

(2.2) Every enactment that applies in respect of exploring or exploiting natural resources that are

(a) mineral or other non-living resources of the seabed or subsoil, or

(b) living organisms belonging to sedentary species, that is to say, organisms that, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or subsoil

applies, in addition to its application to Canada, to the continental shelf of Canada, unless a contrary intention is expressed in the enactment.

Extra-territorial operation

(3) Every Act now in force enacted prior to December 11, 1931 that expressly or by necessary or reasonable implication was intended, as to the whole or any part thereof, to have extra-territorial operation shall be construed as if, at the date of its enactment, the Parliament of Canada had full power to make laws having extra-territorial operation as provided by the *Statute of Westminster, 1931*.

R.S., 1985, c. I-21, s. 8; 1996, c. 31, s. 86.

Rules of Construction

Property and Civil Rights

Duality of legal traditions and application of provincial law

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

2001, c. 4, s. 8.

Terminology

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

2001, c. 4, s. 8.

Indigenous Peoples

Rights of Indigenous peoples

8.3 (1) Every enactment is to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by [section 35](#) of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

Indigenous peoples

(2) For the purposes of subsection (1), **Indigenous peoples** has the meaning assigned by the definition *aboriginal peoples of Canada* in [subsection 35\(2\)](#) of the [Constitution Act, 1982](#).

[2024, c. 30, s. 1.](#)

Private Acts

Provisions in private Acts

9 No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

[R.S., c. I-23, s. 9.](#)

Law Always Speaking

Law always speaking

10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

[R.S., c. I-23, s. 10.](#)

Imperative and Permissive Construction

“Shall” and “may”

11 The expression “shall” is to be construed as imperative and the expression “may” as permissive.

[R.S., c. I-23, s. 28.](#)

Enactments Remedial

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[R.S., c. I-23, s. 11.](#)

Preambles and Marginal Notes

Preamble

13 The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

[R.S., c. I-23, s. 12.](#)

Marginal notes and historical references

14 Marginal notes and references to former enactments that appear after the end of a section or other division in an enactment form no part of the enactment, but are inserted for convenience of reference only.

R.S., c. I-23, s. 13.

Application of Interpretation Provisions

Application of definitions and interpretation rules

15 (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

Interpretation sections subject to exceptions

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(a) as being applicable only if a contrary intention does not appear; and

(b) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

R.S., c. I-23, s. 14.

Words in regulations

16 Where an enactment confers power to make regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

R.S., c. I-23, s. 15.

Her Majesty

Her Majesty not bound or affected unless stated

17 No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

R.S., c. I-23, s. 16.

Proclamations

Proclamation

18 (1) Where an enactment authorizes the issue of a proclamation, the proclamation shall be understood to be a proclamation of the Governor in Council.

Proclamation to be issued on advice

(2) Where the Governor General is authorized to issue a proclamation, the proclamation shall be understood to be a proclamation issued under an order of the Governor in Council, but it is not necessary to mention in the proclamation that it is issued under such an order.

Effective day of proclamations

(3) A proclamation that is issued under an order of the Governor in Council may purport to have been issued on the day of the order or on any subsequent day and, if so, takes effect on that day.

(4) [Repealed, 1992, c. 1, s. 88]

R.S., 1985, c. I-21, s. 18; 1992, c. 1, s. 88.

Oaths

Administration of oaths

19 (1) Where, by an enactment or by a rule of the Senate or House of Commons, evidence under oath is authorized or required to be taken, or an oath is authorized or directed to be made, taken or administered, the oath may be administered, and a certificate of its having been made, taken or administered may be given by

(a) any person authorized by the enactment or rule to take the evidence; or

(b) a judge of any court, a notary public, a justice of the peace or a commissioner for taking affidavits, having authority or jurisdiction within the place where the oath is administered.

Where justice of peace empowered

(2) Where power is conferred on a justice of the peace to administer an oath or solemn affirmation or to take an affidavit or declaration, the power may be exercised by a notary public or a commissioner for taking oaths.

R.S., c. I-23, s. 18.

Reports to Parliament

Reports to Parliament

20 Where an Act requires a report or other document to be laid before Parliament and, in compliance with the Act, a particular report or document has been laid before Parliament at a session thereof, nothing in the Act shall be construed as requiring the same report or document to be laid before Parliament at any subsequent session.

R.S., c. I-23, s. 19.

Corporations

Powers vested in corporations

21 (1) Words establishing a corporation shall be construed

(a) as vesting in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property for the purposes for which the corporation is established and to alienate that property at pleasure;

(b) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, as vesting in the corporation power to use either the English or the French form of its name or both forms and to show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;

(c) as vesting in a majority of the members of the corporation the power to bind the others by their acts; and

(d) as exempting from personal liability for its debts, obligations or acts individual members of the corporation who do not contravene the provisions of the enactment establishing the corporation.

Corporate name

(2) Where an enactment establishes a corporation and in each of the English and French versions of the enactment the name of the corporation is in the form only of the language of that version, the name of the corporation shall consist of the form of its name in each of the versions of the enactment.

Banking business

(3) No corporation is deemed to be authorized to carry on the business of banking unless that power is expressly conferred on it by the enactment establishing the corporation.

R.S., c. I-23, s. 20.

Majority and Quorum

Majorities

22 (1) Where an enactment requires or authorizes more than two persons to do an act or thing, a majority of them may do it.

Quorum of board, court, commission, etc.

(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members, in this section called an "association",

(a) at a meeting of the association, a number of members of the association equal to,

(i) if the number of members provided for by the enactment is a fixed number, at least one-half of the number of members, and

(ii) if the number of members provided for by the enactment is not a fixed number but is within a range having a maximum or minimum, at least one-half of the number of members in office if that number is within the range,

constitutes a quorum;

(b) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, is deemed to have been done by the association; and

(c) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

R.S., c. I-23, s. 21.

Appointment, Retirement and Powers of Officers

Public officers hold office during pleasure

23 (1) Every public officer appointed by or under the authority of an enactment or otherwise is deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment, commission or instrument of appointment.

Effective day of appointments

(2) Where an appointment is made by instrument under the Great Seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued is deemed to be the day on which the appointment takes effect.

Appointment or engagement otherwise than under Great Seal

(3) Where there is authority in an enactment to appoint a person to a position or to engage the services of a person, otherwise than by instrument under the Great Seal, the instrument of appointment or engagement may be expressed to be effective on or after the day on which that person commenced the performance of the duties of the position or commenced the performance of the services, and the day on which it is so expressed to be effective, unless that day is more than sixty days before the day on which the instrument is issued, is deemed to be the day on which the appointment or engagement takes effect.

Remuneration

(4) Where a person is appointed to an office, the appointing authority may fix, vary or terminate that person's remuneration.

Commencement of appointments or retirements

(5) Where a person is appointed to an office effective on a specified day, or where the appointment of a person is terminated effective on a specified day, the appointment or

termination is deemed to have been effected immediately on the expiration of the previous day.

R.S., c. I-23, s. 22.

Implied powers respecting public officers

24 (1) Words authorizing the appointment of a public officer to hold office during pleasure include, in the discretion of the authority in whom the power of appointment is vested, the power to

- (a) terminate the appointment or remove or suspend the public officer;
- (b) re-appoint or reinstate the public officer; and
- (c) appoint another person in the stead of, or to act in the stead of, the public officer.

Power to act for ministers

(2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include

- (a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;
- (b) the successors of that minister in the office;
- (c) his or their deputy; and
- (d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

Restriction as to public servants

(3) Nothing in paragraph (2)(c) or (d) shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the [Statutory Instruments Act](#).

Successors to and deputy of public officer

(4) Words directing or empowering any public officer, other than a minister of the Crown, to do any act or thing, or otherwise applying to the public officer by his name or office, include his successors in the office and his or their deputy.

Powers of holder of public office

(5) Where a power is conferred or a duty imposed on the holder of an office, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

R.S., 1985, c. I-21, s. 24; 1992, c. 1, s. 89.

Evidence

Documentary evidence

25 (1) Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

Queen's Printer

(2) Every copy of an enactment having printed thereon what purports to be the name or title of the Queen's Printer and Controller of Stationery or the Queen's Printer is deemed to be a copy purporting to be printed by the Queen's Printer for Canada.

R.S., c. I-23, s. 24.

Computation of Time

Time limits and holidays

26 Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

R.S., 1985, c. I-21, s. 26; 1999, c. 31, s. 147(F).

Clear days

27 (1) Where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating that number of days the days on which the events happen are excluded.

Not clear days

(2) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included.

Beginning and ending of prescribed periods

(3) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

After specified day

(4) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.

Within a time

(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

Calculation of a period of months after or before a specified day

28 Where there is a reference to a period of time consisting of a number of months after or before a specified day, the period is calculated by

- (a) counting forward or backward from the specified day the number of months, without including the month in which that day falls;
- (b) excluding the specified day; and
- (c) including in the last month counted under paragraph (a) the day that has the same calendar number as the specified day or, if that month has no day with that number, the last day of that month.

Time of the day

29 Where there is a reference to time expressed as a specified time of the day, the time is taken to mean standard time.

Time when specified age attained

30 A person is deemed not to have attained a specified number of years of age until the commencement of the anniversary, of the same number, of the day of that person's birth.

Miscellaneous Rules

Reference to provincial court judge, etc.

31 (1) Where anything is required or authorized to be done by or before a judge, provincial court judge, justice of the peace or any functionary or officer, it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done.

Ancillary powers

(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

Powers to be exercised as required

(3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

Power to repeal

(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.

R.S., 1985, c. I-21, s. 31; R.S., 1985, c. 27 (1st Supp.), s. 203.

Forms

32 Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used.

R.S., c. I-23, s. 26.

Gender

33 (1) Words importing female persons include male persons and corporations and words importing male persons include female persons and corporations.

Number

(2) Words in the singular include the plural, and words in the plural include the singular.

Parts of speech and grammatical forms

(3) Where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings.

R.S., 1985, c. I-21, s. 33; 1992, c. 1, s. 90.

Offences

Indictable and summary conviction offences

34 (1) Where an enactment creates an offence,

(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;

(b) the offence is deemed to be one for which the offender is punishable on summary conviction if there is nothing in the context to indicate that the offence is an indictable offence; and

(c) if the offence is one for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, no person shall be considered to have been convicted of an indictable offence by reason only of having been convicted of the offence on summary conviction.

***Criminal Code* to apply**

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

Documents similarly construed

(3) In a commission, proclamation, warrant or other document relating to criminal law or procedure in criminal matters,

(a) a reference to an offence for which the offender may be prosecuted by indictment shall be construed as a reference to an indictable offence; and

(b) a reference to any other offence shall be construed as a reference to an offence for which the offender is punishable on summary conviction.

R.S., c. I-23, s. 27.

Powers to Enter Dwelling-houses to Carry out Arrests

Authorization to enter dwelling-house

34.1 Any person who may issue a warrant to arrest or apprehend a person under any Act of Parliament, other than the *Criminal Code*, has the same powers, subject to the same terms and conditions, as a judge or justice has under the *Criminal Code*

(a) to authorize the entry into a dwelling-house described in the warrant for the purpose of arresting or apprehending the person, if the person issuing the warrant is satisfied by information on oath that there are reasonable grounds to believe that the person is or will be present in the dwelling-house; and

(b) to authorize the entry into the dwelling-house without prior announcement if the requirement of [subsection 529.4\(1\)](#) of the *Criminal Code* is met.

1997, c. 39, s. 4.

Definitions

General definitions

35 (1) In every enactment,

Act, in respect of an Act of a legislature, includes a law of the Legislature of Yukon, of the Northwest Territories or for Nunavut; (*loi provinciale*)

bank means a bank listed in Schedule I or II to the *Bank Act*; (*banque*)

British Commonwealth or **British Commonwealth of Nations** has the same meaning as *Commonwealth*; (*Commonwealth, Commonwealth britannique, Commonwealth des nations ou Commonwealth des nations britanniques*)

broadcasting means any radiocommunication in which the transmissions are intended for direct reception by the general public; (*radiodiffusion*)

Canada, for greater certainty, includes the internal waters of Canada and the territorial sea of Canada; (*Canada*)

Canadian waters includes the territorial sea of Canada and the internal waters of Canada; (*eaux canadiennes*)

Clerk of the Privy Council or **Clerk of the Queen's Privy Council** means the Clerk of the Privy Council and Secretary to the Cabinet; (*greffier du Conseil privé* ou *greffier du Conseil privé de la Reine*)

commencement, when used with reference to an enactment, means the time at which the enactment comes into force; (*Version anglaise seulement*)

Commonwealth or **Commonwealth of Nations** means the association of countries named in the schedule; (*Commonwealth, Commonwealth britannique, Commonwealth des nations* ou *Commonwealth des nations britanniques*)

Commonwealth and Dependent Territories means the several Commonwealth countries and their colonies, possessions, dependencies, protectorates, protected states, condominiums and trust territories; (*Commonwealth et dépendances*)

contiguous zone,

(a) in relation to Canada, means the contiguous zone of Canada as determined under the [Oceans Act](#), and

(b) in relation to any other state, means the contiguous zone of the other state as determined in accordance with international law and the domestic laws of that other state; (*zone contiguë*)

continental shelf,

(a) in relation to Canada, means the continental shelf of Canada as determined under the [Oceans Act](#), and

(b) in relation to any other state, means the continental shelf of the other state as determined in accordance with international law and the domestic laws of that other state; (*plateau continental*)

contravene includes fail to comply with; (*contravention*)

corporation does not include a partnership that is considered to be a separate legal entity under provincial law; (*personne morale*)

county includes two or more counties united for purposes to which the enactment relates; (*comté*)

county court [Repealed, 1990, c. 17, s. 26]

diplomatic or consular officer includes an ambassador, envoy, minister, chargé d'affaires, counsellor, secretary, attaché, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul, acting consular agent, high commissioner, permanent delegate, adviser, acting high commissioner, and acting permanent delegate; (*agent diplomatique ou consulaire*)

exclusive economic zone,

(a) in relation to Canada, means the exclusive economic zone of Canada as determined under the *Oceans Act* and includes the seabed and subsoil below that zone, and

(b) in relation to any other state, means the exclusive economic zone of the other state as determined in accordance with international law and the domestic laws of that other state; (*zone économique exclusive*)

Federal Court [Repealed, 2002, c. 8, s. 151]

Federal Court — Appeal Division or **Federal Court of Appeal** [Repealed, 2002, c. 8, s. 151]

Federal Court — Trial Division [Repealed, 2002, c. 8, s. 151]

Governor, Governor General or **Governor of Canada** means the Governor General of Canada or other chief executive officer or administrator carrying on the Government of Canada on behalf and in the name of the Sovereign, by whatever title that officer is designated; (*gouverneur, gouverneur du Canada ou gouverneur général*)

Governor General in Council or **Governor in Council** means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada; (*gouverneur en conseil ou gouverneur général en conseil*)

Great Seal means the Great Seal of Canada; (*grand sceau*)

Her Majesty, His Majesty, the Queen, the King or **the Crown** means the Sovereign of the United Kingdom, Canada and Her or His other Realms and Territories, and Head of the Commonwealth; (*Sa Majesté, la Reine, le Roi ou la Couronne*)

Her Majesty's Realms and Territories or **His Majesty's Realms and Territories** means all realms and territories under the sovereignty of Her or His Majesty; (*royaumes et territoires de Sa Majesté*)

herein used in any section shall be understood to relate to the whole enactment, and not to that section only; (*Version anglaise seulement*)

holiday means any of the following days, namely, Sunday; New Year's Day; Good Friday; Easter Monday; Christmas Day; the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning Sovereign; Victoria Day; Canada Day; the first Monday in September, designated Labour Day; National Day for Truth and Reconciliation, which is observed on September 30; Remembrance Day; any day appointed by proclamation to be observed as a day of general prayer or mourning or day of public rejoicing or thanksgiving; and any of the following additional days, namely,

(a) in any province, any day appointed by proclamation of the lieutenant governor of the province to be observed as a public holiday or as a day of general prayer or

mourning or day of public rejoicing or thanksgiving within the province, and any day that is a non-juridical day by virtue of an Act of the legislature of the province, and

(b) in any city, town, municipality or other organized district, any day appointed to be observed as a civic holiday by resolution of the council or other authority charged with the administration of the civic or municipal affairs of the city, town, municipality or district; (*jour férié*)

internal waters,

(a) in relation to Canada, means the internal waters of Canada as determined under the [Oceans Act](#) and includes the airspace above and the bed and subsoil below those waters, and

(b) in relation to any other state, means the waters on the landward side of the baselines of the territorial sea of the other state; (*eaux intérieures*)

legislative assembly, legislative council or legislature [Repealed, 2014, c. 2, s. 14]

legislative assembly or legislature includes the Lieutenant Governor in Council and the Legislative Assembly of the Northwest Territories, as constituted before September 1, 1905, and the Legislature of Yukon, of the Northwest Territories or for Nunavut; (*législature ou assemblée législative*)

lieutenant governor means the lieutenant governor or other chief executive officer or administrator carrying on the government of the province indicated by the enactment, by whatever title that officer is designated, and in Yukon, the Northwest Territories and Nunavut means the Commissioner; (*lieutenant-gouverneur*)

lieutenant governor in council means

(a) the lieutenant governor of the province indicated by the enactment acting by and with the advice of, by and with the advice and consent of, or in conjunction with, the executive council,

(b) in Yukon, the Commissioner of Yukon acting with the consent of the Executive Council of Yukon,

(c) in the Northwest Territories, the Commissioner of the Northwest Territories acting with the consent of the Executive Council of the Northwest Territories, and

(d) in Nunavut, the Commissioner; (*lieutenant-gouverneur en conseil*)

local time, in relation to any place, means the time observed in that place for the regulation of business hours; (*heure locale*)

military shall be construed as relating to all or any part of the Canadian Forces; (*militaire*)

month means a calendar month; (*mois*)

oath includes a solemn affirmation or declaration when the context applies to any person by whom and to any case in which a solemn affirmation or declaration may be made instead of an oath, and in the same cases the expression ***sworn*** includes the expression “affirmed” or “declared”; (*serment*)

Parliament means the Parliament of Canada; (*Parlement*)

person, or any word or expression descriptive of a person, includes a corporation; (*personne*)

proclamation means a proclamation under the Great Seal; (*proclamation*)

province means a province of Canada, and includes Yukon, the Northwest Territories and Nunavut; (*province*)

radio or ***radiocommunication*** means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide; (*radiocommunication* ou *radio*)

regular force means the component of the Canadian Forces that is referred to in the [National Defence Act](#) as the regular force; (*force régulière*)

reserve force means the component of the Canadian Forces that is referred to in the [National Defence Act](#) as the reserve force; (*force de réserve*)

security means sufficient security, and ***sureties*** means sufficient sureties, and when those words are used one person is sufficient therefor, unless otherwise expressly required; (*caution* ou *cautionnement*)

standard time, except as otherwise provided by any proclamation of the Governor in Council that may be issued for the purposes of this definition in relation to any province or territory or any part thereof, means

(a) in relation to the Province of Newfoundland and Labrador, Newfoundland standard time, being three hours and thirty minutes behind Greenwich time,

(b) in relation to the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, that part of the Province of Quebec lying east of the sixty-third meridian of west longitude, and that part of Nunavut lying east of the sixty-eighth meridian of west longitude, Atlantic standard time, being four hours behind Greenwich time,

(c) in relation to that part of the Province of Quebec lying west of the sixty-third meridian of west longitude, that part of the Province of Ontario lying between the sixty-eighth and the ninetieth meridians of west longitude, Southampton Island and the islands adjacent to Southampton Island, and that part of Nunavut lying between the sixty-eighth and the eighty-fifth meridians of west longitude, eastern standard time, being five hours behind Greenwich time,

(d) in relation to that part of the Province of Ontario lying west of the ninetieth meridian of west longitude, the Province of Manitoba, and that part of Nunavut, except

Southampton Island and the islands adjacent to Southampton Island, lying between the eighty-fifth and the one hundred and second meridians of west longitude, central standard time, being six hours behind Greenwich time,

(e) in relation to the Provinces of Saskatchewan and Alberta, the Northwest Territories and that part of Nunavut lying west of the one hundred and second meridian of west longitude, mountain standard time, being seven hours behind Greenwich time,

(f) in relation to the Province of British Columbia, Pacific standard time, being eight hours behind Greenwich time, and

(g) in relation to Yukon, Yukon standard time, being nine hours behind Greenwich time; (*heure normale*)

statutory declaration means a solemn declaration made pursuant to [section 41](#) of the [Canada Evidence Act](#); (*déclaration solennelle*)

superior court means

(a) in the Province of Newfoundland and Labrador, the Supreme Court,

(a.1) in the Province of Ontario, the Court of Appeal for Ontario and the Superior Court of Justice,

(b) in the Province of Quebec, the Court of Appeal and the Superior Court in and for the Province,

(c) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, the Court of Appeal for the Province and the Court of Queen's Bench for the Province,

(d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Court of Appeal and the Supreme Court of the Province, and

(e) the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice,

and includes the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada; (*juridiction supérieure ou cour supérieure*)

telecommunications means the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system; (*télécommunication*)

territorial sea,

(a) in relation to Canada, means the territorial sea of Canada as determined under the [Oceans Act](#) and includes the airspace above and the seabed and subsoil below that sea, and

(b) in relation to any other state, means the territorial sea of the other state as determined in accordance with international law and the domestic laws of that other state; (*mer territoriale*)

territory means Yukon, the Northwest Territories and Nunavut; (*territoires*)

two justices means two or more justices of the peace, assembled or acting together; (*deux juges de paix*)

United Kingdom means the United Kingdom of Great Britain and Northern Ireland; (*Royaume-Uni*)

United States means the United States of America; (*États-Unis*)

writing, or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form. (*écrit*)

Governor in Council may amend schedule

(2) The Governor in Council may, by order, amend the schedule by adding thereto the name of any country recognized by the order to be a member of the Commonwealth or deleting therefrom the name of any country recognized by the order to be no longer a member of the Commonwealth.

R.S., 1985, c. I-21, s. 35; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 26; 1992, c. 1, s. 91, c. 47, s. 79, c. 51, s. 56; 1993, c. 28, s. 78, c. 38, s. 87; 1995, c. 39, s. 174; 1996, c. 31, s. 87; 1998, c. 15, s. 28, c. 30, ss. 13(F), 15(E); 1999, c. 3, s. 71, c. 28, s. 168; [2002, c. 7, s. 188](#), c. 8, s. 151; [2014, c. 2, s. 14](#); [2015, c. 3, s. 124](#); [2021, c. 11, s. 3](#).

Construction of telegraph

36 The expression **telegraph** and its derivatives, in an enactment or in an Act of the legislature of any province enacted before that province became part of Canada on any subject that is within the legislative powers of Parliament, are deemed not to include the word “telephone” or its derivatives.

R.S., c. I-23, s. 29.

Construction of year

37 (1) The expression **year** means any period of twelve consecutive months, except that a reference

(a) to a **calendar year** means a period of twelve consecutive months commencing on January 1;

(b) to a **financial year** or **fiscal year** means, in relation to money provided by Parliament, or the Consolidated Revenue Fund, or the accounts, taxes or finances of Canada, the period beginning on April 1 in one calendar year and ending on March 31 in the next calendar year; and

(c) by number to a Dominical year means the period of twelve consecutive months commencing on January 1 of that Dominical year.

Governor in Council may define year

(2) Where in an enactment relating to the affairs of Parliament or the Government of Canada there is a reference to a period of a year without anything in the context to indicate beyond doubt whether a financial or fiscal year, any period of twelve consecutive months or a period of twelve consecutive months commencing on January 1 is intended, the Governor in Council may prescribe which of those periods of twelve consecutive months shall constitute a year for the purposes of the enactment.

R.S., c. I-23, ss. 28, 31.

Common names

38 The name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied, although the name is not the formal or extended designation thereof.

R.S., c. I-23, s. 30.

Affirmative and negative resolutions

39 (1) In every Act,

(a) the expression ***subject to affirmative resolution of Parliament***, when used in relation to any regulation, means that the regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and shall not come into force unless and until it is affirmed by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses;

(b) the expression ***subject to affirmative resolution of the House of Commons***, when used in relation to any regulation, means that the regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that the House is sitting and shall not come into force unless and until it is affirmed by a resolution of the House of Commons introduced and passed in accordance with the rules of that House;

(c) the expression ***subject to negative resolution of Parliament***, when used in relation to any regulation, means that the regulation shall be laid before Parliament within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting and may be annulled by a resolution of both Houses of Parliament introduced and passed in accordance with the rules of those Houses; and

(d) the expression ***subject to negative resolution of the House of Commons***, when used in relation to any regulation, means that the regulation shall be laid before the House of Commons within fifteen days after it is made or, if the House is not then sitting, on any of the first fifteen days next thereafter that the House is sitting and may be annulled by a resolution of the House of Commons introduced and passed in accordance with the rules of that House.

Effect of negative resolution

(2) Where a regulation is annulled by a resolution of Parliament or of the House of Commons, it is deemed to have been revoked on the day the resolution is passed and any law that was revoked or amended by the making of that regulation is deemed to be revived on the day the resolution is passed, but the validity of any action taken or not taken in compliance with a regulation so deemed to have been revoked shall not be affected by the resolution.

R.S., c. 29(2nd Supp.), s. 1.

References and Citations

Citation of enactment

40 (1) In an enactment or document,

(a) an Act may be cited by reference to its chapter number in the Revised Statutes, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted or by reference to its long title or short title, with or without reference to its chapter number; and

(b) a regulation may be cited by reference to its long title or short title, by reference to the Act under which it was made or by reference to the number or designation under which it was registered by the Clerk of the Privy Council.

Citation includes amendment

(2) A citation of or reference to an enactment is deemed to be a citation of or reference to the enactment as amended.

R.S., c. I-23, s. 32.

Reference to two or more parts, etc.

41 (1) A reference in an enactment by number or letter to two or more parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses, schedules, appendices or forms shall be read as including the number or letter first mentioned and the number or letter last mentioned.

Reference in enactments to parts, etc.

(2) A reference in an enactment to a part, division, section, schedule, appendix or form shall be read as a reference to a part, division, section, schedule, appendix or form of the enactment in which the reference occurs.

Reference in enactment to subsections, etc.

(3) A reference in an enactment to a subsection, paragraph, subparagraph, clause or subclause shall be read as a reference to a subsection, paragraph, subparagraph, clause or subclause of the section, subsection, paragraph, subparagraph or clause, as the case may be, in which the reference occurs.

Reference to regulations

(4) A reference in an enactment to regulations shall be read as a reference to regulations made under the enactment in which the reference occurs.

Reference to another enactment

(5) A reference in an enactment by number or letter to any section, subsection, paragraph, subparagraph, clause, subclause or other division or line of another enactment shall be read as a reference to the section, subsection, paragraph, subparagraph, clause, subclause or other division or line of such other enactment as printed by authority of law.

R.S., c. I-23, s. 33.

Repeal and Amendment

Power of repeal or amendment reserved

42 (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

Amendment or repeal at same session

(2) An Act may be amended or repealed by an Act passed in the same session of Parliament.

Amendment part of enactment

(3) An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

R.S., c. I-23, s. 34.

Effect of repeal

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

(a) revive any enactment or anything not in force or existing at the time when the repeal takes effect,

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,

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

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

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

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

R.S., c. I-23, s. 35.

Repeal and substitution

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

(a) every person acting under the former enactment shall continue to act, as if appointed under the new enactment, until another person is appointed in the stead of that person;

(b) every bond and security given by a person appointed under the former enactment remains in force, and all books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal in so far as they are consistent with the new enactment;

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

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

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

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

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

(e) when any punishment, penalty or forfeiture is reduced or mitigated by the new enactment, the punishment, penalty or forfeiture if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(g) all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(h) any reference in an unrepealed enactment to the former enactment shall, with respect to a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

R.S., c. I-23, s. 36.

Repeal does not imply enactment was in force

45 (1) The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

Amendment does not imply change in law

(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

Repeal does not declare previous law

(3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

Judicial construction not adopted

(4) A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

R.S., c. I-23, s. 37.

Demise of Crown

Effect of demise

46 (1) Where there is a demise of the Crown,

(a) the demise does not affect the holding of any office under the Crown in right of Canada; and

(b) it is not necessary by reason of the demise that the holder of any such office again be appointed thereto or, having taken an oath of office or allegiance before the demise, again take that oath.

Continuation of proceedings

(2) No writ, action or other process or proceeding, civil or criminal, in or issuing out of any court established by an Act is, by reason of a demise of the Crown, determined, abated, discontinued or affected, but every such writ, action, process or proceeding remains in full force and may be enforced, carried on or otherwise proceeded with or completed as though there had been no such demise.

R.S., c. I-23, s. 38.

SCHEDULE

(Section 35)

Antigua and Barbuda

Australia

The Bahamas

Bangladesh

Barbados

Belize

Botswana

Brunei Darussalam

Canada

Cyprus

Dominica

Fiji

Gambia

Ghana

Grenada

Guyana

India

Jamaica

Kenya

Kiribati

Lesotho

Malawi

Malaysia

Maldives

Malta

Mauritius

Nauru
New Zealand
Nigeria
Pakistan
Papua New Guinea
St. Christopher and Nevis
St. Lucia
St. Vincent and the Grenadines
Seychelles
Sierra Leone
Singapore
Solomon Islands
South Africa
Sri Lanka
Swaziland
Tanzania
Tonga
Trinidad and Tobago
Tuvalu
Uganda
United Kingdom
Vanuatu
Western Samoa
Zambia
Zimbabwe

R.S., 1985, c. I-21, Sch.; SOR/86-532; SOR/93-140; SOR/95-366.

Tab 63

Evidence Act, RSO 1990, c E.23



Current version: in force since 2024-03-06

Link to this version: <https://canlii.ca/t/5671x>

Citation to this version: Evidence Act, RSO 1990, c E.23, <<https://canlii.ca/t/5671x>> retrieved on 2026-03-23

Currency: Last updated from the [e-Laws](#) site on 2026-03-16

Evidence Act

R.S.O. 1990, CHAPTER E.23

Consolidation Period: From March 6, 2024 to the [e-Laws currency date](#).

Last amendment: 2024, c. 2, Sched. 19, s. 6.

Definitions

1 In this Act,

“action” includes an issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario; (“action”)

“court” includes a judge, arbitrator, umpire, commissioner, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence; (“tribunal”)

“spouse” means a spouse as defined in section 1 of the *Family Law Act*. (“conjoint”) R.S.O. 1990, c. E.23, s. 1; 2005, c. 5, s. 25 (1).

Application of Act

2 This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction. R.S.O. 1990, c. E.23, s. 2.

Administration of oaths and affirmations

Authorized persons

3 (1) Where by any Act of the Legislature or order of the Assembly an oath or affirmation is authorized or directed to be administered, the oath or affirmation may be administered by any person authorized to take affidavits in Ontario. R.S.O. 1990, c. E.23, s. 3 (1).

Courts

(2) Every court has power to administer or cause to be administered an oath or affirmation to every witness who is called to give evidence before the court. R.S.O. 1990, c. E.23, s. 3 (2).

Certification

4 Where an oath, affirmation or declaration is directed to be made before a person, he or she has power and authority to administer it and to certify to its having been made. R.S.O. 1990, c. E.23, s. 4.

Recordings and transcripts of evidence

Recording

5 (1) Despite any Act, regulation or the rules of court, a stenographic reporter, shorthand writer, stenographer or other person who is authorized to record evidence and proceedings in an action in a court or in a proceeding authorized by or under any Act may record the evidence and the proceedings by any form of shorthand or by any device for recording sound of a type approved by the Attorney General. R.S.O. 1990, c. E.23, s. 5 (1).

Admissibility of transcripts

(2) Despite any Act or regulation or the rules of court, a transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection (1) and that has or have been certified in accordance with the Act, regulation or rule of court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he or she has read or signed the transcript. R.S.O. 1990, c. E.23, s. 5 (2).

Regulations

(3) The Attorney General may make regulations,

- (a) requiring the certification of recordings of evidence and proceedings under subsection (1), and respecting the certification of those recordings;
- (b) requiring the certification of transcripts under subsection (2), and respecting the certification of those transcripts; and
- (c) prescribing the format, wording or content of certificates to be used in connection with certification under clauses (a) and (b). 2001, c. 9, Sched. B, s. 8; 2011, c. 1, Sched. 1, s. 2.

Witnesses, not incapacitated by crime, etc.

6 No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest. R.S.O. 1990, c. E.23, s. 6.

Admissibility notwithstanding interest or crime

7 Every person offered as a witness shall be admitted to give evidence although he or she has an interest in the matter in question or in the event of the action and although he or she has been previously convicted of a crime or offence. R.S.O. 1990, c. E.23, s. 7.

Evidence of parties

8 (1) The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the spouses of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties. R.S.O. 1990, c. E.23, s. 8 (1); 2005, c. 5, s. 25 (2).

Evidence of spouse

(2) Without limiting the generality of subsection (1), a spouse may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. R.S.O. 1990, c. E.23, s. 8 (2); 2005, c. 5, s. 25 (3).

Witness not excused from answering questions tending to criminate

9 (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (1).

Answer not to be used in evidence against witness

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (2).

Evidence in proceedings in consequence of adultery

10 The parties to a proceeding instituted in consequence of adultery and the spouses of such parties are competent to give evidence in such proceedings, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery. R.S.O. 1990, c. E.23, s. 10; 2005, c. 5, s. 25 (4).

Communications made during marriage

11 A person is not compellable to disclose any communication made to the person by his or her spouse during the marriage. 2005, c. 5, s. 25 (5).

Expert evidence

12 Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding. R.S.O. 1990, c. E.23, s. 12.

Actions by or against heirs, etc.

13 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.

Actions by or against incapable persons, etc.

14 An opposite or interested party in an action by or against one of the following persons shall not obtain a verdict, judgment or decision on the party's own evidence, unless the evidence is corroborated by some other material evidence:

1. A person who has been found,
 - i. incapable of managing property under the *Substitute Decisions Act, 1992* or under the *Mental Health Act*,
 - ii. incapable of personal care under the *Substitute Decisions Act, 1992*, or
 - iii. incapable by a court in Canada or elsewhere.
2. A patient in a psychiatric facility.
3. A person who, because of a mental disorder within the meaning of the *Mental Health Act*, is incapable of giving evidence. 2009, c. 33, Sched. 2, s. 32 (1).

Use of examination for discovery of officer or employee of corporation at trial

15 An examination for discovery, or any part thereof, of an officer or employee of a corporation made under the rules of court may be used as evidence at the trial by any party adverse in interest to the corporation, subject to such protection to the corporation as the rules of court provide. R.S.O. 1990, c. E.23, s. 15.

Mode of administering oath

16 Where an oath may be lawfully taken, it may be administered to a person while such person holds in his or her hand a copy of the Old or New Testament without requiring him or her to kiss the same, or, when the person objects to being sworn in this manner or declares that the oath so administered is not binding upon the person's conscience, then in such manner and form and with such ceremonies as he or she declares to be binding. R.S.O. 1990, c. E.23, s. 16.

Affirmation in lieu of oath

17 (1) A person may, instead of taking an oath, make an affirmation or declaration that is of the same force and effect as if the person had taken an oath in the usual form. 2009, c. 33, Sched. 2, s. 32 (2).

Certifying affirmation

(2) Where the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied him or her that the deponent was a person entitled to affirm. R.S.O. 1990, c. E.23, s. 17 (2).

Presumption of competency

18 (1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).

Challenge, examination

(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).

Exception

(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).

Evidence of witness under 14

18.1 (1) When the competence of a proposed witness who is a person under the age of 14 is challenged, the court may admit the person's evidence if the person is able to communicate the evidence, understands the nature of an oath or solemn affirmation and testifies under oath or solemn affirmation. 1995, c. 6, s. 6 (1).

Same

(2) The court may admit the person's evidence, if the person is able to communicate the evidence, even though the person does not understand the nature of an oath or solemn affirmation, if the person understands what it means to tell the truth and promises to tell the truth. 1995, c. 6, s. 6 (1).

Further discretion

(3) If the court is of the opinion that the person's evidence is sufficiently reliable, the court has discretion to admit it, if the person is able to communicate the evidence, even if the person understands neither the nature of an oath or solemn affirmation nor what it means to tell the truth. 1995, c. 6, s. 6 (1).

Corroboration not required, witness under 14

18.2 (1) Evidence given by a person under the age of 14 need not be corroborated. 1995, c. 6, s. 6 (1).

No mandatory warning

(2) It is not necessary to instruct the trier of fact that it is unsafe to rely on the uncorroborated evidence of a person under the age of 14. 1995, c. 6, s. 6 (1).

Videotaped testimony, witness under 18

18.3 (1) A videotape of the testimony of a witness under the age of 18 that satisfies the conditions set out in subsection (2) may be admitted in evidence, if the court is of the opinion that this is likely to help the witness give complete and accurate testimony or that it is in the best interests of the witness. 1995, c. 6, s. 6 (1).

Conditions

(2) The judge or other person who is to preside at the trial and the lawyers of the parties to the proceeding shall be present when the testimony is given, and the lawyers shall be given an opportunity to examine the witness in the same way as if he or she were testifying in the courtroom. 1995, c. 6, s. 6 (1).

Screen, support person

(3) Subsection 18.4 (1) and section 18.5 apply with necessary modifications when testimony is being videotaped. 1995, c. 6, s. 6 (1).

Effect of admitting videotape

(4) If a videotape is admitted under subsection (1), the witness need not attend or testify and shall not be summoned to testify. 1995, c. 6, s. 6 (1).

Exception

(5) However, in exceptional circumstances, the court may require the witness to attend and testify even though a videotape of his or her testimony has been admitted in evidence. 1995, c. 6, s. 6 (1).

Videotaped interview

(6) With the leave of the court, a videotape of an interview with a person under the age of 18 may be admitted in evidence if the person, while testifying, adopts the contents of the videotape. 1995, c. 6, s. 6 (1).

Hearsay exceptions preserved

(7) Subsection (6) is in addition to any rule of law under which a videotape may be admitted in evidence. 1995, c. 6, s. 6 (1).

Special measures, witness under 18**Screen**

18.4 (1) A witness under the age of 18 may testify behind a screen or similar device that allows the witness not to see an adverse party, if the court is of the opinion that this is likely to help the witness give complete and accurate testimony or that it is in the best interests of the witness, and if the condition set out in subsection (4) is satisfied. 1995, c. 6, s. 6 (1).

Closed-circuit television

(2) The court may order that closed-circuit television be used instead of a screen or similar device if the court is of the opinion that,

- (a) a screen or similar device is insufficient to allow the witness to give complete and accurate testimony; or
- (b) the best interests of the witness require the use of closed-circuit television. 1995, c. 6, s. 6 (1).

Same

(3) If the court makes an order under subsection (2), the witness shall testify outside the courtroom and his or her testimony shall be shown in the courtroom by means of closed-circuit television. 1995, c. 6, s. 6 (1).

Condition

(4) When a screen or similar device or closed-circuit television is used, the judge and jury and the parties to the proceeding and their lawyers shall be able to see and hear the witness testify. 1995, c. 6, s. 6 (1).

Support person, witness under 18

18.5 (1) During the testimony of a witness under the age of 18, a support person chosen by the witness may accompany him or her. 1995, c. 6, s. 6 (1).

Court's discretion

(2) If the court determines that the support person chosen by the witness is not appropriate for any reason, the witness is entitled to choose another support person. 1995, c. 6, s. 6 (1).

Examples

(3) The following are examples of reasons on the basis of which the court may determine that the support person chosen by a witness is not appropriate:

1. The court is of the opinion that the support person may attempt to influence the testimony of the witness.
2. The support person behaves in a disruptive manner.
3. The support person is also a witness in the proceeding. 1995, c. 6, s. 6 (1).

Personal cross-examination by adverse party

18.6 (1) The court may prohibit personal cross-examination of a witness under the age of 18 by an adverse party if the court is of the opinion that such a cross-examination,

- (a) would be likely to affect adversely the ability of the witness to give evidence; or
- (b) would not be in the best interests of the witness. 1995, c. 6, s. 6 (1).

Alternatives

(2) If the court prohibits personal cross-examination by the adverse party, the cross-examination may be conducted in some other appropriate way (for example, by means of questions written by the adverse party and read to the witness by the court). 1995, c. 6, s. 6 (1).

Attendance of witnesses

19 A witness served in due time with a summons issued out of a court in Ontario, and paid proper witness fees and conduct money, who makes default in obeying such summons, without any lawful and reasonable impediment, in addition to any penalty he or she may incur as for a contempt of court, is liable to an action on the part of the person by whom, or on whose behalf, he or she has been summonsed for any damage that such person may sustain or be put to by reason of such default. R.S.O. 1990, c. E.23, s. 19.

[The following provisions were enacted by the Province of Canada as part of Chapter 9 of 1854. They were carried into the Consolidated Statutes of Canada, 1859 as sections 4-11 and 13 of Chapter 79. They have appeared in their present form in successive revisions since Confederation. They are revised in the Revised Statutes of Ontario to provide for gender-neutrality and to include a French version. See Rideout vs Rideout (1956) O.W.N. 644].

Courts may issue subpoenas to any part of Canada

4. If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court that it is proper to compel the personal attendance at any trial or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his or her discretion, may order that a writ called a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquête* or examination of witnesses wherever he or she may be in Canada.

Service thereof in any part of Canada to be good

5. The service of any such writ or process in any part of Canada, shall be valid and effectual to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court.

When not to be issued

6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside.

Writs to be specially noted

7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order, and no such writ shall issue without such special order.

Consequences of disobedience

8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued, may, upon proof made of the service thereof, and of such default to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of subpoena or other similar process issued out of such last mentioned Court.

If expenses paid or tendered

9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial or *enquête* or examination of witnesses, in obedience to any such subpoena or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the Superior Court of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of subpoena, or other similar process was served upon him or her.

How service proved

10. The service of such writs of subpoena or other similar process, in Lower Canada, shall be proved by the certificate of a Bailiff within the jurisdiction where the service has been made, under his or her oath of office, and such service in Upper Canada by the affidavit of service endorsed on or annexed to such writ by the person who served the same.

Costs of attendance provided for

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have been allowed on a commission *rogatoire*, or to examine witnesses unless the Court or Judge before whom such trial or *enquête* or examination of witnesses is had, so orders.

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Power to issue commissions to examine witnesses preserved

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court.

Examination of witnesses, proof of contradictory written statements

20 A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the matter in question, without the writing being shown to the witness, but, if it is intended to contradict the witness by the writing, his or her attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting the witness, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his or her inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he or she thinks fit. R.S.O. 1990, c. E.23, s. 20.

Proof of contradictory oral statements

21 If a witness upon cross-examination as to a former statement made by him or her relative to the matter in question and inconsistent with his or her present testimony does not distinctly admit that he or she did make such statement, proof may be given that the witness did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether or not he or she did make such statement. R.S.O. 1990, c. E.23, s. 21.

Proof of previous conviction of a witness

22 (1) A witness may be asked whether he or she has been convicted of any crime, and upon being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by the deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate. R.S.O. 1990, c. E.23, s. 22 (1).

(2) Repealed: 1995, c. 6, s. 6 (2).

Proof of conviction or discharge

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

- (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
- (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available. 1995, c. 6, s. 6 (3).

Same

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding. 1995, c. 6, s. 6 (3).

Same

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate. 1995, c. 6, s. 6 (3).

How far a party may discredit his or her own witness

23 A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement. R.S.O. 1990, c. E.23, s. 23.

Letters patent

24 Letters patent under the Great Seal of the United Kingdom, or of any other of His Majesty's dominions, may be proved by the production of an exemplification thereof, or of the enrolment thereof, under the Great Seal under which such letters patent were issued, and such exemplification has the like force and effect for all purposes as the letters patent thereby exemplified or enrolled, as well against His Majesty as against all other persons whomsoever. R.S.O. 1990, c. E.23, s. 24; 2024, c. 2, Sched. 19, s. 6 (3).

24.1 Repealed: 2006, c. 21, Sched. F, s. 110.

24.2 Repealed: 2006, c. 21, Sched. F, s. 110.

Copies of statutes, etc.

25 Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be published by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within His Majesty's dominions, shall be admitted in evidence to prove the contents thereof. R.S.O. 1990, c. E.23, s. 25; 2020, c. 34, Sched. 13, s. 3 (1); 2024, c. 2, Sched. 19, s. 6 (1).

Proclamations, orders, etc.

26 Proof in the absence of evidence to the contrary of a proclamation, order, regulation or appointment to office made or issued,

- (a) by the Governor General or the Governor General in Council, or other chief executive officer or administrator of the Government of Canada; or
- (b) by or under the authority of a minister or head of a department of the Government of Canada or of a provincial or territorial government in Canada; or
- (c) by a Lieutenant Governor or Lieutenant Governor in Council or other chief executive officer or administrator of Ontario or of any other province or territory in Canada,

may be given by the production of,

- (d) a copy of the *Canada Gazette* or of the official gazette for a province or territory purporting to contain a notice of such proclamation, order, regulation or appointment;
- (e) a copy of such proclamation, order, regulation or appointment purporting to be published by the King's Printer for Ontario, the printer for the Government of Canada or the government printer for the province or territory; or
- (f) a copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such minister or head of a department or by the clerk, or assistant or acting clerk of the Executive Council or by the head of a department of the Government of Canada or of a provincial or territorial government or by his or her deputy or acting deputy. R.S.O. 1990, c. E.23, s. 26; 1993, c. 27, Sched.; 2020, c. 34, Sched. 13, s. 3 (2); 2024, c. 2, Sched. 19, s. 6 (2).

Orders signed by Secretary of State or member of Executive Council

27 An order in writing purporting to be signed by the Secretary of State of Canada and to be written by command of the Governor General shall be received in evidence as the order of the Governor General and an order in writing purporting to be signed by a member of the Executive Council and to be written by command of the Lieutenant Governor shall be received in evidence as the order of the Lieutenant Governor. R.S.O. 1990, c. E.23, s. 27.

Notices in Gazette

28 Copies of proclamations and of official and other documents, notices and advertisements published in the *Canada Gazette*, or in *The Ontario Gazette*, or in the official gazette of any province or territory in Canada are proof, in the absence of evidence to the contrary, of the originals and of the contents thereof. R.S.O. 1990, c. E.23, s. 28; 2020, c. 34, Sched. 13, s. 3 (3).

Public or official documents

29 Where the original record could be received in evidence, a copy of an official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of an entry in a register or other book of a corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation and the hand of the presiding officer or secretary thereof, is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R.S.O. 1990, c. E.23, s. 29.

Privilege in case of official documents

30 Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a ministry of the public service of Ontario, if the deputy head or other officer of the ministry has the document in his or her personal possession, and is called as a witness, he or she is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the ministry, to object to producing the document on the ground that it is privileged, and such objection may be taken by him or her in the same manner, and has the same effect, as if such member of the Executive Council or head of the ministry were personally present and made the objection. R.S.O. 1990, c. E.23, s. 30.

Sharing of information within public sector not affecting privilege

30.1 (1) In this section,

“public sector body” means,

- (a) the Crown in right of Ontario,
- (b) a Crown agency as defined in the *Crown Liability and Proceedings Act, 2019*,
- (c) a Crown corporation as defined in the *Crown Liability and Proceedings Act, 2019*, or
- (d) any person, body or office specified by the regulations made under subsection (7). 2024, c. 2, Sched. 7, s. 1.

Privilege not waived, affected

(2) If a public sector body shares information on a confidential basis with another public sector body, the sharing does not constitute a waiver of, or otherwise affect, any privilege that applies with respect to the information. 2024, c. 2, Sched. 7, s. 1.

Same

(3) For the purposes of subsection (2), privilege includes solicitor-client privilege, litigation privilege, settlement privilege and public interest immunity. 2024, c. 2, Sched. 7, s. 1.

Same

(4) Subsection (2) applies regardless of whether the public sector body is required to share the information. 2024, c. 2, Sched. 7, s. 1.

Retroactive application

(5) This section is deemed to have applied with respect to any sharing of information between public sector bodies before the day the *Enhancing Access to Justice Act, 2024* received Royal Assent. 2024, c. 2, Sched. 7, s. 1.

Same

(6) In the case of a person, body or office that becomes a public sector body after the day the *Enhancing Access to Justice Act, 2024* receives Royal Assent, this section is also deemed to have applied with respect to any sharing of information with or by the person, body or office before becoming a public sector body. 2024, c. 2, Sched. 7, s. 1.

Regulations

(7) The Lieutenant Governor in Council may make regulations prescribing persons, bodies or offices for the purposes of clause (d) of the definition of “public sector body” in subsection (1). 2024, c. 2, Sched. 7, s. 1.

Books of accounts of municipalities and government departments

31 (1) Repealed: 2002, c. 17, Sched. F, Table.

Copies of entries

(2) A copy of an entry in a book of account kept by a municipality or in a department of the Government of Canada or of Ontario shall be received as proof in the absence of evidence to the contrary of such entry and of the matters, transactions and accounts recorded therein, if it is proved by the oath, affirmation or affidavit of an officer of the municipality or of the department,

- (a) that the book was, at the time of the making of the entry, one of the ordinary books kept by the municipality or in the department;
- (b) that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of the municipality or department; and
- (c) that such copy is a true copy thereof. R.S.O. 1990, c. E.23, s. 31 (2); 1993, c. 27, Sched.

Copies of public books or documents

32 (1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom is admissible in evidence if it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original was entrusted. R.S.O. 1990, c. E.23, s. 32 (1).

Copies to be delivered if required

(2) Such officer shall furnish the certified copy or extract to any person applying for it at a reasonable time, upon the person paying therefor a sum not exceeding 10 cents for every folio of 100 words. R.S.O. 1990, c. E.23, s. 32 (2).

Books and records of banks

Definition

33 (1) In this section,

“bank” means a bank to which the *Bank Act* (Canada) applies and includes a branch, agency or office of a bank.
R.S.O. 1990, c. E.23, s. 33 (1); 2002, c. 8, Sched. I, s. 10.

Copies of entries

(2) Subject to this section, a copy of an entry in a book or record kept in a bank is in any action to which the bank is not a party proof in the absence of evidence to the contrary of such entry and of the matters, transactions and accounts therein recorded. R.S.O. 1990, c. E.23, s. 33 (2); 1993, c. 27, Sched.

Proof required as to entry in ordinary course of business

(3) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was at the time of making the entry one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the bank, or its successor, and that such copy is a true copy thereof, and such proof may be given by the manager or accountant, or a former manager of the bank or its successor, and may be given orally or by affidavit. R.S.O. 1990, c. E.23, s. 33 (3).

Production of books to be required only under order

(4) A bank or officer of a bank is not, in an action to which the bank is not a party, compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court or a judge made for special cause. R.S.O. 1990, c. E.23, s. 33 (4).

Inspection of account

(5) On the application of a party to an action, the court or judge may order that such party be at liberty to inspect and take copies of any entries in the books or records of a bank for the purposes of such proceeding, but a person whose account is to be inspected shall be served with notice of the application at least two clear days before the hearing thereof, and, if it is shown to the satisfaction of the court or judge that such person cannot be notified personally, such notice may be given by addressing it to the bank. R.S.O. 1990, c. E.23, s. 33 (5).

Costs

(6) The costs of an application to a court or judge under or for the purposes of this section, and the costs of any thing done or to be done under an order of a court or judge made under or for the purposes of this section, are in the discretion of the court or judge who may order such costs or any part thereof to be paid to a party by the bank, where such costs have been occasioned by a default or delay on the part of the bank, and any such order against a bank may be enforced as if the bank were a party to the proceeding. R.S.O. 1990, c. E.23, s. 33 (6).

Prints from photographic film

Definitions

34 (1) In this section,

“person” includes,

- (a) the Government of Canada and of a province of Canada, and a department, commission, board or branch of any such government,
- (b) a corporation, its successors and assigns, and
- (c) the heirs, executors, administrators or other legal representatives of a person; (“personne”)

“photographic film” includes any photographic plate, microphotographic film and photostatic negative, and

“photograph” has a corresponding meaning. (“pellicule photographique”, “photographier”) R.S.O. 1990, c. E.23, s. 34 (1).

Admissible in evidence

(2) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by a person,

- (a) is photographed in the course of an established practice of such person of photographing objects of the same or a similar class in order to keep a permanent record thereof; and
- (b) is destroyed by or in the presence of such person or of one or more of the person's employees or delivered to another person in the ordinary course of business or lost,

a print from the photographic film is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible. R.S.O. 1990, c. E.23, s. 34 (2).

(3) Repealed: 1999, c. 12, Sched. B, s. 7 (1).

(4) Repealed: 1999, c. 12, Sched. B, s. 7 (1).

Proof of compliance with conditions

(5) Proof of compliance with the conditions prescribed by this section may be given by any person having knowledge of the facts either orally or by affidavit sworn or affirmed before a notary public, and, unless the court otherwise orders, a notarial copy of any such affidavit is admissible in evidence in lieu of the original affidavit. R.S.O. 1990, c. E.23, s. 34 (5).

Electronic records

Definitions

34.1 (1) In this section,

“data” means representations, in any form, of information or concepts; (“données”)

“electronic record” means data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device, and includes a display, printout or other output of that data, other than a printout referred to in subsection (6); (“document électronique”)

“electronic records system” includes the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and storage of electronic records. (“système d’archivage électronique”) 1999, c. 12, Sched. B, s. 7 (2).

Application

(2) This section does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence. 1999, c. 12, Sched. B, s. 7 (2).

Power of court

(3) A court may have regard to evidence adduced under this section in applying any common law or statutory rule relating to the admissibility of records. 1999, c. 12, Sched. B, s. 7 (2).

Authentication

(4) The person seeking to introduce an electronic record has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. 1999, c. 12, Sched. B, s. 7 (2).

Application of best evidence rule

(5) Subject to subsection (6), where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic record. 2000, c. 26, Sched. A, s. 7 (1).

Same

(5.1) The integrity of an electronic record may be proved by evidence of the integrity of the electronic records system by or in which the data was recorded or stored, or by evidence that reliable encryption techniques were used to support the integrity of the electronic record. 2000, c. 26, Sched. A, s. 7 (1).

What constitutes record

(6) An electronic record in the form of a printout that has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, is the record for the purposes of the best evidence rule. 1999, c. 12, Sched. B, s. 7 (2).

Presumption of integrity

(7) In the absence of evidence to the contrary, the integrity of the electronic records system by or in which an electronic record is recorded or stored is proved for the purposes of subsection (5),

- (a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system;
- (b) if it is established that the electronic record was recorded or stored by a party to the proceeding who is adverse in interest to the party seeking to introduce it; or
- (c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceeding and who did not record or store it under the control of the party seeking to introduce the record. 1999, c. 12, Sched. B, s. 7 (2).

Standards

(8) For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record. 1999, c. 12, Sched. B, s. 7 (2).

Proof by affidavit

(9) The matters referred to in subsections (6), (7) and (8) may be established by an affidavit given to the best of the deponent’s knowledge and belief. 1999, c. 12, Sched. B, s. 7 (2).

Cross-examination

(10) A deponent of an affidavit referred to in subsection (9) that has been introduced in evidence may be cross-examined as of right by a party to the proceeding who is adverse in interest to the party who has introduced the affidavit or has caused the affidavit to be introduced. 1999, c. 12, Sched. B, s. 7 (2).

Same

(11) Any party to the proceeding may, with leave of the court, cross-examine a person referred to in clause (7) (c). 1999, c. 12, Sched. B, s. 7 (2).

Business records

Definitions

35 (1) In this section,

“business” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; (“entreprise”)

“record” includes any information that is recorded or stored by means of any device. (“document”) R.S.O. 1990, c. E.23, s. 35 (1).

Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. R.S.O. 1990, c. E.23, s. 35 (2).

Notice and production

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party’s intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same. R.S.O. 1990, c. E.23, s. 35 (3).

Surrounding circumstances

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility. R.S.O. 1990, c. E.23, s. 35 (4).

Previous rules as to admissibility and privileged documents not affected

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. R.S.O. 1990, c. E.23, s. 35 (5).

Judicial notice to be taken of signatures of judges, etc.

36 (1) All courts, judges, justices, associate judges, clerks of courts, commissioners and other officers acting judicially, shall take judicial notice of the signature of any judge of any court in Canada, in Ontario and in every other province and territory in Canada, where the judge’s signature is appended or attached to a decree, order, certificate, affidavit, or judicial or official document. R.S.O. 1990, c. E.23, s. 36 (1); 1996, c. 25, s. 5; 2020, c. 11, Sched. 5, s. 15; 2021, c. 4, Sched. 3, s. 21.

Interpretation

(2) The members of the Canadian Transport Commission and a referee appointed under the *Drainage Act* shall be deemed judges for the purposes of this section. R.S.O. 1990, c. E.23, s. 36 (2); 2017, c. 8, Sched. 17, s. 6; 2021, c. 4, Sched. 6, s. 47.

Proof of handwriting, when not required

37 No proof is required of the handwriting or official position of a person certifying to the truth of a copy of or extract from any proclamation, order, regulation or appointment, or to any matter or thing as to which he or she is by law authorized or required to certify. R.S.O. 1990, c. E.23, s. 37.

Foreign judgments, etc., how proved

38 A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any court of record in England or Ireland or in any of the superior courts of law, equity or bankruptcy in Scotland, or in any court of record in Canada, or in any of the provinces or territories in Canada, or in any British colony or possession, or in any court of record of the United States of America, or of any state of the United States of America, may be proved by an exemplification of the same under the seal of the court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree or other judicial proceeding of the Superior Court of Justice may be proved by an exemplification thereof. R.S.O. 1990, c. E.23, s. 38; 2000, c. 26, Sched. A, s. 7 (2).

Copies of notarial acts in Quebec admissible

39 (1) A copy of a notarial act or instrument in writing made in Quebec before a notary and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his or her possession as such notary or prothonotary, is receivable in evidence in the place and stead of the original, and has the same force and effect as the original would have if produced and proved. R.S.O. 1990, c. E.23, s. 39 (1).

How impeached

(2) The proof of such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary. R.S.O. 1990, c. E.23, s. 39 (2).

Protests of bills and notes

40 A protest of a bill of exchange or promissory note purporting to be under the hand of a notary public wherever made is proof, in the absence of evidence to the contrary, of the allegations and facts therein stated. R.S.O. 1990, c. E.23, s. 40.

Effect of certain certificates of notaries

41 Any note, memorandum or certificate purporting to be made by a notary public in Canada, in his or her own handwriting or to be signed by him or her at the foot of or embodied in any protest, or in a regular register of official acts purporting to be kept by him or her is proof, in the absence of evidence to the contrary, of the fact of notice of non-acceptance or non-payment of a bill of exchange or promissory note having been sent or delivered at the time and in the manner stated in such note, certificate or memorandum. R.S.O. 1990, c. E.23, s. 41.

Proving titles under Small Claims Court executions

42 In proving a title under a sheriff's conveyance based upon an execution issued from the Small Claims Court, it is sufficient to prove the judgment recovered in the Small Claims Court without proof of any prior proceedings. R.S.O. 1990, c. E.23, s. 42.

Solemn declaration

43 Any person authorized to take declarations in Ontario may receive the solemn declaration of any person in attestation of the truth of any fact or of any account rendered in writing and the declaration and any declaration authorized or required by any Act of the Legislature shall be in the following form:

I, ..., solemnly declare that (*state* the fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Declared before me

at the of
this day of , 20
A Commissioner, etc.

R.S.O. 1990, c. E.23, s. 43.

Oaths, etc., administered by commissioned officers

44 (1) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made in or outside Ontario before a person who holds a commission as an officer in the Canadian Forces and is on full-time service is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario. R.S.O. 1990, c. E.23, s. 44 (1).

Admissibility

(2) A document that purports to be signed by a person mentioned in subsection (1) in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him or her and on which the officer's rank and unit are shown below his or her signature is admissible in evidence without proof of the signature or rank or unit or that he or she is on full-time service. R.S.O. 1990, c. E.23, s. 44 (2).

Oaths, etc., administered outside Ontario

45 (1) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before,

- (a) a judge;
- (b) a magistrate;
- (c) an officer of a court of justice;
- (d) a commissioner for taking affidavits or other competent authority of the like nature;
- (e) a notary public;
- (f) the head of a city, town, village, township or other municipality;
- (g) an officer of any of His Majesty's diplomatic or consular services, including an ambassador, envoy, minister, charge d'affairs, counsellor, secretary, attache, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul and acting consular agent;
- (h) an officer of the Canadian diplomatic, consular or representative services, including, in addition to the diplomatic and consular officers mentioned in clause (g), a high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor and secretary; or
- (i) a Canadian Government trade commissioner or assistant trade commissioner,

exercising his or her functions or having jurisdiction or authority as such in the place in which it is administered, sworn, affirmed or made, is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario. R.S.O. 1990, c. E.23, s. 45 (1); 2024, c. 2, Sched. 19, s. 6 (3).

Idem

(2) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before a notary public for Ontario or before a commissioner for taking affidavits in Ontario is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario. R.S.O. 1990, c. E.23, s. 45 (2).

Admissibility

(3) A document that purports to be signed by a person mentioned in subsection (1) or (2) in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him or her, and on which the person's office is shown below his or her signature, and,

- (a) in the case of a notary public, that purports to have impressed thereon or attached thereto his or her official seal;
- (b) in the case of a person mentioned in clause (1) (f), that purports to have impressed thereon or attached thereto the seal of the municipality;
- (c) in the case of a person mentioned in clause (1) (g), (h) or (i), that purports to have impressed thereon or attached thereto his or her seal or the seal or stamp of his or her office or of the office to which he or she is attached,

is admissible in evidence without proof of his or her signature or of his or her office or official character or of the seal or stamp and without proof that he or she was exercising his or her functions or had jurisdiction or authority in the place in which the oath, affidavit, affirmation or statutory declaration was administered, sworn, affirmed or made. R.S.O. 1990, c. E.23, s. 45 (3).

Formal defects, when not to vitiate

46 No informality in the heading or other formal requisites to any affidavit, declaration or affirmation made or taken before a commissioner or other person authorized to take affidavits under the *Commissioners for Taking Affidavits Act*, or under this Act, is any objection to its reception in evidence if the court or judge before whom it is tendered thinks proper to receive it. R.S.O. 1990, c. E.23, s. 46; 2020, c. 7, Sched. 4, s. 10.

Affidavit sworn before solicitor for a party

47 An affidavit or declaration is not inadmissible or unusable in evidence in an action for the reason only that it is made before the solicitor of a party to the action or before the partner, associate, clerk or agent of such solicitor. R.S.O. 1990, c. E.23, s. 47.

Admissibility of copies of depositions

48 (1) Where an examination or deposition of a party or witness has been taken before a judge or other officer or person appointed to take it, copies of it, certified under the hand of the judge, officer or other person taking it, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R.S.O. 1990, c. E.23, s. 48 (1).

Presumption

(2) An examination or deposition received or read in evidence under subsection (1) shall be presumed to represent accurately the evidence of the party or witness, unless there is good reason to doubt its accuracy. R.S.O. 1990, c. E.23, s. 48 (2).

Effect of probate, etc., as evidence of will, etc.

49 In order to establish a devise or other testamentary disposition of or affecting real estate, probate of the will or letters of administration with the will annexed containing such devise or disposition, or a copy thereof, under the seal of the court that granted it or under the seal of the Superior Court of Justice, are proof, in the absence of evidence to the contrary, of the will and of its validity and contents. R.S.O. 1990, c. E.23, s. 49; 2000, c. 26, Sched. A, s. 7 (2).

Proof in the case of will of real estate filed in courts outside Ontario

50 (1) Where a person dies in any of His Majesty's possessions outside Ontario having made a will sufficient to pass real estate in Ontario, purporting to devise, charge or affect real estate in Ontario, the party desiring to establish any such disposition, after giving one month's notice to the opposite party to the proceeding of the party's intentions so to do, may produce and file the probate of the will or letters of administration with the will annexed or a certified copy thereof under the seal of the court that granted the same with a certificate of the judge, registrar or clerk of such court that the original will is filed and remains in the court and purports to have been executed before two witnesses, and such probate or letters of administration or certified copy with such certificate is, unless the court otherwise orders, proof in the absence of evidence to the contrary of the will and of its validity and contents. R.S.O. 1990, c. E.23, s. 50 (1); 1993, c. 27, Sched; 2024, c. 2, Sched. 19, s. 6 (3).

Effect of certificate

(2) The production of the certificate mentioned in subsection (1) is proof in the absence of evidence to the contrary of the facts therein stated and of the authority of the judge, registrar or clerk, without proof of his or her appointment, authority or signature. R.S.O. 1990, c. E.23, s. 50 (2); 1993, c. 27, Sched.

Military records

51 The production of a certificate, purporting to be signed by an authority authorized in that behalf by the *National Defence Act* (Canada) or by regulations made thereunder, stating that the person named in the certificate died, or was deemed to have died, on a date set forth therein, is proof, in the absence of evidence to the contrary, for any purpose to which the authority of the Legislature extends that the person so named died on that date, and also of the office, authority and signature of the person signing the certificate, without any proof of his or her appointment, authority or signature. R.S.O. 1990, c. E.23, s. 51.

Reports and evidence of practitioners

Definition

52 (1) In this section,

“practitioner” means,

- (a) a member of a College as defined in subsection 1 (1) of the *Regulated Health Professions Act, 1991*,
- (b) a drugless practitioner registered under the *Drugless Practitioners Act*,
- (c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b). R.S.O. 1990, c. E.23, s. 52 (1); 1998, c. 18, Sched. G, s. 50.

Medical reports

(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action. R.S.O. 1990, c. E.23, s. 52 (2).

Entitlement

(3) Unless otherwise ordered by the court, a party to an action is entitled, at the time that notice is given under subsection (2), to a copy of the report together with any other report of the practitioner that relates to the action. R.S.O. 1990, c. E.23, s. 52 (3).

Report required

(4) Except by leave of the judge presiding at the trial, a practitioner who signs a report with respect to a party shall not give evidence at the trial unless the report is given to all other parties in accordance with subsection (2). R.S.O. 1990, c. E.23, s. 52 (4).

If practitioner called unnecessarily

(5) If a practitioner is required to give evidence in person in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay as costs therefor such sum as the court considers appropriate. R.S.O. 1990, c. E.23, s. 52 (5).

Registered instruments

Definition

53 (1) In this section,

“instrument” has the meaning assigned to it in section 1 of the *Registry Act*. R.S.O. 1990, c. E.23, s. 53 (1).

Proof

(2) A copy of an instrument or memorial, certified to be a true copy by the land registrar in whose office the instrument or memorial is deposited, filed, kept or registered, is proof of the original, in the absence of evidence to the contrary, except in the cases provided for in subsection (3). 1998, c. 18, Sched. B, s. 7 (2).

Where certified copies of registered instruments may be used

(3) Where it would be necessary to produce and prove an instrument or memorial that has been so deposited, filed, kept or registered in order to establish such instrument or memorial and the contents thereof, the party intending to prove it may give notice to the opposite party, at least ten days before the trial or other proceeding in which the proof is intended to be adduced, that the party intends at the trial or other proceeding to give in evidence, as proof of the instrument or memorial, a copy thereof certified by the land registrar, and in every such case the copy so certified is sufficient evidence of the instrument or memorial and of its validity and contents unless the party receiving the notice, within four days after such receipt, gives notice that the party disputes its validity, in which case the costs of producing and proving it may be ordered to be paid by any or either of the parties as is considered just. R.S.O. 1990, c. E.23, s. 53 (3); 1998, c. 18, Sched. B, s. 7 (3).

Filing copies of official documents

54 (1) Where a public officer produces upon a summons an original document, it shall not be deposited in court unless otherwise ordered, but, if the document or a copy is needed for subsequent reference or use, a copy thereof or of so much thereof as is considered necessary, certified under the hand of the officer producing the document or otherwise proved, shall be filed as an exhibit in the place of the original, and the officer is entitled to receive in addition to his or her ordinary fees the fees for any certified copy, to be paid to the officer before it is delivered or filed. R.S.O. 1990, c. E.23, s. 54 (1).

When original to be retained

(2) Where an order is made that the original be retained, the order shall be delivered to the public officer and the exhibit shall be retained in court and filed. R.S.O. 1990, c. E.23, s. 54 (2).

Proof of certain written instruments

55 (1) A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account or other written instrument used in business or other transactions, may give notice to the opposite party, ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that the party intends to give in evidence as proof of the contents a writing purporting to be a copy of the documents, and in the notice shall name some convenient time and place for the inspection thereof. R.S.O. 1990, c. E.23, s. 55 (1).

Inspection

(2) Such copy may then be inspected by the opposite party, and is without further proof sufficient evidence of the contents of the original document, and shall be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned for such inspection gives notice that the party intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original, and the costs attending any production or proof of the original document are in the discretion of the court. R.S.O. 1990, c. E.23, s. 55 (2).

Where no attestation required

56 It is not necessary to prove, by the attesting witness, an instrument to the validity of which attestation is not requisite. R.S.O. 1990, c. E.23, s. 56.

Comparison of disputed writing with genuine

57 Comparison of a disputed writing with a writing proved to the satisfaction of the court to be genuine shall be permitted to be made by a witness, and such writings and the evidence of witnesses respecting them may be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute. R.S.O. 1990, c. E.23, s. 57.

Where instruments offered in evidence may be impounded

58 Where a document is received in evidence, the court admitting it may direct that it be impounded and kept in such custody for such period and subject to such conditions as seem proper, or until the further order of the court or of the Superior Court of Justice or of a judge thereof, as the case may be. R.S.O. 1990, c. E.23, s. 58; 2000, c. 26, Sched. A, s. 7 (2).

Evidence dispensed with under *Vendors and Purchasers Act*

59 It is not necessary in an action to produce any evidence that, by section 1 of the *Vendors and Purchasers Act*, is dispensed with as between vendor and purchaser, and the evidence declared to be sufficient as between vendor and purchaser is sufficient in the absence of evidence to the contrary for the purposes of the action. R.S.O. 1990, c. E.23, s. 59; 1993, c. 27, Sched.

Evidence for foreign tribunals

60 (1) Where it is made to appear to the Superior Court of Justice or a judge thereof, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the rules of court, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the court or judge in an action pending in the court or before a judge of the court. R.S.O. 1990, c. E.23, s. 60 (1); 2000, c. 26, Sched. A, s. 7 (2).

Payment of expenses of witness

(2) A person whose attendance is so ordered is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Superior Court of Justice. R.S.O. 1990, c. E.23, s. 60 (2); 2000, c. 26, Sched. A, s. 7 (2).

Right of refusal to answer questions and to produce documents

(3) A person examined under such commission, order or process has the like right to object to answer questions tending to criminate himself or herself, and to refuse to answer any questions that, in an action pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer, and no person shall be compelled to produce at the examination any writing, document or thing that the person could not be compelled to produce at the trial of such an action. R.S.O. 1990, c. E.23, s. 60 (3).

Administration of oath

(4) Where the commission, order or other process, or the instructions of the court accompanying the same, direct that the person to be examined shall be sworn or shall affirm, the person so appointed has authority to administer the oath to the person or take his or her affirmation. R.S.O. 1990, c. E.23, s. 60 (4).

Tab 64

Certification of Recordings and Transcripts, O Reg 158/03



Current version: in force since 2022-12-05

Link to this version: <https://canlii.ca/t/55pgw>

Citation to this version: Certification of Recordings and Transcripts, O Reg 158/03, <<https://canlii.ca/t/55pgw>> retrieved on 2026-03-23

Currency: Last updated from the [e-Laws](#) site on 2026-03-16

Evidence Act**ONTARIO REGULATION 158/03****CERTIFICATION OF RECORDINGS AND TRANSCRIPTS**

Consolidation Period: From December 5, 2022 to the [e-Laws currency date](#).

Last amendment: 531/22.

This is the English version of a bilingual regulation.

Application

1. This Regulation applies to proceedings in the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice. O. Reg. 158/03, s. 1.

Definition

2. In this Regulation,

“approved device” means a device for recording sound of a type approved by the Attorney General, as mentioned in subsection 5 (1) of the Act. O. Reg. 158/03, s. 2.

Certification of recordings

3. (1) A recording made under subsection 5 (1) of the Act by means of an approved device shall be certified in Form 1 by a person who,

(a) is authorized to record evidence and proceedings under subsection 5 (1) of the Act; and

(b) is in charge of the approved device while the recording is being made. O. Reg. 158/03, s. 3 (1); O. Reg. 109/11, s. 1.

(2) The certificate in Form 1 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the recording is a recording of evidence and proceedings in the proceeding. O. Reg. 158/03, s. 3 (2); O. Reg. 109/11, s. 1.

Certification of transcripts

4. (1) A transcript made under subsection 5 (2) of the Act from a recording made under subsection 5 (1) of the Act by means of an approved device shall be certified by a person described in subsection (1.1),

(a) in paper format in Form 2, if the transcript is in paper format; or

(b) in electronic format in Form 3, if the transcript is in electronic format. O. Reg. 531/22, s. 1 (1).

(1.1) The transcript shall be certified by a person who has proofread the transcript in its entirety against the recording to confirm that the transcript is accurate, but need not be the same person who transcribed the recording. O. Reg. 531/22, s. 1 (1).

(2) The recording shall be transcribed, and the transcript proofread and certified, by a person who is trained and qualified to transcribe recordings and is a member of a class of persons who are authorized to do so by the Attorney General, but need not be the same person who is in charge of the approved device while the recording is being made. O. Reg. 158/03, s. 4 (2); O. Reg. 531/22, s. 1 (2).

(3) The certificate in Form 2 or 3 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the transcript is a transcript of the certified recording of evidence and proceedings in the proceeding that is identified in the certificate in Form 2 or 3. O. Reg. 92/04, s. 1; O. Reg. 109/11, s. 1; O. Reg. 531/22, s. 1 (3).

(4) The certificate in Form 2 or 3 has the status referred to in subsection (3), with respect to admissibility and proof, without being accompanied by a certificate in Form 1 relating to the certified recording that is identified in the certificate in Form 2 or 3. O. Reg. 92/04, s. 1; O. Reg. 109/11, s. 1; O. Reg. 531/22, s. 1 (3).

(5) When a certificate in Form 2 or 3 is completed, nothing further is required to certify the transcript. O. Reg. 92/04, s. 1; O. Reg. 109/11, s. 1; O. Reg. 531/22, s. 1 (3).

(6) Subsections (3) to (5) apply with respect to any electronically distributed or duplicated copy of an electronic transcript certified in Form 3. O. Reg. 531/22, s. 1 (4).

Forms

5. In this Regulation, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and is available on the Internet through www.ontariocourtforms.on.ca. O. Reg. 109/11, s. 2.

TABLE OF FORMS

Form Number	Form Name	Date of Form
1	Certificate of Recording (Subsection 5 (1))	March 17, 2011
2	Certificate of Transcript (Subsection 5 (2))	September 1, 2022
3	Electronic Certificate of Transcript (Subsection 5 (2))	September 1, 2022

O. Reg. 124/17, s. 1; O. Reg. 531/22, s. 2.

FORMS 1, 2 REVOKED: O. REG. 109/11, S. 4.

Tab 65

Criminal Code, RSC 1985, c C-46



Current version: in force since 2025-10-10

Link to this version: <https://canlii.ca/t/56lsh>

Citation to this version: Criminal Code, RSC 1985, c C-46, <<https://canlii.ca/t/56lsh>> retrieved on 2026-03-23

Currency: This statute is current to 2026-03-02 according to the [Justice Laws Web Site](#)

Criminal Code

R.S.C., 1985, c. C-46

An Act respecting the Criminal Law

Short Title

Short title

1 This Act may be cited as the *Criminal Code*.

R.S., c. C-34, s. 1.

Interpretation

Definitions

2 In this Act,

Act includes

- (a) an Act of Parliament,
- (b) an Act of the legislature of the former Province of Canada,
- (c) an Act of the legislature of a province, and

(d) an Act or ordinance of the legislature of a province, territory or place in force at the time that province, territory or place became a province of Canada; (*loi*)

appearance notice means a notice in Form 9 issued by a peace officer; (*citation à comparaître*)

associated personnel means persons who are

(a) assigned by a government or an intergovernmental organization with the agreement of the competent organ of the United Nations,

(b) engaged by the Secretary-General of the United Nations, by a specialized agency of the United Nations or by the International Atomic Energy Agency, or

(c) deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations, by a specialized agency of the United Nations or by the International Atomic Energy Agency,

to carry out activities in support of the fulfilment of the mandate of a United Nations operation; (*personnel associé*)

Attorney General

(a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his or her lawful deputy or, if those proceedings are referred to in [subsection 2.3\(1\)](#), the Attorney General of Canada or the Attorney General or Solicitor General of the province in which those proceedings are taken and includes the lawful deputy of any of them,

(b) means the Attorney General of Canada and includes his or her lawful deputy with respect to

(i) Yukon, the Northwest Territories and Nunavut, or

(ii) proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of an offence under any Act of Parliament — other than this Act or the [Canada Elections Act](#) — or any regulation made under such an Act, and

(c) means the Director of Public Prosecutions appointed under [subsection 3\(1\)](#) of the [Director of Public Prosecutions Act](#) with respect to proceedings in relation to an offence under the [Canada Elections Act](#); (*procureur général*)

audioconference means any means of telecommunication that allows the judge or justice and any individual to communicate orally in a proceeding; (*audioconférence*)

bank-note includes any negotiable instrument

(a) issued by or on behalf of a person carrying on the business of banking in or out of Canada, and

(b) issued under the authority of Parliament or under the lawful authority of the government of a state other than Canada,

intended to be used as money or as the equivalent of money, immediately on issue or at some time subsequent thereto, and includes bank bills and bank post bills; (*billet de banque*)

bodily harm means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature; (*lésions corporelles*)

Canadian Forces means the armed forces of Her Majesty raised by Canada; (*Forces canadiennes*)

cattle means neat cattle or an animal of the bovine species by whatever technical or familiar name it is known, and includes any horse, mule, ass, pig, sheep or goat; (*bétail*)

clerk of the court includes a person, by whatever name or title he may be designated, who from time to time performs the duties of a clerk of the court; (*greffier du tribunal*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

complainant means the victim of an alleged offence; (*plaignant*)

counsel means a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings; (*avocat*)

count means a charge in an information or indictment; (*chef d'accusation*)

court of appeal means, in all provinces, the Court of Appeal. (*cour d'appel*)

court of criminal jurisdiction means

(a) a court of general or quarter sessions of the peace, when presided over by a superior court judge,

(a.1) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,

(b) a provincial court judge or judge acting under Part XIX, and

(c) in the Province of Ontario, the Ontario Court of Justice; (*cour de juridiction criminelle*)

criminal organization has the same meaning as in [subsection 467.1\(1\)](#); (*organisation criminelle*)

criminal organization offence means

(a) an offence under [section 467.11](#), [467.111](#), [467.12](#) or [467.13](#), or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization, or

(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a);
(*infraction d'organisation criminelle*)

day means the period between six o'clock in the forenoon and nine o'clock in the afternoon of the same day; (*jour*)

document of title to goods includes a bought and sold note, bill of lading, warrant, certificate or order for the delivery or transfer of goods or any other valuable thing, and any other document used in the ordinary course of business as evidence of the possession or control of goods, authorizing or purporting to authorize, by endorsement or by delivery, the person in possession of the document to transfer or receive any goods thereby represented or therein mentioned or referred to; (*titre de marchandises*)

document of title to lands includes any writing that is or contains evidence of the title, or any part of the title, to real property or to any interest in real property, and any notarial or registrar's copy thereof and any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada with respect to registration of titles that relates to title to real property or to any interest in real property; (*titre de bien-fonds*)

dwelling-house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes

(a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and

(b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence; (*maison d'habitation*)

environment means the components of the Earth and includes

(a) air, land and water,

(b) all layers of the atmosphere,

(c) all organic and inorganic matter and living organisms, and

(d) the interacting natural systems that include components referred to in paragraphs (a) to (c); (*environnement*)

every one, person and **owner**, and similar expressions, include Her Majesty and an organization; (*quiconque, individu, personne et propriétaire*)

explosive substance includes

(a) anything intended to be used to make an explosive substance,

(b) anything, or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance, and

(c) an incendiary grenade, fire bomb, molotov cocktail or other similar incendiary substance or device and a delaying mechanism or other thing intended for use in connection with such a substance or device; (*substance explosive*)

feeble-minded person [Repealed, 1991, c. 43, s. 9]

firearm means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm; (*arme à feu*)

government or public facility means a facility or conveyance, whether permanent or temporary, that is used or occupied in connection with their official duties by representatives of a state, members of a government, members of a legislature, members of the judiciary, or officials or employees of a state or of any other public authority or public entity, or by officials or employees of an intergovernmental organization; (*installation gouvernementale ou publique*)

Her Majesty's Forces means the naval, army and air forces of Her Majesty wherever raised, and includes the Canadian Forces; (*forces de Sa Majesté*)

highway means a road to which the public has the right of access, and includes bridges over which or tunnels through which a road passes; (*voie publique ou grande route*)

indictment includes

(a) information or a count therein,

(b) a plea, replication or other pleading, and

(c) any record; (*acte d'accusation*)

internationally protected person means

(a) a head of state, including any member of a collegial body that performs the functions of a head of state under the constitution of the state concerned, a head of a government or a minister of foreign affairs, whenever that person is in a state other than the state in which he holds that position or office,

(b) a member of the family of a person described in paragraph (a) who accompanies that person in a state other than the state in which that person holds that position or office,

(c) a representative or an official of a state or an official or agent of an international organization of an intergovernmental character who, at the time when and at the place where an offence referred to in [subsection 7\(3\)](#) is committed against his person or any property referred to in [section 431](#) that is used by him, is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity, or

(d) a member of the family of a representative, official or agent described in paragraph (c) who forms part of his household, if the representative, official or agent, at the time when and at the place where any offence referred to in [subsection 7\(3\)](#) is committed against the member of his family or any property referred to in [section 431](#) that is used by that member, is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity; (*personne jouissant d'une protection internationale*)

intimate partner with respect to a person, includes their current or former spouse, common-law partner and dating partner; (*partenaire intime*)

justice means a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction; (*juge de paix*)

justice system participant means

(a) a member of the Senate, of the House of Commons, of a legislative assembly or of a municipal council,

(b) a person who plays a role in the administration of criminal justice, including

(i) the Minister of Public Safety and Emergency Preparedness and a Minister responsible for policing in a province,

(ii) a prosecutor, a lawyer, a member of the Chambre des notaires du Québec and an officer of a court,

(iii) a judge and a justice,

(iv) a juror and a person who is summoned as a juror,

(v) an informant, a prospective witness, a witness under subpoena and a witness who has testified,

(vi) a peace officer within the meaning of any of paragraphs (b), (c), (d), (e) and (g) of the definition **peace officer**,

(vii) a civilian employee of a police force,

(viii) a person employed in the administration of a court,

(viii.1) a public officer within the meaning of [subsection 25.1\(1\)](#) and a person acting at the direction of such an officer,

(ix) an employee of the Canada Revenue Agency who is involved in the investigation of an offence under an Act of Parliament,

(ix.1) an employee of the Canada Border Services Agency who is involved in the investigation of an offence under an Act of Parliament,

(x) an employee of a federal or provincial correctional service, a parole supervisor and any other person who is involved in the administration of a sentence under the

supervision of such a correctional service and a person who conducts disciplinary hearings under the *Corrections and Conditional Release Act*, and

(xi) an employee and a member of the Parole Board of Canada and of a provincial parole board, and

(c) a person who plays a role in respect of proceedings involving

(i) security information,

(ii) criminal intelligence information,

(iii) information that would endanger the safety of any person if it were disclosed,

(iv) information that is obtained in confidence from a source in Canada, the government of a foreign state, an international organization of states or an institution of such a government or international organization, or

(v) potentially injurious information or sensitive information as those terms are defined in *section 38* of the *Canada Evidence Act*; (*personne associée au système judiciaire*)

magistrate [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 2]

mental disorder means a disease of the mind; (*troubles mentaux*)

military shall be construed as relating to all or any of the Canadian Forces; (*militaire*)

military law includes all laws, regulations or orders relating to the Canadian Forces; (*loi militaire*)

motor vehicle means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment; (*véhicule à moteur*)

municipality includes the corporation of a city, town, village, county, township, parish or other territorial or local division of a province, the inhabitants of which are incorporated or are entitled to hold property collectively for a public purpose; (*municipalité*)

newly-born child means a person under the age of one year; (*enfant nouveau-né ou nouveau-né*)

night means the period between nine o'clock in the afternoon and six o'clock in the forenoon of the following day; (*nuît*)

nuclear facility means

(a) any nuclear reactor, including a reactor installed on a vessel, vehicle, aircraft or space object for use as an energy source in order to propel the vessel, vehicle, aircraft or space object or for any other purpose, and

(b) any plant or conveyance used for the production, storage, processing or transport of nuclear material or radioactive material; (*installation nucléaire*)

nuclear material means

- (a) plutonium, except plutonium with an isotopic concentration of plutonium-238 that is greater than 80%,
- (b) uranium-233,
- (c) uranium containing uranium-233 or uranium-235 or both in an amount such that the abundance ratio of the sum of those isotopes to the isotope uranium-238 is greater than 0.72%,
- (d) uranium with an isotopic concentration equal to that occurring in nature, except uranium in the form of ore or ore-residue, and
- (e) any substance containing any material described in paragraphs (a) to (d);
(*matière nucléaire*)

offence-related property means any property, within or outside Canada,

- (a) by means or in respect of which an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* is committed,
- (b) that is used in any manner in connection with the commission of such an offence, or
- (c) that is intended to be used for committing such an offence; (*bien infractionnel*)

offender means a person who has been determined by a court to be guilty of an offence, whether on acceptance of a plea of guilty or on a finding of guilt; (*contrevenant*)

offensive weapon has the same meaning as *weapon*; (*arme offensive*)

organization means

- (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
- (b) an association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons; (*organisation*)

peace officer includes

- (a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,
- (b) a member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the *Corrections and Conditional Release Act*, and a warden, deputy warden, instructor, keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the *Corrections and Conditional Release Act*,

(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,

(c.1) a designated officer as defined in [section 2](#) of the *Integrated Cross-border Law Enforcement Operations Act*, when

(i) participating in an integrated cross-border operation, as defined in [section 2](#) of that Act, or

(ii) engaging in an activity incidental to such an operation, including travel for the purpose of participating in the operation and appearances in court arising from the operation,

(d) an officer within the meaning of the *Customs Act*, the *Excise Act* or the *Excise Act, 2001*, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts,

(d.1) an officer authorized under [subsection 138\(1\)](#) of the *Immigration and Refugee Protection Act*,

(e) a person designated as a fishery guardian under the *Fisheries Act* when performing any duties or functions under that Act and a person designated as a fishery officer under the *Fisheries Act* when performing any duties or functions under that Act or the *Coastal Fisheries Protection Act*,

(f) the pilot in command of an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, and

(g) officers and non-commissioned members of the Canadian Forces who are

(i) appointed for the purposes of [section 156](#) of the *National Defence Act*, or

(ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers; (*agent de la paix*)

prison includes a penitentiary, common jail, public or reformatory prison, lock-up, guard-room or other place in which persons who are charged with or convicted of offences are usually kept in custody; (*prison*)

property includes

(a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,

(b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange, and

(c) any postal card, postage stamp or other stamp issued or prepared for issue under the authority of Parliament or the legislature of a province for the payment to the Crown or a corporate body of any fee, rate or duty, whether or not it is in the possession of the Crown or of any person; (*biens ou propriété*)

prosecutor means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them; (*poursuivant*)

provincial court judge means a person appointed or authorized to act by or pursuant to an Act of the legislature of a province, by whatever title that person may be designated, who has the power and authority of two or more justices of the peace and includes the lawful deputy of that person; (*juge de la cour provinciale*)

public department means a department of the Government of Canada or a branch thereof or a board, commission, corporation or other body that is an agent of Her Majesty in right of Canada; (*ministère public*)

public officer includes

(a) an officer of customs or excise,

(b) an officer of the Canadian Forces,

(c) an officer of the Royal Canadian Mounted Police, and

(d) any officer while the officer is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation; (*fonctionnaire public*)

public stores includes any personal property that is under the care, supervision, administration or control of a public department or of any person in the service of a public department; (*approvisionnement publics*)

radioactive material means any material that emits one or more types of ionizing radiation, such as alpha or beta particles, neutrons and gamma rays, and that is capable of, owing to its radiological or fissile properties, causing death, serious bodily harm or substantial damage to property or the environment; (*matière radioactive*)

railway equipment means

(a) any machine that is constructed for movement exclusively on lines of railway, whether or not the machine is capable of independent motion, or

(b) any vehicle that is constructed for movement both on and off lines of railway while the adaptations of that vehicle for movement on lines of railway are in use; (*matériel ferroviaire*)

recognizance means a recognizance in Form 32 entered into before a judge or justice;
(*engagement*)

release order means an order in Form 11 made by a *judge* as defined in [section 493](#) or a justice; (*ordonnance de mise en liberté*)

representative, in respect of an organization, means a director, partner, employee, member, agent or contractor of the organization; (*agent*)

senior officer means a representative who plays an important role in the establishment of an organization's policies or is responsible for managing an important aspect of the organization's activities and, in the case of a body corporate, includes a director, its chief executive officer and its chief financial officer; (*cadre supérieur*)

serious offence has the same meaning as in [subsection 467.1\(1\)](#); (*infraction grave*)

steal means to commit theft; (*voler*)

street racing [Repealed, 2018, c. 21, s. 12]

summons means, unless a contrary intention appears, a summons in Form 6 issued by a judge or justice or by the *chairperson* of a *Review Board* as defined in [subsection 672.1\(1\)](#); (*sommatation*)

superior court of criminal jurisdiction means

(a) in the Province of Ontario, the Court of Appeal or the Superior Court of Justice,

(b) in the Province of Quebec, the Superior Court,

(c) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, the Court of Appeal or the Supreme Court,

(d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Appeal or the Court of Queen's Bench,

(e) in the Province of Newfoundland and Labrador, Yukon and the Northwest Territories, the Supreme Court, and

(f) in Nunavut, the Nunavut Court of Justice; (*cour supérieure de juridiction criminelle*)

(g) and (h) [Repealed, 2015, c. 3, s. 44]

territorial division includes any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies;
(*circonscription territoriale*)

terrorism offence means

(a) an offence under any of [sections 83.02 to 83.04](#) or [83.18 to 83.23](#),

(b) an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group,

(c) an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity, or

(d) a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (c); (*infraction de terrorisme*)

terrorist activity has the same meaning as in [subsection 83.01\(1\)](#); (*activité terroriste*)

terrorist group has the same meaning as in [subsection 83.01\(1\)](#); (*groupe terroriste*)

testamentary instrument includes any will, codicil or other testamentary writing or appointment, during the life of the testator whose testamentary disposition it purports to be and after his death, whether it relates to real or personal property or to both; (*acte testamentaire*)

trustee means a person who is declared by any Act to be a trustee or is, by the law of a province, a trustee, and, without restricting the generality of the foregoing, includes a trustee on an express trust created by deed, will or instrument in writing, or by parol; (*fiduciaire*)

undertaking means, unless a contrary intention appears, an undertaking in Form 10 given to a peace officer; (*promesse*)

unfit to stand trial means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

(a) understand the nature or object of the proceedings,

(b) understand the possible consequences of the proceedings, or

(c) communicate with counsel; (*inaptitude à subir son procès*)

United Nations operation means an operation that is established by the competent organ of the United Nations in accordance with the Charter of the United Nations and is conducted under United Nations authority and control, if the operation is for the purpose of maintaining or restoring international peace and security or if the Security Council or the General Assembly of the United Nations has declared, for the purposes of the *Convention on the Safety of United Nations and Associated Personnel*, that there exists an exceptional risk to the safety of the personnel participating in the operation. It does not include an operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies; (*opération des Nations Unies*)

United Nations personnel means

(a) persons who are engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation, or

(b) any other officials or experts who are on mission of the United Nations or one of its specialized agencies or the International Atomic Energy Agency and who are present in an official capacity in the area where a United Nations operation is conducted; (*personnel des Nations Unies*)

valuable mineral means a mineral of a value of at least \$100 per kilogram, and includes precious metals, diamonds and other gemstones and any rock or ore that contains those minerals; (*minéraux précieux*)

valuable security includes

(a) an order, exchequer acquittance or other security that entitles or evidences the title of any person

(i) to a share or interest in a public stock or fund or in any fund of a body corporate, company or society, or

(ii) to a deposit in a financial institution,

(b) any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money,

(c) a document of title to lands or goods wherever situated,

(d) a stamp or writing that secures or evidences title to or an interest in a chattel personal, or that evidences delivery of a chattel personal, and

(e) a release, receipt, discharge or other instrument evidencing payment of money; (*valeur ou effet appréciable*)

victim means a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of [sections 672.5, 722 and 745.63](#), a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person. (*victim*)

videoconference means any means of telecommunication that allows the judge, justice or *chairperson* of a *Review Board*, as defined in [subsection 672.1\(1\)](#), and any individual to engage in simultaneous visual and oral communication in a proceeding; (*vidéoconférence*)

weapon means any thing used, designed to be used or intended for use

(a) in causing death or injury to any person, or

(b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm and, for the purposes of [sections 88, 267 and 272](#), any thing used, designed to be used or intended for use in binding or tying up a person against their will; (*arme*)

wreck includes the cargo, stores and tackle of a vessel and all parts of a vessel separated from the vessel, and the property of persons who belong to, are on board or have quitted a vessel that is wrecked, stranded or in distress at any place in Canada; (*épave*)

writing includes a document of any kind and any mode in which, and any material on which, words or figures, whether at length or abridged, are written, printed or otherwise expressed, or a map or plan is inscribed. (*écrit*)

R.S., 1985, c. C-46, s. 2; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 2, 203, c. 31 (1st Supp.), s. 61, c. 1 (2nd Supp.), s. 213, c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34, c. 32 (4th Supp.), s. 55, c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28, c. 40, s. 1, c. 43, ss. 1, 9; 1992, c. 20, s. 216, c. 51, s. 32; 1993, c. 28, s. 78, c. 34, s. 59; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40, c. 39, s. 138; 1997, c. 23, s. 1; 1998, c. 30, s. 14; 1999, c. 3, s. 25, c. 5, s. 1, c. 25, s. 1(Preamble), c. 28, s. 155; 2000, c. 12, s. 91, c. 25, s. 1(F); 2001, c. 32, s. 1, c. 41, ss. 2, 131; 2002, c. 7, s. 137, c. 22, s. 324; 2003, c. 21, s. 1; 2004, c. 3, s. 1; 2005, c. 10, s. 34, c. 38, s. 58, c. 40, ss. 1, 7; 2006, c. 14, s. 1; 2007, c. 13, s. 1; 2012, c. 1, s. 160, c. 19, s. 371; 2013, c. 13, s. 2; 2014, c. 17, s. 1, c. 23, s. 2, c. 25, s. 2; 2015, c. 3, s. 44, c. 13, s. 3, c. 20, s. 15; 2018, c. 21, s. 12; 2019, c. 13, s. 140; 2019, c. 25, s. 1; 2022, c. 17, s. 1.

Further definitions — firearms

2.1 In this Act, **ammunition**, **antique firearm**, **automatic firearm**, **cartridge magazine**, **cross-bow**, **firearm part**, **handgun**, **imitation firearm**, **prohibited ammunition**, **prohibited device**, **prohibited firearm**, **prohibited weapon**, **replica firearm**, **restricted firearm** and **restricted weapon**, as well as **authorization**, **licence** and **registration certificate** when used in relation to those words and expressions, have the same meaning as in [subsection 84\(1\)](#).

[2009, c. 22, s. 1](#); [2023, c. 32, s. 0.1](#).

Acting on victim's behalf

2.2 (1) For the purposes of [sections 606](#), [672.5](#), [715.37](#), [722](#), [737.1](#) and [745.63](#), any of the following individuals may act on the victim's behalf if the victim is dead or incapable of acting on their own behalf:

- (a) the victim's spouse, or if the victim is dead, their spouse at the time of death;
- (b) the victim's common-law partner, or if the victim is dead, their common-law partner at the time of death;
- (c) a relative or dependant of the victim;
- (d) an individual who has in law or fact custody, or is responsible for the care or support, of the victim; and
- (e) an individual who has in law or fact custody, or is responsible for the care or support, of a dependant of the victim.

Exception

(2) An individual is not entitled to act on a victim's behalf if the individual is an accused in relation to the offence or alleged offence that resulted in the victim suffering harm or

loss or is an individual who is found guilty of that offence or who is found not criminally responsible on account of mental disorder or unfit to stand trial in respect of that offence.

2015, c. 13, s. 4; 2018, c. 12, s. 403.

Concurrent jurisdiction

2.3 (1) The proceedings for the purposes of paragraph (a) of the definition *Attorney General* in [section 2](#) are

- (a) proceedings in relation to an offence under [subsection 7\(2.01\), \(2.3\), \(2.31\), \(2.35\) or \(2.36\)](#) or [section 57, 58, 83.12, 103, 104, 121.1, 380, 382, 382.1, 391, 400, 424.1, 431.1, 467.11 or 467.111](#) or in relation to any terrorism offence;
- (b) proceedings in relation to an offence against a member of United Nations personnel or associated personnel under [section 235, 236, 266 to 269, 269.1, 271 to 273, 279 or 279.1](#);
- (c) proceedings in relation to an offence referred to in [subsection 7\(3.71\)](#) or in relation to an offence referred to in paragraph (a) of the definition *terrorist activity* in [subsection 83.01\(1\)](#) if the act or omission constituting the offence was committed outside Canada and is deemed under any of [subsections 7\(2\), \(2.1\) to \(2.21\), \(3\), \(3.1\), \(3.72\) and \(3.73\)](#) to have been committed in Canada;
- (d) proceedings in relation to an offence if the act or omission constituting the offence is a terrorist activity referred to in paragraph (b) of the definition *terrorist activity* in [subsection 83.01\(1\)](#) and was committed outside Canada and is deemed by virtue of [subsection 7\(3.74\) or \(3.75\)](#) to have been committed in Canada;
- (e) a proceeding in relation to an offence under [section 811](#) that arises out of a breach of a recognizance made under [section 810.01 or 810.011](#), if he or she has given consent to the information referred to in those sections; and
- (f) proceedings under [section 83.13, 83.14, 83.222, 83.223 or 83.3](#).

For greater certainty — Attorney General of Canada

(2) For greater certainty, the Attorney General of Canada or his or her lawful deputy may, in respect of an offence referred to in subsection (1) or an offence under any Act of Parliament — other than this Act or the [Canada Elections Act](#) — or any regulation made under such an Act, exercise all the powers and perform all the duties and functions assigned to the Attorney General by or under this Act, and those powers include the power to commence and to conduct

- (a) a proceeding for conspiring or attempting to commit such an offence or for being an accessory after the fact or counselling a person to be a party to such an offence;
- (b) a proceeding in relation to a criminal organization offence that arises out of conduct that relates, in whole or in part, to any offence for which he or she has the power to commence and to conduct a proceeding;
- (c) a proceeding in relation to an offence referred to in [section 354, 355.2, 355.4 or 462.31](#) that arises out of conduct that relates, in whole or in part, to any offence for

which he or she has the power to commence and to conduct a proceeding or out of any act or omission that, if it had occurred in Canada, would have constituted such an offence;

(d) a proceeding for the breach of any court order made in the course of a proceeding commenced or conducted by him or her;

(e) a proceeding for the failure to comply with any condition associated with the release of a person by a peace officer or other competent authority — including a condition to appear at a specified time and place — in relation to any offence for which he or she has the power to commence and to conduct a proceeding; and

(f) any ancillary proceedings in relation to any offence for which he or she has the power to commence and to conduct a proceeding.

For greater certainty — Director of Public Prosecutions

(3) For greater certainty, in respect of an offence under the [Canada Elections Act](#), the Director of Public Prosecutions, subject to the [Director of Public Prosecutions Act](#), exercises the powers and performs the duties and functions of the Attorney General of Canada referred to in subsection (2).

[2019, c. 25, s. 2](#); [2019, c. 25, s. 404](#); [2020, c. 1, s. 35](#); [2022, c. 10, s. 295](#).

Descriptive cross-references

3 Where, in any provision of this Act, a reference to another provision of this Act or a provision of any other Act is followed by words in parenthesis that are or purport to be descriptive of the subject-matter of the provision referred to, the words in parenthesis form no part of the provision in which they occur but shall be deemed to have been inserted for convenience of reference only.

[1976-77, c. 53, s. 2](#).

Part I

General

Effect of judicial acts

3.1 (1) Unless otherwise provided or ordered, anything done by a court, justice or judge is effective from the moment it is done, whether or not it is reduced to writing.

Clerk of the court

(2) Unless otherwise provided or ordered, if anything is done from the bench by a court, justice or judge and it is reduced to writing, the clerk of the court may sign the writing.

[2002, c. 13, s. 2](#); [2019, c. 25, s. 3](#).

Postcard a chattel, value

4 (1) For the purposes of this Act, a postal card or stamp referred to in paragraph (c) of the definition **property** in [section 2](#) shall be deemed to be a chattel and to be equal in value to the amount of the postage, rate or duty expressed on its face.

Value of valuable security

(2) For the purposes of this Act, the following rules apply for the purpose of determining the value of a valuable security where value is material:

(a) where the valuable security is one mentioned in paragraph (a) or (b) of the definition **valuable security** in [section 2](#), the value is the value of the share, interest, deposit or unpaid money, as the case may be, that is secured by the valuable security;

(b) where the valuable security is one mentioned in paragraph (c) or (d) of the definition **valuable security** in [section 2](#), the value is the value of the lands, goods, chattel personal or interest in the chattel personal, as the case may be; and

(c) where the valuable security is one mentioned in paragraph (e) of the definition **valuable security** in [section 2](#), the value is the amount of money that has been paid.

Possession

(3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

Expressions taken from other Acts

(4) Where an offence that is dealt with in this Act relates to a subject that is dealt with in another Act, the words and expressions used in this Act with respect to that offence have, subject to this Act, the meaning assigned to them in that other Act.

Sexual intercourse

(5) For the purposes of this Act, sexual intercourse is complete on penetration to even the slightest degree, notwithstanding that seed is not emitted.

Proof of notifications and service of documents

(6) For the purposes of this Act, the service of any document and the giving or sending of any notice may be proved

(a) by oral evidence given under oath by, or by the affidavit or solemn declaration of, the person claiming to have served, given or sent it; or

(b) in the case of a peace officer, by a statement in writing certifying that the document was served or the notice was given or sent by the peace officer, and such a statement is deemed to be a statement made under oath.

Proof of service in accordance with provincial laws

(6.1) Despite subsection (6), the service of documents may be proved in accordance with the laws of a province relating to offences created by the laws of that province.

Attendance for examination

(7) Despite subsection (6) or (6.1), the court may require the person who appears to have signed an affidavit, a solemn declaration or a statement in accordance with that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service or of the giving or sending of any notice.

Means of telecommunication

(8) For greater certainty, for the purposes of this Act, if the elements of an offence contain an explicit or implicit element of communication without specifying the means of communication, the communication may also be made by a means of telecommunication.

R.S., 1985, c. C-46, s. 4; R.S., 1985, c. 27 (1st Supp.), s. 3; 1994, c. 44, s. 3; 1997, c. 18, s. 2; [2008, c. 18, s. 1](#); [2014, c. 31, s. 2](#).

Canadian Forces not affected

5 Nothing in this Act affects any law relating to the government of the Canadian Forces.

R.S., c. C-34, s. 4.

Presumption of innocence

6 (1) Where an enactment creates an offence and authorizes a punishment to be imposed in respect of that offence,

(a) a person shall be deemed not to be guilty of the offence until he is convicted or discharged under [section 730](#) of the offence; and

(b) a person who is convicted or discharged under [section 730](#) of the offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.

Offences outside Canada

(2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under [section 730](#) of an offence committed outside Canada.

Definition of *enactment*

(3) In this section, ***enactment*** means

(a) an Act of Parliament, or

(b) an Act of the legislature of a province that creates an offence to which Part XXVII applies,

or any regulation made thereunder.

R.S., 1985, c. C-46, s. 6; R.S., 1985, c. 27 (1st Supp.), s. 4, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.

Offences committed on aircraft

7 (1) Notwithstanding anything in this Act or any other Act, every one who

(a) on or in respect of an aircraft

(i) registered in Canada under regulations made under the [Aeronautics Act](#), or

(ii) leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, or

(b) on any aircraft, while the aircraft is in flight if the flight terminated in Canada,

commits an act or omission in or outside Canada that if committed in Canada would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

Idem

(2) Notwithstanding this Act or any other Act, every one who

(a) on an aircraft, while the aircraft is in flight, commits an act or omission outside Canada that if committed in Canada or on an aircraft registered in Canada under regulations made under the [Aeronautics Act](#) would be an offence against [section 76](#) or [paragraph 77\(a\)](#),

(b) in relation to an aircraft in service, commits an act or omission outside Canada that if committed in Canada would be an offence against any of [paragraphs 77\(c\)](#), (d) or (g),

(c) in relation to an air navigation facility used in international air navigation, commits an act or omission outside Canada that if committed in Canada would be an offence against [paragraph 77\(e\)](#),

(d) at or in relation to an airport serving international civil aviation, commits an act or omission outside Canada that if committed in Canada would be an offence against [paragraph 77\(b\)](#) or (f), or

(e) commits an act or omission outside Canada that if committed in Canada would constitute a conspiracy or an attempt to commit an offence referred to in this subsection, or being an accessory after the fact or counselling in relation to such an offence,

shall be deemed to have committed that act or omission in Canada if the person is, after the commission thereof, present in Canada.

Offences in relation to cultural property

(2.01) Despite anything in this Act or any other Act, a person who commits an act or omission outside Canada that if committed in Canada would constitute an offence under [section 322, 341, 344, 380, 430 or 434](#) in relation to cultural property as defined in [Article 1](#) of the Convention, or a conspiracy or an attempt to commit such an offence, or being an accessory after the fact or counselling in relation to such an offence, is deemed to have committed that act or omission in Canada if the person

- (a)** is a Canadian citizen;
- (b)** is not a citizen of any state and ordinarily resides in Canada; or
- (c)** is a permanent resident within the meaning of [subsection 2\(1\)](#) of the *Immigration and Refugee Protection Act* and is, after the commission of the act or omission, present in Canada.

Definition of *Convention*

(2.02) For the purpose of subsection (2.01), ***Convention*** means the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on May 14, 1954. [Article 1](#) of the Convention is set out in the schedule to the *Cultural Property Export and Import Act*.

Offences against fixed platforms or international maritime navigation

(2.1) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada against or on board a fixed platform attached to the continental shelf of any state or against or on board a ship navigating or scheduled to navigate beyond the territorial sea of any state, that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, [section 78.1](#), shall be deemed to commit that act or omission in Canada if it is committed

- (a)** against or on board a fixed platform attached to the continental shelf of Canada;
- (b)** against or on board a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (c)** by a Canadian citizen;
- (d)** by a person who is not a citizen of any state and who ordinarily resides in Canada;
- (e)** by a person who is, after the commission of the offence, present in Canada;
- (f)** in such a way as to seize, injure or kill, or threaten to injure or kill, a Canadian citizen; or
- (g)** in an attempt to compel the Government of Canada to do or refrain from doing any act.

Offences against fixed platforms or navigation in the internal waters or territorial sea of another state

(2.2) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada against or on board a fixed platform not attached to the continental shelf of any state or against or on board a ship not navigating or scheduled to navigate beyond the territorial sea of any state, that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, [section 78.1](#), shall be deemed to commit that act or omission in Canada

- (a)** if it is committed as described in any of paragraphs (2.1)(b) to (g); and
- (b)** if the offender is found in the territory of a state, other than the state in which the act or omission was committed, that is
 - (i)** a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988, in respect of an offence committed against or on board a ship, or
 - (ii)** a party to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988, in respect of an offence committed against or on board a fixed platform.

Nuclear terrorism offence committed outside Canada

(2.21) Despite anything in this Act or any other Act, everyone who commits an act or omission outside Canada that if committed in Canada would constitute an offence under any of [sections 82.3 to 82.6](#), or a conspiracy or attempt to commit such an offence, or being an accessory after the fact or counselling in relation to such an offence, is deemed to have committed that act or omission in Canada if

- (a)** the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under any Act of Parliament;
- (b)** the act or omission is committed on an aircraft that
 - (i)** is registered in Canada under regulations made under the [Aeronautics Act](#), or
 - (ii)** is leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as owner of an aircraft in Canada under those regulations;
- (c)** the person who commits the act or omission is a Canadian citizen; or
- (d)** the person who commits the act or omission is, after the commission of the act or omission, present in Canada.

Space Station — Canadian crew members

(2.3) Despite anything in this Act or any other Act, a Canadian crew member who, during a space flight, commits an act or omission outside Canada that if committed in

Canada would constitute an indictable offence is deemed to have committed that act or omission in Canada, if that act or omission is committed

(a) on, or in relation to, a flight element of the Space Station; or

(b) on any means of transportation to or from the Space Station.

Space Station — crew members of Partner States

(2.31) Despite anything in this Act or any other Act, a crew member of a Partner State who commits an act or omission outside Canada during a space flight on, or in relation to, a flight element of the Space Station or on any means of transportation to and from the Space Station that if committed in Canada would constitute an indictable offence is deemed to have committed that act or omission in Canada, if that act or omission

(a) threatens the life or security of a Canadian crew member; or

(b) is committed on or in relation to, or damages, a flight element provided by Canada.

(2.32) [Repealed, 2019, c. 25, s. 4]

Consent of Attorney General of Canada

(2.33) No proceedings in relation to an offence referred to in subsection (2.3) or (2.31) may be instituted without the consent of the Attorney General of Canada.

Definitions

(2.34) The definitions in this subsection apply in this subsection and in subsections (2.3) and (2.31).

Agreement has the same meaning as in [section 2](#) of the [Civil International Space Station Agreement Implementation Act](#). (*Accord*)

Canadian crew member means a crew member of the Space Station who is

(a) a Canadian citizen; or

(b) a citizen of a foreign state, other than a Partner State, who is authorized by Canada to act as a crew member for a space flight on, or in relation to, a flight element. (*membre d'équipage canadien*)

crew member of a Partner State means a crew member of the Space Station who is

(a) a citizen of a Partner State; or

(b) a citizen of a state, other than Canada or a Partner State, who is authorized by a Partner State to act as a crew member for a space flight on, or in relation to, a flight element. (*membre d'équipage d'un État partenaire*)

flight element means a Space Station element provided by Canada or by a Partner State under the Agreement and under any memorandum of understanding or other implementing arrangement entered into to carry out the Agreement. (*élément de vol*)

Partner State means a State, other than Canada, who contracted to enter into the Agreement and for which the Agreement has entered into force in accordance with [article 25](#) of the Agreement. (*État partenaire*)

space flight means the period that begins with the launching of a crew member of the Space Station, continues during their stay in orbit and ends with their landing on earth. (*vol spatial*)

Space Station means the civil international Space Station that is a multi-use facility in low-earth orbit, with flight elements and dedicated ground elements provided by, or on behalf of, Canada or the Partner States. (*station spatiale*)

Lunar Gateway — Canadian crew members

(2.35) Despite anything in this Act or any other Act, a Canadian crew member who, during a space flight, commits an act or omission outside Canada that if committed in Canada would constitute an indictable offence is deemed to have committed that act or omission in Canada, if that act or omission is committed

- (a)** on, or in relation to, a flight element of the Lunar Gateway;
- (b)** on any means of transportation to or from the Lunar Gateway; or
- (c)** on the surface of the Moon.

Lunar Gateway — crew members of Partner States

(2.36) Despite anything in this Act or any other Act, a crew member of a Partner State who commits an act or omission outside Canada during a space flight on, or in relation to, a flight element of the Lunar Gateway, on any means of transportation to and from the Lunar Gateway or on the surface of the Moon that if committed in Canada would constitute an indictable offence is deemed to have committed that act or omission in Canada, if that act or omission

- (a)** threatens the life or security of a Canadian crew member; or
- (b)** is committed on or in relation to, or damages, a flight element provided by Canada.

Consent of Attorney General of Canada

(2.37) No proceedings in relation to an offence referred to in subsection (2.35) or (2.36) may be instituted without the consent of the Attorney General of Canada.

Definitions

(2.38) The definitions in this subsection apply in this subsection and in subsections (2.35) and (2.36).

Agreement has the same meaning as in [section 2](#) of the [Civil Lunar Gateway Agreement Implementation Act](#). (*Accord*)

Canadian crew member means a crew member of the Lunar Gateway who is

- (a) a Canadian citizen; or
- (b) a citizen of a foreign state, other than a Partner State, who is authorized by Canada to act as a crew member for a space flight on, or in relation to, a flight element. (*membre d'équipage canadien*)

crew member of a Partner State means a crew member of the Lunar Gateway who is

- (a) a citizen of a Partner State; or
- (b) a citizen of a state, other than Canada or a Partner State, who is authorized by a Partner State to act as a crew member for a space flight on, or in relation to, a flight element. (*membre d'équipage d'un État partenaire*)

flight element means a Lunar Gateway element provided by Canada or by a Partner State under the Agreement and under any memorandum of understanding or implementing arrangement entered into to carry out the Agreement. (*élément de vol*)

Lunar Gateway means the civil Lunar Gateway that is a multi-use facility in orbit around the Moon, with flight elements and dedicated ground elements provided by, or on behalf of, Canada or the Partner States. (*station lunaire Gateway*)

Partner State means a State, other than Canada, that is a Gateway Partner as defined in [Article 3.1](#) of the Agreement. (*État partenaire*)

space flight means a flight that spans the period beginning with the launching of a crew member of the Lunar Gateway, continuing during their stay in orbit around or on the surface of the Moon and ending with their landing on earth. (*vol spatial*)

Offence against internationally protected person

(3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in [section 431](#) used by that person that, if committed in Canada, would be an offence against any of [sections 235, 236, 266, 267, 268, 269, 269.1, 271, 272, 273, 279, 279.1, 280 to 283, 424](#) and 431 is deemed to commit that act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (b) the act or omission is committed on an aircraft
 - (i) registered in Canada under regulations made under the [Aeronautics Act](#), or
 - (ii) leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as owner of an aircraft in Canada under those regulations;

(c) the person who commits the act or omission is a Canadian citizen or is, after the act or omission has been committed, present in Canada; or

(d) the act or omission is against

(i) a person who enjoys the status of an internationally protected person by virtue of the functions that person performs on behalf of Canada, or

(ii) a member of the family of a person described in subparagraph (i) who qualifies under paragraph (b) or (d) of the definition *internationally protected person* in [section 2](#).

Offence of hostage taking

(3.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against [section 279.1](#) shall be deemed to commit that act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the [Aeronautics Act](#), or

(ii) leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as owner of an aircraft in Canada under such regulations;

(c) the person who commits the act or omission

(i) is a Canadian citizen, or

(ii) is not a citizen of any state and ordinarily resides in Canada;

(d) the act or omission is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission;

(e) a person taken hostage by the act or omission is a Canadian citizen; or

(f) the person who commits the act or omission is, after the commission thereof, present in Canada.

(3.2) to (3.6) [\[Repealed, 2013, c. 13, s. 3\]](#)

Jurisdiction

(3.7) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against, [section 269.1](#) shall be deemed to commit that act or omission in Canada if

- (a)** the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (b)** the act or omission is committed on an aircraft
 - (i)** registered in Canada under regulations made under the [Aeronautics Act](#), or
 - (ii)** leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as owner of an aircraft in Canada under those regulations;
- (c)** the person who commits the act or omission is a Canadian citizen;
- (d)** the complainant is a Canadian citizen; or
- (e)** the person who commits the act or omission is, after the commission thereof, present in Canada.

Offence against United Nations or associated personnel

(3.71) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against a member of United Nations personnel or associated personnel or against property referred to in [section 431.1](#) that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, [section 235](#), [236](#), [266](#), [267](#), [268](#), [269](#), [269.1](#), [271](#), [272](#), [273](#), [279](#), [279.1](#), [424.1](#) or [431.1](#) is deemed to commit that act or omission in Canada if

- (a)** the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under an Act of Parliament;
- (b)** the act or omission is committed on an aircraft
 - (i)** registered in Canada under regulations made under the [Aeronautics Act](#), or
 - (ii)** leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as owner of an aircraft in Canada under those regulations;
- (c)** the person who commits the act or omission
 - (i)** is a Canadian citizen, or
 - (ii)** is not a citizen of any state and ordinarily resides in Canada;
- (d)** the person who commits the act or omission is, after the commission of the act or omission, present in Canada;
- (e)** the act or omission is committed against a Canadian citizen; or
- (f)** the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act.

Offence involving explosive or other lethal device

(3.72) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, [section 431.2](#) is deemed to commit that act or omission in Canada if

- (a)** the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under any Act of Parliament;
- (b)** the act or omission is committed on an aircraft
 - (i)** registered in Canada under regulations made under the [Aeronautics Act](#),
 - (ii)** leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as owner of an aircraft in Canada under those regulations, or
 - (iii)** operated for or on behalf of the Government of Canada;
- (c)** the person who commits the act or omission
 - (i)** is a Canadian citizen, or
 - (ii)** is not a citizen of any state and ordinarily resides in Canada;
- (d)** the person who commits the act or omission is, after the commission of the act or omission, present in Canada;
- (e)** the act or omission is committed against a Canadian citizen;
- (f)** the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act; or
- (g)** the act or omission is committed against a Canadian government or public facility located outside Canada.

Offence relating to financing of terrorism

(3.73) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, [section 83.02](#) is deemed to commit the act or omission in Canada if

- (a)** the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, under an Act of Parliament;
- (b)** the act or omission is committed on an aircraft
 - (i)** registered in Canada under regulations made under the [Aeronautics Act](#), or
 - (ii)** leased without crew and operated by a person who is qualified under regulations made under the [Aeronautics Act](#) to be registered as the owner of an aircraft in Canada under those regulations;
- (c)** the person who commits the act or omission

(i) is a Canadian citizen, or

(ii) is not a citizen of any state and ordinarily resides in Canada;

(d) the person who commits the act or omission is, after its commission, present in Canada;

(e) the act or omission is committed for the purpose of committing an act or omission referred to in [paragraph 83.02\(a\)](#) or (b) in order to compel the Government of Canada or of a province to do or refrain from doing any act;

(f) the act or omission is committed for the purpose of committing an act or omission referred to in [paragraph 83.02\(a\)](#) or (b) against a Canadian government or public facility located outside Canada; or

(g) the act or omission is committed for the purpose of committing an act or omission referred to in [paragraph 83.02\(a\)](#) or (b) in Canada or against a Canadian citizen.

Terrorism offence committed outside Canada

(3.74) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada that, if committed in Canada, would be a terrorism offence, other than an offence under [section 83.02](#) or an offence referred to in paragraph (a) of the definition *terrorist activity* in [subsection 83.01\(1\)](#), is deemed to have committed that act or omission in Canada if the person

(a) is a Canadian citizen;

(b) is not a citizen of any state and ordinarily resides in Canada; or

(c) is a permanent resident within the meaning of [subsection 2\(1\)](#) of the *Immigration and Refugee Protection Act* and is, after the commission of the act or omission, present in Canada.

Terrorist activity committed outside Canada

(3.75) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada that, if committed in Canada, would be an indictable offence and would also constitute a terrorist activity referred to in paragraph (b) of the definition *terrorist activity* in [subsection 83.01\(1\)](#) is deemed to commit that act or omission in Canada if

(a) the act or omission is committed against a Canadian citizen;

(b) the act or omission is committed against a Canadian government or public facility located outside Canada; or

(c) the act or omission is committed with intent to compel the Government of Canada or of a province to do or refrain from doing any act.

(3.76) and (3.77) [Repealed, 2000, c. 24, s. 42]

Offences by Public Service employees

(4) Every one who, while employed as an employee within the meaning of the *Public Service Employment Act* in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

Offence in relation to sexual offences against children

(4.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against [section 151, 152, 153 or 155, subsection 160\(2\) or \(3\), section 163.1, 170, 171, 171.1, 172.1, 172.2 or 173 or subsection 286.1\(2\)](#) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a *permanent resident* within the meaning of [subsection 2\(1\)](#) of the *Immigration and Refugee Protection Act*.

Offence in relation to trafficking in persons

(4.11) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against [section 279.01, 279.011, 279.02 or 279.03](#) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a *permanent resident* within the meaning of [subsection 2\(1\)](#) of the *Immigration and Refugee Protection Act*.

Offence outside Canada

(4.2) Despite anything in this Act or any other Act, a person who commits an act or omission outside Canada that, if committed in Canada, would be an offence under [section 240.1](#) is deemed to commit that act or omission in Canada if the person is a Canadian citizen or a *permanent resident* within the meaning of [subsection 2\(1\)](#) of the *Immigration and Refugee Protection Act*.

Consent of Attorney General

(4.3) Proceedings with respect to an act or omission deemed to have been committed in Canada under subsection (4.1) or (4.2) may only be instituted with the consent of the Attorney General.

Jurisdiction

(5) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

Appearance of accused at trial

(5.1) For greater certainty, the provisions of this Act relating to

- (a) requirements that an accused appear at and be present during proceedings, and
- (b) the exceptions to those requirements,

apply to proceedings commenced in any territorial division pursuant to subsection (5).

If previously tried outside Canada

(6) If a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if that person had been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict*, pardon or an expungement order under the [Expungement of Historically Unjust Convictions Act](#), that person shall be deemed to have been so tried and dealt with in Canada.

If accused not Canadian citizen

(7) If the accused is not a Canadian citizen, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.

Definition of *flight* and *in flight*

(8) For the purposes of this section, of the definition **peace officer** in [section 2](#) and of [sections 27.1](#), [76](#) and [77](#), **flight** means the act of flying or moving through the air and an aircraft is deemed to be in flight from the time when all external doors are closed following embarkation until the later of

- (a) the time at which any such door is opened for the purpose of disembarkation, and
- (b) where the aircraft makes a forced landing in circumstances in which the owner or operator thereof or a person acting on behalf of either of them is not in control of the aircraft, the time at which control of the aircraft is restored to the owner or operator thereof or a person acting on behalf of either of them.

Definition of *in service*

(9) For the purposes of this section and [section 77](#), an aircraft shall be deemed to be in service from the time when pre-flight preparation of the aircraft by ground personnel or the crew thereof begins for a specific flight until

- (a) the flight is cancelled before the aircraft is in flight,
- (b) twenty-four hours after the aircraft, having commenced the flight, lands, or
- (c) the aircraft, having commenced the flight, ceases to be in flight,

whichever is the latest.

Certificate as evidence

(10) In any proceedings under this Act, a certificate purporting to have been issued by or under the authority of the Minister of Foreign Affairs is admissible in evidence without proof of the signature or authority of the person appearing to have signed it and, in the absence of evidence to the contrary, is proof of the facts it states that are relevant to the question of whether any person is a member of United Nations personnel, a member of associated personnel or a person who is entitled under international law to protection from attack or threat of attack against his or her person, freedom or dignity.

Idem

(11) A certificate purporting to have been issued by or under the authority of the Minister of Foreign Affairs stating

(a) that at a certain time any state was engaged in an armed conflict against Canada or was allied with Canada in an armed conflict,

(b) that at a certain time any convention, treaty or other international agreement was or was not in force and that Canada was or was not a party thereto, or

(c) that Canada agreed or did not agree to accept and apply the provisions of any convention, treaty or other international agreement in an armed conflict in which Canada was involved,

is admissible in evidence in any proceedings without proof of the signature or authority of the person appearing to have issued it, and is proof of the facts so stated.

R.S., 1985, c. C-46, s. 7; R.S., 1985, c. 27 (1st Supp.), s. 5, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1, c. 1 (4th Supp.), s. 18(F); 1992, c. 1, ss. 58, 60(F); 1993, c. 7, s. 1; 1995, c. 5, s. 25; 1997, c. 16, s. 1; 1999, c. 35, s. 11; 2000, c. 24, s. 42; [2001, c. 27, s. 244](#), c. 41, ss. 3, 126; [2002, c. 13, s. 3](#); [2004, c. 12, s. 1](#); [2005, c. 40, s. 2](#); [2012, c. 1, s. 10](#), c. 15, s. 1; [2013, c. 9, s. 2](#), c. 13, s. 3; [2014, c. 25, s. 3](#); [2018, c. 11, s. 27](#); [2019, c. 25, s. 4](#); [2022, c. 10, s. 296](#); [2022, c. 18, s. 1](#).

Application to territories

8 (1) The provisions of this Act apply throughout Canada except

(a) in Yukon, in so far as they are inconsistent with the [Yukon Act](#);

(b) in the Northwest Territories, in so far as they are inconsistent with the [Northwest Territories Act](#); and

(c) in Nunavut, in so far as they are inconsistent with the [Nunavut Act](#).

Application of criminal law of England

(2) The criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

Common law principles continued

(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament

except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

R.S., 1985, c. C-46, s. 8; 1993, c. 28, s. 78; 2002, c. 7, s. 138.

Criminal offences to be under law of Canada

9 Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under [section 730](#)

(a) of an offence at common law,

(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

R.S., 1985, c. C-46, s. 9; R.S., 1985, c. 27 (1st Supp.), s. 6, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 10.

Appeal

10 (1) Where a court, judge, justice or provincial court judge summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal

(a) from the conviction; or

(b) against the punishment imposed.

Idem

(2) Where a court or judge summarily convicts a person for a contempt of court not committed in the face of the court and punishment is imposed in respect thereof, that person may appeal

(a) from the conviction; or

(b) against the punishment imposed.

Part XXI applies

(3) An appeal under this section lies to the court of appeal of the province in which the proceedings take place, and, for the purposes of this section, the provisions of Part XXI apply, with such modifications as the circumstances require.

R.S., 1985, c. C-46, s. 10; R.S., 1985, c. 27 (1st Supp.), s. 203.

Civil remedy not suspended

11 No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence.

Offence punishable under more than one Act

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

R.S., c. C-34, s. 11.

Child under twelve

13 No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

R.S., c. C-34, s. 12; 1980-81-82-83, c. 110, s. 72.

Consent to death

14 No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent.

R.S., 1985, c. C-46, s. 14; [2016, c. 3, s. 1](#).

Obedience to *de facto* law

15 No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

R.S., c. C-34, s. 15.

Defence of mental disorder

16 (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

Burden of proof

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

R.S., 1985, c. C-46, s. 16; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1991, c. 43, s. 2.

Compulsion by threats

17 A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under [sections 280 to 283](#) (abduction and detention of young persons).

R.S., 1985, c. C-46, s. 17; R.S., 1985, c. 27 (1st Supp.), s. 40.

Compulsion of spouse

18 No presumption arises that a married person who commits an offence does so under compulsion by reason only that the offence is committed in the presence of the spouse of that married person.

R.S., c. C-34, s. 18; 1980-81-82-83, c. 125, s. 4.

Ignorance of the law

19 Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

R.S., c. C-34, s. 19.

Certain acts on holidays valid

20 A warrant, summons, appearance notice, undertaking, release order or recognizance that is authorized by this Act may be executed, issued, given or entered into, as the case may be, on a holiday.

R.S., 1985, c. C-46, s. 20; [2019, c. 25, s. 5](#).

Parties to Offences

Parties to offence

21 (1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the

common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

R.S., c. C-34, s. 21.

Person counselling offence

22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of *counsel*

(3) For the purposes of this Act, ***counsel*** includes procure, solicit or incite.

R.S., 1985, c. C-46, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 7.

Offences of negligence — organizations

22.1 In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

(a) acting within the scope of their authority

(i) one of its representatives is a party to the offence, or

(ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and

(b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

2003, c. 21, s. 2.

Other offences — organizations

22.2 In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

(a) acting within the scope of their authority, is a party to the offence;

(b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or

(c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

2003, c. 21, s. 2.

Accessory after the fact

23 (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.

(2) [Repealed, 2000, c. 12, s. 92]

R.S., 1985, c. C-46, s. 23; 2000, c. 12, s. 92.

Where one party cannot be convicted

23.1 For greater certainty, [sections 21 to 23](#) apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

R.S., 1985, c. 24 (2nd Supp.), s. 45.

Attempts

24 (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

Question of law

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

R.S., c. C-34, s. 24.

Protection of Persons Administering and Enforcing the Law

Protection of persons acting under authority

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(a) as a private person,

(b) as a peace officer or public officer,

(c) in aid of a peace officer or public officer, or

(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

Idem

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

When not protected

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

When protected

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

Power in case of escape from penitentiary

(5) A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of [subsection 2\(1\)](#) of the *Corrections and Conditional Release Act*, if

(a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and

(b) the escape cannot be prevented by reasonable means in a less violent manner.

R.S., 1985, c. C-46, s. 25; 1994, c. 12, s. 1.

Definitions

25.1 (1) The following definitions apply in this section and [sections 25.2 to 25.4](#).

competent authority means, with respect to a public officer or a senior official,

(a) in the case of a member of the Royal Canadian Mounted Police, the Minister of Public Safety and Emergency Preparedness, personally;

(b) in the case of a member of a police service constituted under the laws of a province, the Minister responsible for policing in the province, personally; and

(c) in the case of any other public officer or senior official, the Minister who has responsibility for the Act of Parliament that the officer or official has the power to enforce, personally. (*autorité compétente*)

public officer means a peace officer, or a public officer who has the powers of a peace officer under an Act of Parliament. (*fonctionnaire public*)

senior official means a senior official who is responsible for law enforcement and who is designated under subsection (5). (*fonctionnaire supérieur*)

Principle

(2) It is in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law and, to that end, to expressly recognize in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences.

Designation of public officers

(3) A competent authority may designate public officers for the purposes of this section and [sections 25.2 to 25.4](#).

Condition — civilian oversight

(3.1) A competent authority referred to in paragraph (a) or (b) of the definition of that term in subsection (1) may not designate any public officer under subsection (3) unless there is a public authority composed of persons who are not peace officers that may review the public officer's conduct.

Declaration as evidence

(3.2) The Governor in Council or the lieutenant governor in council of a province, as the case may be, may designate a person or body as a public authority for the purposes of subsection (3.1), and that designation is conclusive evidence that the person or body is a public authority described in that subsection.

Considerations

(4) The competent authority shall make designations under subsection (3) on the advice of a senior official and shall consider the nature of the duties performed by the public officer in relation to law enforcement generally, rather than in relation to any particular investigation or enforcement activity.

Designation of senior officials

(5) A competent authority may designate senior officials for the purposes of this section and [sections 25.2 to 25.4](#).

Emergency designation

(6) A senior official may designate a public officer for the purposes of this section and [sections 25.2 to 25.4](#) for a period of not more than 48 hours if the senior official is of the opinion that

(a) by reason of exigent circumstances, it is not feasible for the competent authority to designate a public officer under subsection (3); and

(b) in the circumstances of the case, the public officer would be justified in committing an act or omission that would otherwise constitute an offence.

The senior official shall without delay notify the competent authority of the designation.

Conditions

(7) A designation under subsection (3) or (6) may be made subject to conditions, including conditions limiting

(a) the duration of the designation;

(b) the nature of the conduct in the investigation of which a public officer may be justified in committing, or directing another person to commit, acts or omissions that would otherwise constitute an offence; and

(c) the acts or omissions that would otherwise constitute an offence and that a public officer may be justified in committing or directing another person to commit.

Justification for acts or omissions

(8) A public officer is justified in committing an act or omission — or in directing the commission of an act or omission under subsection (10) — that would otherwise constitute an offence if the public officer

(a) is engaged in the investigation of an offence under, or the enforcement of, an Act of Parliament or in the investigation of criminal activity;

(b) is designated under subsection (3) or (6); and

(c) believes on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as

the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties.

Requirements for certain acts

(9) No public officer is justified in committing an act or omission that would otherwise constitute an offence and that would be likely to result in loss of or serious damage to property, or in directing the commission of an act or omission under subsection (10), unless, in addition to meeting the conditions set out in paragraphs (8)(a) to (c), he or she

(a) is personally authorized in writing to commit the act or omission — or direct its commission — by a senior official who believes on reasonable grounds that committing the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer's law enforcement duties; or

(b) believes on reasonable grounds that the grounds for obtaining an authorization under paragraph (a) exist but it is not feasible in the circumstances to obtain the authorization and that the act or omission is necessary to

(i) preserve the life or safety of any person,

(ii) prevent the compromise of the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer, or

(iii) prevent the imminent loss or destruction of evidence of an indictable offence.

Person acting at direction of public officer

(10) A person who commits an act or omission that would otherwise constitute an offence is justified in committing it if

(a) a public officer directs him or her to commit that act or omission and the person believes on reasonable grounds that the public officer has the authority to give that direction; and

(b) he or she believes on reasonable grounds that the commission of that act or omission is for the purpose of assisting the public officer in the public officer's law enforcement duties.

Limitation

(11) Nothing in this section justifies

(a) the intentional or criminally negligent causing of death or bodily harm to another person;

(b) the wilful attempt in any manner to obstruct, pervert or defeat the course of justice; or

(c) conduct that would violate the sexual integrity of an individual.

Protection, defences and immunities unaffected

(12) Nothing in this section affects the protection, defences and immunities of peace officers and other persons recognized under the law of Canada.

Compliance with requirements

(13) Nothing in this section relieves a public officer of criminal liability for failing to comply with any other requirements that govern the collection of evidence.

Exception — *Controlled Drugs and Substances Act* and *Cannabis Act*

(14) Nothing in this section justifies a public officer or a person acting at his or her direction in committing an act or omission — or a public officer in directing the commission of an act or omission — that constitutes an offence under a provision of Part I of the *Controlled Drugs and Substances Act* or of the regulations made under it or a provision of Division 1 of Part 1 of the *Cannabis Act*.

2001, c. 32, s. 2; 2005, c. 10, s. 34; 2018, c. 16, s. 207.

Public officer to file report

25.2 Every public officer who commits an act or omission — or directs the commission by another person of an act or omission — under [paragraph 25.1\(9\)\(a\)](#) or (b) shall, as soon as is feasible after the commission of the act or omission, file a written report with the appropriate senior official describing the act or omission.

2001, c. 32, s. 2.

Annual report

25.3 (1) Every competent authority shall publish or otherwise make available to the public an annual report for the previous year that includes, in respect of public officers and senior officials designated by the competent authority,

(a) the number of designations made under [subsection 25.1\(6\)](#) by the senior officials;

(b) the number of authorizations made under [paragraph 25.1\(9\)\(a\)](#) by the senior officials;

(c) the number of times that acts and omissions were committed in accordance with [paragraph 25.1\(9\)\(b\)](#) by the public officers;

(d) the nature of the conduct being investigated when the designations referred to in paragraph (a) or the authorizations referred to in paragraph (b) were made or when the acts or omissions referred to in paragraph (c) were committed; and

(e) the nature of the acts or omissions committed under the designations referred to in paragraph (a), under the authorizations referred to in paragraph (b) and in the manner described in paragraph (c).

Limitation

- (2)** The annual report shall not contain any information the disclosure of which would
- (a)** compromise or hinder an ongoing investigation of an offence under an Act of Parliament;
 - (b)** compromise the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer;
 - (c)** endanger the life or safety of any person;
 - (d)** prejudice a legal proceeding; or
 - (e)** otherwise be contrary to the public interest.

2001, c. 32, s. 2.

Written notification to be given

25.4 (1) When a public officer commits an act or omission — or directs the commission by another person of an act or omission — under [paragraph 25.1\(9\)\(a\)](#) or (b), the senior official with whom the public officer files a written report under [section 25.2](#) shall, as soon as is feasible after the report is filed, and no later than one year after the commission of the act or omission, notify in writing any person whose property was lost or seriously damaged as a result of the act or omission.

Limitation

- (2)** The competent authority may authorize the senior official not to notify the person under subsection (1) until the competent authority is of the opinion that notification would not
- (a)** compromise or hinder an ongoing investigation of an offence under an Act of Parliament;
 - (b)** compromise the identity of a public officer acting in an undercover capacity, of a confidential informant or of a person acting covertly under the direction and control of a public officer;
 - (c)** endanger the life or safety of any person;
 - (d)** prejudice a legal proceeding; or
 - (e)** otherwise be contrary to the public interest.

2001, c. 32, s. 2.

Excessive force

26 Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

R.S., c. C-34, s. 26.

Use of force to prevent commission of offence

27 Every one is justified in using as much force as is reasonably necessary

(a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

R.S., c. C-34, s. 27.

Use of force on board an aircraft

27.1 (1) Every person on an aircraft in flight is justified in using as much force as is reasonably necessary to prevent the commission of an offence against this Act or another Act of Parliament that the person believes on reasonable grounds, if it were committed, would be likely to cause immediate and serious injury to the aircraft or to any person or property therein.

Application of this section

(2) This section applies in respect of any aircraft in flight in Canadian airspace and in respect of any aircraft registered in Canada in accordance with the regulations made under the [Aeronautics Act](#) in flight outside Canadian airspace.

[2004, c. 12, s. 2.](#)

Arrest of wrong person

28 (1) Where a person who is authorized to execute a warrant to arrest believes, in good faith and on reasonable grounds, that the person whom he arrests is the person named in the warrant, he is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.

Person assisting

(2) Where a person is authorized to execute a warrant to arrest,

(a) every one who, being called on to assist him, believes that the person in whose arrest he is called on to assist is the person named in the warrant, and

(b) every keeper of a prison who is required to receive and detain a person who he believes has been arrested under the warrant,

is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.

R.S., c. C-34, s. 28.

Duty of person arresting

29 (1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

Notice

(2) It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, where it is feasible to do so, of

(a) the process or warrant under which he makes the arrest; or

(b) the reason for the arrest.

Failure to comply

(3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility.

R.S., c. C-34, s. 29.

Preventing breach of peace

30 Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.

R.S., c. C-34, s. 30.

Arrest for breach of peace

31 (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

Giving person in charge

(2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable grounds the peace officer believes has, witnessed the breach of the peace.

R.S., c. C-34, s. 31.

Suppression of Riots

Use of force to suppress riot

32 (1) Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds,

(a) is necessary to suppress a riot; and

(b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

Person bound by military law

(2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful.

Obeying order of peace officer

(3) Every one is justified in obeying an order of a peace officer to use force to suppress a riot if

(a) he acts in good faith; and

(b) the order is not manifestly unlawful.

Apprehension of serious mischief

(4) Every one who, in good faith and on reasonable grounds, believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer is justified in using as much force as he believes in good faith and on reasonable grounds,

(a) is necessary to suppress the riot; and

(b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

Question of law

(5) For the purposes of this section, the question whether an order is manifestly unlawful or not is a question of law.

R.S., c. C-34, s. 32.

Duty of officers if rioters do not disperse

33 (1) Where the proclamation referred to in [section 67](#) has been made or an offence against [paragraph 68\(a\)](#) or (b) has been committed, it is the duty of a peace officer and of a person who is lawfully required by him to assist, to disperse or to arrest persons who do not comply with the proclamation.

Protection of officers

(2) No civil or criminal proceedings lie against a peace officer or a person who is lawfully required by a peace officer to assist him in respect of any death or injury that by reason of resistance is caused as a result of the performance by the peace officer or that person of a duty that is imposed by subsection (1).

Section not restrictive

(3) Nothing in this section limits or affects any powers, duties or functions that are conferred or imposed by this Act with respect to the suppression of riots.

R.S., c. C-34, s. 33.

Self-induced Extreme Intoxication

Offences of violence by negligence

33.1 (1) A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if

- (a)** all the other elements of the offence are present; and
- (b)** before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances.

Marked departure — foreseeability of risk and other circumstances

(2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.

Offences

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

Definition of *extreme intoxication*

(4) In this section, ***extreme intoxication*** means intoxication that renders a person unaware of, or incapable of consciously controlling, their behaviour.

1995, c. 32, s. 1; [2022, c. 11, s. 1](#).

Defence of Person

Defence — use or threat of force

34 (1) A person is not guilty of an offence if

- (a)** they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

- (b)** the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c)** the act committed is reasonable in the circumstances.

Factors

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a)** the nature of the force or threat;
- (b)** the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c)** the person's role in the incident;
- (d)** whether any party to the incident used or threatened to use a weapon;
- (e)** the size, age, gender and physical capabilities of the parties to the incident;
- (f)** the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1)** any history of interaction or communication between the parties to the incident;
- (g)** the nature and proportionality of the person's response to the use or threat of force; and
- (h)** whether the act committed was in response to a use or threat of force that the person knew was lawful.

No defence

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

R.S., 1985, c. C-46, s. 34; 1992, c. 1, s. 60(F); [2012, c. 9, s. 2](#).

Defence of Property

Defence — property

35 (1) A person is not guilty of an offence if

- (a)** they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;
- (b)** they believe on reasonable grounds that another person

(i) is about to enter, is entering or has entered the property without being entitled by law to do so,

(ii) is about to take the property, is doing so or has just done so, or

(iii) is about to damage or destroy the property, or make it inoperative, or is doing so;

(c) the act that constitutes the offence is committed for the purpose of

(i) preventing the other person from entering the property, or removing that person from the property, or

(ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and

(d) the act committed is reasonable in the circumstances.

No defence

(2) Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property does not have a claim of right to it and the other person is entitled to its possession by law.

No defence

(3) Subsection (1) does not apply if the other person is doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

R.S., 1985, c. C-46, s. 35; [2012, c. 9, s. 2](#).

36 [Repealed, [2012, c. 9, s. 2](#)]

37 [Repealed, [2012, c. 9, s. 2](#)]

38 [Repealed, [2012, c. 9, s. 2](#)]

39 [Repealed, [2012, c. 9, s. 2](#)]

40 [Repealed, [2012, c. 9, s. 2](#)]

41 [Repealed, [2012, c. 9, s. 2](#)]

42 [Repealed, [2012, c. 9, s. 2](#)]

Protection of Persons in Authority

Correction of child by force

43 Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

44 [Repealed, 2001, c. 26, s. 294]

Surgical operations

45 Every one is protected from criminal responsibility for performing a surgical operation on any person for the benefit of that person if

- (a) the operation is performed with reasonable care and skill; and
- (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

PART II

Offences Against Public Order

Treason and other Offences against the Queen's Authority and Person

High treason

46 (1) Every one commits high treason who, in Canada,

- (a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
- (b) levies war against Canada or does any act preparatory thereto; or
- (c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.

Treason

(2) Every one commits treason who, in Canada,

- (a) uses force or violence for the purpose of overthrowing the government of Canada or a province;
- (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;
- (c) conspires with any person to commit high treason or to do anything mentioned in paragraph (a);

(d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or

(e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act.

Canadian citizen

(3) Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada,

(a) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or

(b) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).

Overt act

(4) Where it is treason to conspire with any person, the act of conspiring is an overt act of treason.

R.S., c. C-34, s. 46; 1974-75-76, c. 105, s. 2.

Punishment for high treason

47 (1) Every one who commits high treason is guilty of an indictable offence and shall be sentenced to imprisonment for life.

Punishment for treason

(2) Every one who commits treason is guilty of an indictable offence and liable

(a) to be sentenced to imprisonment for life if he is guilty of an offence under [paragraph 46\(2\)\(a\)](#), (c) or (d);

(b) to be sentenced to imprisonment for life if he is guilty of an offence under [paragraph 46\(2\)\(b\)](#) or (e) committed while a state of war exists between Canada and another country; or

(c) to be sentenced to imprisonment for a term not exceeding fourteen years if he is guilty of an offence under [paragraph 46\(2\)\(b\)](#) or (e) committed while no state of war exists between Canada and another country.

Corroboration

(3) No person shall be convicted of high treason or treason on the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

Minimum punishment

(4) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by subsection (1) is a minimum punishment.

R.S., c. C-34, s. 47; 1974-75-76, c. 105, s. 2.

Limitation

48 (1) No proceedings for an offence of treason as defined by [paragraph 46\(2\)\(a\)](#) shall be commenced more than three years after the time when the offence is alleged to have been committed.

Information for treasonable words

(2) No proceedings shall be commenced under [section 47](#) in respect of an overt act of treason expressed or declared by open and considered speech unless

(a) an information setting out the overt act and the words by which it was expressed or declared is laid under oath before a justice within six days after the time when the words are alleged to have been spoken; and

(b) a warrant for the arrest of the accused is issued within ten days after the time when the information is laid.

R.S., c. C-34, s. 48; 1974-75-76, c. 105, s. 29.

Prohibited Acts

49 [\[Repealed, 2018, c. 29, s. 1\]](#)

Assisting alien enemy to leave Canada, or omitting to prevent treason

50 (1) Every one commits an offence who

(a) incites or wilfully assists a subject of

(i) a state that is at war with Canada, or

(ii) a state against whose forces Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the state whose forces they are,

to leave Canada without the consent of the Crown, unless the accused establishes that assistance to the state referred to in subparagraph (i) or the forces of the state referred to in subparagraph (ii), as the case may be, was not intended thereby; or

(b) knowing that a person is about to commit high treason or treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing high treason or treason.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Intimidating Parliament or legislature

51 Every one who does an act of violence in order to intimidate Parliament or the legislature of a province is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 51.

Sabotage

52 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who does a prohibited act with the intent to endanger

(a) the safety, security or defence of Canada, or

(b) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada.

Definition of *prohibited act*

(2) In this section, ***prohibited act*** means an act or omission that

(a) impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing; or

(b) causes property, by whomever it may be owned, to be lost, damaged or destroyed.

Saving

(3) No person does a prohibited act within the meaning of this section by reason only that

(a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment;

(b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or

(c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.

Idem

(4) No person does a prohibited act within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

For greater certainty

(5) For greater certainty, no person commits an offence under subsection (1) if they do a prohibited act while participating in advocacy, protest or dissent but they do not intend to

cause any of the harms referred to in paragraphs (1)(a) and (b).

R.S., 1985, c. C-46, s. 52; 2019, c. 25, s. 6; 2024, c. 16, s. 60.

Sabotage — essential infrastructure

52.1 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who interferes with access to an essential infrastructure or causes an essential infrastructure to be lost, inoperable, unsafe or unfit for use with the intent to

- (a) endanger the safety, security or defence of Canada;
- (b) endanger the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada; or
- (c) cause a serious risk to the health or safety of the public or any segment of the public.

Definition of essential infrastructure

(2) In this section, **essential infrastructure** means a facility or system, whether public or private, completed or under construction, that provides or distributes — or is intended to provide or distribute — services that are essential to the health, safety, security or economic well-being of persons in Canada, including the following:

- (a) transportation infrastructure;
- (b) information and communication technology infrastructure;
- (c) water and wastewater management infrastructure;
- (d) energy and utilities infrastructure;
- (e) health services infrastructure;
- (f) food supply and food services infrastructure;
- (g) government operations infrastructure;
- (h) financial infrastructure; and
- (i) any other infrastructure prescribed by regulations.

Saving — stop work

(3) No person commits an offence under subsection (1) by reason only that

- (a) they stop work as a result of the failure of their employer and themselves to agree on any matter relating to their employment;
- (b) they stop work as a result of the failure of their employer and a bargaining agent acting on their behalf to agree on any matter relating to their employment; or
- (c) they stop work as a result of their taking part in a combination of workers or employees for their own reasonable protection as workers or employees.

Saving — obtaining or communicating information

(4) No person commits an offence under subsection (1) by reason only that they attend at or near or approach a dwelling-house or place for the purpose only of obtaining or communicating information.

For greater certainty

(5) For greater certainty, no person commits an offence under subsection (1) if they interfere with access to an essential infrastructure or cause an essential infrastructure to be lost, inoperable, unsafe or unfit for use while participating in advocacy, protest or dissent but they do not intend to cause any of the harms referred to in paragraphs (1)(a) to (c).

Regulations

(6) The Governor in Council may make regulations prescribing any infrastructure for the purpose of paragraph (i) of the definition *essential infrastructure* in subsection (2).

[2024, c. 16, s. 61.](#)

Sabotage — device

52.2 (1) Every person commits an offence who makes, possesses, sells or distributes a device intending that it be used or knowing that it will be used, in whole or in part, to carry out an offence under [subsection 52\(1\)](#) or [52.1\(1\)](#).

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) is guilty of an offence punishable on summary conviction.

Definition of *device*

(3) For the purposes of this section, ***device*** includes a *computer program* as defined in [subsection 342.1\(2\)](#).

[2024, c. 16, s. 61.](#)

Attorney General's consent

52.3 No proceeding for an offence under [subsection 52\(1\)](#), [52.1\(1\)](#) or [52.2\(1\)](#) shall be instituted without the Attorney General's consent.

[2024, c. 16, s. 61.](#)

Inciting to mutiny

53 Every one who

(a) attempts, for a traitorous or mutinous purpose, to seduce a member of the Canadian Forces from his duty and allegiance to Her Majesty, or

(b) attempts to incite or to induce a member of the Canadian Forces to commit a traitorous or mutinous act,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 53.

Assisting deserter

54 Every one who aids, assists, harbours or conceals a person who he knows is a deserter or absentee without leave from the Canadian Forces is guilty of an offence punishable on summary conviction, but no proceedings shall be instituted under this section without the consent of the Attorney General of Canada.

R.S., c. C-34, s. 54.

Evidence of overt acts

55 In proceedings for an offence against any provision in [section 47](#) or [sections 50 to 53](#), evidence of an overt act is not admissible unless that overt act is set out in the indictment or unless the evidence is otherwise relevant as tending to prove an overt act that is set out in the indictment.

R.S., 1985, c. C-46, s. 55; [2018, c. 29, s. 2](#).

Offences in relation to members of R.C.M.P.

56 Every one who wilfully

(a) persuades or counsels a member of the Royal Canadian Mounted Police to desert or absent himself without leave,

(b) aids, assists, harbours or conceals a member of the Royal Canadian Mounted Police who he knows is a deserter or absentee without leave, or

(c) aids or assists a member of the Royal Canadian Mounted Police to desert or absent himself without leave, knowing that the member is about to desert or absent himself without leave,

is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 56; R.S., 1985, c. 27 (1st Supp.), s. 8.

Official Documents

Identity documents

56.1 (1) Every person commits an offence who, without lawful excuse, procures to be made, possesses, transfers, sells or offers for sale an identity document that relates or purports to relate, in whole or in part, to another person.

For greater certainty

- (2)** For greater certainty, subsection (1) does not prohibit an act that is carried out
- (a)** in good faith, in the ordinary course of the person's business or employment or in the exercise of the duties of their office;
 - (b)** for genealogical purposes;
 - (c)** with the consent of the person to whom the identity document relates or of a person authorized to consent on behalf of the person to whom the document relates, or of the entity that issued the identity document; or
 - (d)** for a legitimate purpose related to the administration of justice.

Definition of *identity document*

(3) For the purposes of this section, ***identity document*** means a Social Insurance Number card, a driver's licence, a health insurance card, a birth certificate, a death certificate, a passport as defined in [subsection 57\(5\)](#), a document that simplifies the process of entry into Canada, a certificate of citizenship, a document indicating immigration status in Canada, a certificate of Indian status or an employee identity card that bears the employee's photograph and signature, or any similar document, issued or purported to be issued by a department or agency of the federal government or of a provincial or foreign government.

Punishment

- (4)** Every person who commits an offence under subsection (1)
- (a)** is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or
 - (b)** is guilty of an offence punishable on summary conviction.

[2009, c. 28, s. 1.](#)

Forgery of or uttering forged passport

57 (1) Every one who, while in or out of Canada,

- (a)** forges a passport, or
- (b)** knowing that a passport is forged
 - (i)** uses, deals with or acts on it, or
 - (ii)** causes or attempts to cause any person to use, deal with or act on it, as if the passport were genuine,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

False statement in relation to passport

(2) Every one who, while in or out of Canada, for the purpose of procuring a passport for himself or any other person or for the purpose of procuring any material alteration or addition to any such passport, makes a written or an oral statement that he knows is false or misleading

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

Possession of forged, etc., passport

(3) Every person who, without lawful excuse, has in their possession a forged passport or a passport in respect of which an offence under subsection (2) has been committed is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Special provisions applicable

(4) For the purposes of proceedings under this section,

(a) the place where a passport was forged is not material; and

(b) the definition *false document* in [section 321](#), and [section 366](#), apply with such modifications as the circumstances require.

Definition of *passport*

(5) In this section, *passport* has the same meaning as in [section 2](#) of the [Canadian Passport Order](#).

Jurisdiction

(6) Where a person is alleged to have committed, while out of Canada, an offence under this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

Appearance of accused at trial

(7) For greater certainty, the provisions of this Act relating to

(a) requirements that an accused appear at and be present during proceedings, and

(b) the exceptions to those requirements,

apply to proceedings commenced in any territorial division pursuant to subsection (6).

R.S., 1985, c. C-46, s. 57; R.S., 1985, c. 27 (1st Supp.), s. 9; 1992, c. 1, s. 60(F); 1994, c. 44, s. 4; 1995, c. 5, s. 25; [2013, c. 40, s. 174](#); [2018, c. 29, s. 3](#); [2019, c. 25, s. 7](#).

Fraudulent use of certificate of citizenship

58 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who, while in or outside Canada,

(a) uses a certificate of citizenship or a certificate of naturalization for a fraudulent purpose, or

(b) being a person to whom a certificate of citizenship or a certificate of naturalization has been granted, knowingly parts with the possession of that certificate with intent that it should be used for a fraudulent purpose.

Definition of certificate of citizenship and certificate of naturalization

(2) In this section, **certificate of citizenship** and **certificate of naturalization**, respectively, mean a certificate of citizenship and a certificate of naturalization as defined by the [Citizenship Act](#).

R.S., 1985, c. C-46, s. 58; [2019, c. 25, s. 8](#).

Sedition

Seditious words

59 (1) Seditious words are words that express a seditious intention.

Seditious libel

(2) A seditious libel is a libel that expresses a seditious intention.

Seditious conspiracy

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

Seditious intention

(4) Without limiting the generality of the meaning of the expression *seditious intention*, every one shall be presumed to have a seditious intention who

(a) teaches or advocates, or

(b) publishes or circulates any writing that advocates,

the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.

R.S., c. C-34, s. 60.

Exception

60 Notwithstanding [subsection 59\(4\)](#), no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,

- (a) to show that Her Majesty has been misled or mistaken in her measures;
- (b) to point out errors or defects in
 - (i) the government or constitution of Canada or a province,
 - (ii) Parliament or the legislature of a province, or
 - (iii) the administration of justice in Canada;
- (c) to procure, by lawful means, the alteration of any matter of government in Canada; or
- (d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.

R.S., c. C-34, s. 61.

Punishment of seditious offences

61 Every one who

- (a) speaks seditious words,
- (b) publishes a seditious libel, or
- (c) is a party to a seditious conspiracy,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 62.

Offences in relation to military forces

62 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who intentionally

- (a) interferes with, impairs or influences the loyalty or discipline of a member of a force,
- (b) publishes, edits, issues, circulates or distributes a writing that advises, counsels or urges insubordination, disloyalty, mutiny or refusal of duty by a member of a force, or
- (c) advises, counsels, urges or in any manner causes insubordination, disloyalty, mutiny or refusal of duty by a member of a force.

Definition of *member of a force*

(2) In this section, ***member of a force*** means a member of

- (a) the Canadian Forces; or
- (b) the naval, army or air forces of a state other than Canada that are lawfully present in Canada.

R.S., 1985, c. C-46, s. 62; [2019, c. 25, s. 9](#).

Unlawful Assemblies and Riots

Unlawful assembly

63 (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

(a) will disturb the peace tumultuously; or

(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

Lawful assembly becoming unlawful

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.

Exception

(3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.

R.S., c. C-34, s. 64.

Riot

64 A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

R.S., c. C-34, s. 65.

Punishment of rioter

65 (1) Every person who takes part in a riot is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Concealment of identity

(2) Every person who commits an offence under subsection (1) while wearing a mask or other disguise to conceal their identity without lawful excuse is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 65; [2013, c. 15, s. 2](#); [2019, c. 25, s. 10](#).

Punishment for unlawful assembly

66 (1) Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.

Concealment of identity

(2) Every person who commits an offence under subsection (1) while wearing a mask or other disguise to conceal their identity without lawful excuse is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 66; 2013, c. 15, s. 3.

Reading proclamation

67 A person who is

(a) a justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff,

(b) a warden or deputy warden of a prison, or

(c) the institutional head of a penitentiary, as those expressions are defined in [subsection 2\(1\)](#) of the *Corrections and Conditional Release Act*, or that person's deputy,

who receives notice that, at any place within the jurisdiction of the person, twelve or more persons are unlawfully and riotously assembled together shall go to that place and, after approaching as near as is safe, if the person is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:

Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN.

R.S., 1985, c. C-46, s. 67; 1994, c. 44, s. 5.

Offences related to proclamation

68 Every one is guilty of an indictable offence and liable to imprisonment for life who

(a) opposes, hinders or assaults, wilfully and with force, a person who begins to make or is about to begin to make or is making the proclamation referred to in [section 67](#) so that it is not made;

(b) does not peaceably disperse and depart from a place where the proclamation referred to in [section 67](#) is made within thirty minutes after it is made; or

(c) does not depart from a place within thirty minutes when he has reasonable grounds to believe that the proclamation referred to in [section 67](#) would have been made in that place if some person had not opposed, hindered or assaulted, wilfully and with force, a person who would have made it.

Neglect by peace officer

69 A peace officer who receives notice that there is a riot within their jurisdiction and, without reasonable excuse, fails to take all reasonable steps to suppress the riot is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 69; [2019, c. 25, s. 11](#).

Unlawful Drilling

Orders by Governor in Council

70 (1) The Governor in Council may, by proclamation, make orders

(a) to prohibit assemblies, without lawful authority, of persons for the purpose

(i) of training or drilling themselves,

(ii) of being trained or drilled to the use of arms, or

(iii) of practising military exercises; or

(b) to prohibit persons when assembled for any purpose from training or drilling themselves or from being trained or drilled.

General or special order

(2) An order that is made under subsection (1) may be general or may be made applicable to particular places, districts or assemblies to be specified in the order.

Punishment

(3) Every person who contravenes an order made under this section is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 70; 1992, c. 1, s. 60(F); [2019, c. 25, s. 12](#).

Duels

71 [\[Repealed, 2018, c. 29, s. 4\]](#)

Forcible Entry and Detainer

Forcible entry

72 (1) A person commits forcible entry when that person enters real property that is in the actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.

Matters not material

(1.1) For the purposes of subsection (1), it is immaterial whether or not a person is entitled to enter the real property or whether or not that person has any intention of taking possession of the real property.

Forcible detainer

(2) A person commits forcible detainer when, being in actual possession of real property without colour of right, he detains it in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person who is entitled by law to possession of it.

Questions of law

(3) The questions whether a person is in actual and peaceable possession or is in actual possession without colour of right are questions of law.

R.S., 1985, c. C-46, s. 72; R.S., 1985, c. 27 (1st Supp.), s. 10; 1992, c. 1, s. 60(F).

Punishment

73 Every person who commits forcible entry or forcible detainer is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 73; R.S., 1985, c. 27 (1st Supp.), s. 11; 1992, c. 1, s. 58; [2019, c. 25, s. 13](#).

Piracy

Piracy by law of nations

74 (1) Every one commits piracy who does any act that, by the law of nations, is piracy.

Punishment

(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.

R.S., c. C-34, s. 75; 1974-75-76, c. 105, s. 3.

Piratical acts

75 Every one who, while in or out of Canada,

(a) steals a Canadian ship,

(b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,

(c) does or attempts to do a mutinous act on a Canadian ship, or

(d) counsels a person to do anything mentioned in paragraph (a), (b) or (c),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., 1985, c. C-46, s. 75; R.S., 1985, c. 27 (1st Supp.), s. 7.

Offences against Air or Maritime Safety

Hijacking

76 Every one who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with intent

(a) to cause any person on board the aircraft to be confined or imprisoned against his will,

(b) to cause any person on board the aircraft to be transported against his will to any place other than the next scheduled place of landing of the aircraft,

(c) to hold any person on board the aircraft for ransom or to service against his will, or

(d) to cause the aircraft to deviate in a material respect from its flight plan,

is guilty of an indictable offence and liable to imprisonment for life.

1972, c. 13, s. 6.

Endangering safety of aircraft or airport

77 Every one who

(a) on board an aircraft in flight, commits an act of violence against a person that is likely to endanger the safety of the aircraft,

(b) using a weapon, commits an act of violence against a person at an airport serving international civil aviation that causes or is likely to cause serious injury or death and that endangers or is likely to endanger safety at the airport,

(c) causes damage to an aircraft in service that renders the aircraft incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(d) places or causes to be placed on board an aircraft in service anything that is likely to cause damage to the aircraft, that will render it incapable of flight or that is likely to endanger the safety of the aircraft in flight,

(e) causes damage to or interferes with the operation of any air navigation facility where the damage or interference is likely to endanger the safety of an aircraft in flight,

(f) using a weapon, substance or device, destroys or causes serious damage to the facilities of an airport serving international civil aviation or to any aircraft not in service located there, or causes disruption of services of the airport, that endangers or is likely to endanger safety at the airport, or

(g) endangers the safety of an aircraft in flight by communicating to any other person any information that the person knows to be false,

is guilty of an indictable offence and liable to imprisonment for life.

R.S., 1985, c. C-46, s. 77; 1993, c. 7, s. 3.

Offensive weapons and explosive substances

78 (1) Every one, other than a peace officer engaged in the execution of his duty, who takes on board a civil aircraft an offensive weapon or any explosive substance

(a) without the consent of the owner or operator of the aircraft or of a person duly authorized by either of them to consent thereto, or

(b) with the consent referred to in paragraph (a) but without complying with all terms and conditions on which the consent was given,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definition of *civil aircraft*

(2) For the purposes of this section, ***civil aircraft*** means all aircraft other than aircraft operated by the Canadian Forces, a police force in Canada or persons engaged in the administration or enforcement of the [Customs Act](#), the [Excise Act](#) or the [Excise Act, 2001](#).

R.S., 1985, c. C-46, s. 78; [R.S., 1985, c. 1 \(2nd Supp.\), s. 213](#); [2002, c. 22, s. 325](#).

Seizing control of ship or fixed platform

78.1 (1) Every one who seizes or exercises control over a ship or fixed platform by force or threat of force or by any other form of intimidation is guilty of an indictable offence and liable to imprisonment for life.

Endangering safety of ship or fixed platform

(2) Every one who

(a) commits an act of violence against a person on board a ship or fixed platform,

(b) destroys or causes damage to a ship or its cargo or to a fixed platform,

(c) destroys or causes serious damage to or interferes with the operation of any maritime navigational facility, or

(d) places or causes to be placed on board a ship or fixed platform anything that is likely to cause damage to the ship or its cargo or to the fixed platform,

where that act is likely to endanger the safe navigation of a ship or the safety of a fixed platform, is guilty of an indictable offence and liable to imprisonment for life.

False communication

(3) Every one who communicates information that endangers the safe navigation of a ship, knowing the information to be false, is guilty of an indictable offence and liable to imprisonment for life.

Threats causing death or injury

(4) Every one who threatens to commit an offence under paragraph (2)(a), (b) or (c) in order to compel a person to do or refrain from doing any act, where the threat is likely to endanger the safe navigation of a ship or the safety of a fixed platform, is guilty of an indictable offence and liable to imprisonment for life.

Definitions

(5) In this section,

fixed platform means an artificial island or a marine installation or structure that is permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes; (*plate-forme fixe*)

ship means every description of vessel not permanently attached to the seabed, other than a warship, a ship being used as a naval auxiliary or for customs or police purposes or a ship that has been withdrawn from navigation or is laid up. (*navire*)

1993, c. 7, s. 4.

Dangerous Materials and Devices

Duty of care re explosive

79 Every one who has an explosive substance in his possession or under his care or control is under a legal duty to use reasonable care to prevent bodily harm or death to persons or damage to property by that explosive substance.

R.S., c. C-34, s. 77.

Breach of duty

80 Every one who, being under a legal duty within the meaning of [section 79](#), fails without lawful excuse to perform that duty, is guilty of an indictable offence and, if as a result an explosion of an explosive substance occurs that

(a) causes death or is likely to cause death to any person, is liable to imprisonment for life; or

(b) causes bodily harm or damage to property or is likely to cause bodily harm or damage to property, is liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 78.

Using explosives

81 (1) Every one commits an offence who

- (a)** does anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property;
- (b)** with intent to do bodily harm to any person
 - (i)** causes an explosive substance to explode,
 - (ii)** sends or delivers to a person or causes a person to take or receive an explosive substance or any other dangerous substance or thing, or
 - (iii)** places or throws anywhere or at or on a person a corrosive fluid, explosive substance or any other dangerous substance or thing;
- (c)** with intent to destroy or damage property without lawful excuse, places or throws an explosive substance anywhere; or
- (d)** makes or has in his possession or has under his care or control any explosive substance with intent thereby
 - (i)** to endanger life or to cause serious damage to property, or
 - (ii)** to enable another person to endanger life or to cause serious damage to property.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of an indictable offence and liable

- (a)** for an offence under paragraph (1)(a) or (b), to imprisonment for life; or
- (b)** for an offence under paragraph (1)(c) or (d), to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 79.

Possession of explosive

82 (1) Every person who, without lawful excuse, makes or has in their possession or under their care or control any explosive substance is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction.

Possession in association with criminal organization

(2) Every person who, without lawful excuse, makes or has in their possession or under their care or control any explosive substance for the benefit of, at the direction of or in association with a criminal organization is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Sentences to be served consecutively

82.1 A sentence imposed on a person for an offence under [subsection 82\(2\)](#) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection 82(2).

1997, c. 23, s. 2.

Definition of *device*

82.2 For the purposes of [sections 82.3 to 82.5](#), ***device*** means any of the following:

- (a) a nuclear explosive device;
- (b) a device that disperses radioactive material;
- (c) a device that emits ionizing radiation and that is capable of causing death, serious bodily harm or substantial damage to property or the environment.

[2013, c. 13, s. 5.](#)

Possession, etc., of nuclear material, radioactive material or device

82.3 Everyone who, with intent to cause death, serious bodily harm or substantial damage to property or the environment, makes a device or possesses, uses, transfers, exports, imports, alters or disposes of nuclear material, radioactive material or a device or commits an act against a nuclear facility or an act that causes serious interference with or serious disruption of its operations, is guilty of an indictable offence and liable to imprisonment for life.

[2013, c. 13, s. 5.](#)

Use or alteration of nuclear material, radioactive material or device

82.4 Everyone who, with intent to compel a person, government or international organization to do or refrain from doing any act, uses or alters nuclear material, radioactive material or a device or commits an act against a nuclear facility or an act that causes serious interference with or serious disruption of its operations, is guilty of an indictable offence and liable to imprisonment for life.

[2013, c. 13, s. 5.](#)

Commission of indictable offence to obtain nuclear material, etc.

82.5 Everyone who commits an indictable offence under this or any other Act of Parliament, with intent to obtain nuclear material, radioactive material or a device or to obtain access to a nuclear facility, is guilty of an indictable offence and is liable to imprisonment for life.

[2013, c. 13, s. 5.](#)

Threats

82.6 Everyone who threatens to commit an offence under any of [sections 82.3 to 82.5](#) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years.

[2013, c. 13, s. 5.](#)

Armed forces

82.7 For greater certainty, [sections 82.3 to 82.6](#) do not apply to an act that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or to activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

[2013, c. 13, s. 5.](#)

Prize Fights

Engaging in prize fight

83 (1) Every one who

- (a) engages as a principal in a prize fight,
- (b) advises, encourages or promotes a prize fight, or
- (c) is present at a prize fight as an aid, second, surgeon, umpire, backer or reporter,

is guilty of an offence punishable on summary conviction.

Definition of *prize fight*

(2) In this section, ***prize fight*** means an encounter or fight with fists, hands or feet between two persons who have met for that purpose by previous arrangement made by or for them, but does not include

- (a) a contest between amateur athletes in a combative sport with fists, hands or feet held in a province if the sport is on the programme of the International Olympic Committee or the International Paralympic Committee and, in the case where the province's lieutenant governor in council or any other person or body specified by him or her requires it, the contest is held with their permission;
- (b) a contest between amateur athletes in a combative sport with fists, hands or feet held in a province if the sport has been designated by the province's lieutenant governor in council or by any other person or body specified by him or her and, in the case where the lieutenant governor in council or other specified person or body requires it, the contest is held with their permission;
- (c) a contest between amateur athletes in a combative sport with fists, hands or feet held in a province with the permission of the province's lieutenant governor in council or any other person or body specified by him or her; and

(d) a boxing contest or mixed martial arts contest held in a province with the permission or under the authority of an athletic board, commission or similar body established by or under the authority of the province's legislature for the control of sport within the province.

R.S., 1985, c. C-46, s. 83; R.S., 1985, c. 27 (1st Supp.), s. 186; 2013, c. 19, s. 1.

PART II.1

Terrorism

Interpretation

Definitions

83.01 (1) The following definitions apply in this Part.

Canadian means a Canadian citizen, a permanent resident within the meaning of [subsection 2\(1\)](#) of the *Immigration and Refugee Protection Act* or a body corporate incorporated and continued under the laws of Canada or a province. (*Canadien*)

entity means a person, group, trust, partnership or fund or an unincorporated association or organization. (*entité*)

listed entity means an entity on a list established by the Governor in Council under [section 83.05](#). (*entité inscrite*)

terrorist activity means

(a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

(i) the offences referred to in [subsection 7\(2\)](#) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,

(ii) the offences referred to in [subsection 7\(2\)](#) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,

(iii) the offences referred to in [subsection 7\(3\)](#) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in [subsection 7\(3.1\)](#) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in [subsection 7\(2.21\)](#) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980, as amended by the Amendment to the Convention on the Physical Protection of Nuclear Material, done at Vienna on July 8, 2005 and the International Convention for the Suppression of Acts of Nuclear Terrorism, done at New York on September 14, 2005,

(vi) the offences referred to in [subsection 7\(2\)](#) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,

(vii) the offences referred to in [subsection 7\(2.1\)](#) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,

(viii) the offences referred to in [subsection 7\(2.1\)](#) or [\(2.2\)](#) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,

(ix) the offences referred to in [subsection 7\(3.72\)](#) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in [subsection 7\(3.73\)](#) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. (*activité terroriste*)

terrorist group means

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity,

and includes an association of such entities. (*groupe terroriste*)

For greater certainty

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition *terrorist activity* in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

For greater certainty

(1.2) For greater certainty, a suicide bombing is an act that comes within paragraph (a) or (b) of the definition *terrorist activity* in subsection (1) if it satisfies the criteria of that paragraph.

Facilitation

(2) For the purposes of this Part, facilitation shall be construed in accordance with [subsection 83.19\(2\)](#).

[2001, c. 41, ss. 4, 126; 2010, c. 19, s. 1; 2013, c. 13, s. 6.](#)

Financing of Terrorism

Providing or collecting property for certain activities

83.02 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out

(a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of **terrorist activity** in [subsection 83.01\(1\)](#), or

(b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act.

[2001, c. 41, s. 4](#); [2019, c. 25, s. 15\(E\)](#).

Providing, making available, etc., property or services for terrorist purposes

83.03 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years who, directly or indirectly, wilfully and without lawful justification or excuse, collects property or provides, invites a person to provide or makes available property or financial or other related services, intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity.

Providing, making available, etc., property or services — use by terrorist group

(2) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years who, directly or indirectly, wilfully and without lawful justification or excuse, collects property or provides, invites a person to provide or makes available property or financial or other related services, knowing that, in whole or part, they will be used by or will benefit a terrorist group.

Exception — authorization

(3) Subsection (2) does not apply to a person who carries out any of the acts referred to in that subsection under and in accordance with an authorization granted under [section 83.032](#).

Exception — humanitarian assistance activities

(4) Subsections (1) and (2) do not apply to a person who carries out any of the acts referred to in those subsections for the sole purpose of carrying out humanitarian assistance activities conducted under the auspices of impartial humanitarian organizations in accordance with international law while using reasonable efforts to minimize any benefit to terrorist groups.

[2001, c. 41, s. 4](#); [2019, c. 25, s. 16\(E\)](#); [2023, c. 14, s. 1](#).

Definition of *Public Safety Minister*

83.031 (1) In [sections 83.032](#) to [83.0392](#), **Public Safety Minister** means the Minister of Public Safety and Emergency Preparedness.

Designation

(2) Any Minister referred to in any of [sections 83.032 to 83.0392](#) may designate a person to exercise a power, or perform a duty or function, conferred on that Minister under those sections.

[2023, c. 14, s. 1.](#)

Authorization

83.032 (1) On application, the Public Safety Minister may authorize an eligible person to carry out, in a specified geographic area that is controlled by a terrorist group, a specified activity that would otherwise be prohibited under [subsection 83.03\(2\)](#) — or a specified class of such activities — for any specified purpose from among the following:

- (a)** providing or supporting the provision of health services;
- (b)** providing or supporting the provision of education services;
- (c)** providing or supporting the provision of programs to assist individuals in earning a livelihood;
- (d)** providing or supporting the provision of programs to promote or protect human rights;
- (e)** providing or supporting the provision of services related to immigration, including services related to the resettlement of individuals and the safe passage of individuals from one geographic area to another; and
- (f)** supporting any operations of a federal minister or a department or agency of the Government of Canada that are conducted for a purpose other than one set out in any of paragraphs (a) to (e).

Control

(2) For the purposes of this section, a terrorist group controls a geographic area if the group exerts sufficient influence over the area such that the carrying out, in the area, of an activity involving property or financial or other related services could reasonably be expected to result in the terrorist group using or benefiting from the property or services, in whole or in part.

Minister's obligation — information

(2.1) The Public Safety Minister must, at the request of an eligible person or an organization, provide to that person or organization information in writing about whether an authorization is required to carry out an activity or a class of activities in a given geographic area.

Limitation

(3) The Public Safety Minister must not, under subsection (1), authorize the making by a federal minister or a department or agency of the Government of Canada of a grant or

contribution that is for the purpose of supporting any operations referred to in paragraph (1)(f).

Eligible persons

(4) A person is eligible to be granted an authorization if they are in Canada or are a Canadian outside Canada.

Referral

(5) The Public Safety Minister may consider an application only if it has been referred to them by

(a) the Minister of Citizenship and Immigration, if the application is in respect of only the purpose set out in paragraph (1)(e);

(b) the Minister of Foreign Affairs, if the application is not in respect of the purpose set out in paragraph (1)(e); or

(c) both of those Ministers, if the application is in respect of two or more purposes set out in subsection (1), at least one of which is the purpose set out in paragraph (1)(e).

Conditions of referral

(6) The Minister of Foreign Affairs, the Minister of Citizenship and Immigration or both of those Ministers, as the case may be, may refer an application if they are satisfied that

(a) the application meets any requirements set out in the regulations;

(b) the geographic area identified in the application is controlled by a terrorist group;

(c) the activity proposed in the application is to be carried out for any of the purposes set out in paragraphs (1)(a) to (f);

(d) that activity responds to a real and important need in that geographic area; and

(e) the applicant is capable of administering funds, and reporting on that administration, in a manner that is transparent and accountable, in circumstances in which a terrorist group may use or benefit from property or financial or other related services.

Deemed withdrawal

(7) An application may be deemed to be withdrawn by the Minister or Ministers who may refer it if the applicant has, within 60 days after the day on which the request is made, failed to comply with a request to provide information that ought to have been included in the application.

Assessment

(8) The Minister who refers an application must, as part of the referral, set out their assessment of how the application meets the conditions set out in paragraphs (6)(a) to (e).

Conditions for grant

(9) The Public Safety Minister may grant the authorization under subsection (1) if they are satisfied that

- (a)** there is no practical way to carry out the activity proposed in the application without creating a risk that, in whole or in part, a terrorist group will use or benefit from the property or financial or related services at issue; and
- (b)** the benefits of carrying out of that activity outweigh that risk, taking into account
 - (i)** the referral of the Minister of Foreign Affairs, the Minister of Citizenship and Immigration or both of those Ministers, as the case may be,
 - (ii)** the security review conducted by the Public Safety Minister under subsection (10),
 - (iii)** any mitigation measures to minimize that risk, and any other terms and conditions, that may be included in the authorization, and
 - (iv)** any other factor that the Public Safety Minister considers appropriate in the circumstances.

Security review

(10) In conducting a security review, the Public Safety Minister must assess the impact of granting the authorization on the financing of terrorism, and in doing so may consider, among other factors,

- (a)** whether the applicant or any person who is to be involved in carrying out the activity proposed in the application has any links to a terrorist group;
- (b)** the likelihood that the applicant or any person who is to be involved in carrying out that activity will be acting for the benefit of, at the direction of or in association with a terrorist group in carrying out the activity; and
- (c)** whether the applicant or any person who is to be involved in carrying out that activity is being or has been investigated for having committed a terrorism offence or has ever been charged with a terrorism offence.

Additional information

(11) The Public Safety Minister may request that the applicant provide any additional information in respect of the application in the form and manner, and within the period, that are specified by that Minister. If the applicant fails, without reasonable excuse, to provide the information within the specified period, that Minister may deem the application to be withdrawn.

Terms and conditions

(12) The Public Safety Minister may make the authorization subject to any terms and conditions that, in their opinion, are required.

Third party involvement

(13) An authorization applies not only to the person to whom it is granted but also to any other person involved, directly or indirectly, in carrying out a specified activity in accordance with the authorization.

Period of validity

(14) An authorization is valid for the period of not more than five years that is specified in the authorization.

Decisions of the United Nations Security Council

(15) In the case of an activity proposed in an application in the course of which property or financial or other related services will be used by or will benefit a listed entity that is subject to a sanctions regime established by the Security Council of the United Nations, the Public Safety Minister may authorize the carrying out of that activity only if the Minister of Foreign Affairs confirms that

- (a)** the Security Council did not intend that the activity be prohibited;
- (b)** the Security Council or a Committee established by the Security Council has approved the activity in advance; or
- (c)** in the opinion of the Minister of Foreign Affairs, there is no obstacle in international law to granting the authorization.

Statutory Instruments Act

(16) The *Statutory Instruments Act* does not apply to an authorization.

2023, c. 14, s. 1.

Notice of refusal

83.033 (1) The Public Safety Minister, the Minister of Foreign Affairs or the Minister of Citizenship and Immigration, as the case may be, must give notice of a decision to refuse an application made under [section 83.032](#) to the applicant within a reasonable time.

Waiting period — new application

(2) An applicant whose application is refused is not permitted to make a new application in respect of the same activity until the end of the 30th day after the day on which the notice is given, unless the Minister who gave the notice is satisfied that there has been a material change of circumstances.

Consideration of new application without referral

(3) If the Public Safety Minister gave the notice and is satisfied as described in subsection (2), that Minister may consider the new application without it having been referred under [subsection 83.032\(5\)](#). In that case, that Minister may take into account the referral of the previous application for the purposes of [subparagraph 83.032\(9\)\(b\)\(i\)](#).

2023, c. 14, s. 1.

Additional security reviews

83.034 At any time during the period of validity of an authorization granted under [section 83.032](#) or renewed under [section 83.035](#), the Public Safety Minister may conduct additional security reviews under [subsection 83.032\(10\)](#) in respect of any person to whom the authorization applies. For the purpose of those reviews, that Minister may request that the person to whom the authorization is granted provide any additional information in the form and manner, and within the period, that are specified by that Minister, but the request must relate only to the authorization or its renewal.

[2023, c. 14, s. 1.](#)

Renewal of authorization

83.035 (1) The Public Safety Minister may renew an authorization granted under [section 83.032](#) for successive periods of not more than five years each on application, for each renewal, made within any period set out in the regulations and before the authorization expires.

Exception

(2) Despite subsection (1), if an application for renewal is made after the authorization expires, the Public Safety Minister may renew the authorization if, in that Minister's opinion, there are exceptional circumstances that justify why the application for renewal was not made before it expired.

[2023, c. 14, s. 1.](#)

Amendment to authorization

83.036 (1) The Public Safety Minister may amend an authorization granted under [section 83.032](#) or renewed under [section 83.035](#), including any terms and conditions included in it.

Exception

(2) Despite subsection (1), the Public Safety Minister is not permitted to amend an authorization if the amendment would be so significant as to change the essential nature of the authorization, including if the amendment would replace a purpose set out in [subsection 83.032\(1\)](#) and specified in the authorization or add another such purpose.

Supporting information

(3) The person to whom the authorization is granted must provide to the Public Safety Minister any information specified by that Minister in support of the amendment.

[2023, c. 14, s. 1.](#)

Authorization — suspension and revocation

83.037 The Public Safety Minister may, at any time after granting an authorization under [section 83.032](#), suspend or revoke it or restrict its scope if

- (a) a person to whom the authorization applies fails to comply with the authorization, including any terms and conditions included in it;
- (b) the person to whom the authorization is granted fails, without reasonable excuse, to comply with any reporting requirements or to provide any information requested under [section 83.034](#); or
- (c) the Public Safety Minister is no longer satisfied that the condition set out in [paragraph 83.032\(9\)\(b\)](#) is met.

[2023, c. 14, s. 1.](#)

Assistance to Public Safety Minister

83.038 (1) The following entities may assist the Public Safety Minister in the administration and enforcement of [sections 83.031 to 83.0392](#), including by collecting information from and disclosing information to that Minister and each other:

- (a) the Canadian Security Intelligence Service;
- (b) the Royal Canadian Mounted Police;
- (c) the Communications Security Establishment;
- (d) the Department of National Defence;
- (e) the Canadian Armed Forces;
- (f) the Department of Foreign Affairs, Trade and Development;
- (g) the Canada Revenue Agency;
- (h) the Canada Border Services Agency;
- (i) the Department of Citizenship and Immigration; and
- (j) any other entity prescribed by regulation.

Use of information

(2) Any information collected or disclosed under subsection (1) must only be used for the administration and enforcement of [sections 83.031 to 83.0392](#).

Compliance with subsection (2)

(3) The Public Safety Minister must take reasonable steps to ensure that any entity assisting that Minister under subsection (1) complies with subsection (2).

[2023, c. 14, s. 1.](#)

Judicial review

83.039 (1) The rules set out in subsection (2) apply to judicial review proceedings in respect of decisions made by the Public Safety Minister, the Minister of Foreign Affairs or the Minister of Citizenship and Immigration under [sections 83.032 to 83.038](#).

Rules

(2) The following rules apply for the purposes of subsection (1):

(a) [Repealed, 2024, c. 16, s. 88]

(a.1) [Repealed, 2024, c. 16, s. 88]

(b) [Repealed, 2024, c. 16, s. 88]

(c) [Repealed, 2024, c. 16, s. 88]

(d) the judge must provide the applicant and the relevant Minister with an opportunity to be heard;

(e) [Repealed, 2024, c. 16, s. 88]

(f) if the judge determines that evidence or other information provided by the relevant Minister is not relevant or if the relevant Minister withdraws the evidence or other information, the judge must not base their decision on that evidence or other information and must return it to the relevant Minister; and

(g) the judge must ensure the confidentiality of all evidence and other information that the relevant Minister withdraws.

For greater certainty

(2.1) For greater certainty, [sections 38.2 to 38.45](#) of the *Canada Evidence Act* apply to the judicial review proceedings referred to in subsection (1).

Protection of information on an appeal

(3) Subsection (2) applies to any appeal of a decision made by a judge in relation to the judicial review proceedings referred to in subsection (1) and to any further appeal, with any necessary modifications.

Definition of *judge*

(4) In this section, ***judge*** means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

[2023, c. 14, s. 1](#); [2024, c. 16, s. 88](#).

Regulations

83.0391 The Governor in Council may, on the recommendation of the Public Safety Minister, make regulations

(a) respecting applications for authorization referred to in [subsection 83.032\(1\)](#);

(a.1) respecting requests and the provision of information under [subsection 83.032\(2.1\)](#);

(b) respecting the granting, renewal, amendment, suspension, revocation or restriction of the scope of authorizations by the Public Safety Minister for the purposes of [sections 83.032 and 83.035 to 83.037](#);

(c) respecting reporting by the person to whom an authorization is granted under [section 83.032](#) for the purpose of ensuring compliance with the authorization and with any terms and conditions included in it under [subsection 83.032\(12\)](#); and

(d) prescribing any other entity for the purpose of [paragraph 83.038\(1\)\(j\)](#).

[2023, c. 14, s. 1.](#)

Annual report

83.0392 (1) The Public Safety Minister must prepare and cause to be laid before each House of Parliament, within 90 days after the first day of January of every year, a report on the operation of [sections 83.031](#) to [83.0391](#) for the previous calendar year.

Number of applications for authorizations

(1.1) The report under subsection (1) must set out the number of applications for authorizations made, approved or refused in the previous calendar year.

Redactions

(1.2) If the report under subsection (1) contains any redactions, the Public Safety Minister must forward the unredacted report to the National Security and Intelligence Committee of Parliamentarians as well as the National Security and Intelligence Review Agency.

Comprehensive review and report

(2) A comprehensive review of [sections 83.031](#) to [83.0391](#) and their operation must be conducted by the Public Safety Minister no later than the first anniversary of the day on which this section comes into force. The Public Safety Minister must cause a report to be laid before each House of Parliament within 180 days after that first anniversary and every five years thereafter.

Plan to remedy deficiencies

(3) If the report identifies any deficiencies in [sections 83.031](#) to [83.0391](#) or their operation, the report must include a plan to remedy those deficiencies — including any proposed legislative amendments — and a timeline for its implementation.

[2023, c. 14, s. 1.](#)

Using or possessing property for terrorist purposes

83.04 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years who

(a) uses property, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity, or

(b) possesses property intending that it be used or knowing that it will be used, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity.

List of Entities

Establishment of list

83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that

(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or

(b) the entity has knowingly acted on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

Recommendation

(1.1) The Minister may make a recommendation referred to in subsection (1) only if he or she has reasonable grounds to believe that the entity to which the recommendation relates is an entity referred to in paragraph (1)(a) or (b).

Amendment to name of listed entity

(1.2) The Minister may, by regulation,

(a) change the name of a listed entity, or add to the list any other name by which a listed entity may also be or have been known, if the Minister has reasonable grounds to believe that the listed entity is using a name that is not on the list; and

(b) delete from the list any other name by which a listed entity may also have been known, if the entity is no longer using that name.

Application to Minister

(2) On application in writing by a listed entity to be removed from the list, the Minister shall decide whether the applicant should remain a listed entity or whether the Minister should recommend to the Governor in Council that the applicant be removed from the list, taking into account the grounds set out in subsection (1).

Deeming

(3) If the Minister does not make a decision on the application referred to in subsection (2) within 90 days after receipt of the application, or within any longer period that may be agreed to in writing by the Minister and the applicant, the Minister is deemed to have decided that the applicant should remain a listed entity.

Notice of the decision to the applicant

(4) The Minister shall give notice without delay to the applicant of any decision taken or deemed to have been taken respecting the application referred to in subsection (2).

Judicial review

(5) Within 60 days after the receipt of the notice of the decision referred to in subsection (4), the applicant may apply to a judge for judicial review of the decision.

Reference

(6) When an application is made under subsection (5), the judge shall, without delay

(a) [Repealed, 2024, c. 16, s. 89]

(b) [Repealed, 2024, c. 16, s. 89]

(c) provide the applicant with a reasonable opportunity to be heard; and

(d) determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

Evidence

(6.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

Publication

(7) The Minister shall cause to be published, without delay, in the *Canada Gazette* notice of a final order of a court that the applicant no longer be a listed entity.

New application

(8) A listed entity may not make another application under subsection (2) except if, since the time when the entity made its last application,

(a) there has been a material change in its circumstances; or

(b) the Minister has completed a review under subsection (8.1) with respect to that entity.

Review — listed entity

(8.1) The Minister shall review whether there are still reasonable grounds, as set out in subsection (1), for an entity to be a listed entity and make a recommendation to the Governor in Council as to whether the entity should remain a listed entity

(a) within five years after

(i) the day on which this subsection comes into force, if the entity is a listed entity on that day, or

(ii) the day on which the entity is added to the list, if the entity is added to the list after the day on which this subsection comes into force; and

(b) subsequently, within five years after the most recent recommendation made under this subsection with respect to the entity.

Validity

(9) Reviews undertaken under subsection (8.1) do not affect the validity of the list.

Publication

(10) The Minister shall cause notice of the results of every review of a listed entity undertaken under subsection (8.1) to be published in the [Canada Gazette](#) within five years after the review is completed.

Definition of judge

(11) In this section, **judge** means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

[2001, c. 41, ss. 4, 143](#); [2005, c. 10, ss. 18, 34](#); [2019, c. 13, s. 141](#); [2024, c. 16, s. 89](#).

Return of information

83.06 (1) For the purposes of subsection 83.05(6), any information that is obtained in confidence from a government, an institution or an agency of a foreign state, from an international organization of states or from an institution or an agency of an international organization of states and that is provided to the judge by the Minister of Public Safety and Emergency Preparedness shall be returned to counsel representing the Minister and shall not be considered by the judge in making the determination under [paragraph 83.05\(6\)\(d\)](#), if

- (a) the judge determines that the information is not relevant;
- (b) the judge determines that the information is relevant but should be summarized in a statement to be provided to the applicant; or
- (c) the Minister withdraws the information.

For greater certainty

(2) For greater certainty, [sections 38.2 to 38.45](#) of the [Canada Evidence Act](#) apply to an application made under [subsection 83.05\(5\)](#).

[2001, c. 41, s. 4](#); [2005, c. 10, s. 19](#); [2024, c. 16, s. 90](#).

Mistaken identity

83.07 (1) An entity whose name is the same as or similar to a name, appearing on the list, of a listed entity and who claims not to be that listed entity may apply in writing to the Minister of Public Safety and Emergency Preparedness for a certificate stating that it is not that listed entity.

Issuance of certificate

(2) The Minister shall, within 30 days after receiving the application, issue a certificate if he or she is satisfied that the applicant is not that listed entity.

[2001, c. 41, s. 4](#); [2005, c. 10, s. 20](#); [2019, c. 13, s. 142](#).

Freezing of Property

Freezing of property

83.08 (1) No person in Canada and no Canadian outside Canada shall knowingly

(a) deal directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group;

(b) enter into or facilitate, directly or indirectly, any transaction in respect of property referred to in paragraph (a); or

(c) provide any financial or other related services in respect of property referred to in paragraph (a) to, for the benefit of or at the direction of a terrorist group.

No civil liability

(2) A person who acts reasonably in taking, or omitting to take, measures to comply with subsection (1) shall not be liable in any civil action arising from having taken or omitted to take the measures, if they took all reasonable steps to satisfy themselves that the relevant property was owned or controlled by or on behalf of a terrorist group.

[2001, c. 41, s. 4](#); [2013, c. 9, s. 3](#).

Exemptions

83.09 (1) The Minister of Public Safety and Emergency Preparedness, or a person designated by him or her, may authorize any person in Canada or any Canadian outside Canada to carry out a specified activity or transaction that is prohibited by [section 83.08](#), or a class of such activities or transactions.

Ministerial authorization

(2) The Minister, or a person designated by him or her, may make the authorization subject to any terms and conditions that are required in their opinion and may amend, suspend, revoke or reinstate it.

Existing equities maintained

(3) All secured and unsecured rights and interests in the frozen property that are held by persons, other than terrorist groups or their agents, are entitled to the same ranking that they would have been entitled to had the property not been frozen.

Third party involvement

(4) If a person has obtained an authorization under subsection (1), any other person involved in carrying out the activity or transaction, or class of activities or transactions, to which the authorization relates is not subject to [sections 83.08](#), [83.1](#) and [83.11](#) if the

terms or conditions of the authorization that are imposed under subsection (2), if any, are met.

[2001, c. 41, s. 4](#); [2005, c. 10, s. 21](#).

Disclosure

83.1 (1) Every person in Canada and every Canadian outside Canada shall disclose without delay to the Commissioner of the Royal Canadian Mounted Police or to the Director of the Canadian Security Intelligence Service

(a) the existence of property in their possession or control that they know is owned or controlled by or on behalf of a terrorist group; and

(b) information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

Immunity

(2) No criminal or civil proceedings lie against a person for disclosure made in good faith under subsection (1).

[2001, c. 41, s. 4](#); [2013, c. 9, s. 4](#).

Audit

83.11 (1) The following entities must determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a listed entity:

(a) authorized foreign banks within the meaning of [section 2](#) of the *Bank Act* in respect of their business in Canada, or banks to which that Act applies;

(b) cooperative credit societies, savings and credit unions and caisses populaires regulated by a provincial Act and associations regulated by the *Cooperative Credit Associations Act*;

(c) foreign companies within the meaning of [subsection 2\(1\)](#) of the *Insurance Companies Act* in respect of their insurance business in Canada;

(c.1) companies, provincial companies and societies within the meaning of [subsection 2\(1\)](#) of the *Insurance Companies Act*;

(c.2) fraternal benefit societies regulated by a provincial Act in respect of their insurance activities, and insurance companies and other entities engaged in the business of insuring risks that are regulated by a provincial Act;

(d) companies to which the *Trust and Loan Companies Act* applies;

(e) trust companies regulated by a provincial Act;

(f) loan companies regulated by a provincial Act; and

(g) entities authorized under provincial legislation to engage in the business of dealing in securities, or to provide portfolio management or investment counselling services.

Monthly report

(2) Subject to the regulations, every entity referred to in paragraphs (1)(a) to (g) must report, within the period specified by regulation or, if no period is specified, monthly, to the principal agency or body that supervises or regulates it under federal or provincial law either

(a) that it is not in possession or control of any property referred to in subsection (1), or

(b) that it is in possession or control of such property, in which case it must also report the number of persons, contracts or accounts involved and the total value of the property.

Immunity

(3) No criminal or civil proceedings lie against a person for making a report in good faith under subsection (2).

Regulations

(4) The Governor in Council may make regulations

(a) excluding any entity or class of entities from the requirement to make a report referred to in subsection (2), and specifying the conditions of exclusion; and

(b) specifying a period for the purposes of subsection (2).

[2001, c. 41, s. 4.](#)

Offences — freezing of property, disclosure or audit

83.12 (1) Every person who contravenes any of [sections 83.08, 83.1](#) and [83.11](#) is guilty of an offence and liable

(a) on conviction on indictment, to imprisonment for a term of not more than 10 years; or

(b) on summary conviction, to a fine of not more than \$100,000 or to imprisonment for a term of not more than two years less a day, or to both.

(2) [\[Repealed, 2013, c. 9, s. 5\]](#)

[2001, c. 41, s. 4; 2013, c. 9, s. 5; 2019, c. 25, s. 18.](#)

Seizure and Restraint of Property

Seizure and restraint of assets

83.13 (1) Where a judge of the Federal Court, on an *ex parte* application by the Attorney General, after examining the application in private, is satisfied that there are reasonable grounds to believe that there is in any building, receptacle or place any property in respect of which an order of forfeiture may be made under [subsection 83.14\(5\)](#), the judge may issue

(a) if the property is situated in Canada, a warrant authorizing a person named therein or a peace officer to search the building, receptacle or place for that property and to seize that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made under that subsection; or

(b) if the property is situated in or outside Canada, a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, that property other than as may be specified in the order.

Contents of application

(1.1) An affidavit in support of an application under subsection (1) may be sworn on information and belief, and, notwithstanding the *Federal Court Rules, 1998*, no adverse inference shall be drawn from a failure to provide evidence of persons having personal knowledge of material facts.

Appointment of manager

(2) On an application under subsection (1), at the request of the Attorney General, if a judge is of the opinion that the circumstances so require, the judge may

(a) appoint a person to take control of, and to manage or otherwise deal with, all or part of the property in accordance with the directions of the judge; and

(b) require any person having possession of that property to give possession of the property to the person appointed under paragraph (a).

Appointment of Minister of Public Works and Government Services

(3) When the Attorney General of Canada so requests, a judge appointing a person under subsection (2) shall appoint the Minister of Public Works and Government Services.

Power to manage

(4) The power to manage or otherwise deal with property under subsection (2) includes

(a) the power to make an interlocutory sale of perishable or rapidly depreciating property;

(b) the power to destroy, in accordance with subsections (5) to (8), property that has little or no value; and

(c) the power to have property, other than real property or a conveyance, forfeited to Her Majesty in accordance with subsection (8.1).

Application for destruction order

(5) Before a person who is appointed to manage property destroys property that has little or no value, they shall apply to a judge of the Federal Court for a destruction order.

Notice

(6) Before making a destruction order, a judge shall require notice in accordance with subsection (7) to be given to and may hear any person who, in the judge's opinion, appears to have a valid interest in the property.

Manner of giving notice

(7) A notice shall

(a) be given in the manner that the judge directs or that may be specified in the rules of the Federal Court; and

(b) specify the effective period of the notice that the judge considers reasonable or that may be set out in the rules of the Federal Court.

Destruction order

(8) A judge shall order that the property be destroyed if they are satisfied that the property has little or no financial or other value.

Forfeiture order

(8.1) On application by a person who is appointed to manage the property, a judge of the Federal Court shall order that the property, other than real property or a conveyance, be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the law if

(a) a notice is given or published in the manner that the judge directs or that may be specified in the rules of the Federal Court;

(b) the notice specifies a period of 60 days during which a person may make an application to the judge asserting their interest in the property; and

(c) during that period, no one makes such an application.

When management order ceases to have effect

(9) A management order ceases to have effect when the property that is the subject of the management order is returned in accordance with the law, destroyed or forfeited to Her Majesty.

For greater certainty

(9.1) For greater certainty, if property that is the subject of a management order is sold, the management order applies to the net proceeds of the sale.

Application to vary

(10) The Attorney General may at any time apply to a judge of the Federal Court to cancel or vary an order or warrant made under this section, other than an appointment made under subsection (3).

Procedure

(11) Subsection 462.32(4), sections 462.34 to 462.35 and 462.4, subsection 487(3) and section 488 apply, with any modifications that the circumstances require, to a warrant issued under paragraph (1)(a). Any peace officer who executes the warrant must have authority to act as a peace officer in the place where it is executed.

Procedure

(12) Subsections 462.33(4) and (6) to (11) and sections 462.34 to 462.35 and 462.4 apply, with such modifications as the circumstances require, to an order issued under paragraph (1)(b).

2001, c. 41, s. 4; 2017, c. 7, s. 54; 2019, c. 25, s. 19; 2024, c. 15, s. 307.

Forfeiture of Property

Application for order of forfeiture

83.14 (1) The Attorney General may make an application to a judge of the Federal Court for an order of forfeiture in respect of

- (a)** property owned or controlled by or on behalf of a terrorist group; or
- (b)** property that has been or will be used, in whole or in part, to facilitate or carry out a terrorist activity.

Contents of application

(2) An affidavit in support of an application by the Attorney General under subsection (1) may be sworn on information and belief, and, notwithstanding the *Federal Court Rules, 1998*, no adverse inference shall be drawn from a failure to provide evidence of persons having personal knowledge of material facts.

Respondents

(3) The Attorney General is required to name as a respondent to an application under subsection (1) only those persons who are known to own or control the property that is the subject of the application.

Notice

(4) The Attorney General shall give notice of an application under subsection (1) to named respondents in such a manner as the judge directs or as provided in the rules of the Federal Court.

Granting of forfeiture order

(5) If a judge is satisfied on a balance of probabilities that property is property referred to in paragraph (1)(a) or (b), the judge shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

Use of proceeds

(5.1) Any proceeds that arise from the disposal of property under subsection (5) may be used to compensate victims of terrorist activities and to fund anti-terrorist initiatives in accordance with any regulations made by the Governor in Council under subsection (5.2).

Regulations

(5.2) The Governor in Council may make regulations for the purposes of specifying how the proceeds referred to in subsection (5.1) are to be distributed.

Order refusing forfeiture

(6) Where a judge refuses an application under subsection (1) in respect of any property, the judge shall make an order that describes the property and declares that it is not property referred to in that subsection.

Notice

(7) On an application under subsection (1), a judge may require notice to be given to any person who, in the opinion of the Court, appears to have an interest in the property, and any such person shall be entitled to be added as a respondent to the application.

Third party interests

(8) If a judge is satisfied that a person referred to in subsection (7) has an interest in property that is subject to an application, has exercised reasonable care to ensure that the property would not be used to facilitate or carry out a terrorist activity, and is not a member of a terrorist group, the judge shall order that the interest is not affected by the forfeiture. Such an order shall declare the nature and extent of the interest in question.

Dwelling-house

(9) Where all or part of property that is the subject of an application under subsection (1) is a dwelling-house, the judge shall also consider

(a) the impact of an order of forfeiture on any member of the immediate family of the person who owns or controls the dwelling-house, if the dwelling-house was the member's principal residence at the time the dwelling-house was ordered restrained or at the time the forfeiture application was made and continues to be the member's principal residence; and

(b) whether the member appears innocent of any complicity or collusion in the terrorist activity.

Motion to vary or set aside

(10) A person who claims an interest in property that was forfeited and who did not receive notice under subsection (7) may bring a motion to the Federal Court to vary or set aside an order made under subsection (5) not later than 60 days after the day on which the forfeiture order was made.

No extension of time

(11) The Court may not extend the period set out in subsection (10).

2001, c. 41, s. 4; 2017, c. 7, s. 55(F).

Disposition of property

83.15 Subsection 462.42(6) and sections 462.43 and 462.46 apply, with such modifications as the circumstances require, to property subject to a warrant or restraint order issued under subsection 83.13(1) or ordered forfeited under subsection 83.14(5).

2001, c. 41, s. 4.

Interim preservation rights

83.16 (1) Pending any appeal of an order made under section 83.14, property restrained under an order issued under section 83.13 shall continue to be restrained, property seized under a warrant issued under that section shall continue to be detained, and any person appointed to manage, control or otherwise deal with that property under that section shall continue in that capacity.

Appeal of refusal to grant order

(2) Section 462.34 applies, with such modifications as the circumstances require, to an appeal taken in respect of a refusal to grant an order under subsection 83.14(5).

2001, c. 41, s. 4.

Other forfeiture provisions unaffected

83.17 (1) This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting the forfeiture of property.

Priority for restitution to victims of crime

(2) Property is subject to forfeiture under subsection 83.14(5) only to the extent that it is not required to satisfy the operation of any other provision of this or any other Act of Parliament respecting restitution to, or compensation of, persons affected by the commission of offences.

2001, c. 41, s. 4.

Participating, Facilitating, Instructing and Harbours

Participation in activity of terrorist group

83.18 (1) Every person who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Prosecution

- (2)** An offence may be committed under subsection (1) whether or not
- (a)** a terrorist group actually facilitates or carries out a terrorist activity;
 - (b)** the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
 - (c)** the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

Meaning of participating or contributing

- (3)** Participating in or contributing to an activity of a terrorist group includes
- (a)** providing, receiving or recruiting a person to receive training;
 - (b)** providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;
 - (c)** recruiting a person in order to facilitate or commit
 - (i)** a terrorism offence, or
 - (ii)** an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;
 - (d)** entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and
 - (e)** making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit
 - (i)** a terrorism offence, or
 - (ii)** an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.

Factors

- (4)** In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused
- (a)** uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;
 - (b)** frequently associates with any of the persons who constitute the terrorist group;
 - (c)** receives any benefit from the terrorist group; or
 - (d)** repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.

2001, c. 41, s. 4; 2019, c. 25, s. 20.

Leaving Canada to participate in activity of terrorist group

83.181 Every person who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under [subsection 83.18\(1\)](#) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

[2013, c. 9, s. 6](#); [2019, c. 25, s. 21](#).

Facilitating terrorist activity

83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Facilitation

(2) For the purposes of this Part, a terrorist activity is facilitated whether or not

- (a)** the facilitator knows that a particular terrorist activity is facilitated;
- (b)** any particular terrorist activity was foreseen or planned at the time it was facilitated; or
- (c)** any terrorist activity was actually carried out.

[2001, c. 41, s. 4](#).

Leaving Canada to facilitate terrorist activity

83.191 Everyone who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under [subsection 83.19\(1\)](#) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[2013, c. 9, s. 7](#).

Commission of offence for terrorist group

83.2 Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

[2001, c. 41, s. 4](#).

Leaving Canada to commit offence for terrorist group

83.201 Everyone who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[2013, c. 9, s. 8](#).

Leaving Canada to commit offence that is terrorist activity

83.202 Everyone who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

2013, c. 9, s. 8.

Instructing to carry out activity for terrorist group

83.21 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

(2) An offence may be committed under subsection (1) whether or not

- (a)** the activity that the accused instructs to be carried out is actually carried out;
- (b)** the accused instructs a particular person to carry out the activity referred to in paragraph (a);
- (c)** the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (a);
- (d)** the person whom the accused instructs to carry out the activity referred to in paragraph (a) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist group;
- (e)** a terrorist group actually facilitates or carries out a terrorist activity;
- (f)** the activity referred to in paragraph (a) actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
- (g)** the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

2001, c. 41, s. 4.

Instructing to carry out terrorist activity

83.22 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

(2) An offence may be committed under subsection (1) whether or not

- (a) the terrorist activity is actually carried out;
- (b) the accused instructs a particular person to carry out the terrorist activity;
- (c) the accused knows the identity of the person whom the accused instructs to carry out the terrorist activity; or
- (d) the person whom the accused instructs to carry out the terrorist activity knows that it is a terrorist activity.

2001, c. 41, s. 4.

Counselling commission of terrorism offence

83.221 (1) Every person who counsels another person to commit a terrorism offence without identifying a specific terrorism offence is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

Application

(2) An offence may be committed under subsection (1) whether or not a terrorism offence is committed by the person who is counselled.

2015, c. 20, s. 16; 2019, c. 13, s. 143.

Warrant of seizure

83.222 (1) A judge who is satisfied by information on oath that there are reasonable grounds to believe that any publication, copies of which are kept for sale or distribution in premises within the court's jurisdiction, is terrorist propaganda may issue a warrant authorizing seizure of the copies.

Summons to occupier

(2) Within seven days after the day on which the warrant is issued, the judge shall issue a summons to the premises' occupier requiring the occupier to appear before the court and to show cause why the matter seized should not be forfeited to Her Majesty.

Owner and author may appear

(3) The owner and the author of the matter seized and alleged to be terrorist propaganda may appear and be represented before the court in order to oppose the making of an order for the forfeiture of the matter.

Order of forfeiture

(4) If the court is satisfied, on a balance of probabilities, that the publication is terrorist propaganda, it may make an order declaring that the matter be forfeited to Her Majesty, for disposal as the Attorney General may direct.

Disposal of matter

(5) If the court is not satisfied that the publication is terrorist propaganda, it may order that the matter be restored to the person from whom it was seized without delay after

the time for final appeal has expired.

Appeal

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared before the court, on any ground of appeal that involves a question of law or fact alone, or a question of mixed law and fact, as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and [sections 673 to 696](#) apply with any modifications that the circumstances require.

Consent

(7) No proceeding under this section shall be instituted without the Attorney General's consent.

Definitions

(8) The following definitions apply in this section.

court has the same meaning as in [subsection 320\(8\)](#). (*tribunal*)

judge has the same meaning as in [subsection 320\(8\)](#). (*juge*)

terrorist propaganda means any writing, sign, visible representation or audio recording that counsels the commission of a terrorism offence. (*propagande terroriste*)

[2015, c. 20, s. 16; 2019, c. 13, s. 144.](#)

Order to computer system's custodian

83.223 (1) If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material — that is terrorist propaganda or computer data that makes terrorist propaganda available — stored on and made available to the public through a computer system that is within the court's jurisdiction, the judge may order the computer system's custodian to

(a) give an electronic copy of the material to the court;

(b) ensure that the material is no longer stored on and made available through the computer system; and

(c) provide the information that is necessary to identify and locate the person who posted the material.

Notice to person who posted material

(2) Within a reasonable time after receiving the information referred to in paragraph (1) (c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court and to show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the computer system's

custodian to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.

Person who posted material may appear

(3) The person who posted the material may appear and be represented before the court in order to oppose the making of an order under subsection (5).

Non-appearance

(4) If the person who posted the material does not appear before the court, the court may proceed to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.

Order of deletion

(5) If the court is satisfied, on a balance of probabilities, that the material is available to the public and is terrorist propaganda or computer data that makes terrorist propaganda available, it may order the computer system's custodian to delete the material.

Destruction of electronic copy

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

Return of material

(7) If the court is not satisfied that the material is available to the public and is terrorist propaganda or computer data that makes terrorist propaganda available, the court shall order that the electronic copy be returned to the computer system's custodian and terminate the order under paragraph (1)(b).

Appeal

(8) An appeal lies from an order made under subsection (5) or (6) by any person who appeared before the court, on any ground of appeal that involves a question of law or fact alone, or a question of mixed law and fact, as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and [sections 673 to 696](#) apply with any modifications that the circumstances require.

Consent

(9) No proceeding under this section shall be instituted without the Attorney General's consent.

When order takes effect

(10) No order made under any of subsections (5) to (7) takes effect until the time for final appeal has expired.

Definitions

(11) The following definitions apply in this section.

computer data has the same meaning as in [subsection 342.1\(2\)](#). (*données informatiques*)

computer system has the same meaning as in [subsection 342.1\(2\)](#). (*ordinateur*)

court has the same meaning as in [subsection 320\(8\)](#). (*tribunal*)

data [Repealed, 2015, c. 20, s. 35]

judge has the same meaning as in [subsection 320\(8\)](#). (*juge*)

terrorist propaganda has the same meaning as in [subsection 83.222\(8\)](#). (*propagande terroriste*)

[2015, c. 20, ss. 16, 35.](#)

Concealing person who carried out terrorist activity

83.23 (1) Every person who knowingly harbours or conceals another person whom they know to be a person who has carried out a terrorist activity, for the purpose of enabling that other person to facilitate or carry out any terrorist activity, is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than 14 years, if the person who is harboured or concealed carried out a terrorist activity that is a terrorism offence for which that person is liable to imprisonment for life; and
- (b) an indictable offence and liable to imprisonment for a term of not more than 10 years, if the person who is harboured or concealed carried out a terrorist activity that is a terrorism offence for which that person is liable to any other punishment.

Concealing person who is likely to carry out terrorist activity

(2) Every person who knowingly harbours or conceals another person whom they know to be a person who is likely to carry out a terrorist activity, for the purpose of enabling that other person to facilitate or carry out any terrorist activity, is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

[2001, c. 41, s. 4; 2013, c. 9, s. 9; 2019, c. 25, s. 22.](#)

Hoax Regarding Terrorist Activity

Hoax — terrorist activity

83.231 (1) Every one commits an offence who, without lawful excuse and with intent to cause any person to fear death, bodily harm, substantial damage to property or serious interference with the lawful use or operation of property,

- (a) conveys or causes or procures to be conveyed information that, in all the circumstances, is likely to cause a reasonable apprehension that terrorist activity is

occurring or will occur, without believing the information to be true; or

(b) commits an act that, in all the circumstances, is likely to cause a reasonable apprehension that terrorist activity is occurring or will occur, without believing that such activity is occurring or will occur.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Causing bodily harm

(3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

Causing death

(4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for life.

2004, c. 15, s. 32; 2019, c. 25, s. 23.

Proceedings and Aggravated Punishment

Attorney General's consent

83.24 Proceedings in respect of a terrorism offence or an offence under [section 83.12](#) shall not be commenced without the consent of the Attorney General.

2001, c. 41, s. 4.

Jurisdiction

83.25 (1) Where a person is alleged to have committed a terrorism offence or an offence under [section 83.12](#), proceedings in respect of that offence may, whether or not that person is in Canada, be commenced at the instance of the Government of Canada and conducted by the Attorney General of Canada or counsel acting on his or her behalf in any territorial division in Canada, if the offence is alleged to have occurred outside the province in which the proceedings are commenced, whether or not proceedings have previously been commenced elsewhere in Canada.

Trial and punishment

(2) An accused may be tried and punished in respect of an offence referred to in subsection (1) in the same manner as if the offence had been committed in the territorial division where the proceeding is conducted.

2001, c. 41, s. 4.

Sentences to be served consecutively

83.26 A sentence, other than one of life imprisonment, imposed on a person for an offence under any of [sections 83.02 to 83.04](#) and [83.18 to 83.23](#) shall be served consecutively to

- (a)** any other punishment imposed on the person, other than a sentence of life imprisonment, for an offence arising out of the same event or series of events; and
- (b)** any other sentence, other than one of life imprisonment, to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.

2001, c. 41, s. 4.

Punishment for terrorist activity

83.27 (1) Notwithstanding anything in this Act, a person convicted of an indictable offence, other than an offence for which a sentence of imprisonment for life is imposed as a minimum punishment, where the act or omission constituting the offence also constitutes a terrorist activity, is liable to imprisonment for life.

Offender must be notified

(2) Subsection (1) does not apply unless the prosecutor satisfies the court that the offender, before making a plea, was notified that the application of that subsection would be sought.

2001, c. 41, s. 4.

83.28 [Repealed, 2019, c. 13, s. 145]

83.29 [Repealed, 2019, c. 13, s. 145]

Recognizance with Conditions

Attorney General's consent

83.3 (1) The Attorney General's consent is required before a peace officer may lay an information under subsection (2).

Terrorist activity

(2) Subject to subsection (1), a peace officer may lay an information before a provincial court judge if the peace officer

- (a)** believes on reasonable grounds that a terrorist activity may be carried out; and

(b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity.

Appearance

(3) The judge who receives the information may cause the person to appear before any provincial court judge.

Arrest without warrant

(4) Despite subsections (2) and (3), a peace officer may arrest a person without a warrant and cause the person to be detained in custody, in order to bring them before a provincial court judge in accordance with subsection (6), if

(a) either

(i) the grounds for laying an information referred to in paragraphs (2)(a) and (b) exist but, by reason of exigent circumstances, it would be impracticable to lay an information under subsection (2), or

(ii) an information has been laid under subsection (2) and a summons has been issued; and

(b) the peace officer suspects on reasonable grounds that the detention of the person in custody is necessary to prevent a terrorist activity.

Duty of peace officer

(5) If a peace officer arrests a person without a warrant in the circumstance described in subparagraph (4)(a)(i), the peace officer shall, within the time prescribed by paragraph (6)(a) or (b),

(a) lay an information in accordance with subsection (2); or

(b) release the person.

When person to be taken before judge

(6) Unless a peace officer is satisfied that a person should be released from custody without conditions before their appearance before a provincial court judge in accordance with the rules in paragraph (a) or (b), and so releases the person, the person detained in custody shall be taken before a provincial court judge in accordance with the following rules:

(a) if a provincial court judge is available within 24 hours after the person has been arrested, the person shall be taken before a provincial court judge without unreasonable delay and in any event within that period; and

(b) if a provincial court judge is not available within 24 hours after the person has been arrested, the person shall be taken before a provincial court judge as soon as feasible.

How person dealt with

- (7)** When a person is taken before a provincial court judge under subsection (6),
- (a)** if an information has not been laid under subsection (2), the judge shall order that the person be released; or
 - (b)** if an information has been laid under subsection (2),
 - (i)** the judge shall order that the person be released unless the peace officer who laid the information shows cause why the person's detention in custody is justified on one or more of the following grounds:
 - (A)** the detention is necessary to ensure the person's appearance before a provincial court judge in order to be dealt with in accordance with subsection (8),
 - (B)** the detention is necessary for the protection or safety of the public, including any witness, having regard to all the circumstances including
 - (I)** the likelihood that, if the person is released from custody, a terrorist activity will be carried out, and
 - (II)** any substantial likelihood that the person will, if released from custody, interfere with the administration of justice, and
 - (C)** the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the peace officer's grounds under subsection (2), and the gravity of any terrorist activity that may be carried out, and
 - (ii)** the judge may adjourn the matter for a hearing under subsection (8) but, if the person is not released under subparagraph (i), the adjournment may not exceed 48 hours.

Adjournment under subparagraph (7)(b)(ii)

- (7.1)** If a judge has adjourned the matter under subparagraph (7)(b)(ii) and the person remains in custody at the end of the period of adjournment, the person shall be taken before a provincial court judge who
- (a)** shall order that the person be released unless a peace officer shows cause why the person's detention in custody is justified on one or more of the grounds set out in clauses (7)(b)(i)(A) to (C) and satisfies the judge that the investigation in relation to which the person is detained is being conducted diligently and expeditiously; and
 - (b)** may adjourn the matter for a hearing under subsection (8) but, if the person is not released under paragraph (a), the adjournment may not exceed 48 hours.

Adjournment under paragraph (7.1)(b)

- (7.2)** If a judge has adjourned the matter under paragraph (7.1)(b) and the person remains in custody at the end of the period of adjournment, the person shall be taken before a provincial court judge who

(a) shall order that the person be released unless a peace officer shows cause why the person's detention in custody is justified on one or more of the grounds set out in clauses (7)(b)(i)(A) to (C) and satisfies the judge that the investigation in relation to which the person is detained is being conducted diligently and expeditiously; and

(b) may adjourn the matter for a hearing under subsection (8) but, if the person is not released under paragraph (a), the adjournment may not exceed 48 hours.

Hearing before judge

(8) The judge before whom the person appears in accordance with subsection (3)

(a) may, if the judge is satisfied by the evidence adduced that the peace officer has reasonable grounds for the suspicion, order that the person enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period of not more than 12 months and to comply with any other reasonable conditions prescribed in the recognizance, including the conditions set out in subsections (10), (11.1) and (11.2), that the judge considers desirable for preventing the carrying out of a terrorist activity; and

(b) if the person was not released under subparagraph (7)(b)(i) or paragraph (7.1)(a) or (7.2)(a), shall order that the person be released, subject to the recognizance, if any, ordered under paragraph (a).

Duration extended

(8.1) However, if the judge is also satisfied that the person was convicted previously of a terrorism offence, the judge may order that the person enter into the recognizance for a period of not more than two years.

Refusal to enter into recognizance

(9) The judge may commit the person to prison for a term not exceeding 12 months if the person fails or refuses to enter into the recognizance.

Conditions — firearms

(10) Before making an order under paragraph (8)(a), the judge shall consider whether it is desirable, in the interests of the safety of the person or of any other person, to include as a condition of the recognizance that the person be prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all of those things, for any period specified in the recognizance, and if the judge decides that it is so desirable, they shall add the condition to the recognizance.

Surrender, etc.

(11) If the judge adds the condition described in subsection (10) to a recognizance, they shall specify in it the manner and method by which

- (a) the things referred to in that subsection that are in the person's possession shall be surrendered, disposed of, detained, stored or dealt with; and
- (b) the authorizations, licences and registration certificates that are held by the person shall be surrendered.

Condition — passport

(11.1) The judge shall consider whether it is desirable, to prevent the carrying out of a terrorist activity, to include in the recognizance a condition that the person deposit, in the specified manner, any passport or other travel document issued in their name that is in their possession or control. If the judge decides that it is desirable, the judge shall add the condition to the recognizance and specify the period during which it applies.

Condition — specified geographic area

(11.2) The judge shall consider whether it is desirable, to prevent the carrying out of a terrorist activity, to include in the recognizance a condition that the person remain within a specified geographic area unless written permission to leave that area is obtained from the judge or any individual designated by the judge. If the judge decides that it is desirable, the judge shall add the condition to the recognizance and specify the period during which it applies.

Reasons

(12) If the judge does not add a condition described in subsection (10), (11.1) or (11.2) to a recognizance, the judge shall include in the record a statement of the reasons for not adding it.

Variance of conditions

(13) The judge, or any other judge of the same court, may, on application of the peace officer, the Attorney General or the person, vary the conditions fixed in the recognizance.

Other provisions to apply

(14) Subsections 810(4) and (5) apply, with any necessary modifications, to proceedings under this section.

2001, c. 41, s. 4; 2013, c. 9, s. 10; 2015, c. 20, s. 17; 2019, c. 13, s. 146; 2019, c. 25, s. 24; 2023, c. 32, s. 0.2.

83.31 (1) [Repealed, 2019, c. 13, s. 147]

(1.1) [Repealed, 2019, c. 13, s. 147]

Annual report (section 83.3)

(2) The Attorney General of Canada shall prepare and cause to be laid before Parliament and the Attorney General of every province shall publish or otherwise make available to the public an annual report for the previous year on the operation of [section 83.3](#) that includes

- (a)** the number of consents to lay an information that were sought, and the number that were obtained, by virtue of [subsections 83.3\(1\) and \(2\)](#);
- (b)** the number of cases in which a summons or a warrant of arrest was issued for the purposes of [subsection 83.3\(3\)](#);
- (c)** the number of cases in which a person was not released under [subsection 83.3\(7\)](#), [\(7.1\)](#) or [\(7.2\)](#) pending a hearing;
- (d)** the number of cases in which an order to enter into a recognizance was made under [paragraph 83.3\(8\)\(a\)](#), and the types of conditions that were imposed;
- (e)** the number of times that a person failed or refused to enter into a recognizance, and the term of imprisonment imposed under [subsection 83.3\(9\)](#) in each case; and
- (f)** the number of cases in which the conditions fixed in a recognizance were varied under [subsection 83.3\(13\)](#).

Annual report (section 83.3)

(3) The Minister of Public Safety and Emergency Preparedness shall prepare and cause to be laid before Parliament and the Minister responsible for policing in every province shall publish or otherwise make available to the public an annual report for the previous year on the operation of [section 83.3](#) that includes

- (a)** the number of arrests without warrant that were made under [subsection 83.3\(4\)](#) and the period of the arrested person's detention in custody in each case; and
- (b)** the number of cases in which a person was arrested without warrant under [subsection 83.3\(4\)](#) and was released
 - (i)** by a peace officer under [paragraph 83.3\(5\)\(b\)](#), or
 - (ii)** by a judge under [paragraph 83.3\(7\)\(a\)](#), [\(7.1\)\(a\)](#) or [\(7.2\)\(a\)](#).

Opinions

(3.1) The Attorney General of Canada and the Minister of Public Safety and Emergency Preparedness shall include in their annual reports under subsections (2) and (3), respectively, their opinion, supported by reasons, on whether the operation of [section 83.3](#) should be extended.

Limitation

- (4)** The annual report shall not contain any information the disclosure of which would
- (a)** compromise or hinder an ongoing investigation of an offence under an Act of Parliament;
 - (b)** endanger the life or safety of any person;
 - (c)** prejudice a legal proceeding; or
 - (d)** otherwise be contrary to the public interest.

Sunset provision

83.32 (1) [Section 83.3](#) ceases to have effect at the end of the fifth anniversary of the day on which the *National Security Act, 2017* receives royal assent unless, before the end of that fifth anniversary, the operation of that section is extended by resolution — whose text is established under subsection (2) — passed by both Houses of Parliament in accordance with the rules set out in subsection (3).

Review

(1.1) A comprehensive review of [section 83.3](#) and its operation shall be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

Report

(1.2) The committee shall, no later than one year before the fifth anniversary referred to subsection (1), submit a report on the review to the appropriate House of Parliament, or to both Houses, as the case may be, including its recommendation with respect to extending the operation of [section 83.3](#).

Order in council

(2) The Governor in Council may, by order, establish the text of a resolution that provides for the extension of the operation of [section 83.3](#) and that specifies the period of the extension, which may not exceed five years from the first day on which the resolution has been passed by both Houses of Parliament.

Rules

(3) A motion for the adoption of the resolution may be debated in both Houses of Parliament but may not be amended. At the conclusion of the debate, the Speaker of the House of Parliament shall immediately put every question necessary to determine whether or not the motion is concurred in.

Subsequent extensions

(4) The operation of [section 83.3](#) may be further extended in accordance with this section, but

(a) the reference to “at the end of the fifth anniversary of the day on which the *National Security Act, 2017* receives royal assent unless, before the end of that fifth anniversary” in subsection (1) is to be read as a reference to “on the expiry of the most recent extension under this section unless, before that extension expires”; and

(b) the reference to “the fifth anniversary referred to subsection (1)” in subsection (1.2) is to be read as a reference to “the expiry of the most recent extension under this section”.

(5) [\[Repealed, 2019, c. 13, s. 148\]](#)

2001, c. 41, s. 4; 2013, c. 9, s. 12; 2019, c. 13, s. 148.

83.33 (1) [Repealed, 2019, c. 13, s. 149]

Transitional provision — section 83.3

(2) In the event that [section 83.3](#) ceases to have effect in accordance with [section 83.32](#), a person detained in custody under section 83.3 shall be released when that section ceases to have effect, except that [subsections 83.3\(7\) to \(14\)](#) continue to apply to a person who was taken before a judge under [subsection 83.3\(6\)](#) before section 83.3 ceased to have effect.

2001, c. 41, s. 4; 2013, c. 9, s. 13; 2019, c. 13, s. 149.

PART III

Firearms and Other Weapons

Interpretation

Definitions

84 (1) In this Part,

ammunition means a cartridge containing a projectile designed to be discharged from a firearm and, without restricting the generality of the foregoing, includes a caseless cartridge and a shot shell; (*munitions*)

antique firearm means

(a) any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition, or

(b) any firearm that is prescribed to be an antique firearm; (*arme à feu historique*)

authorization means an authorization issued under the [Firearms Act](#); (*autorisation*)

automatic firearm means a firearm that is capable of, or assembled or designed and manufactured with the capability of, discharging projectiles in rapid succession during one pressure of the trigger; (*arme automatique*)

cartridge magazine means a device or container from which ammunition may be fed into the firing chamber of a firearm; (*chargeur*)

chief firearms officer means a chief firearms officer as defined in [subsection 2\(1\)](#) of the [Firearms Act](#); (*contrôleur des armes à feu*)

Commissioner of Firearms means the Commissioner of Firearms appointed under [section 81.1](#) of the [Firearms Act](#); (*commissaire aux armes à feu*)

cross-bow means a device with a bow and a bowstring mounted on a stock that is designed to propel an arrow, a bolt, a quarrel or any similar projectile on a trajectory guided by a barrel or groove and that is capable of causing serious bodily injury or death to a person; (*arbalète*)

export means export from Canada and, for greater certainty, includes the exportation of goods from Canada that are imported into Canada and shipped in transit through Canada; (*exporter*)

firearm part means a barrel for a firearm, a slide for a handgun and any other prescribed part, but does not include, unless otherwise prescribed, a barrel for a firearm or a slide for a handgun if that barrel or slide is designed exclusively for use on a firearm that is deemed under [subsection 84\(3\)](#) not to be a firearm; (*pièce d'arme à feu*)

firearms officer means a firearms officer as defined in [subsection 2\(1\)](#) of the [Firearms Act](#); (*préposé aux armes à feu*)

handgun means a firearm that is designed, altered or intended to be aimed and fired by the action of one hand, whether or not it has been redesigned or subsequently altered to be aimed and fired by the action of both hands; (*arme de poing*)

imitation firearm means any thing that imitates a firearm, and includes a replica firearm; (*fausse arme à feu*)

import means import into Canada and, for greater certainty, includes the importation of goods into Canada that are shipped in transit through Canada and exported from Canada; (*importer*)

licence means a licence issued under the [Firearms Act](#); (*permis*)

non-restricted firearm means a firearm that is neither a prohibited firearm nor a restricted firearm; (*arme à feu sans restriction*)

prescribed means prescribed by the regulations; (*Version anglaise seulement*)

prohibited ammunition means ammunition, or a projectile of any kind, that is prescribed to be prohibited ammunition; (*munitions prohibées*)

prohibited device means

- (a) any component or part of a weapon, or any accessory for use with a weapon, that is prescribed to be a prohibited device,
- (b) a handgun barrel that is equal to or less than 105 mm in length, but does not include any such handgun barrel that is prescribed, where the handgun barrel is for use in international sporting competitions governed by the rules of the International Shooting Union,
- (c) a device or contrivance designed or intended to muffle or stop the sound or report of a firearm,
- (d) a cartridge magazine that is prescribed to be a prohibited device, or

(e) a replica firearm; (*dispositif prohibé*)

prohibited firearm means

(a) a handgun that

(i) has a barrel equal to or less than 105 mm in length, or

(ii) is designed or adapted to discharge a 25 or 32 calibre cartridge,

but does not include any such handgun that is prescribed, where the handgun is for use in international sporting competitions governed by the rules of the International Shooting Union,

(b) a firearm that is adapted from a rifle or shotgun, whether by sawing, cutting or any other alteration, and that, as so adapted,

(i) is less than 660 mm in length, or

(ii) is 660 mm or greater in length and has a barrel less than 457 mm in length,

(c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger,

(d) any firearm that is prescribed to be a prohibited firearm, or

(e) any unlawfully manufactured firearm regardless of the means or method of manufacture;

(e) a firearm that is not a handgun and that

(i) discharges centre-fire ammunition in a semi-automatic manner,

(ii) was originally designed with a detachable cartridge magazine with a capacity of six cartridges or more, and

(iii) is designed and manufactured on or after the day on which this paragraph comes into force; (*arme à feu prohibée*)

prohibited weapon means

(a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or

(b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon; (*arme prohibée*)

prohibition order means an order made under this Act or any other Act of Parliament prohibiting a person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things; (*ordonnance d'interdiction*)

Registrar means the Registrar of Firearms appointed under [section 82](#) of the [Firearms Act](#); (*directeur*)

registration certificate means a registration certificate issued under the *Firearms Act*; (*certificat d'enregistrement*)

replica firearm means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm that is designed or adapted to discharge a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second and at a muzzle energy exceeding 5.7 Joules, and that itself is not a firearm, but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm; (*réplique*)

restricted firearm means

- (a) a handgun that is not a prohibited firearm,
- (b) a firearm that
 - (i) is not a prohibited firearm,
 - (ii) has a barrel less than 470 mm in length, and
 - (iii) is capable of discharging centre-fire ammunition in a semi-automatic manner,
- (c) a firearm that is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise, or
- (d) a firearm of any other kind that is prescribed to be a restricted firearm; (*arme à feu à autorisation restreinte*)

restricted weapon means any weapon, other than a firearm, that is prescribed to be a restricted weapon; (*arme à autorisation restreinte*)

semi-automatic, in respect of a firearm, means that the firearm that is equipped with a mechanism that, following the discharge of a cartridge, automatically operates to complete any part of the reloading cycle necessary to prepare for the discharge of the next cartridge; (*semi-automatique*)

superior court means

- (a) in Ontario, the Superior Court of Justice, sitting in the region, district or county or group of counties where the relevant adjudication was made,
- (b) in Quebec, the Superior Court,
- (c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
- (d) in Nova Scotia, British Columbia, Prince Edward Island and a territory, the Supreme Court, and
- (e) in Newfoundland and Labrador, the Trial Division of the Supreme Court; (*cour supérieure*)

transfer means sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver. (*cession*)

Barrel length

(2) For the purposes of this Part, the length of a barrel of a firearm is

- (a)** in the case of a revolver, the distance from the muzzle of the barrel to the breach end immediately in front of the cylinder, and
- (b)** in any other case, the distance from the muzzle of the barrel to and including the chamber,

but does not include the length of any component, part or accessory including any component, part or accessory designed or intended to suppress the muzzle flash or reduce recoil.

Certain weapons deemed not to be firearms

(3) For the purposes of [sections 91 to 95](#), [99 to 101](#), [103 to 107](#) and [117.03](#) of this Act and the provisions of the [Firearms Act](#), the following weapons are deemed not to be firearms:

- (a)** any antique firearm;
- (b)** any device that is
 - (i)** designed exclusively for signalling, for notifying of distress, for firing blank cartridges or for firing stud cartridges, explosive-driven rivets or other industrial projectiles, and
 - (ii)** intended by the person in possession of it to be used exclusively for the purpose for which it is designed;
- (c)** any shooting device that is
 - (i)** designed exclusively for the slaughtering of domestic animals, the tranquillizing of animals or the discharging of projectiles with lines attached to them, and
 - (ii)** intended by the person in possession of it to be used exclusively for the purpose for which it is designed; and
- (d)** any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge
 - (i)** a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules, or
 - (ii)** a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second or an energy exceeding 5.7 Joules.

Exception — antique firearms

(3.1) Notwithstanding subsection (3), an antique firearm is a firearm for the purposes of regulations made under [paragraph 117\(h\)](#) of the [Firearms Act](#) and [subsection 86\(2\)](#) of this Act.

Meaning of *holder*

(4) For the purposes of this Part, a person is the holder of

(a) an authorization or a licence if the authorization or licence has been issued to the person and the person continues to hold it; and

(b) a registration certificate for a firearm if

(i) the registration certificate has been issued to the person and the person continues to hold it, or

(ii) the person possesses the registration certificate with the permission of its lawful holder.

Subsequent offences

(5) In determining, for the purpose of [subsection 99\(2\)](#), [100\(2\)](#) or [103\(2\)](#), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under [section 85](#), [95](#), [96](#), [98](#), [98.1](#), [99](#), [100](#), [102](#) or [103](#) or [subsection 117.01\(1\)](#);

(b) an offence under [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#), [272](#) or [273](#), [subsection 279\(1\)](#) or [section 279.1](#), [344](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(6) For the purposes of subsection (5), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

R.S., 1985, c. C-46, s. 84; R.S., 1985, c. 27 (1st Supp.), ss. 185(F), 186; 1991, c. 40, s. 2; 1995, c. 39, s. 139; 1998, c. 30, s. 16; [2003, c. 8, s. 2](#); [2008, c. 6, s. 2](#); [2009, c. 22, s. 2](#); [2015, c. 3, s. 45](#), c. 27, s. 18; [2019, c. 9, s. 16](#); [2022, c. 15, s. 1](#); [2023, c. 32, s. 1](#).

Use Offences

Using firearm in commission of offence

85 (1) Every person commits an offence who uses a firearm, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm,

(a) while committing an indictable offence, other than an offence under [section 220](#) (criminal negligence causing death), [236](#) (manslaughter), [239](#) (attempted murder), [244](#) (discharging firearm with intent), [244.2](#) (discharging firearm — recklessness), [272](#) (sexual assault with a weapon) or [273](#) (aggravated sexual assault), [subsection](#)

[279\(1\)](#) (kidnapping) or [section 279.1](#) (hostage taking), 344 (robbery) or 346 (extortion);

(b) while attempting to commit an indictable offence; or

(c) during flight after committing or attempting to commit an indictable offence.

Using imitation firearm in commission of offence

(2) Every person commits an offence who uses an imitation firearm

(a) while committing an indictable offence,

(b) while attempting to commit an indictable offence, or

(c) during flight after committing or attempting to commit an indictable offence,

whether or not the person causes or means to cause bodily harm to any person as a result of using the imitation firearm.

Punishment

(3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Sentences to be served consecutively

(4) A sentence imposed on a person for an offence under subsection (1) or (2) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1) or (2).

R.S., 1985, c. C-46, s. 85; 1995, c. 39, s. 139; [2003, c. 8, s. 3](#); [2008, c. 6, s. 3](#); [2009, c. 22, s. 3](#); [2022, c. 15, s. 2](#).

Careless use of firearm, etc.

86 (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

Contravention of storage regulations, etc.

(2) Every person commits an offence who contravenes a regulation made under [paragraph 117\(h\)](#) of the *Firearms Act* respecting the storage, handling, transportation, shipping, display, advertising and mail-order sales of firearms and restricted weapons.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment

(i) in the case of a first offence, for a term not exceeding two years, and

(ii) in the case of a second or subsequent offence, for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 86; 1991, c. 40, s. 3; 1995, c. 39, s. 139.

Pointing a firearm

87 (1) Every person commits an offence who, without lawful excuse, points a firearm at another person, whether the firearm is loaded or unloaded.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 87; 1995, c. 39, s. 139.

Possession Offences

Possession of weapon for dangerous purpose

88 (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 88; 1995, c. 39, s. 139.

Carrying weapon while attending public meeting

89 (1) Every person commits an offence who, without lawful excuse, carries a weapon, a prohibited device or any ammunition or prohibited ammunition while the person is attending or is on the way to attend a public meeting.

Punishment

(2) Every person who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 89; 1995, c. 39, s. 139.

Carrying concealed weapon

90 (1) Every person commits an offence who carries a weapon, a prohibited device or any prohibited ammunition concealed, unless the person is authorized under the [Firearms Act](#) to carry it concealed.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 90; 1991, c. 28, s. 6, c. 40, ss. 4, 35; 1994, c. 44, s. 6; 1995, c. 39, s. 139.

Unauthorized possession of firearm

91 (1) Subject to subsection (4), every person commits an offence who possesses a prohibited firearm, a restricted firearm or a non-restricted firearm without being the holder of

(a) a licence under which the person may possess it; and

(b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

Unauthorized possession of prohibited weapon or restricted weapon

(2) Subject to subsection (4), every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, without being the holder of a licence under which the person may possess it.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Exceptions

(4) Subsections (1) and (2) do not apply to

(a) a person who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or

(b) a person who comes into possession of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,

(i) lawfully disposes of it, or

(ii) obtains a licence under which the person may possess it and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

(5) [Repealed, 2012, c. 6, s. 2]

R.S., 1985, c. C-46, s. 91; 1991, c. 28, s. 7, c. 40, ss. 5, 36; 1995, c. 22, s. 10, c. 39, s. 139; 2008, c. 6, s. 4; 2012, c. 6, s. 2; 2015, c. 27, s. 19.

Possession of firearm knowing its possession is unauthorized

92 (1) Subject to subsection (4), every person commits an offence who possesses a prohibited firearm, a restricted firearm or a non-restricted firearm knowing that the person is not the holder of

(a) a licence under which the person may possess it; and

(b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

Possession of prohibited weapon, device or ammunition knowing its possession is unauthorized

(2) Subject to subsection (4), every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition knowing that the person is not the holder of a licence under which the person may possess it.

Punishment

(3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Exceptions

(4) Subsections (1) and (2) do not apply to

(a) a person who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or

(b) a person who comes into possession of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,

(i) lawfully disposes of it, or

(ii) obtains a licence under which the person may possess it and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

(5) and (6) [Repealed, 2012, c. 6, s. 3]

R.S., 1985, c. C-46, s. 92; R.S., 1985, c. 1 (2nd Supp.), s. 213; 1991, c. 40, s. 7; 1995, c. 39, s. 139; 2008, c. 6, s. 5; 2012, c. 6, s. 3; 2015, c. 27, s. 20; 2022, c. 15, s. 3.

Possession at unauthorized place

93 (1) Subject to subsection (3), every person commits an offence who, being the holder of an authorization or a licence under which the person may possess a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or prohibited ammunition, possesses them at a place that is

(a) indicated on the authorization or licence as being a place where the person may not possess it;

(b) other than a place indicated on the authorization or licence as being a place where the person may possess it; or

(c) other than a place where it may be possessed under the *Firearms Act*.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(3) Subsection (1) does not apply to a person who possesses a replica firearm.

R.S., 1985, c. C-46, s. 93; 1991, c. 40, s. 8; 1995, c. 39, s. 139; 2008, c. 6, s. 6; 2015, c. 27, s. 21.

Unauthorized possession in motor vehicle

94 (1) Subject to subsections (3) and (4), every person commits an offence who is an occupant of a motor vehicle in which the person knows there is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless

(a) in the case of a prohibited firearm, a restricted firearm or a non-restricted firearm,

(i) the person or any other occupant of the motor vehicle is the holder of

(A) a licence under which the person or other occupant may possess the firearm, and

(B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it,

(ii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was the holder of

(A) a licence under which that other occupant may possess the firearm, and

(B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it, or

(iii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was a person who could not be convicted of an offence under this Act by reason of [sections 117.07 to 117.1](#) or any other Act of Parliament; and

(b) in the case of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition,

(i) the person or any other occupant of the motor vehicle is the holder of an authorization or a licence under which the person or other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or

(ii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was

(A) the holder of an authorization or a licence under which the other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or

(B) a person who could not be convicted of an offence under this Act by reason of [sections 117.07 to 117.1](#) or any other Act of Parliament.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(3) Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm, weapon, device or ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.

Exception

(4) Subsection (1) does not apply to an occupant of a motor vehicle when the occupant or any other occupant of the motor vehicle is a person who came into possession of the firearm, weapon, device or ammunition by the operation of law.

(5) [\[Repealed, 2012, c. 6, s. 4\]](#)

Possession of prohibited or restricted firearm with ammunition

95 (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

- (a) an authorization or a licence under which the person may possess the firearm in that place; and
- (b) the registration certificate for the firearm.

Punishment

(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years; or
- (b) is guilty of an offence punishable on summary conviction.

Exception

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.

R.S., 1985, c. C-46, s. 95; 1991, c. 28, s. 8, c. 40, ss. 9, 37; 1993, c. 25, s. 93; 1995, c. 39, s. 139; [2008, c. 6, s. 8](#); [2012, c. 6, s. 5\(E\)](#); [2019, c. 25, s. 25](#); [2022, c. 15, s. 4](#); [2023, c. 32, s. 14](#); 2023, c. 32, s. 71.

Possession of weapon obtained by commission of offence

96 (1) Subject to subsection (3), every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition that the person knows was obtained by the commission in Canada of an offence or by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence.

Punishment

(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years; or
- (b) is guilty of an offence punishable on summary conviction.

Exception

(3) Subsection (1) does not apply to a person who comes into possession of anything referred to in that subsection by the operation of law and who lawfully disposes of it within a reasonable period after acquiring possession of it.

R.S., 1985, c. C-46, s. 96; 1995, c. 39, s. 139; [2019, c. 25, s. 26](#); [2022, c. 15, s. 5](#); [2023, c. 32, s. 14](#); 2023, c. 32, s. 71.

97 [Repealed before coming into force, [2008, c. 20, s. 3](#)]

Breaking and entering to steal firearm

98 (1) Every person commits an offence who

- (a) breaks and enters a place with intent to steal a firearm located in it;
- (b) breaks and enters a place and steals a firearm located in it; or
- (c) breaks out of a place after
 - (i) stealing a firearm located in it, or
 - (ii) entering the place with intent to steal a firearm located in it.

Definitions of *break* and *place*

(2) In this section, ***break*** has the same meaning as in [section 321](#), and ***place*** means any building or structure — or part of one — and any motor vehicle, vessel, aircraft, railway vehicle, container or trailer.

Entrance

(3) For the purposes of this section,

- (a) a person enters as soon as any part of his or her body or any part of an instrument that he or she uses is within any thing that is being entered; and
- (b) a person is deemed to have broken and entered if he or she
 - (i) obtained entrance by a threat or an artifice or by collusion with a person within, or
 - (ii) entered without lawful justification or excuse by a permanent or temporary opening.

Punishment

(4) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life.

R.S., 1985, c. C-46, s. 98; R.S., 1985, c. 27 (1st Supp.), s. 13; 1991, c. 40, s. 11; 1995, c. 39, s. 139; [2008, c. 6, s. 9](#).

Robbery to steal firearm

98.1 Every person who commits a robbery within the meaning of [section 343](#) with intent to steal a firearm or in the course of which he or she steals a firearm commits an indictable offence and is liable to imprisonment for life.

[2008, c. 6, s. 9](#).

Trafficking Offences

Weapons trafficking

99 (1) Every person commits an offence who

(a) manufactures or transfers, whether or not for consideration, or

(b) offers to do anything referred to in paragraph (a) in respect of

a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition or any prohibited ammunition knowing that the person is not authorized to do so under the [Firearms Act](#) or any other Act of Parliament or any regulations made under any Act of Parliament.

Punishment — firearm

(2) Every person who commits an offence under subsection (1) when the object in question is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited device, a firearm part, any ammunition or any prohibited ammunition is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(a) in the case of a first offence, three years; and

(b) in the case of a second or subsequent offence, five years.

Punishment — other cases

(3) In any other case, a person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

R.S., 1985, c. C-46, s. 99; 1995, c. 39, s. 139; [2008, c. 6, s. 10](#); [2015, c. 27, s. 23](#); [2022, c. 15, s. 6](#); [2023, c. 32, s. 1.1](#); 2023, c. 32, s. 14; 2023, c. 32, s. 71.

Possession for purpose of weapons trafficking

100 (1) Every person commits an offence who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition or any prohibited ammunition for the purpose of

(a) transferring it, whether or not for consideration, or

(b) offering to transfer it,

knowing that the person is not authorized to transfer it under the [Firearms Act](#) or any other Act of Parliament or any regulations made under any Act of Parliament.

Punishment — firearm

(2) Every person who commits an offence under subsection (1) when the object in question is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited device, a firearm part, any ammunition or any prohibited ammunition is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(a) in the case of a first offence, three years; and

(b) in the case of a second or subsequent offence, five years.

Punishment — other cases

(3) In any other case, a person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

R.S., 1985, c. C-46, s. 100; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 14, 203, c. 27 (2nd Supp.), s. 10, c. 1 (4th Supp.), s. 18(F); 1990, c. 16, s. 2, c. 17, s. 8; 1991, c. 40, s. 12; 1992, c. 51, s. 33; 1995, c. 22, ss. 10, 18(F), c. 39, s. 139; 1996, c. 19, s. 65; [2008, c. 6, s. 11](#); [2015, c. 27, s. 24](#); [2022, c. 15, s. 7](#); [2023, c. 32, s. 1.2](#); 2023, c. 32, s. 14; 2023, c. 32, s. 71.

Transfer without authority

101 (1) Every person commits an offence who transfers a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition or any prohibited ammunition to any person otherwise than under the authority of the [Firearms Act](#) or any other Act of Parliament or any regulations made under an Act of Parliament.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 101; 1991, c. 40, s. 13; 1995, c. 39, s. 139; [2015, c. 27, s. 25](#); [2023, c. 32, s. 1.3](#).

Assembling Offence

Making automatic firearm

102 (1) Every person commits an offence who, without lawful excuse, alters a firearm so that it is capable of, or manufactures or assembles any firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 102; R.S., 1985, c. 27 (1st Supp.), s. 203; 1991, c. 28, s. 9, c. 40, s. 14; 1995, c. 39, s. 139; [2019, c. 25, s. 27](#).

Computer Data Offence

Possession of computer data

102.1 (1) Every person commits an offence who possesses or accesses computer data that pertain to a firearm — other than a firearm that is deemed under [subsection 84\(3\)](#) not to be a firearm — or a prohibited device and that are capable of being used with a 3D printer, metal milling machine or similar computer system for the purpose of manufacturing or trafficking a firearm or prohibited device derived from that computer data otherwise than under the authority of the [Firearms Act](#) or any other Act of Parliament or any regulations made under an Act of Parliament.

Distribution of computer data

(2) Every person commits an offence who distributes, publishes or makes available computer data that pertain to a firearm — other than a firearm that is deemed under [subsection 84\(3\)](#) not to be a firearm — or a prohibited device and that are capable of being used with a 3D printer, metal milling machine or similar computer system knowing that the computer data are intended to be used for the purpose of manufacturing or trafficking a firearm or prohibited device derived from that computer data otherwise than under the authority of the [Firearms Act](#) or any other Act of Parliament or any regulations made under an Act of Parliament.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years; or

(b) is guilty of an offence punishable on summary conviction.

Definitions of *computer data* and *computer system*

(4) In this section, ***computer data*** and ***computer system*** have the same meaning as in [subsection 342.1\(2\)](#).

[2023, c. 32, s. 1.4.](#)

Export and Import Offences

Importing or exporting knowing it is unauthorized

103 (1) Every person commits an offence who imports or exports

(a) a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part or any prohibited ammunition, or

(b) any component or part, other than a firearm part, designed exclusively for use in the manufacture of or assembly into an automatic firearm,

knowing that the person is not authorized to do so under the [Firearms Act](#) or any other Act of Parliament or any regulations made under an Act of Parliament.

Punishment — firearm

(2) Every person who commits an offence under subsection (1) when the object in question is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited device, a firearm part or any prohibited ammunition is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(a) in the case of a first offence, three years; and

(b) in the case of a second or subsequent offence, five years.

Punishment — other cases

(2.1) In any other case, a person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

(3) [Repealed, 2019, c. 25, s. 28]

R.S., 1985, c. C-46, s. 103; 1991, c. 40, s. 15; 1995, c. 39, s. 139; 2008, c. 6, s. 12; 2015, c. 27, s. 26; 2019, c. 25, s. 28; 2022, c. 15, s. 8; 2023, c. 32, s. 1.5; 2023, c. 32, s. 14; 2023, c. 32, s. 71.

Unauthorized importing or exporting

104 (1) Every person commits an offence who imports or exports

(a) a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part or any prohibited ammunition, or

(b) any component or part, other than a firearm part, designed exclusively for use in the manufacture of or assembly into an automatic firearm,

otherwise than under the authority of the *Firearms Act* or any other Act of Parliament or any regulations made under an Act of Parliament.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

(3) [Repealed, 2019, c. 25, s. 29]

R.S., 1985, c. C-46, s. 104; 1991, c. 40, s. 16; 1995, c. 39, s. 139; 2015, c. 27, s. 27; 2019, c. 25, s. 29; 2023, c. 32, s. 1.6.

Offence Relating to Altering Cartridge Magazine

Altering cartridge magazine

104.1 (1) Every person commits an offence who, without lawful excuse, alters a cartridge magazine that is not a prohibited device so that it becomes a prohibited device.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

2023, c. 32, s. 2.

Offences relating to Lost, Destroyed or Defaced Weapons, etc.

Losing or finding

105 (1) Every person commits an offence who

(a) having lost a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition, an authorization, a licence or a registration certificate, or having had it stolen from the person's possession, does not with reasonable despatch report the loss to a peace officer, to a firearms officer or a chief firearms officer; or

(b) on finding a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition that the person has reasonable grounds to believe has been lost or abandoned, does not with reasonable despatch deliver it to a peace officer, a firearms officer or a chief firearms officer or report the finding to a peace officer, a firearms officer or a chief firearms officer.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 105; 1991, c. 28, s. 10, c. 40, ss. 18, 39; 1994, c. 44, s. 7; 1995, c. 39, s. 139; 2015, c. 27, s. 28.

Destroying

106 (1) Every person commits an offence who

(a) after destroying any prohibited firearm, restricted firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or

(b) on becoming aware of the destruction of any prohibited firearm, restricted firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition that was in the person's possession before its destruction,

does not with reasonable despatch report the destruction to a peace officer, firearms officer or chief firearms officer.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 106; R.S., 1985, c. 27 (1st Supp.), s. 203; 1991, c. 40, s. 19; 1995, c. 22, s. 10, c. 39, s. 139; [2012, c. 6, s. 6](#).

False statements

107 (1) Every person commits an offence who knowingly makes, before a peace officer, firearms officer or chief firearms officer, a false report or statement concerning the loss, theft or destruction of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition, an authorization, a licence or a registration certificate.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Definition of *report* or *statement*

(3) In this section, ***report*** or ***statement*** means an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not.

R.S., 1985, c. C-46, s. 107; 1991, c. 40, s. 20; 1995, c. 39, s. 139; [2015, c. 27, s. 29](#).

Tampering with serial number

108 (1) Every person commits an offence who, without lawful excuse,

(a) alters, defaces or removes a serial number on a firearm; or

(b) possesses a firearm knowing that the serial number on it has been altered, defaced or removed.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(3) No person is guilty of an offence under paragraph (1)(b) by reason only of possessing a prohibited firearm or restricted firearm the serial number on which has been altered, defaced or removed, if that serial number has been replaced and a registration certificate in respect of the firearm has been issued setting out a new serial number for the firearm.

Evidence

(4) In proceedings for an offence under subsection (1), evidence that a person possesses a firearm the serial number on which has been wholly or partially obliterated otherwise than through normal use over time is, in the absence of evidence to the contrary, proof that the person possesses the firearm knowing that the serial number on it has been altered, defaced or removed.

R.S., 1985, c. C-46, s. 108; 1991, c. 40, s. 20; 1995, c. 39, s. 139; [2012, c. 6, s. 7](#); [2018, c. 29, s. 6](#).

Prohibition Orders

Mandatory prohibition order

109 (1) Where a person is convicted, or discharged under [section 730](#), of

(a) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,

(a.1) an indictable offence in the commission of which violence was used, threatened or attempted against

(i) the person's intimate partner,

(ii) a child or parent of the person or of anyone referred to in subparagraph (i), or

(iii) any person who resides with the person or with anyone referred to in subparagraph (i) or (ii),

(b) an offence under [subsection 85\(1\)](#) (using firearm in commission of offence), [85\(2\)](#) (using imitation firearm in commission of offence), [95\(1\)](#) (possession of prohibited or restricted firearm with ammunition), [99\(1\)](#) (weapons trafficking), [100\(1\)](#) (possession for purpose of weapons trafficking), [102\(1\)](#) (making automatic firearm), [102.1\(1\)](#) (possession of computer data), [102.1\(2\)](#) (distribution of computer data), [103\(1\)](#) (importing or exporting knowing it is unauthorized) or [104.1\(1\)](#) (altering cartridge magazine) or [section 264](#) (criminal harassment),

(c) an offence relating to the contravention of [subsection 5\(1\) or \(2\)](#), [6\(1\) or \(2\)](#) or [7\(1\)](#) of the *Controlled Drugs and Substances Act*,

(c.1) an offence relating to the contravention of [subsection 9\(1\) or \(2\)](#), [10\(1\) or \(2\)](#), [11\(1\) or \(2\)](#), [12\(1\)](#), [\(4\)](#), [\(5\)](#), [\(6\)](#) or [\(7\)](#), [13\(1\)](#) or [14\(1\)](#) of the *Cannabis Act*, or

(d) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition, any prohibited ammunition or an explosive substance and, at the time of the offence, the person was prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing,

the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.

Duration of prohibition order — first offence

(2) An order made under subsection (1) shall, in the case of a first conviction for or discharge from the offence to which the order relates, prohibit the person from possessing

(a) any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, firearm part, ammunition and explosive substance during the period that

(i) begins on the day on which the order is made, and

(ii) ends not earlier than ten years after the person's release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence; and

(b) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

Duration of prohibition order — subsequent offences

(3) An order made under subsection (1) shall, in any case other than a case described in subsection (2), prohibit the person from possessing any firearm, cross-bow, restricted weapon, firearm part, ammunition and explosive substance for life.

Definition of *release from imprisonment*

(4) In subparagraph (2)(a)(ii), ***release from imprisonment*** means release from confinement by reason of expiration of sentence, commencement of statutory release or grant of parole.

Application of ss. 113 to 117

(5) Sections 113 to 117 apply in respect of every order made under subsection (1).

R.S., 1985, c. C-46, s. 109; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1991, c. 40, s. 21; 1995, c. 39, ss. 139, 190; 1996, c. 19, s. 65.1; 2003, c. 8, s. 4; 2015, c. 27, s. 30; 2018, c. 16, s. 208; 2019, c. 25, s. 30; 2023, c. 32, s. 3; 2023, c. 32, s. 3.1.

Discretionary prohibition order

110 (1) Where a person is convicted, or discharged under [section 730](#), of

(a) an offence, other than an offence referred to in any of [paragraphs 109\(1\)\(a\)](#) to (c.1), in the commission of which violence against a person was used, threatened or attempted, or

(b) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, ammunition, prohibited ammunition or an explosive substance and, at the time of the offence, the person was not prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing,

the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, consider whether it is desirable, in the interests of the safety of the person or of any other person, to make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things, and if the court decides that it is so desirable, the court shall so order.

Duration of prohibition order

(2) An order made under subsection (1) against a person begins on the day on which the order is made and ends not later than ten years after the person's release from imprisonment after conviction for the offence to which the order relates or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence.

Exception

(2.1) Despite subsection (2), an order made under subsection (1) may be imposed for life or for any shorter duration if, in the commission of the offence, violence was used, threatened or attempted against

(a) the person's intimate partner;

(b) a child or parent of the person or of anyone referred to in paragraph (a); or

(c) any person who resides with the person or with anyone referred to in paragraph (a) or (b).

Reasons

(3) Where the court does not make an order under subsection (1), or where the court does make such an order but does not prohibit the possession of everything referred to in that subsection, the court shall include in the record a statement of the court's reasons for not doing so.

Definition of *release from imprisonment*

(4) In subsection (2), **release from imprisonment** means release from confinement by reason of expiration of sentence, commencement of statutory release or grant of parole.

Application of ss. 113 to 117

(5) Sections 113 to 117 apply in respect of every order made under subsection (1).

R.S., 1985, c. C-46, s. 110; 1991, c. 40, ss. 23, 40; 1995, c. 39, ss. 139, 190; 2015, c. 27, s. 31; 2018, c. 16, s. 209; 2019, c. 25, s. 31; 2023, c. 32, s. 3.2.

Application for emergency prohibition order

110.1 (1) Any person may make an *ex parte* application to a provincial court judge for an order prohibiting another person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things, if the person believes on reasonable grounds that it is not desirable in the interests of the safety of the person against whom the order is sought or of any other person that the person against whom the order is sought should possess any such thing.

Hearing in private

(2) The provincial court judge may hold the hearing of an application made under subsection (1) in private if the judge considers that it is necessary to protect the security of the applicant or of anyone known to the applicant.

Emergency prohibition order

(3) If, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist and that an order should be made without delay to ensure the immediate protection of any person, the judge shall make an order prohibiting the person against whom the order is sought from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things, for a period not exceeding 30 days, as is specified in the order, beginning on the day on which the order is made.

Service of order

(4) A copy of the order shall be served on the person to whom the order is addressed in the manner that the provincial court judge directs or in accordance with the rules of court.

Warrant to search and seize

(5) If a provincial court judge is satisfied by information on oath that there are reasonable grounds to believe that a person who is subject to an order made under subsection (3) possesses, in a building, receptacle or place, any thing the possession of which is prohibited by the order and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the thing, the judge may issue a warrant authorizing a peace officer to search the building, receptacle or place and

seize any such thing, and every authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

Search and seizure without warrant

(6) If, in respect of a person who is subject to an order made under subsection (3), a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person, or of any other person, for the person to possess any thing the possession of which is prohibited by the order, the peace officer may — if the grounds for obtaining a warrant under subsection (5) exist but, by reason of a possible danger to the safety of the person or any other person, it would not be practicable to obtain a warrant — search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

Report to justice

(7) A peace officer who executes a warrant referred to in subsection (5) or who conducts a search without a warrant under subsection (6) shall immediately make a report to a justice having jurisdiction in respect of the matter and, in the case of an execution of a warrant, jurisdiction in the province in which the warrant was issued, showing

(a) in the case of an execution of a warrant, the things or documents, if any, seized and the date of execution of the warrant; and

(b) in the case of a search conducted without a warrant, the grounds on which it was concluded that the peace officer was entitled to conduct the search, and the things or documents, if any, seized.

Return of things and documents

(8) Any things or documents seized under subsection (5) or (6) from a person against whom an order has been made under subsection (3) shall be returned to the person and any things or documents surrendered by the person in accordance with the order shall be returned to the person

(a) if no date is fixed under [subsection 110.4\(1\)](#) for the hearing of an application made under [subsection 111\(1\)](#) in respect of the person, as soon as feasible after the end of the period specified in the order made against the person under subsection (3);

(b) if a date is fixed for the hearing but no order is made against the person under [subsection 111\(5\)](#), as soon as feasible after the final disposition of the application; or

(c) despite paragraphs (a) and (b), if the order made against the person under subsection (3) is revoked, as soon as feasible after the day on which it is revoked.

Application of [sections 113](#), [114](#) and [116](#)

(9) [Sections 113](#), [114](#) and [116](#) apply in respect of every order made under subsection (3).

Definition of *provincial court judge*

(10) In this section and [sections 110.4, 111, 112, 117.0101, 117.0104, 117.011 and 117.012](#), **provincial court judge** means a provincial court judge having jurisdiction in the territorial division where the person against whom the application for an order was brought resides.

[2015, c. 27, s. 32](#); [2019, c. 25, s. 32](#); [2023, c. 32, s. 4](#); [2023, c. 32, s. 70](#).

Order denying access to information

110.2 (1) If an order is made under [subsection 110.1\(3\)](#), a provincial court judge may, on application by the person who applied for the order or on the judge's own motion, if the judge considers that it is necessary to protect the security of the person or of anyone known to the person, make an order prohibiting access to, and the disclosure of, any or all of the following:

- (a) any information relating to the order made under that subsection;
- (b) any information relating to a warrant issued under [subsection 110.1\(5\)](#);
- (c) any information relating to a search and seizure conducted without a warrant under [subsection 110.1\(6\)](#); and
- (d) any information relating to the order made under this subsection.

Expiry of order

(2) Unless an order made under subsection (1) is revoked earlier, it expires on the day on which the order made under [subsection 110.1\(3\)](#) expires or is revoked.

Exception

(3) Despite subsection (2), if, before the order made under [subsection 110.1\(3\)](#) expires or is revoked, a date is fixed under [subsection 110.4\(1\)](#) for the hearing of an application made under [subsection 111\(1\)](#), an order made under subsection (1) ceases to have effect on

- (a) the date fixed under [subsection 110.4\(1\)](#); or
- (b) if the order made under [subsection 110.1\(3\)](#) is revoked before that date, the day on which it is revoked.

Procedure

(4) If an order is made under subsection (1), all documents relating to, as the case may be, the order made under that subsection, the order made under subsection 110.1(3), the warrant issued under [subsection 110.1\(5\)](#) or, in the case of a search and seizure conducted without a warrant under [subsection 110.1\(6\)](#), the report made under [subsection 110.1\(7\)](#) shall — subject to any terms and conditions that the provincial court judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning partial disclosure of a document, deletion of any information or the occurrence of a condition — be immediately placed in a

packet and sealed by the judge, and the packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (5).

Revocation or variance of order

(5) An application to revoke an order made under subsection (1) or vary any of its terms and conditions may be made to the provincial court judge who made the order or to another provincial court judge.

2023, c. 32, s. 4; 2023, c. 32, s. 70(E).

Order to delete identifying information

110.3 (1) If an order is made under [subsection 110.1\(3\)](#) or [110.2\(1\)](#), a provincial court judge may, on application by the person who applied for the order referred to in subsection 110.1(3) or on the judge's own motion, if the judge considers that it is necessary to protect the security of the person or of anyone known to the person, make an order, subject to any terms and conditions that the judge considers desirable in the circumstances, directing that

- (a)** copies be made of any documents relating to the order made under [subsection 110.1\(3\)](#) or [110.2\(1\)](#), as the case may be, including the order itself;
- (b)** any information that could identify the person who applied for the order referred to in [subsection 110.1\(3\)](#) or anyone known to the person be deleted from those copies; and
- (c)** the documents relating to the order made under [subsection 110.1\(3\)](#) or [110.2\(1\)](#), as the case may be, including the order itself, to which the public has access or that are made available to or required to be served on any person are to be the edited copies referred to in paragraph (b).

Duration of order

(2) An order made under subsection (1) may be for any period — definite or indefinite — that the provincial court judge considers necessary to protect the security of the person who applied for the order referred to in [subsection 110.1\(3\)](#) or of anyone known to the person.

Procedure

(3) If an order is made under subsection (1), the originals of all documents that are the subject of the order shall — subject to any terms and conditions that the provincial court judge considers desirable in the circumstances — be immediately placed in a packet and sealed by the judge, and the packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Revocation or variance of order

(4) An application to revoke an order made under subsection (1) or vary any of its terms and conditions may be made to the provincial court judge who made the order or to another provincial court judge.

Clarification

(5) For greater certainty, if a date is fixed under [subsection 110.4\(1\)](#) for the hearing of an application made under [subsection 111\(1\)](#), any order made under this section that is still in force applies in respect of that hearing.

[2023, c. 32, s. 4.](#)

Order under [subsection 111\(5\)](#)

110.4 (1) If a provincial court judge makes an order under [subsection 110.1\(3\)](#), the judge may, on the judge's own motion, fix a date for the hearing of an application made under [subsection 111\(1\)](#) and shall direct that notice of the hearing be given, in the manner that the judge may specify, to the person against whom an order under [subsection 111\(5\)](#) is sought.

Clarification — application for order

(2) For the purpose of this section,

(a) the application for the order referred to in [subsection 110.1\(3\)](#) is deemed, except for the purpose of [subsection 111\(2\)](#), to be an application made under [subsection 111\(1\)](#); and

(b) if a person other than a peace officer, firearms officer or chief firearms officer made the application for the order referred to in [subsection 110.1\(3\)](#), the Attorney General of the province in which the application was made — or, if the application was made in a territory, the Attorney General of Canada — becomes the applicant, in their place, in the application made under [subsection 111\(1\)](#).

Date for hearing

(3) The date fixed for the hearing must be before the end of the period for which the order made under [subsection 110.1\(3\)](#) is in force. However, a provincial court judge may, before or at any time during the hearing, on application by the applicant or the person against whom an order under [subsection 111\(5\)](#) is sought, adjourn the hearing.

Requirement — notice

(4) If the Attorney General becomes, under paragraph (2)(b), the applicant in an application made under [subsection 111\(1\)](#), the provincial court judge shall, as soon as feasible but not later than 15 days before the date fixed under subsection (1), cause notice of that application and of that date to be served on that Attorney General.

Cancellation of hearing

(5) If a provincial court judge revokes an order made under [subsection 110.1\(3\)](#) against a person before the application for an order sought under [subsection 111\(5\)](#) against the person is heard, the judge shall cancel the hearing.

[2023, c. 32, s. 4.](#)

Application for prohibition order

111 (1) A peace officer, firearms officer or chief firearms officer may apply to a provincial court judge for an order prohibiting a person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things, if the peace officer, firearms officer or chief firearms officer believes on reasonable grounds that it is not desirable in the interests of the safety of the person against whom the order is sought or of any other person that the person against whom the order is sought should possess any such thing.

Date for hearing and notice

(2) On receipt of an application made under subsection (1), the provincial court judge shall fix a date for the hearing of the application and direct that notice of the hearing be given, in such manner as the provincial court judge may specify, to the person against whom the order is sought.

Hearing of application

(3) Subject to subsection (4), at the hearing of an application made under subsection (1), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order is sought.

Where hearing may proceed *ex parte*

(4) A provincial court judge may proceed *ex parte* to hear and determine an application made under subsection (1) in the absence of the person against whom the order is sought in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.

Prohibition order

(5) If, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist, the provincial court judge shall make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things, for the period, not exceeding five years, that is specified in the order, beginning on the day on which the order is made.

Reasons

(6) Where a provincial court judge does not make an order under subsection (1), or where a provincial court judge does make such an order but does not prohibit the

possession of everything referred to in that subsection, the provincial court judge shall include in the record a statement of the court's reasons.

Application of ss. 113 to 117

(7) Sections 113 to 117 apply in respect of every order made under subsection (5).

Appeal by person or Attorney General

(8) Where a provincial court judge makes an order under subsection (5), the person to whom the order relates, or the Attorney General, may appeal to the superior court against the order.

Appeal by Attorney General

(9) Where a provincial court judge does not make an order under subsection (5), the Attorney General may appeal to the superior court against the decision not to make an order.

Application of Part XXVII to appeals

(10) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838, apply in respect of an appeal made under subsection (8) or (9), with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

(11) [Repealed, 2023, c. 32, s. 5]

R.S., 1985, c. C-46, s. 111; 1991, c. 40, s. 24; 1995, c. 39, s. 139; 2023, c. 32, s. 5.

Revocation of prohibition order under subsection 110.1(3) or 111(5)

112 A provincial court judge may, on application by the person against whom an order is made under subsection 110.1(3) or 111(5), revoke the order if satisfied that the circumstances for which it was made have ceased to exist.

R.S., 1985, c. C-46, s. 112; R.S., 1985, c. 27 (1st Supp.), s. 203; 1991, c. 40, s. 26; 1995, c. 39, s. 139; 2023, c. 32, s. 6.

Lifting of prohibition order for sustenance or employment

113 (1) Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that

(a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or

(b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,

the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers

appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.

Factors

(2) A competent authority may make an order under subsection (1) only after taking the following factors into account:

- (a)** the criminal record, if any, of the person;
- (b)** the nature and circumstances of the offence, if any, in respect of which the prohibition order was or will be made; and
- (c)** the safety of the person and of other persons.

Effect of order

(3) Where an order is made under subsection (1),

- (a)** an authorization, a licence or a registration certificate may not be denied to the person in respect of whom the order was made solely on the basis of a prohibition order against the person or the commission of an offence in respect of which a prohibition order was made against the person; and
- (b)** an authorization and a licence may, for the duration of the order, be issued to the person in respect of whom the order was made only for sustenance or employment purposes and, where the order sets out terms and conditions, only in accordance with those terms and conditions, but, for greater certainty, the authorization or licence may also be subject to terms and conditions set by the chief firearms officer that are not inconsistent with the purpose for which it is issued and any terms and conditions set out in the order.

When order can be made

(4) For greater certainty, an order under subsection (1) may be made during proceedings for an order under [subsection 109\(1\)](#), [110\(1\)](#), [110.1\(3\)](#), [111\(5\)](#), [117.05\(4\)](#) or [515\(2\)](#), [paragraph 732.1\(3\)\(d\)](#) or [subsection 810\(3\)](#).

Meaning of *competent authority*

(5) In this section, ***competent authority*** means the competent authority that made or has jurisdiction to make the prohibition order.

R.S., 1985, c. C-46, s. 113; 1991, c. 40, s. 27(E); 1995, c. 22, s. 10, c. 39, ss. 139, 190; [2023, c. 32, s. 7](#).

Requirement to surrender

114 A competent authority that makes a prohibition order against a person may, in the order, require the person to surrender to a peace officer, a firearms officer or a chief firearms officer

- (a)** any thing the possession of which is prohibited by the order that is in the possession of the person on the commencement of the order, and

(b) every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by the order that is held by the person on the commencement of the order,

and where the competent authority does so, it shall specify in the order a reasonable period for surrendering such things and documents and during which [section 117.01](#) does not apply to that person.

R.S., 1985, c. C-46, s. 114; R.S., 1985, c. 27 (1st Supp.), s. 203; 1995, c. 22, s. 10, c. 39, s. 139.

Forfeiture

115 (1) Unless a prohibition order against a person specifies otherwise, every thing the possession of which is prohibited by the order is forfeited to Her Majesty if, on the commencement of the order, the thing is in the person's possession or has been seized and detained by, or surrendered to, a peace officer.

Exception

(1.1) Subsection (1) does not apply in respect of an order made under [subsection 110.1\(3\)](#) or [section 515](#).

Disposal

(2) Every thing forfeited to Her Majesty under subsection (1) shall be disposed of or otherwise dealt with as the Attorney General directs.

R.S., 1985, c. C-46, s. 115; 1995, c. 39, s. 139; [2003, c. 8, s. 5](#); [2019, c. 9, s. 17](#); [2023, c. 32, s. 8](#).

Authorizations revoked or amended

116 (1) Subject to subsection (2), every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by a prohibition order and issued to a person against whom the prohibition order is made is, on the commencement of the prohibition order, revoked, or amended, as the case may be, to the extent of the prohibitions in the order.

Duration of revocation or amendment

(2) An authorization, a licence and a registration certificate relating to a thing the possession of which is prohibited by an order made under [subsection 110.1\(3\)](#) or [section 515](#) is revoked, or amended, as the case may be, only in respect of the period during which the order is in force.

R.S., 1985, c. C-46, s. 116; 1991, c. 28, s. 11, c. 40, ss. 28, 41; 1995, c. 39, s. 139; [2003, c. 8, s. 6](#); [2023, c. 32, s. 9](#).

Return to owner

117 Where the competent authority that makes a prohibition order or that would have had jurisdiction to make the order is, on application for an order under this section, satisfied that a person, other than the person against whom a prohibition order was or will be made,

(a) is the owner of any thing that is or may be forfeited to Her Majesty under [subsection 115\(1\)](#) and is lawfully entitled to possess it, and

(b) in the case of a prohibition order under [subsection 109\(1\)](#) or [110\(1\)](#), had no reasonable grounds to believe that the thing would or might be used in the commission of the offence in respect of which the prohibition order was made,

the competent authority shall order that the thing be returned to the owner or the proceeds of any sale of the thing be paid to that owner or, if the thing was destroyed, that an amount equal to the value of the thing be paid to the owner.

R.S., 1985, c. C-46, s. 117; 1991, c. 40, s. 29; 1995, c. 39, s. 139.

Possession contrary to order

117.01 (1) Subject to subsection (4), every person commits an offence who possesses a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition, any prohibited ammunition or an explosive substance while the person is prohibited from doing so by any order made under this Act or any other Act of Parliament.

Failure to surrender authorization, etc.

(2) Every person commits an offence who wilfully fails to surrender to a peace officer, a firearms officer or a chief firearms officer any authorization, licence or registration certificate held by the person when the person is required to do so by any order made under this Act or any other Act of Parliament.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(4) Subsection (1) does not apply to a person who possessed a firearm in accordance with an authorization or licence issued to the person as the result of an order made under [subsection 113\(1\)](#).

1995, c. 39, s. 139; [2023, c. 32, s. 9.1](#).

Limitations on Access

Application for emergency limitations on access order

117.0101 (1) Any person may make an *ex parte* application to a provincial court judge for an order under this section if the person believes on reasonable grounds that

(a) the person against whom the order is sought cohabits with, or is an associate of, another person who is prohibited by any order made under this Act or any other Act of Parliament from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things; and

(b) the other person would or might have access to any such thing that is in the possession of the person against whom the order is sought.

Hearing in private

(2) The provincial court judge may hold the hearing of an application made under subsection (1) in private if the judge considers that it is necessary to protect the security of the applicant or of anyone known to the applicant.

Emergency limitations on access order

(3) If, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist and that an order should be made without delay to ensure the immediate protection of any person, the judge shall make an order in respect of the person against whom the order is sought, for a period not exceeding 30 days, as is specified in the order, beginning on the day on which the order is made, imposing any terms and conditions on the person's use and possession of any thing referred to in subsection (1) that the judge considers appropriate.

Service of order

(4) A copy of the order shall be served on the person to whom the order is addressed in the manner that the provincial court judge directs or in accordance with the rules of court.

Terms and conditions

(5) In determining terms and conditions under subsection (3), the provincial court judge shall impose terms and conditions that are the least intrusive as possible, bearing in mind the purpose of the order.

Warrant to search and seize

(6) If a provincial court judge is satisfied by information on oath that there are reasonable grounds to believe that a person who is subject to an order made under subsection (3) possesses, in a building, receptacle or place, any thing the use and possession of which is subject to terms and conditions under the order, and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the thing, the judge may issue a warrant authorizing a peace officer to search the building, receptacle or place and seize any such thing that is in the possession of the person.

Search and seizure without warrant

(7) If, in respect of a person who is subject to an order made under subsection (3), a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person, or of any other person, for the person to possess any thing the use and possession of which is subject to terms and conditions under the order, the peace officer may — if the grounds for obtaining a warrant under subsection (6) exist but, by reason of a possible danger to the safety of the person or any other person, it would not be practicable to obtain a warrant — search for and seize any such thing that is in the possession of the person.

Report to justice

(8) A peace officer who executes a warrant referred to in subsection (6) or who conducts a search without a warrant under subsection (7) shall immediately make a report to a justice having jurisdiction in respect of the matter and, in the case of an execution of a warrant, jurisdiction in the province in which the warrant was issued, showing

(a) in the case of an execution of a warrant, the things, if any, seized and the date of execution of the warrant; and

(b) in the case of a search conducted without a warrant, the grounds on which it was concluded that the peace officer was entitled to conduct the search, and the things, if any, seized.

Requirement to surrender

(9) A provincial court judge who makes an order against a person under subsection (3) may, in the order, require the person to surrender to a peace officer, a firearms officer or a chief firearms officer any thing the use or possession of which is subject to terms and conditions under the order that is in the possession of the person on the day on which the order is made, if the judge is satisfied by information on oath that it is not desirable in the interests of the safety of any person for the person to possess the thing, and if the judge does so, they shall specify in the order a reasonable period for surrendering the thing.

Condition

(10) A provincial court judge may issue a warrant under subsection (6) or include in an order made under subsection (3) a requirement set out in subsection (9) only if they are satisfied that there is no other way to ensure that the terms and conditions of that order can reasonably be complied with.

Return of things before expiry or revocation of order

(11) A peace officer who has seized any thing under subsection (6) or (7), and a peace officer, a firearms officer or a chief firearms officer to whom any thing has been surrendered in accordance with subsection (9), may, before the expiry or revocation of the order made under subsection (3), on being issued a receipt for it, return the thing to the person from whom it was seized or who surrendered it, if the peace officer, firearms officer or chief firearms officer, as the case may be, has reasonable grounds to believe

that the person will comply with the terms and conditions of the order as to the use and possession of the thing.

Return of things after expiry or revocation of order

(12) Any things seized under subsection (6) or (7) from a person against whom an order has been made under subsection (3) and any things surrendered by the person in accordance with subsection (9) shall, unless already returned under subsection (11), be returned to the person

(a) if the order made against the person under subsection (3) is revoked, as soon as feasible after the day on which it is revoked; or

(b) in any other case, as soon as feasible after the end of the period specified in the order made against the person under subsection (3).

2023, c. 32, s. 10; 2023, c. 32, s. 70.

Order denying access to information

117.0102 (1) If an order is made under [subsection 117.0101\(3\)](#), a provincial court judge may, on application by the person who applied for the order or on the judge's own motion, if the judge considers that it is necessary to protect the security of the person or of anyone known to the person, make an order prohibiting access to, and the disclosure of, any or all of the following:

(a) any information relating to the order made under that subsection;

(b) any information relating to a warrant issued under [subsection 117.0101\(6\)](#);

(c) any information relating to a search and seizure conducted without a warrant under [subsection 117.0101\(7\)](#); and

(d) any information relating to the order made under this subsection.

Expiry of order

(2) Unless an order made under subsection (1) is revoked earlier, it expires on the day on which the order made under [subsection 117.0101\(3\)](#) expires or is revoked.

Exception

(3) Despite subsection (2), if, before the order made under [subsection 117.0101\(3\)](#) expires or is revoked, a date is fixed under [subsection 117.0104\(1\)](#) for the hearing of an application made under [subsection 117.011\(1\)](#), an order made under subsection (1) ceases to have effect on

(a) the date fixed under [subsection 117.0104\(1\)](#); or

(b) if the order made under [subsection 117.0101\(3\)](#) is revoked before that date, the day on which it is revoked.

Procedure

(4) If an order is made under subsection (1), all documents relating to, as the case may be, the order made under that subsection, the order made under subsection 117.0101(3), the warrant issued under [subsection 117.0101\(6\)](#) or, in the case of a search and seizure conducted without a warrant under [subsection 117.0101\(7\)](#), the report made under [subsection 117.0101\(8\)](#) shall — subject to any terms and conditions that the provincial court judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning partial disclosure of a document, deletion of any information or the occurrence of a condition — be immediately placed in a packet and sealed by the judge, and the packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (5).

Revocation or variance of order

(5) An application to revoke an order made under subsection (1) or vary any of its terms and conditions may be made to the provincial court judge who made the order or to another provincial court judge.

[2023, c. 32, s. 10](#); [2023, c. 32, s. 70\(E\)](#).

Order to delete identifying information

117.0103 (1) If an order is made under [subsection 117.0101\(3\)](#) or [117.0102\(1\)](#), a provincial court judge may, on application by the person who applied for the order referred to in subsection 117.0101(3) or on the judge's own motion, if the judge considers that it is necessary to protect the security of the person or of anyone known to the person, make an order, subject to any terms and conditions that the judge considers desirable in the circumstances, directing that

- (a)** copies be made of any documents relating to the order made under [subsection 117.0101\(3\)](#) or [117.0102\(1\)](#), as the case may be, including the order itself;
- (b)** any information that could identify the person who applied for the order referred to in [subsection 117.0101\(3\)](#) or anyone known to the person be deleted from those copies; and
- (c)** the documents relating to the order made under [subsection 117.0101\(3\)](#) or [117.0102\(1\)](#), as the case may be, including the order itself, to which the public has access or that are made available to or required to be served on any person are to be the edited copies referred to in paragraph (b).

Duration of order

(2) An order made under subsection (1) may be for any period — definite or indefinite — that the provincial court judge considers necessary to protect the security of the person who applied for the order referred to in [subsection 117.0101\(3\)](#) or of anyone known to the person.

Procedure

(3) If an order is made under subsection (1), the originals of all documents that are the subject of the order shall — subject to any terms and conditions that the provincial court judge considers desirable in the circumstances — be immediately placed in a packet and sealed by the judge, and the packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Revocation or variance of order

(4) An application to revoke an order made under subsection (1) or vary any of its terms and conditions may be made to the provincial court judge who made the order or to another provincial court judge.

Clarification

(5) For greater certainty, if a date is fixed under [subsection 117.0104\(1\)](#) for the hearing of an application made under [subsection 117.011\(1\)](#), any order made under this section that is still in force applies in respect of that hearing.

[2023, c. 32, s. 10.](#)

Order under [subsection 117.011\(5\)](#)

117.0104 (1) If a provincial court judge makes an order under [subsection 117.0101\(3\)](#), the judge may, on the judge's own motion, fix a date for the hearing of an application made under [subsection 117.011\(1\)](#) and shall direct that notice of the hearing be given, in the manner that the judge may specify, to the person against whom an order under [subsection 117.011\(5\)](#) is sought.

Clarification — application for order

(2) For the purpose of this section,

(a) the application for the order referred to in [subsection 117.0101\(3\)](#) is deemed, except for the purpose of [subsection 117.011\(2\)](#), to be an application made under [subsection 117.011\(1\)](#); and

(b) if a person other than a peace officer, firearms officer or chief firearms officer made the application for the order referred to in [subsection 117.0101\(3\)](#), the Attorney General of the province in which the application was made — or, if the application was made in a territory, the Attorney General of Canada — becomes the applicant, in their place, in the application made under [subsection 117.011\(1\)](#).

Date for hearing

(3) The date fixed for the hearing must be before the end of the period for which the order made under [subsection 117.0101\(3\)](#) is in force. However, a provincial court judge may, before or at any time during the hearing, on application by the applicant or the person against whom an order under [subsection 117.011\(5\)](#) is sought, adjourn the hearing.

Requirement — notice

(4) If the Attorney General becomes, under paragraph (2)(b), the applicant in an application made under [subsection 117.011\(1\)](#), the provincial court judge shall, as soon as feasible but not later than 15 days before the date fixed under subsection (1), cause notice of that application and of that date to be served on that Attorney General.

Cancellation of hearing

(5) If a provincial court judge revokes an order made under [subsection 117.0101\(3\)](#) against a person before the application for an order sought under [subsection 117.011\(5\)](#) against the person is heard, the judge shall cancel the hearing.

[2023, c. 32, s. 10.](#)

Application for order

117.011 (1) A peace officer, firearms officer or chief firearms officer may apply to a provincial court judge for an order under this section where the peace officer, firearms officer or chief firearms officer believes on reasonable grounds that

(a) the person against whom the order is sought cohabits with, or is an associate of, another person who is prohibited by any order made under this Act or any other Act of Parliament from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all such things; and

(b) the other person would or might have access to any such thing that is in the possession of the person against whom the order is sought.

Date for hearing and notice

(2) On receipt of an application made under subsection (1), the provincial court judge shall fix a date for the hearing of the application and direct that notice of the hearing be given, in such manner as the provincial court judge may specify, to the person against whom the order is sought.

Hearing of application

(3) Subject to subsection (4), at the hearing of an application made under subsection (1), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order is sought.

Where hearing may proceed *ex parte*

(4) A provincial court judge may proceed *ex parte* to hear and determine an application made under subsection (1) in the absence of the person against whom the order is sought in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.

Order

(5) Where, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist, the provincial court judge shall make an order in respect of the person against whom the order was sought imposing such terms and conditions on the person's use and possession of anything referred to in subsection (1) as the provincial court judge considers appropriate.

Terms and conditions

(6) In determining terms and conditions under subsection (5), the provincial court judge shall impose terms and conditions that are the least intrusive as possible, bearing in mind the purpose of the order.

Appeal by person or Attorney General

(7) Where a provincial court judge makes an order under subsection (5), the person to whom the order relates, or the Attorney General, may appeal to the superior court against the order.

Appeal by Attorney General

(8) Where a provincial court judge does not make an order under subsection (5), the Attorney General may appeal to the superior court against the decision not to make an order.

Application of Part XXVII to appeals

(9) The provisions of Part XXVII, except [sections 785 to 812](#), [816 to 819](#) and [829 to 838](#), apply in respect of an appeal made under subsection (7) or (8), with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

1995, c. 39, s. 139; [2023, c. 32, s. 10.1](#).

Revocation of order under [subsection 117.0101\(3\)](#) or [117.011\(5\)](#)

117.012 A provincial court judge may, on application by the person against whom an order is made under [subsection 117.0101\(3\)](#) or [117.011\(5\)](#), revoke the order if satisfied that the circumstances for which it was made have ceased to exist.

1995, c. 39, s. 139; [2023, c. 32, s. 11](#).

Search and Seizure

Search and seizure without warrant where offence committed

117.02 (1) Where a peace officer believes on reasonable grounds

(a) that a weapon, an imitation firearm, a prohibited device, a firearm part, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence, or

(b) that an offence is being committed, or has been committed, under any provision of this Act that involves, or the subject-matter of which is, a firearm, an imitation firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, ammunition, prohibited ammunition or an explosive substance,

and evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practicable to obtain a warrant, search, without warrant, the person, vehicle, place or premises, and seize any thing by means of or in relation to which that peace officer believes on reasonable grounds the offence is being committed or has been committed.

Disposition of seized things

(2) Any thing seized pursuant to subsection (1) shall be dealt with in accordance with [sections 490](#) and [491](#).

1995, c. 39, s. 139; [2023, c. 32, s. 11.1](#).

Seizure on failure to produce authorization

117.03 (1) Despite [section 117.02](#), a peace officer who finds

(a) a person in possession of a prohibited firearm, a restricted firearm or a non-restricted firearm who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess the firearm and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it, or

(b) a person in possession of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess it,

may seize the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition unless its possession by the person in the circumstances in which it is found is authorized by any provision of this Part, or the person is under the direct and immediate supervision of another person who may lawfully possess it.

Return of seized thing on production of authorization

(2) If a person from whom any thing is seized under subsection (1) claims the thing within 14 days after the seizure and produces for inspection by the peace officer by whom it was seized, or any other peace officer having custody of it,

(a) a licence under which the person is lawfully entitled to possess it, and

(b) in the case of a prohibited firearm or a restricted firearm, an authorization and registration certificate for it,

the thing shall without delay be returned to that person.

Forfeiture of seized thing

(3) Where any thing seized pursuant to subsection (1) is not claimed and returned as and when provided by subsection (2), a peace officer shall forthwith take the thing before a provincial court judge, who may, after affording the person from whom it was seized or its owner, if known, an opportunity to establish that the person is lawfully entitled to possess it, declare it to be forfeited to Her Majesty, to be disposed of or otherwise dealt with as the Attorney General directs.

1995, c. 39, s. 139; [2012, c. 6, s. 8](#); [2015, c. 27, s. 33](#).

Application for warrant to search and seize

117.04 (1) Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied by information on oath that there are reasonable grounds to believe that the person possesses a weapon, a prohibited device, a firearm part, ammunition, prohibited ammunition or an explosive substance in a building, receptacle or place and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to search the building, receptacle or place and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

Search and seizure without warrant

(2) Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or any other person, for the person to possess any weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, the peace officer may, where the grounds for obtaining a warrant under subsection (1) exist but, by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

Report to justice

(3) A peace officer who executes a warrant referred to in subsection (1) or who conducts a search without a warrant under subsection (2) shall immediately make a report to a justice having jurisdiction in respect of the matter and, in the case of an execution of a warrant, jurisdiction in the province in which the warrant was issued, showing

(a) in the case of an execution of a warrant, the things or documents, if any, seized and the date of execution of the warrant; and

(b) in the case of a search conducted without a warrant, the grounds on which it was concluded that the peace officer was entitled to conduct the search, and the things or documents, if any, seized.

Authorizations, etc., revoked

(4) Where a peace officer who seizes any thing under subsection (1) or (2) is unable at the time of the seizure to seize an authorization or a licence under which the person from whom the thing was seized may possess the thing and, in the case of a seized firearm, a registration certificate for the firearm, every authorization, licence and registration certificate held by the person is, as at the time of the seizure, revoked.

1995, c. 39, s. 139; 2004, c. 12, s. 3; 2022, c. 17, s. 2; 2023, c. 32, s. 11.2.

Application for disposition

117.05 (1) If any thing or document has been seized under [subsection 117.04\(1\)](#) or [\(2\)](#), a justice having jurisdiction in respect of the matter and, in the case of an execution of a warrant, jurisdiction in the province in which the warrant was issued shall, on application for an order for the disposition of the thing or document so seized made by a peace officer within 30 days after the date of execution of the warrant or of the seizure without a warrant, as the case may be, fix a date for the hearing of the application and direct that notice of the hearing be given to the persons or in the manner that the justice may specify.

***Ex parte* hearing**

(2) A justice may proceed *ex parte* to hear and determine an application made under subsection (1) in the absence of the person from whom the thing or document was seized in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.

Hearing of application

(3) At the hearing of an application made under subsection (1), the justice shall hear all relevant evidence, including evidence respecting the value of the thing in respect of which the application was made.

Forfeiture and prohibition order on finding

(4) If, following the hearing of an application made under subsection (1), the justice finds that it is not desirable in the interests of the safety of the person from whom the thing was seized or of any other person that the person should possess any weapon, prohibited device, firearm part, ammunition, prohibited ammunition and explosive substance, or any such thing, the justice shall

(a) order that any thing seized be forfeited to Her Majesty or be otherwise disposed of; and

(b) where the justice is satisfied that the circumstances warrant such an action, order that the possession by that person of any weapon, prohibited device, firearm part, ammunition, prohibited ammunition and explosive substance, or of any such thing, be prohibited during any period, not exceeding five years, that is specified in the order, beginning on the making of the order.

Reasons

(5) Where a justice does not make an order under subsection (4), or where a justice does make such an order but does not prohibit the possession of all of the things referred to in that subsection, the justice shall include in the record a statement of the justice's reasons.

Application of ss. 113 to 117

(6) Sections 113 to 117 apply in respect of every order made under subsection (4).

Appeal by person

(7) Where a justice makes an order under subsection (4) in respect of a person, or in respect of any thing that was seized from a person, the person may appeal to the superior court against the order.

Appeal by Attorney General

(8) Where a justice does not make a finding as described in subsection (4) following the hearing of an application under subsection (1), or makes the finding but does not make an order to the effect described in paragraph (4)(b), the Attorney General may appeal to the superior court against the failure to make the finding or to make an order to the effect so described.

Application of Part XXVII to appeals

(9) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838, apply in respect of an appeal made under subsection (7) or (8) with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

1995, c. 39, s. 139; 2022, c. 17, s. 3; 2023, c. 32, s. 11.3.

Where no finding or application

117.06 (1) Any thing or document seized pursuant to subsection 117.04(1) or (2) shall be returned to the person from whom it was seized if

(a) no application is made under subsection 117.05(1) within thirty days after the date of execution of the warrant or of the seizure without a warrant, as the case may be; or

(b) an application is made under subsection 117.05(1) within the period referred to in paragraph (a), and the justice does not make a finding as described in subsection 117.05(4).

Restoration of authorizations

(2) Where, pursuant to subsection (1), any thing is returned to the person from whom it was seized and an authorization, a licence or a registration certificate, as the case may be, is revoked pursuant to subsection 117.04(4), the justice referred to in paragraph (1) (b) may order that the revocation be reversed and that the authorization, licence or registration certificate be restored.

Exempted Persons

Public officers

117.07 (1) Notwithstanding any other provision of this Act, but subject to [section 117.1](#), no public officer is guilty of an offence under this Act or the [Firearms Act](#) by reason only that the public officer

- (a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance in the course of or for the purpose of the public officer's duties or employment;
- (b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition or any prohibited ammunition in the course of the public officer's duties or employment;
- (c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part or any prohibited ammunition in the course of the public officer's duties or employment;
- (d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm in the course of the public officer's duties or employment;
- (e) in the course of the public officer's duties or employment, alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger;
- (f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of the public officer's duties or employment or the destruction of any such thing in the course of the public officer's duties or employment; or
- (g) alters a serial number on a firearm in the course of the public officer's duties or employment.

Definition of *public officer*

(2) In this section, *public officer* means

- (a) a peace officer;
- (b) a member of the Canadian Forces or of the armed forces of a state other than Canada who is attached or seconded to any of the Canadian Forces;
- (c) an operator of a museum established by the Chief of the Defence Staff or a person employed in any such museum;

- (d) a member of a cadet organization under the control and supervision of the Canadian Forces;
- (e) a person training to become a police officer or a peace officer under the control and supervision of
 - (i) a police force, or
 - (ii) a police academy or similar institution designated by the Attorney General of Canada or the lieutenant governor in council of a province;
- (f) a member of a visiting force, within the meaning of [section 2](#) of the *Visiting Forces Act*, who is authorized under [paragraph 14\(a\)](#) of that Act to possess and carry explosives, ammunition and firearms;
- (g) a person, or member of a class of persons, employed in the federal public administration or by the government of a province or municipality who is prescribed to be a public officer;
- (h) the Commissioner of Firearms, the Registrar, a chief firearms officer, any firearms officer and any person designated under [section 100](#) of the *Firearms Act*;
- (i) a person employed by the Bank of Canada or the Royal Canadian Mint who is responsible for the security of its facilities; or
- (j) a person employed by any federal agency or body, other than a person employed in the federal public administration, who is responsible for the security of that agency's or body's facilities and is prescribed to be a public officer.

1995, c. 39, s. 139; [2003, c. 8, s. 7](#), c. 22, s. 224(E); [2023, c. 32, s. 12](#).

Preclearance officers

117.071 Despite any other provision of this Act, but subject to [section 117.1](#), no *preclearance officer*, as defined in [section 5](#) of the *Preclearance Act, 2016*, is guilty of an offence under this Act or the *Firearms Act* by reason only that the preclearance officer

- (a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of or for the purpose of their duties or employment;
- (b) transfers or offers to transfer a firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition or any prohibited ammunition in the course of their duties or employment;
- (c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part or any prohibited ammunition in the course of their duties or employment; or
- (d) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of their duties or employment or the destruction of any such thing in the course of their duties or employment.

[2017, c. 27, s. 61](#); [2023, c. 32, s. 12.1](#).

Individuals acting for police force, Canadian Forces and visiting forces

117.08 Notwithstanding any other provision of this Act, but subject to [section 117.1](#), no individual is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual

- (a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance,
- (b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition or any prohibited ammunition,
- (c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part or any prohibited ammunition,
- (d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,
- (e) alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger,
- (f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or the destruction of any such thing, or
- (g) alters a serial number on a firearm,

if the individual does so on behalf of, and under the authority of, a police force, the Canadian Forces, a visiting force, within the meaning of [section 2](#) of the *Visiting Forces Act*, or a department of the Government of Canada or of a province.

1995, c. 39, s. 139; [2023, c. 32, s. 12.2](#).

Employees of business with licence

117.09 (1) Notwithstanding any other provision of this Act, but subject to [section 117.1](#), no individual who is the holder of a licence to possess and acquire restricted firearms and who is employed by a business as defined in [subsection 2\(1\)](#) of the *Firearms Act* that itself is the holder of a licence that authorizes the business to carry out specified activities in relation to prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual, in the course of the individual's duties or employment in relation to those specified activities,

- (a) possesses a prohibited firearm, a prohibited weapon, a prohibited device or any prohibited ammunition;
- (b) manufactures or transfers, or offers to manufacture or transfer, a prohibited weapon, a prohibited device or any prohibited ammunition;
- (c) alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid

succession during one pressure of the trigger; or

(d) alters a serial number on a firearm.

Employees of business with licence

(2) Notwithstanding any other provision of this Act, but subject to [section 117.1](#), no individual who is employed by a business as defined in [subsection 2\(1\)](#) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual, in the course of the individual's duties or employment, possesses, manufactures or transfers, or offers to manufacture or transfer, a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person.

Employees of carriers

(3) Notwithstanding any other provision of this Act, but subject to [section 117.1](#), no individual who is employed by a *carrier*, as defined in [subsection 2\(1\)](#) of the *Firearms Act*, is guilty of an offence under this Act or that Act by reason only that the individual, in the course of the individual's duties or employment, possesses any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition or prohibited ammunition or transfers, or offers to transfer any such thing.

Employees of museums handling functioning imitation antique firearm

(4) Notwithstanding any other provision of this Act, but subject to [section 117.1](#), no individual who is employed by a museum as defined in [subsection 2\(1\)](#) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual, in the course of the individual's duties or employment, possesses or transfers a firearm that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm if the individual has been trained to handle and use such a firearm.

Employees of museums handling firearms generally

(5) Notwithstanding any other provision of this Act, but subject to [section 117.1](#), no individual who is employed by a museum as defined in [subsection 2\(1\)](#) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual possesses or transfers a firearm in the course of the individual's duties or employment if the individual is designated, by name, by a provincial minister within the meaning of subsection 2(1) of the *Firearms Act*.

Public safety

(6) A provincial minister shall not designate an individual for the purpose of subsection (5) where it is not desirable, in the interests of the safety of any person, to designate the individual.

Conditions

(7) A provincial minister may attach to a designation referred to in subsection (5) any reasonable condition that the provincial minister considers desirable in the particular circumstances and in the interests of the safety of any person.

1995, c. 39, s. 139; [2023, c. 32, s. 12.3](#).

Restriction

117.1 Sections 117.07 to 117.09 do not apply if the public officer or the individual is subject to a prohibition order and acts contrary to that order or to an authorization or a licence issued under the authority of an order made under [subsection 113\(1\)](#).

1995, c. 39, s. 139.

General

Onus on the accused

117.11 Where, in any proceedings for an offence under any of [sections 89, 90, 91, 93, 97, 101, 104](#) and [105](#), any question arises as to whether a person is the holder of an authorization, a licence or a registration certificate, the onus is on the accused to prove that the person is the holder of the authorization, licence or registration certificate.

1995, c. 39, s. 139.

Authorizations, etc., as evidence

117.12 (1) In any proceedings under this Act or any other Act of Parliament, a document purporting to be an authorization, a licence or a registration certificate is evidence of the statements contained therein.

Certified copies

(2) In any proceedings under this Act or any other Act of Parliament, a copy of any authorization, licence or registration certificate is, if certified as a true copy by the Registrar or a chief firearms officer, admissible in evidence and, in the absence of evidence to the contrary, has the same probative force as the authorization, licence or registration certificate would have had if it had been proved in the ordinary way.

1995, c. 39, s. 139.

Certificate of analyst

117.13 (1) A certificate purporting to be signed by an analyst stating that the analyst has analyzed any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or any part or component of such a thing, and stating the results of the analysis is evidence in any proceedings in relation to any of those things under this Act or under [section 19](#) of the [Export and Import Permits Act](#) in relation to subsection 15(2) of that Act without proof of the signature or official character of the person appearing to have signed the certificate.

Attendance of analyst

(2) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

Notice of intention to produce certificate

(3) No certificate of an analyst may be admitted in evidence unless the party intending to produce it has, before the trial, given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.

(4) and (5) [Repealed, 2008, c. 18, s. 2]

1995, c. 39, s. 139; 2008, c. 18, s. 2.

Amnesty period

117.14 (1) The Governor in Council may, by order, declare for any purpose referred to in subsection (2) any period as an amnesty period with respect to any weapon, prohibited device, prohibited ammunition, explosive substance or component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm.

Purposes of amnesty period

(2) An order made under subsection (1) may declare an amnesty period for the purpose of

(a) permitting any person in possession of any thing to which the order relates to do anything provided in the order, including, without restricting the generality of the foregoing, delivering the thing to a peace officer, a firearms officer or a chief firearms officer, registering it, destroying it or otherwise disposing of it; or

(b) permitting alterations to be made to any prohibited firearm, prohibited weapon, prohibited device or prohibited ammunition to which the order relates so that it no longer qualifies as a prohibited firearm, a prohibited weapon, a prohibited device or prohibited ammunition, as the case may be.

Reliance on amnesty period

(3) No person who, during an amnesty period declared by an order made under subsection (1) and for a purpose described in the order, does anything provided for in the order, is, by reason only of the fact that the person did that thing, guilty of an offence under this Part.

Proceedings are a nullity

(4) Any proceedings taken under this Part against any person for anything done by the person in reliance of this section are a nullity.

1995, c. 39, s. 139.

Regulations

117.15 (1) Subject to subsection (2), the Governor in Council may make regulations prescribing anything that by this Part is to be or may be prescribed.

Restriction

(2) In making regulations, the Governor in Council may not prescribe any thing to be a prohibited firearm, a restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or prohibited ammunition if, in the opinion of the Governor in Council, the thing to be prescribed is reasonable for use in Canada for hunting or sporting purposes.

(3) [Repealed, 2019, c. 9, s. 18]

(4) [Repealed, 2019, c. 9, s. 18]

1995, c. 39, s. 139; 2015, c. 27, s. 34; 2019, c. 9, s. 18.

PART IV

Offences Against the Administration of Law and Justice

Interpretation

Definitions

118 In this Part,

evidence or **statement** means an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not; (*témoignage, déposition ou déclaration*)

government means

- (a)** the Government of Canada,
- (b)** the government of a province, or
- (c)** Her Majesty in right of Canada or a province; (*gouvernement*)

judicial proceeding means a proceeding

- (a)** in or under the authority of a court of justice,
- (b)** before the Senate or House of Commons or a committee of the Senate or House of Commons, or before a legislative council, legislative assembly or house of assembly or a committee thereof that is authorized by law to administer an oath,
- (c)** before a court, judge, justice, provincial court judge or coroner,
- (d)** before an arbitrator or umpire, or a person or body of persons authorized by law to make an inquiry and take evidence therein under oath, or
- (e)** before a tribunal by which a legal right or legal liability may be established,

whether or not the proceeding is invalid for want of jurisdiction or for any other reason;
(*procédure judiciaire*)

office includes

- (a) an office or appointment under the government,
- (b) a civil or military commission, and
- (c) a position or an employment in a public department; (*charge ou emploi*)

official means a person who

- (a) holds an office, or
- (b) is appointed or elected to discharge a public duty; (*fonctionnaire*)

witness means a person who gives evidence orally under oath or by affidavit in a judicial proceeding, whether or not he is competent to be a witness, and includes a child of tender years who gives evidence but does not give it under oath, because, in the opinion of the person presiding, the child does not understand the nature of an oath.
(*témoin*)

R.S., 1985, c. C-46, s. 118; R.S., 1985, c. 27 (1st Supp.), ss. 15, 203; [2007, c. 13, s. 2](#).

Corruption and Disobedience

Bribery of judicial officers, etc.

119 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who

- (a) being the holder of a judicial office, or being a member of Parliament or of the legislature of a province, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by them in their official capacity, or
- (b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by that person in their official capacity.

Consent of Attorney General

(2) No proceedings against a person who holds a judicial office shall be instituted under this section without the consent in writing of the Attorney General of Canada.

R.S., 1985, c. C-46, s. 119; [2007, c. 13, s. 3](#).

Bribery of officers

120 Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years who

(a) being a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law, directly or indirectly, corruptly accepts, obtains, agrees to accept or attempts to obtain, for themselves or another person, any money, valuable consideration, office, place or employment with intent

(i) to interfere with the administration of justice,

(ii) to procure or facilitate the commission of an offence, or

(iii) to protect from detection or punishment a person who has committed or who intends to commit an offence; or

(b) directly or indirectly, corruptly gives or offers to a person mentioned in paragraph (a), or to anyone for the benefit of that person, any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (a)(i), (ii) or (iii).

R.S., 1985, c. C-46, s. 120; [2007, c. 13, s. 4.](#)

Frauds on the government

121 (1) Every one commits an offence who

(a) directly or indirectly

(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,

a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

(b) having dealings of any kind with the government, directly or indirectly pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which the dealings take place, or to any member of the employee's or official's family, or to anyone for the benefit of the employee or official, with respect to those dealings, unless the person has the consent in writing of the head of the branch of government with which the dealings take place;

(c) being an official or employee of the government, directly or indirectly demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind for themselves or another person, unless they have the consent in writing of the head of the branch of government that employs them or of which they are an official;

(d) having or pretending to have influence with the government or with a minister of the government or an official, directly or indirectly demands, accepts or offers or agrees to accept, for themselves or another person, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including themselves, to an office;

(e) directly or indirectly gives or offers, or agrees to give or offer, to a minister of the government or an official, or to anyone for the benefit of a minister or an official, a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence, or an act or omission, by that minister or official, in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including themselves, to an office; or

(f) having made a tender to obtain a contract with the government,

(i) directly or indirectly gives or offers, or agrees to give or offer, to another person who has made a tender, to a member of that person's family or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or

(ii) directly or indirectly demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind for themselves or another person as consideration for the withdrawal of their own tender.

Contractor subscribing to election fund

(2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes or gives, or agrees to subscribe or give, to any person any valuable consideration

(a) for the purpose of promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or

(b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in Parliament or the legislature of a province.

Punishment

(3) Every person who commits an offence under this section is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 121; 2007, c. 13, s. 5; 2019, c. 25, s. 33.

Selling, etc., of tobacco products and raw leaf tobacco

121.1 (1) No person shall sell, offer for sale, transport, deliver, distribute or have in their possession for the purpose of sale a tobacco product, or raw leaf tobacco that is not packaged, unless it is stamped. The terms **tobacco product**, **raw leaf tobacco**, **packaged** and **stamped** have the same meanings as in [section 2](#) of the *Excise Act, 2001*.

Exceptions — [subsections 30\(2\)](#) and [32\(2\)](#) and [\(3\)](#) of *Excise Act, 2001*

(2) Subsection (1) does not apply in any of the circumstances described in any of [subsections 30\(2\)](#) and [32\(2\)](#) and [\(3\)](#) of the *Excise Act, 2001*.

Exception — [section 31](#) of *Excise Act, 2001*

(3) A tobacco grower does not contravene subsection (1) by reason only that they have in their possession raw leaf tobacco described in [paragraph 31\(a\)](#), (b) or (c) of the *Excise Act, 2001*.

Punishment

(4) Every person who contravenes subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) is guilty of an offence punishable on summary conviction.

(5) [Repealed, 2022, c. 15, s. 9]

[2014, c. 23, s. 3](#); [2019, c. 25, s. 34](#); [2022, c. 15, s. 9](#).

Breach of trust by public officer

122 Every official who, in connection with the duties of their office, commits fraud or a breach of trust, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 122; [2019, c. 25, s. 35](#).

Municipal corruption

123 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who directly or indirectly gives, offers or agrees to give or offer to a municipal official or to anyone for the benefit of a municipal official — or, being a municipal official, directly or indirectly demands, accepts or offers or agrees to accept from any person for themselves or another person — a loan, reward, advantage or benefit of any kind as consideration for the official

(a) to abstain from voting at a meeting of the municipal council or a committee of the council;

(b) to vote in favour of or against a measure, motion or resolution;

(c) to aid in procuring or preventing the adoption of a measure, motion or resolution;
or

(d) to perform or fail to perform an official act.

Influencing municipal official

(2) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who influences or attempts to influence a municipal official to do anything mentioned in paragraphs (1)(a) to (d) by

(a) suppression of the truth, in the case of a person who is under a duty to disclose the truth;

(b) threats or deceit; or

(c) any unlawful means.

Definition of *municipal official*

(3) In this section, *municipal official* means a member of a municipal council or a person who holds an office under a municipal government.

R.S., 1985, c. C-46, s. 123; R.S., 1985, c. 27 (1st Supp.), s. 16; [2007, c. 13, s. 6](#); [2019, c. 25, s. 36](#).

Selling or purchasing office

124 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

(a) purports to sell or agrees to sell an appointment to or a resignation from an office, or a consent to any such appointment or resignation, or receives or agrees to receive a reward or profit from the purported sale thereof, or

(b) purports to purchase or gives a reward or profit for the purported purchase of any such appointment, resignation or consent, or agrees or promises to do so.

R.S., 1985, c. C-46, s. 124; [2019, c. 25, s. 37](#).

Influencing or negotiating appointments or dealing in offices

125 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

(a) receives, agrees to receive, gives or procures to be given, directly or indirectly, a reward, advantage or benefit of any kind as consideration for cooperation, assistance or exercise of influence to secure the appointment of any person to an office,

(b) solicits, recommends or negotiates in any manner with respect to an appointment to or resignation from an office, in expectation of a direct or indirect reward, advantage or benefit, or

(c) keeps without lawful authority a place for transacting or negotiating any business relating to

(i) the filling of vacancies in offices,

(ii) the sale or purchase of offices, or

(iii) appointments to or resignations from offices.

R.S., 1985, c. C-46, s. 125; [2018, c. 29, s. 7](#); [2019, c. 25, s. 38](#).

Disobeying a statute

126 (1) Every person who, without lawful excuse, contravenes an Act of Parliament by intentionally doing anything that it forbids or by intentionally omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Attorney General of Canada may act

(2) Any proceedings in respect of a contravention of or conspiracy to contravene an Act mentioned in subsection (1), other than this Act, may be instituted at the instance of the Government of Canada and conducted by or on behalf of that Government.

R.S., 1985, c. C-46, s. 126; R.S., 1985, c. 27 (1st Supp.), s. 185(F); [2019, c. 25, s. 39](#).

Disobeying order of court

127 (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Attorney General of Canada may act

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a contravention of or conspiracy to contravene that order may be instituted and conducted in like manner.

R.S., 1985, c. C-46, s. 127; R.S., 1985, c. 27 (1st Supp.), s. 185(F); [2005, c. 32, s. 1](#).

Misconduct of officers executing process

128 Every peace officer or coroner is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who, being entrusted with the execution of a process, intentionally

(a) misconducts himself in the execution of the process, or

(b) makes a false return to the process.

R.S., 1985, c. C-46, s. 128; [2019, c. 25, s. 40](#).

Offences relating to public or peace officer

129 Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or

(c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,

is guilty of

(d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(e) an offence punishable on summary conviction.

R.S., c. C-34, s. 118; 1972, c. 13, s. 7.

Personating peace officer

130 (1) Everyone commits an offence who

(a) falsely represents himself to be a peace officer or a public officer; or

(b) not being a peace officer or public officer, uses a badge or article of uniform or equipment in a manner that is likely to cause persons to believe that he is a peace officer or a public officer, as the case may be.

Punishment

(2) Everyone who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 130; [2009, c. 28, s. 2](#).

Aggravating circumstance

130.1 If a person is convicted of an offence under [section 130](#), the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the accused personated a peace officer or a public officer, as the case may be, for the purpose of facilitating the commission of another offence.

[2014, c. 10, s. 1](#).

Misleading Justice

Perjury

131 (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.

Video links, etc.

(1.1) Subject to subsection (3), every person who gives evidence under [subsection 46\(2\)](#) of the [Canada Evidence Act](#), or gives evidence or a statement pursuant to an order made under [section 22.2](#) of the [Mutual Legal Assistance in Criminal Matters Act](#), commits perjury who, with intent to mislead, makes a false statement knowing that it is false, whether or not the false statement was made under oath or solemn affirmation in accordance with subsection (1), so long as the false statement was made in accordance with any formalities required by the law of the place outside Canada in which the person is virtually present or heard.

Idem

(2) Subsection (1) applies, whether or not a statement referred to in that subsection is made in a judicial proceeding.

Application

(3) Subsections (1) and (1.1) do not apply to a statement referred to in either of those subsections that is made by a person who is not specially permitted, authorized or required by law to make that statement.

R.S., 1985, c. C-46, s. 131; R.S., 1985, c. 27 (1st Supp.), s. 17; 1999, c. 18, s. 92.

Punishment

132 Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Corroboration

133 No person shall be convicted of an offence under [section 132](#) on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

R.S., 1985, c. C-46, s. 133; R.S., 1985, c. 27 (1st Supp.), s. 17.

Idem

134 (1) Subject to subsection (2), every one who, not being specially permitted, authorized or required by law to make a statement under oath or solemn affirmation, makes such a statement, by affidavit, solemn declaration or deposition or orally before a person who is authorized by law to permit it to be made before him, knowing that the statement is false, is guilty of an offence punishable on summary conviction.

Application

(2) Subsection (1) does not apply to a statement referred to in that subsection that is made in the course of a criminal investigation.

R.S., 1985, c. C-46, s. 134; R.S., 1985, c. 27 (1st Supp.), s. 17.

135 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 17]

Witness giving contradictory evidence

136 (1) Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, whether or not the prior or later evidence or either is true, but no person shall be convicted under this section unless the court, judge or provincial court judge, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead.

Evidence in specific cases

(1.1) Evidence given under [section 714.1](#), [714.2](#) or [714.3](#) or under [subsection 46\(2\)](#) of the *Canada Evidence Act* or evidence or a statement given under an order made under [section 22.2](#) of the *Mutual Legal Assistance in Criminal Matters Act* is deemed to be evidence given by a witness in a judicial proceeding for the purposes of subsection (1).

Definition of evidence

(2) Notwithstanding the definition **evidence** in [section 118](#), **evidence**, for the purposes of this section, does not include evidence that is not material.

Proof of former trial

(2.1) Where a person is charged with an offence under this section, a certificate specifying with reasonable particularity the proceeding in which that person is alleged to have given the evidence in respect of which the offence is charged, is evidence that it was given in a judicial proceeding, without proof of the signature or official character of the person by whom the certificate purports to be signed if it purports to be signed by the clerk of the court or other official having the custody of the record of that proceeding or by his lawful deputy.

Consent required

(3) No proceedings shall be instituted under this section without the consent of the Attorney General.

R.S., 1985, c. C-46, s. 136; R.S., 1985, c. 27 (1st Supp.), ss. 18, 203; 1999, c. 18, s. 93; [2019, c. 25, s. 41](#).

Fabricating evidence

137 Every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 125.

Offences relating to affidavits

138 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the writing was not so sworn or declared or when he knows that he has no authority to administer the oath or declaration,

(b) uses or offers for use any writing purporting to be an affidavit or statutory declaration that he knows was not sworn or declared, as the case may be, by the affiant or declarant or before a person authorized in that behalf, or

(c) signs as affiant or declarant a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared by him, as the case may be, when the writing was not so sworn or declared.

R.S., 1985, c. C-46, s. 138; [2019, c. 25, s. 42](#).

Obstructing justice

139 (1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

(a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or

(b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,

is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(d) an offence punishable on summary conviction.

Idem

(2) Every person who intentionally attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Idem

(3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;

(b) influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or

(c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

R.S., 1985, c. C-46, s. 139; [2019, c. 25, s. 43](#).

Public mischief

140 (1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by

(a) making a false statement that accuses some other person of having committed an offence;

(b) doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;

(c) reporting that an offence has been committed when it has not been committed; or

(d) reporting or in any other way making it known or causing it to be made known that he or some other person has died when he or that other person has not died.

Punishment

(2) Every one who commits public mischief

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 140; R.S., 1985, c. 27 (1st Supp.), s. 19.

Compounding indictable offence

141 (1) Every person who asks for or obtains or agrees to receive or obtain any valuable consideration for themselves or any other person by agreeing to compound or conceal an indictable offence is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Exception for diversion agreements

(2) No offence is committed under subsection (1) where valuable consideration is received or obtained or is to be received or obtained under an agreement for compensation or restitution or personal services that is

(a) entered into with the consent of the Attorney General; or

(b) made as part of a program, approved by the Attorney General, to divert persons charged with indictable offences from criminal proceedings.

R.S., 1985, c. C-46, s. 141; R.S., 1985, c. 27 (1st Supp.), s. 19; [2019, c. 25, s. 44](#).

Corruptly taking reward for recovery of goods

142 Every person who corruptly accepts any valuable consideration, directly or indirectly, under pretence or on account of helping any person to recover anything obtained by the commission of an indictable offence is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 142; [2019, c. 25, s. 45](#).

143 [Repealed, [2018, c. 29, s. 8](#)]

Escapes and Rescues

Prison breach

144 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction

who

(a) by force or violence breaks a prison with intent to set at liberty himself or any other person confined therein, or

(b) with intent to escape forcibly breaks out of, or makes any breach in, a cell or other place within a prison in which he is confined.

R.S., 1985, c. C-46, s. 144; [2019, c. 25, s. 46](#).

Escape and being at large without excuse

145 (1) Every person who escapes from lawful custody or who is, before the expiration of a term of imprisonment to which they were sentenced, at large in or outside Canada without lawful excuse, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Failure to attend court or surrender

(2) Every person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction who,

(a) is at large on a release order and who fails, without lawful excuse, to attend court in accordance with the release order;

(b) having appeared before a court, justice or judge, fails, without lawful excuse, to subsequently attend court as required by the court, justice or judge;

(c) fails to surrender themselves in accordance with an order of the court, justice or judge, as the case may be; or

(d) fails, without lawful excuse, to comply with an order made under [section 515.01](#).

Failure to comply with appearance notice or summons

(3) Every person who is named in an appearance notice that has been confirmed by a justice under [section 508](#) or who is served with a summons and who fails, without lawful excuse, to appear at the time and place stated in the notice or the summons, as the case may be, for the purposes of the [Identification of Criminals Act](#), or to attend court in accordance with the notice or the summons, as the case may be, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Failure to comply with undertaking

(4) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or an offence punishable on summary conviction who,

(a) is at large on an undertaking and who fails, without lawful excuse, to comply with a condition of that undertaking; or

(b) is at large on an undertaking that has been confirmed by a justice under [section 508](#) and who fails, without lawful excuse, to appear at the time and place stated in the undertaking for the purposes of the *Identification of Criminals Act* or to attend court in accordance with the undertaking.

Failure to comply with order

(5) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, or is guilty of an offence punishable on summary conviction, who

(a) is at large on a release order and who fails, without lawful excuse, to comply with a condition of that release order other than the condition to attend court; or

(b) is bound to comply with an order under [subsection 515\(12\)](#), [516\(2\)](#) or [522\(2.1\)](#) and who fails, without lawful excuse, to comply with that order.

(5.1) [Repealed, 2019, c. 25, s. 47]

Not an excuse

(6) For the purposes of subsections (3) and (4), it is not a lawful excuse that an appearance notice or undertaking states defectively the substance of the alleged offence.

(7) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 20]

Election of Crown under *Contraventions Act*

(8) For the purposes of paragraph (2)(a) and subsections (3) to (5), it is a lawful excuse to fail to attend court in accordance with a summons, appearance notice, undertaking or release order, to comply with a condition of an undertaking or release order or to fail to appear at the time and place stated in a summons, an appearance notice or an undertaking for the purposes of the *Identification of Criminals Act* if — before the failure — the *Attorney General*, within the meaning of the *Contraventions Act*, makes an election under [section 50](#) of that Act.

Proof of certain facts by certificate

(9) In any proceedings under subsections (2) to (4), a certificate of the clerk of the court or a judge of the court before which the accused is alleged to have failed to attend or of the person in charge of the place at which it is alleged the accused failed to attend for the purposes of the *Identification of Criminals Act* is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate if the certificate states that,

(a) in the case of proceedings under subsection (2), the accused failed to attend court as required by the release order or, having attended court, failed to subsequently attend court as required by the court, judge or justice or failed to surrender in accordance with an order of the court, judge or justice, as the case may be;

(b) in the case of proceedings under subsection (3), the accused was named in an appearance notice that was confirmed by a justice under [section 508](#) and the accused failed to attend court in accordance with the notice or failed to appear at the time and place stated in the notice for the purposes of the *Identification of Criminals Act*, as the case may be;

(c) in the case of proceedings under subsection (3), a summons was issued to and served on the accused and the accused failed to attend court in accordance with the summons or failed to appear at the time and place stated in the summons for the purposes of the *Identification of Criminals Act*, as the case may be; and

(d) in the case of proceedings under subsection (4), the accused was at large on an undertaking that was confirmed by a justice under [section 508](#), and the accused failed to attend court in accordance with the undertaking or failed to appear at the time and place stated in the undertaking for the purposes of the *Identification of Criminals Act*, as the case may be.

Attendance and right to cross-examination

(10) An accused against whom a certificate described in subsection (9) is produced may, with leave of the court, require the attendance of the person making the certificate for the purposes of cross-examination.

Notice of intention to produce

(11) No certificate shall be received in evidence pursuant to subsection (9) unless the party intending to produce it has, before the trial, given to the accused reasonable notice of his intention together with a copy of the certificate.

R.S., 1985, c. C-46, s. 145; R.S., 1985, c. 27 (1st Supp.), s. 20; 1992, c. 47, s. 68; 1994, c. 44, s. 8; 1996, c. 7, s. 38; 1997, c. 18, s. 3; [2008, c. 18, s. 3](#); [2018, c. 29, s. 9](#); [2019, c. 25, s. 47](#); [2022, c. 17, s. 4](#).

Permitting or assisting escape

146 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) permits a person whom he has in lawful custody to escape, by failing to perform a legal duty,

(b) conveys or causes to be conveyed into a prison anything, with intent to facilitate the escape of a person imprisoned therein, or

(c) directs or procures, under colour of pretended authority, the discharge of a prisoner who is not entitled to be discharged.

R.S., 1985, c. C-46, s. 146; [2019, c. 25, s. 48](#).

Rescue or permitting escape

147 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

- (a) rescues any person from lawful custody or assists any person in escaping or attempting to escape from lawful custody,
- (b) being a peace officer, wilfully permits a person in his lawful custody to escape, or
- (c) being an officer of or an employee in a prison, wilfully permits a person to escape from lawful custody therein.

R.S., 1985, c. C-46, s. 147; [2019, c. 25, s. 49](#).

Assisting prisoner of war to escape

148 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who knowingly

- (a) assists a prisoner of war in Canada to escape from a place where he is detained, or
- (b) assists a prisoner of war, who is permitted to be at large on parole in Canada, to escape from the place where he is at large on parole.

R.S., 1985, c. C-46, s. 148; [2019, c. 25, s. 50](#).

Service of term for escape

149 (1) Notwithstanding [section 743.1](#), a court that convicts a person for an escape committed while undergoing imprisonment may order that the term of imprisonment be served in a penitentiary, even if the time to be served is less than two years.

Definition of escape

(2) In this section, **escape** means breaking prison, escaping from lawful custody or, without lawful excuse, being at large before the expiration of a term of imprisonment to which a person has been sentenced.

R.S., 1985, c. C-46, s. 149; R.S., 1985, c. 27 (1st Supp.), s. 203; 1992, c. 20, s. 199; 1995, c. 22, s. 1.

PART V

Sexual Offences, Public Morals and Disorderly Conduct

Interpretation

Definitions

150 In this Part,

guardian includes any person who has in law or in fact the custody or control of another person; (*tuteur*)

public place includes any place to which the public have access as of right or by invitation, express or implied; (*endroit public*)

theatre includes any place that is open to the public where entertainments are given, whether or not any charge is made for admission. (*théâtre*)

R.S., c. C-34, s. 138.

Sexual Offences

Consent no defence

150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under [section 151](#) or [152](#) or [subsection 153\(1\)](#), [160\(3\)](#) or [173\(2\)](#) or is charged with an offence under [section 271](#), [272](#) or [273](#) in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

Exception — complainant aged 12 or 13

(2) When an accused is charged with an offence under [section 151](#) or [152](#), [subsection 173\(2\)](#) or [section 271](#) in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than two years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

Exception — complainant aged 14 or 15

(2.1) If an accused is charged with an offence under [section 151](#) or [152](#), [subsection 173\(2\)](#) or [section 271](#) in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than five years older than the complainant; and

(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

Exception for transitional purposes

(2.2) When the accused referred to in subsection (2.1) is five or more years older than the complainant, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if, on the day on which this subsection comes into force,

(a) the accused is the common-law partner of the complainant, or has been cohabiting with the complainant in a conjugal relationship for a period of less than one year and they have had or are expecting to have a child as a result of the relationship; and

(b) the accused is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

Exception for transitional purposes

(2.3) If, immediately before the day on which this subsection comes into force, the accused referred to in subsection (2.1) is married to the complainant, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge.

Exemption for accused aged twelve or thirteen

(3) No person aged twelve or thirteen years shall be tried for an offence under [section 151](#) or [152](#) or [subsection 173\(2\)](#) unless the person is in a position of trust or authority towards the complainant, is a person with whom the complainant is in a relationship of dependency or is in a relationship with the complainant that is exploitative of the complainant.

Mistake of age

(4) It is not a defence to a charge under [section 151](#) or [152](#), [subsection 160\(3\)](#) or [173\(2\)](#), or [section 271](#), [272](#) or [273](#) that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

Idem

(5) It is not a defence to a charge under [section 153](#), [170](#), [171](#) or [172](#) or [subsection 286.1\(2\)](#), [286.2\(2\)](#) or [286.3\(2\)](#) that the accused believed that the complainant was 18 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

Mistake of age

(6) An accused cannot raise a mistaken belief in the age of the complainant in order to invoke a defence under subsection (2) or (2.1) unless the accused took all reasonable steps to ascertain the age of the complainant.

R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 2; 2008, c. 6, ss. 13, 54; 2014, c. 25, s. 4; 2015, c. 29, s. 6; 2019, c. 25, s. 51.

Sexual interference

151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

R.S., 1985, c. C-46, s. 151; R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 3; 2008, c. 6, s. 54; 2012, c. 1, s. 11; 2015, c. 23, s. 2.

Invitation to sexual touching

152 Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

R.S., 1985, c. C-46, s. 152; R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 3; 2008, c. 6, s. 54; 2012, c. 1, s. 12; 2015, c. 23, s. 3.

Sexual exploitation

153 (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or

(b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

Punishment

(1.1) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum

punishment of imprisonment for a term of 90 days.

Inference of sexual exploitation

(1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

- (a)** the age of the young person;
- (b)** the age difference between the person and the young person;
- (c)** the evolution of the relationship; and
- (d)** the degree of control or influence by the person over the young person.

Definition of *young person*

(2) In this section, ***young person*** means a person 16 years of age or more but under the age of eighteen years.

R.S., 1985, c. C-46, s. 153; R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 4; 2008, c. 6, s. 54; 2012, c. 1, s. 13; 2015, c. 23, s. 4.

Sexual exploitation of person with disability

153.1 (1) Every person who is in a position of trust or authority towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability is in a relationship of dependency and who, for a sexual purpose, counsels or incites that person to touch, without that person's consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly, with a part of the body or with an object, is guilty of

- (a)** an indictable offence and liable to imprisonment for a term not exceeding 10 years; or
- (b)** an offence punishable on summary conviction.

Definition of *consent*

(2) Subject to subsection (3), ***consent*** means, for the purposes of this section, the voluntary agreement of the complainant to engage in the sexual activity in question.

Consent

(2.1) Consent must be present at the time the sexual activity in question takes place.

Question of law

(2.2) The question of whether no consent is obtained under subsection (3) or (4) or 265(3) is a question of law.

When no consent obtained

(3) For the purposes of this section, no consent is obtained if

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(a.1) the complainant is unconscious;

(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);

(c) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (3) not limiting

(4) Nothing in subsection (3) shall be construed as limiting the circumstances in which no consent is obtained.

When belief in consent not a defence

(5) It is not a defence to a charge under this section that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge if

(a) the accused's belief arose from

(i) the accused's self-induced intoxication,

(ii) the accused's recklessness or wilful blindness, or

(iii) any circumstance referred to in subsection (3) or (4) or 265(3) in which no consent is obtained;

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or

(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

Accused's belief as to consent

(6) If an accused alleges that he or she believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

1998, c. 9, s. 2; 2018, c. 29, s. 10; 2019, c. 25, s. 52; 2023, c. 28, s. 1.

154 [Repealed, R.S., 1985, c. 19 (3rd Supp.), s. 1]

Incest

155 (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

Punishment

(2) Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and, if the other person is under the age of 16 years, to a minimum punishment of imprisonment for a term of five years.

Defence

(3) No accused shall be determined by a court to be guilty of an offence under this section if the accused was under restraint, duress or fear of the person with whom the accused had the sexual intercourse at the time the sexual intercourse occurred.

Definition of *brother* and *sister*

(4) In this section, *brother* and *sister*, respectively, include half-brother and half-sister.

R.S., 1985, c. C-46, s. 155; R.S., 1985, c. 27 (1st Supp.), s. 21; [2012, c. 1, s. 14](#).

Historical offences

156 No person shall be convicted of any sexual offence under this Act as it read from time to time before January 4, 1983 unless the conduct alleged would be an offence under this Act if it occurred on the day on which the charge was laid.

R.S., 1985, c. C-46, s. 156; R.S., 1985, c. 19 (3rd Supp.), s. 2; [2019, c. 25, s. 53](#).

157 and 158 [Repealed, R.S., 1985, c. 19 (3rd Supp.), s. 2]

159 [Repealed, [2019, c. 25, s. 54](#)]

Bestiality

160 (1) Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Compelling the commission of bestiality

(2) Every person who compels another to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Bestiality in presence of or by child

(3) Despite subsection (1), every person who commits bestiality in the presence of a person under the age of 16 years, or who incites a person under the age of 16 years to commit bestiality,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Order of prohibition or restitution

(4) The court may, in addition to any other sentence that it may impose under any of subsections (1) to (3),

(a) make an order prohibiting the accused from owning, having the custody or control of or residing in the same premises as an animal during any period that the court considers appropriate but, in the case of a second or subsequent offence, for a minimum of five years; and

(b) on application of the Attorney General or on its own motion, order that the accused pay to a person or an organization that has taken care of an animal as a result of the commission of the offence the reasonable costs that the person or organization incurred in respect of the animal, if the costs are readily ascertainable.

Breach of order

(5) Every person who contravenes an order made under paragraph (4)(a) is guilty of an offence punishable on summary conviction.

Application

(6) [Sections 740 to 741.2](#) apply, with any modifications that the circumstances require, to orders made under paragraph (4)(b).

Definition of *bestiality*

(7) In this section, ***bestiality*** means any contact, for a sexual purpose, with an animal.

R.S., 1985, c. C-46, s. 160; R.S., 1985, c. 19 (3rd Supp.), s. 3; [2008, c. 6, s. 54](#); [2012, c. 1, s. 15](#); [2015, c. 23, s. 5](#); [2019, c. 17, s. 1](#).

Order of prohibition

161 (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under [section 730](#), of an offence referred to in subsection (1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

(a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare

centre, schoolground, playground or community centre;

(a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;

(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

(c) having any contact — including communicating by any means — with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate; or

(d) using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

Offences

(1.1) The offences for the purpose of subsection (1) are

(a) an offence under [section 151](#), [152](#) or [155](#), [subsection 160\(2\)](#) or [\(3\)](#), [section 163.1](#), [170](#), [171](#), [171.1](#), [172.1](#) or [172.2](#), [subsection 173\(2\)](#), [section 271](#), [272](#), [273](#) or [279.011](#), [subsection 279.02\(2\)](#) or [279.03\(2\)](#), [section 280](#) or [281](#) or [subsection 286.1\(2\)](#), [286.2\(2\)](#) or [286.3\(2\)](#);

(b) an offence under [section 144](#) (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983;

(c) an offence under subsection 146(1) (sexual intercourse with a female under 14) or [section 153](#) (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(d) an offence under subsection 212(1) (procuring), 212(2) (living on the avails of prostitution of person under 18 years), 212(2.1) (aggravated offence in relation to living on the avails of prostitution of person under 18 years) or 212(4) (prostitution of person under 18 years) of this Act, as it read from time to time before the day on which this paragraph comes into force.

Duration of prohibition

(2) The prohibition may be for life or for any shorter duration that the court considers desirable and, in the case of a prohibition that is not for life, the prohibition begins on the later of

(a) the date on which the order is made; and

(b) where the offender is sentenced to a term of imprisonment, the date on which the offender is released from imprisonment for the offence, including release on parole,

mandatory supervision or statutory release.

Court may vary order

(3) A court that makes an order of prohibition or, where the court is for any reason unable to act, another court of equivalent jurisdiction in the same province, may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.

Offence

(4) Every person who is bound by an order of prohibition and who does not comply with the order is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than four years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 161; R.S., 1985, c. 19 (3rd Supp.), s. 4; 1993, c. 45, s. 1; 1995, c. 22, s. 18; 1997, c. 18, s. 4; 1999, c. 31, s. 67; [2002, c. 13, s. 4](#); [2005, c. 32, s. 5](#); [2008, c. 6, s. 54](#); [2012, c. 1, s. 16](#); [2014, c. 21, s. 1](#), c. 25, s. 5; [2015, c. 23, s. 6](#); [2019, c. 25, s. 55](#).

Voyeurism

162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

(a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

(b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or

(c) the observation or recording is done for a sexual purpose.

Definition of *visual recording*

(2) In this section, ***visual recording*** includes a photographic, film or video recording made by any means.

Exemption

(3) Paragraphs (1)(a) and (b) do not apply to a peace officer who, under the authority of a warrant issued under [section 487.01](#), is carrying out any activity referred to in those paragraphs.

Printing, publication, etc., of voyeuristic recordings

(4) Every one commits an offence who, knowing that a recording was obtained by the commission of an offence under subsection (1), prints, copies, publishes, distributes, circulates, sells, advertises or makes available the recording, or has the recording in his or her possession for the purpose of printing, copying, publishing, distributing, circulating, selling or advertising it or making it available.

Punishment

(5) Every one who commits an offence under subsection (1) or (4)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Defence

(6) No person shall be convicted of an offence under this section if the acts that are alleged to constitute the offence serve the public good and do not extend beyond what serves the public good.

Question of law, motives

(7) For the purposes of subsection (6),

(a) it is a question of law whether an act serves the public good and whether there is evidence that the act alleged goes beyond what serves the public good, but it is a question of fact whether the act does or does not extend beyond what serves the public good; and

(b) the motives of an accused are irrelevant.

R.S., 1985, c. C-46, s. 162; R.S., 1985, c. 19 (3rd Supp.), s. 4; [2005, c. 32, s. 6](#).

Publication, etc., of an intimate image without consent

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) of an offence punishable on summary conviction.

Definition of *intimate image*

(2) In this section, *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

Defence

(3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.

Question of fact and law, motives

(4) For the purposes of subsection (3),

(a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and

(b) the motives of an accused are irrelevant.

[2014, c. 31, s. 3.](#)

Prohibition order

162.2 (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under [section 730](#), of an offence referred to in [subsection 162.1\(1\)](#), the court that sentences or discharges the offender, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from using the Internet or other digital network, unless the offender does so in accordance with conditions set by the court.

Duration of prohibition

(2) The prohibition may be for any period that the court considers appropriate, including any period to which the offender is sentenced to imprisonment.

Court may vary order

(3) A court that makes an order of prohibition or, if the court is for any reason unable to act, another court of equivalent jurisdiction in the same province may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.

Offence

(4) Every person who is bound by an order of prohibition and who does not comply with the order is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than four years; or

(b) an offence punishable on summary conviction.

2014, c. 31, s. 3; 2015, c. 23, s. 33; 2019, c. 25, s. 56.

Offences Tending to Corrupt Morals

Obscene materials

163 (1) Every person commits an offence who makes, prints, publishes, distributes, circulates or has in their possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or any other obscene thing.

Idem

(2) Every person commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in their possession for that purpose any obscene written matter, picture, model, phonograph record or any other obscene thing; or

(b) publicly exhibits a disgusting object or an indecent show.

(c) and (d) [Repealed, 2018, c. 29, s. 11]

Defence of public good

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

Question of law and question of fact

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

Motives irrelevant

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) [Repealed, 1993, c. 46, s. 1]

(7) [Repealed, 2018, c. 29, s. 11]

Obscene publication

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

R.S., 1985, c. C-46, s. 163; 1993, c. 46, s. 1; [2018, c. 29, s. 11](#).

Definition of *child sexual abuse and exploitation material*

163.1 (1) In this section, *child sexual abuse and exploitation material* means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

(b) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(c) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(d) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

Making child sexual abuse and exploitation material

(2) Every person who makes, prints, publishes or possesses for the purpose of publication any child sexual abuse and exploitation material is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

Distribution, etc. of child sexual abuse and exploitation material

(3) Every person who transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission, making available, distribution, sale, advertising or exportation any child sexual abuse and exploitation material is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

Possession of child sexual abuse and exploitation material

(4) Every person who possesses any child sexual abuse and exploitation material is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Accessing child sexual abuse and exploitation material

(4.1) Every person who accesses any child sexual abuse and exploitation material is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Interpretation

(4.2) For the purposes of subsection (4.1), a person accesses child sexual abuse and exploitation material who knowingly causes child sexual abuse and exploitation material to be viewed by, or transmitted to, himself or herself.

Aggravating factor

(4.3) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that the person committed the offence with intent to make a profit.

Defence

(5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child sexual abuse and exploitation material was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

Defence

(6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence

(a) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and

(b) does not pose an undue risk of harm to persons under the age of eighteen years.

Question of law

(7) For greater certainty, for the purposes of this section, it is a question of law whether any written material, visual representation or audio recording advocates or counsels

sexual activity with a person under the age of eighteen years that would be an offence under this Act.

1993, c. 46, s. 2; 2002, c. 13, s. 5; 2005, c. 32, s. 7; 2012, c. 1, s. 17; 2015, c. 23, s. 7; 2024, c. 23, s. 1.

Warrant of seizure

164 (1) A judge may issue a warrant authorizing seizure of copies of a recording, a publication, a representation or any written material, if the judge is satisfied by information on oath that there are reasonable grounds to believe that

- (a) the recording, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is a voyeuristic recording;
- (b) the recording, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is an intimate image;
- (c) the publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is *obscene*, within the meaning of [subsection 163\(8\)](#);
- (d) the representation, written material or recording, copies of which are kept in premises within the jurisdiction of the court, is *child sexual abuse and exploitation material* as defined in [section 163.1](#);
- (e) the representation, written material or recording, copies of which are kept in premises within the jurisdiction of the court, is an advertisement of sexual services; or
- (f) the representation, written material or recording, copies of which are kept in premises within the jurisdiction of the court, is an advertisement for conversion therapy.

Summons to occupier

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

Owner and maker may appear

(3) The owner and the maker of the matter seized under subsection (1), and alleged to be obscene, child sexual abuse and exploitation material, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, may appear and be represented in the proceedings to oppose the making of an order for the forfeiture of the matter.

Order of forfeiture

(4) If the court is satisfied, on a balance of probabilities, that the publication, representation, written material or recording referred to in subsection (1) is obscene, child sexual abuse and exploitation material, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, it may

make an order declaring the matter forfeited to His Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

Disposal of matter

(5) If the court is not satisfied that the publication, representation, written material or recording referred to in subsection (1) is obscene, child sexual abuse and exploitation material, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, it shall order that the matter be restored to the person from whom it was seized without delay after the time for final appeal has expired.

Appeal

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI and [sections 673 to 696](#) apply with such modifications as the circumstances require.

Consent

(7) If an order is made under this section by a judge in a province with respect to one or more copies of a publication, a representation, written material or a recording, no proceedings shall be instituted or continued in that province under [section 162](#), [162.1](#), [163](#), [163.1](#), [286.4](#) or [320.103](#) with respect to those or other copies of the same publication, representation, written material or recording without the consent of the Attorney General.

Definitions

(8) In this section,

advertisement for conversion therapy means any material — including a photographic, film, video, audio or other recording, made by any means, a visual representation or any written material — that is used to promote or advertise conversion therapy contrary to [section 320.103](#); (*publicité de thérapie de conversion*)

advertisement of sexual services means any material — including a photographic, film, video, audio or other recording, made by any means, a visual representation or any written material — that is used to advertise sexual services contrary to [section 286.4](#); (*publicité de services sexuels*)

court means

(a) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,

(a.1) in the Province of Ontario, the Superior Court of Justice,

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court,

(c.1) [Repealed, 1992, c. 51, s. 34]

(d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, in Yukon and in the Northwest Territories, the Supreme Court, and

(e) in Nunavut, the Nunavut Court of Justice; (*tribunal*)

crime comic [Repealed, 2018, c. 29, s. 12]

intimate image has the same meaning as in [subsection 162.1\(2\)](#); (*image intime*)

judge means a judge of a court; (*juge*)

voyeuristic recording means a visual recording within the meaning of [subsection 162\(2\)](#) that is made as described in [subsection 162\(1\)](#). (*enregistrement voyeuriste*)

R.S., 1985, c. C-46, s. 164; R.S., 1985, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 3, c. 17, s. 9; 1992, c. 1, s. 58, c. 51, s. 34; 1993, c. 46, s. 3; 1997, c. 18, s. 5; 1998, c. 30, s. 14; 1999, c. 3, s. 27; [2002, c. 7, s. 139](#), c. 13, s. 6; [2005, c. 32, s. 8](#); [2014, c. 25, ss. 6, 46](#), c. 31, s. 4; [2015, c. 3, s. 46](#); [2018, c. 29, s. 12](#); [2021, c. 24, s. 1](#); [2024, c. 23, s. 2](#).

Warrant of seizure

164.1 (1) If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material — namely, *child sexual abuse and exploitation material* as defined in [section 163.1](#), a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, or *computer data* as defined in [subsection 342.1\(2\)](#) that makes child sexual abuse and exploitation material, a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy available — that is stored on and made available through a *computer system* as defined in [subsection 342.1\(2\)](#) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

(a) give an electronic copy of the material to the court;

(b) ensure that the material is no longer stored on and made available through the computer system; and

(c) provide the information necessary to identify and locate the person who posted the material.

Notice to person who posted the material

(2) Within a reasonable time after receiving the information referred to in paragraph (1) (c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court, and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.

Person who posted the material may appear

(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).

Non-appearance

(4) If the person who posted the material does not appear for the proceedings, the court may proceed *ex parte* to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.

Order

(5) If the court is satisfied, on a balance of probabilities, that the material is *child sexual abuse and exploitation material* as defined in [section 163.1](#), a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, or *computer data* as defined in [subsection 342.1\(2\)](#) that makes child sexual abuse and exploitation material, the voyeuristic recording, the intimate image, the advertisement of sexual services or the advertisement for conversion therapy available, it may order the custodian of the computer system to delete the material.

Destruction of copy

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

Return of material

(7) If the court is not satisfied that the material is *child sexual abuse and exploitation material* as defined in [section 163.1](#), a voyeuristic recording, an intimate image, an advertisement of sexual services or an advertisement for conversion therapy, or *computer data* as defined in [subsection 342.1\(2\)](#) that makes child sexual abuse and exploitation material, the voyeuristic recording, the intimate image, the advertisement of sexual services or the advertisement for conversion therapy available, the court shall order that the electronic copy be returned to the custodian of the computer system and terminate the order under paragraph (1)(b).

Other provisions to apply

(8) [Subsections 164\(6\) to \(8\)](#) apply, with any modifications that the circumstances require, to this section.

When order takes effect

(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired.

2002, c. 13, s. 7; 2005, c. 32, s. 9; 2014, c. 25, ss. 7, 46, c. 31, s. 5; 2021, c. 24, s. 2; 2024, c. 23, s. 3.

Forfeiture after conviction

164.2 (1) On application of the Attorney General, a court that convicts a person of an offence under [section 162.1](#), [163.1](#), [172.1](#) or [172.2](#), in addition to any other punishment that it may impose, may order that anything — other than real property — be forfeited to Her Majesty and disposed of as the Attorney General directs if it is satisfied, on a balance of probabilities, that the thing

(a) was used in the commission of the offence; and

(b) is the property of

(i) the convicted person or another person who was a party to the offence, or

(ii) a person who acquired the thing from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that it was transferred for the purpose of avoiding forfeiture.

Third party rights

(2) Before making an order under subsection (1), the court shall cause notice to be given to, and may hear, any person whom it considers to have an interest in the thing, and may declare the nature and extent of the person's interest in it.

Right of appeal — third party

(3) A person who was heard in response to a notice given under subsection (2) may appeal to the court of appeal against an order made under subsection (1).

Right of appeal — Attorney General

(4) The Attorney General may appeal to the court of appeal against the refusal of a court to make an order under subsection (1).

Application of Part XXI

(5) Part XXI applies, with any modifications that the circumstances require, with respect to the procedure for an appeal under subsections (3) and (4).

2002, c. 13, s. 7; 2008, c. 18, s. 4; 2012, c. 1, s. 18; 2014, c. 31, s. 6.

Relief from forfeiture

164.3 (1) Within thirty days after an order under [subsection 164.2\(1\)](#) is made, a person who claims an interest in the thing forfeited may apply in writing to a judge for an order under subsection (4).

Hearing of application

(2) The judge shall fix a day — not less than thirty days after the application is made — for its hearing.

Notice to Attorney General

(3) At least fifteen days before the hearing, the applicant shall cause notice of the application and of the hearing day to be served on the Attorney General.

Order

(4) The judge may make an order declaring that the applicant's interest in the thing is not affected by the forfeiture and declaring the nature and extent of the interest if the judge is satisfied that the applicant

(a) was not a party to the offence; and

(b) did not acquire the thing from a person who was a party to the offence under circumstances that give rise to a reasonable inference that it was transferred for the purpose of avoiding forfeiture.

Appeal to court of appeal

(5) A person referred to in subsection (4) or the Attorney General may appeal to the court of appeal against an order made under that subsection. Part XXI applies, with any modifications that the circumstances require, with respect to the procedure for an appeal under this subsection.

Powers of Attorney General

(6) On application by a person who obtained an order under subsection (4), made after the expiration of the time allowed for an appeal against the order and, if an appeal is taken, after it has been finally disposed of, the Attorney General shall direct that

(a) the thing be returned to the person; or

(b) an amount equal to the value of the extent of the person's interest, as declared in the order, be paid to the person.

2002, c. 13, s. 7.

165 [Repealed, 2018, c. 29, s. 13]

166 [Repealed, 1994, c. 44, s. 9]

Immoral theatrical performance

167 (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

Person taking part

(2) Every one commits an offence who takes part or appears as an actor, a performer or an assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

R.S., c. C-34, s. 163.

Mailing obscene matter

168 (1) Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous.

Exceptions

(2) Subsection (1) does not apply to a person who

(a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;

(b) prints or publishes a notice or report under the direction of a court; or

(c) prints or publishes any matter

(i) in a volume or part of a genuine series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character that is intended, in good faith, for circulation among members of the legal or medical profession.

R.S., 1985, c. C-46, s. 168; 1999, c. 5, s. 2.

Punishment

169 Every one who commits an offence under [section 163](#), [165](#), [167](#) or [168](#) is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 169; 1999, c. 5, s. 3.

Parent or guardian procuring sexual activity

170 Every parent or guardian of a person under the age of 18 years who procures the person for the purpose of engaging in any sexual activity prohibited by this Act with a person other than the parent or guardian is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

R.S., 1985, c. C-46, s. 170; R.S., 1985, c. 19 (3rd Supp.), s. 5; [2005, c. 32, s. 9.1](#); [2008, c. 6, s. 54](#); [2012, c. 1, s. 19](#); [2015, c. 23, s. 8](#).

Householder permitting prohibited sexual activity

171 Every owner, occupier or manager of premises, or any other person who has control of premises or assists in the management or control of premises, who knowingly permits

a person under the age of 18 years to resort to or to be in or on the premises for the purpose of engaging in any sexual activity prohibited by this Act is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

R.S., 1985, c. C-46, s. 171; R.S., 1985, c. 19 (3rd Supp.), s. 5; 2005, c. 32, s. 9.1; 2008, c. 6, s. 54; 2012, c. 1, s. 20; 2015, c. 23, s. 9.

Making sexually explicit material available to child

171.1 (1) Every person commits an offence who transmits, makes available, distributes or sells sexually explicit material to

(a) a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person under [subsection 153\(1\)](#), [section 155](#), [163.1](#), [170](#), [171](#) or [279.011](#) or [subsection 279.02\(2\)](#), [279.03\(2\)](#), [286.1\(2\)](#), [286.2\(2\)](#) or [286.3\(2\)](#);

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under [section 151](#) or [152](#), [subsection 160\(3\)](#) or [173\(2\)](#) or [section 271](#), [272](#), [273](#) or [280](#) with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under [section 281](#) with respect to that person.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of six months; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

Presumption

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of 18, 16 or 14 years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

No defence

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least 18, 16 or 14 years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

Definition of *sexually explicit material*

(5) In subsection (1), ***sexually explicit material*** means material that is not *child sexual abuse and exploitation material*, as defined in subsection 163.1(1), and that is

- (a)** a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
 - (i)** that shows a person who is engaged in or is depicted as engaged in explicit sexual activity, or
 - (ii)** the dominant characteristic of which is the depiction, for a sexual purpose, of a person's genital organs or anal region or, if the person is female, her breasts;
- (b)** written material whose dominant characteristic is the description, for a sexual purpose, of explicit sexual activity with a person; or
- (c)** an audio recording whose dominant characteristic is the description, presentation or representation, for a sexual purpose, of explicit sexual activity with a person.

2012, c. 1, s. 21; 2014, c. 25, s. 8; 2015, c. 23, s. 10; 2024, c. 23, s. 4.

Corrupting children

172 (1) Every person who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and by doing so endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b)** an offence punishable on summary conviction.

(2) [Repealed, R.S., 1985, c. 19 (3rd Supp.), s. 6]

Definition of *child*

(3) For the purposes of this section, ***child*** means a person who is or appears to be under the age of eighteen years.

Who may institute prosecutions

(4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court.

R.S., 1985, c. C-46, s. 172; R.S., 1985, c. 19 (3rd Supp.), s. 6; 2019, c. 25, s. 57.

Luring a child

172.1 (1) Every person commits an offence who, by a means of telecommunication, communicates with

- (a)** a person who is, or who the accused believes is, under the age of 18 years, for the purpose of facilitating the commission of an offence with respect to that person

under [subsection 153\(1\)](#), [section 155](#), [163.1](#), [170](#), [171](#) or [279.011](#) or [subsection 279.02\(2\)](#), [279.03\(2\)](#), [286.1\(2\)](#), [286.2\(2\)](#) or [286.3\(2\)](#);

(b) a person who is, or who the accused believes is, under the age of 16 years, for the purpose of facilitating the commission of an offence under [section 151](#) or [152](#), [subsection 160\(3\)](#) or [173\(2\)](#) or [section 271](#), [272](#), [273](#) or [280](#) with respect to that person; or

(c) a person who is, or who the accused believes is, under the age of 14 years, for the purpose of facilitating the commission of an offence under [section 281](#) with respect to that person.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Presumption re age

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

No defence

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

[2002, c. 13, s. 8](#); [2007, c. 20, s. 1](#); [2008, c. 6, s. 14](#); [2012, c. 1, s. 22](#); [2014, c. 25, s. 9](#); [2015, c. 23, s. 11](#).

Disorderly Conduct

Agreement or arrangement — sexual offence against child

172.2 (1) Every person commits an offence who, by a means of telecommunication, agrees with a person, or makes an arrangement with a person, to commit an offence

(a) under [subsection 153\(1\)](#), [section 155](#), [163.1](#), [170](#), [171](#) or [279.011](#) or [subsection 279.02\(2\)](#), [279.03\(2\)](#), [286.1\(2\)](#), [286.2\(2\)](#) or [286.3\(2\)](#) with respect to another person who is, or who the accused believes is, under the age of 18 years;

(b) under [section 151](#) or [152](#), [subsection 160\(3\)](#) or [173\(2\)](#) or [section 271](#), [272](#), [273](#) or [280](#) with respect to another person who is, or who the accused believes is, under the age of 16 years; or

(c) under [section 281](#) with respect to another person who is, or who the accused believes is, under the age of 14 years.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Presumption

(3) Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of 18, 16 or 14 years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.

No defence

(4) It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least 18, 16 or 14 years of age, as the case may be, unless the accused took reasonable steps to ascertain the age of the person.

No defence

(5) It is not a defence to a charge under paragraph (1)(a), (b) or (c)

(a) that the person with whom the accused agreed or made an arrangement was a peace officer or a person acting under the direction of a peace officer; or

(b) that, if the person with whom the accused agreed or made an arrangement was a peace officer or a person acting under the direction of a peace officer, the person referred to in paragraph (1)(a), (b) or (c) did not exist.

[2012, c. 1, s. 23](#); [2014, c. 25, s. 10](#); [2015, c. 23, s. 12](#).

Indecent acts

173 (1) Everyone who wilfully does an indecent act in a public place in the presence of one or more persons, or in any place with intent to insult or offend any person,

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

Exposure

(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of 16 years

(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years and to a minimum punishment of imprisonment for a term of 90 days; or

(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months and to a minimum punishment of imprisonment for a term of 30 days.

R.S., 1985, c. C-46, s. 173; R.S., 1985, c. 19 (3rd Supp.), s. 7; 2008, c. 6, s. 54; 2010, c. 17, s. 2; 2012, c. 1, s. 23; 2019, c. 25, s. 58.

Nudity

174 (1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

Nude

(2) For the purposes of this section, a person is nude who is so clad as to offend against public decency or order.

Consent of Attorney General

(3) No proceedings shall be commenced under this section without the consent of the Attorney General.

R.S., c. C-34, s. 170.

Causing disturbance, indecent exhibition, loitering, etc.

175 (1) Every one who

(a) not being in a dwelling-house, causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

(ii) by being drunk, or

(iii) by impeding or molesting other persons,

(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are in that place, or

(d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling-houses comprised in the building or structure have access as of right or by invitation, express or implied,

is guilty of an offence punishable on summary conviction.

Evidence of peace officer

(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a) or (d) or an obstruction described in paragraph (1)(c) was caused or occurred.

R.S., 1985, c. C-46, s. 175; 1997, c. 18, s. 6.

Obstructing or violence to or arrest of officiating clergyman

176 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent an officiant from celebrating a religious or spiritual service or performing any other function in connection with their calling, or

(b) knowing that an officiant is about to perform, is on their way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)

(i) assaults or offers any violence to them, or

(ii) arrests them on a civil process, or under the pretence of executing a civil process.

Disturbing religious worship or certain meetings

(2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.

Idem

(3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 176; [2018, c. 29, s. 13.1](#); [2019, c. 25, s. 59](#).

Trespassing at night

177 Every person who, without lawful excuse, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 177; [2018, c. 29, s. 14](#).

178 [Repealed, [2018, c. 29, s. 14](#)]

179 [Repealed, [2019, c. 25, s. 60](#)]

Nuisances

Common nuisance

180 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who commits a common nuisance and by doing so

- (a) endangers the lives, safety or health of the public, or
- (b) causes physical injury to any person.

Definition

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

- (a) endangers the lives, safety, health, property or comfort of the public; or
- (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

R.S., 1985, c. C-46, s. 180; [2019, c. 25, s. 61](#).

181 [Repealed, [2019, c. 25, s. 62](#)]

Dead body

182 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

- (a) neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains, or
- (b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not.

R.S., 1985, c. C-46, s. 182; [2019, c. 25, s. 63](#).

PART VI

Invasion of Privacy

Definitions

Definitions

183 In this Part,

authorization means an authorization to intercept a private communication given under [subsection 184.2\(3\)](#), [section 186](#) or [subsection 188\(2\)](#); (*autorisation*)

electro-magnetic, acoustic, mechanical or other device means any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing; (*dispositif électromagnétique, acoustique, mécanique ou autre*)

intercept includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof; (*intercepter*)

offence means an offence contrary to, any conspiracy or attempt to commit or being an accessory after the fact in relation to an offence contrary to, or any counselling in relation to an offence contrary to

(a) any of the following provisions of this Act, namely,

- (i) [section 47](#) (high treason),
- (ii) [section 51](#) (intimidating Parliament or a legislature),
- (iii) [section 52](#) (sabotage),
 - (iii.01) [section 52.1](#) (sabotage — essential infrastructure),
 - (iii.02) [section 52.2](#) (sabotage — device),
 - (iii.1) [section 56.1](#) (identity documents),
- (iv) [section 57](#) (forgery, etc.),
- (v) [section 61](#) (sedition),
- (vi) [section 76](#) (hijacking),
- (vii) [section 77](#) (endangering safety of aircraft or airport),
- (viii) [section 78](#) (offensive weapons, etc., on aircraft),
- (ix) [section 78.1](#) (offences against maritime navigation or fixed platforms),
- (x) [section 80](#) (breach of duty),
- (xi) [section 81](#) (using explosives),
- (xii) [section 82](#) (possessing explosives),

(xii.01) [section 82.3](#) (possession, etc., of nuclear material, radioactive material or device),

(xii.02) [section 82.4](#) (use or alteration of nuclear material, radioactive material or device),

(xii.03) [section 82.5](#) (commission of indictable offence to obtain nuclear material, etc.),

(xii.04) [section 82.6](#) (threats),

(xii.1) [section 83.02](#) (providing or collecting property for certain activities),

(xii.2) [subsection 83.03\(1\)](#) (providing, making available, etc., property or services for terrorist purposes),

(xii.21) [subsection 83.03\(2\)](#) (providing, making available, etc., property or services — use by terrorist group),

(xii.3) [section 83.04](#) (using or possessing property for terrorist purposes),

(xii.4) [section 83.18](#) (participation in activity of terrorist group),

(xii.41) [section 83.181](#) (leaving Canada to participate in activity of terrorist group),

(xii.5) [section 83.19](#) (facilitating terrorist activity),

(xii.51) [section 83.191](#) (leaving Canada to facilitate terrorist activity),

(xii.6) [section 83.2](#) (commission of offence for terrorist group),

(xii.61) [section 83.201](#) (leaving Canada to commit offence for terrorist group),

(xii.62) [section 83.202](#) (leaving Canada to commit offence that is terrorist activity),

(xii.7) [section 83.21](#) (instructing to carry out activity for terrorist group),

(xii.8) [section 83.22](#) (instructing to carry out terrorist activity),

(xii.81) [section 83.221](#) (counselling commission of terrorism offence),

(xii.9) [section 83.23](#) (harbouring or concealing),

(xii.91) [section 83.231](#) (hoax — terrorist activity),

(xii.92) [section 92](#) (possession of firearm knowing its possession is unauthorized),

(xii.93) [section 95](#) (possession of prohibited or restricted firearm with ammunition),

(xiii) [section 96](#) (possession of weapon obtained by commission of offence),

(xiii.1) [section 98](#) (breaking and entering to steal firearm),

(xiii.2) [section 98.1](#) (robbery to steal firearm),

(xiv) [section 99](#) (weapons trafficking),

(xv) [section 100](#) (possession for purpose of weapons trafficking),

(xvi) [section 102](#) (making automatic firearm),

(xvi.1) [section 102.1](#) (possession of computer data),

(xvii) [section 103](#) (importing or exporting knowing it is unauthorized),

(xviii) [section 104](#) (unauthorized importing or exporting),

(xviii.1) [section 104.1](#) (altering cartridge magazine),

(xix) [section 119](#) (bribery, etc.),

(xx) [section 120](#) (bribery, etc.),

(xxi) [section 121](#) (fraud on government),

(xxii) [section 122](#) (breach of trust),

(xxiii) [section 123](#) (municipal corruption),

(xxiv) [section 132](#) (perjury),

(xxv) [section 139](#) (obstructing justice),

(xxvi) [section 144](#) (prison breach),

(xxvii) [subsection 145\(1\)](#) (escape, etc.),

(xxvii.1) [section 162](#) (voyeurism),

(xxvii.2) [section 162.1](#) (intimate image),

(xxviii) [subsection 163\(1\)](#) (obscene materials),

(xxix) [section 163.1](#) (child sexual abuse and exploitation material),

(xxix.1) [section 170](#) (parent or guardian procuring sexual activity),

(xxix.2) [section 171](#) (householder permitting sexual activity),

(xxix.3) [section 171.1](#) (making sexually explicit material available to child),

(xxix.4) [section 172.1](#) (luring a child),

(xxix.5) [section 172.2](#) (agreement or arrangement — sexual offence against child),

(xxx) [section 184](#) (unlawful interception),

(xxxi) [section 191](#) (possession of intercepting device),

(xxxii) [subsection 201\(1\)](#) (keeping gaming or betting house),

(xxxiii) [paragraph 202\(1\)\(e\)](#) (pool-selling, etc.),

(xxxiv) [\[Repealed, 2019, c. 25, s. 63.1\]](#)

(xxxv) to (xxxviii) [\[Repealed, 2014, c. 25, s. 11\]](#)

(xxxix) [section 235](#) (murder),

(xxxix.1) [section 244](#) (discharging firearm with intent),

(xxxix.2) [section 244.2](#) (discharging firearm — recklessness),

(xl) [section 264.1](#) (uttering threats),

(xli) [section 267](#) (assault with a weapon or causing bodily harm),

(xlii) [section 268](#) (aggravated assault),

(xliii) [section 269](#) (unlawfully causing bodily harm),

(xliii.1) [section 270.01](#) (assaulting peace officer with weapon or causing bodily harm),

(xliii.2) [section 270.02](#) (aggravated assault of peace officer),

(xliv) [section 271](#) (sexual assault),

(xlv) [section 272](#) (sexual assault with a weapon, threats to a third party or causing bodily harm),

(xlvi) [section 273](#) (aggravated sexual assault),

(xlvi.1) [section 273.3](#) (removal of child from Canada),

(xlvii) [section 279](#) (kidnapping),

(xlvii.1) [section 279.01](#) (trafficking in persons),

(xlvii.11) [section 279.011](#) (trafficking of a person under the age of eighteen years),

(xlvii.2) [section 279.02](#) (material benefit),

(xlvii.3) [section 279.03](#) (withholding or destroying documents),

(xlviii) [section 279.1](#) (hostage taking),

(xlix) [section 280](#) (abduction of person under sixteen),

(l) [section 281](#) (abduction of person under fourteen),

(li) [section 282](#) (abduction in contravention of custody order or parenting order),

(lii) [section 283](#) (abduction),

(lii.1) 286.1 (obtaining sexual services for consideration),

(lii.2) 286.2 (material benefit from sexual services),

(lii.3) 286.3 (procuring),

(lii.4) 286.4 (advertising sexual services),

(liii) [section 318](#) (advocating genocide),

(liii.1) [section 320.102](#) (conversion therapy),

(liv) [section 327](#) (possession of device to obtain telecommunication facility or service),

(liv.1) [subsection 333.1\(1\)](#) (motor vehicle theft),

(liv.2) [subsection 333.1\(3\)](#) (motor vehicle theft when violence used, threatened or attempted),

(liv.3) [subsection 333.1\(4\)](#) (motor vehicle theft for criminal organization),

(lv) [section 334](#) (theft),

(lvi) [section 342](#) (theft, forgery, etc., of credit card),

(lvi.1) [section 342.01](#) (instruments for copying credit card data or forging or falsifying credit cards),

(lvii) [section 342.1](#) (unauthorized use of computer),

(lviii) [section 342.2](#) (possession of device to obtain unauthorized use of computer system or to commit mischief),

(lix) [section 344](#) (robbery),

(lx) [section 346](#) (extortion),

(lxi) [section 347](#) (criminal interest rate),

(lxii) [section 348](#) (breaking and entering),

(lxii.1) [section 353.1](#) (tampering with vehicle identification number),

(lxiii) [section 354](#) (possession of property obtained by crime),

(lxiii.1) [section 355.2](#) (trafficking in property obtained by crime),

(lxiii.2) [section 355.4](#) (possession of property obtained by crime — trafficking),

(lxiv) [section 356](#) (theft from mail),

(lxv) [section 367](#) (forgery),

(lxvi) [section 368](#) (use, trafficking or possession of forged document),

(lxvi.1) [section 368.1](#) (forgery instruments),

(lxvii) [section 372](#) (false information),

(lxviii) [section 380](#) (fraud),

(lix) [section 381](#) (using mails to defraud),

(lxx) [section 382](#) (fraudulent manipulation of stock exchange transactions),

(lxx.01) [section 391](#) (trade secret),

(lxx.1) [subsection 402.2\(1\)](#) (identity theft),

(lxx.2) [subsection 402.2\(2\)](#) (trafficking in identity information),

(lxx.3) [section 403](#) (identity fraud),

(lxxi) [section 423.1](#) (intimidation of justice system participant or journalist),

(lxxi.1) [section 423.2](#) (intimidation — health services),

(lxxii) [section 424](#) (threat to commit offences against internationally protected person),

(lxxii.1) [section 424.1](#) (threat against United Nations or associated personnel),

(lxxiii) [section 426](#) (secret commissions),

(lxxiv) [section 430](#) (mischief),

(lxxv) [section 431](#) (attack on premises, residence or transport of internationally protected person),

(lxxv.1) [section 431.1](#) (attack on premises, accommodation or transport of United Nations or associated personnel),

(lxxv.2) [subsection 431.2\(2\)](#) (explosive or other lethal device),

(lxxvi) [section 433](#) (arson),

(lxxvii) [section 434](#) (arson),

(lxxviii) [section 434.1](#) (arson),

(lxxix) [section 435](#) (arson for fraudulent purpose),

(lxxx) [section 449](#) (making counterfeit money),

(lxxxi) [section 450](#) (possession, etc., of counterfeit money),

(lxxxii) [section 452](#) (uttering, etc., counterfeit money),

(lxxxiii) [subsection 462.31\(1\)](#) (laundering proceeds of crime),

(lxxxiii.1) [subsection 462.31\(2.1\)](#) (laundering proceeds of crime for criminal organization),

(lxxxiv) [subsection 462.33\(11\)](#) (acting in contravention of restraint order),

(lxxxv) [section 467.11](#) (participation in criminal organization),

(lxxxv.1) [section 467.111](#) (recruitment of members — criminal organization),

(lxxxvi) [section 467.12](#) (commission of offence for criminal organization), or

(lxxxvii) [section 467.13](#) (instructing commission of offence for criminal organization),

- (b) [section 198](#) (fraudulent bankruptcy) of the *Bankruptcy and Insolvency Act*,
- (b.1) any of the following provisions of the *Biological and Toxin Weapons Convention Implementation Act*, namely,
- (i) [section 6](#) (production, etc., of biological agents and means of delivery), or
 - (ii) [section 7](#) (unauthorized production, etc., of biological agents),
- (b.2) any of the following provisions of the *Cannabis Act*, namely,

- (i) [section 9](#) (distribution and possession for purpose of distributing),
 - (ii) [section 10](#) (selling and possession for purpose of selling),
 - (iii) [section 11](#) (importing and exporting and possession for purpose of exporting),
 - (iv) [section 12](#) (production),
 - (v) [section 13](#) (possession, etc., for use in production or distribution of illicit cannabis), or
 - (vi) [section 14](#) (use of young person),
- (c) any of the following provisions of the [Competition Act](#), namely,
- (i) [section 45](#) (conspiracies, agreements or arrangements between competitors),
 - (ii) [section 47](#) (bid-rigging), or
 - (iii) [subsection 52.1\(3\)](#) (deceptive telemarketing),
- (d) any of the following provisions of the [Controlled Drugs and Substances Act](#), namely,
- (i) [section 5](#) (trafficking),
 - (ii) [section 6](#) (importing and exporting),
 - (iii) [section 7](#) (production), or
 - (iv) [section 7.1](#) (possession, sale, etc., for use in production or trafficking),
- (d.1) [section 42](#) (offences related to infringement of copyright) of the [Copyright Act](#),
- (e) [section 3](#) (bribing a foreign public official) of the [Corruption of Foreign Public Officials Act](#),
- (e.1) the [Crimes Against Humanity and War Crimes Act](#),
- (f) either of the following provisions of the [Customs Act](#), namely,
- (i) [section 153](#) (false statements), or
 - (ii) [section 159](#) (smuggling),
- (g) any of the following provisions of the [Excise Act, 2001](#), namely,
- (i) [section 214](#) (unlawful production, sale, etc., of tobacco, alcohol, cannabis or vaping products),
 - (ii) [section 216](#) (unlawful possession of tobacco product),
 - (iii) [section 218](#) (unlawful possession, sale, etc., of alcohol),
 - (iii.1) [section 218.1](#) (unlawful possession, sale, etc., of unstamped cannabis),
 - (iii.2) [section 218.2](#) (unlawful possession, sale, etc., of unstamped vaping products),
 - (iv) [section 219](#) (falsifying or destroying records),

- (v) [section 230](#) (possession of property obtained by excise offences), or
- (vi) [section 231](#) (laundering proceeds of excise offences),
- (h) any of the following provisions of the [Export and Import Permits Act](#), namely,
 - (i) [section 13](#) (export or attempt to export),
 - (ii) [section 14](#) (import or attempt to import),
 - (ii.1) [section 14.2](#) (broker or attempt to broker),
 - (iii) [section 15](#) (diversion, etc.),
 - (iv) [section 16](#) (no transfer of permits),
 - (v) [section 17](#) (false information), or
 - (vi) [section 18](#) (aiding and abetting),
- (i) any of the following provisions of the [Immigration and Refugee Protection Act](#), namely,
 - (i) [section 117](#) (organizing entry into Canada),
 - (ii) [section 118](#) (trafficking in persons),
 - (iii) [section 119](#) (disembarking persons at sea),
 - (iv) [section 122](#) (offences related to documents),
 - (v) [section 126](#) (counselling misrepresentation), or
 - (vi) [section 129](#) (offences relating to officers),
- (j) any offence under the [Foreign Interference and Security of Information Act](#), or
- (k) [section 51.01](#) (offences related to goods, labels, packaging or services) of the [Trademarks Act](#),

and includes any other offence that there are reasonable grounds to believe is a criminal organization offence or any other offence that there are reasonable grounds to believe is an offence described in paragraph (b) or (c) of the definition *terrorism offence* in [section 2](#); (*infraction*)

police officer means any officer, constable or other person employed for the preservation and maintenance of the public peace; (*policier*)

private communication means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it; (*communication privée*)

public switched telephone network means a telecommunication facility the primary purpose of which is to provide a land line-based telephone service to the public for compensation; (*réseau téléphonique public commuté*)

radio-based telephone communication means any radiocommunication within the meaning of the *Radiocommunication Act* that is made over apparatus that is used primarily for connection to a public switched telephone network; (*communication radiotéléphonique*)

sell includes offer for sale, expose for sale, have in possession for sale or distribute or advertise for sale; (*vendre*)

solicitor means, in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor. (*avocat*)

R.S., 1985, c. C-46, s. 183; R.S., 1985, c. 27 (1st Supp.), ss. 7, 23, c. 1 (2nd Supp.), s. 213, c. 1 (4th Supp.), s. 13, c. 29 (4th Supp.), s. 17, c. 42 (4th Supp.), s. 1; 1991, c. 28, s. 12; 1992, c. 27, s. 90; 1993, c. 7, s. 5, c. 25, s. 94, c. 40, s. 1, c. 46, s. 4; 1995, c. 39, s. 140; 1996, c. 19, s. 66; 1997, c. 18, s. 7, c. 23, s. 3; 1998, c. 34, s. 8; 1999, c. 2, s. 47, c. 5, s. 4; 2000, c. 24, s. 43; 2001, c. 32, s. 4, c. 41, ss. 5, 31, 133; 2002, c. 22, s. 409; 2004, c. 15, s. 108; 2005, c. 32, s. 10, c. 43, s. 1; 2008, c. 6, s. 15; 2009, c. 2, s. 442, c. 22, s. 4, c. 28, s. 3; 2010, c. 3, s. 1, c. 14, s. 2; 2012, c. 1, s. 24; 2013, c. 8, s. 2, c. 9, s. 14, c. 13, s. 7; 2014, c. 17, s. 2, c. 20, s. 366(E), c. 25, s. 11, c. 31, s. 7, c. 32, s. 59; 2015, c. 20, s. 19; 2017, c. 7, s. 56; 2018, c. 12, s. 114, c. 16, s. 210, c. 26, s. 23, c. 29, s. 15; 2019, c. 13, s. 150; 2019, c. 16, s. 122; 2019, c. 25, s. 63.1; 2020, c. 1, s. 36; 2021, c. 24, s. 3; 2021, c. 27, s. 1; 2022, c. 10, s. 81; 2022, c. 17, s. 5; 2023, c. 14, s. 2; 2023, c. 32, s. 13; 2024, c. 16, s. 57; 2024, c. 16, s. 62; 2024, c. 17, s. 368; 2024, c. 23, s. 5.

Consent to interception

183.1 Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of those persons is sufficient consent for the purposes of any provision of this Part.

1993, c. 40, s. 2.

Interception of Communications

Interception

184 (1) Every person who, by means of any electro-magnetic, acoustic, mechanical or other device, knowingly intercepts a private communication is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Saving provision

(2) Subsection (1) does not apply to

(a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to

receive it;

(b) a person who intercepts a private communication in accordance with an authorization or pursuant to [section 184.4](#) or any person who in good faith aids in any way another person who the aiding person believes on reasonable grounds is acting with an authorization or pursuant to section 184.4;

(c) a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,

(i) if the interception is necessary for the purpose of providing the service,

(ii) in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or

(iii) if the interception is necessary to protect the person's rights or property directly related to providing the service;

(d) an officer or servant of Her Majesty in right of Canada who engages in radio frequency spectrum management, in respect of a private communication intercepted by that officer or servant for the purpose of identifying, isolating or preventing an unauthorized or interfering use of a frequency or of a transmission; or

(e) a person, or any person acting on their behalf, in possession or control of a computer system, as defined in [subsection 342.1\(2\)](#), who intercepts a private communication originating from, directed to or transmitting through that computer system, if the interception is reasonably necessary for

(i) managing the quality of service of the computer system as it relates to performance factors such as the responsiveness and capacity of the system as well as the integrity and availability of the system and data, or

(ii) protecting the computer system against any act that would be an offence under [subsection 342.1\(1\)](#) or [430\(1.1\)](#).

Use or retention

(3) A private communication intercepted by a person referred to in paragraph (2)(e) can be used or retained only if

(a) it is essential to identify, isolate or prevent harm to the computer system; or

(b) it is to be disclosed in circumstances referred to in [subsection 193\(2\)](#).

R.S., 1985, c. C-46, s. 184; 1993, c. 40, s. 3; [2004, c. 12, s. 4](#); [2019, c. 25, s. 64](#).

Interception to prevent bodily harm

184.1 (1) An agent of the state may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if

(a) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception;

- (b) the agent of the state believes on reasonable grounds that there is a risk of bodily harm to the person who consented to the interception; and
- (c) the purpose of the interception is to prevent the bodily harm.

Admissibility of intercepted communication

(2) The contents of a private communication that is obtained from an interception pursuant to subsection (1) are inadmissible as evidence except for the purposes of proceedings in which actual, attempted or threatened bodily harm is alleged, including proceedings in respect of an application for an authorization under this Part or in respect of a search warrant or a warrant for the arrest of any person.

Destruction of recordings and transcripts

(3) The agent of the state who intercepts a private communication pursuant to subsection (1) shall, as soon as is practicable in the circumstances, destroy any recording of the private communication that is obtained from an interception pursuant to subsection (1), any full or partial transcript of the recording and any notes made by that agent of the private communication if nothing in the private communication suggests that bodily harm, attempted bodily harm or threatened bodily harm has occurred or is likely to occur.

Definition of *agent of the state*

(4) For the purposes of this section, ***agent of the state*** means

- (a) a peace officer; and
- (b) a person acting under the authority of, or in cooperation with, a peace officer.

1993, c. 40, s. 4.

Interception with consent

184.2 (1) A person may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication where either the originator of the private communication or the person intended by the originator to receive it has consented to the interception and an authorization has been obtained pursuant to subsection (3).

Application for authorization

(2) An application for an authorization under this section shall be made by a peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, *ex parte* and in writing to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#), and shall be accompanied by an affidavit, which may be sworn on the information and belief of that peace officer or public officer or of any other peace officer or public officer, deposing to the following matters:

- (a) that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
- (b) the particulars of the offence;
- (c) the name of the person who has consented to the interception;
- (d) the period for which the authorization is requested; and
- (e) in the case of an application for an authorization where an authorization has previously been granted under this section or [section 186](#), the particulars of the authorization.

Judge to be satisfied

(3) An authorization may be given under this section if the judge to whom the application is made is satisfied that

- (a) there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
- (b) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and
- (c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

Content and limitation of authorization

(4) An authorization given under this section shall

- (a) state the offence in respect of which private communications may be intercepted;
- (b) state the type of private communication that may be intercepted;
- (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
- (d) contain the terms and conditions that the judge considers advisable in the public interest; and
- (e) be valid for the period, not exceeding sixty days, set out therein.

Related warrant or order

(5) A judge who gives an authorization under this section may, at the same time, issue a warrant or make an order under any of [sections 487, 487.01, 487.014 to 487.018, 487.02, 492.1 and 492.2](#) if the judge is of the opinion that the requested warrant or order is related to the execution of the authorization.

1993, c. 40, s. 4; [2014, c. 31, s. 8](#).

Application — telecommunication producing writing

184.3 (1) A person who is permitted to make one of the following applications may submit their application by a means of telecommunication that produces a writing:

- (a) an application for an authorization under [subsection 184.2\(2\)](#), [185\(1\)](#), [186\(5.2\)](#) or [188\(1\)](#);
- (b) an application for an extension under [subsection 185\(2\)](#), [196\(2\)](#) or [196.1\(2\)](#);
- (c) an application to renew an authorization under [subsection 186\(6\)](#).

Sealing

(2) A judge who receives an application submitted by a means of telecommunication that produces a writing shall, immediately on the determination of the application, cause it to be placed and sealed in the packet referred to in [subsection 187\(1\)](#).

Application — telecommunication not producing writing

(3) Despite anything in [section 184.2](#) or [188](#), a person who is permitted to make an application for an authorization under [subsection 184.2\(2\)](#) or [188\(1\)](#) may submit their application by a means of telecommunication that does not produce a writing if it would be impracticable in the circumstances to submit the application by a means of telecommunication that produces a writing.

Statement of circumstances

(4) An application submitted by a means of telecommunication that does not produce a writing shall include a statement of the circumstances that make it impracticable to submit the application by a means of telecommunication that produces a writing.

Oath

(5) Any oath required in connection with an application submitted by a means of telecommunication that does not produce a writing may be administered by a means of telecommunication.

Recording and sealing

(6) A judge who receives an application submitted by a means of telecommunication that does not produce a writing shall record the application verbatim, in writing or otherwise, and shall, immediately on the determination of the application, cause the writing or recording to be placed and sealed in the packet referred to in [subsection 187\(1\)](#), and a recording sealed in a packet shall be treated as if it were a document for the purposes of [section 187](#).

Limitation

(7) If an application is submitted by a means of telecommunication that does not produce a writing, the judge shall not give the authorization unless he or she is satisfied that the application discloses reasonable grounds for dispensing with its submission by a means of telecommunication that produces a writing.

Giving authorization, etc.

(8) A judge who gives the authorization, extension or renewal may do so by a means of telecommunication, in which case

- (a)** the judge shall complete and sign the document in question, noting on its face the time and date;
- (b)** if the means of telecommunication produces a writing, the judge shall transmit a copy of the document to the applicant by that means;
- (c)** if the means of telecommunication does not produce a writing, the applicant shall, as directed by the judge, transcribe the document, noting on its face the name of the judge as well as the time and date; and
- (d)** the judge shall, immediately after the authorization, extension or renewal is given, cause the document to be placed and sealed in the packet referred to in [subsection 187\(1\)](#).

1993, c. 40, s. 4; [2022, c. 17, s. 6](#).

Immediate interception — imminent harm

184.4 A police officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if the police officer has reasonable grounds to believe that

- (a)** the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of this Part;
- (b)** the interception is immediately necessary to prevent an offence that would cause serious harm to any person or to property; and
- (c)** either the originator of the private communication or the person intended by the originator to receive it is the person who would commit the offence that is likely to cause the harm or is the victim, or intended victim, of the harm.

1993, c. 40, s. 4; [2013, c. 8, s. 3](#).

Interception of radio-based telephone communications

184.5 (1) Every person who intercepts, by means of any electro-magnetic, acoustic, mechanical or other device, maliciously or for gain, a radio-based telephone communication, if the originator of the communication or the person intended by the originator of the communication to receive it is in Canada, is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction.

Other provisions to apply

(2) [Section 183.1](#), [subsection 184\(2\)](#) and [sections 184.1 to 190](#) and [194 to 196](#) apply, with such modifications as the circumstances require, to interceptions of radio-based

telephone communications referred to in subsection (1).

1993, c. 40, s. 4; 2019, c. 25, s. 65.

One application for authorization sufficient

184.6 For greater certainty, an application for an authorization under this Part may be made with respect to both private communications and radio-based telephone communications at the same time.

1993, c. 40, s. 4.

Application for authorization

185 (1) An application for an authorization to be given under [section 186](#) shall be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#) and shall be signed by the Attorney General of the province in which the application is made or the Minister of Public Safety and Emergency Preparedness or an agent specially designated in writing for the purposes of this section by

(a) the Minister personally or the Deputy Minister of Public Safety and Emergency Preparedness personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province personally or the Deputy Attorney General of a province personally, in any other case,

and shall be accompanied by an affidavit, which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters:

(c) the facts relied on to justify the belief that an authorization should be given together with particulars of the offence,

(d) the type of private communication proposed to be intercepted,

(e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used,

(f) the number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit pursuant to paragraph (e) and on which the application was withdrawn or no authorization was given, the date on which each application was made and the name of the judge to whom each application was made,

(g) the period for which the authorization is requested, and

(h) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it

would be impractical to carry out the investigation of the offence using only other investigative procedures.

Exception for criminal organizations and terrorist groups

(1.1) Notwithstanding paragraph (1)(h), that paragraph does not apply where the application for an authorization is in relation to

- (a)** an offence under [section 52](#), [52.1](#), [52.2](#), [467.11](#), [467.111](#), [467.12](#) or [467.13](#);
- (b)** an offence committed for the benefit of, at the direction of or in association with a criminal organization;
- (b.1)** an offence under [subsection 20\(1\)](#), [20.1\(1\)](#), [20.2\(1\)](#), [20.3\(1\)](#) or [20.4\(1\)](#) of the *Foreign Interference and Security of Information Act*; or
- (c)** a terrorism offence.

Extension of period for notification

(2) An application for an authorization may be accompanied by an application, personally signed by the Attorney General of the province in which the application for the authorization is made or the Minister of Public Safety and Emergency Preparedness if the application for the authorization is made by him or on his behalf, to substitute for the period mentioned in [subsection 196\(1\)](#) such longer period not exceeding three years as is set out in the application.

Where extension to be granted

(3) Where an application for an authorization is accompanied by an application referred to in subsection (2), the judge to whom the applications are made shall first consider the application referred to in subsection (2) and where, on the basis of the affidavit in support of the application for the authorization and any other affidavit evidence submitted in support of the application referred to in subsection (2), the judge is of the opinion that the interests of justice warrant the granting of the application, he shall fix a period, not exceeding three years, in substitution for the period mentioned in [subsection 196\(1\)](#).

If extension not granted

(4) If the judge to whom an application for an authorization and an application referred to in subsection (2) are made refuses to fix a period in substitution for the period mentioned in [subsection 196\(1\)](#) or if the judge fixes a shorter period than the one set out in the application referred to in subsection (2), the person submitting the application for the authorization may withdraw that application and, if it is withdrawn, the judge shall not proceed to consider it or to give the authorization and shall destroy, or return to that person, both applications and all other material pertaining to them.

R.S., 1985, c. C-46, s. 185; 1993, c. 40, s. 5; 1997, c. 18, s. 8, c. 23, s. 4; [2001, c. 32, s. 5](#), c. 41, ss. 6, 133; [2005, c. 10, ss. 22, 34](#); [2014, c. 17, s. 3](#); [2022, c. 17, s. 7](#); [2024, c. 16, s. 63](#).

Judge to be satisfied

186 (1) An authorization under this section may be given if the judge to whom the application is made is satisfied

- (a) that it would be in the best interests of the administration of justice to do so; and
- (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Exception for criminal organizations and terrorism offences

(1.1) Notwithstanding paragraph (1)(b), that paragraph does not apply where the judge is satisfied that the application for an authorization is in relation to

- (a) an offence under [section 52](#), [52.1](#), [52.2](#), [467.11](#), [467.111](#), [467.12](#) or [467.13](#);
- (b) an offence committed for the benefit of, at the direction of or in association with a criminal organization;
- (b.1) an offence under [subsection 20\(1\)](#), [20.1\(1\)](#), [20.2\(1\)](#), [20.3\(1\)](#) or [20.4\(1\)](#) of the *Foreign Interference and Security of Information Act*; or
- (c) a terrorism offence.

Where authorization not to be given

(2) No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.

Terms and conditions

(3) Where an authorization is given in relation to the interception of private communications at a place described in subsection (2), the judge by whom the authorization is given shall include therein such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients.

Content and limitation of authorization

(4) An authorization shall

- (a) state the offence in respect of which private communications may be intercepted;
- (b) state the type of private communication that may be intercepted;
- (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be

intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;

(d) contain such terms and conditions as the judge considers advisable in the public interest; and

(e) be valid for the period, not exceeding sixty days, set out therein.

Persons designated

(5) The Minister of Public Safety and Emergency Preparedness or the Attorney General, as the case may be, may designate a person or persons who may intercept private communications under authorizations.

Installation and removal of device

(5.1) For greater certainty, an authorization that permits interception by means of an electro-magnetic, acoustic, mechanical or other device includes the authority to install, maintain or remove the device covertly.

Removal after expiry of authorization

(5.2) On an *ex parte* application, in writing, supported by affidavit, the judge who gave an authorization referred to in subsection (5.1) or any other judge having jurisdiction to give such an authorization may give a further authorization for the covert removal of the electro-magnetic, acoustic, mechanical or other device after the expiry of the original authorization

(a) under any terms or conditions that the judge considers advisable in the public interest; and

(b) during any specified period of not more than sixty days.

Renewal of authorization

(6) Renewals of an authorization may be given by a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#) on receipt by him or her of an *ex parte* application in writing signed by the Attorney General of the province in which the application is made or the Minister of Public Safety and Emergency Preparedness — or an agent specially designated in writing for the purposes of [section 185](#) by the Minister or the Attorney General, as the case may be — accompanied by an affidavit of a peace officer or public officer deposing to the following matters:

(a) the reason and period for which the renewal is required,

(b) full particulars, together with times and dates, when interceptions, if any, were made or attempted under the authorization, and any information that has been obtained by any interception, and

(c) the number of instances, if any, on which, to the knowledge and belief of the deponent, an application has been made under this subsection in relation to the same authorization and on which the application was withdrawn or no renewal was given,

the date on which each application was made and the name of the judge to whom each application was made,

and supported by such other information as the judge may require.

Renewal

(7) A renewal of an authorization may be given if the judge to whom the application is made is satisfied that any of the circumstances described in subsection (1) still obtain, but no renewal shall be for a period exceeding sixty days.

Related warrant or order

(8) A judge who gives an authorization under this section may, at the same time, issue a warrant or make an order under any of [sections 487, 487.01, 487.014 to 487.018, 487.02, 492.1 and 492.2](#) if the judge is of the opinion that the requested warrant or order is related to the execution of the authorization.

R.S., 1985, c. C-46, s. 186; 1993, c. 40, s. 6; 1997, c. 23, s. 5; 1999, c. 5, s. 5; [2001, c. 32, s. 6](#), c. 41, ss. 6.1, 133; [2005, c. 10, ss. 23, 34](#); [2014, c. 17, s. 4](#), c. 31, s. 9; [2024, c. 16, s. 64](#).

Time limitation in relation to criminal organizations and terrorism offences

186.1 Notwithstanding [paragraphs 184.2\(4\)\(e\) and 186\(4\)\(e\)](#) and [subsection 186\(7\)](#), an authorization or any renewal of an authorization may be valid for one or more periods specified in the authorization exceeding sixty days, each not exceeding one year, where the authorization is in relation to

- (a)** an offence under [section 52, 52.1, 52.2, 467.11, 467.111, 467.12 or 467.13](#);
- (b)** an offence committed for the benefit of, at the direction of or in association with a criminal organization;
- (b.1)** an offence under [subsection 20\(1\), 20.1\(1\), 20.2\(1\), 20.3\(1\) or 20.4\(1\)](#) of the *Foreign Interference and Security of Information Act*; or
- (c)** a terrorism offence.

1997, c. 23, s. 6; [2001, c. 32, s. 7](#), c. 41, ss. 7, 133; [2014, c. 17, s. 5](#); [2024, c. 16, s. 65](#).

Manner in which application to be kept secret

187 (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).

Exception

(1.1) An authorization given under this Part need not be placed in the packet except if, under [subsection 184.3\(8\)](#), the original authorization is in the hands of the judge, in

which case that judge must place it in the packet and the copy remains with the applicant.

Opening for further applications

(1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.

Opening on order of judge

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#) may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.

Opening on order of trial judge

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

- (a)** any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and
- (b)** the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

Order for destruction of documents

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

Order of judge

(2) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to [section 185](#) or [subsection 186\(6\)](#) or [196\(2\)](#) may only be made after the Attorney General or the Minister of Public Safety and Emergency Preparedness by whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.

Order of judge

(3) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made under [subsection 184.2\(2\)](#) may only be made after the Attorney General has been given an opportunity to be heard.

Editing of copies

(4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could

- (a)** compromise the identity of any confidential informant;
- (b)** compromise the nature and extent of ongoing investigations;
- (c)** endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
- (d)** prejudice the interests of innocent persons.

Accused to be provided with copies

(5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4), the accused shall be provided with an edited copy of the document.

Original documents to be returned

(6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.

Deleted parts

(7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused.

Documents to be kept secret — related warrant or order

(8) The rules provided for in this section apply to all documents relating to a request for a related warrant or order referred to in [subsection 184.2\(5\)](#), [186\(8\)](#) or [188\(6\)](#) with any necessary modifications.

R.S., 1985, c. C-46, s. 187; R.S., 1985, c. 27 (1st Supp.), s. 24; 1993, c. 40, s. 7; [2005, c. 10, s. 24](#); [2014, c. 31, s. 10](#); [2022, c. 17, s. 8](#).

Applications to specially appointed judges

188 (1) Notwithstanding [section 185](#), an application made under that section for an authorization may be made *ex parte* to a judge of a superior court of criminal jurisdiction, or a judge as defined in [section 552](#), designated from time to time by the Chief Justice,

by a peace officer specially designated in writing, by name or otherwise, for the purposes of this section by

(a) the Minister of Public Safety and Emergency Preparedness, if the offence is one in respect of which proceedings, if any, may be instituted by the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province, in respect of any other offence in the province, if the urgency of the situation requires interception of private communications to commence before an authorization could, with reasonable diligence, be obtained under [section 186](#).

Authorizations in emergency

(2) Where the judge to whom an application is made pursuant to subsection (1) is satisfied that the urgency of the situation requires that interception of private communications commence before an authorization could, with reasonable diligence, be obtained under [section 186](#), he may, on such terms and conditions, if any, as he considers advisable, give an authorization in writing for a period of up to thirty-six hours.

(3) [Repealed, 1993, c. 40, s. 8]

Definition of *Chief Justice*

(4) In this section, ***Chief Justice*** means

(a) in the Province of Ontario, the Chief Justice of the Ontario Court;

(b) in the Province of Quebec, the Chief Justice of the Superior Court;

(c) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, and in the Yukon and the Northwest Territories, the Chief Justice of the Supreme Court;

(d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen's Bench;

(e) in the Province of Newfoundland and Labrador, the Chief Justice of the Supreme Court, Trial Division; and

(f) in Nunavut, the Chief Justice of the Nunavut Court of Justice.

Inadmissibility of evidence

(5) The trial judge may deem inadmissible the evidence obtained by means of an interception of a private communication pursuant to a subsequent authorization given under this section, where he finds that the application for the subsequent authorization was based on the same facts, and involved the interception of the private communications of the same person or persons, or related to the same offence, on which the application for the original authorization was based.

Related warrant or order

(6) A judge who gives an authorization under this section may, at the same time, issue a warrant or make an order under any of [sections 487, 487.01, 487.014 to 487.018, 487.02, 492.1 and 492.2](#) if the judge is of the opinion that the requested warrant or order is related to the execution of the authorization, that the urgency of the situation requires the warrant or the order and that it can be reasonably executed or complied with within 36 hours.

R.S., 1985, c. C-46, s. 188; R.S., 1985, c. 27 (1st Supp.), ss. 25, 185(F), c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 10; 1992, c. 1, s. 58, c. 51, s. 35; 1993, c. 40, s. 8; 1999, c. 3, s. 28; [2002, c. 7, s. 140](#); [2005, c. 10, s. 34](#); [2014, c. 31, s. 11](#); [2015, c. 3, s. 47](#); [2017, c. 33, s. 255](#).

Execution in Canada

188.1 An authorization given under [section 184.2, 186 or 188](#) may be executed at any place in Canada. Any peace officer who executes the authorization must have authority to act as a peace officer in the place where it is executed.

1993, c. 40, s. 9; [2019, c. 25, s. 66](#); [2022, c. 17, s. 9](#).

No civil or criminal liability

188.2 No person who acts in accordance with an authorization or under [section 184.1 or 184.4](#) or who aids, in good faith, a person who he or she believes on reasonable grounds is acting in accordance with an authorization or under one of those sections incurs any criminal or civil liability for anything reasonably done further to the authorization or to that section.

1993, c. 40, s. 9.

189 (1) to (4) [Repealed, 1993, c. 40, s. 10]

Notice of intention to produce evidence

(5) The contents of a private communication that is obtained from an interception of the private communication pursuant to any provision of, or pursuant to an authorization given under, this Part shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of the intention together with

(a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting out full particulars of the private communication, where evidence of the private communication will be given *viva voce*; and

(b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.

Privileged evidence

(6) Any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

R.S., 1985, c. C-46, s. 189; 1993, c. 40, s. 10.

Further particulars

190 Where an accused has been given notice pursuant to [subsection 189\(5\)](#), any judge of the court in which the trial of the accused is being or is to be held may at any time order that further particulars be given of the private communication that is intended to be adduced in evidence.

1973-74, c. 50, s. 2.

Possession, etc.

191 (1) Every person who possesses, sells or purchases any electro-magnetic, acoustic, mechanical or other device or any component of it knowing that its design renders it primarily useful for surreptitious interception of private communications is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Exemptions

(2) Subsection (1) does not apply to

(a) a police officer in possession of a device or component described in subsection (1) in the course of his employment;

(b) a person in possession of such a device or component for the purpose of using it in an interception made or to be made in accordance with an authorization;

(b.1) a person in possession of such a device or component under the direction of a police officer in order to assist that officer in the course of his duties as a police officer;

(c) an officer or a servant of Her Majesty in right of Canada or a member of the Canadian Forces in possession of such a device or component in the course of his duties as such an officer, servant or member, as the case may be; and

(d) any other person in possession of such a device or component under the authority of a licence issued by the Minister of Public Safety and Emergency Preparedness.

Terms and conditions of licence

(3) A licence issued for the purpose of paragraph (2)(d) may contain such terms and conditions relating to the possession, sale or purchase of a device or component described in subsection (1) as the Minister of Public Safety and Emergency Preparedness may prescribe.

R.S., 1985, c. C-46, s. 191; R.S., 1985, c. 27 (1st Supp.), s. 26; [2005, c. 10, s. 34](#); [2013, c. 8, s. 4](#); [2019, c. 25, s. 67](#).

Forfeiture

192 (1) Where a person is convicted of an offence under [section 184](#) or [191](#), any electro-magnetic, acoustic, mechanical or other device by means of which the offence was committed or the possession of which constituted the offence, on the conviction, in

addition to any punishment that is imposed, may be ordered forfeited to Her Majesty whereupon it may be disposed of as the Attorney General directs.

Limitation

(2) No order for forfeiture shall be made under subsection (1) in respect of telephone, telegraph or other communication facilities or equipment owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of that person by means of which an offence under [section 184](#) has been committed if that person was not a party to the offence.

1973-74, c. 50, s. 2.

Disclosure of information

193 (1) If a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator of that communication or of the person intended by the originator to receive it, every person commits an offence who, without the express consent of the originator of that communication or of the person intended to receive it, knowingly

(a) uses or discloses the private communication or any part of it or the substance, meaning or purpose of it or of any part of it, or

(b) discloses the existence of the private communication.

Punishment

(1.1) Every person who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Exemptions

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(a) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

(b) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

(c) in giving notice under [section 189](#) or furnishing further particulars pursuant to an order under [section 190](#);

(d) in the course of the operation of

- (i) a telephone, telegraph or other communication service to the public,
- (ii) a department or an agency of the Government of Canada, or
- (iii) services relating to the management or protection of a computer system, as defined in [subsection 342.1\(2\)](#),

if the disclosure is necessarily incidental to an interception described in [paragraph 184\(2\)\(c\), \(d\) or \(e\)](#);

(e) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

(f) where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties and functions under [section 12](#) of the *Canadian Security Intelligence Service Act*.

Publishing of prior lawful disclosure

(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(a).

R.S., 1985, c. C-46, s. 193; [R.S., 1985, c. 30 \(4th Supp.\), s. 45](#); 1993, c. 40, s. 11; [2004, c. 12, s. 5](#); [2019, c. 25, s. 68](#).

Disclosure of information received from interception of radio-based telephone communications

193.1 (1) Every person who knowingly uses or discloses a radio-based telephone communication or who knowingly discloses the existence of such a communication is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction, if

(a) the originator of the communication or the person intended by the originator of the communication to receive it was in Canada when the communication was made;

(b) the communication was intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator of the communication or of the person intended by the originator to receive the communication; and

(c) the person does not have the express or implied consent of the originator of the communication or of the person intended by the originator to receive the communication.

Other provisions to apply

(2) Subsections 193(2) and (3) apply, with such modifications as the circumstances require, to disclosures of radio-based telephone communications.

1993, c. 40, s. 12; 2019, c. 25, s. 69.

Damages

194 (1) Subject to subsection (2), a court that convicts an accused of an offence under section 184, 184.5, 193 or 193.1 may, on the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount not exceeding five thousand dollars as punitive damages.

No damages where civil proceedings commenced

(2) No amount shall be ordered to be paid under subsection (1) to a person who has commenced an action under Part II of the *Crown Liability Act*.

Judgment may be registered

(3) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

Moneys in possession of accused may be taken

(4) All or any part of an amount that is ordered to be paid under subsection (1) may be taken out of moneys found in the possession of the accused at the time of his arrest, except where there is a dispute respecting ownership of or right of possession to those moneys by claimants other than the accused.

R.S., 1985, c. C-46, s. 194; 1993, c. 40, s. 13.

Annual report

195 (1) The Minister of Public Safety and Emergency Preparedness shall, as soon as possible after the end of each year, prepare a report relating to

(a) authorizations for which that Minister and agents specially designated in writing by that Minister for the purposes of section 185 applied and the interceptions made under those authorizations in the immediately preceding year;

(b) authorizations given under section 188 for which peace officers specially designated by that Minister for the purposes of that section applied and the interceptions made under those authorizations in the immediately preceding year; and

(c) interceptions made under section 184.4 in the immediately preceding year if the interceptions relate to an offence for which proceedings may be commenced by the Attorney General of Canada.

Information respecting authorizations — sections 185 and 188

(2) The report shall, in relation to the authorizations and interceptions referred to in paragraphs (1)(a) and (b), set out

- (a)** the number of applications made for authorizations;
- (b)** the number of applications made for renewal of authorizations;
- (c)** the number of applications referred to in paragraphs (a) and (b) that were granted, the number of those applications that were refused and the number of applications referred to in paragraph (a) that were granted subject to terms and conditions;
- (d)** the number of persons identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
 - (i)** an offence specified in the authorization,
 - (ii)** an offence other than an offence specified in the authorization but in respect of which an authorization may be given, and
 - (iii)** an offence in respect of which an authorization may not be given;
- (e)** the number of persons not identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
 - (i)** an offence specified in such an authorization,
 - (ii)** an offence other than an offence specified in such an authorization but in respect of which an authorization may be given, and
 - (iii)** an offence other than an offence specified in such an authorization and for which no such authorization may be given,

and whose commission or alleged commission of the offence became known to a peace officer as a result of an interception of a private communication under an authorization;

- (f)** the average period for which authorizations were given and for which renewals thereof were granted;
- (g)** the number of authorizations that, by virtue of one or more renewals thereof, were valid for more than sixty days, for more than one hundred and twenty days, for more than one hundred and eighty days and for more than two hundred and forty days;
- (h)** the number of notifications given pursuant to [section 196](#);
- (i)** the offences in respect of which authorizations were given, specifying the number of authorizations given in respect of each of those offences;
- (j)** a description of all classes of places specified in authorizations and the number of authorizations in which each of those classes of places was specified;

- (k)** a general description of the methods of interception involved in each interception under an authorization;
- (l)** the number of persons arrested whose identity became known to a peace officer as a result of an interception under an authorization;
- (m)** the number of criminal proceedings commenced at the instance of the Attorney General of Canada in which private communications obtained by interception under an authorization were adduced in evidence and the number of those proceedings that resulted in a conviction; and
- (n)** the number of criminal investigations in which information obtained as a result of the interception of a private communication under an authorization was used although the private communication was not adduced in evidence in criminal proceedings commenced at the instance of the Attorney General of Canada as a result of the investigations.

Information respecting interceptions — [section 184.4](#)

(2.1) The report shall, in relation to the interceptions referred to in paragraph (1)(c), set out

- (a)** the number of interceptions made;
- (b)** the number of parties to each intercepted private communication against whom proceedings were commenced in respect of the offence that the police officer sought to prevent in intercepting the private communication or in respect of any other offence that was detected as a result of the interception;
- (c)** the number of persons who were not parties to an intercepted private communication but whose commission or alleged commission of an offence became known to a police officer as a result of the interception of a private communication, and against whom proceedings were commenced in respect of the offence that the police officer sought to prevent in intercepting the private communication or in respect of any other offence that was detected as a result of the interception;
- (d)** the number of notifications given under [section 196.1](#);
- (e)** the offences in respect of which interceptions were made and any other offences for which proceedings were commenced as a result of an interception, as well as the number of interceptions made with respect to each offence;
- (f)** a general description of the methods of interception used for each interception;
- (g)** the number of persons arrested whose identity became known to a police officer as a result of an interception;
- (h)** the number of criminal proceedings commenced in which private communications obtained by interception were adduced in evidence and the number of those proceedings that resulted in a conviction;
- (i)** the number of criminal investigations in which information obtained as a result of the interception of a private communication was used even though the private

communication was not adduced in evidence in criminal proceedings commenced as a result of the investigations; and

(j) the duration of each interception and the aggregate duration of all the interceptions related to the investigation of the offence that the police officer sought to prevent in intercepting the private communication.

Other information

(3) The report shall, in addition to the information referred to in subsections (2) and (2.1), set out

(a) the number of prosecutions commenced against officers or servants of Her Majesty in right of Canada or members of the Canadian Forces for offences under [section 184](#) or [193](#); and

(b) a general assessment of the importance of interception of private communications for the investigation, detection, prevention and prosecution of offences in Canada.

Report to be laid before Parliament

(4) The Minister of Public Safety and Emergency Preparedness shall cause a copy of each report prepared by him under subsection (1) to be laid before Parliament forthwith on completion thereof, or if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

Report by Attorneys General

(5) The Attorney General of each province shall, as soon as possible after the end of each year, prepare and publish or otherwise make available to the public a report relating to

(a) authorizations for which the Attorney General and agents specially designated in writing by the Attorney General for the purposes of [section 185](#) applied and to the interceptions made under those authorizations in the immediately preceding year;

(b) authorizations given under [section 188](#) for which peace officers specially designated by the Attorney General for the purposes of that section applied and to the interceptions made under those authorizations in the immediately preceding year; and

(c) interceptions made under [section 184.4](#) in the immediately preceding year, if the interceptions relate to an offence not referred to in paragraph (1)(c).

The report must set out, with any modifications that the circumstances require, the information described in subsections (2) to (3).

R.S., 1985, c. C-46, s. 195; R.S., 1985, c. 27 (1st Supp.), s. 27; [2005, c. 10, s. 34](#); [2013, c. 8, s. 5](#); [2015, c. 20, s. 20](#).

Written notification to be given

196 (1) The Attorney General of the province in which an application under [subsection 185\(1\)](#) was made or the Minister of Public Safety and Emergency Preparedness if the

application was made by or on behalf of that Minister shall, within 90 days after the period for which the authorization was given or renewed or within such other period as is fixed pursuant to [subsection 185\(3\)](#) or subsection (3) of this section, notify in writing the person who was the object of the interception pursuant to the authorization and shall, in a manner prescribed by regulations made by the Governor in Council, certify to the court that gave the authorization that the person has been so notified.

Extension of period for notification

(2) The running of the 90 days referred to in subsection (1), or of any other period fixed pursuant to [subsection 185\(3\)](#) or subsection (3) of this section, is suspended until any application made by the Attorney General or the Minister to a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#) for an extension or a subsequent extension of the period for which the authorization was given or renewed has been heard and disposed of.

Where extension to be granted

(3) Where the judge to whom an application referred to in subsection (2) is made, on the basis of an affidavit submitted in support of the application, is satisfied that

- (a)** the investigation of the offence to which the authorization relates, or
- (b)** a subsequent investigation of an offence listed in [section 183](#) commenced as a result of information obtained from the investigation referred to in paragraph (a),

is continuing and is of the opinion that the interests of justice warrant the granting of the application, the judge shall grant an extension, or a subsequent extension, of the period, each extension not to exceed three years.

Application to be accompanied by affidavit

(4) An application pursuant to subsection (2) shall be accompanied by an affidavit deposing to

- (a)** the facts known or believed by the deponent and relied on to justify the belief that an extension should be granted; and
- (b)** the number of instances, if any, on which an application has, to the knowledge or belief of the deponent, been made under that subsection in relation to the particular authorization and on which the application was withdrawn or the application was not granted, the date on which each application was made and the judge to whom each application was made.

Exception for criminal organizations and terrorist groups

(5) Notwithstanding subsections (3) and 185(3), where the judge to whom an application referred to in subsection (2) or 185(2) is made, on the basis of an affidavit submitted in support of the application, is satisfied that the investigation is in relation to

- (a)** an offence under [section 52](#), [52.1](#), [52.2](#), [467.11](#), [467.111](#), [467.12](#) or [467.13](#),

(b) an offence committed for the benefit of, at the direction of or in association with a criminal organization, or

(c) a terrorism offence,

and is of the opinion that the interests of justice warrant the granting of the application, the judge shall grant an extension, or a subsequent extension, of the period, but no extension may exceed three years.

R.S., 1985, c. C-46, s. 196; R.S., 1985, c. 27 (1st Supp.), s. 28; 1993, c. 40, s. 14; 1997, c. 23, s. 7; 2001, c. 32, s. 8, c. 41, ss. 8, 133; 2005, c. 10, s. 25; 2014, c. 17, s. 6; 2024, c. 16, s. 66.

Written notice — interception in accordance with [section 184.4](#)

196.1 (1) Subject to subsections (3) and (5), the Attorney General of the province in which a police officer intercepts a private communication under [section 184.4](#) or, if the interception relates to an offence for which proceedings may be commenced by the Attorney General of Canada, the Minister of Public Safety and Emergency Preparedness shall give notice in writing of the interception to any person who was the object of the interception within 90 days after the day on which it occurred.

Extension of period for notification

(2) The running of the 90-day period or of any extension granted under subsection (3) or (5) is suspended until any application made by the Attorney General of the province or the Minister to a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#) for an extension or a subsequent extension of the period has been heard and disposed of.

Where extension to be granted

(3) The judge to whom an application under subsection (2) is made shall grant an extension or a subsequent extension of the 90-day period — each extension not to exceed three years — if the judge is of the opinion that the interests of justice warrant granting the application and is satisfied, on the basis of an affidavit submitted in support of the application, that one of the following investigations is continuing:

(a) the investigation of the offence to which the interception relates; or

(b) a subsequent investigation of an offence commenced as a result of information obtained from the investigation referred to in paragraph (a).

Application to be accompanied by affidavit

(4) An application shall be accompanied by an affidavit deposing to

(a) the facts known or believed by the deponent and relied on to justify the belief that an extension should be granted; and

(b) the number of instances, if any, on which an application has, to the knowledge or belief of the deponent, been made under subsection (2) in relation to the particular interception and on which the application was withdrawn or the application was not

granted, the date on which each application was made and the judge to whom each application was made.

Exception — criminal organization or terrorism offence

(5) Despite subsection (3), the judge to whom an application under subsection (2) is made shall grant an extension or a subsequent extension of the 90-day period — each extension not to exceed three years — if the judge is of the opinion that the interests of justice warrant granting the application and is satisfied, on the basis of an affidavit submitted in support of the application, that the interception of the communication relates to an investigation of

- (a)** an offence under [section 52](#), [52.1](#), [52.2](#), [467.11](#), [467.12](#) or [467.13](#);
- (b)** an offence committed for the benefit of, at the direction of or in association with a criminal organization;
- (b.1)** an offence under [subsection 20\(1\)](#), [20.1\(1\)](#), [20.2\(1\)](#), [20.3\(1\)](#) or [20.4\(1\)](#) of the [Foreign Interference and Security of Information Act](#); or
- (c)** a terrorism offence.

[2013, c. 8, s. 6](#); [2024, c. 16, s. 67](#).

PART VII

Disorderly Houses, Gaming and Betting

Interpretation

Definitions

197 (1) In this Part,

bet means a bet that is placed on any contingency or event that is to take place in or out of Canada, and without restricting the generality of the foregoing, includes a bet that is placed on any contingency relating to a horse-race, fight, match or sporting event that is to take place in or out of Canada; (*pari*)

common bawdy-house [Repealed, [2019, c. 25, s. 69.1](#)]

common betting house means a place that is opened, kept or used for the purpose of

- (a)** enabling, encouraging or assisting persons who resort thereto to bet between themselves or with the keeper, or
- (b)** enabling any person to receive, record, register, transmit or pay bets or to announce the results of betting; (*maison de pari*)

common gaming house means a place that is

- (a) kept for gain to which persons resort for the purpose of playing games, or
- (b) kept or used for the purpose of playing games
 - (i) in which a bank is kept by one or more but not all of the players,
 - (ii) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,
 - (iii) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or
 - (iv) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game; (*maison de jeu*)

disorderly house means a common betting house or a common gaming house; (*maison de désordre*)

game means a game of chance or mixed chance and skill; (*jeu*)

gaming equipment means anything that is or may be used for the purpose of playing games or for betting; (*matériel de jeu*)

keeper includes a person who

- (a) is an owner or occupier of a place,
- (b) assists or acts on behalf of an owner or occupier of a place,
- (c) appears to be, or to assist or act on behalf of an owner or occupier of a place,
- (d) has the care or management of a place, or
- (e) uses a place permanently or temporarily, with or without the consent of the owner or occupier thereof; (*tenancier*)

place includes any place, whether or not

- (a) it is covered or enclosed,
- (b) it is used permanently or temporarily, or
- (c) any person has an exclusive right of user with respect to it; (*local ou endroit*)

prostitute [Repealed, 2014, c. 25, s. 12]

public place includes any place to which the public have access as of right or by invitation, express or implied. (*endroit public*)

Exception

(2) A place is not a common gaming house within the meaning of paragraph (a) or subparagraph (b)(ii) or (iii) of the definition *common gaming house* in subsection (1) while it is occupied and used by an incorporated genuine social club or branch thereof, if

(a) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof; and

(b) no fee is charged to persons for the right or privilege of participating in the games played therein other than under the authority of and in accordance with the terms of a licence issued by the Attorney General of the province in which the place is situated or by such other person or authority in the province as may be specified by the Attorney General thereof.

Onus

(3) The onus of proving that, by virtue of subsection (2), a place is not a common gaming house is on the accused.

Effect when game partly played on premises

(4) A place may be a common gaming house notwithstanding that

(a) it is used for the purpose of playing part of a game and another part of the game is played elsewhere;

(b) the stake that is played for is in some other place; or

(c) it is used on only one occasion in the manner described in paragraph (b) of the definition *common gaming house* in subsection (1), if the keeper or any person acting on behalf of or in concert with the keeper has used another place on another occasion in the manner described in that paragraph.

R.S., 1985, c. C-46, s. 197; R.S., 1985, c. 27 (1st Supp.), s. 29; [2014, c. 25, s. 12](#); [2019, c. 25, s. 69.1](#).

Presumptions

198 [[Repealed, 2018, c. 29, s. 16](#)]

Search

Warrant to search

199 (1) A justice who is satisfied by information on oath that there are reasonable grounds to believe that an offence under [section 201](#), [202](#), [203](#), [206](#) or [207](#) is being committed at any place within the jurisdiction of the justice may issue a warrant authorizing a peace officer to enter and search the place by day or night and seize anything found in that place that may be evidence that an offence under section 201, 202, 203, 206 or 207, as the case may be, is being committed at that place, and to take into custody all persons who are found in or at that place and requiring those persons and things to be brought before that justice or before another justice having jurisdiction, to be dealt with according to law.

Search without warrant, seizure and arrest

(2) A peace officer may, whether or not he is acting under a warrant issued pursuant to this section, take into custody any person whom he finds keeping a common gaming

house and any person whom he finds therein, and may seize anything that may be evidence that such an offence is being committed and shall bring those persons and things before a justice having jurisdiction, to be dealt with according to law.

Disposal of property seized

(3) Except where otherwise expressly provided by law, a court, judge, justice or provincial court judge before whom anything that is seized under this section is brought may declare that the thing is forfeited, in which case it shall be disposed of or dealt with as the Attorney General may direct if no person shows sufficient cause why it should not be forfeited.

When declaration or direction may be made

(4) No declaration or direction shall be made pursuant to subsection (3) in respect of anything seized under this section until

- (a)** it is no longer required as evidence in any proceedings that are instituted pursuant to the seizure; or
- (b)** the expiration of thirty days from the time of seizure where it is not required as evidence in any proceedings.

Conversion into money

(5) The Attorney General may, for the purpose of converting anything forfeited under this section into money, deal with it in all respects as if he were the owner thereof.

Telephones exempt from seizure

(6) Nothing in this section or in [section 489](#) authorizes the seizure, forfeiture or destruction of telephone, telegraph or other communication facilities or equipment that may be evidence of or that may have been used in the commission of an offence under [section 201](#), [202](#), [203](#), [206](#) or [207](#) and that is owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of that person.

Exception

(7) Subsection (6) does not apply to prohibit the seizure, for use as evidence, of any facility or equipment described in that subsection that is designed or adapted to record a communication.

R.S., 1985, c. C-46, s. 199; R.S., 1985, c. 27 (1st Supp.), s. 203; 1994, c. 44, s. 10; [2019, c. 25, s. 69.2](#).

Obstruction

200 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 30]

Gaming and Betting

Keeping gaming or betting house

201 (1) Every person who keeps a common gaming house or common betting house is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b)** an offence punishable on summary conviction.

Person found in or owner permitting use

(2) Every one who

- (a)** is found, without lawful excuse, in a common gaming house or common betting house, or
- (b)** as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,

is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 201; [2019, c. 25, s. 70](#).

Betting, pool-selling, book-making, etc.

202 (1) Every one commits an offence who

- (a)** uses or knowingly allows a place under his control to be used for the purpose of recording or registering bets or selling a pool;
- (b)** imports, makes, buys, sells, rents, leases, hires or keeps, exhibits, employs or knowingly allows to be kept, exhibited or employed in any place under his control any device or apparatus for the purpose of recording or registering bets or selling a pool, or any machine or device for gambling or betting;
- (c)** has under his control any money or other property relating to a transaction that is an offence under this section;
- (d)** records or registers bets or sells a pool;
- (e)** engages in book-making or pool-selling, or in the business or occupation of betting, or makes any agreement for the purchase or sale of betting or gaming privileges, or for the purchase or sale of information that is intended to assist in book-making, pool-selling or betting;
- (f)** prints, provides or offers to print or provide information intended for use in connection with book-making, pool-selling or betting on any horse-race, fight, game or sport, whether or not it takes place in or outside Canada or has or has not taken place;
- (g)** imports or brings into Canada any information or writing that is intended or is likely to promote or be of use in gambling, book-making, pool-selling or betting on a horse-race, fight, game or sport, and where this paragraph applies it is immaterial

(i) whether the information is published before, during or after the race, fight game or sport, or

(ii) whether the race, fight, game or sport takes place in Canada or elsewhere,

but this paragraph does not apply to a newspaper, magazine or other periodical published in good faith primarily for a purpose other than the publication of such information;

(h) advertises, prints, publishes, exhibits, posts up, or otherwise gives notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of a contest, or a result of or contingency relating to any contest;

(i) wilfully and knowingly sends, transmits, delivers or receives any message that conveys any information relating to book-making, pool-selling, betting or wagering, or that is intended to assist in book-making, pool-selling, betting or wagering; or

(j) aids or assists in any manner in anything that is an offence under this section.

Punishment

(2) Every one who commits an offence under this section is guilty of an indictable offence and liable

(a) for a first offence, to imprisonment for not more than two years;

(b) for a second offence, to imprisonment for not more than two years and not less than fourteen days; and

(c) for each subsequent offence, to imprisonment for not more than two years and not less than three months.

R.S., 1985, c. C-46, s. 202; [2008, c. 18, s. 5](#).

Placing bets on behalf of others

203 Every one who

(a) places or offers or agrees to place a bet on behalf of another person for a consideration paid or to be paid by or on behalf of that other person,

(b) engages in the business or practice of placing or agreeing to place bets on behalf of other persons, whether for a consideration or otherwise, or

(c) holds himself out or allows himself to be held out as engaging in the business or practice of placing or agreeing to place bets on behalf of other persons, whether for a consideration or otherwise,

is guilty of an indictable offence and liable

(d) for a first offence, to imprisonment for not more than two years,

(e) for a second offence, to imprisonment for not more than two years and not less than fourteen days, and

(f) for each subsequent offence, to imprisonment for not more than two years and not less than three months.

R.S., c. C-34, s. 187; 1974-75-76, c. 93, s. 11.

Exemption

204 (1) Sections 201 and 202 do not apply to

(a) any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to

(i) the winner of a lawful race, sport, game or exercise,

(ii) the owner of a horse engaged in a lawful race, or

(iii) the winner of any bets between not more than ten individuals;

(b) a private bet between individuals not engaged in any way in the business of betting;

(c) bets made or records of bets made through the agency of a pari-mutuel system on running, trotting or pacing horse-races if

(i) the bets or records of bets are made on the race-course of an association in respect of races conducted at that race-course or another race-course in or out of Canada, and, in the case of a race conducted on a race-course situated outside Canada, the governing body that regulates the race has been certified as acceptable by the Minister of Agriculture and Agri-Food or a person designated by that Minister pursuant to subsection (8.1) and that Minister or person has permitted pari-mutuel betting in Canada on the race pursuant to that subsection, and

(ii) the provisions of this section and the regulations are complied with.

Exception

(1.1) For greater certainty, a person may, in accordance with the regulations, do anything described in section 201 or 202, if the person does it for the purposes of legal pari-mutuel betting.

Presumption

(2) For the purposes of paragraph (1)(c), bets made, in accordance with the regulations, in a betting theatre referred to in paragraph (8)(e), or by any means of telecommunication to the race-course of an association or to such a betting theatre, are deemed to be made on the race-course of the association.

Operation of pari-mutuel system

(3) No person or association shall use a pari-mutuel system of betting in respect of a horse-race unless the system has been approved by and its operation is carried on under the supervision of an officer appointed by the Minister of Agriculture and Agri-Food.

Supervision of pari-mutuel system

(4) Every person or association operating a pari-mutuel system of betting in accordance with this section in respect of a horse-race, whether or not the person or association is conducting the race-meeting at which the race is run, shall pay to the Receiver General in respect of each individual pool of the race and each individual feature pool one-half of one per cent, or such greater fraction not exceeding one per cent as may be fixed by the Governor in Council, of the total amount of money that is bet through the agency of the pari-mutuel system of betting.

Percentage that may be deducted and retained

(5) Where any person or association becomes a custodian or depository of any money, bet or stakes under a pari-mutuel system in respect of a horse-race, that person or association shall not deduct or retain any amount from the total amount of money, bets or stakes unless it does so pursuant to subsection (6).

Percentage that may be deducted and retained

(6) An association operating a pari-mutuel system of betting in accordance with this section in respect of a horse-race, or any other association or person acting on its behalf, may deduct and retain from the total amount of money that is bet through the agency of the pari-mutuel system, in respect of each individual pool of each race or each individual feature pool, a percentage not exceeding the percentage prescribed by the regulations plus any odd cents over any multiple of five cents in the amount calculated in accordance with the regulations to be payable in respect of each dollar bet.

Stopping of betting

(7) Where an officer appointed by the Minister of Agriculture and Agri-Food is not satisfied that the provisions of this section and the regulations are being carried out in good faith by any person or association in relation to a race meeting, he may, at any time, order any betting in relation to the race meeting to be stopped for any period that he considers proper.

Regulations

(8) The Minister of Agriculture and Agri-Food may make regulations

(a) prescribing the maximum number of races for each race-course on which a race meeting is conducted, in respect of which a pari-mutuel system of betting may be used for the race meeting or on any one calendar day during the race meeting, and the circumstances in which the Minister of Agriculture and Agri-Food or a person designated by him for that purpose may approve of the use of that system in respect of additional races on any race-course for a particular race meeting or on a particular day during the race meeting;

(b) prohibiting any person or association from using a pari-mutuel system of betting for any race-course on which a race meeting is conducted in respect of more than the maximum number of races prescribed pursuant to paragraph (a) and the additional

races, if any, in respect of which the use of a pari-mutuel system of betting has been approved pursuant to that paragraph;

(c) prescribing the maximum percentage that may be deducted and retained pursuant to subsection (6) by or on behalf of a person or association operating a pari-mutuel system of betting in respect of a horse-race in accordance with this section and providing for the determination of the percentage that each such person or association may deduct and retain;

(d) respecting pari-mutuel betting in Canada on horse-races conducted on a race-course situated outside Canada; and

(e) authorizing pari-mutuel betting and governing the conditions for pari-mutuel betting, including the granting of licences therefor, that is conducted by an association in a betting theatre owned or leased by the association in a province in which the Lieutenant Governor in Council, or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, has issued a licence to that association for the betting theatre.

Approvals

(8.1) The Minister of Agriculture and Agri-Food or a person designated by that Minister may, with respect to a horse-race conducted on a race-course situated outside Canada,

(a) certify as acceptable, for the purposes of this section, the governing body that regulates the race; and

(b) permit pari-mutuel betting in Canada on the race.

Idem

(9) The Minister of Agriculture and Agri-Food may make regulations respecting

(a) the supervision and operation of pari-mutuel systems related to race meetings, and the fixing of the dates on which and the places at which an association may conduct those meetings;

(b) the method of calculating the amount payable in respect of each dollar bet;

(c) the conduct of race-meetings in relation to the supervision and operation of pari-mutuel systems, including photo-finishes, video patrol and the testing of bodily substances taken from horses entered in a race at such meetings, including, in the case of a horse that dies while engaged in racing or immediately before or after the race, the testing of any tissue taken from its body;

(d) the prohibition, restriction or regulation of

(i) the possession of drugs or medicaments or of equipment used in the administering of drugs or medicaments at or near race-courses, or

(ii) the administering of drugs or medicaments to horses participating in races run at a race meeting during which a pari-mutuel system of betting is used; and

(e) the provision, equipment and maintenance of accommodation, services or other facilities for the proper supervision and operation of pari-mutuel systems related to race meetings, by associations conducting those meetings or by other associations.

900 metre zone

(9.1) For the purposes of this section, the Minister of Agriculture and Agri-Food may designate, with respect to any race-course, a zone that shall be deemed to be part of the race-course, if

- (a) the zone is immediately adjacent to the race-course;
- (b) the farthest point of that zone is not more than 900 metres from the nearest point on the race track of the race-course; and
- (c) all real property situated in that zone is owned or leased by the person or association that owns or leases the race-course.

Contravention

(10) Every person who contravenes or fails to comply with any of the provisions of this section or of any regulations made under this section is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Definition of *association*

(11) For the purposes of this section, ***association*** means an association incorporated by or pursuant to an Act of Parliament or of the legislature of a province that owns or leases a race-course and conducts horse-races in the ordinary course of its business and, to the extent that the applicable legislation requires that the purposes of the association be expressly stated in its constating instrument, having as one of its purposes the conduct of horse-races.

R.S., 1985, c. C-46, s. 204; R.S., 1985, c. 47 (1st Supp.), s. 1; 1989, c. 2, s. 1; 1994, c. 38, ss. 14, 25; 2008, c. 18, s. 6.

205 [Repealed, R.S., 1985, c. 52 (1st Supp.), s. 1]

Offence in relation to lotteries and games of chance

206 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

- (a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property by lots, cards, tickets or any mode of chance whatever;

(b) sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever;

(c) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article that is used or intended for use in carrying out any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatever;

(d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of;

(e) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;

(f) disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;

(g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;

(h) for valuable consideration carries on or plays or offers to carry on or to play, or employs any person to carry on or play in a public place or a place to which the public have access, the game of three-card monte;

(i) receives bets of any kind on the outcome of a game of three-card monte; or

(j) being the owner of a place, permits any person to play the game of three-card monte therein.

Definition of *three-card monte*

(2) In this section, ***three-card monte*** means the game commonly known as three-card monte and includes any other game that is similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.

Exemption for fairs

(3) Paragraphs (1)(f) and (g), in so far as they do not relate to a dice game, three-card monte, punch board or coin table, do not apply to the board of an annual fair or exhibition, or to any operator of a concession leased by that board within its own grounds and operated during the fair or exhibition on those grounds.

Definition of *fair or exhibition*

(3.1) For the purposes of this section, ***fair or exhibition*** means an event where agricultural or fishing products are presented or where activities relating to agriculture or fishing take place.

Offence

(4) Every one who buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.

Lottery sale void

(5) Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending on or to be determined by chance or lot, is void, and all property so sold, lent, given, bartered or exchanged is forfeited to Her Majesty.

***Bona fide* exception**

(6) Subsection (5) does not affect any right or title to property acquired by any *bona fide* purchaser for valuable consideration without notice.

Foreign lottery included

(7) This section applies to the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

Saving

(8) This section does not apply to

(a) the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests in any such property; or

(b) [Repealed, 1999, c. 28, s. 156]

(c) bonds, debentures, debenture stock or other securities recallable by drawing of lots and redeemable with interest and providing for payment of premiums on redemption or otherwise.

R.S., 1985, c. C-46, s. 206; R.S., 1985, c. 52 (1st Supp.), s. 2; 1999, c. 28, s. 156; 2019, c. 25, s. 71.

Permitted lotteries

207 (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province;

(b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;

(c) for the board of a fair or of an exhibition, or an operator of a concession leased by that board, to conduct and manage a lottery scheme in a province where the Lieutenant Governor in Council of the province or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof has

(i) designated that fair or exhibition as a fair or exhibition where a lottery scheme may be conducted and managed, and

(ii) issued a licence for the conduct and management of a lottery scheme to that board or operator;

(d) for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme at a public place of amusement in that province if

(i) the amount or value of each prize awarded does not exceed five hundred dollars, and

(ii) the money or other valuable consideration paid to secure a chance to win a prize does not exceed two dollars;

(e) for the government of a province to agree with the government of another province that lots, cards or tickets in relation to a lottery scheme that is by any of paragraphs (a) to (d) authorized to be conducted and managed in that other province may be sold in the province;

(f) for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or such other person or authority in the province as may be designated by the Lieutenant Governor in Council thereof, to conduct and manage in the province a lottery scheme that is authorized to be conducted and managed in one or more other provinces where the authority by which the lottery scheme was first authorized to be conducted and managed consents thereto;

(g) for any person, for the purpose of a lottery scheme that is lawful in a province under any of paragraphs (a) to (f), to do anything in the province, in accordance with the applicable law or licence, that is required for the conduct, management or operation of the lottery scheme or for the person to participate in the scheme; and

(h) for any person to make or print anywhere in Canada or to cause to be made or printed anywhere in Canada anything relating to gaming and betting that is to be used in a place where it is or would, if certain conditions provided by law are met, be lawful to use such a thing, or to send, transmit, mail, ship, deliver or allow to be sent, transmitted, mailed, shipped or delivered or to accept for carriage or transport or convey any such thing where the destination thereof is such a place.

Terms and conditions of licence

(2) Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor in Council of a province as described in paragraph (1)(b), (c), (d) or (f) may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council of that province, the person or authority in the province designated by the Lieutenant Governor in Council thereof or any law enacted by the legislature of that province may prescribe.

Offence

(3) Every one who, for the purposes of a lottery scheme, does anything that is not authorized by or pursuant to a provision of this section

(a) in the case of the conduct, management or operation of that lottery scheme,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, or

(ii) is guilty of an offence punishable on summary conviction; or

(b) in the case of participating in that lottery scheme, is guilty of an offence punishable on summary conviction.

Definition of *lottery scheme*

(4) In this section, ***lottery scheme*** means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of [paragraphs 206\(1\)\(a\) to \(g\)](#), whether or not it involves betting, pool selling or a pool system of betting other than

(a) three-card monte, punch board or coin table;

(b) bookmaking, pool selling or the making or recording of bets, including bets made through the agency of a pool or pari-mutuel system, on any horse-race; or

(c) for the purposes of paragraphs (1)(b) to (f), a game or proposal, scheme, plan, means, device, contrivance or operation described in any of [paragraphs 206\(1\)\(a\) to \(g\)](#) that is operated on or through a computer, video device, slot machine or a dice game.

Definition of *slot machine*

(4.01) In [paragraph 4\(c\)](#), ***slot machine*** means any automatic machine or slot machine, other than any automatic machine or slot machine that dispenses as prizes only one or

more free games on that machine, that

- (a)** is used or intended to be used for any purpose other than selling merchandise or services; or
- (b)** is used or intended to be used for the purpose of selling merchandise or services if
 - (i)** the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator,
 - (ii)** as a result of a given number of successive operations by the operator, the machine produces different results, or
 - (iii)** on any operation of the machine, it discharges or emits a slug or token.

Exception — charitable or religious organization

(4.1) The use of a computer for the sale of a ticket, selection of a winner or the distribution of a prize in a raffle, including a 50/50 draw, is excluded from paragraph (4) (c) in so far as the raffle is authorized under paragraph (1)(b) and the proceeds are used for a charitable or religious object or purpose.

Exception re: pari-mutuel betting

(5) For greater certainty, nothing in this section shall be construed as authorizing the making or recording of bets on horse-races through the agency of a pari-mutuel system other than in accordance with [section 204](#).

R.S., 1985, c. C-46, s. 207; R.S., 1985, c. 27 (1st Supp.), s. 31, c. 52 (1st Supp.), s. 3; 1999, c. 5, s. 6; [2014, c. 39, s. 171](#); [2018, c. 29, s. 17](#); [2021, c. 20, s. 2](#).

Exemption — lottery scheme on an international cruise ship

207.1 (1) Despite any of the provisions of this Part relating to gaming and betting, it is lawful for the owner or operator of an international cruise ship, or their agent, to conduct, manage or operate and for any person to participate in a lottery scheme during a voyage on an international cruise ship when all of the following conditions are satisfied:

- (a)** all the people participating in the lottery scheme are located on the ship;
- (b)** the lottery scheme is not linked, by any means of communication, with any lottery scheme, betting, pool selling or pool system of betting located off the ship;
- (c)** the lottery scheme is not operated within five nautical miles of a Canadian port at which the ship calls or is scheduled to call; and
- (d)** the ship is registered
 - (i)** in Canada and its entire voyage is scheduled to be outside Canada, or
 - (ii)** anywhere, including Canada, and its voyage includes some scheduled voyaging within Canada and the voyage
 - (A)** is of at least forty-eight hours duration and includes some voyaging in international waters and at least one non-Canadian port of call including the port

at which the voyage begins or ends, and

(B) is not scheduled to disembark any passengers at a Canadian port who have embarked at another Canadian port, without calling on at least one non-Canadian port between the two Canadian ports.

Paragraph 207(1)(h) and subsection 207(5) apply

(2) For greater certainty, paragraph 207(1)(h) and subsection 207(5) apply for the purposes of this section.

Offence

(3) Every one who, for the purpose of a lottery scheme, does anything that is not authorized by this section

(a) in the case of the conduct, management or operation of the lottery scheme,

(i) is guilty of an indictable offence and liable to imprisonment for a term of not more than two years, or

(ii) is guilty of an offence punishable on summary conviction; and

(b) in the case of participating in the lottery scheme, is guilty of an offence punishable on summary conviction.

Definitions

(4) The definitions in this subsection apply in this section.

international cruise ship means a passenger ship that is suitable for continuous ocean voyages of at least forty-eight hours duration, but does not include such a ship that is used or fitted for the primary purpose of transporting cargo or vehicles. (*navire de croisière internationale*)

lottery scheme means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g), whether or not it involves betting, pool selling or a pool system of betting. It does not include

(a) three-card monte, punch board or coin table; or

(b) bookmaking, pool selling or the making or recording of bets, including bets made through the agency of a pool or pari-mutuel system, on any race or fight, or on a single sporting event or athletic contest. (*loterie*)

1999, c. 5, s. 7.

208 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 32]

Cheating at play

209 Every person who, with intent to defraud any person, cheats while playing a game or in holding the stakes for a game or in betting is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 209; [2019, c. 25, s. 72](#).

210 [Repealed, [2019, c. 25, s. 73](#)]

211 [Repealed, [2019, c. 25, s. 73](#)]

212 [Repealed, [2014, c. 25, s. 13](#)]

Offences in Relation to Offering, Providing or Obtaining Sexual Services for Consideration

Stopping or impeding traffic

213 (1) Everyone is guilty of an offence punishable on summary conviction who, in a public place or in any place open to public view, for the purpose of offering, providing or obtaining sexual services for consideration,

(a) stops or attempts to stop any motor vehicle; or

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.

(c) [Repealed, [2014, c. 25, s. 15](#)]

Communicating to provide sexual services for consideration

(1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.

Definition of *public place*

(2) In this section, *public place* includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

R.S., 1985, c. C-46, s. 213; R.S., 1985, c. 51 (1st Supp.), s. 1; [2014, c. 25, s. 15](#).

PART VIII

Offences Against the Person and Reputation

Interpretation

Definitions

214 In this Part,

abandon or **expose** includes

- (a) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and
- (b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection; (*abandonner* ou *exposer*)

aircraft [Repealed, 2018, c. 21, s. 13]

child [Repealed, 2002, c. 13, s. 9]

form of marriage includes a ceremony of marriage that is recognized as valid

- (a) by the law of the place where it was celebrated, or
- (b) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated; (*formalité de mariage*)

guardian includes a person who has in law or in fact the custody or control of a child. (*tuteur*)

operate [Repealed, 2018, c. 21, s. 13]

vessel [Repealed, 2018, c. 21, s. 13]

R.S., 1985, c. C-46, s. 214; R.S., 1985, c. 27 (1st Supp.), s. 33, c. 32 (4th Supp.), s. 56; 2002, c. 13, s. 9; 2018, c. 21, s. 13.

Duties Tending to Preservation of Life

Duty of persons to provide necessities

215 (1) Every one is under a legal duty

- (a) as a parent, foster parent, guardian or head of a family, to provide necessities of life for a child under the age of sixteen years;
- (b) to provide necessities of life to their spouse or common-law partner; and
- (c) to provide necessities of life to a person under his charge if that person
 - (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
 - (ii) is unable to provide himself with necessities of life.

Offence

(2) Every person commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

Punishment

(3) Every one who commits an offence under subsection (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Presumptions

(4) For the purpose of proceedings under this section,

(a) [Repealed, 2000, c. 12, s. 93]

(b) evidence that a person has in any way recognized a child as being his child is, in the absence of any evidence to the contrary, proof that the child is his child;

(c) evidence that a person has failed for a period of one month to make provision for the maintenance of any child of theirs under the age of sixteen years is, in the absence of any evidence to the contrary, proof that the person has failed without lawful excuse to provide necessities of life for the child; and

(d) the fact that a spouse or common-law partner or child is receiving or has received necessities of life from another person who is not under a legal duty to provide them is not a defence.

R.S., 1985, c. C-46, s. 215; 1991, c. 43, s. 9; 2000, c. 12, ss. 93, 95; 2005, c. 32, s. 11; 2018, c. 29, s. 18; 2019, c. 25, s. 74.

Duty of persons undertaking acts dangerous to life

216 Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.

R.S., c. C-34, s. 198.

Duty of persons undertaking acts

217 Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

R.S., c. C-34, s. 199.

Duty of persons directing work

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

[2003, c. 21, s. 3.](#)

Abandoning child

218 Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 218; [2005, c. 32, s. 12](#); [2019, c. 25, s. 75](#).

Criminal Negligence

Criminal negligence

219 (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

Definition of *duty*

(2) For the purposes of this section, ***duty*** means a duty imposed by law.

R.S., c. C-34, s. 202.

Causing death by criminal negligence

220 Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

R.S., 1985, c. C-46, s. 220; 1995, c. 39, s. 141.

Causing bodily harm by criminal negligence

221 Every person who by criminal negligence causes bodily harm to another person is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 221; [2019, c. 25, s. 76](#).

Homicide

Homicide

222 (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

Kinds of homicide

(2) Homicide is culpable or not culpable.

Non culpable homicide

(3) Homicide that is not culpable is not an offence.

Culpable homicide

(4) Culpable homicide is murder or manslaughter or infanticide.

Idem

(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act;

(b) by criminal negligence;

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(d) by wilfully frightening that human being, in the case of a child or sick person.

Exception

(6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.

R.S., c. C-34, s. 205.

When child becomes human being

223 (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not

(a) it has breathed;

(b) it has an independent circulation; or

(c) the navel string is severed.

Killing child

(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

R.S., c. C-34, s. 206.

Death that might have been prevented

224 Where a person, by an act or omission, does any thing that results in the death of a human being, he causes the death of that human being notwithstanding that death from that cause might have been prevented by resorting to proper means.

R.S., c. C-34, s. 207.

Death from treatment of injury

225 Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith.

R.S., c. C-34, s. 208.

Acceleration of death

226 Where a person causes to a human being a bodily injury that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

R.S., c. C-34, s. 209.

Exemption for medical assistance in dying

227 (1) No medical practitioner or nurse practitioner commits culpable homicide if they provide a person with medical assistance in dying in accordance with [section 241.2](#).

Exemption for person aiding practitioner

(2) No person is a party to culpable homicide if they do anything for the purpose of aiding a medical practitioner or nurse practitioner to provide a person with medical assistance in dying in accordance with [section 241.2](#).

Reasonable but mistaken belief

(3) For greater certainty, the exemption set out in subsection (1) or (2) applies even if the person invoking it has a reasonable but mistaken belief about any fact that is an element of the exemption.

Non-application of [section 14](#)

(4) [Section 14](#) does not apply with respect to a person who consents to have death inflicted on them by means of medical assistance in dying provided in accordance with [section 241.2](#).

Definitions

(5) In this section, *medical assistance in dying*, *medical practitioner* and *nurse practitioner* have the same meanings as in [section 241.1](#).

R.S., 1985, c. C-46, s. 227; R.S., 1985, c. 27 (1st Supp.), s. 34; 1997, c. 18, s. 9; 1999, c. 5, s. 9; [2016, c. 3, s. 2](#).

Killing by influence on the mind

228 No person commits culpable homicide where he causes the death of a human being

(a) by any influence on the mind alone, or

(b) by any disorder or disease resulting from influence on the mind alone,

but this section does not apply where a person causes the death of a child or sick person by wilfully frightening him.

R.S., c. C-34, s. 211.

Murder, Manslaughter and Infanticide

Murder

229 Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or

(c) if a person, for an unlawful object, does anything that they know is likely to cause death, and by doing so causes the death of a human being, even if they desire to effect their object without causing death or bodily harm to any human being.

R.S., 1985, c. C-46, s. 229; [2019, c. 25, s. 77](#).

Classification of murder

231 (1) Murder is first degree murder or second degree murder.

Planned and deliberate murder

(2) Murder is first degree murder when it is planned and deliberate.

Contracted murder

(3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.

Murder of peace officer, etc.

(4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is

- (a)** a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
- (b)** a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or
- (c)** a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

Hijacking, sexual assault or kidnapping

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

- (a)** [section 76](#) (hijacking an aircraft);
- (b)** [section 271](#) (sexual assault);
- (c)** [section 272](#) (sexual assault with a weapon, threats to a third party or causing bodily harm);
- (d)** [section 273](#) (aggravated sexual assault);
- (e)** [section 279](#) (kidnapping and forcible confinement); or
- (f)** [section 279.1](#) (hostage taking).

Criminal harassment

(6) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under [section 264](#) and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered.

Murder — terrorist activity

(6.01) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an indictable offence under this or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity.

Murder — criminal organization

(6.1) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when

(a) the death is caused by that person for the benefit of, at the direction of or in association with a criminal organization; or

(b) the death is caused by that person while committing or attempting to commit an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a criminal organization.

Intimidation

(6.2) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under [section 423.1](#).

Second degree murder

(7) All murder that is not first degree murder is second degree murder.

R.S., 1985, c. C-46, s. 231; R.S., 1985, c. 27 (1st Supp.), ss. 7, 35, 40, 185(F), c. 1 (4th Supp.), s. 18(F); 1997, c. 16, s. 3, c. 23, s. 8; [2001, c. 32, s. 9](#), c. 41, s. 9; [2009, c. 22, s. 5](#).

Murder reduced to manslaughter

232 (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

What is provocation

(2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the

purposes of this section, if the accused acted on it on the sudden and before there was time for their passion to cool.

Questions of fact

(3) For the purposes of this section, the questions

(a) whether the conduct of the victim amounted to provocation under subsection (2), and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

Death during illegal arrest

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

R.S., 1985, c. C-46, s. 232; [2015, c. 29, s. 7](#).

Infanticide

233 A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

R.S., c. C-34, s. 216.

Manslaughter

234 Culpable homicide that is not murder or infanticide is manslaughter.

R.S., c. C-34, s. 217.

Punishment for murder

235 (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

Minimum punishment

(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

R.S., c. C-34, s. 218; 1973-74, c. 38, s. 3; 1974-75-76, c. 105, s. 5.

Manslaughter

236 Every person who commits manslaughter is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

R.S., 1985, c. C-46, s. 236; 1995, c. 39, s. 142.

Punishment for infanticide

237 Every female person who commits infanticide is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 237; 2019, c. 25, s. 79.

Killing unborn child in act of birth

238 (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life.

Saving

(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of that child.

R.S., c. C-34, s. 221.

Attempt to commit murder

239 (1) Every person who attempts by any means to commit murder is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

Subsequent offences

(2) In determining, for the purpose of paragraph (1)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [272](#) or [273](#), [subsection 279\(1\)](#) or [section 279.1](#), [344](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(3) For the purposes of subsection (2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

R.S., 1985, c. C-46, s. 239; 1995, c. 39, s. 143; [2008, c. 6, s. 16](#); [2009, c. 22, s. 6](#).

Accessory after fact to murder

240 Every one who is an accessory after the fact to murder is guilty of an indictable offence and liable to imprisonment for life.

R.S., c. C-34, s. 223.

Trafficking in Human Organs

Removal without informed consent

240.1 (1) Everyone commits an offence who

(a) obtains an organ to be transplanted into their body or into the body of another person, knowing that the person from whom it was removed or a person lawfully authorized to consent on behalf of the person from whom it was removed did not give informed consent to the removal, or being reckless as to whether or not such consent was given;

(b) carries out, participates in or facilitates the removal of an organ from the body of another person, knowing that the person from whom it was removed or a person lawfully authorized to consent on behalf of the person from whom it was removed did not give informed consent to the removal, or being reckless as to whether or not such consent was given; or

(c) does anything in connection with the removal of an organ from the body of another person on behalf of, at the direction of or in association with the person who removes the organ, knowing that the person from whom it was removed or a person

lawfully authorized to consent on behalf of the person from whom it was removed did not give informed consent to the removal, or being reckless as to whether or not such consent was given.

Financial transaction

(2) Everyone commits an offence who obtains or participates in or facilitates the obtaining of an organ from the body of another person for the purposes of having that organ transplanted into their body or the body of another person, knowing that it was obtained for consideration or being reckless as to whether or not it was obtained for consideration.

Punishment

(3) Everyone who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[2022, c. 18, s. 2.](#)

Suicide

Counselling or aiding suicide

241 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not,

(a) counsels a person to die by suicide or abets a person in dying by suicide; or

(b) aids a person to die by suicide.

Exemption for medical assistance in dying

(2) No medical practitioner or nurse practitioner commits an offence under paragraph (1)(b) if they provide a person with medical assistance in dying in accordance with [section 241.2](#).

Exemption for person aiding practitioner

(3) No person is a party to an offence under paragraph (1)(b) if they do anything for the purpose of aiding a medical practitioner or nurse practitioner to provide a person with medical assistance in dying in accordance with [section 241.2](#).

Exemption for pharmacist

(4) No pharmacist who dispenses a substance to a person other than a medical practitioner or nurse practitioner commits an offence under paragraph (1)(b) if the pharmacist dispenses the substance further to a prescription that is written by such a practitioner in providing medical assistance in dying in accordance with [section 241.2](#).

Exemption for person aiding patient

(5) No person commits an offence under paragraph (1)(b) if they do anything, at another person's explicit request, for the purpose of aiding that other person to self-administer a substance that has been prescribed for that other person as part of the provision of medical assistance in dying in accordance with [section 241.2](#).

Clarification

(5.1) For greater certainty, no social worker, psychologist, psychiatrist, therapist, medical practitioner, nurse practitioner or other health care professional commits an offence if they provide information to a person on the lawful provision of medical assistance in dying.

Reasonable but mistaken belief

(6) For greater certainty, the exemption set out in any of subsections (2) to (5) applies even if the person invoking the exemption has a reasonable but mistaken belief about any fact that is an element of the exemption.

Definitions

(7) In this section, ***medical assistance in dying***, ***medical practitioner***, ***nurse practitioner*** and ***pharmacist*** have the same meanings as in [section 241.1](#).

R.S., 1985, c. C-46, s. 241; R.S., 1985, c. 27 (1st Supp.), s. 7; [2016, c. 3, s. 3](#).

Medical Assistance in Dying

Definitions

241.1 The following definitions apply in this section and in [sections 241.2](#) to [241.4](#).

medical assistance in dying means

(a) the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or

(b) the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death. (*aide médicale à mourir*)

medical practitioner means a person who is entitled to practise medicine under the laws of a province. (*médecin*)

nurse practitioner means a registered nurse who, under the laws of a province, is entitled to practise as a nurse practitioner — or under an equivalent designation — and to autonomously make diagnoses, order and interpret diagnostic tests, prescribe substances and treat patients. (*infirmier praticien*)

pharmacist means a person who is entitled to practise pharmacy under the laws of a province. (*pharmacien*)

[2016, c. 3, s. 3](#).

Eligibility for medical assistance in dying

241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

- (a)** they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;
- (b)** they are at least 18 years of age and capable of making decisions with respect to their health;
- (c)** they have a grievous and irremediable medical condition;
- (d)** they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and
- (e)** they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

- (a)** they have a serious and incurable illness, disease or disability;
- (b)** they are in an advanced state of irreversible decline in capability; and
- (c)** that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable.
- (d)** [Repealed, 2021, c. 2, s. 1]

Exclusion

(2.1) For the purposes of paragraph (2)(a), a mental illness is not considered to be an illness, disease or disability.

Safeguards — natural death foreseeable

(3) Subject to subsection (3.2), before a medical practitioner or nurse practitioner provides medical assistance in dying to a person whose natural death is reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining, the medical practitioner or nurse practitioner must

- (a)** be of the opinion that the person meets all of the criteria set out in subsection (1);
- (b)** ensure that the person's request for medical assistance in dying was
 - (i)** made in writing and signed and dated by the person or by another person under subsection (4), and

- (ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;
- (c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) — before an independent witness who then also signed and dated the request;
- (d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;
- (e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);
- (f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;
- (g) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision; and
- (h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying.
- (i) [Repealed, 2021, c. 2, s. 1]

Safeguards — natural death not foreseeable

- (3.1)** Before a medical practitioner or nurse practitioner provides medical assistance in dying to a person whose natural death is not reasonably foreseeable, taking into account all of their medical circumstances, the medical practitioner or nurse practitioner must
- (a) be of the opinion that the person meets all of the criteria set out in subsection (1);
 - (b) ensure that the person's request for medical assistance in dying was
 - (i) made in writing and signed and dated by the person or by another person under subsection (4), and
 - (ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;
 - (c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) — before an independent witness who then also signed and dated the request;
 - (d) ensure that the person has been informed that the person may, at any time and in any manner, withdraw their request;
 - (e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in

subsection (1);

(e.1) if neither they nor the other medical practitioner or nurse practitioner referred to in paragraph (e) has expertise in the condition that is causing the person's suffering, ensure that they or the medical practitioner or nurse practitioner referred to in paragraph (e) consult with a medical practitioner or nurse practitioner who has that expertise and share the results of that consultation with the other practitioner;

(f) be satisfied that they and the medical practitioner or nurse practitioner referred to in paragraph (e) are independent;

(g) ensure that the person has been informed of the means available to relieve their suffering, including, where appropriate, counselling services, mental health and disability support services, community services and palliative care and has been offered consultations with relevant professionals who provide those services or that care;

(h) ensure that they and the medical practitioner or nurse practitioner referred to in paragraph (e) have discussed with the person the reasonable and available means to relieve the person's suffering and they and the medical practitioner or nurse practitioner referred to in paragraph (e) agree with the person that the person has given serious consideration to those means;

(i) ensure that there are at least 90 clear days between the day on which the first assessment under this subsection of whether the person meets the criteria set out in subsection (1) begins and the day on which medical assistance in dying is provided to them or — if the assessments have been completed and they and the medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the loss of the person's capacity to provide consent to receive medical assistance in dying is imminent — any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;

(j) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision; and

(k) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying.

Final consent — waiver

(3.2) For the purposes of subsection (3), the medical practitioner or nurse practitioner may administer a substance to a person to cause their death without meeting the requirement set out in paragraph (3)(h) if

(a) before the person loses the capacity to consent to receiving medical assistance in dying,

(i) they met all of the criteria set out in subsection (1) and all other safeguards set out in subsection (3) were met,

(ii) they entered into an arrangement in writing with the medical practitioner or nurse practitioner that the medical practitioner or nurse practitioner would administer a substance to cause their death on a specified day,

(iii) they were informed by the medical practitioner or nurse practitioner of the risk of losing the capacity to consent to receiving medical assistance in dying prior to the day specified in the arrangement, and

(iv) in the written arrangement, they consented to the administration by the medical practitioner or nurse practitioner of a substance to cause their death on or before the day specified in the arrangement if they lost their capacity to consent to receiving medical assistance in dying prior to that day;

(b) the person has lost the capacity to consent to receiving medical assistance in dying;

(c) the person does not demonstrate, by words, sounds or gestures, refusal to have the substance administered or resistance to its administration; and

(d) the substance is administered to the person in accordance with the terms of the arrangement.

For greater certainty

(3.3) For greater certainty, involuntary words, sounds or gestures made in response to contact do not constitute a demonstration of refusal or resistance for the purposes of paragraph (3.2)(c).

Advance consent invalidated

(3.4) Once a person demonstrates, by words, sounds or gestures, in accordance with subsection (3.2), refusal to have the substance administered or resistance to its administration, medical assistance in dying can no longer be provided to them on the basis of the consent given by them under subparagraph (3.2)(a)(iv).

Advance consent — self-administration

(3.5) In the case of a person who loses the capacity to consent to receiving medical assistance in dying after self-administering a substance, provided to them under this section, so as to cause their own death, a medical practitioner or nurse practitioner may administer a substance to cause the death of that person if

(a) before the person loses the capacity to consent to receiving medical assistance in dying, they and the medical practitioner or nurse practitioner entered into an arrangement in writing providing that the medical practitioner or nurse practitioner would

(i) be present at the time the person self-administered the first substance, and

(ii) administer a second substance to cause the person's death if, after self-administering the first substance, the person lost the capacity to consent to receiving medical assistance in dying and did not die within a specified period;

(b) the person self-administers the first substance, does not die within the period specified in the arrangement and loses the capacity to consent to receiving medical assistance in dying; and

(c) the second substance is administered to the person in accordance with the terms of the arrangement.

Unable to sign

(4) If the person requesting medical assistance in dying is unable to sign and date the request, another person — who is at least 18 years of age, who understands the nature of the request for medical assistance in dying and who does not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death — may do so in the person's presence, on the person's behalf and under the person's express direction.

Independent witness

(5) Any person who is at least 18 years of age and who understands the nature of the request for medical assistance in dying may act as an independent witness, except if they

(a) know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death;

(b) are an owner or operator of any health care facility at which the person making the request is being treated or any facility in which that person resides;

(c) are directly involved in providing health care services to the person making the request; or

(d) directly provide personal care to the person making the request.

Exception

(5.1) Despite paragraphs (5)(c) and (d), a person who provides health care services or personal care as their primary occupation and who is paid to provide that care to the person requesting medical assistance in dying is permitted to act as an independent witness, except for

(a) the medical practitioner or nurse practitioner who will provide medical assistance in dying to the person; and

(b) the medical practitioner or nurse practitioner who provided an opinion under paragraph (3)(e) or (3.1)(e), as the case may be, in respect of the person.

Independence — medical practitioners and nurse practitioners

(6) The medical practitioner or nurse practitioner providing medical assistance in dying and the medical practitioner or nurse practitioner who provides the opinion referred to in paragraph (3)(e) or (3.1)(e) are independent if they

(a) are not a mentor to the other practitioner or responsible for supervising their work;

(b) do not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death, other than standard compensation for their services relating to the request; and

(c) do not know or believe that they are connected to the other practitioner or to the person making the request in any other way that would affect their objectivity.

Reasonable knowledge, care and skill

(7) Medical assistance in dying must be provided with reasonable knowledge, care and skill and in accordance with any applicable provincial laws, rules or standards.

Informing pharmacist

(8) The medical practitioner or nurse practitioner who, in providing medical assistance in dying, prescribes or obtains a substance for that purpose must, before any pharmacist dispenses the substance, inform the pharmacist that the substance is intended for that purpose.

Clarification

(9) For greater certainty, nothing in this section compels an individual to provide or assist in providing medical assistance in dying.

2016, c. 3, s. 3; 2021, c. 2, s. 1.

Failure to comply with safeguards

241.3 A medical practitioner or nurse practitioner who, in providing medical assistance in dying, knowingly fails to comply, subject to [subsection 241.2\(3.2\)](#), with all of the requirements set out in [paragraphs 241.2\(3\)\(b\) to \(h\)](#) or [paragraphs 241.2\(3.1\)\(b\) to \(k\)](#), as the case may be, and with [subsection 241.2\(8\)](#) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

2016, c. 3, s. 3; 2019, c. 25, s. 80; 2021, c. 2, s. 2.

Filing information — practitioners

241.31 (1) Unless they are exempted under regulations made under subsection (3), a medical practitioner or nurse practitioner who carries out an assessment of whether a person meets the criteria set out in [subsection 241.2\(1\)](#) or who receives a written request for medical assistance in dying must, in accordance with those regulations, provide the information required by those regulations to the recipient designated in those regulations.

Filing information — responsible for preliminary assessments

(1.1) Unless they are exempted under regulations made under subsection (3), any person who has the responsibility to carry out preliminary assessments of whether a person meets the criteria set out in [subsection 241.2\(1\)](#) must, in accordance with those regulations, provide the information required by those regulations to the recipient designated in those regulations.

Filing information — pharmacist and pharmacy technicians

(2) Unless they are exempted under regulations made under subsection (3), a pharmacist who dispenses a substance in connection with the provision of medical assistance in dying, or the person permitted to act as a pharmacy technician under the laws of a province who dispenses a substance to aid a medical practitioner or nurse practitioner in providing a person with medical assistance in dying, must, in accordance with those regulations, provide the information required by those regulations to the recipient designated in those regulations.

Regulations

(3) The Minister of Health must make regulations that he or she considers necessary

(a) respecting the provision and collection, for the purpose of monitoring medical assistance in dying, of information relating to requests for, and the provision of, medical assistance in dying, including

(i) the information to be provided, at various stages, by medical practitioners, nurse practitioners, persons referred to in subsection (1.1) who have the responsibility to carry out preliminary assessments, pharmacists and pharmacy technicians, or by a class of any of them, including

(A) the elements considered in the course of the assessments — preliminary or otherwise — of whether a person meets the criteria set out in [subsection 241.2\(1\)](#),

(B) information respecting the race or indigenous identity of a person who requests or receives medical assistance in dying, if the person consents to providing this information, and

(C) information — other than information that must be provided in relation to the assessment of eligibility to receive medical assistance in dying and the application of safeguards — respecting any *disability*, as defined in [section 2](#) of the *Accessible Canada Act*, of a person who requests or receives medical assistance in dying, if the person consents to providing that information,

(ii) the form, manner and time in which the information must be provided,

(iii) the designation of a person as the recipient of the information, and

(iv) the collection of information from coroners and medical examiners;

(b) respecting the use, analysis and interpretation of that information, including for the purposes of determining the presence of any inequality — including systemic inequality — or disadvantage based on race, Indigenous identity, disability or other characteristics, in medical assistance in dying;

(b.1) respecting the protection, publication, and disclosure of that information;

(c) respecting the disposal of that information; and

(d) exempting, on any terms that may be specified, a class of persons from the requirements set out in subsections (1) to (2).

Guidelines — information on death certificates

(3.1) The Minister of Health, after consultation with representatives of the provincial governments responsible for health, must establish guidelines on the information to be included on death certificates in cases where medical assistance in dying has been provided, which may include the way in which to clearly identify medical assistance in dying as the manner of death, as well as the illness, disease or disability that prompted the request for medical assistance in dying.

Offence and punishment

(4) A medical practitioner or nurse practitioner who knowingly fails to comply with subsection (1), a person having the responsibility to carry out preliminary assessments who knowingly fails to comply with subsection (1.1) or a pharmacist or pharmacy technician who knowingly fails to comply with subsection (2),

(a) is guilty of an indictable offence and liable to a term of imprisonment of not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

Offence and punishment

(5) Everyone who knowingly contravenes the regulations made under subsection (3)

(a) is guilty of an indictable offence and liable to a term of imprisonment of not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

Consultation

(6) In performing his or her functions or duties under subsection (3), the Minister of Health must, when appropriate, consult with the minister responsible for the status of persons with disabilities.

[2016, c. 3, s. 4](#); [2021, c. 2, s. 3](#).

Forgery

241.4 (1) Everyone commits an offence who commits forgery in relation to a request for medical assistance in dying.

Destruction of documents

(2) Everyone commits an offence who destroys a document that relates to a request for medical assistance in dying with intent to interfere with

- (a)** another person's access to medical assistance in dying;
- (b)** the lawful assessment of a request for medical assistance in dying;
- (c)** another person invoking an exemption under any of [subsections 227\(1\) or \(2\), 241\(2\) to \(5\) or 245\(2\)](#); or
- (d)** the provision by a person of information under [section 241.31](#).

Punishment

(3) Everyone who commits an offence under subsection (1) or (2) is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction.

Definition of *document*

(4) In subsection (2), *document* has the same meaning as in [section 321](#).

[2016, c. 3, ss. 3, 5](#); [2019, c. 25, s. 81](#).

Neglect in Child-birth and Concealing Dead Body

Neglect to obtain assistance in childbirth

242 A female person who, being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable assistance in respect of her delivery is, if the child is permanently injured as a result of the failure or dies immediately before, during or in a short time after birth, as a result of the failure, guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 242; [2019, c. 25, s. 82](#).

Concealing body of child

243 Every person who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b)** an offence punishable on summary conviction.

Bodily Harm and Acts and Omissions Causing Danger to the Person

Discharging firearm with intent

244 (1) Every person commits an offence who discharges a firearm at a person with intent to wound, maim or disfigure, to endanger the life of or to prevent the arrest or detention of any person — whether or not that person is the one at whom the firearm is discharged.

Punishment

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years; and

(b) in any other case, to imprisonment for a term of not more than 14 years.

Subsequent offences

(3) In determining, for the purpose of paragraph (2)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#), [272](#) or [273](#), [subsection 279\(1\)](#) or [section 279.1](#), [344](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(4) For the purposes of subsection (3), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

Causing bodily harm with intent — air gun or pistol

244.1 Every person who, with intent

- (a) to wound, maim or disfigure any person,
- (b) to endanger the life of any person, or
- (c) to prevent the arrest or detention of any person,

discharges an air or compressed gas gun or pistol at any person, whether or not that person is the person mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

1995, c. 39, s. 144.

Discharging firearm — recklessness

244.2 (1) Every person commits an offence

- (a) who intentionally discharges a firearm into or at a place, knowing that or being reckless as to whether another person is present in the place; or
- (b) who intentionally discharges a firearm while being reckless as to the life or safety of another person.

Definition of *place*

(2) For the purpose of paragraph (1)(a), ***place*** means any building or structure — or part of one — or any motor vehicle, vessel, aircraft, railway vehicle, container or trailer.

Punishment

(3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and

- (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if the offence is committed for the benefit of, at the direction of or in association with a criminal organization, is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of
 - (i) five years, in the case of a first offence, and
 - (ii) seven years, in the case of a second or subsequent offence; and
- (b) in any other case, is liable to imprisonment for a term of not more than 14 years.

Subsequent offences

(4) In determining, for the purpose of paragraph (3)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

- (a) an offence under this section;
- (b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#); or

(c) an offence under [section 220, 236, 239, 272 or 273, subsection 279\(1\)](#) or [section 279.1, 344 or 346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(5) For the purpose of subsection (4), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

[2009, c. 22, s. 8](#); [2022, c. 15, s. 11](#).

Administering noxious thing

245 (1) Every person who administers or causes to be administered to any other person or causes any other person to take poison or any other destructive or noxious thing is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than 14 years, if they did so with intent to endanger the life of or to cause bodily harm to that person; or

(b) of an indictable offence and liable to imprisonment for a term of not more than two years or of an offence punishable on summary conviction, if they did so with intent to aggrieve or annoy that person.

Exemption

(2) Subsection (1) does not apply to

(a) a medical practitioner or nurse practitioner who provides medical assistance in dying in accordance with [section 241.2](#); and

(b) a person who does anything for the purpose of aiding a medical practitioner or nurse practitioner to provide medical assistance in dying in accordance with [section 241.2](#).

Definitions

(3) In subsection (2), **medical assistance in dying**, **medical practitioner** and **nurse practitioner** have the same meanings as in [section 241.1](#).

R.S., 1985, c. C-46, s. 245; [2016, c. 3, s. 6](#); [2019, c. 25, s. 83](#).

Overcoming resistance to commission of offence

246 Every one who, with intent to enable or assist himself or another person to commit an indictable offence,

(a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance, or

(b) administers or causes to be administered to any person, or attempts to administer to any person, or causes or attempts to cause any person to take a stupefying or overpowering drug, matter or thing,

is guilty of an indictable offence and liable to imprisonment for life.

R.S., c. C-34, s. 230; 1972, c. 13, s. 70.

Traps likely to cause bodily harm

247 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who with intent to cause death or bodily harm to a person, whether ascertained or not,

(a) sets or places a trap, device or other thing that is likely to cause death or bodily harm to a person; or

(b) being in occupation or possession of a place, knowingly permits such a trap, device or other thing to remain in that place.

Bodily harm

(2) Every person who commits an offence under subsection (1), and by doing so causes bodily harm to any other person, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Offence-related place

(3) Every person who commits an offence under subsection (1), in a place kept or used for the purpose of committing another indictable offence, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Offence-related place — bodily harm

(4) Every one who commits an offence under subsection (1), in a place kept or used for the purpose of committing another indictable offence, and thereby causes bodily harm to a person is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years.

Death

(5) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for life.

R.S., 1985, c. C-46, s. 247; 2004, c. 12, s. 6; 2019, c. 25, s. 84.

Interfering with transportation facilities

248 Every one who, with intent to endanger the safety of any person, places anything on or does anything to any property that is used for or in connection with the transportation of persons or goods by land, water or air that is likely to cause death or bodily harm to persons is guilty of an indictable offence and liable to imprisonment for life.

R.S., c. C-34, s. 232.

249 [Repealed, 2018, c. 21, s. 14]

249.1 [Repealed, 2018, c. 21, s. 14]

249.2 [Repealed, 2018, c. 21, s. 14]

249.3 [Repealed, 2018, c. 21, s. 14]

249.4 [Repealed, 2018, c. 21, s. 14]

250 [Repealed, 2018, c. 21, s. 14]

251 [Repealed, 2018, c. 21, s. 14]

252 [Repealed, 2018, c. 21, s. 14]

253 [Repealed, 2018, c. 21, s. 14]

253.1 [Repealed, 2018, c. 21, s. 14]

254 [Repealed, 2018, c. 21, s. 14]

254.01 [Repealed, 2018, c. 21, s. 14]

254.1 [Repealed, 2018, c. 21, s. 14]

255 [Repealed, 2018, c. 21, s. 14]

255.1 [Repealed, 2018, c. 21, s. 14]

256 [Repealed, 2018, c. 21, s. 14]

257 [Repealed, 2018, c. 21, s. 14]

258 [Repealed, 2018, c. 21, s. 14]

258.1 [Repealed, 2018, c. 21, s. 14]

259 [Repealed, 2018, c. 21, s. 14]

260 [Repealed, 2018, c. 21, s. 14]

261 [Repealed, 2018, c. 21, s. 14]

Impeding attempt to save life

262 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who

(a) prevents or impedes or attempts to prevent or impede any person who is attempting to save his own life, or

(b) without reasonable cause prevents or impedes or attempts to prevent or impede any person who is attempting to save the life of another person.

R.S., 1985, c. C-46, s. 262; [2019, c. 25, s. 90](#).

Duty to safeguard opening in ice

263 (1) Every one who makes or causes to be made an opening in ice that is open to or frequented by the public is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the opening exists.

Excavation on land

(2) Every one who leaves an excavation on land that he owns or of which he has charge or supervision is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the excavation exists.

Offences

(3) Every one who fails to perform a duty imposed by subsection (1) or (2) is guilty of

(a) manslaughter, if the death of any person results therefrom;

(b) an offence under [section 269](#), if bodily harm to any person results therefrom; or

(c) an offence punishable on summary conviction.

R.S., c. C-34, s. 242; 1980-81-82-83, c. 125, s. 18.

Criminal harassment

264 (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Prohibited conduct

(2) The conduct mentioned in subsection (1) consists of

(a) repeatedly following from place to place the other person or anyone known to them;

(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

(c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or

(d) engaging in threatening conduct directed at the other person or any member of their family.

Punishment

(3) Every person who contravenes this section is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

Factors to be considered

(4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened

(a) the terms or conditions of an order made pursuant to [section 161](#) or a recognizance entered into pursuant to [section 810](#), [810.1](#) or [810.2](#); or

(b) the terms or conditions of any other order or recognizance, or of an undertaking, made or entered into under the common law, this Act or any other Act of Parliament or of a provincial legislature that is similar in effect to an order or recognizance referred to in paragraph (a).

Reasons

(5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.

R.S., 1985, c. C-46, s. 264; R.S., 1985, c. 27 (1st Supp.), s. 37; 1993, c. 45, s. 2; 1997, c. 16, s. 4, c. 17, s. 9; [2002, c. 13, s. 10](#); [2019, c. 25, s. 91](#).

Assaults

Uttering threats

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or bodily harm to any person;

(b) to burn, destroy or damage real or personal property; or

(c) to kill, poison or injure an animal or bird that is the property of any person.

Punishment

(2) Every one who commits an offence under paragraph (1)(a) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Idem

(3) Every one who commits an offence under paragraph (1)(b) or (c)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. 27 (1st Supp.), s. 38; 1994, c. 44, s. 16; [2019, c. 25, s. 92](#).

Assault

265 (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

Application

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

Consent

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

Accused's belief as to consent

(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is

sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

R.S., c. C-34, s. 244; 1974-75-76, c. 93, s. 21; 1980-81-82-83, c. 125, s. 19.

Assault

266 Every one who commits an assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

R.S., c. C-34, s. 245; 1972, c. 13, s. 21; 1974-75-76, c. 93, s. 22; 1980-81-82-83, c. 125, s. 19.

Assault with a weapon or causing bodily harm

267 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,

(a) carries, uses or threatens to use a weapon or an imitation thereof,

(b) causes bodily harm to the complainant, or

(c) chokes, suffocates or strangles the complainant.

R.S., 1985, c. C-46, s. 267; 1994, c. 44, s. 17; [2019, c. 25, s. 93](#).

Aggravated assault

268 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

Punishment

(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Excision

(3) For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where

(a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or

(b) the person is at least eighteen years of age and there is no resulting bodily harm.

Consent

(4) For the purposes of this section and [section 265](#), no consent to the excision, infibulation or mutilation, in whole or in part, of the labia majora, labia minora or clitoris of a person is valid, except in the cases described in paragraphs (3)(a) and (b).

R.S., 1985, c. C-46, s. 268; 1997, c. 16, s. 5.

Unlawfully causing bodily harm

269 Every one who unlawfully causes bodily harm to any person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 269; 1994, c. 44, s. 18; [2019, c. 25, s. 94](#).

Aggravating circumstance — assault against a public transit operator

269.01 (1) When a court imposes a sentence for an offence referred to in [paragraph 264.1\(1\)](#)(a) or any of [sections 266](#) to [269](#), it shall consider as an aggravating circumstance the fact that the victim of the offence was, at the time of the commission of the offence, a public transit operator engaged in the performance of his or her duty.

Definitions

(2) The following definitions apply in this section.

public transit operator means an individual who operates a vehicle used in the provision of passenger transportation services to the public, and includes an individual who operates a school bus. (*conducteur de véhicule de transport en commun*)

vehicle includes a bus, paratransit vehicle, licensed taxi cab, train, subway, tram and ferry. (*véhicule*)

[2015, c. 1, s. 1](#).

Torture

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definitions

(2) For the purposes of this section,

official means

(a) a peace officer,

(b) a public officer,

(c) a member of the Canadian Forces, or

(d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c),

whether the person exercises powers in Canada or outside Canada; (*fonctionnaire*)

torture means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

(i) obtaining from the person or from a third person information or a statement,

(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and

(iii) intimidating or coercing the person or a third person, or

(b) for any reason based on discrimination of any kind,

but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions. (*torture*)

No defence

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

Evidence

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.

R.S., 1985, c. 10 (3rd Supp.), s. 2.

Assaulting a peace officer

270 (1) Every one commits an offence who

(a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;

(b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or

(c) assaults a person

(i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or

(ii) with intent to rescue anything taken under lawful process, distress or seizure.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

R.S., c. C-34, s. 246; 1972, c. 13, s. 22; 1980-81-82-83, c. 125, s. 19.

Assaulting peace officer with weapon or causing bodily harm

270.01 (1) Everyone commits an offence who, in committing an assault referred to in [section 270](#),

(a) carries, uses or threatens to use a weapon or an imitation of one; or

(b) causes bodily harm to the complainant.

Punishment

(2) Everyone who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

[2009, c. 22, s. 9](#); [2019, c. 25, s. 95](#).

Aggravated assault of peace officer

270.02 Everyone who, in committing an assault referred to in [section 270](#), wounds, maims, disfigures or endangers the life of the complainant is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[2009, c. 22, s. 9](#).

Sentences to be served consecutively

270.03 A sentence imposed on a person for an offence under [subsection 270\(1\)](#) or [270.01\(1\)](#) or [section 270.02](#) committed against a law enforcement officer, as defined in [subsection 445.01\(4\)](#), shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events.

[2015, c. 34, s. 2](#).

Disarming a peace officer

270.1 (1) Every one commits an offence who, without the consent of a peace officer, takes or attempts to take a weapon that is in the possession of the peace officer when the peace officer is engaged in the execution of his or her duty.

Definition of *weapon*

(2) For the purpose of subsection (1), **weapon** means any thing that is designed to be used to cause injury or death to, or to temporarily incapacitate, a person.

Punishment

(3) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

[2002, c. 13, s. 11](#); [2019, c. 25, s. 96](#).

Sexual assault

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

R.S., 1985, c. C-46, s. 271; R.S., 1985, c. 19 (3rd Supp.), s. 10; 1994, c. 44, s. 19; [2012, c. 1, s. 25](#); [2015, c. 23, s. 14](#).

Sexual assault with a weapon, threats to a third party or causing bodily harm

272 (1) Every person commits an offence who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

(c) causes bodily harm to the complainant;

(c.1) chokes, suffocates or strangles the complainant; or

(d) is a party to the offence with any other person.

Punishment

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years; and

(a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and

(b) in any other case, to imprisonment for a term not exceeding fourteen years.

Subsequent offences

(3) In determining, for the purpose of paragraph (2)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#) or [273](#), [subsection 279\(1\)](#) or [section 279.1](#), [344](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(4) For the purposes of subsection (3), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

R.S., 1985, c. C-46, s. 272; 1995, c. 39, s. 145; [2008, c. 6, s. 28](#); [2009, c. 22, s. 10](#); [2012, c. 1, s. 26](#); [2015, c. 23, s. 15](#); [2019, c. 25, s. 97](#).

Aggravated sexual assault

273 (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

Aggravated sexual assault

(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal

organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(a.2) if the complainant is under the age of 16 years, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years; and

(b) in any other case, to imprisonment for life.

Subsequent offences

(3) In determining, for the purpose of paragraph (2)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#) or [272](#), [subsection 279\(1\)](#) or [section 279.1](#), [344](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(4) For the purposes of subsection (3), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

R.S., 1985, c. C-46, s. 273; 1995, c. 39, s. 146; [2008, c. 6, s. 29](#); [2009, c. 22, s. 11](#); [2012, c. 1, s. 27](#).

Meaning of *consent*

273.1 (1) Subject to subsection (2) and [subsection 265\(3\)](#), ***consent*** means, for the purposes of [sections 271](#), [272](#) and [273](#), the voluntary agreement of the complainant to engage in the sexual activity in question.

Consent

(1.1) Consent must be present at the time the sexual activity in question takes place.

Question of law

(1.2) The question of whether no consent is obtained under [subsection 265\(3\)](#) or subsection (2) or (3) is a question of law.

No consent obtained

(2) For the purpose of subsection (1), no consent is obtained if

- (a)** the agreement is expressed by the words or conduct of a person other than the complainant;
- (a.1)** the complainant is unconscious;
- (b)** the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph [\(a.1\)](#);
- (c)** the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d)** the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e)** the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Subsection (2) not limiting

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

1992, c. 38, s. 1; [2018, c. 29, s. 19](#).

Where belief in consent not a defence

273.2 It is not a defence to a charge under [section 271](#), [272](#) or [273](#) that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a)** the accused's belief arose from
 - (i)** the accused's self-induced intoxication,
 - (ii)** the accused's recklessness or wilful blindness, or
 - (iii)** any circumstance referred to in [subsection 265\(3\)](#) or [273.1\(2\)](#) or [\(3\)](#) in which no consent is obtained;
- (b)** the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- (c)** there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

1992, c. 38, s. 1; [2018, c. 29, s. 20](#).

Removal of child from Canada

273.3 (1) No person shall do anything for the purpose of removing from Canada a person who is ordinarily resident in Canada and who is

- (a) under the age of 16 years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against [section 151](#) or [152](#) or [subsection 160\(3\)](#) or [173\(2\)](#) in respect of that person;
- (b) 16 years of age or more but under the age of eighteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against [section 153](#) in respect of that person;
- (c) under the age of 18 years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against [section 155](#), [subsection 160\(2\)](#) or [section 170](#), [171](#), [267](#), [268](#), [269](#), [271](#), [272](#), [273](#) or [320.102](#) in respect of that person; or
- (d) under the age of 18 years, with the intention that an act be committed outside Canada that, if it were committed in Canada, would be an offence against [section 293.1](#) in respect of that person or under the age of 16 years, with the intention that an act be committed outside Canada that, if it were committed in Canada, would be an offence against [section 293.2](#) in respect of that person.

Punishment

(2) Every person who contravenes this section is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction.

1993, c. 45, s. 3; 1997, c. 18, s. 13; [2008, c. 6, s. 54](#); [2015, c. 29, s. 8](#); [2019, c. 25, s. 98](#); [2021, c. 24, s. 4](#).

Corroboration not required

274 If an accused is charged with an offence under [section 151](#), [152](#), [153](#), [153.1](#), [155](#), [160](#), [170](#), [171](#), [172](#), [173](#), [271](#), [272](#), [273](#), [286.1](#), [286.2](#) or [286.3](#), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

R.S., 1985, c. C-46, s. 274; R.S., 1985, c. 19 (3rd Supp.), s. 11; [2002, c. 13, s. 12](#); [2014, c. 25, s. 16](#); [2019, c. 25, s. 99](#).

Rules respecting recent complaint abrogated

275 The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under [sections 151](#), [152](#), [153](#), [153.1](#) and [155](#), [subsections 160\(2\)](#) and [\(3\)](#) and [sections 170](#), [171](#), [172](#), [173](#), [271](#), [272](#) and [273](#).

R.S., 1985, c. C-46, s. 275; R.S., 1985, c. 19 (3rd Supp.), s. 11; [2002, c. 13, s. 12](#); [2019, c. 25, s. 99](#).

Evidence of complainant's sexual activity

276 (1) In proceedings in respect of an offence under [section 151, 152, 153, 153.1 or 155, subsection 160\(2\) or \(3\) or section 170, 171, 172, 173, 271, 272 or 273](#), evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

Conditions for admissibility

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in [sections 278.93 and 278.94](#), that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

(b) is relevant to an issue at trial; and

(c) is of specific instances of sexual activity; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

Interpretation

(4) For the purpose of this section, **sexual activity** includes any communication made for a sexual purpose or whose content is of a sexual nature.

R.S., 1985, c. C-46, s. 276; R.S., 1985, c. 19 (3rd Supp.), s. 12; 1992, c. 38, s. 2; 2002, c. 13, s. 13; 2018, c. 29, s. 21; 2019, c. 25, s. 100.

276.1 [Repealed, 2018, c. 29, s. 22]

276.2 [Repealed, 2018, c. 29, s. 22]

276.3 [Repealed, 2018, c. 29, s. 22]

276.4 [Repealed, 2018, c. 29, s. 22]

276.5 [Repealed, 2018, c. 29, s. 22]

Reputation evidence

277 In proceedings in respect of an offence under [section 151](#), [152](#), [153](#), [153.1](#) or [155](#), [subsection 160\(2\)](#) or [\(3\)](#) or [section 170](#), [171](#), [172](#), [173](#), [271](#), [272](#) or [273](#), evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

R.S., 1985, c. C-46, s. 277; R.S., 1985, c. 19 (3rd Supp.), s. 13; 2002, c. 13, s. 14; 2019, c. 25, s. 101.

Spouse may be charged

278 A husband or wife may be charged with an offence under [section 271](#), [272](#) or [273](#) in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred.

1980-81-82-83, c. 125, s. 19.

Definition of record

278.1 For the purposes of [sections 278.2](#) to [278.92](#), **record** means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

1997, c. 30, s. 1; 2018, c. 29, s. 23.

Production of record to accused

278.2 (1) Except in accordance with [sections 278.3](#) to [278.91](#), no record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

- (a)** an offence under [section 151](#), [152](#), [153](#), [153.1](#), [155](#), [160](#), [170](#), [171](#), [172](#), [173](#), [213](#), [271](#), [272](#), [273](#), [279.01](#), [279.011](#), [279.02](#), [279.03](#), [286.1](#), [286.2](#) or [286.3](#); or

(b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

Application of provisions

(2) [Section 278.1](#), this section and [sections 278.3](#) to [278.91](#) apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.

Duty of prosecutor to give notice

(3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents.

1997, c. 30, s. 1; 1998, c. 9, s. 3; [2014, c. 25, ss. 17, 48](#); [2015, c. 13, s. 5](#); [2019, c. 25, s. 102](#).

Application for production

278.3 (1) An accused who seeks production of a record referred to in [subsection 278.2\(1\)](#) must make an application to the judge before whom the accused is to be, or is being, tried.

No application in other proceedings

(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.

Form and content of application

(3) An application must be made in writing and set out

(a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and

(b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

Insufficient grounds

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(a) that the record exists;

(b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

- (c) that the record relates to the incident that is the subject-matter of the proceedings;
- (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
- (e) that the record may relate to the credibility of the complainant or witness;
- (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
- (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
- (h) that the record relates to the sexual activity of the complainant with any person, including the accused;
- (i) that the record relates to the presence or absence of a recent complaint;
- (j) that the record relates to the complainant's sexual reputation; or
- (k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

Service of application and subpoena

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least 60 days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

Service on other persons

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

1997, c. 30, s. 1; 2015, c. 13, s. 6; 2018, c. 29, s. 24.

Hearing *in camera*

278.4 (1) The judge shall hold a hearing *in camera* to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

Persons who may appear at hearing

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

Right to counsel

(2.1) The judge shall, as soon as feasible, inform any person referred to in subsection (2) who participates in the hearing of their right to be represented by counsel.

Costs

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing.

1997, c. 30, s. 1; 2015, c. 13, s. 7.

Judge may order production of record for review

278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that

- (a)** the application was made in accordance with [subsections 278.3\(2\) to \(6\)](#);
- (b)** the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
- (c)** the production of the record is necessary in the interests of justice.

Factors to be considered

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:

- (a)** the extent to which the record is necessary for the accused to make a full answer and defence;
- (b)** the probative value of the record;
- (c)** the nature and extent of the reasonable expectation of privacy with respect to the record;
- (d)** whether production of the record is based on a discriminatory belief or bias;
- (e)** the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- (f)** society's interest in encouraging the reporting of sexual offences;
- (g)** society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- (h)** the effect of the determination on the integrity of the trial process.

1997, c. 30, s. 1; 2015, c. 13, s. 8.

Review of record by judge

278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

Hearing *in camera*

(2) The judge may hold a hearing *in camera* if the judge considers that it will assist in making the determination.

Provisions re hearing

(3) [Subsections 278.4\(2\) to \(3\)](#) apply in the case of a hearing under subsection (2).

1997, c. 30, s. 1; [2015, c. 13, s. 9](#).

Judge may order production of record to accused

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

Factors to be considered

(2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates and, in particular, shall take the factors specified in [paragraphs 278.5\(2\)\(a\) to \(h\)](#) into account.

Conditions on production

(3) If the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy, personal security and equality interests of the complainant or witness, as the case may be, and of any other person to whom the record relates, including, for example, the following conditions:

- (a)** that the record be edited as directed by the judge;
- (b)** that a copy of the record, rather than the original, be produced;
- (c)** that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
- (d)** that the record be viewed only at the offices of the court;
- (e)** that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

Copy to prosecutor

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

Record not to be used in other proceedings

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

Retention of record by court

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.

1997, c. 30, s. 1; [2015, c. 13, s. 10](#).

Reasons for decision

278.8 (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to [subsection 278.5\(1\)](#) or [278.7\(1\)](#).

Record of reasons

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

1997, c. 30, s. 1.

Publication prohibited

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

- (a)** the contents of an application made under [section 278.3](#);
- (b)** any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or
- (c)** the determination of the judge pursuant to [subsection 278.5\(1\)](#) or [278.7\(1\)](#) and the reasons provided pursuant to [section 278.8](#), unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

1997, c. 30, s. 1; 2005, c. 32, s. 14.

Appeal

278.91 For the purposes of [sections 675](#) and [676](#), a determination to make or refuse to make an order pursuant to [subsection 278.5\(1\)](#) or [278.7\(1\)](#) is deemed to be a question of law.

1997, c. 30, s. 1.

Admissibility — accused in possession of records relating to complainant

278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

(a) an offence under [section 151](#), [152](#), [153](#), [153.1](#), [155](#), [160](#), [170](#), [171](#), [172](#), [173](#), [213](#), [271](#), [272](#), [273](#), [279.01](#), [279.011](#), [279.02](#), [279.03](#), [286.1](#), [286.2](#) or [286.3](#); or

(b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

Requirements for admissibility

(2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in [sections 278.93](#) and [278.94](#),

(a) if the admissibility of the evidence is subject to [section 276](#), that the evidence meets the conditions set out in [subsection 276\(2\)](#) while taking into account the factors set out in subsection (3); or

(b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge shall consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

- (c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
- (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (e) the need to remove from the fact-finding process any discriminatory belief or bias;
- (f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (g) the potential prejudice to the complainant's personal dignity and right of privacy;
- (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (i) any other factor that the judge, provincial court judge or justice considers relevant.

[2018, c. 29, s. 25](#); [2019, c. 25, s. 403](#).

Application for hearing — [sections 276](#) and [278.92](#)

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under [section 278.94](#) to determine whether evidence is admissible under [subsection 276\(2\)](#) or [278.92\(2\)](#).

Form and content of application

(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

Jury and public excluded

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

Judge may decide to hold hearing

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under [subsection 276\(2\)](#), the judge, provincial court judge or justice shall grant the application and hold a hearing under [section 278.94](#) to determine whether the evidence is admissible under subsection 276(2) or [278.92\(2\)](#).

[2018, c. 29, s. 25](#).

Hearing — jury and public excluded

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under [subsection 276\(2\)](#) or [278.92\(2\)](#).

Complainant not compellable

(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

Right to counsel

(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

Judge's determination and reasons

(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under [subsection 276\(2\)](#) or [278.92\(2\)](#) and shall provide reasons for that determination, and

(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(b) the reasons must state the factors referred to in [subsection 276\(3\)](#) or [278.92\(3\)](#) that affected the determination; and

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Record of reasons

(5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

[2018, c. 29, s. 25.](#)

Publication prohibited

278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under subsection 278.93;

(b) any evidence taken, the information given and the representations made at an application under [section 278.93](#) or at a hearing under [section 278.94](#);

(c) the decision of a judge or justice under [subsection 278.93\(4\)](#), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and

(d) the determination made and the reasons provided under [subsection 278.94\(4\)](#), unless

(i) that determination is that evidence is admissible, or

(ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

2018, c. 29, s. 25.

Judge to instruct jury — re use of evidence

278.96 If evidence is admitted at trial on the basis of a determination made under [subsection 278.94\(4\)](#), the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

2018, c. 29, s. 25.

Appeal

278.97 For the purposes of [sections 675](#) and [676](#), a determination made under [subsection 278.94\(4\)](#) shall be deemed to be a question of law.

2018, c. 29, s. 25.

Reasons

278.98 (1) In proceedings in respect of an offence under [section 151](#), [152](#), [153](#), [153.1](#) or [155](#), [subsection 160\(2\)](#) or [\(3\)](#) or [section 170](#), [171](#), [172](#), [173](#), [271](#), [272](#) or [273](#), the judge shall provide reasons for a decision that a person is

- (a) acquitted;
- (b) found guilty;
- (c) discharged, after having been found guilty;
- (d) found not criminally responsible on account of mental disorder; or
- (e) found unfit to stand trial.

Historical offences

(2) Subsection (1) also applies in proceedings for any offence under this Act, as it read from time to time before the day on which this section comes into force, if the conduct alleged would be an offence referred to in subsection (1) if it occurred on or after that day.

Record of reasons

(3) The reasons shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

Proceedings before judge

(4) This section applies only in proceedings before a judge without a jury.

2021, c. 8, s. 4.

Kidnapping, Trafficking in Persons, Hostage Taking and Abduction

Kidnapping

279 (1) Every person commits an offence who kidnaps a person with intent

- (a)** to cause the person to be confined or imprisoned against the person's will;
- (b)** to cause the person to be unlawfully sent or transported out of Canada against the person's will; or
- (c)** to hold the person for ransom or to service against the person's will.

Punishment

(1.1) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years;

(a.2) if the person referred to in paragraph (1)(a), (b) or (c) is under 16 years of age, to imprisonment for life and, unless the person who commits the offence is a parent, guardian or person having the lawful care or charge of the person referred to in that paragraph, to a minimum punishment of imprisonment for a term of five years; and

(b) in any other case, to imprisonment for life.

Subsequent offences

(1.2) In determining, for the purpose of paragraph (1.1)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under subsection (1);

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#), [272](#), [273](#), [279.1](#), [344](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Factors to consider

(1.21) In imposing a sentence under paragraph (1.1)([a.2](#)), the court shall take into account the age and vulnerability of the victim.

Sequence of convictions only

(1.3) For the purposes of subsection (1.2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

Forcible confinement

(2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

(3) [\[Repealed, 2018, c. 29, s. 26\]](#)

R.S., 1985, c. C-46, s. 279; R.S., 1985, c. 27 (1st Supp.), s. 39; 1995, c. 39, s. 147; 1997, c. 18, s. 14; [2008, c. 6, s. 30](#); [2009, c. 22, s. 12](#); [2013, c. 32, s. 1](#); [2018, c. 29, s. 26](#); [2019, c. 25, s. 103](#).

Trafficking in persons

279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case.

Consent

(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

Presumption

(3) For the purposes of subsections (1) and 279.011(1), evidence that a person who is not exploited lives with or is habitually in the company of a person who is exploited is, in the absence of evidence to the contrary, proof that the person exercises control, direction or influence over the movements of that person for the purpose of exploiting them or facilitating their exploitation.

2005, c. 43, s. 3; 2014, c. 25, s. 18; 2015, c. 16, s. 1.

Trafficking of a person under the age of eighteen years

279.011 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person under the age of eighteen years, or exercises control, direction or influence over the movements of a person under the age of eighteen years, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable

(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of six years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than fourteen years and to a minimum punishment of imprisonment for a term of five years, in any other case.

Consent

(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

2010, c. 3, s. 2.

Material benefit — trafficking

279.02 (1) Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under [subsection 279.01\(1\)](#), is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Material benefit — trafficking of person under 18 years

(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under [subsection 279.011\(1\)](#), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

2005, c. 43, s. 3; 2010, c. 3, s. 3; 2014, c. 25, s. 19; 2019, c. 25, s. 104.

Withholding or destroying documents — trafficking

279.03 (1) Every person who, for the purpose of committing or facilitating an offence under [subsection 279.01\(1\)](#), conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person's identity or immigration status — whether or not the document is of Canadian origin or is authentic — is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Withholding or destroying documents — trafficking of person under 18 years

(2) Everyone who, for the purpose of committing or facilitating an offence under [subsection 279.011\(1\)](#), conceals, removes, withholds or destroys any travel document that belongs to another person or any document that establishes or purports to establish another person's identity or immigration status — whether or not the document is of Canadian origin or is authentic — is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year.

[2005, c. 43, s. 3](#); [2010, c. 3, s. 3](#); [2014, c. 25, s. 19](#); [2019, c. 25, s. 105](#).

Exploitation

279.04 (1) For the purposes of [sections 279.01 to 279.03](#), a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

Factors

(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused

(a) used or threatened to use force or another form of coercion;

(b) used deception; or

(c) abused a position of trust, power or authority.

Organ or tissue removal

(3) For the purposes of [sections 279.01 to 279.03](#), a person exploits another person if they cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

[2005, c. 43, s. 3](#); [2012, c. 15, s. 2](#); [2015, c. 16, s. 2\(F\)](#).

Hostage taking

279.1 (1) Everyone takes a person hostage who — with intent to induce any person, other than the hostage, or any group of persons or any state or international or

intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage —

- (a) confines, imprisons, forcibly seizes or detains that person; and
- (b) in any manner utters, conveys or causes any person to receive a threat that the death of, or bodily harm to, the hostage will be caused or that the confinement, imprisonment or detention of the hostage will be continued.

Hostage-taking

(2) Every person who takes a person hostage is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

Subsequent offences

(2.1) In determining, for the purpose of paragraph (2)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#), [272](#) or [273](#), [subsection 279\(1\)](#) or [section 344](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(2.2) For the purposes of subsection (2.1), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

(3) [\[Repealed, 2018, c. 29, s. 27\]](#)

Abduction of person under age of 16

280 (1) Every person who, without lawful authority, takes or causes to be taken a person under the age of 16 years out of the possession of and against the will of the parent or guardian of that person or of any other person who has the lawful care or charge of that person is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Definition of *guardian*

(2) In this section and [sections 281 to 283](#), ***guardian*** includes any person who has in law or in fact the custody or control of another person.

R.S., 1985, c. C-46, s. 280; [2019, c. 25, s. 106](#).

Abduction of person under age of 14

281 Every person who, not being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, unlawfully takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 281; [2019, c. 25, s. 107](#).

Abduction in contravention of custody or parenting order

282 (1) Every one who, being the parent, guardian or person having the lawful care or charge of a child under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that child, in contravention of a custody order or a parenting order made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that child, of the possession of that child is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

If no belief in validity of custody order or parenting order

(2) If a count charges an offence under subsection (1) and the offence is not proven only because the accused did not believe that there was a valid custody order or parenting

order but the evidence does prove an offence under [section 283](#), the accused may be convicted of an offence under that section.

R.S., 1985, c. C-46, s. 282; 1993, c. 45, s. 4; [2019, c. 16, s. 123](#).

Abduction

283 (1) Everyone who, being the parent, guardian or person having the lawful care or charge of a child under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that child, whether or not there is an order referred to in [subsection 282\(1\)](#) in respect of the child, with intent to deprive a parent, guardian or any other person who has the lawful care or charge of that child, of the possession of that child, is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

Consent required

(2) No proceedings may be commenced under subsection (1) without the consent of the Attorney General or counsel instructed by him for that purpose.

R.S., 1985, c. C-46, s. 283; 1993, c. 45, s. 5; [2019, c. 16, s. 124](#).

Defence

284 No one shall be found guilty of an offence under [sections 281 to 283](#) if he establishes that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of that young person.

1980-81-82-83, c. 125, s. 20.

Defence

285 No one shall be found guilty of an offence under [sections 280 to 283](#) if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.

R.S., 1985, c. C-46, s. 285; 1993, c. 45, s. 6.

No defence

286 In proceedings in respect of an offence under [sections 280 to 283](#), it is not a defence to any charge that a young person consented to or suggested any conduct of the accused.

1980-81-82-83, c. 125, s. 20.

Commodification of Sexual Activity

Obtaining sexual services for consideration

286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,

(i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,

(A) for a first offence, a fine of \$2,000, and

(B) for each subsequent offence, a fine of \$4,000, or

(ii) in any other case,

(A) for a first offence, a fine of \$1,000, and

(B) for each subsequent offence, a fine of \$2,000; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,

(i) in the case referred to in subparagraph (a)(i),

(A) for a first offence, a fine of \$1,000, and

(B) for each subsequent offence, a fine of \$2,000, or

(ii) in any other case,

(A) for a first offence, a fine of \$500, and

(B) for each subsequent offence, a fine of \$1,000.

Obtaining sexual services for consideration from person under 18 years

(2) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18 years is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of

(a) for a first offence, six months; and

(b) for each subsequent offence, one year.

Subsequent offences

(3) In determining, for the purpose of subsection (2), whether a convicted person has committed a subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under that subsection; or

(b) an offence under [subsection 212\(4\)](#) of this Act, as it read from time to time before the day on which this subsection comes into force.

Sequence of convictions only

(4) In determining, for the purposes of this section, whether a convicted person has committed a subsequent offence, the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences, whether any offence occurred before or after any conviction or whether offences were prosecuted by indictment or by way of summary conviction proceedings.

Definitions of *place* and *public place*

(5) For the purposes of this section, ***place*** and ***public place*** have the same meaning as in [subsection 197\(1\)](#).

[2014, c. 25, s. 20](#); [2019, c. 25, s. 108](#).

Material benefit from sexual services

286.2 (1) Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under [subsection 286.1\(1\)](#), is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Material benefit from sexual services provided by person under 18 years

(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under [subsection 286.1\(2\)](#), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

Presumption

(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.

Exception

(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit

(a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;

(b) as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;

(c) in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or

(d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

No exception

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;

(d) engaged in conduct, in relation to any person, that would constitute an offence under [section 286.3](#); or

(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

Aggravating factor

(6) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that that person received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

[2014, c. 25, s. 20](#); [2019, c. 25, s. 109](#).

Procuring

286.3 (1) Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under [subsection 286.1\(1\)](#), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Procuring — person under 18 years

(2) Everyone who procures a person under the age of 18 years to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under [subsection 286.1\(2\)](#), recruits, holds, conceals or harbours a person under the age of 18 who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of five years.

[2014, c. 25, s. 20.](#)

Advertising sexual services

286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction.

[2014, c. 25, s. 20;](#) [2019, c. 25, s. 110.](#)

Immunity — material benefit and advertising

286.5 (1) No person shall be prosecuted for

- (a)** an offence under [section 286.2](#) if the benefit is derived from the provision of their own sexual services; or
- (b)** an offence under [section 286.4](#) in relation to the advertisement of their own sexual services.

Immunity — aiding, abetting, etc.

(2) No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of [sections 286.1](#) to [286.4](#) or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

[2014, c. 25, s. 20.](#)

Abortion

287 [Repealed, [2019, c. 25, s. 111](#)]

288 [Repealed, [2018, c. 29, s. 28](#)]

Venereal Diseases

289 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 41]

Offences Against Conjugal Rights

Bigamy

290 (1) Every one commits bigamy who

(a) in Canada,

(i) being married, goes through a form of marriage with another person,

(ii) knowing that another person is married, goes through a form of marriage with that person, or

(iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or

(b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

Matters of defence

(2) No person commits bigamy by going through a form of marriage if

(a) that person in good faith and on reasonable grounds believes that his spouse is dead;

(b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years;

(c) that person has been divorced from the bond of the first marriage; or

(d) the former marriage has been declared void by a court of competent jurisdiction.

Incompetency no defence

(3) Where a person is alleged to have committed bigamy, it is not a defence that the parties would, if unmarried, have been incompetent to contract marriage under the law of the place where the offence is alleged to have been committed.

Validity presumed

(4) Every marriage or form of marriage shall, for the purpose of this section, be deemed to be valid unless the accused establishes that it was invalid.

Act or omission by accused

(5) No act or omission on the part of an accused who is charged with bigamy invalidates a marriage or form of marriage that is otherwise valid.

R.S., c. C-34, s. 254.

Punishment

291 (1) Every person who commits bigamy is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Certificate of marriage

(2) For the purposes of this section, a certificate of marriage issued under the authority of law is evidence of the marriage or form of marriage to which it relates without proof of the signature or official character of the person by whom it purports to be signed.

R.S., 1985, c. C-46, s. 291; [2019, c. 25, s. 112](#).

Procuring feigned marriage

292 (1) Every person who procures or knowingly aids in procuring a feigned marriage between themselves and another person is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Corroboration

(2) No person shall be convicted of an offence under this section on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

R.S., 1985, c. C-46, s. 292; [2019, c. 25, s. 113](#).

Polygamy

293 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

(a) practises or enters into or in any manner agrees or consents to practise or enter into any form of polygamy or any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or

(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in paragraph (a).

Evidence in case of polygamy

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

R.S., 1985, c. C-46, s. 293; [2019, c. 25, s. 114](#).

Forced marriage

293.1 Every person who celebrates, aids or participates in a marriage rite or ceremony knowing that one of the persons being married is marrying against their will is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

2015, c. 29, s. 9; 2019, c. 25, s. 115.

Marriage under age of 16 years

293.2 Every person who celebrates, aids or participates in a marriage rite or ceremony knowing that one of the persons being married is under the age of 16 years is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

2015, c. 29, s. 9; 2019, c. 25, s. 115.

Unlawful Solemnization of Marriage

Pretending to solemnize marriage

294 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) solemnizes or pretends to solemnize a marriage without lawful authority; or

(b) procures a person to solemnize a marriage knowing that he is not lawfully authorized to solemnize the marriage.

R.S., 1985, c. C-46, s. 294; 2018, c. 29, s. 29; 2019, c. 25, s. 116.

Marriage contrary to law

295 Every person who, being lawfully authorized to solemnize marriage, knowingly solemnizes a marriage in contravention of federal law or the laws of the province in which the marriage is solemnized is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 295; 2015, c. 29, s. 10; 2019, c. 25, s. 117.

296 [Repealed, 2018, c. 29, s. 30]

Defamatory Libel

Definition of *newspaper*

297 In [sections 303, 304](#) and [308](#), **newspaper** means any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally.

R.S., c. C-34, s. 261.

Definition

298 (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

Mode of expression

(2) A defamatory libel may be expressed directly or by insinuation or irony

(a) in words legibly marked on any substance; or

(b) by any object signifying a defamatory libel otherwise than by words.

R.S., c. C-34, s. 262.

Publishing

299 A person publishes a libel when he

(a) exhibits it in public;

(b) causes it to be read or seen; or

(c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by any person other than the person whom it defames.

R.S., 1985, c. C-46, s. 299; [2018, c. 29, s. 31](#).

Punishment of libel known to be false

300 Every person who publishes a defamatory libel that they know is false is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 300; [2019, c. 25, s. 118](#).

Punishment for defamatory libel

301 Every person who publishes a defamatory libel is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 301; [2019, c. 25, s. 118](#).

Extortion by libel

302 (1) Every one commits an offence who, with intent

(a) to extort money from any person, or

(b) to induce a person to confer on or procure for another person an appointment or office of profit or trust,

publishes or threatens to publish or offers to abstain from publishing or to prevent the publication of a defamatory libel.

Idem

(2) Every one commits an offence who, as the result of the refusal of any person to permit money to be extorted or to confer or procure an appointment or office of profit or trust, publishes or threatens to publish a defamatory libel.

Punishment

(3) Every person who commits an offence under this section is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 302; [2019, c. 25, s. 119](#).

Proprietor of newspaper presumed responsible

303 (1) The proprietor of a newspaper shall be deemed to publish defamatory matter that is inserted and published therein, unless he proves that the defamatory matter was inserted in the newspaper without his knowledge and without negligence on his part.

General authority to manager when negligence

(2) Where the proprietor of a newspaper gives to a person general authority to manage or conduct the newspaper as editor or otherwise, the insertion by that person of defamatory matter in the newspaper shall, for the purposes of subsection (1), be deemed not to be negligence on the part of the proprietor unless it is proved that

(a) he intended the general authority to include authority to insert defamatory matter in the newspaper; or

(b) he continued to confer general authority after he knew that it had been exercised by the insertion of defamatory matter in the newspaper.

Selling newspapers

(3) No person shall be deemed to publish a defamatory libel by reason only that he sells a number or part of a newspaper that contains a defamatory libel, unless he knows that the number or part contains defamatory matter or that defamatory matter is habitually contained in the newspaper.

R.S., c. C-34, s. 267.

Selling book containing defamatory libel

304 (1) No person shall be deemed to publish a defamatory libel by reason only that he sells a book, magazine, pamphlet or other thing, other than a newspaper that contains defamatory matter, if, at the time of the sale, he does not know that it contains the defamatory matter.

Sale by servant

(2) Where a servant, in the course of his employment, sells a book, magazine, pamphlet or other thing, other than a newspaper, the employer shall be deemed not to publish any defamatory matter contained therein unless it is proved that the employer authorized the sale knowing that

(a) defamatory matter was contained therein; or

(b) defamatory matter was habitually contained therein, in the case of a periodical.

R.S., c. C-34, s. 268.

Publishing proceedings of courts of justice

305 No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

(a) in a proceeding held before or under the authority of a court exercising judicial authority; or

(b) in an inquiry made under the authority of an Act or by order of Her Majesty, or under the authority of a public department or a department of the government of a province.

R.S., c. C-34, s. 269.

Parliamentary papers

306 No person shall be deemed to publish a defamatory libel by reason only that he

(a) publishes to the Senate or House of Commons or to the legislature of a province defamatory matter contained in a petition to the Senate or House of Commons or to the legislature of a province, as the case may be;

(b) publishes by order or under the authority of the Senate or House of Commons or of the legislature of a province a paper containing defamatory matter; or

(c) publishes, in good faith and without ill-will to the person defamed, an extract from or abstract of a petition or paper mentioned in paragraph (a) or (b).

R.S., c. C-34, s. 270.

Fair reports of parliamentary or judicial proceedings

307 (1) No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons or the legislature of a province, or a committee thereof, or of the public proceedings before a court exercising judicial authority, or publishes, in good faith, any fair comment on any such proceedings.

Divorce proceedings an exception

(2) This section does not apply to a person who publishes a report of evidence taken or offered in any proceeding before the Senate or House of Commons or any committee thereof, on a petition or bill relating to any matter of marriage or divorce, if the report is published without authority from or leave of the House in which the proceeding is held or is contrary to any rule, order or practice of that House.

R.S., c. C-34, s. 271.

Fair report of public meeting

308 No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, in a newspaper, a fair report of the proceedings of any public meeting if

- (a)** the meeting is lawfully convened for a lawful purpose and is open to the public;
- (b)** the report is fair and accurate;
- (c)** the publication of the matter complained of is for the public benefit; and
- (d)** he does not refuse to publish in a conspicuous place in the newspaper a reasonable explanation or contradiction by the person defamed in respect of the defamatory matter.

R.S., c. C-34, s. 272.

Public benefit

309 No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

R.S., c. C-34, s. 273.

Fair comment on public person or work of art

310 No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments

- (a)** on the public conduct of a person who takes part in public affairs; or
- (b)** on a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof.

When truth a defence

311 No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.

R.S., c. C-34, s. 275.

Publication invited or necessary

312 No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

- (a) on the invitation or challenge of the person in respect of whom it is published, or
- (b) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person,

if he believes that the defamatory matter is true and it is relevant to the invitation, challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances.

R.S., c. C-34, s. 276.

Answer to inquiries

313 No person shall be deemed to publish a defamatory libel by reason only that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject-matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if

- (a) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries;
- (b) the person who publishes the defamatory matter believes that it is true;
- (c) the defamatory matter is relevant to the inquiries; and
- (d) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

R.S., c. C-34, s. 277.

Giving information to person interested

314 No person shall be deemed to publish a defamatory libel by reason only that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject-matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject-matter if

- (a) the conduct of the person who gives the information is reasonable in the circumstances;

(b) the defamatory matter is relevant to the subject-matter; and

(c) the defamatory matter is true, or if it is not true, is made without ill-will toward the person who is defamed and is made in the belief, on reasonable grounds, that it is true.

R.S., c. C-34, s. 278.

Publication in good faith for redress of wrong

315 No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has, the right or is under an obligation to remedy or redress the wrong or grievance, if

(a) he believes that the defamatory matter is true;

(b) the defamatory matter is relevant to the remedy or redress that is sought; and

(c) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

R.S., c. C-34, s. 279.

Proving publication by order of legislature

316 (1) An accused who is alleged to have published a defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or the legislature of a province.

Directing verdict

(2) Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or provincial court judge is satisfied that the matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or the legislature of a province, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

Certificate of order

(3) For the purposes of this section, a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or the legislature of a province to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or the legislature of a province, as the case may be, is conclusive evidence thereof.

R.S., 1985, c. C-46, s. 316; R.S., 1985, c. 27 (1st Supp.), s. 203.

Verdicts

Verdicts in cases of defamatory libel

317 Where, on the trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty on the whole matter put in issue on the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict.

R.S., c. C-34, s. 281.

Hate Propaganda

Advocating genocide

318 (1) Every person who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.

Definition of *genocide*

(2) In this section, *genocide* means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

- (a)** killing members of the group; or
- (b)** deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

Consent

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

Definition of *identifiable group*

(4) In this section, *identifiable group* means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

R.S., 1985, c. C-46, s. 318; [2004, c. 14, s. 1](#); [2014, c. 31, s. 12](#); [2017, c. 13, s. 3](#); [2019, c. 25, s. 120](#).

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

- (a)** an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b)** an offence punishable on summary conviction.

Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Wilful promotion of antisemitism

(2.1) Everyone who, by communicating statements, other than in private conversation, wilfully promotes antisemitism by condoning, denying or downplaying the Holocaust

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

Defences

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Defences — subsection (2.1)

(3.1) No person shall be convicted of an offence under subsection (2.1)

(a) if they establish that the statements communicated were true;

(b) if, in good faith, they expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds they believed them to be true; or

(d) if, in good faith, they intended to point out, for the purpose of removal, matters producing or tending to produce feelings of antisemitism toward Jews.

Forfeiture

(4) If a person is convicted of an offence under subsection (1), (2) or (2.1) or [section 318](#), anything by means of or in relation to which the offence was committed, on such

conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply, with any modifications that the circumstances require, to subsection (1), (2) or (2.1) or [section 318](#).

Consent

(6) No proceeding for an offence under subsection (2) or (2.1) shall be instituted without the consent of the Attorney General.

Definitions

(7) In this section,

communicating includes communicating by telephone, broadcasting or other audible or visible means; (*communiquer*)

Holocaust means the planned and deliberate state-sponsored persecution and annihilation of European Jewry by the Nazis and their collaborators from 1933 to 1945; (*Holocauste*)

identifiable group has the same meaning as in [section 318](#); (*groupe identifiable*)

public place includes any place to which the public have access as of right or by invitation, express or implied; (*endroit public*)

statements includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations. (*déclarations*)

R.S., 1985, c. C-46, s. 319; R.S., 1985, c. 27 (1st Supp.), s. 203; [2004, c. 14, s. 2](#); [2022, c. 10, s. 332](#).

Warrant of seizure

320 (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.

Summons to occupier

(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

Owner and author may appear

(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

Order of forfeiture

(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

Disposal of matter

(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

Appeal

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and [sections 673 to 696](#) apply with such modifications as the circumstances require.

Consent

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

Definitions

(8) In this section,

court means

(a) in the Province of Quebec, the Court of Quebec,

(a.1) in the Province of Ontario, the Superior Court of Justice,

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c) in the Province of Newfoundland and Labrador, the Supreme Court, Trial Division,

(c.1) [Repealed, 1992, c. 51, s. 36]

(d) in the Provinces of Nova Scotia, British Columbia and Prince Edward Island, in Yukon and in the Northwest Territories, the Supreme Court, and

(e) in Nunavut, the Nunavut Court of Justice; (*tribunal*)

genocide has the same meaning as in [section 318](#); (*génocide*)

hate propaganda means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under [section 319](#); (*propagande haineuse*)

judge means a judge of a court. (*juge*)

R.S., 1985, c. C-46, s. 320; R.S., 1985, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 4, c. 17, s. 11; 1992, c. 1, s. 58, c. 51, s. 36; 1998, c. 30, s. 14; 1999, c. 3, s. 29; [2002, c. 7, s. 142](#); [2015, c. 3, s. 49](#).

Warrant of seizure

320.1 (1) If a judge is satisfied by information on oath that there are reasonable grounds to believe that there is material that is hate propaganda within the meaning of [subsection 320\(8\)](#) or computer data within the meaning of [subsection 342.1\(2\)](#) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to

(a) give an electronic copy of the material to the court;

(b) ensure that the material is no longer stored on and made available through the computer system; and

(c) provide the information necessary to identify and locate the person who posted the material.

Notice to person who posted the material

(2) Within a reasonable time after receiving the information referred to in paragraph (1) (c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.

Person who posted the material may appear

(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).

Non-appearance

(4) If the person who posted the material does not appear for the proceedings, the court may proceed *ex parte* to hear and determine the proceedings in the absence of the

person as fully and effectually as if the person had appeared.

Order

(5) If the court is satisfied, on a balance of probabilities, that the material is available to the public and is hate propaganda within the meaning of [subsection 320\(8\)](#) or computer data within the meaning of [subsection 342.1\(2\)](#) that makes hate propaganda available, it may order the custodian of the computer system to delete the material.

Destruction of copy

(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.

Return of material

(7) If the court is not satisfied that the material is available to the public and is hate propaganda within the meaning of [subsection 320\(8\)](#) or computer data within the meaning of [subsection 342.1\(2\)](#) that makes hate propaganda available, the court shall order that the electronic copy be returned to the custodian and terminate the order under paragraph (1)(b).

Other provisions to apply

(8) [Subsections 320\(6\)](#) to [\(8\)](#) apply, with any modifications that the circumstances require, to this section.

When order takes effect

(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired.

[2001, c. 41, s. 10](#); [2014, c. 31, s. 13](#).

Conversion Therapy

Definition of *conversion therapy*

320.101 In [sections 320.102](#) to [320.104](#), ***conversion therapy*** means a practice, treatment or service designed to

- (a)** change a person's sexual orientation to heterosexual;
- (b)** change a person's gender identity to cisgender;
- (c)** change a person's gender expression so that it conforms to the sex assigned to the person at birth;
- (d)** repress or reduce non-heterosexual attraction or sexual behaviour;
- (e)** repress a person's non-cisgender gender identity; or
- (f)** repress or reduce a person's gender expression that does not conform to the sex assigned to the person at birth.

For greater certainty, this definition does not include a practice, treatment or service that relates to the exploration or development of an integrated personal identity — such as a practice, treatment or service that relates to a person’s gender transition — and that is not based on an assumption that a particular sexual orientation, gender identity or gender expression is to be preferred over another.

2021, c. 24, s. 5.

Conversion therapy

320.102 Everyone who knowingly causes another person to undergo conversion therapy — including by providing conversion therapy to that other person — is

(a) guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) guilty of an offence punishable on summary conviction.

2021, c. 24, s. 5.

Promoting or advertising

320.103 Everyone who knowingly promotes or advertises conversion therapy is

(a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) guilty of an offence punishable on summary conviction.

2021, c. 24, s. 5.

Material benefit

320.104 Everyone who receives a financial or other material benefit, knowing that it is obtained or derived directly or indirectly from the provision of conversion therapy, is

(a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) guilty of an offence punishable on summary conviction.

2021, c. 24, s. 5.

PART VIII.1

Offences Relating to Conveyances

Interpretation

Definitions

320.11 The following definitions apply in this Part.

analyst means a person who is, or a person who is a member of a class of persons that is, designated by the Attorney General under [subparagraph 320.4\(b\)\(ii\)](#) or paragraph 320.4(c). (*analyste*)

approved container means a container that is designed to receive a sample of a person's blood for analysis and that is approved by the Attorney General of Canada under [paragraph 320.39\(d\)](#). (*contenant approuvé*)

approved drug screening equipment means equipment that is designed to ascertain the presence of a drug in a person's body and that is approved by the Attorney General of Canada under [paragraph 320.39\(b\)](#). (*matériel de détection des drogues approuvé*)

approved instrument means an instrument that is designed to receive and make an analysis of a sample of a person's breath to determine their blood alcohol concentration and that is approved by the Attorney General of Canada under [paragraph 320.39\(c\)](#). (*éthylomètre approuvé*)

approved screening device means a device that is designed to ascertain the presence of alcohol in a person's blood and that is approved by the Attorney General of Canada under [paragraph 320.39\(a\)](#). (*appareil de détection approuvé*)

conveyance means a motor vehicle, a vessel, an aircraft or railway equipment. (*moyen de transport*)

evaluating officer means a peace officer who has the qualifications prescribed by regulation that are required in order to act as an evaluating officer. (*agent évaluateur*)

operate means

- (a) in respect of a motor vehicle, to drive it or to have care or control of it;
- (b) in respect of a vessel or aircraft, to navigate it, to assist in its navigation or to have care or control of it; and
- (c) in respect of railway equipment, to participate in the direct control of its motion, or to have care or control of it as a member of the equipment's crew, as a person who acts in lieu of a member of the equipment's crew by remote control, or otherwise. (*conduire*)

qualified medical practitioner means a person who is qualified under provincial law to practise medicine. (*médecin qualifié*)

qualified technician means

- (a) in respect of breath samples, a person who is designated by the Attorney General under [paragraph 320.4\(a\)](#); and
- (b) in respect of blood samples, a person who is, or a person who is a member of a class of persons that is, designated by the Attorney General under [subparagraph 320.4\(b\)\(i\)](#). (*technicien qualifié*)

vessel includes a hovercraft. (*bateau*)

Recognition and Declaration

Recognition and declaration

320.12 It is recognized and declared that

- (a) operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;
- (b) the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;
- (c) the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration; and
- (d) an evaluation conducted by an evaluating officer is a reliable method of determining whether a person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

2018, c. 21, s. 15.

Offences and Punishment

Dangerous operation

320.13 (1) Everyone commits an offence who operates a conveyance in a manner that, having regard to all of the circumstances, is dangerous to the public.

Operation causing bodily harm

(2) Everyone commits an offence who operates a conveyance in a manner that, having regard to all of the circumstances, is dangerous to the public and, as a result, causes bodily harm to another person.

Operation causing death

(3) Everyone commits an offence who operates a conveyance in a manner that, having regard to all of the circumstances, is dangerous to the public and, as a result, causes the death of another person.

2018, c. 21, s. 15.

Operation while impaired

320.14 (1) Everyone commits an offence who

- (a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;

(b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

(c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or

(d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

Operation causing bodily harm

(2) Everyone commits an offence who commits an offence under subsection (1) and who, while operating the conveyance, causes bodily harm to another person.

Operation causing death

(3) Everyone commits an offence who commits an offence under subsection (1) and who, while operating the conveyance, causes the death of another person.

Operation — low blood drug concentration

(4) Subject to subsection (6), everyone commits an offence who has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation and that is less than the concentration prescribed for the purposes of paragraph (1)(c).

Exception — alcohol

(5) No person commits an offence under paragraph (1)(b) if

(a) they consumed alcohol after ceasing to operate the conveyance;

(b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of breath or blood; and

(c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with [subsection 320.31\(1\)](#) or [\(2\)](#) and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.

Exception — drugs

(6) No person commits an offence under paragraph (1)(c) or subsection (4) if

(a) they consumed the drug after ceasing to operate the conveyance; and

(b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of a bodily substance.

Exception — combination of alcohol and drug

(7) No person commits an offence under paragraph (1)(d) if

- (a)** they consumed the drug or the alcohol or both after ceasing to operate the conveyance;
- (b)** after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of a bodily substance; and
- (c)** their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with [subsection 320.31\(1\)](#) or [\(2\)](#) and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration less than the blood alcohol concentration established under [paragraph 320.38\(c\)](#).

[2018, c. 21, s. 15.](#)

Failure or refusal to comply with demand

320.15 (1) Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under [section 320.27](#) or [320.28](#).

Accident resulting in bodily harm

(2) Everyone commits an offence who commits an offence under subsection (1) and who, at the time of the failure or refusal, knows that, or is reckless as to whether, they were involved in an accident that resulted in bodily harm to another person.

Accident resulting in death

(3) Everyone commits an offence who commits an offence under subsection (1) and who, at the time of the failure or refusal, knows that, or is reckless as to whether, they were involved in an accident that resulted in the death of another person or in bodily harm to another person whose death ensues.

Only one conviction

(4) A person who is convicted of an offence under this section is not to be convicted of another offence under this section with respect to the same transaction.

[2018, c. 21, s. 15.](#)

Failure to stop after accident

320.16 (1) Everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance and who fails, without reasonable excuse, to stop the conveyance, give their name and address and, if any person has been injured or appears to require assistance, offer assistance.

Accident resulting in bodily harm

(2) Everyone commits an offence who commits an offence under subsection (1) and who at the time of committing the offence knows that, or is reckless as to whether, the accident resulted in bodily harm to another person.

Accident resulting in death

(3) Everyone commits an offence who commits an offence under subsection (1) and who, at the time of committing the offence, knows that, or is reckless as to whether, the accident resulted in the death of another person or in bodily harm to another person whose death ensues.

[2018, c. 21, s. 15.](#)

Flight from peace officer

320.17 Everyone commits an offence who operates a motor vehicle or vessel while being pursued by a peace officer and who fails, without reasonable excuse, to stop the motor vehicle or vessel as soon as is reasonable in the circumstances.

[2018, c. 21, s. 15.](#)

Operation while prohibited

320.18 (1) Everyone commits an offence who operates a conveyance while prohibited from doing so

(a) by an order made under this Act; or

(b) by any other form of legal restriction imposed under any other Act of Parliament or under provincial law in respect of a conviction under this Act or a discharge under [section 730](#).

Exception

(2) No person commits an offence under subsection (1) arising out of the operation of a motor vehicle if they are registered in an alcohol ignition interlock device program established under the law of the province in which they reside and they comply with the conditions of the program.

[2018, c. 21, s. 15.](#)

Punishment

320.19 (1) Every person who commits an offence under [subsection 320.14\(1\)](#) or [320.15\(1\)](#) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of,

(i) for a first offence, a fine of \$1,000,

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,

(i) for a first offence, a fine of \$1,000,

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days.

Summary conviction

(2) Everyone who commits an offence under [subsection 320.14\(4\)](#) is liable on summary conviction to a fine of not more than \$1,000.

Minimum fines for high blood alcohol concentrations

(3) Despite subparagraphs (1)(a)(i) and (b)(i), every person who commits an offence under [paragraph 320.14\(1\)\(b\)](#) is liable, for a first offence, to

(a) a fine of not less than \$1,500, if the person's blood alcohol concentration is equal to or exceeds 120 mg of alcohol in 100 mL of blood but is less than 160 mg of alcohol in 100 mL of blood; and

(b) a fine of not less than \$2,000, if the person's blood alcohol concentration is equal to or exceeds 160 mg of alcohol in 100 mL of blood.

Minimum fine — [subsection 320.15\(1\)](#)

(4) Despite subparagraphs (1)(a)(i) and (b)(i), every person who commits an offence under [subsection 320.15\(1\)](#) is liable, for a first offence, to a fine of not less than \$2,000.

Punishment — dangerous operation and other offences

(5) Every person who commits an offence under [subsection 320.13\(1\)](#) or [320.16\(1\)](#), [section 320.17](#) or [subsection 320.18\(1\)](#) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

[2018, c. 21, s. 15; 2019, c. 25, s. 402.](#)

Punishment in case of bodily harm

320.2 Every person who commits an offence under [subsection 320.13\(2\)](#), [320.14\(2\)](#), [320.15\(2\)](#) or [320.16\(2\)](#) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of,

(i) for a first offence, a fine of \$1,000,

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to the minimum punishments set out in subparagraphs (a)(i) to (iii).

2018, c. 21, s. 15; 2019, c. 25, s. 402.

Punishment in case of death

320.21 Everyone who commits an offence under [subsection 320.13\(3\)](#), [320.14\(3\)](#), [320.15\(3\)](#) or [320.16\(3\)](#) is liable on conviction on indictment to imprisonment for life and to a minimum punishment of,

(a) for a first offence, a fine of \$1,000;

(b) for a second offence, imprisonment for a term of 30 days; and

(c) for each subsequent offence, imprisonment for a term of 120 days.

2018, c. 21, s. 15.

Aggravating circumstances for sentencing purposes

320.22 A court imposing a sentence for an offence under any of [sections 320.13](#) to [320.18](#) shall consider, in addition to any other aggravating circumstances, the following:

(a) the commission of the offence resulted in bodily harm to, or the death of, more than one person;

(b) the offender was operating a motor vehicle in a race with at least one other motor vehicle or in a contest of speed, on a street, road or highway or in another public place;

(c) a person under the age of 16 years was a passenger in the conveyance operated by the offender;

(d) the offender was being remunerated for operating the conveyance;

(e) the offender's blood alcohol concentration at the time of committing the offence was equal to or exceeded 120 mg of alcohol in 100 mL of blood;

(f) the offender was operating a large motor vehicle; and

(g) the offender was not permitted, under a federal or provincial Act, to operate the conveyance.

2018, c. 21, s. 15.

Delay of sentencing

320.23 (1) The court may, with the consent of the prosecutor and the offender, and after considering the interests of justice, delay sentencing of an offender who has been found guilty of an offence under [subsection 320.14\(1\)](#) or [320.15\(1\)](#) to allow the offender to attend a treatment program approved by the province in which the offender resides. If the court delays sentencing, it shall make an order prohibiting the offender from

operating, before sentencing, the type of conveyance in question, in which case [subsections 320.24\(6\) to \(9\)](#) apply.

Exception to minimum punishment

(2) If the offender successfully completes the treatment program, the court is not required to impose the minimum punishment under [section 320.19](#) or to make a prohibition order under [section 320.24](#), but it shall not direct a discharge under [section 730](#).

[2018, c. 21, s. 15](#).

Mandatory prohibition order

320.24 (1) If an offender is found guilty of an offence under [subsection 320.14\(1\)](#) or [320.15\(1\)](#), the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (2).

Prohibition period

(2) The prohibition period is

- (a)** for a first offence, not less than one year and not more than three years, plus the entire period to which the offender is sentenced to imprisonment;
- (b)** for a second offence, not less than two years and not more than 10 years, plus the entire period to which the offender is sentenced to imprisonment; and
- (c)** for each subsequent offence, not less than three years, plus the entire period to which the offender is sentenced to imprisonment.

Discretionary order of prohibition — low blood drug concentration

(3) If an offender is found guilty of an offence under [subsection 320.14\(4\)](#), the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period of not more than one year.

Discretionary order of prohibition — other offences

(4) If an offender is found guilty of an offence under [section 320.13](#), [subsection 320.14\(2\) or \(3\)](#), [320.15\(2\) or \(3\)](#) or under any of [sections 320.16 to 320.18](#), the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (5).

Prohibition period

(5) The prohibition period is

- (a)** if the offender is liable to imprisonment for life in respect of that offence, of any duration that the court considers appropriate, plus the entire period to which the offender is sentenced to imprisonment;
- (b)** if the offender is liable to imprisonment for more than five years but less than life in respect of that offence, not more than 10 years, plus the entire period to which the offender is sentenced to imprisonment; and
- (c)** in any other case, not more than three years, plus the entire period to which the offender is sentenced to imprisonment.

Effect of order

(5.1) Subject to subsection (9), a prohibition order takes effect on the day that it is made.

Obligation of court

(6) A court that makes a prohibition order under this section shall cause the order to be read by or to the offender or a copy of the order to be given to the offender.

Validity of prohibition order not affected

(7) A failure to comply with subsection (6) does not affect the validity of the prohibition order.

Application — public place

(8) A prohibition order in respect of a motor vehicle applies only to its operation on a street, road or highway or in any other public place.

Consecutive prohibition periods

(9) If the offender is, at the time of the commission of the offence, subject to an order made under this Act prohibiting the offender from operating a conveyance, a court that makes a prohibition order under this section that prohibits the offender from operating the same type of conveyance may order that the prohibition order be served consecutively to that order.

Minimum absolute prohibition period

(10) A person may not be registered in an alcohol ignition interlock device program referred to in [subsection 320.18\(2\)](#) until the expiry of

- (a)** in the case of a first offence, a period, if any, that may be fixed by order of the court;
- (b)** in the case of a second offence, a period of three months after the day on which the sentence is imposed or any longer period that may be fixed by order of the court; and

(c) in the case of a subsequent offence, a period of six months after the day on which the sentence is imposed or any longer period that may be fixed by order of the court.

2018, c. 21, s. 15.

Stay of order pending appeal

320.25 (1) Subject to subsection (2), if an appeal is taken against a conviction or sentence for an offence under any of [sections 320.13 to 320.18](#), a judge of the court to which the appeal is taken may direct that the prohibition order under [section 320.24](#) arising out of the conviction shall, on any conditions that the judge imposes, be stayed pending the final disposition of the appeal or until otherwise ordered by that court.

Appeals to Supreme Court of Canada

(2) In the case of an appeal to the Supreme Court of Canada, a direction may be made only by a judge of the court from which the appeal was taken.

Effect of conditions

(3) The imposition of conditions on a stay of a prohibition order does not operate to decrease the prohibition period provided in the prohibition order.

2018, c. 21, s. 15.

Earlier and subsequent offences

320.26 In determining, for the purpose of imposing a sentence for an offence under [subsection 320.14\(1\)](#) or [320.15\(1\)](#), whether the offence is a second, third or subsequent offence, any of the following offences for which the offender was previously convicted is considered to be an earlier offence:

- (a)** an offence under any of [subsections 320.14\(1\) to \(3\)](#) or [section 320.15](#); or
- (b)** an offence under any of [sections 253, 254 and 255](#), as those sections read from time to time before the day on which this section comes into force.

2018, c. 21, s. 15.

Investigative Matters

Testing for presence of alcohol or drug

320.27 (1) If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the requirements of either or both of paragraphs (a) and (c) in the case of a drug:

- (a)** to immediately perform the physical coordination tests prescribed by regulation and to accompany the peace officer for that purpose;
- (b)** to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved

screening device and to accompany the peace officer for that purpose;

(c) to immediately provide the samples of a bodily substance that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of approved drug screening equipment and to accompany the peace officer for that purpose.

Mandatory alcohol screening

(2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

[2018, c. 21, s. 15.](#)

Samples of breath or blood — alcohol

320.28 (1) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under [paragraph 320.14\(1\)\(b\)](#), the peace officer may, by demand made as soon as practicable,

(a) require the person to provide, as soon as practicable,

(i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to take one, the samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, are necessary to enable a proper analysis to be made to determine the person's blood alcohol concentration; and

(b) require the person to accompany the peace officer for the purpose of taking samples of that person's breath or blood.

Evaluation and samples of blood — drugs

(2) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by a drug or by a combination of alcohol and a drug, or has committed an offence under [paragraph 320.14\(1\)\(c\)](#) or [\(d\)](#) or [subsection 320.14\(4\)](#), the peace officer may, by demand, made as soon as practicable, require the person to comply with the requirements of either or both of paragraphs (a) and (b):

(a) to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a conveyance is impaired

by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose; or

(b) to provide, as soon as practicable, the samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, are necessary to enable a proper analysis to be made to determine the person's blood drug concentration, or the person's blood drug concentration and blood alcohol concentration, as the case may be, and to accompany the peace officer for that purpose.

Samples of breath — alcohol

(3) An evaluating officer who has reasonable grounds to suspect that a person has alcohol in their body may, if a demand was not made under subsection (1), by demand made as soon as practicable, require the person to provide, as soon as practicable, the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument.

Samples of bodily substances

(4) If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe that one or more of the types of drugs set out in subsection (5) — or that a combination of alcohol and one or more of those types of drugs — is impairing the person's ability to operate a conveyance, the evaluating officer shall identify the type or types of drugs in question and may, by demand made as soon as practicable, require the person to provide, as soon as practicable,

(a) a sample of oral fluid or urine that, in the evaluating officer's opinion, is necessary to enable a proper analysis to be made to ascertain the presence in the person's body of one or more of the types of drugs set out in subsection (5); or

(b) the samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, are necessary to enable a proper analysis to be made to ascertain the presence in the person's body of one or more of the types of drugs set out in subsection (5) or to determine the person's blood drug concentration for one or more of those types of drugs.

Types of drugs

(5) For the purpose of subsection (4), the types of drugs are the following:

(a) a depressant;

(b) an inhalant;

(c) a dissociative anaesthetic;

(d) cannabis;

(e) a stimulant;

(f) a hallucinogen; or

(g) a narcotic analgesic.

Condition

(6) A sample of blood may be taken from a person under this section only by a qualified medical practitioner or a qualified technician, and only if they are satisfied that taking the sample would not endanger the person's health.

Approved containers

(7) A sample of blood shall be received into an approved container that shall be subsequently sealed.

Retained sample

(8) A person who takes samples of blood under this section shall cause one of the samples to be retained for the purpose of analysis by or on behalf of the person from whom the blood samples were taken.

Validity of analysis not affected

(9) A failure to comply with subsection (7) or (8) does not by itself affect the validity of the taking of the sample or of an analysis made of the sample.

Release of retained sample

(10) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction shall, on the summary application of the person from whom samples of blood were taken under this section, made within six months after the day on which the samples were taken, order the release of any sample that was retained to the person for the purpose of examination or analysis, subject to any terms that the judge considers appropriate to ensure that the sample is safeguarded and preserved for use in any proceedings in respect of which it was taken.

[2018, c. 21, s. 15.](#)

Warrants to obtain blood samples

320.29 (1) A justice may issue a warrant authorizing a peace officer to require a qualified medical practitioner or a qualified technician to take the samples of a person's blood that, in the opinion of the practitioner or technician taking the samples, are necessary to enable a proper analysis to be made to determine the person's blood alcohol concentration or blood drug concentration, or both, if the justice is satisfied, on an information on oath in Form 1, that

(a) there are reasonable grounds to believe that the person has, within the preceding eight hours, operated a conveyance that was involved in an accident that resulted in bodily harm to themselves or another person or in the death of another person;

(b) there are reasonable grounds to suspect that the person has alcohol or a drug in their body; and

(c) a qualified medical practitioner is of the opinion that

(i) by reason of any physical or mental condition of the person, the person is unable to consent to the taking of samples of their blood, and

(ii) the taking of samples of the person's blood will not endanger their health.

Form

(2) A warrant issued under subsection (1) may be in Form 5, varied to suit the case.

(3) [Repealed, 2022, c. 17, s. 10]

Duration of warrant

(4) Samples of blood may be taken from a person under a warrant issued under subsection (1) only during the time that a qualified medical practitioner is satisfied that the conditions referred to in subparagraphs (1)(c)(i) and (ii) continue to exist.

Copy to person

(5) If a warrant issued under subsection (1) is executed, the peace officer shall, as soon as practicable, give a copy of it — as well as a notice in Form 5.1, varied to suit the case — to the person from whom the samples of blood are taken.

Taking of samples

(6) Subsections 320.28(7) to (10) apply with respect to the taking of samples of blood under this section.

2018, c. 21, s. 15; 2022, c. 17, s. 10.

Testing blood — drug or alcohol

320.3 Samples of a person's blood that are taken for the purposes of this Part may be analyzed to determine the person's blood alcohol concentration or blood drug concentration, or both.

2018, c. 21, s. 15.

Evidentiary Matters

Breath samples

320.31 (1) If samples of a person's breath have been received into an approved instrument operated by a qualified technician, the results of the analyses of the samples are conclusive proof of the person's blood alcohol concentration at the time when the analyses were made if the results of the analyses are the same — or, if the results of the analyses are different, the lowest of the results is conclusive proof of the person's blood alcohol concentration at the time when the analyses were made — if

(a) before each sample was taken, the qualified technician conducted a system blank test the result of which is not more than 10 mg of alcohol in 100 mL of blood and a

system calibration check the result of which is within 10% of the target value of an alcohol standard that is certified by an analyst;

(b) there was an interval of at least 15 minutes between the times when the samples were taken; and

(c) the results of the analyses, rounded down to the nearest multiple of 10 mg, did not differ by more than 20 mg of alcohol in 100 mL of blood.

Blood samples — concentration when sample taken

(2) The result of an analysis made by an analyst of a sample of a person's blood is proof of their blood alcohol concentration or their blood drug concentration, as the case may be, at the time when the sample was taken in the absence of evidence tending to show that the analysis was performed improperly.

Evidence not included

(3) Evidence of the following does not constitute evidence tending to show that an analysis of a sample of a person's blood was performed improperly:

(a) the amount of alcohol or a drug that they consumed;

(b) the rate at which the alcohol or the drug would have been absorbed or eliminated by their body; or

(c) a calculation based on the evidence referred to in paragraphs (a) and (b) of what their blood alcohol concentration or blood drug concentration would have been at the time the sample was taken.

Presumption — blood alcohol concentration

(4) For the purpose of [paragraphs 320.14\(1\)\(b\)](#) and (d), if the first of the samples of breath was taken, or the sample of blood was taken, more than two hours after the person ceased to operate the conveyance and the person's blood alcohol concentration was equal to or exceeded 20 mg of alcohol in 100 mL of blood, the person's blood alcohol concentration within those two hours is conclusively presumed to be the concentration established in accordance with subsection (1) or (2), as the case may be, plus an additional 5 mg of alcohol in 100 mL of blood for every interval of 30 minutes in excess of those two hours.

Admissibility of evaluating officer's opinion

(5) An evaluating officer's opinion relating to the impairment, by a type of drug that they identified, or by a combination of alcohol and that type of drug, of a person's ability to operate a conveyance is admissible in evidence without qualifying the evaluating officer as an expert.

Presumption — drug

(6) If the analysis of a sample provided under [subsection 320.28\(4\)](#) demonstrates that the person has a drug in their body that is of a type that the evaluating officer has

identified as impairing the person's ability to operate a conveyance, that drug — or, if the person has also consumed alcohol, the combination of alcohol and that drug — is presumed, in the absence of evidence to the contrary, to be the drug, or the combination of alcohol and that drug, that was present in the person's body at the time when the person operated the conveyance and, on proof of the person's impairment, to have been the cause of that impairment.

Admissibility of result of analysis

(7) The result of an analysis of a sample of a person's breath, blood, urine, sweat or other bodily substance that they were not required to provide under this Part may be admitted in evidence even if the person was not warned before they provided the sample that they were not required to do so or that the result of the analysis of the sample might be used in evidence.

Evidence of failure to provide sample

(8) Unless a person is required to provide a sample of a bodily substance under this Part, evidence that they failed or refused to provide a sample for analysis or that a sample was not taken is not admissible and the failure, refusal or fact that a sample was not taken shall not be the subject of comment by any person in any proceedings under this Part.

Admissibility of statement

(9) A statement made by a person to a peace officer, including a statement compelled under a provincial Act, is admissible in evidence for the purpose of justifying a demand made under [section 320.27](#) or [320.28](#).

Evidence of failure to comply with demand

(10) In any proceedings in respect of an offence under [section 320.14](#), evidence that the accused, without reasonable excuse, failed or refused to comply with a demand made under [section 320.27](#) or [320.28](#) is admissible and the court may draw an inference adverse to the accused from that evidence.

[2018, c. 21, s. 15.](#)

Certificates

320.32 (1) A certificate of an analyst, qualified medical practitioner or qualified technician made under this Part is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who signed the certificate.

Notice of intention to produce certificate

(2) No certificate shall be received in evidence unless the party intending to produce it has, before the trial, given to the other party reasonable notice of their intention to produce it and a copy of the certificate.

Attendance and cross-examination

(3) A party against whom the certificate is produced may apply to the court for an order requiring the attendance of the person who signed the certificate for the purposes of cross-examination.

Form and content of application

(4) The application shall be made in writing and set out the likely relevance of the proposed cross-examination with respect to the facts alleged in the certificate. A copy of the application shall be given to the prosecutor at least 30 days before the day on which the application is to be heard.

Time of hearing

(5) The hearing of the application shall be held at least 30 days before the day on which the trial is to be held.

Certificate admissible in evidence

(6) In proceedings in respect of an offence under [subsection 320.18\(1\)](#), the following certificates are evidence of the facts alleged in them without proof of the signature or official character of the person who signed them:

(a) a certificate setting out with reasonable particularity that the person named in it is prohibited from operating a motor vehicle in the province specified in the certificate, signed by the person who is responsible for the registration of motor vehicles in that province or any person authorized by the responsible person to sign it; and

(b) a certificate setting out with reasonable particularity that the person named in it is prohibited from operating a conveyance other than a motor vehicle, signed by the Minister of Transport or any person authorized by him or her to sign it.

Onus

(7) If it is proved that a prohibition under [paragraph 320.18\(1\)\(b\)](#) has been imposed on a person and that notice of the prohibition has been mailed to them at their last known address, that person is, beginning on the tenth day after the day on which the notice is mailed, in the absence of evidence to the contrary, presumed to have received the notice and to have knowledge of the prohibition, of the date of its commencement and of its duration.

[2018, c. 21, s. 15.](#)

Printout from approved instrument

320.33 A document that is printed out from an approved instrument and signed by a qualified technician who certifies it to be the printout produced by the approved instrument when it made an analysis of a sample of a person's breath is evidence of the facts alleged in the document without proof of the signature or official character of the person who signed it.

[2018, c. 21, s. 15.](#)

Disclosure of information

320.34 (1) In proceedings in respect of an offence under [section 320.14](#), the prosecutor shall disclose to the accused, with respect to any samples of breath that the accused provided under section 320.28, information sufficient to determine whether the conditions set out in [paragraphs 320.31\(1\)\(a\) to \(c\)](#) have been met, namely:

- (a) the results of the system blank tests;
- (b) the results of the system calibration checks;
- (c) any error or exception messages produced by the approved instrument at the time the samples were taken;
- (d) the results of the analysis of the accused's breath samples; and
- (e) a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument.

Application for further disclosure

(2) The accused may apply to the court for a hearing to determine whether further information should be disclosed.

Form and content of application

(3) The application shall be in writing and set out detailed particulars of the information that the accused seeks to have disclosed and the likely relevance of that information to determining whether the approved instrument was in proper working order. A copy of the application shall be given to the prosecutor at least 30 days before the day on which the application is to be heard.

Time of hearing

(4) The hearing of the application shall be held at least 30 days before the day on which the trial is to be held.

For greater certainty

(5) For greater certainty, nothing in this section limits the disclosure to which the accused may otherwise be entitled.

[2018, c. 21, s. 15.](#)

Presumption of operation

320.35 In proceedings in respect of an offence under [section 320.14](#) or [320.15](#), if it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion.

[2018, c. 21, s. 15.](#)

General Provisions

Unauthorized use of bodily substance

320.36 (1) No person shall use a bodily substance obtained under this Part for any purpose other than for an analysis under this Part.

Unauthorized use or disclosure of results

(2) No person shall use, disclose or allow the disclosure of the results obtained under this Part of any evaluation, physical coordination test or analysis of a bodily substance, except for the purpose of the administration or enforcement of a federal or provincial Act related to drugs and/or alcohol and/or to the operation of a motor vehicle, vessel, aircraft or railway equipment.

Exception

(3) The results of an evaluation, test or analysis referred to in subsection (2) may be disclosed to the person to whom they relate, and may be disclosed to any other person if the results are made anonymous and the disclosure is made for statistical or research purposes.

Offence

(4) Everyone who contravenes subsection (1) or (2) commits an offence punishable on summary conviction.

[2018, c. 21, s. 15.](#)

Refusal to take sample

320.37 (1) No qualified medical practitioner or qualified technician shall be found guilty of an offence by reason only of their refusal to take a sample of blood from a person for the purposes of this Part if they have a reasonable excuse for refusing to do so.

No liability

(2) No qualified medical practitioner, and no qualified technician, who takes a sample of blood from a person under this Part incurs any liability for doing anything necessary to take the sample that was done with reasonable care and skill.

[2018, c. 21, s. 15.](#)

Regulations

320.38 The Governor in Council may make regulations

(a) prescribing the qualifications required for a peace officer to act as an evaluating officer and respecting the training of evaluating officers;

(b) prescribing the blood drug concentration for a drug for the purpose of [paragraph 320.14\(1\)\(c\)](#);

- (c) prescribing a blood alcohol concentration and a blood drug concentration for a drug for the purposes of [paragraph 320.14\(1\)\(d\)](#);
- (d) prescribing the blood drug concentration for a drug for the purpose of [subsection 320.14\(4\)](#);
- (e) prescribing the physical coordination tests to be conducted under [paragraph 320.27\(1\)\(a\)](#); and
- (f) prescribing the tests to be conducted and procedures to be followed during an evaluation under paragraph 320.28(2)(a) and the forms to be used in recording the results of the evaluation.

[2018, c. 21, s. 15.](#)

Approval — Attorney General of Canada

320.39 The Attorney General of Canada may, by order, approve

- (a) a device that is designed to ascertain the presence of alcohol in a person's blood;
- (b) equipment that is designed to ascertain the presence of a drug in a person's body;
- (c) an instrument that is designed to receive and make an analysis of a sample of a person's breath to determine their blood alcohol concentration; and
- (d) a container that is designed to receive a sample of a person's blood for analysis.

[2018, c. 21, s. 15.](#)

Designation — Attorney General

320.4 The Attorney General may designate

- (a) a person as qualified, for the purposes of this Part, to operate an approved instrument;
- (b) a person or class of persons as qualified, for the purposes of this Part,
 - (i) to take samples of blood, or
 - (ii) to analyze samples of bodily substances; and
- (c) a person or class of persons as qualified, for the purposes of this Part, to certify that an alcohol standard is suitable for use with an approved instrument.

[2018, c. 21, s. 15.](#)

PART IX

Offences Against Rights of Property

Interpretation

Definitions

321 In this Part,

break means

- (a) to break any part, internal or external, or
- (b) to open any thing that is used or intended to be used to close or to cover an internal or external opening; (*effraction*)

credit card means any card, plate, coupon book or other device issued or otherwise distributed for the purpose of being used

- (a) on presentation to obtain, on credit, money, goods, services or any other thing of value, or
- (b) in an automated teller machine, a remote service unit or a similar automated banking device to obtain any of the services offered through the machine, unit or device; (*carte de crédit*)

document means any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trademarks on articles of commerce or inscriptions on stone or metal or other like material; (*document*)

exchequer bill means a bank-note, bond, note, debenture or security that is issued or guaranteed by Her Majesty under the authority of Parliament or the legislature of a province; (*bon du Trésor*)

exchequer bill paper means paper that is used to manufacture exchequer bills; (*papier de bons du Trésor*)

false document means a document

- (a) the whole or a material part of which purports to be made by or on behalf of a person
 - (i) who did not make it or authorize it to be made, or
 - (ii) who did not in fact exist,
- (b) that is made by or on behalf of the person who purports to make it but is false in some material particular,
- (c) that is made in the name of an existing person, by him or under his authority, with a fraudulent intention that it should pass as being made by a person, real or fictitious, other than the person who makes it or under whose authority it is made; (*faux document*)

revenue paper means paper that is used to make stamps, licences or permits or for any purpose connected with the public revenue. (*papier de revenu*)

Theft

Theft

322 (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent

- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
- (b) to pledge it or deposit it as security;
- (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
- (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

Time when theft completed

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

Secrecy

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

Purpose of taking

(4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

Wild living creature

(5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

R.S., c. C-34, s. 283.

Oysters

323 (1) Where oysters and oyster brood are in oyster beds, layings or fisheries that are the property of any person and are sufficiently marked out or known as the property of that person, that person shall be deemed to have a special property or interest in them.

Oyster bed

(2) An indictment is sufficient if it describes an oyster bed, laying or fishery by name or in any other way, without stating that it is situated in a particular territorial division.

Theft by bailee of things under seizure

324 Every one who is a bailee of anything that is under lawful seizure by a peace officer or public officer in the execution of the duties of his office, and who is obliged by law or agreement to produce and deliver it to that officer or to another person entitled thereto at a certain time and place, or on demand, steals it if he does not produce and deliver it in accordance with his obligation, but he does not steal it if his failure to produce and deliver it is not the result of a wilful act or omission by him.

R.S., c. C-34, s. 285.

Agent pledging goods, when not theft

325 A factor or an agent does not commit theft by pledging or giving a lien on goods or documents of title to goods that are entrusted to him for the purpose of sale or for any other purpose, if the pledge or lien is for an amount that does not exceed the sum of

- (a) the amount due to him from his principal at the time the goods or documents are pledged or the lien is given; and
- (b) the amount of any bill of exchange that he has accepted for or on account of his principal.

R.S., c. C-34, s. 286.

Theft of telecommunication service

326 (1) Every one commits theft who fraudulently, maliciously, or without colour of right,

- (a) abstracts, consumes or uses electricity or gas or causes it to be wasted or diverted; or
- (b) uses any telecommunication facility or obtains any telecommunication service.

(2) [Repealed, 2014, c. 31, s. 14]

R.S., 1985, c. C-46, s. 326; 2014, c. 31, s. 14.

Possession of device to obtain use of telecommunication facility or service

327 (1) Every person who, without lawful excuse, makes, possesses, sells, offers for sale, imports, obtains for use, distributes or makes available a device that is designed or adapted primarily to use a telecommunication facility or obtain a telecommunication service without payment of a lawful charge, knowing that the device has been used or is intended to be used for that purpose, is

- (a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b) guilty of an offence punishable on summary conviction.

Forfeiture

(2) If a person is convicted of an offence under subsection (1) or [paragraph 326\(1\)\(b\)](#), in addition to any punishment that is imposed, any device in relation to which the offence was committed or the possession of which constituted the offence may be ordered forfeited to Her Majesty and may be disposed of as the Attorney General directs.

Limitation

(3) No order for forfeiture is to be made in respect of telecommunication facilities or equipment by means of which an offence under subsection (1) is committed if they are owned by a person engaged in providing a telecommunication service to the public or form part of such a person's telecommunication service or system and that person is not a party to the offence.

Definition of *device*

(4) In this section, ***device*** includes

(a) a component of a device; and

(b) a computer program within the meaning of [subsection 342.1\(2\)](#).

R.S., 1985, c. C-46, s. 327; [2014, c. 31, s. 15](#); [2018, c. 29, s. 32](#).

Theft by or from person having special property or interest

328 A person may be convicted of theft notwithstanding that anything that is alleged to have been stolen was stolen

(a) by the owner of it from a person who has a special property or interest in it;

(b) by a person who has a special property or interest in it from the owner of it;

(c) by a lessee of it from his reversioner;

(d) by one of several joint owners, tenants in common or partners of or in it from the other persons who have an interest in it; or

(e) by the representatives of an organization from the organization.

R.S., 1985, c. C-46, s. 328; [2003, c. 21, s. 4](#).

329 [\[Repealed, 2000, c. 12, s. 94\]](#)

Theft by person required to account

330 (1) Every one commits theft who, having received anything from any person on terms that require him to account for or pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds of it accordingly.

Effect of entry in account

(2) Where subsection (1) otherwise applies, but one of the terms is that the thing received or the proceeds or part of the proceeds of it shall be an item in a debtor and creditor account between the person who receives the thing and the person to whom he

is to account for or to pay it, and that the latter shall rely only on the liability of the other as his debtor in respect thereof, a proper entry in that account of the thing received or the proceeds or part of the proceeds of it, as the case may be, is a sufficient accounting therefor, and no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for shall be deemed to have taken place.

R.S., c. C-34, s. 290.

Theft by person holding power of attorney

331 Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney.

R.S., c. C-34, s. 291.

Misappropriation of money held under direction

332 (1) Every one commits theft who, having received, either solely or jointly with another person, money or valuable security or a power of attorney for the sale of real or personal property, with a direction that the money or a part of it, or the proceeds or a part of the proceeds of the security or the property shall be applied to a purpose or paid to a person specified in the direction, fraudulently and contrary to the direction applies to any other purpose or pays to any other person the money or proceeds or any part of it.

Effect of entry in account

(2) This section does not apply where a person who receives anything mentioned in subsection (1) and the person from whom he receives it deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, unless the direction is in writing.

R.S., c. C-34, s. 292.

Taking ore for scientific purpose

333 No person commits theft by reason only that he takes, for the purpose of exploration or scientific investigation, a specimen of ore or mineral from land that is not enclosed and is not occupied or worked as a mine, quarry or digging.

R.S., c. C-34, s. 293.

Motor vehicle theft

333.1 (1) Everyone who commits theft is, if the property stolen is a motor vehicle, guilty of an offence and liable

(a) on proceedings by way of indictment, to imprisonment for a term of not more than 10 years, and to a minimum punishment of imprisonment for a term of six months in the case of a third or subsequent offence under this subsection; or

(b) on summary conviction, to imprisonment for a term of not more than two years less a day.

Subsequent offences

(2) For the purpose of determining whether a convicted person has committed a third or subsequent offence, an offence for which the person was previously convicted is considered to be an earlier offence whether it was prosecuted by indictment or by way of summary conviction proceedings.

Motor vehicle theft when violence used, threatened or attempted

(3) Everyone who commits theft in the commission of which violence against a person is used, threatened or attempted is, if the property stolen is a motor vehicle, guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

Motor vehicle theft for criminal organization

(4) Everyone who commits theft for the benefit of, at the direction of or in association with a criminal organization is, if the property stolen is a motor vehicle, guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

[2010, c. 14, s. 3](#); [2019, c. 25, s. 121](#); [2024, c. 17, s. 369](#).

Possession of device for purpose of committing theft

333.2 (1) Everyone commits an offence who possesses an electronic device suitable for committing theft of a motor vehicle for the purpose of committing a motor vehicle theft offence.

Distribution of device linked to theft

(2) Everyone commits an offence who, without lawful excuse, makes, repairs, sells, offers for sale, imports into Canada, exports from Canada, distributes or makes available an electronic device suitable for committing theft of a motor vehicle, knowing that the device has been used or is intended to be used to commit a motor vehicle theft offence.

Punishment

(3) Everyone who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years; or

(b) is guilty of an offence punishable on summary conviction.

Forfeiture

(4) If a person is convicted of an offence under subsection (1) or (2), in addition to any punishment that is imposed, the electronic device in relation to which the offence was committed may be ordered forfeited to His Majesty and may be disposed of as the Attorney General directs.

Limitation

(5) No order of forfeiture may be made under subsection (4) in respect of any thing that is the property of a person who was not a party to the offence under subsection (1) or (2).

[2024, c. 17, s. 370.](#)

Punishment for theft

334 Except where otherwise provided by law, every one who commits theft

(a) if the property stolen is a testamentary instrument or the value of what is stolen is more than \$5,000, is guilty of

(i) an indictable offence and liable to imprisonment for a term of not more than 10 years, or

(ii) an offence punishable on summary conviction; or

(b) if the value of what is stolen is not more than \$5,000, is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 334; R.S., 1985, c. 27 (1st Supp.), s. 43; 1994, c. 44, s. 20; [2019, c. 25, s. 122.](#)

Offences Resembling Theft

Taking motor vehicle or vessel or found therein without consent

335 (1) Subject to subsection (1.1), every one who, without the consent of the owner, takes a motor vehicle or vessel with intent to drive, use, navigate or operate it or cause it to be driven, used, navigated or operated, or is an occupant of a motor vehicle or vessel knowing that it was taken without the consent of the owner, is guilty of an offence punishable on summary conviction.

Exception

(1.1) Subsection (1) does not apply to an occupant of a motor vehicle or vessel who, on becoming aware that it was taken without the consent of the owner, attempted to leave the motor vehicle or vessel, to the extent that it was feasible to do so, or actually left the motor vehicle or vessel.

Definition of vessel

(2) For the purposes of subsection (1), *vessel* has the same meaning as in [section 320.11](#).

R.S., 1985, c. C-46, s. 335; R.S., 1985, c. 1 (4th Supp.), s. 15; 1997, c. 18, s. 15; [2018, c. 21, s. 16](#).

Criminal breach of trust

336 Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in contravention of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 296.

337 [Repealed, [2018, c. 29, s. 33](#)]

Fraudulently taking cattle or defacing brand

338 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, without the consent of the owner,

(a) fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells cattle that are found astray, or

(b) fraudulently, in whole or in part,

(i) obliterates, alters or defaces a brand or mark on cattle, or

(ii) makes a false or counterfeit brand or mark on cattle.

Punishment for theft of cattle

(2) Every person who commits theft of cattle is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Evidence of property in cattle

(3) In any proceedings under this Act, evidence that cattle are marked with a brand or mark that is recorded or registered in accordance with any Act is, in the absence of any evidence to the contrary, proof that the cattle are owned by the registered owner of that brand or mark.

Presumption from possession

(4) Where an accused is charged with an offence under subsection (1) or (2), the burden of proving that the cattle came lawfully into the possession of the accused or his employee or into the possession of another person on behalf of the accused is on the accused, if the accused is not the registered owner of the brand or mark with which the cattle are marked, unless it appears that possession of the cattle by an employee of the

accused or by another person on behalf of the accused was without the knowledge and authority, sanction or approval of the accused.

R.S., 1985, c. C-46, s. 338; [2019, c. 25, s. 123](#).

Taking possession, etc., of drift timber

339 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, without the consent of the owner,

(a) fraudulently takes, holds, keeps in their possession, conceals, receives, appropriates, purchases or sells any lumber or lumbering equipment that is found adrift, cast ashore or lying on or embedded in the bed or bottom, or on the bank or beach, of a river, stream or lake in Canada, or in the harbours or any of the coastal waters of Canada;

(b) removes, alters, obliterates or defaces a mark or number on such lumber or lumbering equipment; or

(c) refuses to deliver such lumber or lumbering equipment up to the owner or to the person in charge of it on behalf of the owner or to a person authorized by the owner to receive it.

Dealer in second-hand goods

(2) Every one who, being a dealer in second-hand goods of any kind, trades or traffics in or has in his possession for sale or traffic any lumbering equipment that is marked with the mark, brand, registered timber mark, name or initials of a person, without the written consent of that person, is guilty of an offence punishable on summary conviction.

Search for timber unlawfully detained

(3) A peace officer who suspects, on reasonable grounds, that any lumber owned by any person and bearing the registered timber mark of that person is kept or detained in or on any place without the knowledge or consent of that person, may enter into or on that place to ascertain whether or not it is detained there without the knowledge or consent of that person.

Evidence of property in timber

(4) Where any lumber or lumbering equipment is marked with a timber mark or a boom chain brand registered under any Act, the mark or brand is, in proceedings under subsection (1), and, in the absence of any evidence to the contrary, proof that it is the property of the registered owner of the mark or brand.

Presumption from possession

(5) Where an accused or his servants or agents are in possession of lumber or lumbering equipment marked with the mark, brand, registered timber mark, name or initials of another person, the burden of proving that it came lawfully into his possession or into

possession of his servants or agents is, in proceedings under subsection (1), on the accused.

Definitions

(6) In this section,

coastal waters of Canada includes all of Queen Charlotte Sound, all the Strait of Georgia and the Canadian waters of the Strait of Juan de Fuca; (*eaux côtières du Canada*)

lumber means timber, mast, spar, shingle bolt, sawlog or lumber of any description; (*bois*)

lumbering equipment includes a boom chain, chain, line and shackle. (*matériel d'exploitation forestière*)

R.S., 1985, c. C-46, s. 339; [2019, c. 25, s. 124](#).

Destroying documents of title

340 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, for a fraudulent purpose, destroys, cancels, conceals or obliterates

- (a)** a document of title to goods or lands,
- (b)** a valuable security or testamentary instrument, or
- (c)** a judicial or official document.

R.S., 1985, c. C-46, s. 340; [2019, c. 25, s. 125](#).

Fraudulent concealment

341 Every person who, for a fraudulent purpose, takes, obtains, removes or conceals anything is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b)** an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 341; [2019, c. 25, s. 126](#).

Theft, forgery, etc., of credit card

342 (1) Every person who

- (a)** steals a credit card,
- (b)** forges or falsifies a credit card,
- (c)** possesses, uses or traffics in a credit card or a forged or falsified credit card, knowing that it was obtained, made or altered
- (i)** by the commission in Canada of an offence, or

(ii) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence, or

(d) uses a credit card knowing that it has been revoked or cancelled,

is guilty of

(e) an indictable offence and is liable to imprisonment for a term not exceeding ten years, or

(f) an offence punishable on summary conviction.

Jurisdiction

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be commenced in that place without the consent of the Attorney General of that province.

Unauthorized use of credit card data

(3) Every person who, fraudulently and without colour of right, possesses, uses, traffics in or permits another person to use credit card data, including personal authentication information, whether or not the data is authentic, that would enable a person to use a credit card or to obtain the services that are provided by the issuer of a credit card to credit card holders is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

Definitions

(4) In this section,

personal authentication information means a personal identification number or any other password or information that a credit card holder creates or adopts to be used to authenticate his or her identity in relation to the credit card; (*authentifiant personnel*)

traffic means, in relation to a credit card or credit card data, to sell, export from or import into Canada, distribute or deal with in any other way. (*trafic*)

R.S., 1985, c. C-46, s. 342; R.S., 1985, c. 27 (1st Supp.), ss. 44, 185(F); 1997, c. 18, s. 16; 2009, c. 28, s. 4.

Instruments for copying credit card data or forging or falsifying credit cards

342.01 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary

conviction, who, without lawful justification or excuse, makes, repairs, buys, sells, exports from Canada, imports into Canada or possesses any instrument, device, apparatus, material or thing that they know has been used or know is adapted or intended for use

(a) in the copying of credit card data for use in the commission of an offence under [subsection 342\(3\)](#); or

(b) in the forging or falsifying of credit cards.

Forfeiture

(2) Where a person is convicted of an offence under subsection (1), any instrument, device, apparatus, material or thing in relation to which the offence was committed or the possession of which constituted the offence may, in addition to any other punishment that may be imposed, be ordered forfeited to Her Majesty, whereupon it may be disposed of as the Attorney General directs.

Limitation

(3) No order of forfeiture may be made under subsection (2) in respect of any thing that is the property of a person who was not a party to the offence under subsection (1).

1997, c. 18, s. 17; [2009, c. 28, s. 5](#).

Unauthorized use of computer

342.1 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years, or is guilty of an offence punishable on summary conviction who, fraudulently and without colour of right,

(a) obtains, directly or indirectly, any computer service;

(b) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system;

(c) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (a) or (b) or under [section 430](#) in relation to computer data or a computer system; or

(d) uses, possesses, traffics in or permits another person to have access to a computer password that would enable a person to commit an offence under paragraph (a), (b) or (c).

Definitions

(2) In this section,

computer data means representations, including signs, signals or symbols, that are in a form suitable for processing in a computer system; (*données informatiques*)

computer password means any computer data by which a computer service or computer system is capable of being obtained or used; (*mot de passe*)

computer program means computer data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function; (*programme d'ordinateur*)

computer service includes data processing and the storage or retrieval of computer data; (*service d'ordinateur*)

computer system means a device that, or a group of interconnected or related devices one or more of which,

- (a) contains computer programs or other computer data, and
- (b) by means of computer programs,
 - (i) performs logic and control, and
 - (ii) may perform any other function; (*ordinateur*)

data [Repealed, 2014, c. 31, s. 16]

electro-magnetic, acoustic, mechanical or other device means any device or apparatus that is used or is capable of being used to intercept any function of a computer system, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing; (*dispositif électromagnétique, acoustique, mécanique ou autre*)

function includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer system; (*fonction*)

intercept includes listen to or record a function of a computer system, or acquire the substance, meaning or purport thereof; (*intercepter*)

traffic means, in respect of a computer password, to sell, export from or import into Canada, distribute or deal with in any other way. (*trafic*)

R.S., 1985, c. 27 (1st Supp.), s. 45; 1997, c. 18, s. 18; 2014, c. 31, s. 16.

Possession of device to obtain unauthorized use of computer system or to commit mischief

342.2 (1) Every person who, without lawful excuse, makes, possesses, sells, offers for sale, imports, obtains for use, distributes or makes available a device that is designed or adapted primarily to commit an offence under [section 342.1](#) or [430](#), knowing that the device has been used or is intended to be used to commit such an offence, is

- (a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or
- (b) guilty of an offence punishable on summary conviction.

Forfeiture

(2) If a person is convicted of an offence under subsection (1), in addition to any punishment that is imposed, any device in relation to which the offence was committed or the possession of which constituted the offence may be ordered forfeited to Her Majesty and may be disposed of as the Attorney General directs.

Limitation

(3) No order of forfeiture may be made under subsection (2) in respect of any thing that is the property of a person who was not a party to the offence under subsection (1).

Definition of *device*

(4) In this section, ***device*** includes

(a) a component of a device; and

(b) a computer program within the meaning of [subsection 342.1\(2\)](#).

1997, c. 18, s. 19; [2014, c. 31, s. 17](#); [2018, c. 29, s. 34](#).

Robbery and Extortion

Robbery

343 Every one commits robbery who

(a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;

(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;

(c) assaults any person with intent to steal from him; or

(d) steals from any person while armed with an offensive weapon or imitation thereof.

R.S., c. C-34, s. 302.

Robbery

344 (1) Every person who commits robbery is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) [\[Repealed, 2022, c. 15, s. 12\]](#)

(b) in any other case, to imprisonment for life.

Subsequent offences

(2) In determining, for the purpose of paragraph (1)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#), [272](#) or [273](#), subsection [279\(1\)](#) or section [279.1](#) or [346](#) if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(3) For the purposes of subsection (2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

R.S., 1985, c. C-46, s. 344; 1995, c. 39, s. 149; [2008, c. 6, s. 32](#); [2009, c. 22, s. 14](#); [2022, c. 15, s. 12](#).

Stopping mail with intent

345 Every one who stops a mail conveyance with intent to rob or search it is guilty of an indictable offence and liable to imprisonment for life.

R.S., c. C-34, s. 304.

Extortion

346 (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

Extortion

(1.1) Every person who commits extortion is guilty of an indictable offence and liable

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

(ii) in the case of a second or subsequent offence, seven years;

(a.1) [Repealed, 2022, c. 15, s. 13]

(b) in any other case, to imprisonment for life.

Subsequent offences

(1.2) In determining, for the purpose of paragraph (1.1)(a), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under this section;

(b) an offence under [subsection 85\(1\)](#) or [\(2\)](#) or [section 244](#) or [244.2](#); or

(c) an offence under [section 220](#), [236](#), [239](#), [272](#) or 273, subsection 279(1) or section 279.1 or 344 if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Sequence of convictions only

(1.3) For the purposes of subsection (1.2), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

Saving

(2) A threat to institute civil proceedings is not a threat for the purposes of this section.

R.S., 1985, c. C-46, s. 346; R.S., 1985, c. 27 (1st Supp.), s. 46; 1995, c. 39, s. 150; [2008, c. 6, s. 33](#); [2009, c. 22, s. 15](#); [2022, c. 15, s. 13](#).

Criminal Interest Rate

Criminal interest rate

347 (1) Despite any other Act of Parliament, every person who enters or offers to enter into an agreement or arrangement to receive interest at a criminal rate, who advertises an offer to enter into an agreement or arrangement that provides for the receipt of interest at a criminal rate or who receives a payment or partial payment of interest at a criminal rate is

(a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) guilty of an offence punishable on summary conviction and liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than two years less a day, or to both.

Definitions

(2) In this section,

credit advanced means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement, or that would be advanced if an agreement or arrangement — as offered, including in an advertisement — was entered into, minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement; (*capital prêté*)

criminal rate means an annual percentage rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 35 per cent on the credit advanced; (*taux criminel*)

insurance charge means the cost of insuring the risk assumed by the person who advances or is to advance credit under an agreement or arrangement, where the face amount of the insurance does not exceed the credit advanced; (*frais d'assurance*)

interest means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, or that would be paid or payable if such an agreement or arrangement was entered into, by or on behalf of the person to whom the credit is or is to be advanced, or would be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, or would be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage or hypothec transaction, any amount required to be paid on account of property taxes; (*intérêt*)

official fee means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit; (*taxe officielle*)

overdraft charge means a charge not exceeding five dollars for the creation of or increase in an overdraft, imposed by a credit union or caisse populaire the membership of which is wholly or substantially comprised of natural persons or a deposit taking institution the deposits in which are insured, in whole or in part, by the Canada Deposit Insurance Corporation or guaranteed, in whole or in part, by the Quebec Deposit Insurance Board; (*frais pour découvert de compte*)

required deposit balance means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money. (*dépôt de garantie*)

Presumption

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

Proof of annual percentage rate

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that they have calculated the annual percentage rate of interest on any credit advanced and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the annual percentage rate of interest without proof of the signature or official character of the person appearing to have signed the certificate.

Notice

(5) A certificate referred to in subsection (4) shall not be received in evidence unless the party intending to produce it has given to the accused or defendant reasonable notice of that intention together with a copy of the certificate.

Cross-examination with leave

(6) An accused or a defendant against whom a certificate referred to in subsection (4) is produced may, with leave of the court, require the attendance of the actuary for the purposes of cross-examination.

(7) [Repealed, 2024, c. 17, s. 336]

Application

(8) This section does not apply to any transaction to which the *Tax Rebate Discounting Act* applies.

R.S., 1985, c. C-46, s. 347; 1992, c. 1, s. 60(F); 2007, c. 9, s. 1; 2019, c. 25, s. 127; 2023, c. 26, s. 610; 2024, c. 17, s. 336.

Non-application — agreements or arrangements

347.01 (1) [Section 347](#) does not apply in respect of agreements or arrangements provided for by regulation or in respect of offers, or advertisements of offers, provided for by regulation, to enter into an agreement or arrangement.

Non-application — offers and advertisements

(2) [Section 347](#) also does not apply in respect of offers, or advertisements of offers, to enter into an agreement or arrangement if, had the agreement or arrangement been entered into, it would have been considered to be provided for by regulation.

Regulations

(3) The Governor in Council may, by regulation, on the recommendation of the Minister of Justice after consultation with the Minister of Finance, provide for

(a) the types of agreements or arrangements in respect of which [section 347](#) does not apply or the criteria for determining the agreements or arrangements, or the types of agreements or arrangements, in respect of which that section does not apply; or

(b) the types of offers, or of advertisements of offers, to enter into an agreement or arrangement in respect of which [section 347](#) does not apply or the criteria for determining the offers, or advertisements, or the types of offers, or of advertisements, in respect of which that section does not apply.

[2023, c. 26, s. 611](#); [2024, c. 17, s. 338](#).

Definitions

347.1 (1) The following definitions apply in subsection (2).

interest has the same meaning as in [subsection 347\(2\)](#). (*intérêts*)

payday loan means an advancement of money in exchange for a post-dated cheque, a pre-authorized debit or a future payment of a similar nature but not for any guarantee, suretyship, overdraft protection or security on property and not through a margin loan, pawnbroking, a line of credit or a credit card. (*prêt sur salaire*)

Non-application — person

(2) Section 347 and [section 2](#) of the *Interest Act* do not apply to a person, other than a financial institution within the meaning of paragraphs (a) to (d) of the definition *financial institution* in [section 2](#) of the *Bank Act*, who has entered into or has offered to enter into a payday loan agreement to receive interest, has advertised an offer to enter into a payday loan agreement that provides for the receipt of interest or has received interest under a payday loan agreement, if

(a) the amount of money that is or would be advanced under the agreement is \$1,500 or less and the term of the agreement is or would be 62 days or less;

(a.1) the total cost of borrowing under the agreement does not or would not exceed the limit fixed by regulation;

(b) the person is licensed or otherwise specifically authorized under the laws of a province to enter into the agreement; and

(c) the province is designated under subsection (3).

Regulation — limit

(2.1) For the purposes of paragraph (2)(a.1), the Governor in Council may, by regulation, on the recommendation of the Minister of Justice and after that Minister's consultation with the Minister of Finance, fix the limit.

Clarification

(2.2) If [section 347](#) does not apply to a person by reason of subsection (2) immediately before a regulation made under subsection (2.1) comes into force, that section continues

not to apply to the person if the total cost of borrowing under the agreement did not exceed the limit that applied immediately before the regulation came into force.

Designation of province

(3) The Governor in Council shall, by order and at the request of the lieutenant governor in council of a province, designate the province for the purposes of this section if the province has legislative measures that protect recipients of payday loans and that provide for limits on the total cost of borrowing under the agreements.

Revocation

(4) The Governor in Council shall, by order, revoke the designation made under subsection (3) if requested to do so by the lieutenant governor in council of the province or if the legislative measures described in that subsection are no longer in force in that province.

[2007, c. 9, s. 2](#); [2023, c. 26, s. 612](#); [2024, c. 17, s. 337](#); 2024, c. 17, s. 338.

Breaking and Entering

Breaking and entering with intent, committing offence or breaking out

348 (1) Every one who

- (a)** breaks and enters a place with intent to commit an indictable offence therein,
- (b)** breaks and enters a place and commits an indictable offence therein, or
- (c)** breaks out of a place after
 - (i)** committing an indictable offence therein, or
 - (ii)** entering the place with intent to commit an indictable offence therein,

is guilty

- (d)** if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, and
- (e)** if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

Presumptions

(2) For the purposes of proceedings under this section, evidence that an accused

- (a)** broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein; or
- (b)** broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after

- (i) committing an indictable offence therein, or
- (ii) entering with intent to commit an indictable offence therein.

Definition of *place*

(3) For the purposes of this section and [section 351](#), ***place*** means

- (a) a dwelling-house;
- (b) a building or structure or any part thereof, other than a dwelling-house;
- (c) a railway vehicle, a vessel, an aircraft or a trailer; or
- (d) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

R.S., 1985, c. C-46, s. 348; R.S., 1985, c. 27 (1st Supp.), s. 47; 1997, c. 18, s. 20.

Aggravating circumstance — home invasion

348.1 If a person is convicted of an offence under [section 98](#) or 98.1, subsection 279(2) or section 343, 346 or 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,

- (a) knew that or was reckless as to whether the dwelling-house was occupied; and
- (b) used violence or threats of violence to a person or property.

[2002, c. 13, s. 15](#); [2008, c. 6, s. 34](#).

Being unlawfully in dwelling-house

349 (1) Every person who, without lawful excuse, enters or is in a dwelling-house with intent to commit an indictable offence in it is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or of an offence punishable on summary conviction.

Presumption

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein.

R.S., 1985, c. C-46, s. 349; 1997, c. 18, s. 21; [2018, c. 29, s. 35](#).

Entrance

350 For the purposes of [sections 348](#) and [349](#),

- (a) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and
- (b) a person shall be deemed to have broken and entered if

(i) he obtained entrance by a threat or an artifice or by collusion with a person within, or

(ii) he entered without lawful justification or excuse by a permanent or temporary opening.

R.S., 1985, c. C-46, s. 350; [2018, c. 29, s. 36](#).

Possession of break-in instrument

351 (1) Every person who, without lawful excuse, has in their possession any instrument suitable for the purpose of breaking into any place, motor vehicle, vault or safe knowing that the instrument has been used or is intended to be used for that purpose,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Disguise with intent

(2) Every person who, with intent to commit an indictable offence, has their face masked or coloured or is otherwise disguised is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 351; R.S., 1985, c. 27 (1st Supp.), s. 48; [2008, c. 18, s. 9](#); [2018, c. 29, s. 37](#); [2019, c. 25, s. 128](#).

Possession of instruments for breaking into coin-operated or currency exchange devices

352 Every person who, without lawful excuse, has in their possession any instrument suitable for the purpose of breaking into a coin-operated device or a currency exchange device, knowing that the instrument has been used or is or was intended to be used for that purpose, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 352; [2018, c. 29, s. 38](#); [2019, c. 25, s. 129](#).

Selling, etc., automobile master key

353 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) sells, offers for sale or advertises in a province an automobile master key otherwise than under the authority of a licence issued by the Attorney General of that province, or

(b) purchases or has in his possession in a province an automobile master key otherwise than under the authority of a licence issued by the Attorney General of that province.

Exception

(1.1) A police officer specially authorized by the chief of the police force to possess an automobile master key is not guilty of an offence under subsection (1) by reason only that the police officer possesses an automobile master key for the purposes of the execution of the police officer's duties.

Terms and conditions of licence

(2) A licence issued by the Attorney General of a province as described in paragraph (1) (a) or (b) may contain such terms and conditions relating to the sale, offering for sale, advertising, purchasing, having in possession or use of an automobile master key as the Attorney General of that province may prescribe.

Fees

(2.1) The Attorney General of a province may prescribe fees for the issue or renewal of licences as described in paragraph (1)(a) or (b).

Record to be kept

(3) Every one who sells an automobile master key

(a) shall keep a record of the transaction showing the name and address of the purchaser and particulars of the licence issued to the purchaser as described in paragraph (1)(b); and

(b) shall produce the record for inspection at the request of a peace officer.

Failure to comply with subsection (3)

(4) Every one who fails to comply with subsection (3) is guilty of an offence punishable on summary conviction.

Definitions

(5) The definitions in this subsection apply in this section.

automobile master key includes a key, pick, rocker key or other instrument designed or adapted to operate the ignition or other switches or locks of a series of motor vehicles. (*passe-partout d'automobile*)

licence includes any authorization. (*licence*)

R.S., 1985, c. C-46, s. 353; 1997, c. 18, s. 22; [2019, c. 25, s. 130](#).

Tampering with vehicle identification number

353.1 (1) Every person commits an offence who, without lawful excuse, wholly or partially alters, removes or obliterates a vehicle identification number on a motor vehicle.

Definition of *vehicle identification number*

(2) For the purpose of this section, ***vehicle identification number*** means any number or other mark placed on a motor vehicle for the purpose of distinguishing it from other similar motor vehicles.

Exception

(3) Despite subsection (1), it is not an offence to wholly or partially alter, remove or obliterate a vehicle identification number on a motor vehicle during regular maintenance or any repair or other work done on the vehicle for a legitimate purpose, including a modification of the vehicle.

Punishment

(4) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) is guilty of an offence punishable on summary conviction.

[2010, c. 14, s. 4.](#)

Possession and Trafficking

Possession of property obtained by crime

354 (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment; or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

Obliterated vehicle identification number

(2) In proceedings in respect of an offence under subsection (1), evidence that a person has in their possession a motor vehicle the vehicle identification number of which has been wholly or partially removed or obliterated or a part of a motor vehicle being a part bearing a vehicle identification number that has been wholly or partially removed or obliterated is, in the absence of any evidence to the contrary, proof that the motor vehicle or part, as the case may be, was obtained,

(a) by the commission in Canada of an offence punishable by indictment; or

(b) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

Definition of *vehicle identification number*

(3) For the purposes of subsection (2), ***vehicle identification number*** means any number or other mark placed on a motor vehicle for the purpose of distinguishing the motor vehicle from other similar motor vehicles.

Exception

(4) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under this section by reason only that the peace officer or person possesses property or a thing or the proceeds of property or a thing mentioned in subsection (1) for the purposes of an investigation or otherwise in the execution of the peace officer's duties.

R.S., 1985, c. C-46, s. 354; 1997, c. 18, s. 23; [2018, c. 29, s. 39](#).

Punishment

355 Every one who commits an offence under [section 354](#)

- (a)** if the subject matter of the offence is a testamentary instrument or the value of the subject matter of the offence is more than \$5,000, is guilty of
 - (i)** an indictable offence and liable to imprisonment for a term of not more than 10 years, or
 - (ii)** an offence punishable on summary conviction; or
- (b)** if the value of the subject matter of the offence is not more than \$5,000, is guilty
 - (i)** of an indictable offence and is liable to imprisonment for a term not exceeding two years, or
 - (ii)** of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 355; R.S., 1985, c. 27 (1st Supp.), s. 49; 1994, c. 44, s. 21; [2019, c. 25, s. 131](#).

Definition of *traffic*

355.1 For the purposes of [sections 355.2](#) and [355.4](#), ***traffic*** means to sell, give, transfer, transport, export from Canada, import into Canada, send, deliver or deal with in any other way, or to offer to do any of those acts.

[2010, c. 14, s. 6](#).

Trafficking in property obtained by crime

355.2 Everyone commits an offence who traffics in any property or thing or any proceeds of any property or thing knowing that all or part of the property, thing or proceeds was obtained by or derived directly or indirectly from

- (a)** the commission in Canada of an offence punishable by indictment; or
- (b)** an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

[2010, c. 14, s. 6](#).

***In rem* prohibition**

355.3 The importation into Canada or exportation from Canada of any property or thing or any proceeds of any property or thing is prohibited if all or part of the property, thing or proceeds was obtained by or derived directly or indirectly from

- (a) the commission in Canada of an offence punishable by indictment; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

2010, c. 14, s. 6.

Possession of property obtained by crime — trafficking

355.4 Everyone commits an offence who has in their possession, for the purpose of trafficking, any property or thing or any proceeds of any property or thing knowing that all or part of the property, thing or proceeds was obtained by or derived directly or indirectly from

- (a) the commission in Canada of an offence punishable by indictment; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

2010, c. 14, s. 6.

Punishment

355.5 Everyone who commits an offence under [section 355.2](#) or [355.4](#)

- (a) is, if the value of the subject matter of the offence is more than \$5,000, guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years; or
- (b) is, if the value of the subject matter of the offence is not more than \$5,000,
 - (i) guilty of an indictable offence and liable to imprisonment for a term of not more than five years, or
 - (ii) guilty of an offence punishable on summary conviction.

2010, c. 14, s. 6.

Theft from mail

356 (1) Everyone commits an offence who

- (a) steals
 - (i) anything sent by post, after it is deposited at a post office and before it is delivered, or after it is delivered but before it is in the possession of the addressee or of a person who may reasonably be considered to be authorized by the addressee to receive mail,
 - (ii) a bag, sack or other container or covering in which mail is conveyed, whether or not it contains mail, or

(iii) a key suited to a lock adopted for use by the Canada Post Corporation;

(a.1) with intent to commit an offence under paragraph (a), makes, possesses or uses a copy of a key suited to a lock adopted for use by the Canada Post Corporation, or a key suited to obtaining access to a receptacle or device provided for the receipt of mail;

(b) has in their possession anything that they know has been used to commit an offence under paragraph (a) or **(a.1)** or anything in respect of which they know that such an offence has been committed; or

(c) fraudulently redirects, or causes to be redirected, anything sent by post.

Allegation of value not necessary

(2) In proceedings for an offence under this section it is not necessary to allege in the indictment or to prove on the trial that anything in respect of which the offence was committed had any value.

Punishment

(3) Everyone who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 356; [2009, c. 28, s. 6](#).

Bringing into Canada property obtained by crime

357 Every person who brings into or has in Canada anything that they have obtained outside Canada by an act that, if it had been committed in Canada, would have been the offence of theft or an offence under [section 342](#) or [354](#) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 357; R.S., 1985, c. 27 (1st Supp.), s. 50; [2019, c. 25, s. 132](#).

Having in possession when complete

358 For the purposes of [sections 342](#) and [354](#) and [paragraph 356\(1\)\(b\)](#), the offence of having in possession is complete when a person has, alone or jointly with another person, possession of or control over anything mentioned in those sections or when he aids in concealing or disposing of it, as the case may be.

R.S., 1985, c. C-46, s. 358; R.S., 1985, c. 27 (1st Supp.), s. 50.

359 [Repealed, [2018, c. 29, s. 40](#)]

360 [Repealed, [2018, c. 29, s. 40](#)]

False Pretences

False pretence

361 (1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

Exaggeration

(2) Exaggerated commendation or depreciation of the quality of anything is not a false pretence unless it is carried to such an extent that it amounts to a fraudulent misrepresentation of fact.

Question of fact

(3) For the purposes of subsection (2), it is a question of fact whether commendation or depreciation amounts to a fraudulent misrepresentation of fact.

R.S., c. C-34, s. 319.

False pretence or false statement

362 (1) Every one commits an offence who

(a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person;

(b) obtains credit by a false pretence or by fraud;

(c) knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied on, with respect to the financial condition or means or ability to pay of himself or herself or any person or organization that he or she is interested in or that he or she acts for, for the purpose of procuring, in any form whatever, whether for his or her benefit or the benefit of that person or organization,

(i) the delivery of personal property,

(ii) the payment of money,

(iii) the making of a loan,

(iv) the grant or extension of credit,

(v) the discount of an account receivable, or

(vi) the making, accepting, discounting or endorsing of a bill of exchange, cheque, draft or promissory note; or

(d) knowing that a false statement in writing has been made with respect to the financial condition or means or ability to pay of himself or herself or another person or organization that he or she is interested in or that he or she acts for, procures on the

faith of that statement, whether for his or her benefit or for the benefit of that person or organization, anything mentioned in subparagraphs (c)(i) to (vi).

Punishment

(2) Every one who commits an offence under paragraph (1)(a)

(a) if the property obtained is a testamentary instrument or the value of what is obtained is more than \$5,000, is guilty of

(i) an indictable offence and liable to imprisonment for a term of not more than 10 years, or

(ii) an offence punishable on summary conviction; or

(b) if the value of what is obtained is not more than \$5,000, is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction.

Idem

(3) Every person who commits an offence under paragraph (1)(b), (c) or (d) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Presumption from cheque issued without funds

(4) Where, in proceedings under paragraph (1)(a), it is shown that anything was obtained by the accused by means of a cheque that, when presented for payment within a reasonable time, was dishonoured on the ground that no funds or insufficient funds were on deposit to the credit of the accused in the bank or other institution on which the cheque was drawn, it shall be presumed to have been obtained by a false pretence, unless the court is satisfied by evidence that when the accused issued the cheque he believed on reasonable grounds that it would be honoured if presented for payment within a reasonable time after it was issued.

Definition of *cheque*

(5) In this section, ***cheque*** includes, in addition to its ordinary meaning, a bill of exchange drawn on any institution that makes it a business practice to honour bills of exchange or any particular kind thereof drawn on it by depositors.

R.S., 1985, c. C-46, s. 362; R.S., 1985, c. 27 (1st Supp.), s. 52; 1994, c. 44, s. 22; [2003, c. 21, s. 5](#); [2019, c. 25, s. 133](#).

Obtaining execution of valuable security by fraud

363 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction

who, with intent to defraud or injure another person, by a false pretence causes or induces any person

(a) to execute, make, accept, endorse or destroy the whole or any part of a valuable security, or

(b) to write, impress or affix a name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security.

R.S., 1985, c. C-46, s. 363; [2019, c. 25, s. 134](#).

Fraudulently obtaining food, beverage or accommodation

364 (1) Every one who fraudulently obtains food, a beverage or accommodation at any place that is in the business of providing those things is guilty of an offence punishable on summary conviction.

Presumption

(2) In proceedings under this section, evidence that the accused obtained food, a beverage or accommodation at a place that is in the business of providing those things and did not pay for it and

(a) made a false or fictitious show or pretence of having baggage,

(b) had any false or pretended baggage,

(c) surreptitiously removed or attempted to remove his baggage or any material part of it,

(d) absconded or surreptitiously left the premises,

(e) knowingly made a false statement to obtain credit or time for payment, or

(f) offered a worthless cheque, draft or security in payment for the food, beverage or accommodation,

is, in the absence of any evidence to the contrary, proof of fraud.

Definition of *cheque*

(3) In this section, ***cheque*** includes, in addition to its ordinary meaning, a bill of exchange drawn on any institution that makes it a business practice to honour bills of exchange or any particular kind thereof drawn on it by depositors.

R.S., 1985, c. C-46, s. 364; 1994, c. 44, s. 23.

365 [Repealed, [2018, c. 29, s. 41](#)]

Forgery and Offences Resembling Forgery

Forgery

366 (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

(a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or

(b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

Making false document

(2) Making a false document includes

(a) altering a genuine document in any material part;

(b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or

(c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

When forgery complete

(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

Forgery complete though document incomplete

(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine.

Exception

(5) No person commits forgery by reason only that the person, in good faith, makes a false document at the request of a police force, the Canadian Forces or a department or agency of the federal government or of a provincial government.

R.S., 1985, c. C-46, s. 366; [2009, c. 28, s. 7](#).

Punishment for forgery

367 Every one who commits forgery

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 367; 1994, c. 44, s. 24; 1997, c. 18, s. 24.

Use, trafficking or possession of forged document

368 (1) Everyone commits an offence who, knowing or believing that a document is forged,

- (a)** uses, deals with or acts on it as if it were genuine;
- (b)** causes or attempts to cause any person to use, deal with or act on it as if it were genuine;
- (c)** transfers, sells or offers to sell it or makes it available, to any person, knowing that or being reckless as to whether an offence will be committed under paragraph (a) or (b); or
- (d)** possesses it with intent to commit an offence under any of paragraphs (a) to (c).

Punishment

(1.1) Everyone who commits an offence under subsection (1)

- (a)** is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b)** is guilty of an offence punishable on summary conviction.

Wherever forged

(2) For the purposes of proceedings under this section, the place where a document was forged is not material.

R.S., 1985, c. C-46, s. 368; 1992, c. 1, s. 60(F); 1997, c. 18, s. 25; [2009, c. 28, s. 8](#).

Forgery instruments

368.1 Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years, or is guilty of an offence punishable on summary conviction, who, without lawful authority or excuse, makes, repairs, buys, sells, exports from Canada, imports into Canada or possesses any instrument, device, apparatus, material or thing that they know has been used or know is adapted or intended for use by any person to commit forgery.

[2009, c. 28, s. 9](#).

Public officers acting in the course of their duties or employment

368.2 No public officer, as defined in [subsection 25.1\(1\)](#), is guilty of an offence under any of [sections 366](#) to [368.1](#) if the acts alleged to constitute the offence were committed by the public officer for the sole purpose of establishing or maintaining a covert identity for use in the course of the public officer's duties or employment.

[2009, c. 28, s. 9](#).

Exchequer bill paper, public seals, etc.

369 Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, without lawful authority or excuse,

- (a)** makes, uses or possesses

(i) any exchequer bill paper, revenue paper or paper that is used to make bank-notes, or

(ii) any paper that is intended to resemble paper mentioned in subparagraph (i); or

(b) makes, reproduces or uses a public seal of Canada or of a province, or the seal of a public body or authority in Canada or of a court of law.

R.S., 1985, c. C-46, s. 369; [2009, c. 28, s. 9](#).

370 [Repealed, [2018, c. 29, s. 42](#)]

371 [Repealed, [2018, c. 29, s. 42](#)]

False information

372 (1) Everyone commits an offence who, with intent to injure or alarm a person, conveys information that they know is false, or causes such information to be conveyed by letter or any means of telecommunication.

Indecent communications

(2) Everyone commits an offence who, with intent to alarm or annoy a person, makes an indecent communication to that person or to any other person by a means of telecommunication.

Harassing communications

(3) Everyone commits an offence who, without lawful excuse and with intent to harass a person, repeatedly communicates, or causes repeated communications to be made, with them by a means of telecommunication.

Punishment

(4) Everyone who commits an offence under this section is

(a) guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 372; [2014, c. 31, s. 18](#).

373 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 53]

Drawing document without authority, etc.

374 Every one who

(a) with intent to defraud and without lawful authority makes, executes, draws, signs, accepts or endorses a document in the name or on the account of another person by procuration or otherwise, or

(b) makes use of or utters a document knowing that it has been made, executed, signed, accepted or endorsed with intent to defraud and without lawful authority, in

the name or on the account of another person, by procuration or otherwise,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 332.

Obtaining, etc., by instrument based on forged document

375 Every one who demands, receives or obtains anything, or causes or procures anything to be delivered or paid to any person under, on or by virtue of any instrument issued under the authority of law, knowing that it is based on a forged document, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 333.

Counterfeiting stamp, etc.

376 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who

- (a)** fraudulently uses, mutilates, affixes, removes or counterfeits a stamp or part thereof,
- (b)** knowingly and without lawful excuse has in their possession
 - (i)** a counterfeit stamp or a stamp that has been fraudulently mutilated, or
 - (ii)** anything bearing a stamp of which a part has been fraudulently erased, removed or concealed, or
- (c)** without lawful excuse makes or knowingly has in their possession a die or instrument that is capable of making the impression of a stamp or part of a stamp.

Counterfeiting mark

(2) Every one who, without lawful authority,

- (a)** makes a mark,
- (b)** sells, or exposes for sale, or has in his possession a counterfeit mark,
- (c)** affixes a mark to anything that is required by law to be marked, branded, sealed or wrapped other than the thing to which the mark was originally affixed or was intended to be affixed, or
- (d)** affixes a counterfeit mark to anything that is required by law to be marked, branded, sealed or wrapped,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Definitions

(3) In this section,

mark means a mark, brand, seal, wrapper or design used by or on behalf of

- (a) the government of Canada or a province,
- (b) the government of a state other than Canada, or
- (c) any department, board, commission or agent established by a government mentioned in paragraph (a) or (b) in connection with the service or business of that government; (*marque*)

stamp means an impressed or adhesive stamp used for the purpose of revenue by the government of Canada or a province or by the government of a state other than Canada. (*timbre*)

R.S., 1985, c. C-46, s. 376; [2018, c. 29, s. 43](#).

Damaging documents

377 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who unlawfully

- (a) destroys, defaces or injures a register, or any part of a register, of births, baptisms, marriages, deaths or burials that is required or authorized by law to be kept in Canada, or a copy or any part of a copy of such a register that is required by law to be transmitted to a registrar or other officer,
- (b) inserts or causes to be inserted in a register or copy referred to in paragraph (a) an entry, that he knows is false, of any matter relating to a birth, baptism, marriage, death or burial, or erases any material part from that register or copy,
- (c) destroys, damages or obliterates an election document or causes an election document to be destroyed, damaged or obliterated, or
- (d) makes or causes to be made an erasure, alteration or interlineation in or on an election document.

Definition of election document

(2) In this section, ***election document*** means any document or writing issued under the authority of an Act of Parliament or the legislature of a province with respect to an election held pursuant to the authority of that Act.

R.S., 1985, c. C-46, s. 377; [2019, c. 25, s. 135](#).

Offences in relation to registers

378 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

- (a) being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, knowingly makes or issues a false certified copy, extract or certificate,

(b) not being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, fraudulently makes or issues a copy, extract or certificate that purports to be certified as authorized or required by law, or

(c) being authorized or required by law to make a certificate or declaration concerning any particular required for the purpose of making entries in a register, record or document, knowingly and falsely makes the certificate or declaration.

R.S., 1985, c. C-46, s. 378; [2019, c. 25, s. 136](#).

PART X

Fraudulent Transactions Relating to Contracts and Trade

Interpretation

Definition of *goods*

379 In this Part, ***goods*** means anything that is the subject of trade or commerce.

R.S., 1985, c. C-46, s. 379; [2018, c. 29, s. 43.1](#).

Fraud

Fraud

380 (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

Minimum punishment

(1.1) When a person is prosecuted on indictment and convicted of one or more offences referred to in subsection (1), the court that imposes the sentence shall impose a minimum punishment of imprisonment for a term of two years if the total value of the subject-matter of the offences exceeds one million dollars.

Affecting public market

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., 1985, c. C-46, s. 380; R.S., 1985, c. 27 (1st Supp.), s. 54; 1994, c. 44, s. 25; 1997, c. 18, s. 26; 2004, c. 3, s. 2; 2011, c. 6, s. 2.

Sentencing — aggravating circumstances

380.1 (1) Without limiting the generality of [section 718.2](#), where a court imposes a sentence for an offence referred to in [section 380](#), [382](#), [382.1](#) or [400](#), it shall consider the following as aggravating circumstances:

- (a)** the magnitude, complexity, duration or degree of planning of the fraud committed was significant;
- (b)** the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;
- (c)** the offence involved a large number of victims;
- (c.1)** the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;
- (d)** in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;
- (e)** the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and
- (f)** the offender concealed or destroyed records related to the fraud or to the disbursement of the proceeds of the fraud.

Aggravating circumstance — value of the fraud

(1.1) Without limiting the generality of [section 718.2](#), when a court imposes a sentence for an offence referred to in [section 382](#), [382.1](#) or [400](#), it shall also consider as an aggravating circumstance the fact that the value of the fraud committed exceeded one million dollars.

Non-mitigating factors

(2) When a court imposes a sentence for an offence referred to in [section 380, 382, 382.1 or 400](#), it shall not consider as mitigating circumstances the offender's employment, employment skills or status or reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

Record of proceedings

(3) The court shall cause to be stated in the record the aggravating and mitigating circumstances it took into account when determining the sentence.

[2004, c. 3, s. 3](#); [2011, c. 6, s. 3](#).

Prohibition order

380.2 (1) When an offender is convicted, or is discharged on the conditions prescribed in a probation order under [section 730](#), of an offence referred to in [subsection 380\(1\)](#), the court that sentences or discharges the offender, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from seeking, obtaining or continuing any employment, or becoming or being a volunteer in any capacity, that involves having authority over the real property, money or valuable security of another person.

Duration

(2) The prohibition may be for any period that the court considers appropriate, including any period to which the offender is sentenced to imprisonment.

Court may vary order

(3) A court that makes an order of prohibition or, if the court is for any reason unable to act, another court of equivalent jurisdiction in the same province, may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances.

Offence

(4) Every person who is bound by an order of prohibition and who does not comply with the order is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

[2011, c. 6, s. 4](#).

380.3 [Repealed, [2015, c. 13, s. 11](#)]

380.4 [Repealed, [2015, c. 13, s. 11](#)]

Using mails to defraud

381 Every person who makes use of the mails for the purpose of transmitting or delivering letters or circulars concerning schemes devised or intended to deceive or defraud the public, or for the purpose of obtaining money under false pretences, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 381; [2019, c. 25, s. 137](#).

Fraudulent manipulation of stock exchange transactions

382 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,

(a) effects a transaction in the security that involves no change in the beneficial ownership thereof,

(b) enters an order for the purchase of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the security has been or will be entered by or for the same or different persons, or

(c) enters an order for the sale of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the security has been or will be entered by or for the same or different persons.

R.S., 1985, c. C-46, s. 382; [2004, c. 3, s. 4](#); [2019, c. 25, s. 138](#).

Prohibited insider trading

382.1 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, directly or indirectly, buys or sells a security, knowingly using inside information that they

(a) possess by virtue of being a shareholder of the issuer of that security;

(b) possess by virtue of, or obtained in the course of, their business or professional relationship with that issuer;

(c) possess by virtue of, or obtained in the course of, a proposed takeover or reorganization of, or amalgamation, merger or similar business combination with, that issuer;

(d) possess by virtue of, or obtained in the course of, their employment, office, duties or occupation with that issuer or with a person referred to in paragraphs (a) to (c); or

(e) obtained from a person who possesses or obtained the information in a manner referred to in paragraphs (a) to (d).

Tipping

(2) Except when necessary in the course of business, a person who knowingly conveys inside information that they possess or obtained in a manner referred to in subsection (1) to another person, knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security, is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Saving

(3) For greater certainty, an act is not an offence under this section if it is authorized or required, or is not prohibited, by any federal or provincial Act or regulation applicable to it.

Definition of *inside information*

(4) In this section, ***inside information*** means information relating to or affecting the issuer of a security or a security that they have issued, or are about to issue, that

(a) has not been generally disclosed; and

(b) could reasonably be expected to significantly affect the market price or value of a security of the issuer.

2004, c. 3, s. 5; 2019, c. 25, s. 139.

Gaming in stocks or merchandise

383 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, with intent to make gain or profit by the rise or fall in price of the stock of an incorporated or unincorporated company or undertaking, whether in or outside Canada, or of any goods, wares or merchandise,

(a) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the purchase or sale of shares of stock or goods, wares or merchandise, without the *bona fide* intention of acquiring the shares, goods, wares or merchandise or of selling them, as the case may be, or

(b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of shares of stock or goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is

made or received, and without the *bona fide* intention of making or receiving delivery thereof, as the case may be.

This section does not apply if a broker, on behalf of a purchaser, receives delivery, even if the broker retains or pledges what is delivered as security for the advance of the purchase money or any part of it.

Onus

(2) Where, in proceedings under this section, it is established that the accused made or signed a contract or an agreement for the sale or purchase of shares of stock or goods, wares or merchandise, or acted, aided or abetted in the making or signing thereof, the burden of proof of a *bona fide* intention to acquire or to sell the shares, goods, wares or merchandise or to deliver or to receive delivery thereof, as the case may be, lies on the accused.

R.S., 1985, c. C-46, s. 383; [2019, c. 25, s. 140](#).

Broker reducing stock by selling for their own account

384 (1) Every person commits an offence who, being an individual, or a member or employee of a partnership, or a director, officer or employee of a corporation, if they or the partnership or corporation is employed as a broker by any customer to buy and carry on margin any shares of an incorporated or unincorporated company or undertaking, whether in or outside Canada, later sells or causes to be sold shares of the company or undertaking for any account in which they or their firm or a partner of the firm or the corporation or a director of the corporation has a direct or indirect interest, if the effect of the sale is, otherwise than unintentionally, to reduce the amount of those shares in the hands of the broker or under their control in the ordinary course of business below the amount of those shares that the broker should be carrying for all customers.

Punishment

(2) Every person who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 384; [2019, c. 25, s. 141](#).

Fraudulent concealment of title documents

385 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who, being a vendor, mortgagor or hypothecary debtor of property or a chose in action or an incorporeal right or being a lawyer or notary for or agent or mandatary of a vendor, mortgagor or hypothecary debtor of property, a chose in action or incorporeal right, is served with a written demand for an abstract of title by or on behalf of the purchaser, mortgagee or hypothecary creditor before the completion of the purchase, mortgage or hypothec, and who

(a) with intent to defraud and for the purpose of inducing the purchaser, mortgagee or hypothecary creditor to accept the title offered or produced to them, conceals from them any settlement, deed, will or other instrument or act material to the title, or any encumbrance on the title, or

(b) falsifies any pedigree on which the title depends.

Consent required

(2) No proceedings shall be instituted under this section without the consent of the Attorney General.

R.S., 1985, c. C-46, s. 385; [2019, c. 25, s. 142](#).

Fraudulent registration of title

386 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, as principal, agent or mandatary in a proceeding to register title to real property or immovable property, or in a transaction relating to real property or immovable property that is or is proposed to be registered, knowingly and with intent to deceive,

(a) makes a material false statement or representation,

(b) suppresses or conceals from a judge or registrar, or any person employed by or assisting the registrar, any material document, fact, matter or information, or

(c) is privy to anything mentioned in paragraph (a) or (b).

R.S., 1985, c. C-46, s. 386; [2019, c. 25, s. 143](#).

Fraudulent sale of real property

387 Every person who, knowing of an unregistered prior sale or of an existing unregistered grant, mortgage, hypothec, lien or encumbrance of or on real property, fraudulently sells the property or any part of it is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 387; [2019, c. 25, s. 144](#).

Misleading receipt

388 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who knowingly,

(a) with intent to mislead, injure or defraud any person, whether or not that person is known to him, gives to a person anything in writing that purports to be a receipt for or an acknowledgment of property that has been delivered to or received by him, before the property referred to in the purported receipt or acknowledgment has been delivered to or received by him, or

(b) accepts, transmits or uses a purported receipt or acknowledgment to which paragraph (a) applies.

R.S., 1985, c. C-46, s. 388; [2019, c. 25, s. 145](#).

Fraudulent disposal of goods on which money advanced

389 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) having shipped or delivered to the keeper of a warehouse or to a factor, an agent or a carrier anything on which the consignee thereof has advanced money or has given valuable security, thereafter, with intent to deceive, defraud or injure the consignee, disposes of it in a manner that is different from and inconsistent with any agreement that has been made in that behalf between him and the consignee, or

(b) knowingly and wilfully aids or assists any person to make a disposition of anything to which paragraph (a) applies for the purpose of deceiving, defrauding or injuring the consignee.

Saving

(2) No person is guilty of an offence under this section where, before disposing of anything in a manner that is different from and inconsistent with any agreement that has been made in that behalf between him and the consignee, he pays or tenders to the consignee the full amount of money or valuable security that the consignee has advanced.

R.S., 1985, c. C-46, s. 389; [2019, c. 25, s. 146](#).

Fraudulent receipts under *Bank Act*

390 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who

(a) knowingly makes a false statement in any receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the *Bank Act*; or

(b) knowingly, after either giving to another person or after a person employed by them has, to their knowledge, given to another person, or after obtaining and endorsing or assigning to another person, any receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the *Bank Act*, without the consent in writing of the holder or endorsee or the production and delivery of the receipt, certificate or acknowledgment, alienates or parts with, or does not deliver to the holder or owner the property mentioned in the receipt, certificate or acknowledgment.

R.S., 1985, c. C-46, s. 390; [2019, c. 25, s. 147](#).

Trade secret

391 (1) Everyone commits an offence who, by deceit, falsehood or other fraudulent means, knowingly obtains a trade secret or communicates or makes available a trade secret.

Trade secret — prior knowledge

(2) Everyone commits an offence who knowingly obtains a trade secret or communicates or makes available a trade secret knowing that it was obtained by the commission of an offence under subsection (1).

Punishment

- (3)** Everyone who commits an offence referred to in subsection (1) or (2) is guilty
- (a)** of an indictable offence and is liable to imprisonment for a term not exceeding 14 years; or
 - (b)** of an offence punishable on summary conviction.

For greater certainty

(4) For greater certainty, no person commits an offence under subsection (1) or (2) if the trade secret was obtained by independent development or by reason only of reverse engineering.

Definition of *trade secret*

- (5)** For the purpose of this section, ***trade secret*** means any information that
- (a)** is not generally known in the trade or business that uses or may use that information;
 - (b)** has economic value from not being generally known; and
 - (c)** is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.S., 1985, c. C-46, s. 391; [2003, c. 21, s. 6](#); [2020, c. 1, s. 37](#).

Disposal of property to defraud creditors

392 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who,

- (a)** with intent to defraud his creditors,
 - (i)** makes or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or
 - (ii)** removes, conceals or disposes of any of his property, or
- (b)** with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph (a).

R.S., 1985, c. C-46, s. 392; [2019, c. 25, s. 148](#).

Fraud in relation to fares, etc.

393 (1) Every person whose duty it is to collect a fare, toll, ticket or admission and who intentionally does any of the following is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction:

- (a) fails to collect it,
- (b) collects less than the proper amount payable in respect thereof, or
- (c) accepts any valuable consideration for failing to collect it or for collecting less than the proper amount payable in respect thereof.

Idem

(2) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who gives or offers to a person whose duty it is to collect a fare, toll, ticket or admission fee any valuable consideration

- (a) for failing to collect it, or
- (b) for collecting an amount less than the amount payable in respect thereof.

Fraudulently obtaining transportation

(3) Every one who, by any false pretence or fraud, unlawfully obtains transportation by land, water or air is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 393; [2019, c. 25, s. 149](#).

Fraud in relation to valuable minerals

394 (1) No person who is the holder of a lease or licence issued under an Act relating to the mining of valuable minerals, or by the owner of land that is supposed to contain valuable minerals, shall

- (a) by a fraudulent device or contrivance, defraud or attempt to defraud any person of
 - (i) any valuable minerals obtained under or reserved by the lease or licence, or
 - (ii) any money or valuable interest or thing payable in respect of valuable minerals obtained or rights reserved by the lease or licence; or
- (b) fraudulently conceal or make a false statement with respect to the amount of valuable minerals obtained under the lease or licence.

Sale of valuable minerals

(2) No person, other than the owner or the owner's agent or someone otherwise acting under lawful authority, shall sell any valuable mineral that is unrefined, partly refined, uncut or otherwise unprocessed.

Purchase of valuable minerals

(3) No person shall buy any valuable mineral that is unrefined, partly refined, uncut or otherwise unprocessed from anyone who the person has reason to believe is not the owner or the owner's agent or someone otherwise acting under lawful authority.

Presumption

(4) In any proceeding in relation to subsection (2) or (3), in the absence of evidence raising a reasonable doubt to the contrary, it is presumed that

(a) in the case of a sale, the seller is not the owner of the valuable mineral or the owner's agent or someone otherwise acting under lawful authority; and

(b) in the case of a purchase, the purchaser, when buying the valuable mineral, had reason to believe that the seller was not the owner of the mineral or the owner's agent or someone otherwise acting under lawful authority.

Offence

(5) A person who contravenes subsection (1), (2) or (3) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Forfeiture

(6) If a person is convicted of an offence under this section, the court may order anything by means of or in relation to which the offence was committed, on such conviction, to be forfeited to Her Majesty.

Exception

(7) Subsection (6) does not apply to real property other than real property built or significantly modified for the purpose of facilitating the commission of an offence under this section.

R.S., 1985, c. C-46, s. 394; R.S., 1985, c. 27 (1st Supp.), s. 186; 1999, c. 5, s. 10; [2019, c. 25, s. 150](#).

Possession of stolen or fraudulently obtained valuable minerals

394.1 (1) No person shall possess any valuable mineral that is unrefined, partly refined, uncut or otherwise unprocessed that has been stolen or dealt with contrary to [section 394](#).

Evidence

(2) Reasonable grounds to believe that the valuable mineral has been stolen or dealt with contrary to [section 394](#) are, in the absence of evidence raising a reasonable doubt to the contrary, proof that the valuable mineral has been stolen or dealt with contrary to section 394.

Offence

(3) A person who contravenes subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Forfeiture

(4) If a person is convicted of an offence under this section, the court may, on that conviction, order that anything by means of or in relation to which the offence was committed be forfeited to Her Majesty.

Exception

(5) Subsection (4) does not apply to real property, other than real property built or significantly modified for the purpose of facilitating the commission of an offence under subsection (3).

1999, c. 5, s. 10; [2019, c. 25, s. 151](#).

Search for valuable minerals

395 (1) If an information in writing is laid under oath before a justice by a peace officer or by a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and the justice is satisfied that there are reasonable grounds to believe that, contrary to this Act or any other Act of Parliament, any valuable mineral is deposited in a place or held by a person, the justice may issue a warrant authorizing a peace officer or a public officer, if the public officer is named in it, to search any of the places or persons mentioned in the information.

Execution in Canada

(1.1) A warrant issued under subsection (1) may be executed at any place in Canada. A public officer named in the warrant, or any peace officer, who executes the warrant must have authority to act in that capacity in the place where the warrant is executed.

Power to seize

(2) If, on search, anything mentioned in subsection (1) is found, it shall be seized and brought before a justice of the province in which the warrant was issued who has jurisdiction in the matter, and the justice shall order

(a) that it be detained for the purposes of an inquiry or a trial; or

(b) if it is not detained for the purposes of an inquiry or a trial,

(i) that it be restored to the owner, or

(ii) that it be forfeited to Her Majesty in right of the province in which the proceedings take place if the owner cannot be ascertained.

Appeal

(3) An appeal lies from an order made under paragraph (2)(b) in the manner in which an appeal lies in summary conviction proceedings under Part XXVII and the provisions of that Part relating to appeals apply to appeals under this subsection.

R.S., 1985, c. C-46, s. 395; 1999, c. 5, s. 11; [2019, c. 25, s. 152](#); [2022, c. 17, s. 11](#).

Offences in relation to mines

396 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who

(a) adds anything to or removes anything from any existing or prospective mine, mining claim or oil well with a fraudulent intent to affect the result of an assay, a test or a valuation that has been made or is to be made with respect to the mine, mining claim or oil well, or

(b) adds anything to, removes anything from or tampers with a sample or material that has been taken or is being or is about to be taken from any existing or prospective mine, mining claim or oil well for the purpose of being assayed, tested or otherwise valued, with a fraudulent intent to affect the result of the assay, test or valuation.

Presumption

(2) For the purposes of proceedings under subsection (1), evidence that

(a) something has been added to or removed from anything to which subsection (1) applies, or

(b) anything to which subsection (1) applies has been tampered with,

is, in the absence of any evidence to the contrary, proof of a fraudulent intent to affect the result of an assay, a test or a valuation.

R.S., 1985, c. C-46, s. 396; [2019, c. 25, s. 153](#).

Falsification of Books and Documents

Books and documents

397 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, with intent to defraud,

(a) destroys, mutilates, alters, falsifies or makes a false entry in a book, paper, writing, valuable security or document, or

(b) omits a material particular from, or alters a material particular in, a book, paper, writing, valuable security or document.

Privy

(2) Every person who, with intent to defraud their creditors, is privy to the commission of an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 397; [2019, c. 25, s. 154](#).

Falsifying employment record

398 Every one who, with intent to deceive, falsifies an employment record by any means, including the punching of a time clock, is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 398; 1992, c. 1, s. 60(F).

False return by public officer

399 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, being entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes a false statement or return of

(a) any sum of money collected by him or entrusted to his care, or

(b) any balance of money in his hands or under his control.

R.S., 1985, c. C-46, s. 399; [2019, c. 25, s. 155](#).

False prospectus, etc.

400 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who makes, circulates or publishes a prospectus, a statement or an account, whether written or oral, that they know is false in a material particular, with intent

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company, or

(c) to induce any person to

(i) entrust or advance anything to a company, or

(ii) enter into any security for the benefit of a company.

(d) [Repealed, 1994, c. 44, s. 26]

Definition of *company*

(2) In this section, ***company*** means a syndicate, body corporate or company, whether existing or proposed to be created.

Obtaining carriage by false billing

401 (1) Every one who, by means of a false or misleading representation, knowingly obtains or attempts to obtain the carriage of anything by any person into a country, province, district or other place, whether or not within Canada, where the importation or transportation of it is, in the circumstances of the case, unlawful is guilty of an offence punishable on summary conviction.

Forfeiture

(2) Where a person is convicted of an offence under subsection (1), anything by means of or in relation to which the offence was committed, on such conviction, in addition to any punishment that is imposed, is forfeited to Her Majesty and shall be disposed of as the court may direct.

R.S., c. C-34, s. 359.

402 [Repealed, 2018, c. 29, s. 44]

Identity Theft and Identity Fraud

Definition of *identity information*

402.1 For the purposes of [sections 402.2](#) and [403](#), ***identity information*** means any information — including biological or physiological information — of a type that is commonly used alone or in combination with other information to identify or purport to identify an individual, including a fingerprint, voice print, retina image, iris image, DNA profile, name, address, date of birth, written signature, electronic signature, digital signature, user name, credit card number, debit card number, financial institution account number, passport number, Social Insurance Number, health insurance number, driver's licence number or password.

[2009, c. 28, s. 10.](#)

Identity theft

402.2 (1) Every person commits an offence who obtains or possesses another person's identity information with intent to use it to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.

Trafficking in identity information

(2) Everyone commits an offence who transmits, makes available, distributes, sells or offers for sale another person's identity information, or has it in their possession for any of those purposes, knowing that or being reckless as to whether the information will be used to commit an indictable offence that includes fraud, deceit or falsehood as an element of the offence.

Clarification

(3) For the purposes of subsections (1) and (2), an indictable offence referred to in either of those subsections includes an offence under any of the following sections:

- (a)** [section 57](#) (forgery of or uttering forged passport);
- (b)** [section 58](#) (fraudulent use of certificate of citizenship);
- (c)** [section 130](#) (personating peace officer);
- (d)** [section 131](#) (perjury);
- (e)** [section 342](#) (theft, forgery, etc., of credit card);
- (f)** [section 362](#) (false pretence or false statement);
- (g)** [section 366](#) (forgery);
- (h)** [section 368](#) (use, trafficking or possession of forged document);
- (i)** [section 380](#) (fraud); and
- (j)** [section 403](#) (identity fraud).

Jurisdiction

(4) An accused who is charged with an offence under subsection (1) or (2) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody. However, no proceeding in respect of the offence shall be commenced in a province without the consent of the Attorney General of that province if the offence is alleged to have been committed outside that province.

Punishment

(5) Everyone who commits an offence under subsection (1) or (2)

- (a)** is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** is guilty of an offence punishable on summary conviction.

[2009, c. 28, s. 10](#); [2018, c. 29, s. 45](#).

Identity fraud

403 (1) Everyone commits an offence who fraudulently personates another person, living or dead,

- (a)** with intent to gain advantage for themselves or another person;
- (b)** with intent to obtain any property or an interest in any property;
- (c)** with intent to cause disadvantage to the person being personated or another person; or
- (d)** with intent to avoid arrest or prosecution or to obstruct, pervert or defeat the course of justice.

Clarification

(2) For the purposes of subsection (1), personating a person includes pretending to be the person or using the person's identity information — whether by itself or in combination with identity information pertaining to any person — as if it pertains to the person using it.

Punishment

(3) Everyone who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 403; 1994, c. 44, s. 27; [2009, c. 28, s. 10](#).

404 [Repealed, [2018, c. 29, s. 46](#)]

Acknowledging instrument in false name

405 Every person who, without lawful authority or excuse, acknowledges, in the name of another person before a court or a judge or other person authorized to receive the acknowledgment, a recognizance, undertaking, release order, confession of judgment, consent to judgment or judgment, deed or other instrument or act is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 405; [2018, c. 29, s. 46](#); [2019, c. 25, s. 157](#).

Forgery of Trademarks and Trade Descriptions

Forging trademark

406 For the purposes of this Part, every one forges a trademark who

(a) without the consent of the proprietor of the trademark, makes or reproduces in any manner that trademark or a mark so nearly resembling it as to be calculated to deceive; or

(b) falsifies, in any manner, a genuine trademark.

R.S., 1985, c. C-46, s. 406; [2014, c. 20, s. 366\(E\)](#).

Offence

407 Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not, forges a trademark.

R.S., 1985, c. C-46, s. 407; [2014, c. 20, s. 366\(E\)](#).

Passing off

408 Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not,

- (a) passes off other wares or services as and for those ordered or required; or
- (b) makes use, in association with wares or services, of any description that is false in a material respect regarding
 - (i) the kind, quality, quantity or composition,
 - (ii) the geographical origin, or
 - (iii) the mode of the manufacture, production or performanceof those wares or services.

R.S., 1985, c. C-46, s. 408; 1992, c. 1, s. 60(F).

Instruments for forging trademark

409 (1) Every one commits an offence who makes, has in his possession or disposes of a die, block, machine or other instrument designed or intended to be used in forging a trademark.

Saving

(2) No person shall be convicted of an offence under this section where he proves that he acted in good faith in the ordinary course of his business or employment.

R.S., 1985, c. C-46, s. 409; [2014, c. 20, s. 366\(E\)](#).

Other offences in relation to trademarks

410 Every one commits an offence who, with intent to deceive or defraud,

- (a) defaces, conceals or removes a trademark or the name of another person from anything without the consent of that other person; or
- (b) being a manufacturer, dealer, trader or bottler, fills any bottle or siphon that bears the trademark or name of another person, without the consent of that other person, with a beverage, milk, by-product of milk or other liquid commodity for the purpose of sale or traffic.

R.S., 1985, c. C-46, s. 410; [2014, c. 20, s. 366\(E\)](#).

Used goods sold without disclosure

411 Every one commits an offence who sells, exposes or has in his possession for sale, or advertises for sale, goods that have been used, reconditioned or remade and that bear the trademark or the trade-name of another person, without making full disclosure that the goods have been reconditioned, rebuilt or remade for sale and that they are not then in the condition in which they were originally made or produced.

R.S., 1985, c. C-46, s. 411; [2014, c. 20, s. 366\(E\)](#).

Punishment

412 (1) Every one who commits an offence under [section 407](#), [408](#), [409](#), [410](#) or [411](#) is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Forfeiture

(2) Anything by means of or in relation to which a person commits an offence under [section 407](#), [408](#), [409](#), [410](#) or [411](#) is, unless the court otherwise orders, forfeited on the conviction of that person for that offence.

R.S., c. C-34, s. 370.

413 [Repealed, 2018, c. 29, s. 47]

Presumption from port of shipment

414 Where, in proceedings under this Part, the alleged offence relates to imported goods, evidence that the goods were shipped to Canada from a place outside Canada is, in the absence of any evidence to the contrary, proof that the goods were made or produced in the country from which they were shipped.

R.S., c. C-34, s. 372.

Wreck

Offences in relation to wreck

415 Every one who

(a) secretes wreck, defaces or obliterates the marks on wreck or uses any means to disguise or conceal the fact that anything is wreck, or in any manner conceals the character of wreck, from a person who is entitled to inquire into the wreck,

(b) receives wreck, knowing that it is wreck, from a person other than the owner thereof or a receiver of wreck, and does not within forty-eight hours thereafter inform the receiver of wreck thereof,

(c) offers wreck for sale or otherwise deals with it, knowing that it is wreck, and not having a lawful authority to sell or deal with it,

(d) keeps wreck in his possession knowing that it is wreck, without lawful authority to keep it, for any time longer than the time reasonably necessary to deliver it to the receiver of wreck, or

(e) boards, against the will of the master, a vessel that is wrecked, stranded or in distress unless he is a receiver of wreck or a person acting under orders of a receiver of wreck,

is guilty of

(f) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(g) an offence punishable on summary conviction.

R.S., c. C-34, s. 373.

Public Stores

Distinguishing mark on public stores

416 The Governor in Council may, by notice to be published in the [Canada Gazette](#), prescribe distinguishing marks that are appropriated for use on public stores to denote the property of Her Majesty therein, whether the stores belong to Her Majesty in right of Canada or to Her Majesty in any other right.

R.S., c. C-34, s. 374.

Applying or removing marks without authority

417 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who,

(a) without lawful authority applies a distinguishing mark to anything, or

(b) with intent to conceal the property of Her Majesty in public stores, removes, destroys or obliterates, in whole or in part, a distinguishing mark.

Unlawful transactions in public stores

(2) Every person who, without lawful authority, receives, possesses, keeps, sells or delivers public stores that they know bear a distinguishing mark is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Definition of *distinguishing mark*

(3) For the purposes of this section, ***distinguishing mark*** means a distinguishing mark that is appropriated for use on public stores pursuant to [section 416](#).

R.S., 1985, c. C-46, s. 417; [2018, c. 29, s. 48](#); [2019, c. 25, s. 158](#).

Selling defective stores to Her Majesty

418 (1) Every one who knowingly sells or delivers defective stores to Her Majesty or commits fraud in connection with the sale, lease or delivery of stores to Her Majesty or the manufacture of stores for Her Majesty is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Offences by representatives

(2) Every one who, being a representative of an organization that commits, by fraud, an offence under subsection (1),

(a) knowingly takes part in the fraud, or

(b) knows or has reason to suspect that the fraud is being committed or has been or is about to be committed and does not inform the responsible government, or a department thereof, of Her Majesty,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., 1985, c. C-46, s. 418; [2003, c. 21, s. 6.1](#).

Unlawful use of military uniforms or certificates

419 Every person is guilty of an offence punishable on summary conviction who, without lawful authority,

(a) wears a uniform of the Canadian Forces or any other naval, army or air force or a uniform that is so similar to the uniform of any of those forces that it is likely to be mistaken therefor,

(b) wears a distinctive mark relating to wounds received or service performed in war, or a military medal, ribbon, badge, chevron or any decoration or order that is awarded for war services, or any imitation thereof, or any mark or device or thing that is likely to be mistaken for any such mark, medal, ribbon, badge, chevron, decoration or order,

(c) has in his possession a certificate of discharge, certificate of release, statement of service or identity card from the Canadian Forces or any other naval, army or air force that has not been issued to and does not belong to him, or

(d) has in his possession a commission or warrant or a certificate of discharge, certificate of release, statement of service or identity card, issued to an officer or a person in or who has been in the Canadian Forces or any other naval, army or air force, that contains any alteration that is not verified by the initials of the officer who issued it, or by the initials of an officer thereto lawfully authorized.

R.S., 1985, c. C-46, s. 419; [2018, c. 29, s. 49](#).

Military stores

420 (1) Every one who buys, receives or detains from a member of the Canadian Forces or a deserter or an absentee without leave therefrom any military stores that are owned by Her Majesty or for which the member, deserter or absentee without leave is accountable to Her Majesty is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Exception

(2) No person shall be convicted of an offence under this section where he establishes that he did not know and had no reason to suspect that the military stores in respect of which the offence was committed were owned by Her Majesty or were military stores for which the member, deserter or absentee without leave was accountable to Her Majesty.

R.S., c. C-34, s. 378.

Evidence of enlistment

421 (1) In proceedings under [sections 417 to 420](#), evidence that a person was at any time performing duties in the Canadian Forces is, in the absence of any evidence to the contrary, proof that his enrolment in the Canadian Forces prior to that time was regular.

Presumption when accused a dealer in stores

(2) An accused who is charged with an offence under [subsection 417\(2\)](#) shall be presumed to have known that the stores in respect of which the offence is alleged to have been committed bore a distinguishing mark within the meaning of that subsection at the time the offence is alleged to have been committed if he was, at that time, in the service or employment of Her Majesty or was a dealer in marine stores or in old metals.

R.S., c. C-34, s. 379.

Breach of Contract, Intimidation and Discrimination Against Trade Unionists

Criminal breach of contract

422 (1) Every one who wilfully breaks a contract, knowing or having reasonable cause to believe that the probable consequences of doing so, whether alone or in combination with others, will be

- (a)** to endanger human life,
- (b)** to cause serious bodily injury,
- (c)** to expose valuable property, real or personal, to destruction or serious injury,
- (d)** to deprive the inhabitants of a city or place, or part thereof, wholly or to a great extent, of their supply of light, power, gas or water, or
- (e)** to delay or prevent the running of any locomotive engine, tender, freight or passenger train or car, on a railway that is a common carrier,

is guilty of

- (f)** an indictable offence and is liable to imprisonment for a term not exceeding five years, or
- (g)** an offence punishable on summary conviction.

Saving

(2) No person wilfully breaks a contract within the meaning of subsection (1) by reason only that

(a) being the employee of an employer, he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment, or,

(b) being a member of an organization of employees formed for the purpose of regulating relations between employers and employees, he stops work as a result of the failure of the employer and a bargaining agent acting on behalf of the organization to agree on any matter relating to the employment of members of the organization,

if, before the stoppage of work occurs, all steps provided by law with respect to the settlement of industrial disputes are taken and any provision for the final settlement of differences, without stoppage of work, contained in or by law deemed to be contained in a collective agreement is complied with and effect given thereto.

Consent required

(3) No proceedings shall be instituted under this section without the consent of the Attorney General.

R.S., c. C-34, s. 380.

Intimidation

423 (1) Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he or she has a lawful right to do, or to do anything that he or she has a lawful right to abstain from doing,

(a) uses violence or threats of violence to that person or their intimate partner or children, or injures the person's property;

(b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or her or a relative of his or hers, or that the property of any of them will be damaged;

(c) persistently follows that person;

(d) hides any tools, clothes or other property owned or used by that person, or deprives him or her of them or hinders him or her in the use of them;

(e) with one or more other persons, follows that person, in a disorderly manner, on a highway;

(f) besets or watches the place where that person resides, works, carries on business or happens to be; or

(g) blocks or obstructs a highway.

Exception

(2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

R.S., 1985, c. C-46, s. 423; 2000, c. 12, s. 95; 2001, c. 32, s. 10; 2019, c. 25, s. 159.

Intimidation of a justice system participant or a journalist

423.1 (1) No person shall, without lawful authority, engage in any conduct with the intent to provoke a state of fear in

(a) a group of persons or the general public in order to impede the administration of criminal justice;

(b) a justice system participant or military justice system participant in order to impede him or her in the performance of his or her duties; or

(c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.

(2) [Repealed, 2015, c. 13, s. 12]

Punishment

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.

Definition of *military justice system participant*

(4) In this section, ***military justice system participant*** has the same meaning as in subsection 2(1) of the *National Defence Act*.

2001, c. 32, s. 11; 2015, c. 13, s. 12; 2019, c. 15, s. 47.

Intimidation — health services

423.2 (1) Every person commits an offence who engages in any conduct with the intent to provoke a state of fear in

(a) a person in order to impede them from obtaining health services from a health professional;

(b) a health professional in order to impede them in the performance of their duties; or

(c) a person, whose functions are to assist a health professional in the performance of the health professional's duties, in order to impede that person in the performance of those functions.

Obstruction or interference with access

(2) Every person commits an offence who, without lawful authority, intentionally obstructs or interferes with another person's lawful access to a place at which health services are provided by a health professional.

Punishment

(3) Every person who commits an offence under subsection (1) or (2) is

- (a)** guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b)** guilty of an offence punishable on summary conviction.

Defence

(4) No person is guilty of an offence under subsection (2) by reason only that they attend at or near, or approach, a place referred to in that subsection for the purpose only of obtaining or communicating information.

Definition of *health professional*

(5) In this section, ***health professional*** means a person who is entitled under the laws of a province to provide health services.

[2021, c. 27, s. 2.](#)

Threat against internationally protected person

424 Every person who threatens to commit an offence under [section 235](#), [236](#), [266](#), [267](#), [268](#), [269](#), [269.1](#), [271](#), [272](#), [273](#), [279](#) or [279.1](#) against an internationally protected person or who threatens to commit an offence under [section 431](#) is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 424; R.S., 1985, c. 27 (1st Supp.), s. 55; [2001, c. 41, s. 11](#); [2019, c. 25, s. 160](#).

Threat against United Nations or associated personnel

424.1 Every person who, with intent to compel any person, group of persons, state or any international or intergovernmental organization to do or refrain from doing any act, threatens to commit an offence under [section 235](#), [236](#), [266](#), [267](#), [268](#), [269](#), [269.1](#), [271](#), [272](#), [273](#), [279](#) or [279.1](#) against a member of United Nations personnel or associated personnel or threatens to commit an offence under [section 431.1](#) is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b)** an offence punishable on summary conviction.

[2001, c. 41, s. 11](#); [2019, c. 25, s. 160](#).

Offences by employers

425 Every one who, being an employer or the agent of an employer, wrongfully and without lawful authority

(a) refuses to employ or dismisses from his employment any person for the reason only that the person is a member of a lawful trade union or of a lawful association or combination of workmen or employees formed for the purpose of advancing, in a lawful manner, their interests and organized for their protection in the regulation of wages and conditions of work,

(b) seeks by intimidation, threat of loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to any trade union, association or combination to which they have a lawful right to belong, or

(c) conspires, combines, agrees or arranges with any other employer or his agent to do anything mentioned in paragraph (a) or (b),

is guilty of an offence punishable on summary conviction.

R.S., c. C-34, s. 382.

Threats and retaliation against employees

425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,

(a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

(b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

Punishment

(2) Any one who contravenes subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

2004, c. 3, s. 6.

Secret Commissions

Secret commissions

426 (1) Every one commits an offence who

(a) directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent — or, being an agent, directly or indirectly, corruptly demands, accepts or offers or agrees to accept from any person, for themselves or another person — any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favour or disfavour to any person with relation to the affairs or business of the agent's principal; or

(b) with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account or other writing

(i) in which the principal has an interest,

(ii) that contains any statement that is false or erroneous or defective in any material particular, and

(iii) that is intended to mislead the principal.

Privity to offence

(2) Every one commits an offence who is knowingly privy to the commission of an offence under subsection (1).

Punishment

(3) A person who commits an offence under this section is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Definition of *agent* and *principal*

(4) In this section, ***agent*** includes an employee, and ***principal*** includes an employer.

R.S., 1985, c. C-46, s. 426; R.S., 1985, c. 27 (1st Supp.), s. 56; 2007, c. 13, s. 7; 2019, c. 25, s. 161.

427 [Repealed, 2018, c. 29, s. 50]

PART XI

Wilful and Forbidden Acts in Respect of Certain Property

Interpretation

Definition of *property*

428 In this Part, ***property*** means real or personal corporeal property.

Wilfully causing event to occur

429 (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

Colour of right

(2) A person shall not be convicted of an offence under [sections 430 to 446](#) if they act with legal justification or excuse or colour of right.

Interest

(3) Where it is an offence to destroy or to damage anything,

(a) the fact that a person has a partial interest in what is destroyed or damaged does not prevent him from being guilty of the offence if he caused the destruction or damage; and

(b) the fact that a person has a total interest in what is destroyed or damaged does not prevent him from being guilty of the offence if he caused the destruction or damage with intent to defraud.

R.S., 1985, c. C-46, s. 429; [2018, c. 29, s. 51](#).

Mischief

Mischief

430 (1) Every one commits mischief who wilfully

(a) destroys or damages property;

(b) renders property dangerous, useless, inoperative or ineffective;

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

Mischief in relation to computer data

(1.1) Everyone commits mischief who wilfully

(a) destroys or alters computer data;

(b) renders computer data meaningless, useless or ineffective;

(c) obstructs, interrupts or interferes with the lawful use of computer data; or

(d) obstructs, interrupts or interferes with a person in the lawful use of computer data or denies access to computer data to a person who is entitled to access to it.

Punishment

(2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and liable to imprisonment for life.

Punishment

(3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Idem

(4) Every one who commits mischief in relation to property, other than property described in subsection (3),

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

Mischief relating to religious property, educational institutions, etc.

(4.1) Everyone who commits mischief in relation to property described in any of paragraphs (4.101)(a) to (d), if the commission of the mischief is motivated by bias, prejudice or hate based on colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression or mental or physical disability,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Definition of *property*

(4.101) For the purposes of subsection (4.1), ***property*** means

(a) a building or structure, or part of a building or structure, that is primarily used for religious worship — including a church, mosque, synagogue or temple —, an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery;

(b) a building or structure, or part of a building or structure, that is primarily used by an *identifiable group* as defined in [subsection 318\(4\)](#) as an educational institution — including a school, daycare centre, college or university —, or an object associated with that institution located in or on the grounds of such a building or structure;

(c) a building or structure, or part of a building or structure, that is primarily used by an *identifiable group* as defined in [subsection 318\(4\)](#) for administrative, social, cultural or sports activities or events — including a town hall, community centre, playground or arena —, or an object associated with such an activity or event located in or on the grounds of such a building or structure; or

(d) a building or structure, or part of a building or structure, that is primarily used by an *identifiable group* as defined in [subsection 318\(4\)](#) as a residence for seniors or an object associated with that residence located in or on the grounds of such a building or structure.

Mischief relating to war memorials

(4.11) Everyone who commits mischief in relation to property that is a building, structure or part thereof that primarily serves as a monument to honour persons who were killed or died as a consequence of a war, including a war memorial or cenotaph, or an object associated with honouring or remembering those persons that is located in or on the grounds of such a building or structure, or a cemetery is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than \$1,000,

(ii) for a second offence, to imprisonment for not less than 14 days, and

(iii) for each subsequent offence, to imprisonment for not less than 30 days;

(b) if the offence is prosecuted by indictment, to imprisonment for a term not exceeding 10 years; and

(c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than two years less a day.

Mischief in relation to cultural property

(4.2) Every one who commits mischief in relation to cultural property as defined in [Article 1](#) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on May 14, 1954, as set out in the schedule to the [Cultural Property Export and Import Act](#),

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Mischief in relation to computer data

(5) Everyone who commits mischief in relation to computer data

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Offence

(5.1) Everyone who wilfully does an act or wilfully omits to do an act that it is their duty to do, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to property or computer data,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Saving

(6) No person commits mischief within the meaning of this section by reason only that

(a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment;

(b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or

(c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.

Idem

(7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

Definition of *computer data*

(8) In this section, *computer data* has the same meaning as in [subsection 342.1\(2\)](#).

R.S., 1985, c. C-46, s. 430; R.S., 1985, c. 27 (1st Supp.), s. 57; 1994, c. 44, s. 28; [2001, c. 41, s. 12](#); [2005, c. 40, s. 3](#); [2014, c. 9, s. 1](#), c. 31, s. 19; [2017, c. 23, ss. 1, 2](#); [2019, c. 25, s. 162](#).

Attack on premises, residence or transport of internationally protected person

431 Every one who commits a violent attack on the official premises, private accommodation or means of transport of an internationally protected person that is likely to endanger the life or liberty of such a person is guilty of an indictable offence and liable to imprisonment for a term of not more than fourteen years.

R.S., 1985, c. C-46, s. 431; R.S., 1985, c. 27 (1st Supp.), s. 58; [2001, c. 41, s. 13](#).

Attack on premises, accommodation or transport of United Nations or associated personnel

431.1 Every one who commits a violent attack on the official premises, private accommodation or means of transport of a member of United Nations personnel or

associated personnel that is likely to endanger the life or liberty of such a person is guilty of an indictable offence and liable to imprisonment for a term of not more than fourteen years.

2001, c. 41, s. 13.

Definitions

431.2 (1) The following definitions apply in this section.

explosive or other lethal device means

(a) an explosive or incendiary weapon or device that is designed to cause, or is capable of causing, death, serious bodily injury or substantial material damage; or

(b) a weapon or device that is designed to cause, or is capable of causing, death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances, or radiation or radioactive material. (*engin explosif ou autre engin meurtrier*)

infrastructure facility means a publicly or privately owned facility that provides or distributes services for the benefit of the public, including services relating to water, sewage, energy, fuel and communications. (*infrastructure*)

military forces of a state means the armed forces that a state organizes, trains and equips in accordance with the law of the state for the primary purpose of national defence or national security, and every person acting in support of those armed forces who is under their formal command, control and responsibility. (*forces armées d'un État*)

place of public use means those parts of land, a building, street, waterway or other location that are accessible or open to members of the public, whether on a continuous, periodic or occasional basis, and includes any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or other place that is accessible or open to the public on such a basis. (*lieu public*)

public transportation system means a publicly or privately owned facility, conveyance or other thing that is used in connection with publicly available services for the transportation of persons or cargo. (*système de transport public*)

Explosive or other lethal device

(2) Every one who delivers, places, discharges or detonates an explosive or other lethal device to, into, in or against a place of public use, a government or public facility, a public transportation system or an infrastructure facility, either with intent to cause death or serious bodily injury or with intent to cause extensive destruction of such a place, system or facility that results in or is likely to result in major economic loss, is guilty of an indictable offence and liable to imprisonment for life.

Armed forces

(3) For greater certainty, subsection (2) does not apply to an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or to activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

2001, c. 41, s. 13.

Unauthorized recording of a movie

432 (1) A person who, without the consent of the theatre manager, records in a movie theatre a performance of a cinematographic work within the meaning of [section 2](#) of the [Copyright Act](#) or its soundtrack

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

Unauthorized recording for purpose of sale, etc.

(2) A person who, without the consent of the theatre manager, records in a movie theatre a performance of a cinematographic work within the meaning of [section 2](#) of the [Copyright Act](#) or its soundtrack for the purpose of the sale, rental or other commercial distribution of a copy of the cinematographic work

(a) is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) is guilty of an offence punishable on summary conviction.

Forfeiture

(3) In addition to any punishment that is imposed on a person who is convicted of an offence under this section, the court may order that anything that is used in the commission of the offence be forfeited to Her Majesty in right of the province in which the proceedings are taken. Anything that is forfeited may be disposed of as the Attorney General directs.

Forfeiture — limitation

(4) No order may be made under subsection (3) in respect of anything that is the property of a person who is not a party to the offence.

R.S., 1985, c. C-46, s. 432; R.S., 1985, c. 27 (1st Supp.), s. 58; [2007, c. 28, s. 1](#).

Arson and Other Fires

Arson — disregard for human life

433 Every person who intentionally or recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence

and liable to imprisonment for life where

(a) the person knows that or is reckless with respect to whether the property is inhabited or occupied; or

(b) the fire or explosion causes bodily harm to another person.

R.S., 1985, c. C-46, s. 433; 1990, c. 15, s. 1.

Arson — damage to property

434 Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., 1985, c. C-46, s. 434; 1990, c. 15, s. 1.

Arson — own property

434.1 Every person who intentionally or recklessly causes damage by fire or explosion to property that is owned, in whole or in part, by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, where the fire or explosion seriously threatens the health, safety or property of another person.

1990, c. 15, s. 1.

Arson for fraudulent purpose

435 (1) Every person who, with intent to defraud any other person, causes damage by fire or explosion to property, whether or not that person owns, in whole or in part, the property, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Holder or beneficiary of fire insurance policy

(2) Where a person is charged with an offence under subsection (1), the fact that the person was the holder of or was named as a beneficiary under a policy of fire insurance relating to the property in respect of which the offence is alleged to have been committed is a fact from which intent to defraud may be inferred by the court.

R.S., 1985, c. C-46, s. 435; 1990, c. 15, s. 1; [2019, c. 25, s. 163](#).

Arson by negligence

436 (1) Every person who owns, in whole or in part, or controls property and who, as a result of a marked departure from the standard of care that a reasonably prudent person would use to prevent or control the spread of fires or to prevent explosions, is a cause of a fire or explosion in that property that causes bodily harm to another person or damage to property is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Non-compliance with prevention laws

(2) Where a person is charged with an offence under subsection (1), the fact that the person has failed to comply with any law respecting the prevention or control of fires or explosions in the property is a fact from which a marked departure from the standard of care referred to in that subsection may be inferred by the court.

R.S., 1985, c. C-46, s. 436; 1990, c. 15, s. 1; [2019, c. 25, s. 164](#).

Possession of incendiary material

436.1 Every person who possesses any incendiary material, incendiary device or explosive substance for the purpose of committing an offence under any of [sections 433](#) to [436](#) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

1990, c. 15, s. 1; [2019, c. 25, s. 165](#).

Other Interference with Property

False alarm of fire

437 Every one who wilfully, without reasonable cause, by outcry, ringing bells, using a fire alarm, telephone or telegraph, or in any other manner, makes or circulates or causes to be made or circulated an alarm of fire is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

R.S., c. C-34, s. 393; 1972, c. 13, s. 31.

Interfering with saving of wrecked vessel

438 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who intentionally prevents or impedes, or who intentionally endeavours to prevent or impede,

(a) the saving of a vessel that is wrecked, stranded, abandoned or in distress, or

(b) a person who attempts to save a vessel that is wrecked, stranded, abandoned or in distress.

Interfering with saving of wreck

(2) Every one who wilfully prevents or impedes or wilfully endeavours to prevent or impede the saving of wreck is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 438; [2019, c. 25, s. 166](#).

Interfering with marine signal, etc.

439 (1) Every one who makes fast a vessel or boat to a signal, buoy or other sea-mark that is used for purposes of navigation is guilty of an offence punishable on summary conviction.

Idem

(2) Every person who intentionally alters, removes or conceals a signal, buoy or other sea-mark that is used for purposes of navigation is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 439; [2019, c. 25, s. 167](#).

Removing natural bar without permission

440 Every person who knowingly and without the written permission of the Minister of Transport removes any stone, wood, earth or other material that forms a natural bar necessary to the existence of a public harbour, or that forms a natural protection to such a bar, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 440; [2019, c. 25, s. 168](#).

Occupant injuring building

441 Every person who, intentionally and to the prejudice of a mortgagee, a hypothecary creditor or an owner, pulls down, demolishes or removes all or any part of a dwelling-house or other building of which they are in possession or occupation, or severs from the freehold any fixture fixed to it or from the immovable property any movable property permanently attached or joined to the immovable property, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 441; [2019, c. 25, s. 168](#).

Interfering with boundary lines

442 Every one who wilfully pulls down, defaces, alters or removes anything planted or set up as the boundary line or part of the boundary line of land is guilty of an offence

punishable on summary conviction.

R.S., c. C-34, s. 398.

Interfering with international boundary marks, etc.

443 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who intentionally pulls down, defaces, alters or removes

(a) a boundary mark lawfully placed to mark any international, provincial, county or municipal boundary, or

(b) a boundary mark lawfully placed by a land surveyor to mark any limit, boundary or angle of a concession, range, lot or parcel of land.

Saving provision

(2) A land surveyor does not commit an offence under subsection (1) where, in his operations as a land surveyor,

(a) he takes up, when necessary, a boundary mark mentioned in paragraph (1)(b) and carefully replaces it as it was before he took it up; or

(b) he takes up a boundary mark mentioned in paragraph (1)(b) in the course of surveying for a highway or other work that, when completed, will make it impossible or impracticable for that boundary mark to occupy its original position, and he establishes a permanent record of the original position sufficient to permit that position to be ascertained.

R.S., 1985, c. C-46, s. 443; [2019, c. 25, s. 169](#).

Animals

444 [Repealed, [2018, c. 29, s. 52](#)]

Injuring or endangering other animals

445 (1) Every one commits an offence who, wilfully and without lawful excuse,

(a) kills, maims, wounds, poisons or injures dogs, birds or animals that are kept for a lawful purpose; or

(b) places poison in such a position that it may easily be consumed by dogs, birds or animals that are kept for a lawful purpose.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to

both.

R.S., 1985, c. C-46, s. 445; 2008, c. 12, s. 1; 2018, c. 29, s. 53; 2019, c. 25, s. 170.

Killing or injuring certain animals

445.01 (1) Every one commits an offence who, wilfully and without lawful excuse, kills, maims, wounds, poisons or injures a law enforcement animal while it is aiding a law enforcement officer in carrying out that officer's duties, a military animal while it is aiding a member of the Canadian Forces in carrying out that member's duties or a service animal.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years and, if a law enforcement animal is killed in the commission of the offence, to a minimum punishment of imprisonment for a term of six months; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

Sentences to be served consecutively

(3) A sentence imposed on a person for an offence under subsection (1) committed against a law enforcement animal shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events.

Definitions

(4) The following definitions apply in this section.

law enforcement animal means a dog or horse that is trained to aid a law enforcement officer in carrying out that officer's duties. (*animal d'assistance policière*)

law enforcement officer means a police officer, a police constable or any person referred to in paragraph (b), (c.1), (d), (d.1), (e) or (g) of the definition **peace officer** in [section 2](#). (*agent de contrôle d'application de la loi*)

military animal means an animal that is trained to aid a member of the Canadian Forces in carrying out that member's duties. (*animal d'assistance militaire*)

service animal means an animal that is required by a person with a disability for assistance and is certified, in writing, as having been trained by a professional service animal institution to assist a person with a disability. (*animal d'assistance*)

2015, c. 34, s. 3; 2019, c. 25, s. 171.

Cruelty to Animals

Causing unnecessary suffering

445.1 (1) Every one commits an offence who

- (a)** wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
- (b)** in any manner encourages, aids, promotes, arranges, assists at, receives money for or takes part in
 - (i)** the fighting or baiting of animals or birds, or
 - (ii)** the training, transporting or breeding of animals or birds for the purposes of subparagraph (i);
- (c)** wilfully, without reasonable excuse, administers a poisonous or an injurious drug or substance to a domestic animal or bird or an animal or a bird wild by nature that is kept in captivity or, being the owner of such an animal or a bird, wilfully permits a poisonous or an injurious drug or substance to be administered to it;
- (d)** promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive birds are liberated by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated; or
- (e)** being the owner, occupier or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph (d).

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction and liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

Failure to exercise reasonable care as evidence

(3) For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering or injury was caused or was permitted to be caused wilfully, as the case may be.

Presence at baiting as evidence

(4) For the purpose of proceedings under paragraph (1)(b), evidence that an accused was present at the fighting or baiting of animals or birds is, in the absence of any evidence to the contrary, proof that he or she encouraged, aided or assisted at the fighting or baiting.

Definition of *cetacean*

445.2 (1) In this section, ***cetacean*** includes any member of the cetacean order, including a whale, dolphin or porpoise.

Offence

(2) Subject to subsections (2.1) to (3.1), every person commits an offence who

- (a)** owns, has the custody of or controls a cetacean that is kept in captivity;
- (b)** breeds or impregnates a cetacean; or
- (c)** possesses or seeks to obtain reproductive materials of cetaceans, including sperm or an embryo.

Exception — gestation

(2.1) If a cetacean is gestating on the day on which this subsection comes into force, paragraphs (2)(b) and (c) do not apply in respect of that cetacean for the period in which it gestates that includes the day on which this subsection comes into force.

Exception — offspring

(2.2) Paragraph (2)(a) does not apply to the offspring of a cetacean if that offspring was born immediately after a gestational period that included the day on which this subsection came into force.

Exception

(3) Paragraph (2)(a) does not apply to a person who

- (a)** owns, has the custody of or controls a cetacean that is kept in captivity at the coming into force of this section and remains continuously in captivity thereafter;
- (b)** has the custody of or controls a cetacean that is kept in captivity for the purpose of providing it with assistance or care or to rehabilitate it following an injury or another state of distress; or
- (c)** is authorized to keep a cetacean in captivity in the best interests of the cetacean's welfare pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council.

Exception

(3.1) Subsection (2) does not apply to a person who is conducting scientific research pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council.

Exception — authorization

(4) Every person commits an offence who promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive cetaceans are used, in Canada, for performance for entertainment purposes, unless the performance is authorized under a licence issued by the Lieutenant Governor in Council of a province or by an authority in the province as may be specified by the Lieutenant Governor in Council.

Punishment

(5) Every one who commits an offence under subsection (2) or (4) is guilty of an offence punishable on summary conviction and liable to a fine not exceeding \$200,000.

[2019, c. 11, s. 2](#); [2019, c. 14, s. 58.3](#).

Causing damage or injury

446 (1) Every one commits an offence who

(a) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed; or

(b) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

Failure to exercise reasonable care as evidence

(3) For the purposes of proceedings under paragraph (1)(a), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it damage or injury is, in the absence of any evidence to the contrary, proof that the damage or injury was caused by wilful neglect.

R.S., 1985, c. C-46, s. 446; [2008, c. 12, s. 1](#); [2019, c. 25, s. 173](#).

Arena for animal fighting

447 (1) Everyone commits an offence who builds, makes, maintains or keeps an arena for animal fighting on premises that he or she owns or occupies, or allows such an arena to be built, made, maintained or kept on such premises.

Punishment

(2) Every one who commits an offence under subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

(3) [Repealed, 2019, c. 17, s. 3]

R.S., 1985, c. C-46, s. 447; 2008, c. 12, s. 1; 2019, c. 17, s. 3; 2019, c. 25, s. 174.

Order of prohibition or restitution

447.1 (1) The court may, in addition to any other sentence that it may impose under subsection 445(2), 445.1(2), 446(2) or 447(2),

(a) make an order prohibiting the accused from owning, having the custody or control of or residing in the same premises as an animal or a bird during any period that the court considers appropriate but, in the case of a second or subsequent offence, for a minimum of five years; and

(b) on application of the Attorney General or on its own motion, order that the accused pay to a person or an organization that has taken care of an animal or a bird as a result of the commission of the offence the reasonable costs that the person or organization incurred in respect of the animal or bird, if the costs are readily ascertainable.

Breach of order

(2) Every one who contravenes an order made under paragraph (1)(a) is guilty of an offence punishable on summary conviction.

Application

(3) Sections 740 to 741.2 apply, with any modifications that the circumstances require, to orders made under paragraph (1)(b).

2008, c. 12, s. 1; 2018, c. 29, s. 54.

PART XII

Offences Relating to Currency

Interpretation

Definitions

448 In this Part,

counterfeit money includes

- (a)** a false coin or false paper money that resembles or is apparently intended to resemble or pass for a current coin or current paper money,
- (b)** a forged bank-note or forged blank bank-note, whether complete or incomplete,
- (c)** a genuine coin or genuine paper money that is prepared or altered to resemble or pass for a current coin or current paper money of a higher denomination,
- (d)** a current coin from which the milling is removed by filing or cutting the edges and on which new milling is made to restore its appearance,
- (e)** a coin cased with gold, silver or nickel, as the case may be, that is intended to resemble or pass for a current gold, silver or nickel coin, and
- (f)** a coin or a piece of metal or mixed metals that is washed or coloured by any means with a wash or material capable of producing the appearance of gold, silver or nickel and that is intended to resemble or pass for a current gold, silver or nickel coin; (*monnaie contrefaite*)

counterfeit token of value means a counterfeit excise stamp, postage stamp or other evidence of value, by whatever technical, trivial or deceptive designation it may be described, and includes genuine coin or paper money that has no value as money; (*symbole de valeur contrefait*)

current means lawfully current in Canada or elsewhere by virtue of a law, proclamation or regulation in force in Canada or elsewhere as the case may be; (*courant*)

utter includes sell, pay, tender and put off. (*mettre en circulation*)

R.S., c. C-34, s. 406.

Making

Making

449 Every one who makes or begins to make counterfeit money is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 407.

Possession

Possession, etc., of counterfeit money

450 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, without lawful justification or excuse,

- (a)** buys, receives or offers to buy or receive counterfeit money;
- (b)** has in their custody or possession counterfeit money; or
- (c)** introduces counterfeit money into Canada.

R.S., 1985, c. C-46, s. 450; [2018, c. 29, s. 55](#).

Having clippings, etc.

451 Every person who, without lawful justification or excuse, has in their custody or possession gold or silver filings, clippings or bullion or gold or silver in dust, solution or otherwise, produced or obtained by impairing, diminishing or lightening a current gold or silver coin, knowing that it has been so produced or obtained, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 451; [2018, c. 29, s. 56](#); [2019, c. 25, s. 175](#).

Uttering

Uttering, etc., counterfeit money

452 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, without lawful justification or excuse,

(a) utters or offers to utter counterfeit money or uses counterfeit money as if it were genuine, or

(b) exports, sends or takes counterfeit money out of Canada.

R.S., 1985, c. C-46, s. 452; [2018, c. 29, s. 57](#).

Uttering coin

453 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who, with intent to defraud, knowingly utters

(a) a coin that is not current, or

(b) a piece of metal or mixed metals that resembles in size, figure or colour a current coin for which it is uttered.

R.S., 1985, c. C-46, s. 453; [2019, c. 25, s. 176](#).

Slugs and tokens

454 Every person is guilty of an offence punishable on summary conviction who, without lawful excuse, manufactures, produces, sells or has in their possession anything that is intended to be fraudulently used in substitution for a coin or token of value that any coin or token-operated device is designed to receive.

R.S., 1985, c. C-46, s. 454; [2018, c. 29, s. 58](#).

Defacing or Impairing

Clipping and uttering clipped coin

455 Every one who

(a) impairs, diminishes or lightens a current gold or silver coin with intent that it should pass for a current gold or silver coin, or

(b) utters a coin knowing that it has been impaired, diminished or lightened contrary to paragraph (a),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., c. C-34, s. 413.

Defacing current coins

456 Every one who

(a) defaces a current coin, or

(b) utters a current coin that has been defaced,

is guilty of an offence punishable on summary conviction.

R.S., c. C-34, s. 414.

Likeness of bank-notes

457 (1) No person shall make, publish, print, execute, issue, distribute or circulate, including by electronic or computer-assisted means, anything in the likeness of

(a) a current bank-note; or

(b) an obligation or a security of a government or bank.

Exception

(2) Subsection (1) does not apply to

(a) the Bank of Canada or its employees when they are carrying out their duties;

(b) the Royal Canadian Mounted Police or its members or employees when they are carrying out their duties; or

(c) any person acting under a contract or licence from the Bank of Canada or Royal Canadian Mounted Police.

Offence

(3) A person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

Defence

(4) No person shall be convicted of an offence under subsection (3) in relation to the printed likeness of a Canadian bank-note if it is established that the length or width of the likeness is less than three-fourths or greater than one-and-one-half times the length or width, as the case may be, of the bank-note and

(a) the likeness is in black-and-white only; or

(b) the likeness of the bank-note appears on only one side of the likeness.

R.S., 1985, c. C-46, s. 457; 1999, c. 5, s. 12.

Instruments or Materials

Making, having or dealing in instruments for counterfeiting

458 Every person who, without lawful justification or excuse, makes, repairs, buys, sells or has in their custody or possession any machine, engine, tool, instrument, material or other thing that they know has been used or is adapted and intended for use in making counterfeit money or counterfeit tokens of value, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

R.S., 1985, c. C-46, s. 458; [2018, c. 29, s. 59](#).

Conveying instruments for coining out of mint

459 Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, without lawful justification or excuse, knowingly conveys out of any of Her Majesty's mints in Canada,

(a) any machine, engine, tool, instrument, material or thing used or employed in connection with the manufacture of coins,

(b) a useful part of anything mentioned in paragraph (a), or

(c) coin, bullion, metal or a mixture of metals.

R.S., 1985, c. C-46, s. 459; [2018, c. 29, s. 60](#).

Advertising and Trafficking in Counterfeit Money or Counterfeit Tokens of Value

Advertising and dealing in counterfeit money, etc.

460 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than five years or is guilty of an offence punishable on summary conviction who

(a) by an advertisement or any other writing, offers to sell, procure or dispose of counterfeit money or counterfeit tokens of value or to give information with respect to the manner in which or the means by which counterfeit money or counterfeit tokens of value may be sold, procured or disposed of, or

(b) purchases, obtains, negotiates or otherwise deals with counterfeit tokens of value, or offers to negotiate with a view to purchasing or obtaining them.

Fraudulent use of money genuine but valueless

(2) No person shall be convicted of an offence under subsection (1) in respect of genuine coin or genuine paper money that has no value as money unless, at the time when the offence is alleged to have been committed, he knew that the coin or paper money had no

value as money and he had a fraudulent intent in his dealings with or with respect to the coin or paper money.

R.S., 1985, c. C-46, s. 460; [2019, c. 25, s. 177](#).

Special Provisions as to Proof

When counterfeit complete

461 (1) Every offence relating to counterfeit money or counterfeit tokens of value shall be deemed to be complete notwithstanding that the money or tokens of value in respect of which the proceedings are taken are not finished or perfected or do not copy exactly the money or tokens of value that they are apparently intended to resemble or for which they are apparently intended to pass.

Certificate of examiner of counterfeit

(2) In any proceedings under this Part, a certificate signed by a person designated as an examiner of counterfeit by the Minister of Public Safety and Emergency Preparedness, stating that any coin, paper money or bank-note described therein is counterfeit money or that any coin, paper money or bank-note described therein is genuine and is or is not, as the case may be, current in Canada or elsewhere, is evidence of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed the certificate.

Notice of intention to produce certificate

(3) No certificate shall be received in evidence unless the party intending to produce it has, before the trial, given to the other party reasonable notice of their intention and a copy of the certificate.

Attendance and cross-examination

(4) A party against whom the certificate is produced may, with leave of the court, require the attendance of the person who signed the certificate for the purposes of cross-examination.

R.S., 1985, c. C-46, s. 461; 1992, c. 1, s. 58; [2005, c. 10, s. 34](#); [2018, c. 21, s. 17](#).

Forfeiture

Ownership

462 (1) Counterfeit money, counterfeit tokens of value and anything that is used or is intended to be used to make counterfeit money or counterfeit tokens of value belong to Her Majesty.

Seizure

(2) A peace officer may seize and detain

(a) counterfeit money,

(b) counterfeit tokens of value, and

(c) machines, engines, tools, instruments, materials or things that have been used or that have been adapted and are intended for use in making counterfeit money or counterfeit tokens of value,

and anything seized shall be sent to the Minister of Finance to be disposed of or dealt with as he may direct, but anything that is required as evidence in any proceedings shall not be sent to the Minister until it is no longer required in those proceedings.

R.S., c. C-34, s. 420.

PART XII.1

[Repealed, 2018, c. 16, s. 211]

462.1 [Repealed, 2018, c. 16, s. 211]

462.2 [Repealed, 2018, c. 16, s. 211]

PART XII.2

Proceeds of Crime

Interpretation

Definitions

462.3 (1) In this Part,

designated drug offence [Repealed, 1996, c. 19, s. 68]

designated offence means

(a) any offence that may be prosecuted as an indictable offence under this or any other Act of Parliament, other than an indictable offence prescribed by regulation, or

(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a);
(*infraction désignée*)

designated substance offence [Repealed, 2001, c. 32, s. 12]

enterprise crime offence [Repealed, 2001, c. 32, s. 12]

judge means a judge as defined in [section 552](#) or a judge of a superior court of criminal jurisdiction; (*juge*)

proceeds of crime means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence, or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence. (*produits de la criminalité*)

Regulations

(2) The Governor in Council may make regulations prescribing indictable offences that are excluded from the definition *designated offence* in subsection (1).

(3) [Repealed, 2019, c. 25, s. 179]

(4) [Repealed, 2019, c. 25, s. 179]

R.S., 1985, c. 42 (4th Supp.), s. 2; 1993, c. 25, s. 95, c. 37, s. 32, c. 46, s. 5; 1994, c. 44, s. 29; 1995, c. 39, s. 151; 1996, c. 19, ss. 68, 70; 1997, c. 18, s. 27, c. 23, s. 9; 1998, c. 34, ss. 9, 11; 1999, c. 5, ss. 13, 52; 2001, c. 32, s. 12, c. 41, ss. 14, 33; 2005, c. 44, s. 1; 2010, c. 14, s. 7; 2019, c. 25, s. 179.

Offence

Laundering proceeds of crime

462.31 (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

(1.1) [Repealed, 2024, c. 17, s. 378]

(1.2) [Repealed, 2024, c. 17, s. 378]

(1.3) [Repealed, 2024, c. 17, s. 378]

Punishment

(2) Every one who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction.

Laundering proceeds of crime for criminal organization

(2.1) Everyone who commits an offence under subsection (1) for the benefit of, at the direction of or in association with a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.

Prosecution

(2.2) Subject to subsection (2.4), in a prosecution for an offence under subsection (1) or (2.1), it is not necessary for the prosecutor to prove that the accused knew, believed they knew or was reckless as to the specific nature of the designated offence.

Inference

(2.3) Subject to subsection (2.4), the court may infer that an accused had the knowledge or belief or demonstrated the recklessness referred to in subsection (1) if it is satisfied, given the circumstances of the offence, that the manner in which the accused dealt with the property or its proceeds is markedly unusual or the accused's dealings are inconsistent with lawful activities typical of the sector in which they take place, including business activities.

Exception

(2.4) Subsections (2.2) and (2.3) do not apply in cases where the accused is also charged with the designated offence.

Exception

(3) A peace officer or a person acting under the direction of a peace officer is not guilty of an offence under subsection (1) or (2.1) if the peace officer or person does any of the things mentioned in that subsection for the purposes of an investigation or otherwise in the execution of the peace officer's duties.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1996, c. 19, s. 70; 1997, c. 18, s. 28; [2001, c. 32, s. 13](#); [2005, c. 44, s. 2\(F\)](#); [2019, c. 29, s. 103](#); [2024, c. 15, s. 308](#); [2024, c. 17, s. 371](#); 2024, c. 17, s. 378.

Search, Seizure and Detention of Proceeds of Crime

Special search warrant

462.32 (1) Subject to subsection (3), if a judge, on application of the Attorney General, is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in any building, receptacle or place any property that is proceeds of crime, the judge may issue a warrant authorizing a person named in the warrant or a peace officer to

(a) search the building, receptacle or place for that property; and

(b) seize that property and any other property that that person or peace officer believes, on reasonable grounds, is proceeds of crime.

Procedure

(2) An application for a warrant under subsection (1) may be made *ex parte*, shall be made in writing and shall include a statement as to whether any previous applications have been made under subsection (1) with respect to the property that is the subject of the application.

Conditions

(2.01) A warrant issued under subsection (1) may be subject to any reasonable conditions that the judge thinks fit.

Execution in Canada

(2.1) A warrant issued under subsection (1) may be executed at any place in Canada. Any peace officer who executes the warrant must have authority to act as a peace officer in the place where it is executed.

(2.2) [Repealed, 2019, c. 25, s. 180]

Other provisions to apply

(3) Subsections 487(2.1) to (3) and section 488 apply, with any modifications that the circumstances require, to a warrant issued under this section.

Detention and record of property seized

(4) Every person who executes a warrant issued by a judge under this section shall

(a) during that execution, give the following to any person who is present and ostensibly in control of the building, receptacle or place to be searched or, in the absence of any such person, affix the following in a prominent location within the building or place or on or next to the receptacle:

(i) a copy of the warrant, and

(ii) a notice in Form 5.1 setting out the address of the court from which a copy of the report on the property seized may be obtained;

(a.1) detain or cause to be detained the property seized, taking reasonable care to ensure that the property is preserved so that it may be dealt with in accordance with the law;

(b) as soon as practicable after the execution of the warrant but within a period not exceeding seven days thereafter, prepare a report in Form 5.3, identifying the property seized and the location where the property is being detained, and cause the report to be filed with the clerk of the court; and

(c) cause a copy of the report to be provided, on request, to the person from whom the property was seized and to any other person who, in the opinion of the judge, appears to have a valid interest in the property.

Return of proceeds

(4.1) Subject to this or any other Act of Parliament, a peace officer who has seized anything under a warrant issued by a judge under this section may, with the written consent of the Attorney General, on being issued a receipt for it, return the thing seized to the person lawfully entitled to its possession, if

- (a) the peace officer is satisfied that there is no dispute as to who is lawfully entitled to possession of the thing seized;
- (b) the peace officer is satisfied that the continued detention of the thing seized is not required for the purpose of forfeiture; and
- (c) the thing seized is returned before a report is filed with the clerk of the court under paragraph (4)(b).

Notice

(5) Before issuing a warrant under this section in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before the issuance of the warrant would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be seized pursuant to the warrant.

(6) [Repealed, 2024, c. 15, s. 309]

R.S., 1985, c. 42 (4th Supp.), s. 2; 1997, c. 18, s. 29; 2001, c. 32, s. 14; 2005, c. 44, s. 3; 2017, c. 7, s. 57(F); 2019, c. 25, s. 180; 2022, c. 17, s. 12; 2023, c. 26, s. 211(F); 2024, c. 15, s. 309.

Special warrant — digital assets

462.321 (1) If, on an application of the Attorney General, a judge is satisfied by information on oath in Form 1, varied to suit the case, that there are reasonable grounds to believe that any digital assets, including virtual currency, are proceeds of crime, the judge may issue a warrant authorizing a person named in the warrant or a peace officer to

- (a) search for the digital assets by using a *computer program*, as defined in [subsection 342.1\(2\)](#); and
- (b) seize — including by taking control of the right to access — the digital assets, as well as any other digital assets found during that search that the person or peace officer believes, on reasonable grounds, are proceeds of crime.

Conditions

(2) A warrant issued under subsection (1) may be subject to any reasonable conditions that the judge thinks fit.

Procedure

(3) An application for a warrant under subsection (1) may be made *ex parte*, shall be made in writing and shall include a statement as to whether any previous applications have been made under subsection (1) with respect to the property that is the subject of the application.

Execution in Canada

(3.1) A warrant issued under subsection (1) may be executed at any place in Canada. Any peace officer who executes the warrant must have authority to act as a peace officer in the place where it is executed.

Detention and record of property seized

- (4)** Every person who executes a warrant issued by a judge under this section shall
- (a)** detain or cause to be detained any seized property, taking reasonable care to ensure that it is preserved so that it may be dealt with in accordance with the law;
 - (b)** as soon as practicable after the execution of the warrant, cause the following to be sent to the usual place of residence of any person from whom the property is seized if that usual place of residence is in Canada and is known to the person executing the warrant:
 - (i)** a copy of the warrant, and
 - (ii)** a notice in Form 5.1, varied to suit the case, setting out the address of the court from which a copy of a report on the seized property may be obtained;
 - (c)** as soon as practicable after the execution of the warrant but within a period of not more than seven days, prepare a report in Form 5.3, varied to suit the case, identifying the seized property and the manner in which it is being detained, and cause the report to be filed with the clerk of the court; and
 - (d)** cause a copy of the report to be provided, on request, to the person from whom the property was seized and to any other person who, in the opinion of the judge, appears to have a valid interest in the seized property.

Return

- (5)** Subject to this or any other Act of Parliament, a peace officer or a person acting on their behalf may, with the written consent of the Attorney General, on being issued a receipt for it, cause the seized property to be returned to the person lawfully entitled to its possession, if
- (a)** the peace officer is satisfied that there is no dispute as to who is lawfully entitled to possession of the seized property;
 - (b)** the peace officer is satisfied that the continued detention of the seized property is not required for the purpose of forfeiture; and
 - (c)** the seized property is returned before a report is filed with the clerk of the court under paragraph (4)(c).

Notice

- (6)** Before issuing a warrant under this section in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before the issuance of the warrant would result in the disappearance,

dissipation or reduction in value of the property or otherwise affect the property so that all or a part of it could not be seized under the warrant.

(7) [Repealed, 2024, c. 15, s. 310]

2023, c. 26, s. 212; 2024, c. 15, s. 310.

Application for restraint order

462.33 (1) The Attorney General may make an application in accordance with subsection (2) for a restraint order under subsection (3) in respect of any property.

Procedure

(2) An application made under subsection (1) for a restraint order under subsection (3) in respect of any property may be made *ex parte* and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters, namely,

- (a)** the offence or matter under investigation;
- (b)** the person who is believed to be in possession of the property;
- (c)** the grounds for the belief that the property is proceeds of crime;
- (d)** a description of the property; and
- (e)** whether any previous applications have been made under this section with respect to the property.

Restraint order

(3) A judge who hears an application for a restraint order made under subsection (1) may, if the judge is satisfied that there are reasonable grounds to believe that there exists any property that is proceeds of crime, make an order prohibiting any person from disposing of, or otherwise dealing with any interest in, the property specified in the order otherwise than in the manner that may be specified in the order.

Effect of order

(3.01) A restraint order issued under subsection (1) has effect throughout Canada.

Property outside Canada

(3.1) A restraint order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Idem

(4) An order made by a judge under subsection (3) may be subject to such reasonable conditions as the judge thinks fit.

Notice

(5) Before making an order under subsection (3) in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before making the order would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be subject to an order of forfeiture under [subsection 462.37\(1\)](#) or [\(2.01\)](#) or [462.38\(2\)](#).

Order in writing

(6) An order made under subsection (3) shall be made in writing.

(7) [Repealed, 2024, c. 15, s. 311]

Service of order

(8) A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.

Registration of order

(9) A copy of an order made under subsection (3) shall be registered against any property in accordance with the laws of the province in which the property is situated.

Continues in force

(10) An order made under subsection (3) remains in effect until

(a) it is revoked or varied under [subsection 462.34\(4\)](#) or revoked under [paragraph 462.43\(a\)](#);

(b) it ceases to be in force under [section 462.35](#); or

(c) an order of forfeiture or restoration of the property is made under [subsection 462.37\(1\)](#) or [\(2.01\)](#), [462.38\(2\)](#) or [462.41\(3\)](#) or any other provision of this or any other Act of Parliament.

Offence

(11) Any person on whom an order made under subsection (3) is served in accordance with this section and who, while the order is in force, acts in contravention of or fails to comply with the order is guilty of an indictable offence or an offence punishable on summary conviction.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1993, c. 37, s. 21; 1996, c. 16, s. 60; 1997, c. 18, s. 30; [2001, c. 32, s. 15](#); [2005, c. 44, s. 4](#); [2019, c. 25, s. 181](#); [2024, c. 15, s. 311](#).

Management order

462.331 (1) With respect to property seized under [section 462.32](#) or [462.321](#) or restrained under [section 462.33](#), other than a *controlled substance*, within the meaning of the *Controlled Drugs and Substances Act*, or *cannabis*, as defined in [subsection 2\(1\)](#) of

the [Cannabis Act](#), on application of the Attorney General or of any other person with the written consent of the Attorney General, if a judge is of the opinion that the circumstances so require, the judge may

- (a) appoint a person to take control of and to manage or otherwise deal with all or part of the property in accordance with the directions of the judge; and
- (b) require any person having possession of that property to give possession of the property to the person appointed under paragraph (a).

Appointment of Minister of Public Works and Government Services

(2) When the Attorney General of Canada so requests, a judge appointing a person under subsection (1) shall appoint the Minister of Public Works and Government Services.

Power to manage

- (3) The power to manage or otherwise deal with property under subsection (1) includes
- (a) the power to make an interlocutory sale of perishable or rapidly depreciating property;
 - (b) the power to destroy, in accordance with subsections (4) to (7), property that has little or no value; and
 - (c) the power to have property, other than real property or a conveyance, forfeited to Her Majesty in accordance with subsection (7.1).

Application for destruction order

(4) Before a person who is appointed to manage property destroys property that has little or no value, they shall apply to a court for a destruction order.

Notice

(5) Before making a destruction order, a court shall require notice in accordance with subsection (6) to be given to and may hear any person who, in the court's opinion, appears to have a valid interest in the property.

Manner of giving notice

- (6) A notice shall
- (a) be given in the manner that the court directs or that may be specified in the rules of the court; and
 - (b) specify the effective period of the notice that the court considers reasonable or that may be set out in the rules of the court.

Destruction order

(7) A court shall order that the property be destroyed if it is satisfied that the property has little or no financial or other value.

Forfeiture order

(7.1) On application by a person who is appointed to manage the property, a court shall order that the property, other than real property or a conveyance, be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the law if

- (a)** a notice is given or published in the manner that the court directs or that may be specified in the rules of the court;
- (b)** the notice specifies a period of 60 days during which a person may make an application to the court asserting their interest in the property; and
- (c)** during that period, no one makes such an application.

When management order ceases to have effect

(8) A management order ceases to have effect when the property that is the subject of the management order is returned in accordance with the law, destroyed or forfeited to Her Majesty.

For greater certainty

(8.1) For greater certainty, if property that is the subject of a management order is sold, the management order applies to the net proceeds of the sale.

Application to vary conditions

(9) The Attorney General may at any time apply to the judge to cancel or vary any condition to which a management order is subject but may not apply to vary an appointment made under subsection (2).

[2001, c. 32, s. 16](#); [2017, c. 7, s. 58](#); [2018, c. 16, s. 212](#); [2023, c. 26, s. 213](#).

Application for review of special warrants and restraint orders

462.34 (1) Any person who has an interest in property that was seized under a warrant issued under [section 462.32](#) or [462.321](#) or in respect of which a restraint order was made under [subsection 462.33\(3\)](#) may, at any time, apply to a judge for

- (a)** an order under subsection (4);
- (b)** permission to examine any seized property that does not consist of digital assets;
or
- (c)** an order requiring an accounting of any seized digital assets.

Notice to Attorney General

(2) Where an application is made under paragraph (1)(a),

- (a)** the application shall not, without the consent of the Attorney General, be heard by a judge unless the applicant has given to the Attorney General at least two clear days notice in writing of the application; and

(b) the judge may require notice of the application to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property.

Terms of examination order

(3) A judge may, on an application made to the judge under paragraph (1)(b), order that the applicant be permitted to examine property subject to such terms as appear to the judge to be necessary or desirable to ensure that the property is safeguarded and preserved for any purpose for which it may subsequently be required.

Order of restoration of property or revocation or variation of order

(4) On an application made to a judge under paragraph (1)(a) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given pursuant to paragraph (2)(b), the judge may order that the property or a part thereof be returned to the applicant or, in the case of a restraint order made under [subsection 462.33\(3\)](#), revoke the order, vary the order to exclude the property or any interest in the property or part thereof from the application of the order or make the order subject to such reasonable conditions as the judge thinks fit,

(a) if the applicant enters into a recognizance before the judge, with or without sureties, in such amount and with such conditions, if any, as the judge directs and, where the judge considers it appropriate, deposits with the judge such sum of money or other valuable security as the judge directs;

(b) if the conditions referred to in subsection (6) are satisfied; or

(c) for the purpose of

(i) meeting the reasonable living expenses of the person who was in possession of the property at the time the warrant was executed or the order was made or any person who, in the opinion of the judge, has a valid interest in the property and of the dependants of that person,

(ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph (i), or

(iii) permitting the use of the property in relation to an undertaking or release order,

if the judge is satisfied that the applicant has no other assets or means available for the purposes set out in this paragraph and that no other person appears to be the lawful owner of or lawfully entitled to possession of the property.

Hearing

(5) For the purpose of determining the reasonableness of legal expenses referred to in subparagraph (4)(c)(ii), a judge shall hold an *in camera* hearing, without the presence of the Attorney General, and shall take into account the legal aid tariff of the province.

Expenses

(5.1) For the purpose of determining the reasonableness of expenses referred to in paragraph (4)(c), the Attorney General may

- (a)** at the hearing of the application, make representations as to what would constitute the reasonableness of the expenses, other than legal expenses; and
- (b)** before or after the hearing of the application held *in camera* pursuant to subsection (5), make representations as to what would constitute reasonable legal expenses referred to in subparagraph (4)(c)(ii).

Taxing legal fees

(5.2) The judge who made an order under paragraph (4)(c) may, and on the application of the Attorney General shall, tax the legal fees forming part of the legal expenses referred to in subparagraph (4)(c)(ii) and, in so doing, shall take into account

- (a)** the value of property in respect of which an order of forfeiture may be made;
- (b)** the complexity of the proceedings giving rise to those legal expenses;
- (c)** the importance of the issues involved in those proceedings;
- (d)** the duration of any hearings held in respect of those proceedings;
- (e)** whether any stage of those proceedings was improper or vexatious;
- (f)** any representations made by the Attorney General; and
- (g)** any other relevant matter.

Conditions to be satisfied

(6) An order under paragraph (4)(b) in respect of property may be made by a judge if the judge is satisfied that the property will no longer be required for the purpose of any investigation or as evidence in any proceeding and

- (a)** that a warrant should not have been issued under [section 462.32](#) or [462.321](#) or a restraint order under [subsection 462.33\(3\)](#) should not have been made in respect of that property, in the case where the application is made by
 - (i)** a person charged with a designated offence, or
 - (ii)** any person who acquired title to or a right of possession of that property from a person referred to in subparagraph (i) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property; or
- (b)** in any other case, that the applicant is the lawful owner of or lawfully entitled to possession of the property and appears innocent of any complicity in a designated offence or of any collusion in relation to such an offence, and that no other person appears to be the lawful owner of or lawfully entitled to possession of the property.

Saving provision

(7) Sections 354, 355.2 and 355.4 do not apply to a person who comes into possession of any property that, by virtue of an order made under paragraph (4)(c), was returned to any person after having been seized or was excluded from the application of a restraint order made under subsection 462.33(3).

(8) [Repealed, 2019, c. 25, s. 182]

R.S., 1985, c. 42 (4th Supp.), s. 2; 1996, c. 19, ss. 69, 70; 1997, c. 18, ss. 31, 140; 2001, c. 32, s. 17; 2010, c. 14, s. 8; 2019, c. 25, s. 182; 2023, c. 26, s. 214.

Application of property restitution provisions

462.341 Subsection 462.34(2), paragraph 462.34(4)(c) and subsections 462.34(5), (5.1) and (5.2) apply, with any modifications that the circumstances require, to a person who has an interest in money, bank-notes or virtual currency or other digital assets that are seized under this Act, the *Controlled Drugs and Substances Act* or the *Cannabis Act* and in respect of which proceedings may be taken under subsection 462.37(1) or (2.01) or 462.38(2).

1997, c. 18, ss. 32, 140; 1999, c. 5, s. 14; 2005, c. 44, s. 5; 2018, c. 16, s. 213; 2023, c. 26, s. 215.

Expiration of special warrants and restraint orders

462.35 (1) Subject to this section, if property has been seized under a warrant issued under section 462.32 or 462.321 or a restraint order has been made under section 462.33 in relation to property, the property may be detained or the order may continue in force, as the case may be, for a period not exceeding six months from the seizure or the making of the order, as the case may be.

Where proceedings instituted

(2) The property may continue to be detained, or the order may continue in force, for a period that exceeds six months if proceedings are instituted in respect of which the thing detained may be forfeited.

Where application made

(3) The property may continue to be detained or the order may continue in force for a period or periods that exceed six months if the continuation is, on application made by the Attorney General, ordered by a judge, where the judge is satisfied that the property is required, after the expiration of the period or periods, for the purpose of section 462.37 or 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1997, c. 18, s. 33; 2023, c. 26, s. 216.

Forwarding to clerk where accused to stand trial

462.36 If a judge issues a warrant under section 462.32 or 462.321 or makes a restraint order under section 462.33 in respect of any property, the clerk of the court shall, when an accused is ordered to stand trial for a designated offence, cause to be forwarded to the clerk of the court to which the accused has been ordered to stand trial a copy of the

report filed under [paragraph 462.32\(4\)\(b\)](#) or [462.321\(4\)\(c\)](#) or of the restraint order in respect of the property.

R.S., 1985, c. 42 (4th Supp.), s. 2; [2001, c. 32, s. 18](#); [2023, c. 26, s. 217](#).

Forfeiture of Proceeds of Crime

Order of forfeiture of property

462.37 (1) Subject to this section and [sections 462.39](#) to [462.41](#), if an offender is convicted, or discharged under [section 730](#), of a designated offence and the court imposing sentence on or discharging the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime obtained through the commission of the designated offence, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

Proceeds of crime — other offences

(2) If the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) was obtained through the commission of the designated offence of which the offender is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

Order of forfeiture — particular circumstances

(2.01) A court imposing sentence on an offender convicted of an offence described in subsection (2.02) shall, on application of the Attorney General and subject to this section and [sections 462.4](#) and [462.41](#), order that any property of the offender that is identified by the Attorney General in the application be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law if the court is satisfied, on a balance of probabilities, that

(a) within 10 years before the proceedings were commenced in respect of the offence for which the offender is being sentenced, the offender engaged in a pattern of criminal activity for the purpose of directly or indirectly receiving a material benefit, including a financial benefit; or

(b) the income of the offender from sources unrelated to designated offences cannot reasonably account for the value of all the property of the offender.

Offences

(2.02) The offences are the following:

(a) a criminal organization offence punishable by five or more years of imprisonment;

(b) an offence under [section 5](#), [6](#) or [7](#) of the *Controlled Drugs and Substances Act* — or a conspiracy or an attempt to commit, being an accessory after the fact in relation

to, or any counselling in relation to an offence under any of those sections — prosecuted by indictment;

(c) an offence under [subsection 9\(1\) or \(2\), 10\(1\) or \(2\), 11\(1\) or \(2\), 12\(1\), \(4\), \(5\), \(6\) or \(7\), 13\(1\) or 14\(1\)](#) of the *Cannabis Act* — or a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to an offence under any of those subsections — prosecuted by indictment; and

(d) an offence under any of [sections 279.01 to 279.03](#).

Offender may establish that property is not proceeds of crime

(2.03) A court shall not make an order of forfeiture under subsection (2.01) in respect of any property that the offender establishes, on a balance of probabilities, is not proceeds of crime.

Pattern of criminal activity

(2.04) In determining whether the offender has engaged in a pattern of criminal activity described in paragraph (2.01)(a), the court shall consider

- (a) the circumstances of the offence for which the offender is being sentenced;
- (b) any act or omission — other than an act or omission that constitutes the offence for which the offender is being sentenced — that the court is satisfied, on a balance of probabilities, was committed by the offender and constitutes an offence punishable by indictment under any Act of Parliament;
- (c) any act or omission that the court is satisfied, on a balance of probabilities, was committed by the offender and is an offence in the place where it was committed and, if committed in Canada, would constitute an offence punishable by indictment under any Act of Parliament; and
- (d) any other factor that the court considers relevant.

Conditions — pattern of criminal activity

(2.05) A court shall not determine that an offender has engaged in a pattern of criminal activity unless the court is satisfied, on a balance of probabilities, that the offender committed, within the period referred to in paragraph (2.01)(a),

- (a) acts or omissions — other than an act or omission that constitutes the offence for which the offender is being sentenced — that constitute at least two serious offences or one criminal organization offence;
- (b) acts or omissions that are offences in the place where they were committed and, if committed in Canada, would constitute at least two serious offences or one criminal organization offence; or
- (c) an act or omission described in paragraph (a) that constitutes a serious offence and an act or omission described in paragraph (b) that, if committed in Canada, would constitute a serious offence.

Application under subsection (1) not prevented

(2.06) Nothing in subsection (2.01) shall be interpreted as preventing the Attorney General from making an application under subsection (1) in respect of any property.

Exception

(2.07) A court may, if it considers it in the interests of justice, decline to make an order of forfeiture against any property that would otherwise be subject to forfeiture under subsection (2.01). The court shall give reasons for its decision.

Property outside Canada

(2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Fine instead of forfeiture

(3) If a court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made in respect of any property of an offender but that the property or any part of or interest in the property cannot be made subject to an order, the court may, instead of ordering the property or any part of or interest in the property to be forfeited, order the offender to pay a fine in an amount equal to the value of the property or the part of or interest in the property. In particular, a court may order the offender to pay a fine if the property or any part of or interest in the property

- (a)** cannot, on the exercise of due diligence, be located;
- (b)** has been transferred to a third party;
- (c)** is located outside Canada;
- (d)** has been substantially diminished in value or rendered worthless; or
- (e)** has been commingled with other property that cannot be divided without difficulty.

Imprisonment in default of payment of fine

(4) Where a court orders an offender to pay a fine pursuant to subsection (3), the court shall

- (a)** impose, in default of payment of that fine, a term of imprisonment
 - (i)** not exceeding six months, where the amount of the fine does not exceed ten thousand dollars,
 - (ii)** of not less than six months and not exceeding twelve months, where the amount of the fine exceeds ten thousand dollars but does not exceed twenty thousand dollars,
 - (iii)** of not less than twelve months and not exceeding eighteen months, where the amount of the fine exceeds twenty thousand dollars but does not exceed fifty thousand dollars,

(iv) of not less than eighteen months and not exceeding two years, where the amount of the fine exceeds fifty thousand dollars but does not exceed one hundred thousand dollars,

(v) of not less than two years and not exceeding three years, where the amount of the fine exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars,

(vi) of not less than three years and not exceeding five years, where the amount of the fine exceeds two hundred and fifty thousand dollars but does not exceed one million dollars, or

(vii) of not less than five years and not exceeding ten years, where the amount of the fine exceeds one million dollars; and

(b) direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other term of imprisonment imposed on the offender or that the offender is then serving.

Fine option program not available to offender

(5) [Section 736](#) does not apply to an offender against whom a fine is imposed pursuant to subsection (3).

R.S., 1985, c. 42 (4th Supp.), s. 2; 1992, c. 1, s. 60(F); 1995, c. 22, s. 10; 1999, c. 5, s. 15(F); [2001, c. 32, s. 19](#); [2005, c. 44, s. 6](#); [2015, c. 16, s. 4](#); [2017, c. 7, s. 59](#); [2018, c. 16, s. 214](#); 2018, c. 16, s. 225.

Definition of *order*

462.371 (1) In this section, ***order*** means an order made under [section 462.37](#) or [462.38](#).

Execution

(2) An order may be executed anywhere in Canada.

Filing of order from another province

(3) Where the Attorney General of a province in which property that is the subject of an order made in another province is situated receives a certified copy of the order and files it with the superior court of criminal jurisdiction of the province in which the property is situated, the order shall be entered as a judgment of that court.

Attorney General of Canada

(4) Where the Attorney General of Canada receives a certified copy of an order made in a province in respect of property situated in another province and files the order with the superior court of criminal jurisdiction of the province in which the property is situated, the order shall be entered as a judgment of that court.

Effect of registered order

(5) An order has, from the date it is filed in a court of a province under subsection (3) or (4), the same effect as if it had been an order originally made by that court.

Notice

(6) Where an order has been filed in a court under subsection (3) or (4), it shall not be executed before notice in accordance with [subsection 462.41\(2\)](#) is given to every person who, in the opinion of the court, appears to have a valid interest in the property.

Application of [section 462.42](#)

(7) [Section 462.42](#) applies, with such modifications as the circumstances require, in respect of a person who claims an interest in property that is the subject of an order filed under subsection (3) or (4).

Application under [section 462.42](#) to be made in one province

(8) No person may make an application under [section 462.42](#) in relation to property that is the subject of an order filed under subsection (3) or (4) if that person has previously made an application in respect of the same property in another province.

Finding in one court binding

(9) The finding by a court of a province in relation to property that is the subject of an order filed under subsection (3) or (4) as to whether or not an applicant referred to in [subsection 462.42\(4\)](#) is affected by the forfeiture referred to in that subsection or declaring the nature and extent of the interest of the applicant under that subsection is binding on the superior court of criminal jurisdiction of the province where the order is entered as a judgment.

1997, c. 18, s. 34.

Application for forfeiture

462.38 (1) Where an information has been laid in respect of a designated offence, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2) in respect of any property.

Order of forfeiture of property

(2) Subject to [sections 462.39](#) to [462.41](#), where an application is made to a judge under subsection (1), the judge shall, if the judge is satisfied that

- (a)** any property is, beyond a reasonable doubt, proceeds of crime,
- (b)** that property was obtained through the commission of a designated offence in respect of which proceedings were commenced, and
- (c)** the accused charged with the offence referred to in paragraph (b) has died or absconded,

order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

Property outside Canada

(2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Person deemed absconded

(3) For the purposes of this section, a person shall be deemed to have absconded in connection with a designated offence if

- (a)** an information has been laid alleging the commission of the offence by the person,
- (b)** a warrant for the arrest of the person or a summons in respect of an organization has been issued in relation to that information, and
- (c)** reasonable attempts to arrest the person pursuant to the warrant or to serve the summons have been unsuccessful during the period of six months commencing on the day the warrant or summons was issued, or, in the case of a person who is not or never was in Canada, the person cannot be brought within that period to the jurisdiction in which the warrant or summons was issued,

and the person shall be deemed to have so absconded on the last day of that period of six months.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1997, c. 18, s. 35; 2001, c. 32, s. 20; 2003, c. 21, s. 7; 2017, c. 7, s. 60.

Inference

462.39 For the purpose of [subsection 462.37\(1\)](#) or [462.38\(2\)](#), the court may infer that property was obtained or derived as a result of the commission of a designated offence where evidence establishes that the value, after the commission of that offence, of all the property of the person alleged to have committed the offence exceeds the value of all the property of that person before the commission of that offence and the court is satisfied that the income of that person from sources unrelated to designated offences committed by that person cannot reasonably account for such an increase in value.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1996, c. 19, s. 70; 2001, c. 32, s. 21.

Voidable transfers

462.4 A court may,

- (a)** prior to ordering property to be forfeited under [subsection 462.37\(1\)](#) or [\(2.01\)](#) or [462.38\(2\)](#), and
- (b)** in the case of property in respect of which a restraint order was made under [section 462.33](#), where the order was served in accordance with [subsection 462.33\(8\)](#),

set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the order under [section 462.33](#), unless the conveyance or transfer was for valuable consideration to a person acting in good faith.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1997, c. 18, s. 36(E); 2005, c. 44, s. 7.

Notice

462.41 (1) Before making an order under [subsection 462.37\(1\)](#) or [\(2.01\)](#) or [462.38\(2\)](#) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to and may hear any person who, in the opinion of the court, appears to have a valid interest in the property.

Manner of giving notice

(2) A notice shall

- (a)** be given in the manner that the court directs or that may be specified in the rules of the court;
- (b)** specify the period that the court considers reasonable or that may be set out in the rules of the court during which a person may make an application to the court asserting their interest in the property; and
- (c)** set out the designated offence charged and a description of the property.

Order of restoration of property

(3) Where a court is satisfied that any person, other than

- (a)** a person who is charged with, or was convicted of, a designated offence, or
- (b)** a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,

is the lawful owner or is lawfully entitled to possession of any property or any part thereof that would otherwise be forfeited pursuant to [subsection 462.37\(1\)](#) or [\(2.01\)](#) or [462.38\(2\)](#) and that the person appears innocent of any complicity in an offence referred to in paragraph (a) or of any collusion in relation to such an offence, the court may order that the property or part thereof be returned to that person.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1996, c. 19, s. 70; 1997, c. 18, ss. 37, 140; [2001, c. 32, s. 22](#); [2005, c. 44, s. 8](#); [2017, c. 7, s. 61](#).

Application by person claiming interest for relief from forfeiture

462.42 (1) Any person who claims an interest in property that is forfeited to Her Majesty under [subsection 462.37\(1\)](#) or [\(2.01\)](#) or [462.38\(2\)](#) may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4) unless the person is

- (a)** a person who is charged with, or was convicted of, a designated offence that resulted in the forfeiture; or
- (b)** a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property.

Fixing day for hearing

(2) The judge to whom an application is made under subsection (1) shall fix a day not less than thirty days after the date of filing of the application for the hearing thereof.

Notice

(3) An applicant shall serve a notice of the application made under subsection (1) and of the hearing thereof on the Attorney General at least fifteen days before the day fixed for the hearing.

Order declaring interest not subject to forfeiture

(4) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant is not a person referred to in paragraph (1)(a) or (b) and appears innocent of any complicity in any designated offence that resulted in the forfeiture or of any collusion in relation to any such offence, the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest.

Appeal from order under subsection (4)

(5) An applicant or the Attorney General may appeal to the court of appeal from an order under subsection (4) and the provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this subsection.

Return of property

(6) The Attorney General shall, on application made to the Attorney General by any person who has obtained an order under subsection (4) and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined,

(a) direct that the property or the part thereof to which the interest of the applicant relates be returned to the applicant; or

(b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1996, c. 19, s. 70; 1997, c. 18, ss. 38, 140; [2001, c. 32, s. 23](#); [2005, c. 44, s. 9](#).

Residual disposal of property seized or dealt with under special warrants or restraint orders

462.43 (1) If property has been seized under a warrant issued under [section 462.32](#) or [462.321](#), a restraint order has been made under [section 462.33](#) in relation to any property or a recognizance has been entered into under [paragraph 462.34\(4\)\(a\)](#) in relation to any property and a judge, on application made to the judge by the Attorney General or any person having an interest in the property or on the judge's own motion, after notice given to the Attorney General and any other person having an interest in the

property, is satisfied that the property will no longer be required for the purpose of [section 462.37](#), [462.38](#) or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding, the judge

(a) in the case of a restraint order, shall revoke the order;

(b) in the case of a recognizance, shall cancel the recognizance; and

(c) in the case of property seized under a warrant issued under [section 462.32](#) or [462.321](#) or property under the control of a person appointed under [paragraph 462.331\(1\)\(a\)](#),

(i) if possession of it by the person from whom it was taken is lawful, shall order that it be returned to that person,

(ii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, shall order that it be returned to the lawful owner or the person who is lawfully entitled to its possession, or

(iii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known, may order that it be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

Property outside Canada

(2) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

R.S., 1985, c. 42 (4th Supp.), s. 2; [2001, c. 32, s. 24](#); [2004, c. 12, s. 7](#); [2017, c. 7, s. 62\(F\)](#); [2023, c. 26, s. 218](#).

Appeals from certain orders

462.44 Any person who considers that they are aggrieved by an order made under [subsection 462.38\(2\)](#) or [462.41\(3\)](#) or [section 462.43](#) may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI, and that Part applies, with such modifications as the circumstances require, to such an appeal.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1997, c. 18, s. 39.

Suspension of forfeiture pending appeal

462.45 Despite anything in this Part, the operation of an order of forfeiture or restoration of property under [subsection 462.34\(4\)](#), [462.37\(1\)](#) or [\(2.01\)](#), [462.38\(2\)](#) or [462.41\(3\)](#) or [section 462.43](#) is suspended pending

(a) any application made in respect of the property under any of those provisions or any other provision of this or any other Act of Parliament that provides for the restoration or forfeiture of such property,

(b) any appeal taken from an order of forfeiture or restoration in respect of the property, or

(c) any other proceeding in which the right of seizure of the property is questioned,

and property shall not be disposed of within thirty days after an order of forfeiture is made under any of those provisions.

R.S., 1985, c. 42 (4th Supp.), s. 2; [2005, c. 44, s. 10](#).

Copies of documents returned or forfeited

462.46 (1) If any document is returned or ordered to be returned, forfeited or otherwise dealt with under [subsection 462.34\(3\)](#) or (4), [462.37\(1\)](#) or (2.01), [462.38\(2\)](#) or [462.41\(3\)](#) or [section 462.43](#), the Attorney General may, before returning the document or complying with the order, cause a copy of the document to be made and retained.

Probative force

(2) Every copy made under subsection (1) shall, if certified as a true copy by the Attorney General, be admissible in evidence and, in the absence of evidence to the contrary, shall have the same probative force as the original document would have had if it had been proved in the ordinary way.

R.S., 1985, c. 42 (4th Supp.), s. 2; [2005, c. 44, s. 11](#).

Disclosure Provisions

No civil or criminal liability incurred by informants

462.47 For greater certainty but subject to [section 241](#) of the *Income Tax Act*, a person is justified in disclosing to a peace officer or the Attorney General any facts on the basis of which that person reasonably suspects that any property is proceeds of crime or that any person has committed or is about to commit a designated offence.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1996, c. 19, s. 70; [2001, c. 32, ss. 25, 82](#); [2002, c. 13, s. 16\(F\)](#); [2004, c. 12, s. 8\(F\)](#).

Definition of *designated substance offence*

462.48 (1) In this section, ***designated substance offence*** means

(a) an offence under Part I of the *Controlled Drugs and Substances Act*, except [subsection 4\(1\)](#) of that Act;

(a.1) an offence under Division 1 of Part 1 of the *Cannabis Act*, except [subsection 8\(1\)](#) of that Act; or

(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a) or (a.1).

Disclosure of income tax information

(1.1) The Attorney General may make an application in accordance with subsection (2) for an order for disclosure of information under subsection (3), for the purposes of an investigation in relation to

- (a)** a designated substance offence;
- (b)** an offence against [subsection 119\(1\)](#), [section 120](#), [subsection 121\(1\)](#) or [\(2\)](#), [section 122](#) or [subsection 123\(1\)](#) or [\(2\)](#), or a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, such an offence;
- (b.1)** an offence against [subsection 279.01\(1\)](#), [279.011\(1\)](#) or [279.02\(1\)](#) or [\(2\)](#) or a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, such an offence;
- (b.2)** an offence against [subsection 346\(1\)](#) or a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, such an offence;
- (b.3)** an offence against [paragraph 380\(1\)\(a\)](#) or [subsection 380\(2\)](#) or a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, such an offence;
- (c)** an offence against [section 52](#), [52.1](#), [52.2](#), [467.11](#), [467.111](#), [467.12](#) or [467.13](#), or a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, such an offence;
- (d)** a terrorism offence;
- (e)** an offence against [subsection 3\(1\)](#) of the *Corruption of Foreign Public Officials Act*, or a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, such an offence; or
- (f)** an offence against [section 354](#), [355.2](#), [355.4](#) or [462.31](#) — or a conspiracy or attempt to commit, or being an accessory after the fact in relation to such an offence — if the offence is alleged to have been committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of
 - (i)** the commission in Canada of an offence referred to in any of paragraphs (a) to (e), or
 - (ii)** an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence referred to in any of those paragraphs.

Application

(2) An application under subsection (1.1) shall be made *ex parte* in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or a person specially designated by the Attorney General for that purpose deposing to the following matters, namely,

- (a)** the offence or matter under investigation;
- (b)** the person in relation to whom the information or documents referred to in paragraph (c) are required;

(c) the type of information or book, record, writing, return or other document obtained by or on behalf of the Minister of National Revenue for the purposes of Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Excise Act, 2001*, the *Underused Housing Tax Act*, the *Select Luxury Items Tax Act*, the *Digital Services Tax Act* or the *Global Minimum Tax Act* to which access is sought or that is proposed to be examined or communicated; and

(d) the facts relied on to justify the belief, on reasonable grounds, that the person referred to in paragraph (b) has committed or benefited from the commission of any of the offences referred to in subsection (1.1) and that the information or documents referred to in paragraph (c) are likely to be of substantial value, whether alone or together with other material, to the investigation for the purposes of which the application is made.

Order for disclosure of information

(3) Where the judge to whom an application under subsection (1.1) is made is satisfied

(a) of the matters referred to in paragraph (2)(d), and

(b) that there are reasonable grounds for believing that it is in the public interest to allow access to the information or documents to which the application relates, having regard to the benefit likely to accrue to the investigation if the access is obtained,

the judge may, subject to any conditions that the judge considers advisable in the public interest, order the Commissioner of Revenue or any person specially designated in writing by the Commissioner for the purposes of this section

(c) to allow a police officer named in the order access to all such information and documents and to examine them, or

(d) where the judge considers it necessary in the circumstances, to produce all such information and documents to the police officer and allow the police officer to remove the information and documents,

within such period after the expiration of seven clear days following the service of the order pursuant to subsection (4) as the judge may specify.

Service of order

(4) A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.

Extension of period for compliance with order

(5) A judge who makes an order under subsection (3) may, on application of the Minister of National Revenue, extend the period within which the order is to be complied with.

Objection to disclosure of information

(6) The Minister of National Revenue or any person specially designated in writing by that Minister for the purposes of this section may object to the disclosure of any information or document in respect of which an order under subsection (3) has been made by certifying orally or in writing that the information or document should not be disclosed on the ground that

- (a)** the Minister of National Revenue is prohibited from disclosing the information or document by any bilateral or international treaty, convention or other agreement respecting taxation to which the Government of Canada is a signatory;
- (b)** a privilege is attached by law to the information or document;
- (c)** the information or document has been placed in a sealed package pursuant to law or an order of a court of competent jurisdiction; or
- (d)** disclosure of the information or document would not, for any other reason, be in the public interest.

Determination of objection

(7) Where an objection to the disclosure of information or a document is made under subsection (6), the objection may be determined, on application, in accordance with subsection (8), by the Chief Justice of the Federal Court, or by such other judge of that Court as the Chief Justice may designate to hear such applications.

Judge may examine information

(8) A judge who is to determine an objection pursuant to subsection (7) may, if the judge considers it necessary to determine the objection, examine the information or document in relation to which the objection is made and shall grant the objection and order that disclosure of the information or document be refused where the judge is satisfied of any of the grounds mentioned in subsection (6).

Limitation period

(9) An application under subsection (7) shall be made within ten days after the objection is made or within such greater or lesser period as the Chief Justice of the Federal Court, or such other judge of that Court as the Chief Justice may designate to hear such applications, considers appropriate.

Appeal to Federal Court of Appeal

(10) An appeal lies from a determination under subsection (7) to the Federal Court of Appeal.

Limitation period for appeal

(11) An appeal under subsection (10) shall be brought within ten days from the date of the determination appealed from or within such further time as the Federal Court of Appeal considers appropriate in the circumstances.

Special rules for hearings

(12) An application under subsection (7) or an appeal brought in respect of that application shall

(a) be heard *in camera*; and

(b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the [National Capital Act](#).

Ex parte representations

(13) During the hearing of an application under subsection (7) or an appeal brought in respect of that application, the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations *ex parte*.

Copies

(14) When any information or document is examined or provided under subsection (3), the person by whom it is examined or to whom it is provided or any officer of the Canada Revenue Agency may make, or cause to be made, one or more copies of it, and any copy purporting to be certified by the Minister of National Revenue or an authorized person to be a copy made under this subsection is evidence of the nature and content of the original information or document and has the same probative force as the original information or document would have had if it had been proved in the ordinary way.

Further disclosure

(15) No person to whom information or documents have been disclosed or provided pursuant to this subsection or pursuant to an order made under subsection (3) shall further disclose the information or documents except for the purposes of the investigation in relation to which the order was made.

Form

(16) An order made under subsection (3) may be in Form 47.

Definition of *police officer*

(17) In this section, ***police officer*** means any officer, constable or other person employed for the preservation and maintenance of the public peace.

R.S., 1985, c. 42 (4th Supp.), s. 2; 1994, c. 13, s. 7; 1996, c. 19, s. 70; 1997, c. 23, s. 10; 1999, c. 17, s. 120; [2001, c. 32, s. 26](#), c. 41, ss. 15, 133; [2005, c. 38, ss. 138, 140](#); [2010, c. 14, s. 9](#); [2013, c. 9, s. 15](#); [2014, c. 17, s. 7](#); [2018, c. 16, s. 215](#), c. 27, s. 28; [2022, c. 5, s. 13](#); [2022, c. 10, s. 138](#); 2022, c. 10, s. 173; [2023, c. 26, s. 219](#); [2024, c. 15, s. 100](#); [2024, c. 16, s. 68](#); [2024, c. 17, s. 84](#); 2024, c. 17, s. 111; 2024, c. 17, s. 372(F).

Specific Rules of Forfeiture

Specific forfeiture provisions unaffected by this Part

462.49 (1) This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting the forfeiture of property.

Priority for restitution to victims of crime

(2) The property of an offender may be used to satisfy the operation of a provision of this or any other Act of Parliament respecting the forfeiture of property only to the extent that it is not required to satisfy the operation of any other provision of this or any other Act of Parliament respecting restitution to or compensation of persons affected by the commission of offences.

R.S., 1985, c. 42 (4th Supp.), s. 2.

Regulations

Regulations

462.5 The Attorney General may make regulations governing the manner of disposing of or otherwise dealing with, in accordance with the law, property forfeited under this Part.

R.S., 1985, c. 42 (4th Supp.), s. 2.

PART XIII

Attempts — Conspiracies — Accessories

Attempts, accessories

463 Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences:

(a) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to be sentenced to imprisonment for life is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years;

(b) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to imprisonment for fourteen years or less is guilty of an indictable offence and liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable;

(c) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction; and

(d) every one who attempts to commit or is an accessory after the fact to the commission of an offence for which the offender may be prosecuted by indictment or

for which he is punishable on summary conviction

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding a term that is one-half of the longest term to which a person who is guilty of that offence is liable, or

(ii) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 463; R.S., 1985, c. 27 (1st Supp.), s. 59; 1998, c. 35, s. 120.

Counselling offence that is not committed

464 Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable; and

(b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 464; R.S., 1985, c. 27 (1st Supp.), s. 60.

Conspiracy

465 (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

(b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that they did not commit that offence, is guilty of

(i) an indictable offence and liable to imprisonment for a term of not more than 10 years or an offence punishable on summary conviction, if the alleged offence is one for which, on conviction, that person would be liable to be sentenced to imprisonment for life or for a term of not more than 14 years, or

(ii) an indictable offence and liable to imprisonment for a term of not more than five years or an offence punishable on summary conviction, if the alleged offence is one for which, on conviction, that person would be liable to imprisonment for less than 14 years;

(c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; and

(d) every one who conspires with any one to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

(2) [Repealed, 1985, c. 27 (1st Supp.), s. 61]

Conspiracy to commit offences

(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.

Idem

(4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

Jurisdiction

(5) Where a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4), proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada, and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

Appearance of accused at trial

(6) For greater certainty, the provisions of this Act relating to

(a) requirements that an accused appear at and be present during proceedings, and

(b) the exceptions to those requirements,

apply to proceedings commenced in any territorial division pursuant to subsection (5).

If previously tried outside Canada

(7) If a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4) and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if the person had been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict*, pardon or an expungement order under the [Expungement of Historically Unjust Convictions Act](#), the person shall be deemed to have been so tried and dealt with in Canada.

R.S., 1985, c. C-46, s. 465; R.S., 1985, c. 27 (1st Supp.), s. 61; 1998, c. 35, s. 121; [2018, c. 11, s. 28](#); [2019, c. 25, s. 183](#).

Conspiracy in restraint of trade

466 (1) A conspiracy in restraint of trade is an agreement between two or more persons to do or to procure to be done any unlawful act in restraint of trade.

Trade union, exception

(2) The purposes of a trade union are not, by reason only that they are in restraint of trade, unlawful within the meaning of subsection (1).

Saving

467 (1) No person shall be convicted of the offence of conspiracy by reason only that he

(a) refuses to work with a workman or for an employer; or

(b) does any act or causes any act to be done for the purpose of a trade combination, unless that act is an offence expressly punishable by law.

Definition of *trade combination*

(2) In this section, ***trade combination*** means any combination between masters or workmen or other persons for the purpose of regulating or altering the relations between masters or workmen, or the conduct of a master or workman in or in respect of his business, employment or contract of employment or service.

R.S., c. C-34, s. 425.

Definitions

467.1 (1) The following definitions apply in this Act.

criminal organization means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence. (*organisation criminelle*)

serious offence means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation. (*infraction grave*)

Facilitation

(2) For the purposes of this section, [section 467.11](#) and [467.111](#), facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

Commission of offence

(3) In this section and in [sections 467.11 to 467.13](#), committing an offence means being a party to it or counselling any person to be a party to it.

Regulations

(4) The Governor in Council may make regulations prescribing offences that are included in the definition *serious offence* in subsection (1).

1997, c. 23, s. 11; 2001, c. 32, s. 27; 2014, c. 17, s. 8.

Participation in activities of criminal organization

467.11 (1) Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of

- (a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b)** an offence punishable on summary conviction.

Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

- (a)** the criminal organization actually facilitated or committed an indictable offence;
- (b)** the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;
- (c)** the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or
- (d)** the accused knew the identity of any of the persons who constitute the criminal organization.

Factors

(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused

- (a)** uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;
- (b)** frequently associates with any of the persons who constitute the criminal organization;
- (c)** receives any benefit from the criminal organization; or
- (d)** repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.

2001, c. 32, s. 27; 2019, c. 25, s. 184.

Recruitment of members by a criminal organization

467.111 Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this Act or any other Act

of Parliament, recruits, solicits, encourages, coerces or invites a person to join the criminal organization, is guilty of an indictable offence and liable,

(a) in the case where the person recruited, solicited, encouraged or invited is under 18 years of age, to imprisonment for a term not exceeding five years, and to a minimum punishment of imprisonment for a term of six months; and

(b) in any other case, to imprisonment for a term not exceeding five years.

[2014, c. 17, s. 9.](#)

Commission of offence for criminal organization

467.12 (1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

[2001, c. 32, s. 27.](#)

Instructing commission of offence for criminal organization

467.13 (1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.

Prosecution

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

(a) an offence other than the offence under subsection (1) was actually committed;

(b) the accused instructed a particular person to commit an offence; or

(c) the accused knew the identity of all of the persons who constitute the criminal organization.

[2001, c. 32, s. 27.](#)

Sentences to be served consecutively

467.14 A sentence imposed on a person for an offence under [section 467.11](#), [467.111](#), [467.12](#) or [467.13](#) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other

sentence to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.

2001, c. 32, s. 27; 2014, c. 17, s. 10.

467.2 [Repealed, 2019, c. 25, s. 185]

PART XIV

Jurisdiction

General

Superior court of criminal jurisdiction

468 Every superior court of criminal jurisdiction has jurisdiction to try any indictable offence.

R.S., c. C-34, s. 426.

Court of criminal jurisdiction

469 Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

(a) an offence under any of the following sections:

(i) [section 47](#) (treason),

(ii) [Repealed, 2018, c. 29, s. 61]

(iii) [section 51](#) (intimidating Parliament or a legislature),

(iv) [section 53](#) (inciting to mutiny),

(v) [section 61](#) (seditious offences),

(vi) [section 74](#) (piracy),

(vii) [section 75](#) (piratical acts), or

(viii) [section 235](#) (murder);

Accessories

(b) the offence of being an accessory after the fact to high treason or treason or murder;

(c) an offence under [section 119](#) (bribery) by the holder of a judicial office;

Crimes against humanity

(c.1) an offence under any of [sections 4 to 7](#) of the *Crimes Against Humanity and War Crimes Act*;

Attempts

- (d)** the offence of attempting to commit any offence mentioned in subparagraphs (a) (i) to (vii); or

Conspiracy

- (e)** the offence of conspiring to commit any offence mentioned in paragraph (a).

R.S., 1985, c. C-46, s. 469; R.S., 1985, c. 27 (1st Supp.), s. 62; 2000, c. 24, s. 44; [2018, c. 29, s. 61](#).

Jurisdiction over person

470 Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence

- (a)** if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or
- (b)** if the accused has been ordered to be tried by
- (i)** that court, or
 - (ii)** any other court, the jurisdiction of which has by lawful authority been transferred to that court.

R.S., 1985, c. C-46, s. 470; R.S., 1985, c. 27 (1st Supp.), s. 101.

Trial by jury compulsory

471 Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

R.S., c. C-34, s. 429.

472 [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 63]

Trial without jury

473 (1) Notwithstanding anything in this Act, an accused charged with an offence listed in [section 469](#) may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

Joinder of other offences

(1.1) Where the consent of the accused and the Attorney General is given in accordance with subsection (1), the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in [section 469](#).

Withdrawal of consent

(2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1), that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal.

Adjournment when no jury summoned

474 (1) Where the competent authority has determined that a panel of jurors is not to be summoned for a term or sittings of the court for the trial of criminal cases in any territorial division, the clerk of the court may, on the day of the opening of the term or sittings, if a judge is not present to preside over the court, adjourn the court and the business of the court to a subsequent day.

Adjournment on instructions of judge

(2) A clerk of the court for the trial of criminal cases in any territorial division may, at any time, on the instructions of the presiding judge or another judge of the court, adjourn the court and the business of the court to a subsequent day.

R.S., 1985, c. C-46, s. 474; 1994, c. 44, s. 31.

Accused absconding during trial

475 (1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the course of his trial,

(a) he shall be deemed to have waived his right to be present at his trial, and

(b) the court may

(i) continue the trial and proceed to a judgment or verdict and, if it finds the accused guilty, impose a sentence on him in his absence, or

(ii) if a warrant in Form 7 is issued for the arrest of the accused, adjourn the trial to await his appearance,

but where the trial is adjourned pursuant to subparagraph (b)(ii), the court may, at any time, continue the trial if it is satisfied that it is no longer in the interests of justice to await the appearance of the accused.

Adverse inference

(2) Where a court continues a trial pursuant to subsection (1), it may draw an inference adverse to the accused from the fact that he has absconded.

Accused not entitled to re-opening

(3) Where an accused reappears at his trial that is continuing pursuant to subsection (1), he is not entitled to have any part of the proceedings that was conducted in his absence re-opened unless the court is satisfied that because of exceptional circumstances it is in the interests of justice to re-open the proceedings.

Counsel for accused may continue to act

(4) Where an accused has absconded during the course of his trial and the court continues the trial, counsel for the accused is not thereby deprived of any authority he

may have to continue to act for the accused in the proceedings.

R.S., 1985, c. C-46, s. 475; R.S., 1985, c. 27 (1st Supp.), s. 185(F), c. 1 (4th Supp.), s. 18(F).

Special Jurisdiction

Special jurisdictions

476 For the purposes of this Act,

- (a)** where an offence is committed in or on any water or on a bridge between two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;
- (b)** where an offence is committed on the boundary of two or more territorial divisions or within five hundred metres of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;
- (c)** where an offence is committed in or on a vehicle employed in a journey, or on board a vessel employed on a navigable river, canal or inland water, the offence shall be deemed to have been committed in any territorial division through which the vehicle or vessel passed in the course of the journey or voyage on which the offence was committed, and where the center or other part of the road, or navigable river, canal or inland water on which the vehicle or vessel passed in the course of the journey or voyage is the boundary of two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;
- (d)** where an offence is committed in an aircraft in the course of a flight of that aircraft, it shall be deemed to have been committed
 - (i)** in the territorial division in which the flight commenced,
 - (ii)** in any territorial division over which the aircraft passed in the course of the flight, or
 - (iii)** in the territorial division in which the flight ended; and
- (e)** where an offence is committed in respect of the mail in the course of its door-to-door delivery, the offence shall be deemed to have been committed in any territorial division through which the mail was carried on that delivery.

R.S., 1985, c. C-46, s. 476; R.S., 1985, c. 27 (1st Supp.), s. 186; 1992, c. 1, s. 58.

Definition of *ship*

477 (1) In [sections 477.1 to 477.4](#), **ship** includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, without regard to method or lack of propulsion.

Saving

(2) Nothing in [sections 477.1 to 477.4](#) limits the operation of any other Act of Parliament or the jurisdiction that a court may exercise apart from those sections.

Offences outside of Canada

477.1 Every person who commits an act or omission that, if it occurred in Canada, would be an offence under a federal law, within the meaning of [section 2](#) of the *Oceans Act*, is deemed to have committed that act or omission in Canada if it is an act or omission

(a) in the exclusive economic zone of Canada that

(i) is committed by a person who is in the exclusive economic zone of Canada in connection with exploring or exploiting, conserving or managing the natural resources, whether living or non-living, of the exclusive economic zone of Canada, and

(ii) is committed by or in relation to a person who is a Canadian citizen or a permanent resident within the meaning of [subsection 2\(1\)](#) of the *Immigration and Refugee Protection Act*;

(b) that is committed in a place in or above the continental shelf of Canada and that is an offence in that place by virtue of [section 20](#) of the *Oceans Act*;

(c) that is committed outside Canada on board or by means of a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;

(d) that is committed outside Canada in the course of hot pursuit; or

(e) that is committed outside the territory of any state by a Canadian citizen.

1990, c. 44, s. 15; 1996, c. 31, s. 68; [2001, c. 27, s. 247](#).

Consent of Attorney General of Canada

477.2 (1) No proceedings in respect of an offence committed in or on the territorial sea of Canada shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced, if the accused is not a Canadian citizen and the offence is alleged to have been committed on board any ship registered outside Canada.

Exception

(1.1) Subsection (1) does not apply to proceedings by way of summary conviction.

Consent of Attorney General of Canada

(2) No proceedings in respect of which courts have jurisdiction by virtue only of [paragraph 477.1\(a\)](#) or (b) shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced, if the accused is not a Canadian citizen and the offence is alleged to have been committed on board any ship registered outside Canada.

Consent of Attorney General of Canada

(3) No proceedings in respect of which courts have jurisdiction by virtue only of [paragraph 477.1\(d\)](#) or (e) shall be continued unless the consent of the Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.

Consent to be filed

(4) The consent of the Attorney General required by subsection (1), (2) or (3) must be filed with the clerk of the court in which the proceedings have been instituted.

1990, c. 44, s. 15; 1994, c. 44, s. 32; 1996, c. 31, s. 69.

Exercising powers of arrest, entry, etc.

477.3 (1) Every power of arrest, entry, search or seizure or other power that could be exercised in Canada in respect of an act or omission referred to in [section 477.1](#) may be exercised, in the circumstances referred to in that section,

(a) at the place or on board the ship or marine installation or structure, within the meaning of [section 2](#) of the *Oceans Act*, where the act or omission occurred; or

(b) where hot pursuit has been commenced, at any place on the seas, other than a place that is part of the territorial sea of any other state.

Arrest, search, seizure, etc.

(2) A justice or judge in any territorial division in Canada has jurisdiction to authorize an arrest, entry, search or seizure or an investigation or other ancillary matter related to an offence

(a) committed in or on the territorial sea of Canada or any area of the sea that forms part of the internal waters of Canada, or

(b) referred to in [section 477.1](#)

in the same manner as if the offence had been committed in that territorial division.

Limitation

(3) Where an act or omission that is an offence by virtue only of [section 477.1](#) is alleged to have been committed on board any ship registered outside Canada, the powers referred to in subsection (1) shall not be exercised outside Canada with respect to that act or omission without the consent of the Attorney General of Canada.

1990, c. 44, s. 15; 1996, c. 31, s. 70.

477.4 (1) and (2) [Repealed, 1996, c. 31, s. 71]

Evidence

(3) In proceedings in respect of an offence,

(a) a certificate referred to in [subsection 23\(1\)](#) of the *Oceans Act*, or

(b) a certificate issued by or under the authority of the Minister of Foreign Affairs containing a statement that any geographical location specified in the certificate was,

at any time material to the proceedings, in an area of a fishing zone of Canada that is not within the internal waters of Canada or the territorial sea of Canada or outside the territory of any state,

is conclusive proof of the truth of the statement without proof of the signature or official character of the person appearing to have issued the certificate.

Certificate cannot be compelled

(4) A certificate referred to in subsection (3) is admissible in evidence in proceedings referred to in that subsection but its production cannot be compelled.

1990, c. 44, s. 15; 1995, c. 5, s. 25; 1996, c. 31, s. 71.

Offence committed entirely in one province

478 (1) Subject to this Act, a court in a province shall not try an offence committed entirely in another province.

Exception

(2) Every proprietor, publisher, editor or other person charged with the publication of a defamatory libel in a newspaper or with conspiracy to publish a defamatory libel in a newspaper shall be dealt with, indicted, tried and punished in the province where he resides or in which the newspaper is printed.

Idem

(3) An accused who is charged with an offence that is alleged to have been committed in Canada outside the province in which the accused is may, if the offence is not an offence mentioned in [section 469](#) and

(a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, if the Attorney General of Canada consents, or

(b) in any other case, if the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the province where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.

Where accused ordered to stand trial

(4) Notwithstanding that an accused described in subsection (3) has been ordered to stand trial or that an indictment has been preferred against the accused in respect of the offence to which he desires to plead guilty, the accused shall be deemed simply to stand

charged of that offence without a preliminary inquiry having been conducted or an indictment having been preferred with respect thereto.

Definition of *newspaper*

(5) In this section, ***newspaper*** has the same meaning as in [section 297](#).

R.S., 1985, c. C-46, s. 478; R.S., 1985, c. 27 (1st Supp.), ss. 64, 101(E); 1994, c. 44, s. 33(E).

Offence outstanding in same province

479 Where an accused is charged with an offence that is alleged to have been committed in the province in which he is, he may, if the offence is not an offence mentioned in [section 469](#) and

(a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents, or

(b) in any other case, the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the place where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.

R.S., 1985, c. C-46, s. 479; R.S., 1985, c. 27 (1st Supp.), s. 65; 1994, c. 44, s. 34(E).

Offence in unorganized territory

480 (1) Where an offence is committed in an unorganized tract of country in any province or on a lake, river or other water therein, not included in a territorial division or in a provisional judicial district, proceedings in respect thereof may be commenced and an accused may be charged, tried and punished in respect thereof within any territorial division or provisional judicial district of the province in the same manner as if the offence had been committed within that territorial division or provisional judicial district.

New territorial division

(2) Where a provisional judicial district or a new territorial division is constituted in an unorganized tract referred to in subsection (1), the jurisdiction conferred by that subsection continues until appropriate provision is made by law for the administration of criminal justice within the provisional judicial district or new territorial division.

R.S., c. C-34, s. 436.

Offence not in a province

481 Where an offence is committed in a part of Canada not in a province, proceedings in respect thereof may be commenced and the accused may be charged, tried and punished

within any territorial division in any province in the same manner as if that offence had been committed in that territorial division.

R.S., c. C-34, s. 437.

Offence in Canadian waters

481.1 Where an offence is committed in or on the territorial sea of Canada or any area of the sea that forms part of the internal waters of Canada, proceedings in respect thereof may, whether or not the accused is in Canada, be commenced and an accused may be charged, tried and punished within any territorial division in Canada in the same manner as if the offence had been committed in that territorial division.

1996, c. 31, s. 72.

Offence outside Canada

481.2 Subject to this or any other Act of Parliament, where an act or omission is committed outside Canada and the act or omission is an offence when committed outside Canada under this or any other Act of Parliament, proceedings in respect of the offence may, whether or not the accused is in Canada, be commenced, and an accused may be charged, tried and punished within any territorial division in Canada in the same manner as if the offence had been committed in that territorial division.

1996, c. 31, s. 72; [2008, c. 18, s. 10](#).

Appearance of accused at trial

481.3 For greater certainty, the provisions of this Act relating to

- (a) the requirement of the appearance of an accused at proceedings, and
- (b) the exceptions to that requirement

apply to proceedings commenced in any territorial division pursuant to [section 481](#), [481.1](#) or [481.2](#).

1996, c. 31, s. 72.

Rules of Court

Power to make rules

482 (1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.

Power to make rules

(2) The following courts may make rules of court not inconsistent with this Act or any other Act of Parliament that are applicable to any prosecution, proceeding, including a preliminary inquiry or proceedings within the meaning of Part XXVII, action or appeal, as

the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to the prosecution, proceeding, action or appeal:

- (a) every court of criminal jurisdiction for a province;
- (b) every appeal court within the meaning of [section 812](#) that is not a court referred to in subsection (1);
- (c) the Ontario Court of Justice;
- (d) the Court of Quebec and every municipal court in the Province of Quebec;
- (e) the Provincial Court of Nova Scotia;
- (f) the Provincial Court of New Brunswick;
- (g) the Provincial Court of Manitoba;
- (h) the Provincial Court of British Columbia;
- (i) the Provincial Court of Prince Edward Island;
- (j) the Provincial Court of Saskatchewan;
- (k) the Provincial Court of Alberta;
- (l) the Provincial Court of Newfoundland and Labrador;
- (m) the Territorial Court of Yukon;
- (n) the Territorial Court of the Northwest Territories; and
- (o) the Nunavut Court of Justice.

Purpose of rules

(3) Rules under subsection (1) or (2) may be made

- (a) generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;
- (b) to regulate the sittings of the court or any division thereof, or of any judge of the court sitting in chambers, except in so far as they are regulated by law;
- (c) to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under [section 625.1](#), proceedings with respect to judicial interim release and preliminary inquiries and, in the case of rules under subsection (1), proceedings with respect to *mandamus*, *certiorari*, *habeas corpus*, prohibition and *procedendo* and proceedings on an appeal under [section 830](#); and
- (d) to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence and, without restricting the generality of this paragraph,
 - (i) for furnishing necessary forms and instructions in relation to notices of appeal or applications for leave to appeal to officials or other persons requiring or

demanding them,

(ii) for ensuring the accuracy of notes taken at a trial and the verification of any copy or transcript,

(iii) for keeping writings, exhibits or other things connected with the proceedings on the trial,

(iv) for securing the safe custody of property during the period in which the operation of an order with respect to that property is suspended under [subsection 689\(1\)](#), and

(v) for providing that the Attorney General and counsel who acted for the Attorney General at the trial be supplied with certified copies of writings, exhibits and things connected with the proceedings that are required for the purposes of their duties.

Publication

(4) Rules of court that are made under this section must be published or otherwise made available to the public.

Regulations to secure uniformity

(5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act.

R.S., 1985, c. C-46, s. 482; R.S., 1985, c. 27 (1st Supp.), s. 66; 1994, c. 44, s. 35; [2002, c. 13, s. 17](#); [2015, c. 3, s. 50](#); [2019, c. 25, s. 186](#).

Power to make rules respecting case management

482.1 (1) A court referred to in [subsection 482\(1\)](#) or (2) may make rules for case management, including rules

(a) for the determination of any matter that would assist the court in effective and efficient case management;

(b) permitting personnel of the court to deal with administrative matters relating to proceedings out of court; and

(c) establishing case management schedules.

Compliance with directions

(2) The parties to a case shall comply with any direction made in accordance with a rule made under subsection (1).

Summons or warrant

(3) If rules are made under subsection (1), a court, justice or judge may issue a summons or warrant to compel the presence of the accused at case management proceedings.

Provisions to apply

(4) [Sections 512](#) and [512.3](#) apply, with any modifications that the circumstances require, to the issuance of a summons or a warrant under subsection (3).

Subsections 482(4) and (5) to apply

(5) [Subsections 482\(4\)](#) and [\(5\)](#) apply, with any modifications that the circumstances require, to rules made under subsection (1).

(6) [\[Repealed, 2019, c. 25, s. 187\]](#)

[2002, c. 13, s. 18](#); [2019, c. 25, s. 187](#); [2022, c. 17, s. 13](#).

PART XV

Special Procedure and Powers

General Powers of Certain Officials

Officials with powers of two justices

483 Every judge or provincial court judge authorized by the law of the province in which he is appointed to do anything that is required to be done by two or more justices may do alone anything that this Act or any other Act of Parliament authorizes two or more justices to do.

R.S., 1985, c. C-46, s. 483; R.S., 1985, c. 27 (1st Supp.), s. 203.

Preserving order in court

484 Every judge or provincial court judge has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.

R.S., 1985, c. C-46, s. 484; R.S., 1985, c. 27 (1st Supp.), s. 203.

Procedural irregularities

485 (1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.

When accused not appearing personally or in person

(1.1) Jurisdiction over an accused is not lost by reason of the failure of the accused to appear personally or in person, so long as the provisions of this Act or a rule made under [section 482](#) or [482.1](#) permitting the accused not to appear personally or in person apply.

Summons or warrant

(2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

Dismissal for want of prosecution

(3) Where no summons or warrant is issued under subsection (2) within the period provided therein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with [section 485.1](#).

Adjournment and order

(4) Where, in the opinion of the court, judge, provincial court judge or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1), the court, judge, provincial court judge or justice may adjourn the proceeding and may make such order as it or he considers appropriate.

Part XVI to apply

(5) The provisions of Part XVI apply with such modifications as the circumstances require where a summons or warrant is issued under subsection (2).

R.S., 1985, c. C-46, s. 485; R.S., 1985, c. 27 (1st Supp.), s. 67; 1992, c. 1, s. 60(F); 1997, c. 18, s. 40; [2002, c. 13, s. 19](#); [2019, c. 25, s. 188](#); [2022, c. 17, s. 14](#).

Recommencement where dismissal for want of prosecution

485.1 Where an indictment in respect of a transaction is dismissed or deemed by any provision of this Act to be dismissed for want of prosecution, a new information shall not be laid and a new indictment shall not be preferred before any court in respect of the same transaction without

(a) the personal consent in writing of the Attorney General or Deputy Attorney General, in any prosecution conducted by the Attorney General or in which the Attorney General intervenes; or

(b) the written order of a judge of that court, in any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene.

R.S., 1985, c. 27 (1st Supp.), s. 67.

Summons — [Identification of Criminals Act](#)

485.2 (1) A justice or judge may, on application in writing and on oath in Form 6.1, issue a summons, in Form 6.2, requiring an accused or offender to appear at a time and place stated in it for the purposes of the [Identification of Criminals Act](#) if

(a) the accused is charged with, or the offender has been determined to be guilty of, an offence referred to in paragraph 2(1)(c) of that Act;

(b) the accused or offender was previously required to appear for the purposes of that Act and the measurements, processes or operations referred to in that Act were not completed; and

(c) the justice or judge is satisfied that the reasons for the measurements, processes or operations not having been completed were exceptional.

Limitation

(2) Subsection (1) applies in respect of an offender only if proceedings are ongoing in relation to the matter for which they were previously required to appear for the purposes of the *Identification of Criminals Act* and for which the sentencing proceedings have not concluded.

Reasons

(3) The application must state the reasons why the measurements, processes or operations were not completed.

***Ex parte* application**

(4) A justice or judge may proceed *ex parte* to determine an application made under subsection (1).

Application — telecommunication

(5) The application may also be made by any means of telecommunication that produces a writing.

Alternative to oath

(6) A person who uses a means of telecommunication referred to in subsection (5) may, instead of swearing an oath, make a statement in writing stating that all matters contained in the application are true to their knowledge and belief, and that statement is deemed to be a statement made under oath.

Contents of summons

(7) The summons must

(a) be directed to the accused or offender;

(b) set out briefly the offence in respect of which the accused is charged or the offender has been determined to be guilty; and

(c) set out a summary of [subsection 145\(3\)](#), [section 512.1](#) and [subsection 524\(4\)](#).

Service of summons

(8) The summons must be served by a peace officer who shall either deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, leave

it for the person at their latest or usual place of residence with any person found there who appears to be at least 16 years of age.

[2022, c. 17, s. 15.](#)

Exclusion of public

486 (1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.

Application

(1.1) The application may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

(2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider

- (a)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
- (b)** the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;
- (c)** the ability of the witness to give a full and candid account of the acts complained of if the order were not made;
- (d)** whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- (e)** the protection of justice system participants who are involved in the proceedings;
- (f)** whether effective alternatives to the making of the proposed order are available in the circumstances;
- (g)** the salutary and deleterious effects of the proposed order; and
- (h)** any other factor that the judge or justice considers relevant.

Reasons to be stated

(3) If an accused is charged with an offence under [section 151](#), [152](#), [153](#), [153.1](#) or [155](#), [subsection 160\(2\)](#) or [\(3\)](#) or [section 163.1](#), [170](#), [171](#), [171.1](#), [172](#), [172.1](#), [172.2](#), [173](#), [271](#), [272](#), [273](#), [279.01](#), [279.011](#), [279.02](#), [279.03](#), [286.1](#), [286.2](#) or [286.3](#) and the prosecutor or

the accused applies for an order under subsection (1), the judge or justice shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.

No adverse inference

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

R.S., 1985, c. C-46, s. 486; R.S., 1985, c. 27 (1st Supp.), s. 203, c. 19 (3rd Supp.), s. 14, c. 23 (4th Supp.), s. 1; 1992, c. 1, s. 60(F), c. 21, s. 9; 1993, c. 45, s. 7; 1997, c. 16, s. 6; 1999, c. 25, s. 2(Preamble); 2001, c. 32, s. 29, c. 41, ss. 16, 34, 133; 2002, c. 13, s. 20; 2005, c. 32, s. 15, c. 43, ss. 4, 8; 2010, c. 3, s. 4; 2012, c. 1, s. 28; 2014, c. 25, s. 21; 2015, c. 13, s. 13, c. 20, s. 21; 2019, c. 25, s. 189.

Support person — witnesses under 18 or who have a disability

486.1 (1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who has a mental or physical disability, or on application of such a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Other witnesses

(2) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

Application

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

(3) In determining whether to make an order under subsection (2), the judge or justice shall consider

- (a)** the age of the witness;
- (b)** the witness' mental or physical disabilities, if any;
- (c)** the nature of the offence;
- (d)** the nature of any relationship between the witness and the accused;

(e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;

(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and

(g) any other factor that the judge or justice considers relevant.

Witness not to be a support person

(4) The judge or justice shall not permit a witness to be a support person unless the judge or justice is of the opinion that doing so is necessary for the proper administration of justice.

No communication while testifying

(5) The judge or justice may order that the support person and the witness not communicate with each other while the witness testifies.

No adverse inference

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

2005, c. 32, s. 15; 2015, c. 13, s. 14.

Testimony outside court room — witnesses under 18 or who have a disability

486.2 (1) Despite [section 650](#), in any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, or on application of such a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Other witnesses

(2) Despite [section 650](#), in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

Application

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not

been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

(3) In determining whether to make an order under subsection (2), the judge or justice shall consider

- (a)** the age of the witness;
- (b)** the witness' mental or physical disabilities, if any;
- (c)** the nature of the offence;
- (d)** the nature of any relationship between the witness and the accused;
- (e)** whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- (f)** whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
- (f.1)** whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
- (g)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
- (h)** any other factor that the judge or justice considers relevant.

Same procedure for determination

(4) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.

Conditions of exclusion

(5) A witness shall not testify outside the court room in accordance with an order made under subsection (1) or (2) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

No adverse inference

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under subsection (1) or (2).

[2005, c. 32, s. 15](#); [2014, c. 17, s. 12](#); [2015, c. 13, s. 15](#), c. 20, s. 38.

Accused not to cross-examine witness under 18

486.3 (1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years, or on application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Accused not to cross-examine complainant — certain offences

(2) In any proceedings against an accused in respect of an offence under any of [sections 264, 271, 272 and 273](#), the judge or justice shall, on application of the prosecutor in respect of a witness who is a victim, or on application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Other witnesses

(3) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness who is not entitled to make an application under subsection (1) or (2), or on application of such a witness, order that the accused not personally cross-examine the witness if the judge or justice is of the opinion that the order would allow the giving of a full and candid account from the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice. If the order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Factors to be considered

(4) In determining whether to make an order under subsection (3), the judge or justice shall consider

- (a)** the age of the witness;
- (b)** the witness' mental or physical disabilities, if any;
- (c)** the nature of the offence;
- (d)** whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- (e)** the nature of any relationship between the witness and the accused;
- (f)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
- (g)** any other factor that the judge or justice considers relevant.

Application

(4.1) An application referred to in any of subsections (1) to (3) may be made during the proceedings to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

No adverse inference

(5) No adverse inference may be drawn from the fact that counsel is, or is not, appointed under this section.

[2005, c. 32, s. 15](#); [2015, c. 13, s. 16](#).

Non-disclosure of witness' identity

486.31 (1) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Hearing may be held

(2) The judge or justice may hold a hearing to determine whether the order should be made, and the hearing may be in private.

Factors to be considered

(3) In determining whether to make the order, the judge or justice shall consider

- (a)** the right to a fair and public hearing;
- (b)** the nature of the offence;
- (c)** whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- (d)** whether the order is needed to protect the security of anyone known to the witness;
- (e)** whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
- (e.1)** whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
- (f)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
- (g)** the importance of the witness' testimony to the case;
- (h)** whether effective alternatives to the making of the proposed order are available in the circumstances;

- (i) the salutary and deleterious effects of the proposed order; and
- (j) any other factor that the judge or justice considers relevant.

No adverse inference

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

2015, c. 13, s. 17, c. 20, s. 38.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under [section 151](#), [152](#), [153](#), [153.1](#), [155](#), [160](#), [162](#), [162.1](#), [163.1](#), [170](#), [171](#), [171.1](#), [172](#), [172.1](#), [172.2](#), [173](#), [213](#), [271](#), [272](#), [273](#), [279.01](#), [279.011](#), [279.02](#), [279.03](#), [280](#), [281](#), [286.1](#), [286.2](#), [286.3](#), [346](#) or [347](#), or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;

(b) on application made by the victim, the prosecutor or any such witness, make the order; and

(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

- (a)** as soon as feasible, inform the victim of their right to make an application for the order;
- (b)** on application of the victim or the prosecutor, make the order; and
- (c)** if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

Child sexual abuse and exploitation material

(3) In proceedings in respect of an offence under [section 163.1](#), a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes *child sexual abuse and exploitation material* within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Inquiry by court

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

- (a)** if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;
- (b)** if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and
- (c)** in any event, advise the prosecutor of their duty under subsection (3.2).

Duty to inform

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

- (a)** informed the witnesses and the victim who are the subject of the order of its existence;
- (b)** determined whether they wish to be the subject of the order; and
- (c)** informed them of their right to apply to revoke or vary the order.

Limitation

(4) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

Limitation — victim or witness

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

2005, c. 32, s. 15, c. 43, s. 8; 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18; 2019, c. 25, s. 190; 2023, c. 28, s. 2; 2024, c. 23, s. 6.

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under [section 486.4](#), on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences

(2.1) The offences for the purposes of subsection (2) are

(a) an offence under [section 423.1](#), [467.11](#), [467.111](#), [467.12](#) or [467.13](#), or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1), 20.1(1), 20.2(1), 20.3(1), 20.4(1) or 22(1) of the *Foreign Interference and Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Foreign Interference and Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation

(3) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

Limitation — victim, etc.

(3.1) An order made under this section does not apply in respect of the disclosure of information by the victim, witness or justice system participant when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim, or witness or justice system participant.

Application and notice

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Duties — judge or justice

(5.1) If the prosecutor makes an application for an order under subsection (1) or (2), the judge or justice shall

(a) if the victim, witness or justice system participant is present, inquire of them if they wish to be the subject of the order;

(b) if the victim, witness or justice system participant is not present, inquire of the prosecutor if, before the application was made, they determined whether the victim, witness or justice system participant wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (8.2).

Hearing may be held

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

Factors to be considered

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

Conditions

(8) An order may be subject to any conditions that the judge or justice thinks fit.

Supplementary duty — judge or justice

(8.1) If an order is made, the judge or justice shall, as soon as feasible, inform the victims, witnesses and justice system participants who are the subject of that order of its existence and of their right to apply to revoke or vary it.

Duty to inform

(8.2) If the prosecutor makes the application, they shall, as soon as feasible after the judge or justice makes the order, inform the judge or justice that they have

- (a) informed the victims, witnesses and justice system participants who are the subject of the order of its existence;
- (b) determined whether they wish to be the subject of the order; and
- (c) informed them of their right to apply to revoke or vary the order.

Publication prohibited

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

- (a) the contents of an application;
- (b) any evidence taken, information given or submissions made at a hearing under subsection (6); or
- (c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

2005, c. 32, s. 15; 2015, c. 13, s. 19; 2023, c. 28, s. 3; 2024, c. 16, s. 57; 2024, c. 16, s. 69.

Application — vary or revoke

486.51 (1) If a person who is the subject of an order made under [section 486.4](#) or [486.5](#) requests that the prosecutor have it varied or revoked, the prosecutor shall, as soon as feasible, make an application to vary or revoke the order on their behalf.

Order — vary or revoke

(2) If an application to vary or revoke an order made under [section 486.4](#) or [486.5](#) is made by the person who is the subject of the order or by any other person, including a prosecutor, who is acting on their behalf, the court that made the order or, if that court is for any reason unable to act, another court of equivalent jurisdiction in the same province shall, without holding a hearing, vary or revoke the order, unless the court is of the opinion that to do so may affect the privacy interests of any person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person.

Hearing

(3) If the court is of the opinion that varying or revoking the order that is the subject of an application referred to in subsection (2) may affect the privacy interests of any person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person, the court shall hold a hearing to determine whether the order should be varied or revoked.

Factor

(4) In order to determine whether the order should be varied, the court shall take into account whether it is possible to do so in a manner that protects the privacy interests of any other person who is the subject of any order prohibiting the publication in any

document or the broadcasting or transmission in any way of information that could identify that person.

Notice

(5) The applicant is not required to provide notice of the application to vary or revoke the order to the accused.

Submissions

(6) The accused shall not be permitted to make submissions in relation to the application.

Notice of change

(7) If the order is varied or revoked, the prosecutor shall notify the accused.

[2023, c. 28, s. 4.](#)

Offence

486.6 (1) Every person who fails to comply with an order made under any of [subsections 486.4\(1\) to \(3\)](#) or [subsection 486.5\(1\) or \(2\)](#) is guilty of an offence punishable on summary conviction.

Prosecution — limitation

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

- (a)** the person knowingly failed to comply with the order;
- (b)** the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and
- (c)** a warning to the individual is not appropriate.

Application of order

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

[2005, c. 32, s. 15; 2019, c. 13, s. 151; 2023, c. 28, s. 5.](#)

Security of witnesses

486.7 (1) In any proceedings against an accused, the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, make any order, other than one that may be made under any of [sections 486 to 486.5](#), if the judge or

justice is of the opinion that the order is necessary to protect the security of any witness and is otherwise in the interest of the proper administration of justice.

Application

(2) The application may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

- (3)** In determining whether to make the order, the judge or justice shall consider
- (a)** the age of the witness;
 - (b)** the witness's mental or physical disabilities, if any;
 - (c)** the right to a fair and public hearing;
 - (d)** the nature of the offence;
 - (e)** whether the witness needs the order to protect them from intimidation or retaliation;
 - (f)** whether the order is needed to protect the security of anyone known to the witness;
 - (g)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
 - (h)** the importance of the witness's testimony to the case;
 - (i)** whether effective alternatives to the making of the proposed order are available in the circumstances;
 - (j)** the salutary and deleterious effects of the proposed order; and
 - (k)** any other factor that the judge or justice considers relevant.

No adverse inference

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

[2015, c. 20, s. 22.](#)

Information for search warrant

487 (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

- (a)** anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

(c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or

(c.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect of it to, a justice in accordance with [section 489.1](#).

Execution in Canada

(2) A warrant issued under subsection (1) may be executed at any place in Canada. A public officer named in the warrant, or any peace officer, who executes the warrant must have authority to act in that capacity in the place where the warrant is executed.

Operation of computer system and copying equipment

(2.1) A person authorized under this section to search a computer system in a building or place for data may

(a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;

(b) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

(c) seize the print-out or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the data.

Duty of person in possession or control

(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(a) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;

(b) to obtain a hard copy of the data and to seize it; and

(c) to use or cause to be used any copying equipment at the place to make copies of the data.

Form

(3) A search warrant issued under this section may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.

(4) [Repealed, 2019, c. 25, s. 191]

R.S., 1985, c. C-46, s. 487; R.S., 1985, c. 27 (1st Supp.), s. 68; 1994, c. 44, s. 36; 1997, c. 18, s. 41, c. 23, s. 12; 1999, c. 5, s. 16; 2008, c. 18, s. 11; 2019, c. 25, s. 191; 2022, c. 17, s. 16.

Information for general warrant

487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#) may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

(b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

Limitation

(2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

Search or seizure to be reasonable

(3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

Video surveillance

(4) A warrant issued under subsection (1) that authorizes a peace officer to observe, by means of a television camera or other similar electronic device, any person who is engaged in activity in circumstances in which the person has a reasonable expectation of privacy shall contain such terms and conditions as the judge considers advisable to

ensure that the privacy of the person or of any other person is respected as much as possible.

Other provisions to apply

(5) The definition *offence* in [section 183](#) and [sections 183.1, 184.2, 184.3](#) and [185 to 188.2](#), [subsection 189\(5\)](#), and [sections 190, 193](#) and [194 to 196](#) apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.

Notice after covert entry

(5.1) A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require, as part of the terms and conditions referred to in subsection (3), that notice of the entry and search be given within any time after the execution of the warrant that the judge considers reasonable in the circumstances.

Extension of period for giving notice

(5.2) Where the judge who issues a warrant under subsection (1) or any other judge having jurisdiction to issue such a warrant is, on the basis of an affidavit submitted in support of an application to vary the period within which the notice referred to in subsection (5.1) is to be given, is satisfied that the interests of justice warrant the granting of the application, the judge may grant an extension, or a subsequent extension, of the period, but no extension may exceed three years.

Execution in Canada

(6) A warrant issued under subsection (1) may be executed at any place in Canada. Any peace officer who executes the warrant must have authority to act as a peace officer in the place where it is executed.

(7) [\[Repealed, 2022, c. 17, s. 17\]](#)

1993, c. 40, s. 15; 1997, c. 18, s. 42, c. 23, s. 13; [2019, c. 25, s. 192](#); [2022, c. 17, s. 17](#).

Definitions

487.011 The following definitions apply in this section and in [sections 487.012 to 487.0199](#).

computer data has the same meaning as in [subsection 342.1\(2\)](#). (*données informatiques*)

data means representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device. (*données*)

document means a medium on which data is registered or marked. (*document*)

judge means a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec. (*juge*)

public officer means a public officer who is appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament. (*fonctionnaire public*)

tracking data means data that relates to the location of a transaction, individual or thing. (*données de localisation*)

transmission data means data that

- (a) relates to the telecommunication functions of dialling, routing, addressing or signalling;
- (b) is transmitted to identify, activate or configure a device, including a computer program as defined in [subsection 342.1\(2\)](#), in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and
- (c) does not reveal the substance, meaning or purpose of the communication.
(*données de transmission*)

[2004, c. 3, s. 7](#); [2014, c. 31, s. 20](#).

Preservation demand

487.012 (1) A peace officer or public officer may make a demand to a person in Form 5.001 requiring them to preserve computer data that is in their possession or control when the demand is made.

Conditions for making demand

(2) The peace officer or public officer may make the demand only if they have reasonable grounds to suspect that

- (a) an offence has been or will be committed under this or any other Act of Parliament or has been committed under a law of a foreign state;
- (b) in the case of an offence committed under a law of a foreign state, an investigation is being conducted by a person or authority with responsibility in that state for the investigation of such offences; and
- (c) the computer data is in the person's possession or control and will assist in the investigation of the offence.

Limitation

(3) A demand may not be made to a person who is under investigation for the offence referred to in paragraph (2)(a).

Expiry and revocation of demand

(4) A peace officer or public officer may revoke the demand by notice given to the person at any time. Unless the demand is revoked earlier, the demand expires

(a) in the case of an offence that has been or will be committed under this or any other Act of Parliament, 21 days after the day on which it is made; and

(b) in the case of an offence committed under a law of a foreign state, 90 days after the day on which it is made.

Conditions in demand

(5) The peace officer or public officer who makes the demand may impose any conditions in the demand that they consider appropriate — including conditions prohibiting the disclosure of its existence or some or all of its contents — and may revoke a condition at any time by notice given to the person.

No further demand

(6) A peace officer or public officer may not make another demand requiring the person to preserve the same computer data in connection with the investigation.

[2004, c. 3, s. 7](#); [2014, c. 31, s. 20](#).

Preservation order — computer data

487.013 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to preserve computer data that is in their possession or control when they receive the order.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.002

(a) that there are reasonable grounds to suspect that an offence has been or will be committed under this or any other Act of Parliament or has been committed under a law of a foreign state, that the computer data is in the person's possession or control and that it will assist in the investigation of the offence; and

(b) that a peace officer or public officer intends to apply or has applied for a warrant or an order in connection with the investigation to obtain a document that contains the computer data.

Offence against law of foreign state

(3) If an offence has been committed under a law of a foreign state, the justice or judge must also be satisfied that a person or authority with responsibility in that state for the investigation of such offences is conducting the investigation.

Form

(4) The order is to be in Form 5.003.

Limitation

(5) A person who is under investigation for an offence referred to in paragraph (2)(a) may not be made subject to an order.

Expiry of order

(6) Unless the order is revoked earlier, it expires 90 days after the day on which it is made.

2004, c. 3, s. 7; 2014, c. 31, s. 20.

Keep account open or active order

487.0131 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to keep an account specified in the order open or active unless the holder of the account requests that the person close or deactivate the account.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.0031 that there are reasonable grounds to suspect that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) keeping the account open or active will assist in the investigation of the offence.

Form

(3) The order is to be in Form 5.0032.

Notification

(4) The order is to require the person to notify a peace officer or public officer named in the order as soon as practicable after the account is closed or deactivated at the request of the holder of the account.

Limitation

(5) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

Expiry of order

(6) Unless the order is revoked earlier, it expires 60 days after the day on which it is made.

Renewals

(7) A justice or judge may renew the order for a period of not more than 60 days on *ex parte* application made by a peace officer or public officer indicating the reason and

period for which the renewal is required.

Conditions for renewal

(8) Before renewing the order, the justice or judge must be satisfied by information on oath in Form 5.0031 that the conditions specified in subsection (2) are met.

[2024, c. 17, s. 356.](#)

General production order

487.014 (1) Subject to [sections 487.015 to 487.018](#), on *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

Form

(3) The order is to be in Form 5.005.

Limitation

(4) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

[2004, c. 3, s. 7;](#) [2014, c. 31, s. 20.](#)

Production order — specified dates

487.0141 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control on any of the dates specified in the order or prepare and produce a document containing data that is in their possession or control on any of the dates specified in the order.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data, if it is in the person's possession or control on any of the dates to be specified in the order, will afford evidence respecting the commission of the offence.

Form

(3) The order is to be in Form 5.0051.

Dates specified in order

(4) The order may specify up to 10 dates that fall within the 60-day period after the day on which it is made.

Suspicious transactions

(5) The order may also require the person to produce to a peace officer or public officer named in the order a copy of all reports made under any of [sections 7, 7.1 and 9](#) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* during the period the order is in effect if the justice or judge is satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that the information contained in such a report will afford evidence respecting the commission of the offence referred to in subsection (2).

Restrictions

(6) The person must not be required to

- (a) produce documents more than once in any 72-hour period;
- (b) produce a document that is a copy of a document that was in their possession or control before the day on which the order is made; or
- (c) prepare and produce a document that contains data that was in their possession or control before the day on which the order is made.

Limitation

(7) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

Expiry of order

(8) Unless the order is revoked earlier, it expires 60 days after the day on which it is made.

Renewals

(9) A justice or judge may renew the order for a period of not more than 60 days on *ex parte* application made by a peace officer or public officer indicating the reason and period for which the renewal is required.

Conditions for renewal

(10) Before renewing the order, the justice or judge must be satisfied by information on oath in Form 5.004 that the conditions specified in subsection (2) are met.

Dates specified in renewed order

(11) If the order is renewed, it may specify up to 10 dates during the period for which it is renewed.

[2024, c. 17, s. 357.](#)

Production order to trace specified communication

487.015 (1) On *ex parte* application made by a peace officer or public officer for the purpose of identifying a device or person involved in the transmission of a communication, a justice or judge may order a person to prepare and produce a document containing transmission data that is related to that purpose and that is, when they are served with the order, in their possession or control.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to suspect that

- (a)** an offence has been or will be committed under this or any other Act of Parliament;
- (b)** the identification of a device or person involved in the transmission of a communication will assist in the investigation of the offence; and
- (c)** transmission data that is in the possession or control of one or more persons whose identity is unknown when the application is made will enable that identification.

Form

(3) The order is to be in Form 5.006.

Service

(4) A peace officer or public officer may serve the order on any person who was involved in the transmission of the communication and whose identity was unknown when the application was made

- (a)** within 60 days after the day on which the order is made; or
- (b)** within one year after the day on which the order is made, in the case of an offence under [section 467.11](#), [467.12](#) or [467.13](#), an offence committed for the benefit of, at the direction of or in association with a criminal organization, or a terrorism offence.

Limitation

(5) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

Report

(6) A peace officer or public officer named in the order must provide a written report to the justice or judge who made the order as soon as feasible after the person from whom the communication originated is identified or after the expiry of the period referred to in subsection (4), whichever occurs first. The report must state the name and address of each person on whom the order was served, and the date of service.

[2004, c. 3, s. 7](#); [2014, c. 31, s. 20](#).

Production order — transmission data

487.016 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to prepare and produce a document containing transmission data that is in their possession or control when they receive the order.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to suspect that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the transmission data is in the person's possession or control and will assist in the investigation of the offence.

Form

(3) The order is to be in Form 5.007.

Limitation

(4) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

[2004, c. 3, s. 7](#); [2014, c. 31, s. 20](#).

Production order — tracking data

487.017 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a person to prepare and produce a document containing tracking data that is in their possession or control when they receive the order.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to suspect that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the tracking data is in the person's possession or control and will assist in the investigation of the offence.

Form

(3) The order is to be in Form 5.007.

Limitation

(4) A person who is under investigation for the offence referred to in subsection (2) may not be made subject to an order.

2004, c. 3, s. 7; 2014, c. 31, s. 20.

Production order — financial data

487.018 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may order a financial institution, as defined in [section 2](#) of the *Bank Act*, or a person or entity referred to in [section 5](#) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, to prepare and produce a document setting out the following data that is in their possession or control when they receive the order:

- (a)** the account number of a person named in the order or the name of a person whose account number is specified in the order, as well as, in the case of digital assets, including virtual currency, the name and account number of a person whose identifier associated with digital assets is specified in the order;
- (b)** the type of account;
- (c)** the status of the account; and
- (d)** the date on which it was opened or closed.

Identification of person

(2) For the purpose of confirming the identity of a person who is named or whose account number or identifier associated with digital assets is specified in the order, the order may also require the institution, person or entity to prepare and produce a document setting out the following data that is in their possession or control:

- (a)** the date of birth of a person who is named or whose account number or identifier associated with digital assets is specified in the order;
- (b)** that person's current address; and
- (c)** any previous addresses of that person.

Conditions for making order

(3) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to suspect that

- (a)** an offence has been or will be committed under this or any other Act of Parliament; and
- (b)** the data is in the possession or control of the institution, person or entity and will assist in the investigation of the offence.

Form

(4) The order is to be in Form 5.008.

Limitation

(5) A financial institution, person or entity that is under investigation for the offence referred to in subsection (3) may not be made subject to an order.

[2014, c. 31, s. 20](#); [2024, c. 15, s. 312](#).

Conditions in preservation and production orders

487.019 (1) An order made under any of [sections 487.013 to 487.018](#) may contain any conditions that the justice or judge considers appropriate including, in the case of an order made under [section 487.014](#) or [487.0141](#), conditions to protect a privileged communication between a person who is qualified to give legal advice and their client.

Effect of order

(2) The order has effect throughout Canada.

Power to revoke or vary order

(3) On *ex parte* application made by a peace officer or public officer, the justice or judge who made the order — or a judge in the judicial district where the order was made — may, on the basis of an information on oath in Form 5.0081, revoke or vary the order. The peace officer or public officer must give notice of the revocation or variation to the person who is subject to the order as soon as feasible.

[2014, c. 31, s. 20](#); [2019, c. 25, s. 193](#); [2024, c. 17, s. 358](#).

Order prohibiting disclosure

487.0191 (1) On *ex parte* application made by a peace officer or public officer, a justice or judge may make an order prohibiting a person from disclosing the existence or some or all of the contents of a preservation demand made under [section 487.012](#) or an order made under any of [sections 487.013 to 487.018](#) during the period set out in the order.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.009 that there are reasonable grounds to believe that the disclosure during that period would jeopardize the conduct of the investigation of the offence to which the demand or order relates.

Form

(3) The order is to be in Form 5.0091.

Application to revoke or vary order

(4) A peace officer or a public officer or a person, financial institution or entity that is subject to an order made under subsection (1) may apply in writing to the justice or judge who made the order — or to a judge in the judicial district where the order was made — to revoke or vary the order.

2014, c. 31, s. 20; 2024, c. 17, s. 359.

Particulars — production orders

487.0192 (1) An order made under any of [sections 487.014](#), [487.0141](#) and [487.016](#) to [487.018](#) must require a person, financial institution or entity to produce the document to a peace officer or public officer named in the order within the time, at the place and in the form specified in the order.

Particulars — production order to trace specified communication

(2) An order made under [section 487.015](#) must require a person to produce the document to a peace officer or public officer named in the order as soon as feasible after they are served with the order at the place and in the form specified in the order.

Form of production

(3) For greater certainty, an order under any of [sections 487.014](#) to [487.018](#) may specify that a document may be produced on or through an electro-magnetic medium.

Non-application

(4) For greater certainty, [sections 489.1](#) and [490](#) do not apply to a document that is produced under an order under any of [sections 487.014](#) to [487.018](#).

Probative force of copies

(5) Every copy of a document produced under [section 487.014](#) or [487.0141](#) is admissible in evidence in proceedings under this or any other Act of Parliament on proof by affidavit that it is a true copy and has the same probative force as the document would have if it were proved in the ordinary way.

Canada Evidence Act

(6) A document that is prepared for the purpose of production is considered to be original for the purposes of the [Canada Evidence Act](#).

2014, c. 31, s. 20; 2024, c. 17, s. 360.

Application for review of keep account open or active order

487.01921 (1) A person who is subject to an order made under [section 487.0131](#) may apply in writing to the justice or judge who made the order, or to a judge in the judicial district where the order was made, to revoke or vary the order.

Notice required

(2) The person may make the application only if they give at least three days' notice of their intention to do so to a peace officer or public officer named in the order.

Compliance with order

(3) The person must comply with the order until a decision is made with respect to the application.

Hearing

(4) The hearing of the application must be commenced within 14 days after the application is made or as soon as practicable after that period.

Revocation or variation of order

(5) The justice or judge may revoke or vary the order if they are satisfied that it is unreasonable in the circumstances to require the person to keep the account open or active.

[2024, c. 17, s. 361.](#)

Application for review of production order

487.0193 (1) Before they are required by an order made under any of [sections 487.014 to 487.018](#) to produce a document, a person, financial institution or entity may apply in writing to the justice or judge who made the order — or to a judge in the judicial district where the order was made — to revoke or vary the order.

Notice required

(2) The person, institution or entity may make the application only if they give notice of their intention to do so to a peace officer or public officer named in the order within 30 days after the day on which the order is made.

No obligation to produce

(3) The person, institution or entity is not required to prepare or produce the document until a final decision is made with respect to the application.

Revocation or variation of order

(4) The justice or judge may revoke or vary the order if satisfied that

(a) it is unreasonable in the circumstances to require the applicant to prepare or produce the document; or

(b) production of the document would disclose information that is privileged or otherwise protected from disclosure by law.

[2014, c. 31, s. 20.](#)

Destruction of preserved computer data and documents — preservation demand

487.0194 (1) A person to whom a preservation demand is made under [section 487.012](#) shall destroy the computer data that would not be retained in the ordinary course of business and any document that is prepared for the purpose of preserving computer data under that section as soon as feasible after the demand expires or is revoked, unless they are subject to an order made under any of [sections 487.013](#) to [487.017](#) with respect to the computer data.

Destruction of preserved computer data and documents — preservation order

(2) A person who is subject to a preservation order made under [section 487.013](#) shall destroy the computer data that would not be retained in the ordinary course of business and any document that is prepared for the purpose of preserving computer data under that section as soon as feasible after the order expires or is revoked, unless they are subject to a new preservation order or to a production order made under any of [sections 487.014](#) to [487.017](#) with respect to the computer data.

Destruction of preserved computer data and documents — production order

(3) A person who is subject to a production order made under any of [sections 487.014](#) to [487.017](#) with respect to computer data that they preserved under a preservation demand or order made under [section 487.012](#) or [487.013](#) shall destroy the computer data that would not be retained in the ordinary course of business and any document that is prepared for the purpose of preserving computer data under that section as soon as feasible after the earlier of

(a) the day on which the production order is revoked, and

(b) the day on which a document that contains the computer data is produced under the production order.

Destruction of preserved computer data and documents — warrant

(4) Despite subsections (1) to (3), a person who preserved computer data under a preservation demand or order made under [section 487.012](#) or [487.013](#) shall destroy the computer data that would not be retained in the ordinary course of business and any document that is prepared for the purpose of preserving computer data under that section when a document that contains the computer data is obtained under a warrant.

[2014, c. 31, s. 20.](#)

For greater certainty

487.0195 (1) For greater certainty, no preservation demand, preservation order, keep account open or active order or production order is necessary for a peace officer or public officer to ask a person to voluntarily preserve data that the person is not prohibited by law from preserving, to voluntarily keep an account open or active that the person is not prohibited by law from keeping open or active or to voluntarily provide a document to the officer that the person is not prohibited by law from disclosing.

No civil or criminal liability

(2) A person who preserves data, keeps an account open or active or provides a document in those circumstances does not incur any criminal or civil liability for doing so.

2014, c. 31, s. 20; 2024, c. 17, s. 362.

Self-incrimination

487.0196 No one is excused from complying with an order made under any of [sections 487.014 to 487.018](#) on the ground that the document that they are required to produce may tend to incriminate them or subject them to a proceeding or penalty. However, no document that an individual is required to prepare may be used or received in evidence against them in a criminal proceeding that is subsequently instituted against them, other than a prosecution for an offence under [section 132](#), [136](#) or [137](#).

2014, c. 31, s. 20.

Offence — preservation demand

487.0197 A person who contravenes a preservation demand made under [section 487.012](#) without lawful excuse is guilty of an offence punishable on summary conviction and is liable to a fine of not more than \$5,000.

2014, c. 31, s. 20.

Offence — preservation or production order

487.0198 A person, financial institution or entity that contravenes an order made under any of [sections 487.013 to 487.018](#) without lawful excuse is guilty of an offence punishable on summary conviction and liable to a fine of not more than \$250,000 or to imprisonment for a term of not more than two years less a day, or to both.

2014, c. 31, s. 20; 2019, c. 25, s. 194.

Offence — destruction of preserved data

487.0199 A person who contravenes [section 487.0194](#) without lawful excuse is guilty of an offence punishable on summary conviction.

2014, c. 31, s. 20.

Assistance order

487.02 (1) If an authorization is given under [section 184.2](#), [186](#) or [188](#) or a warrant is issued under this Act, the judge or justice who gives the authorization or issues the warrant may order a person to provide assistance, if the person's assistance may reasonably be considered to be required to give effect to the authorization or warrant. The order has effect throughout Canada.

Telecommunication

(2) If the authorization is given or the warrant is issued by a means of telecommunication under [section 184.3](#) or [487.1](#), the order to provide assistance may be

issued by a means of telecommunication and, in that case, section 184.3 or 487.1, as the case may be, applies with respect to the order.

1993, c. 40, s. 15; 1997, c. 18, s. 43; 2014, c. 31, s. 20; 2019, c. 25, s. 195; 2022, c. 17, s. 18.

Review

487.021 (1) Within seven years after the coming into force of this section, a comprehensive review of the provisions and operation of [sections 487.011 to 487.02](#) shall be undertaken by such committee of the House of Commons as may be designated or established by the House for that purpose.

Report

(2) The committee referred to in subsection (1) shall, within a year after a review is undertaken pursuant to that subsection or within such further time as the House may authorize, submit a report on the review to the Speaker of the House, including a statement of any changes the committee recommends.

[2014, c. 31, s. 20.](#)

487.03 [Repealed, [2019, c. 25, s. 196](#)]

Forensic DNA Analysis

Definitions

487.04 In this section and in [sections 487.05 to 487.0911](#),

adult has the meaning assigned by [subsection 2\(1\)](#) of the *Youth Criminal Justice Act*; (*adulte*)

designated offence means a primary designated offence or a secondary designated offence; (*infraction désignée*)

DNA means deoxyribonucleic acid; (*ADN*)

forensic DNA analysis

(a) in relation to a bodily substance that is taken from a person in execution of a warrant under [section 487.05](#), means forensic DNA analysis of the bodily substance and the comparison of the results of that analysis with the results of the analysis of the DNA in the bodily substance referred to in [paragraph 487.05\(1\)\(b\)](#), and includes any incidental tests associated with that analysis, and

(b) in relation to a bodily substance that is provided voluntarily in the course of an investigation of a designated offence or is taken from a person under an order made under [section 487.051](#) or an authorization granted under [section 487.055](#) or [487.091](#), or to a bodily substance referred to in [paragraph 487.05\(1\)\(b\)](#), means forensic DNA analysis of the bodily substance; (*analyse génétique*)

primary designated offence means

- (a)** an offence under any of the following provisions, namely,
- (i)** [subsection 7\(4.1\)](#) (offence in relation to sexual offences against children),
 - (i.1)** [section 151](#) (sexual interference),
 - (i.2)** [section 152](#) (invitation to sexual touching),
 - (i.3)** [section 153](#) (sexual exploitation),
 - (i.4)** [section 153.1](#) (sexual exploitation of person with disability),
 - (i.5)** [section 155](#) (incest),
 - (i.6)** [subsection 160\(2\)](#) (compelling the commission of bestiality),
 - (i.7)** [subsection 160\(3\)](#) (bestiality in presence of or by a child),
 - (i.8)** [section 163.1](#) (child sexual abuse and exploitation material),
 - (i.9)** [section 170](#) (parent or guardian procuring sexual activity),
 - (i.901)** [section 171.1](#) (making sexually explicit material available to child),
 - (i.91)** [section 172.1](#) (luring a child),
 - (i.911)** [section 172.2](#) (agreement or arrangement — sexual offence against child),
 - (i.92)** [subsection 173\(2\)](#) (exposure),
 - (i.93) to (i.96)** [\[Repealed, 2014, c. 25, s. 23\]](#)
 - (ii)** [section 235](#) (murder),
 - (iii)** [section 236](#) (manslaughter),
 - (iv)** [section 239](#) (attempt to commit murder),
 - (v)** [section 244](#) (discharging firearm with intent),
 - (vi)** [section 244.1](#) (causing bodily harm with intent — air gun or pistol),
 - (vi.1)** [section 244.2](#) (discharging firearm — recklessness),
 - (vii)** [paragraph 245\(a\)](#) (administering noxious thing with intent to endanger life or cause bodily harm),
 - (viii)** [section 246](#) (overcoming resistance to commission of offence),
 - (ix)** [section 267](#) (assault with a weapon or causing bodily harm),
 - (x)** [section 268](#) (aggravated assault),
 - (xi)** [section 269](#) (unlawfully causing bodily harm),
 - (xi.1)** [section 270.01](#) (assaulting peace officer with weapon or causing bodily harm),
 - (xi.2)** [section 270.02](#) (aggravated assault of peace officer),
 - (xi.3)** [section 271](#) (sexual assault),

- (xii) [section 272](#) (sexual assault with a weapon, threats to a third party or causing bodily harm),
- (xiii) [section 273](#) (aggravated sexual assault),
- (xiii.1) [subsection 273.3\(2\)](#) (removal of a child from Canada),
- (xiv) [section 279](#) (kidnapping),
- (xiv.1) [section 279.011](#) (trafficking — person under 18 years),
- (xiv.2) [subsection 279.02\(2\)](#) (material benefit — trafficking of person under 18 years),
- (xiv.3) [subsection 279.03\(2\)](#) (withholding or destroying documents — trafficking of person under 18 years),
- (xiv.4) [subsection 286.1\(2\)](#) (obtaining sexual services for consideration from person under 18 years),
- (xiv.5) [subsection 286.2\(2\)](#) (material benefit from sexual services provided by person under 18 years),
- (xiv.6) [subsection 286.3\(2\)](#) (procuring — person under 18 years),
- (xv) [section 344](#) (robbery), and
- (xvi) [section 346](#) (extortion),
- (a.1) an offence under any of the following provisions, namely,
 - (i) [section 75](#) (piratical acts),
 - (i.01) [section 76](#) (hijacking),
 - (i.02) [section 77](#) (endangering safety of aircraft or airport),
 - (i.03) [section 78.1](#) (seizing control of ship or fixed platform),
 - (i.04) [subsection 81\(1\)](#) (using explosives),
 - (i.041) [section 82.3](#) (possession, etc., of nuclear material, radioactive material or device),
 - (i.042) [section 82.4](#) (use or alteration of nuclear material, radioactive material or device),
 - (i.043) [section 82.5](#) (commission of indictable offence to obtain nuclear material, etc.),
 - (i.044) [section 82.6](#) (threats),
 - (i.05) [section 83.18](#) (participation in activity of terrorist group),
 - (i.051) [section 83.181](#) (leaving Canada to participate in activity of terrorist group),
 - (i.06) [section 83.19](#) (facilitating terrorist activity),
 - (i.061) [section 83.191](#) (leaving Canada to facilitate terrorist activity),

(i.07) [section 83.2](#) (commission of offence for terrorist group),

(i.071) [section 83.201](#) (leaving Canada to commit offence for terrorist group),

(i.072) [section 83.202](#) (leaving Canada to commit offence that is terrorist activity),

(i.08) [section 83.21](#) (instructing to carry out activity for terrorist group),

(i.09) [section 83.22](#) (instructing to carry out terrorist activity),

(i.091) [section 83.221](#) (counselling commission of terrorism offence),

(i.1) [section 83.23](#) (harbouring or concealing),

(i.11) to (iii.1) [Repealed, 2010, c. 17, s. 3]

(iv) [Repealed, 2014, c. 25, s. 23]

(iv.1) to (iv.5) [Repealed, 2010, c. 17, s. 3]

(v) [Repealed, 2014, c. 25, s. 23]

(v.1) and (v.2) [Repealed, 2010, c. 17, s. 3]

(vi) [section 233](#) (infanticide),

(vii) [Repealed, 2010, c. 17, s. 3]

(vii.1) [section 279.01](#) (trafficking in persons),

(vii.11) [subsection 279.02\(1\)](#) (material benefit — trafficking),

(vii.12) [subsection 279.03\(1\)](#) (withholding or destroying documents — trafficking),

(viii) [section 279.1](#) (hostage taking),

(viii.1) [subsection 286.2\(1\)](#) (material benefit from sexual services),

(viii.2) [subsection 286.3\(1\)](#) (procuring),

(viii.3) [subsection 333.1\(3\)](#) (motor vehicle theft when violence used, threatened or attempted),

(viii.4) [subsection 333.1\(4\)](#) (motor vehicle theft for criminal organization),

(ix) [paragraph 348\(1\)\(d\)](#) (breaking and entering a dwelling-house),

(x) [section 423.1](#) (intimidation of a justice system participant or journalist),

(xi) [section 431](#) (attack on premises, residence or transport of internationally protected person),

(xii) [section 431.1](#) (attack on premises, accommodation or transport of United Nations or associated personnel),

(xiii) [subsection 431.2\(2\)](#) (explosive or other lethal device),

(xiii.1) [subsection 462.31\(2.1\)](#) (laundering proceeds of crime for criminal organization),

(xiv) [section 467.11](#) (participation in activities of criminal organization),

- (xiv.1) [section 467.111](#) (recruitment of members — criminal organization),
- (xv) [section 467.12](#) (commission of offence for criminal organization), and
- (xvi) [section 467.13](#) (instructing commission of offence for criminal organization),
- (xvi.1) to (xx) [\[Repealed, 2005, c. 25, s. 1\]](#)

(b) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983, namely,

- (i) [section 144](#) (rape),
- (i.1) [section 145](#) (attempt to commit rape),
- (ii) [section 146](#) (sexual intercourse with female under fourteen and between fourteen and sixteen),
- (iii) [section 148](#) (sexual intercourse with feeble-minded, etc.),
- (iv) [section 149](#) (indecent assault on female),
- (v) [section 156](#) (indecent assault on male),
- (vi) [section 157](#) (acts of gross indecency), and
- (vii) [subsection 246\(1\)](#) (assault with intent) if the intent is to commit an offence referred to in subparagraphs (i) to (vi),

(c) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

- (i) [subsection 146\(1\)](#) (sexual intercourse with a female under age of 14),
- (ii) [subsection 146\(2\)](#) (sexual intercourse with a female between ages of 14 and 16),
- (iii) [section 153](#) (sexual intercourse with step-daughter),
- (iv) [section 157](#) (gross indecency),
- (v) [section 166](#) (parent or guardian procuring defilement), and
- (vi) [section 167](#) (householder permitting defilement),

(c.01) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as enacted by [section 19](#) of *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, chapter 125 of the Statutes of Canada, 1980-81-82-83:

- (i) [section 246.1](#) (sexual assault),
- (ii) [section 246.2](#) (sexual assault with a weapon, threats to a third party or causing bodily harm), and

(iii) section 246.3 (aggravated sexual assault),

(c.02) an offence under any of the following provisions of this Act, as they read from time to time before the day on which this paragraph comes into force:

(i) paragraph 212(1)(i) (stupefying or overpowering for the purpose of sexual intercourse),

(ii) subsection 212(2) (living on the avails of prostitution of person under 18 years),

(iii) subsection 212(2.1) (aggravated offence in relation to living on the avails of prostitution of person under 18 years), and

(iv) subsection 212(4) (prostitution of person under 18 years),

(c.03) an offence under any of paragraphs 212(1)(a) to (h) (procuring) of this Act, as they read from time to time before the day on which this paragraph comes into force,

(c.1) an offence under any of the following provisions of the *Foreign Interference and Security of Information Act*, namely,

(i) section 6 (approaching, entering, etc., a prohibited place),

(ii) subsection 20(1) (intimidation, threats or violence),

(ii.1) subsection 20.1(1) (intimidation, threats or violence outside Canada),

(ii.2) subsection 20.2(1) (committing indictable offence for foreign entity),

(ii.3) subsection 20.3(1) (engaging in surreptitious or deceptive conduct),

(ii.4) subsection 20.4(1) (influencing political or governmental process), and

(iii) subsection 21(1) (harbouring or concealing), and

(d) an attempt to commit or, other than for the purposes of subsection 487.05(1), a conspiracy to commit an offence referred to in any of paragraphs (a) to (c.03); (*infraction primaire*)

provincial court judge, in relation to a young person, includes a youth justice court judge within the meaning of subsection 2(1) of the *Youth Criminal Justice Act*; (*juge de la cour provinciale*)

secondary designated offence means an offence, other than a primary designated offence, that is

(a) an offence under this Act that may be prosecuted by indictment — or, for section 487.051 to apply, is prosecuted by indictment — for which the maximum punishment is imprisonment for five years or more,

(a.1) an offence under any of the following provisions of the *Cannabis Act* that may be prosecuted by indictment — or, for section 487.051 to apply, is prosecuted by indictment — for which the maximum punishment is imprisonment for five years or more:

- (i) [section 9](#) (distribution and possession for purpose of distributing),
- (ii) [section 10](#) (selling and possession for purpose of selling),
- (iii) [section 11](#) (importing and exporting and possession for purpose of exporting),
- (iv) [section 12](#) (production),
- (v) [section 13](#) (possession, etc., for use in production or distribution of illicit cannabis), and
- (vi) [section 14](#) (use of young person),

(b) an offence under any of the following provisions of the *Controlled Drugs and Substances Act* that may be prosecuted by indictment — or, for [section 487.051](#) to apply, is prosecuted by indictment — for which the maximum punishment is imprisonment for five years or more:

- (i) [section 5](#) (trafficking in substance and possession for purpose of trafficking),
- (ii) [section 6](#) (importing and exporting), and
- (iii) [section 7](#) (production of substance),

(c) an offence under any of the following provisions of this Act:

- (i) [subsection 52\(1\)](#) (sabotage),
- (i.0001) [subsection 52.1\(1\)](#) (sabotage — essential infrastructure),
- (i.0002) [subsection 52.2\(1\)](#) (sabotage — device),
- (i.001) [subsection 57\(3\)](#) (possession of a forged passport),
- (i.002) [section 62](#) (offences in relation to military forces),
- (i.003) [subsection 65\(2\)](#) (riot — concealing identity),
- (i.004) [subsection 70\(3\)](#) (contravening order made by governor in council),
- (i.005) [subsection 82\(1\)](#) (explosives, possession without lawful excuse),
- (i.006) [subsection 121\(1\)](#) (frauds on the government),
- (i.007) [subsection 121\(2\)](#) (contractor subscribing to election fund),
- (i.008) [section 122](#) (breach of trust by public officer),
- (i.009) [subsection 123\(1\)](#) (municipal corruption),
- (i.01) [subsection 123\(2\)](#) (influencing municipal official),
- (i.011) [section 124](#) (selling or purchasing office),
- (i.012) [section 125](#) (influencing or negotiating appointments or dealings in offices),
- (i.013) [subsection 139\(2\)](#) (obstructing justice),
- (i.014) [section 142](#) (corruptly taking reward for recovery of goods),

(i.015) [section 144](#) (prison breach),

(i.016) [section 145](#) (escape and being at large without excuse),

(i.1) [section 146](#) (permitting or assisting escape),

(i.2) [section 147](#) (rescue or permitting escape),

(i.3) [section 148](#) (assisting prisoner of war to escape),

(i.4) and (ii) [\[Repealed, 2010, c. 17, s. 3\]](#)

(iii) [subsection 173\(1\)](#) (indecent acts),

(iv) [section 182](#) (dead body — neglect to perform duty, improper or indecent interference with),

(iv.1) [section 184](#) (interception of private communication),

(iv.2) [section 184.5](#) (interception of radio-based telephone communications),

(iv.3) [section 221](#) (cause bodily harm by criminal negligence),

(iv.4) [\[Repealed, 2022, c. 17, s. 19\]](#)

(iv.5) [section 242](#) (neglect to obtain assistance in child-birth),

(iv.6) [subsection 247\(1\)](#) (traps likely to cause bodily harm),

(iv.7) [subsection 247\(2\)](#) (traps — causing bodily harm),

(iv.8) [subsection 247\(3\)](#) (traps — in a place kept or used for committing other indictable offence),

(iv.9) [section 262](#) (impeding attempt to save life),

(v) [section 264](#) (criminal harassment),

(vi) [section 264.1](#) (uttering threats),

(vii) [section 266](#) (assault),

(viii) [section 270](#) (assaulting a peace officer),

(viii.01) [section 280](#) (abduction of person under 16),

(viii.02) [section 281](#) (abduction of person under 14),

(viii.1) [subsection 286.1\(1\)](#) (obtaining sexual services for consideration),

(viii.11) [section 291](#) (bigamy),

(viii.12) [section 292](#) (procuring feigned marriage),

(viii.13) [section 293](#) (polygamy),

(viii.14) [section 293.1](#) (forced marriage),

(viii.15) [section 293.2](#) (marriage under age of 16 years),

(viii.16) [section 300](#) (publishing defamatory libel known to be false),

(viii.17) [section 302](#) (extortion by libel),

(viii.2) [subsection 320.16\(1\)](#) (failure to stop after accident),

(viii.201) [subsection 333.1\(1\)](#) (motor vehicle theft),

(viii.202) [subsection 333.2\(1\)](#) (possession of device for purpose of committing theft),

(viii.203) [subsection 333.2\(2\)](#) (distribution of device linked to theft),

(viii.21) [paragraph 334\(a\)](#) (theft over \$5,000 or testamentary instrument),

(viii.22) [section 338](#) (fraudulently taking cattle or defacing brand),

(viii.23) [subsection 339\(1\)](#) (take possession of drift timber, etc.),

(viii.24) [section 340](#) (destroying documents of title),

(ix) [paragraph 348\(1\)\(e\)](#) (breaking and entering a place other than a dwelling-house),

(x) [section 349](#) (being unlawfully in dwelling-house),

(x.1) [subsection 351\(2\)](#) (disguise with intent),

(x.11) [paragraph 355\(a\)](#) (possession of property over \$5,000 or testamentary instrument),

(x.12) [section 357](#) (bring into Canada property obtained by crime),

(x.13) [paragraph 362\(2\)\(a\)](#) (false pretence, property over \$5,000 or testamentary instrument),

(x.14) [subsection 362\(3\)](#) (obtain credit, etc. by false pretence),

(x.15) [section 363](#) (obtain execution of valuable security by fraud),

(x.16) [subsection 377\(1\)](#) (damaging documents),

(x.17) [section 378](#) (offences in relation to registers),

(x.18) [section 382](#) (manipulation of stock exchange),

(x.19) [subsection 382.1\(1\)](#) (prohibited insider trading),

(x.2) [section 383](#) (gaming in stocks or merchandise),

(x.21) [section 384](#) (broker reducing stock by selling his own account),

(x.22) [section 386](#) (fraudulent registration of title),

(x.23) [section 394](#) (fraud in relation to minerals),

(x.24) [section 394.1](#) (possession of stolen minerals),

(x.25) [section 396](#) (offences in relation to mines),

(x.26) [section 397](#) (falsification of books and documents),

(x.27) [section 399](#) (false return by public officer),

- (x.28) [section 400](#) (false prospectus),
- (x.29) [section 405](#) (acknowledging instrument in false name),
- (xi) [section 423](#) (intimidation),
- (xi.01) [subsection 423.2\(1\)](#) (intimidation — health services),
- (xi.1) [section 424](#) (threat against an internationally protected person),
- (xi.11) [section 424.1](#) (threat against United Nations or associated personnel),
- (xi.12) [section 426](#) (secret commissions),
- (xi.13) [section 435](#) (arson for fraudulent purpose),
- (xi.14) [section 436](#) (arson by negligence),
- (xi.15) [section 436.1](#) (possession incendiary material),
- (xi.16) [subsection 438\(1\)](#) (interfering with saving of a wrecked vessel),
- (xi.17) [subsection 439\(2\)](#) (interfering with a marine signal),
- (xi.18) [section 441](#) (occupant injuring building),
- (xi.19) [section 443](#) (interfering with international boundary marks, etc.),
- (xi.2) [section 451](#) (having clippings, etc.),
- (xi.21) [section 460](#) (advertising and dealing in counterfeit money),
- (xi.22) [subparagraphs 465\(1\)\(b\)\(i\) and \(ii\)](#) (conspiracy to prosecute),
- (xi.23) [section 753.3](#) (breach of long-term supervision),

(d) an offence under any of the following provisions of the *Criminal Code*, as they read from time to time before July 1, 1990:

- (i) [section 433](#) (arson), and
- (ii) [section 434](#) (setting fire to other substance),

(d.1) an offence under [section 252](#), as it read from time to time before the day on which [section 14](#) of *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts* comes into force,

(d.2) an offence under any of [sections 249, 249.1, 249.2, 249.3, 249.4, 253, 254](#) and [255](#), as they read from time to time before the day on which [section 14](#) of *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts* comes into force, that may be prosecuted by indictment or, for [section 487.051](#) to apply, is prosecuted by indictment, and

(e) an attempt to commit or, other than for the purposes of [subsection 487.05\(1\)](#), a conspiracy to commit

- (i) an offence referred to in paragraph (a) or (b) — which, for [section 487.051](#) to apply, is prosecuted by indictment, or

(ii) an offence referred to in any of paragraphs (c) to (d.2); (*infraction secondaire*)

Young Offenders Act means chapter Y-1 of the Revised Statutes of Canada, 1985; (*Loi sur les jeunes contrevenants*)

young person has the meaning assigned by subsection 2(1) of the *Youth Criminal Justice Act* or subsection 2(1) of the *Young Offenders Act*, as the case may be. (*adolescent*)

1995, c. 27, s. 1; 1998, c. 37, s. 15; 2001, c. 41, s. 17; 2002, c. 1, s. 175; 2005, c. 25, s. 1, c. 43, ss. 5, 9; 2007, c. 22, ss. 2, 8, 47; 2008, c. 6, ss. 35, 63; 2009, c. 22, s. 16; 2010, c. 3, s. 6, c. 17, s. 3; 2012, c. 1, s. 30; 2013, c. 9, s. 16, c. 13, s. 8; 2014, c. 17, s. 13, c. 25, s. 23; 2015, c. 20, s. 23; 2018, c. 16, s. 216, c. 21, s. 18; 2019, c. 13, s. 152; 2019, c. 25, s. 196.1; 2021, c. 27, s. 3; 2022, c. 17, s. 19; 2024, c. 16, s. 57; 2024, c. 16, s. 70; 2024, c. 17, s. 373; 2024, c. 23, s. 7.

Information for warrant to take bodily substances for forensic DNA analysis

487.05 (1) A provincial court judge who on *ex parte* application made in Form 5.01 is satisfied by information on oath that there are reasonable grounds to believe

- (a) that a designated offence has been committed,
- (b) that a bodily substance has been found or obtained
 - (i) at the place where the offence was committed,
 - (ii) on or within the body of the victim of the offence,
 - (iii) on anything worn or carried by the victim at the time when the offence was committed, or
 - (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,
- (c) that a person was a party to the offence, and
- (d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person

and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in Form 5.02 authorizing the taking, from that person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

Criteria

(2) In considering whether to issue the warrant, the provincial court judge shall have regard to all relevant matters, including

- (a) the nature of the designated offence and the circumstances of its commission; and
- (b) whether there is

(i) a peace officer who is able, by virtue of training or experience, to take samples of bodily substances from the person, by means of the investigative procedures described in [subsection 487.06\(1\)](#), or

(ii) another person who is able, by virtue of training or experience, to take, under the direction of a peace officer, samples of bodily substances from the person, by means of those investigative procedures.

(3) [Repealed, 2022, c. 17, s. 20]

Execution in Canada

(4) A warrant issued under subsection (1) may be executed at any place in Canada. Any peace officer who executes the warrant must have authority to act as a peace officer in the place where it is executed.

1995, c. 27, s. 1; 1997, c. 18, s. 44; 1998, c. 37, s. 16; 2005, c. 25, s. 2(F); 2019, c. 25, s. 197; 2022, c. 17, s. 20.

Order — primary designated offences

487.051 (1) The court shall make an order in Form 5.03 authorizing the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis from a person who is convicted, discharged under [section 730](#) or found guilty under the *Youth Criminal Justice Act* or the *Young Offenders Act*, of an offence committed at any time, including before June 30, 2000, if that offence is a primary designated offence within the meaning of paragraphs (a) and (c.02) of the definition **primary designated offence** in [section 487.04](#) when the person is sentenced or discharged.

Order — primary designated offences

(2) The court shall make such an order in Form 5.03 in relation to a person who is convicted, discharged under [section 730](#) or found guilty under the *Youth Criminal Justice Act* or the *Young Offenders Act*, of an offence committed at any time, including before June 30, 2000, if that offence is a primary designated offence within the meaning of any of paragraphs (a.1) to (c.01) and (c.03) to (d) of the definition **primary designated offence** in [section 487.04](#) when the person is sentenced or discharged. However, the court is not required to make the order if it is satisfied that the person has established that the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

Order — persons found not criminally responsible and secondary designated offences

(3) The court may, on application by the prosecutor and if it is satisfied that it is in the best interests of the administration of justice to do so, make such an order in Form 5.04 in relation to

(a) a person who is found not criminally responsible on account of mental disorder for an offence committed at any time, including before June 30, 2000, if that offence is a designated offence when the finding is made; or

(b) a person who is convicted, discharged under [section 730](#) or found guilty under the *Youth Criminal Justice Act* or the *Young Offenders Act*, of an offence committed at any time, including before June 30, 2000, if that offence is a secondary designated offence when the person is sentenced or discharged.

In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

Order to offender

(4) When the court makes an order authorizing the taking of samples of bodily substances, it may make an order in Form 5.041 to require the person to report at the place, day and time set out in the order and submit to the taking of the samples.

1998, c. 37, s. 17; [2002, c. 1, s. 176](#); [2005, c. 25, s. 3](#); [2007, c. 22, ss. 9, 47](#); [2014, c. 25, s. 24](#).

487.052 [Repealed, [2007, c. 22, s. 3](#)]

Timing of order

487.053 (1) The court may make an order under [section 487.051](#) authorizing the taking of samples of bodily substances when it imposes a sentence on a person, finds the person not criminally responsible on account of mental disorder or directs that they be discharged under [section 730](#).

Hearing

(2) If the court does not consider the matter at that time, it

(a) shall, within 90 days after the day on which it imposes the sentence, makes the finding or directs that the person be discharged, set a date for a hearing to do so;

(b) retains jurisdiction over the matter; and

(c) may require the person to appear by closed-circuit television or videoconference, as long as the person is given the opportunity to communicate privately with counsel if they are represented by counsel.

1998, c. 37, s. 17; 2000, c. 10, s. 14; [2005, c. 25, s. 4](#); [2007, c. 22, s. 3](#); [2019, c. 25, s. 198](#).

Appeal

487.054 The offender or the prosecutor may appeal from a decision of the court under any of [subsections 487.051\(1\) to \(3\)](#).

1998, c. 37, s. 17; [2007, c. 22, s. 10](#).

Offenders serving sentences

487.055 (1) A provincial court judge may, on *ex parte* application made in Form 5.05, authorize in Form 5.06 the taking, for the purpose of forensic DNA analysis, of any number of samples of bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in [subsection 487.06\(1\)](#), from a person who, before June 30, 2000,

- (a) had been declared a dangerous offender under Part XXIV;
- (b) had been declared a dangerous offender or a dangerous sexual offender under Part XXI of the *Criminal Code*, being chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988;
- (c) had been convicted of murder;
- (c.1) had been convicted of attempted murder or conspiracy to commit murder or to cause another person to be murdered and, on the date of the application, is serving a sentence of imprisonment for that offence;
- (d) had been convicted of a sexual offence within the meaning of subsection (3) and, on the date of the application, is serving a sentence of imprisonment for that offence; or
- (e) had been convicted of manslaughter and, on the date of the application, is serving a sentence of imprisonment for that offence.

Certificate

(2) The application shall be accompanied by a certificate referred to in [paragraph 667\(1\)](#) (a) that establishes that the person is a person referred to in subsection (1). The certificate may be received in evidence without giving the notice referred to in [subsection 667\(4\)](#).

Definition of sexual offence

(3) For the purposes of subsection (1), **sexual offence** means

- (a) an offence under any of the following provisions, namely,
 - (i) [section 151](#) (sexual interference),
 - (ii) [section 152](#) (invitation to sexual touching),
 - (iii) [section 153](#) (sexual exploitation),
 - (iv) [section 155](#) (incest),
 - (v) subsection 212(4) (offence in relation to juvenile prostitution),
 - (vi) [section 271](#) (sexual assault),
 - (vii) [section 272](#) (sexual assault with a weapon, threats to a third party or causing bodily harm), and
 - (viii) [section 273](#) (aggravated sexual assault);

(a.1) an offence under [subsection 348\(1\)](#) if the indictable offence referred to in that subsection is a sexual offence within the meaning of paragraph (a), (b), (c) or (d);

(b) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983, namely,

(i) [section 144](#) (rape),

(ii) [section 146](#) (sexual intercourse with female under fourteen or between fourteen and sixteen),

(iii) [section 148](#) (sexual intercourse with feeble-minded, etc.),

(iv) [section 149](#) (indecent assault on female),

(v) [section 156](#) (indecent assault on male), or

(vi) [section 157](#) (acts of gross indecency);

(c) an offence under [paragraph 153\(1\)\(a\)](#) (sexual intercourse with step-daughter, etc.) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988; and

(d) an attempt to commit an offence referred to in any of paragraphs (a) to (c).

Manner of appearance

(3.01) The court may require a person who is given notice of an application under subsection (1) and who wishes to appear at the hearing to appear by closed-circuit television or videoconference, as long as the person is given the opportunity to communicate privately with counsel if they are represented by counsel.

Criteria

(3.1) In deciding whether to grant an authorization under subsection (1), the court shall consider the person's criminal record, the nature of the offence and the circumstances surrounding its commission and the impact such an authorization would have on the privacy and security of the person and shall give reasons for its decision.

Order

(3.11) If the court authorizes the taking of samples of bodily substances from a person who is on conditional release and who has appeared at the hearing, it shall make an order in Form 5.041 to require the person to report at the place, day and time set out in the order and submit to the taking of the samples.

Summons

(4) However, if a person who is on conditional release has not appeared at the hearing, a summons in Form 5.061 setting out the information referred to in [paragraphs 487.07\(1\) \(b\) to \(d\)](#) shall be directed to them requiring them to report at the place, day and time set out in the summons and submit to the taking of the samples.

Service on individual

(5) The summons shall be accompanied by a copy of the authorization referred to in subsection (1) and be served by a peace officer who shall either deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, leave it for the person at their latest or usual place of residence with any person found there who appears to be at least sixteen years of age.

(6) [Repealed, 2008, c. 18, s. 13]

(7) to **(10)** [Repealed, 2007, c. 22, s. 11]

1998, c. 37, s. 17; 2000, c. 10, s. 15; 2005, c. 25, s. 5; 2007, c. 22, s. 11; 2008, c. 18, s. 13; 2019, c. 25, s. 199.

Failure to appear

487.0551 (1) If a person fails to appear at the place, day and time set out in an order made under [subsection 487.051\(4\)](#) or [487.055\(3.11\)](#) or in a summons referred to in [subsection 487.055\(4\)](#) or [487.091\(3\)](#), a justice of the peace may issue a warrant for their arrest in Form 5.062 to allow samples of bodily substances to be taken.

Execution of warrant

(2) The warrant may be executed anywhere in Canada by a peace officer who has jurisdiction in that place or over the person. The warrant remains in force until it is executed.

[2007, c. 22, s. 12.](#)

Failure to comply with order or summons

487.0552 (1) Every person who, without reasonable excuse, fails to comply with an order made under [subsection 487.051\(4\)](#) or [487.055\(3.11\)](#) of this Act or under [subsection 196.14\(4\)](#) or [196.24\(4\)](#) of the *National Defence Act*, or with a summons referred to in [subsection 487.055\(4\)](#) or [487.091\(3\)](#) of this Act, is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than two years; or

(b) an offence punishable on summary conviction.

For greater certainty

(2) For greater certainty, a lawful command that prevents a person from complying with an order or summons is a reasonable excuse if, at the time, the person is subject to the Code of Service Discipline within the meaning of [subsection 2\(1\)](#) of the *National Defence Act*.

[2007, c. 22, s. 12.](#)

When collection to take place

487.056 (1) Samples of bodily substances shall be taken as authorized under [section 487.051](#)

- (a) at the place, day and time set out in an order made under [subsection 487.051\(4\)](#) or as soon as feasible afterwards; or
- (b) in any other case, on the day on which the order authorizing the taking of the samples is made or as soon as feasible afterwards.

When collection to take place

(2) Samples of bodily substances shall be taken as authorized under [section 487.055](#) or [487.091](#)

- (a) at the place, day and time set out in an order made under [subsection 487.055\(3.11\)](#) or a summons referred to in [subsection 487.055\(4\)](#) or [487.091\(3\)](#) or as soon as feasible afterwards; or
- (b) in any other case, as soon as feasible after the authorization is granted.

When collection to take place

(3) If a person fails to appear as required by an order made under [subsection 487.051\(4\)](#) or [487.055\(3.11\)](#) or a summons referred to in [subsection 487.055\(4\)](#) or [487.091\(3\)](#), samples of bodily substances shall be taken

- (a) when the person is arrested under a warrant issued under [subsection 487.0551\(1\)](#) or as soon as feasible afterwards; or
- (b) as soon as feasible after the person appears at the place set out in the order or summons if no warrant is issued.

Appeal

(4) Subsections (1) to (3) apply even if the order or authorization to take the samples of bodily substances is appealed.

Collection of samples

(5) A peace officer who is authorized under [section 487.051](#), [487.055](#) or [487.091](#) to take samples of bodily substances may cause the samples to be taken in any place in Canada in which the person who is subject to the order or authorization is located.

Who collects samples

(6) The samples shall be taken by a peace officer who has jurisdiction over the person or in the place in which the samples are taken — or a person acting under their direction — who is able, by virtue of training or experience, to take them.

1998, c. 37, s. 17; 2000, c. 10, s. 16; [2002, c. 1, s. 179\(E\)](#); [2005, c. 25, s. 6](#); [2007, c. 22, s. 13](#).

Report of peace officer

487.057 (1) A peace officer who takes samples of bodily substances from a person or who causes a person who is not a peace officer to take samples under their direction

shall, as soon as feasible after the samples are taken, make a written report in Form 5.07 and cause the report to be filed with

(a) the provincial court judge who issued the warrant under [section 487.05](#) or granted the authorization under [section 487.055](#) or [487.091](#) or another judge of that provincial court; or

(b) the court that made the order under [section 487.051](#).

Contents of report

(2) The report shall include

(a) a statement of the time and date the samples were taken; and

(b) a description of the bodily substances that were taken.

Copy of report

(3) A peace officer who takes the samples or causes the samples to be taken under their direction at the request of another peace officer shall send a copy of the report to the other peace officer unless that other peace officer had jurisdiction to take the samples.

1998, c. 37, s. 17; 2000, c. 10, s. 17; [2007, c. 22, s. 14](#).

No criminal or civil liability

487.058 No peace officer, and no person acting under a peace officer's direction, incurs any criminal or civil liability for anything necessarily done with reasonable care and skill in the taking of samples of bodily substances from a person under a warrant issued under [section 487.05](#), an order made under [section 487.051](#) or an authorization granted under [section 487.055](#) or [487.091](#).

1998, c. 37, s. 17; 2000, c. 10, s. 18; [2007, c. 22, s. 15](#).

Investigative procedures

487.06 (1) A peace officer or a person acting under a peace officer's direction is authorized by a warrant issued under [section 487.05](#), an order made under [section 487.051](#) or an authorization granted under [section 487.055](#) or [487.091](#) to take samples of bodily substances by any of the following means:

(a) the plucking of individual hairs from the person, including the root sheath;

(b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or

(c) the taking of blood by pricking the skin surface with a sterile lancet.

Terms and conditions

(2) The warrant, order or authorization shall include any terms and conditions that the provincial court judge or court, as the case may be, considers advisable to ensure that the taking of the samples authorized by the warrant, order or authorization is reasonable in the circumstances.

Fingerprints

(3) A peace officer who is authorized to take samples of bodily substances from a person by an order made under [section 487.051](#) or an authorization granted under [section 487.055](#) or [487.091](#), or a person acting under their direction, may take fingerprints from the person for the purpose of the *DNA Identification Act*.

1995, c. 27, s. 1; 1998, c. 37, s. 18; 2000, c. 10, s. 19; 2007, c. 22, s. 16.

Duty to inform

487.07 (1) Before taking samples of bodily substances from a person, or causing samples to be taken under their direction, in execution of a warrant issued under [section 487.05](#) or an order made under [section 487.051](#) or under an authorization granted under [section 487.055](#) or [487.091](#), a peace officer shall inform the person of

- (a)** the contents of the warrant, order or authorization;
- (b)** the nature of the investigative procedures by means of which the samples are to be taken;
- (c)** the purpose of taking the samples;
- (d)** the authority of the peace officer and any other person under the direction of the peace officer to use as much force as is necessary for the purpose of taking the samples; and
- (d.1)** *[Repealed, 2000, c. 10, s. 20]*
- (e)** in the case of samples of bodily substances taken in execution of a warrant,
 - (i)** the possibility that the results of forensic DNA analysis may be used in evidence, and
 - (ii)** if the sample is taken from a young person, the rights of the young person under subsection (4).

Detention of person

- (2)** A person from whom samples of bodily substances are to be taken may
- (a)** be detained for that purpose for a period that is reasonable in the circumstances; and
 - (b)** be required to accompany a peace officer for that purpose.

Respect of privacy

(3) A peace officer who takes samples of bodily substances from a person, or a person who takes such samples under the direction of a peace officer, shall ensure that the person's privacy is respected in a manner that is reasonable in the circumstances.

Execution of warrant against young person

(4) A young person against whom a warrant is executed has, in addition to any other rights arising from his or her detention under the warrant,

(a) the right to a reasonable opportunity to consult with, and

(b) the right to have the warrant executed in the presence of

counsel and a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person.

Waiver of rights of young person

(5) A young person may waive his or her rights under subsection (4) but any such waiver

(a) must be recorded on audio tape or video tape or otherwise; or

(b) must be made in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

1995, c. 27, ss. 1, 3; 1998, c. 37, s. 19; 2000, c. 10, s. 20; [2007, c. 22, s. 17](#).

Verification

487.071 (1) Before taking samples of bodily substances from a person under an order made under [section 487.051](#) or an authorization granted under [section 487.055](#) or [487.091](#), a peace officer, or a person acting under their direction, shall verify whether the convicted offenders index of the national DNA data bank, established under the [DNA Identification Act](#), contains the person's DNA profile.

DNA profile in data bank

(2) If the person's DNA profile is in the convicted offenders index of the national DNA data bank, the peace officer or person acting under their direction shall not take any bodily substances from the person but shall

(a) confirm in writing on the order or authorization that he or she has been advised that the person's DNA profile is in the DNA data bank; and

(b) transmit a copy of the order or authorization containing that confirmation and any other information prescribed by regulations made under the [DNA Identification Act](#) to the Commissioner of the Royal Canadian Mounted Police.

DNA profile not in data bank

(3) If the person's DNA profile is not in the convicted offenders index of the national DNA data bank, the peace officer or person acting under their direction shall execute the order or authorization and transmit to the [Commissioner of the Royal Canadian Mounted Police](#)

(a) any bodily substances taken; and

(b) a copy of the order or authorization and any other information prescribed by regulations made under the [DNA Identification Act](#).

1998, c. 37, s. 20; 2000, c. 10, s. 21; [2005, c. 25, s. 8](#); [2007, c. 22, s. 18](#).

Use of bodily substances — warrant

487.08 (1) No person shall use bodily substances that are taken in execution of a warrant under [section 487.05](#) or under [section 196.12](#) of the *National Defence Act* except to use them for the purpose of forensic DNA analysis in the course of an investigation of a designated offence.

Use of bodily substances — order, authorization

(1.1) No person shall use bodily substances that are taken in execution of an order made under [section 487.051](#) of this Act or [section 196.14](#) of the *National Defence Act*, or under an authorization granted under [section 487.055](#) or [487.091](#) of this Act or [section 196.24](#) of the *National Defence Act*, except to transmit them to the [Commissioner of the Royal Canadian Mounted Police](#) for the purpose of forensic DNA analysis in accordance with the *DNA Identification Act*.

Use of results — warrant

(2) No person shall use the results of forensic DNA analysis of bodily substances that are taken in execution of a warrant under [section 487.05](#) or under [section 196.12](#) of the *National Defence Act* except

(a) in the course of an investigation of the designated offence or any other designated offence in respect of which a warrant was issued or a bodily substance was found in the circumstances described in [paragraph 487.05\(1\)\(b\)](#) or in [paragraph 196.12\(1\)\(b\)](#) of the *National Defence Act*; or

(b) in any proceeding for such an offence.

(2.1) [Repealed, 2005, c. 25, s. 9]

Offence

(3) Every person who contravenes subsection (1) or (2) is guilty of an offence punishable on summary conviction.

Offence

(4) Every person who contravenes subsection (1.1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

1995, c. 27, s. 1; 1998, c. 37, s. 21; 2000, c. 10, s. 22; [2005, c. 25, s. 9](#); [2007, c. 22, s. 19](#); [2019, c. 25, s. 200](#).

Destruction of bodily substances, etc. — warrant

487.09 (1) Subject to subsection (2), bodily substances that are taken from a person in execution of a warrant under [section 487.05](#) and the results of forensic DNA analysis

shall be destroyed or, in the case of results in electronic form, access to those results shall be permanently removed, without delay after

- (a) the results of that analysis establish that the bodily substance referred to in [paragraph 487.05\(1\)\(b\)](#) was not from that person;
- (b) the person is finally acquitted of the designated offence and any other offence in respect of the same transaction; or
- (c) the expiration of one year after
 - (i) the person is discharged after a preliminary inquiry into the designated offence or any other offence in respect of the same transaction,
 - (ii) the dismissal, for any reason other than acquittal, or the withdrawal of any information charging the person with the designated offence or any other offence in respect of the same transaction, or
 - (iii) any proceeding against the person for the offence or any other offence in respect of the same transaction is stayed under [section 579](#) or under that section as applied by [section 572](#) or [795](#),

unless during that year a new information is laid or an indictment is preferred charging the person with the designated offence or any other offence in respect of the same transaction or the proceeding is recommenced.

Exception

(2) A provincial court judge may order that the bodily substances that are taken from a person and the results of forensic DNA analysis not be destroyed during any period that the provincial court judge considers appropriate if the provincial court judge is satisfied that the bodily substances or results might reasonably be required in an investigation or prosecution of the person for another designated offence or of another person for the designated offence or any other offence in respect of the same transaction.

Destruction of bodily substances, etc., voluntarily given

(3) Bodily substances that are provided voluntarily by a person and the results of forensic DNA analysis shall be destroyed or, in the case of results in electronic form, access to those results shall be permanently removed, without delay after the results of that analysis establish that the bodily substance referred to in [paragraph 487.05\(1\)\(b\)](#) was not from that person.

1995, c. 27, s. 1; 1998, c. 37, s. 22.

Collection of additional bodily substances

487.091 (1) A provincial court judge may, on *ex parte* application made in Form 5.08, authorize in Form 5.09 the taking from a person, for the purpose of forensic DNA analysis, of any number of additional samples of bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in [subsection 487.06\(1\)](#), if

(a) a DNA profile cannot be derived from the bodily substances that were taken from that person under an order made under [section 487.051](#) or an authorization granted under [section 487.055](#); or

(b) the information or bodily substances required by regulations made under the [DNA Identification Act](#) were not transmitted in accordance with the requirements of the regulations or were lost.

Reasons

(2) The application shall state the reasons why a DNA profile cannot be derived from the bodily substances or why the information or bodily substances were not transmitted in accordance with the regulations or were lost.

Persons not in custody

(3) If the court authorizes the taking of samples of bodily substances from a person who is not in custody, a summons in Form 5.061 setting out the information referred to in [paragraphs 487.07\(1\)\(b\) to \(d\)](#) shall be directed to the person requiring them to report at the place, day and time set out in the summons and submit to the taking of the samples. Subsections 487.055(5) and (6) apply, with any modifications that the circumstances require.

1998, c. 37, s. 23; 2000, c. 10, s. 23; [2005, c. 25, s. 10](#); [2007, c. 22, s. 20](#).

Review by Attorney General

487.0911 (1) On receipt of a notice from the [Commissioner of the Royal Canadian Mounted Police](#) under [subsection 5.2\(1\)](#) of the [DNA Identification Act](#) that an order made under [section 487.051](#) or an authorization granted under [section 487.091](#) appears to be defective, the Attorney General shall review the order or authorization and the court record.

Clerical error

(2) If the Attorney General is of the opinion that the defect is due to a clerical error, the Attorney General shall

(a) apply, *ex parte*, to the judge who made the order or authorization, or to a judge of the same court, to have it corrected; and

(b) transmit a copy of the corrected order or authorization, if any, to the Commissioner.

Substantive defect

(3) If the Attorney General is of the opinion that the offence referred to in the order or authorization is not a designated offence, the Attorney General shall inform the Commissioner of that opinion.

No defect

(4) If the Attorney General is of the opinion that the offence referred to in the order or authorization is a designated offence, the Attorney General shall transmit that opinion, with written reasons, to the Commissioner.

[2005, c. 25, s. 11](#); [2007, c. 22, s. 21](#).

Information for impression warrant

487.092 (1) A justice may issue a warrant in writing authorizing a peace officer to do any thing, or cause any thing to be done under the direction of the peace officer, described in the warrant in order to obtain any handprint, fingerprint, footprint, foot impression, teeth impression or other print or impression of the body or any part of the body in respect of a person if the justice is satisfied

(a) by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been committed and that information concerning the offence will be obtained by the print or impression; and

(b) that it is in the best interests of the administration of justice to issue the warrant.

Search or seizure to be reasonable

(2) A warrant issued under subsection (1) shall contain such terms and conditions as the justice considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

Execution in Canada

(3) A warrant issued under subsection (1) may be executed at any place in Canada. Any peace officer who executes the warrant must have authority to act as a peace officer in the place where it is executed.

(4) [\[Repealed, 2022, c. 17, s. 21\]](#)

[1997, c. 18, s. 45](#); [1998, c. 37, s. 23](#); [2019, c. 25, s. 201](#); [2022, c. 17, s. 21](#).

Other Provisions Respecting Warrants and Orders

Duty of person executing certain warrants

487.093 (1) A person who executes a warrant issued under [subsection 110.1\(5\)](#), [117.0101\(6\)](#), [117.04\(1\)](#), [199\(1\)](#), [395\(1\)](#) or [487\(1\)](#) shall, during that execution,

(a) give the following to any person who is present and ostensibly in control of the building, receptacle or place to be searched:

(i) a copy of the warrant, and

(ii) a notice in Form 5.1 setting out the address of the court before which anything seized during the execution may be brought or from which a copy of a report on anything so seized may be obtained;

(b) affix the copy and the notice in a prominent location within the building or place or on or next to the receptacle, if there is no person present and ostensibly in control of

the building, receptacle or place; or

(c) give the copy and the notice to the person to be searched, if the warrant is issued under [subsection 395\(1\)](#) for the search of a person.

Exception

(2) Subsection (1) does not apply if the warrant authorizes the search of anything that is detained under this Act after it has been lawfully seized.

[2022, c. 17, s. 22](#); [2023, c. 32, s. 70](#).

Warrants, etc., by telecommunication

487.1 (1) Despite anything in this Act, the Attorney General, a peace officer or a public officer may, if they are permitted to apply for any of the following, submit their application by a means of telecommunication:

- (a)** a warrant under [subsection 83.222\(1\)](#);
- (b)** an order under [subsection 83.223\(1\)](#);
- (b.1)** a warrant under [subsection 110.1\(5\)](#);
- (b.2)** a warrant under [subsection 117.0101\(6\)](#);
- (c)** a warrant under [subsection 117.04\(1\)](#);
- (d)** a warrant under [subsection 164\(1\)](#);
- (e)** an order under [subsection 164.1\(1\)](#);
- (f)** a warrant under [subsection 320\(1\)](#);
- (g)** an order under [subsection 320.1\(1\)](#);
- (h)** a warrant under [subsection 320.29\(1\)](#);
- (i)** a warrant under [subsection 395\(1\)](#);
- (j)** a warrant under [subsection 462.32\(1\)](#);
- (j.1)** a warrant under [subsection 462.321\(1\)](#);
- (k)** an order under [subsection 462.33\(3\)](#);
- (l)** a warrant under [subsection 487\(1\)](#);
- (m)** a warrant under [subsection 487.01\(1\)](#) that does not authorize the observation of a person by means of a television camera or other similar electronic device;
- (n)** an extension under [subsection 487.01\(5.2\)](#);
- (o)** an order under any of [sections 487.013](#) to [487.018](#);
- (p)** an order under [subsection 487.019\(3\)](#);
- (q)** an order under [subsection 487.0191\(1\)](#);
- (r)** an order under [subsection 487.0191\(4\)](#);

- (s) a warrant under [subsection 487.05\(1\)](#);
- (t) a warrant under [subsection 487.092\(1\)](#);
- (u) an order under [subsection 487.3\(1\)](#);
- (v) an order under [subsection 487.3\(4\)](#);
- (w) a warrant under [subsection 492.1\(1\)](#);
- (x) a warrant under [subsection 492.1\(2\)](#);
- (y) an authorization under [subsection 492.1\(7\)](#);
- (z) a warrant under [subsection 492.2\(1\)](#).

Alternative to oath

(2) A person who must swear an oath in connection with an application submitted by a means of telecommunication that produces a writing may, instead of swearing the oath, make a statement in writing stating that all matters submitted in support of the application are true to their knowledge and belief, and the statement is deemed to be a statement made under oath.

Certification

(3) A judicial officer who receives an application submitted by a means of telecommunication that produces a writing shall certify the application as to time and date of receipt.

Limitation

(4) An application under [subsection 487.01\(5.2\)](#) shall not be submitted by a means of telecommunication that does not produce a writing.

Application — telecommunication not producing writing

(5) An applicant may submit their application by a means of telecommunication that does not produce a writing only if it would be impracticable in the circumstances to submit the application by a means of telecommunication that produces a writing.

Statement of circumstances

(6) An application submitted by a means of telecommunication that does not produce a writing shall include a statement of the circumstances that make it impracticable to submit the application by a means of telecommunication that produces a writing.

Oath

(7) Any oath required in connection with an application submitted by a means of telecommunication that does not produce a writing may be administered by a means of telecommunication.

Certification

(8) A judicial officer who receives an application submitted by a means of telecommunication that does not produce a writing shall record the application verbatim, in writing or otherwise, and certify the record or a transcription of it as to time, date and contents.

Limitation on issuance

(9) If an application is submitted by a means of telecommunication that does not produce a writing, the judicial officer shall not issue the warrant, order, extension or authorization unless he or she is satisfied that the application discloses reasonable grounds for dispensing with its submission by a means of telecommunication that produces a writing.

Warrant, etc.

(10) A judicial officer who issues the warrant, order, extension or authorization may do so by a means of telecommunication, in which case

(a) the judicial officer shall complete and sign the document in question, noting on its face the time and date;

(b) if the means of telecommunication produces a writing, the judicial officer shall transmit a copy of the document to the applicant by that means; and

(c) if the means of telecommunication does not produce a writing, the applicant shall, as directed by the judicial officer, transcribe the document, noting on its face the name of the judicial officer as well as the time and date.

Definitions

(11) The following definitions apply in this section.

judicial officer means a judge or justice who is authorized, under the applicable provision of this Act, to issue a warrant, order, extension or authorization referred to in subsection (1). (*fonctionnaire judiciaire*)

public officer means a public officer who is appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament. (*fonctionnaire public*)

R.S., 1985, c. 27 (1st Supp.), s. 69; 1992, c. 1, ss. 58, 59(E), 60(F); 1994, c. 44, s. 37; [2018, c. 21, s. 19](#); [2022, c. 17, s. 22](#); [2023, c. 26, s. 220](#); [2023, c. 32, s. 70](#).

Where warrant not necessary

487.11 A peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, may, in the course of his or her duties, exercise any of the powers described in [subsection 487\(1\)](#) or [492.1\(1\)](#) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

Restriction on publication

487.2 If a search warrant is issued under [section 487](#) or a search is made under such a warrant, everyone who publishes in any document, or broadcasts or transmits in any way, any information with respect to

- (a) the location of the place searched or to be searched, or
- (b) the identity of any person who is or appears to occupy or be in possession or control of that place or who is suspected of being involved in any offence in relation to which the warrant was issued,

without the consent of every person referred to in paragraph (b) is, unless a charge has been laid in respect of any offence in relation to which the warrant was issued, guilty of an offence punishable on summary conviction.

R.S., 1985, c. 27 (1st Supp.), s. 69; [2005, c. 32, s. 16](#); [2022, c. 17, s. 23](#).

Order denying access to information

487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of [sections 487.013](#) to [487.018](#) or an authorization under [section 529](#) or [529.4](#), or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

- (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
- (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

- (a) if disclosure of the information would
 - (i) compromise the identity of a confidential informant,
 - (ii) compromise the nature and extent of an ongoing investigation,
 - (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used,
 - (iii.1)** be injurious to international relations, national defence or national security, or
 - (iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

1997, c. 23, s. 14, c. 39, s. 1; 2004, c. 3, s. 8; 2014, c. 31, s. 22; 2024, c. 16, s. 100.

Execution of search warrant

488 A warrant issued under [section 487](#) shall be executed by day, unless

(a) the justice is satisfied that there are reasonable grounds for it to be executed by night;

(b) the reasonable grounds are included in the information; and

(c) the warrant authorizes that it be executed by night.

R.S., 1985, c. C-46, s. 488; R.S., 1985, c. 27 (1st Supp.), s. 70; 1997, c. 18, s. 47; 2022, c. 17, s. 24.

Definitions

488.01 (1) The following definitions apply in this section and in [section 488.02](#).

data has the same meaning as in [section 487.011](#). (*données*)

document has the same meaning as in [section 487.011](#). (*document*)

journalist has the same meaning as in [subsection 39.1\(1\)](#) of the *Canada Evidence Act*. (*journaliste*)

journalistic source has the same meaning as in [subsection 39.1\(1\)](#) of the *Canada Evidence Act*. (*source journalistique*)

officer means a peace officer or public officer. (*fonctionnaire*)

Warrant, authorization and order

(2) Despite any other provision of this Act, if an applicant for a warrant under section 487.01, 492.1 or 492.2, a search warrant under this Act, notably under [section 487](#), an authorization under [section 184.2](#), [186](#) or [188](#), or an order under any of [sections 487.014](#) to [487.017](#) knows that the application relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist, they shall make the application to a judge of a superior court of criminal jurisdiction or to a *judge* as defined in [section 552](#). That judge has exclusive jurisdiction to dispose of the application.

Warrant, authorization and order

(3) A judge may issue a warrant, authorization or order under subsection (2) only if, in addition to the conditions required for the issue of the warrant, authorization or order, he or she is satisfied that

- (a)** there is no other way by which the information can reasonably be obtained; and
- (b)** the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

Special Advocate

(4) The judge to whom the application for the warrant, authorization or order is made may, in his or her discretion, request that a special advocate present observations in the interests of freedom of the press concerning the conditions set out in subsection (3).

Offence by journalist — exception

(5) Subsections (3) and (4) do not apply in respect of an application for a warrant, authorization or order that is made in relation to the commission of an offence by a journalist.

Offence by journalist — order

(6) If a warrant, authorization or order referred to in subsection (2) is sought in relation to the commission of an offence by a journalist and the judge considers it necessary to protect the confidentiality of journalistic sources, the judge may order that some or all documents obtained pursuant to the warrant, authorization or order are to be dealt with in accordance with [section 488.02](#).

Conditions

(7) The warrant, authorization or order referred to in subsection (2) may contain any conditions that the judge considers appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities.

Powers

(8) The judge who rules on the application for the warrant, authorization or order referred to in subsection (2) has the same powers, with the necessary adaptations, as the authority who may issue the warrant, authorization or order.

Discovery of relation to journalist

(9) If an officer, acting under a warrant, authorization or order referred to in subsection (2) for which an application was not made in accordance with that subsection, becomes aware that the warrant, authorization or order relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist, the officer shall, as soon as possible, make an *ex parte* application to a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#) and, until the judge disposes of the application,

(a) refrain from examining or reproducing, in whole or in part, any document obtained pursuant to the warrant, authorization or order; and

(b) place any document obtained pursuant to the warrant, authorization or order in a sealed packet and keep it in a place to which the public has no access.

Powers of judge

(10) On an application under subsection (9), the judge may

(a) confirm the warrant, authorization or order if the judge is of the opinion that no additional conditions to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities should be imposed;

(b) vary the warrant, authorization or order to impose any conditions that the judge considers appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities;

(c) if the judge considers it necessary to protect the confidentiality of journalistic sources, order that some or all documents that were or will be obtained pursuant to the warrant, authorization or order are to be dealt with in accordance with [section 488.02](#); or

(d) revoke the warrant, authorization or order if the judge is of the opinion that the applicant knew or ought reasonably to have known that the application for the warrant, authorization or order related to a journalist's communications or an object, document or data relating to or in the possession of a journalist.

[2017, c. 22, s. 3](#); [2022, c. 17, s. 25](#).

Documents

488.02 (1) Any document obtained pursuant to a warrant, authorization or order issued in accordance with [subsection 488.01\(3\)](#), or that is the subject of an order made under [subsection 488.01\(6\)](#) or [paragraph 488.01\(10\)\(c\)](#), is to be placed in a packet and sealed by the court that issued the warrant, authorization or order and is to be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and is not to be dealt with except in accordance with this section.

Notice

(2) No officer is to examine or reproduce, in whole or in part, a document referred to in subsection (1) without giving the journalist and relevant media outlet notice of his or her intention to examine or reproduce the document.

Application

(3) The journalist or relevant media outlet may, within 10 days of receiving the notice referred to in subsection (2), apply to a judge of the court that issued the warrant, authorization or order to issue an order that the document is not to be disclosed to an officer on the grounds that the document identifies or is likely to identify a journalistic source.

Disclosure: prohibition

(4) A document that is subject to an application under subsection (3) is to be disclosed to an officer only following a disclosure order in accordance with paragraph (7)(b).

Disclosure order

(5) The judge may order the disclosure of a document only if he or she is satisfied that

- (a)** there is no other way by which the information can reasonably be obtained; and
- (b)** the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

Examination

(6) The judge may, if he or she considers it necessary, examine a document to determine whether it should be disclosed.

Order

(7) The judge must,

- (a)** if he or she is of the opinion that the document should not be disclosed, order that it be returned to the journalist or the media outlet, as the case may be; or
- (b)** if he or she is of the opinion that the document should be disclosed, order that it be delivered to the officer who gave the notice under subsection (2), subject to such restrictions and conditions as the judge deems appropriate.

[2017, c. 22, s. 3.](#)

Definitions

488.1 (1) In this section,

custodian means a person in whose custody a package is placed pursuant to subsection (2); (*gardien*)

document, for the purposes of this section, has the same meaning as in [section 321](#); (*document*)

judge means a judge of a superior court of criminal jurisdiction of the province where the seizure was made; (*juge*)

lawyer means, in the Province of Quebec, an advocate, lawyer or notary and, in any other province, a barrister or solicitor; (*avocat*)

officer means a peace officer or public officer. (*fonctionnaire*)

Examination or seizure of certain documents where privilege claimed

(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(a) seize the document and place it in a package and suitably seal and identify the package; and

(b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

Application to judge

(3) Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

(a) within fourteen days from the day the document was so placed in custody, apply, on two days notice of motion to all other persons entitled to make application, to a judge for an order

(i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(b) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and

(c) if he has proceeded as authorized by paragraph (b), apply, at the appointed time and place, for an order determining the question.

Disposition of application

(4) On an application under paragraph (3)(c), the judge

(a) may, if the judge considers it necessary to determine the question whether the document should be disclosed, inspect the document;

(b) where the judge is of the opinion that it would materially assist him in deciding whether or not the document is privileged, may allow the Attorney General to inspect

the document;

(c) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and

(d) shall determine the question summarily and,

(i) if the judge is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver the document to the lawyer who claimed the solicitor-client privilege or to the client, or

(ii) if the judge is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as the judge deems appropriate,

and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

Privilege continues

(5) Where the judge determines pursuant to paragraph (4)(d) that a solicitor-client privilege exists in respect of a document, whether or not the judge has, pursuant to paragraph (4)(b), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

Order to custodian to deliver

(6) Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(a) or that following such an application no further application has been made under paragraph (3)(c), the judge shall order the custodian to deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

Application to another judge

(7) Where the judge to whom an application has been made under paragraph (3)(c) cannot act or continue to act under this section for any reason, subsequent applications under that paragraph may be made to another judge.

Prohibition

(8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

Authority to make copies

(9) At any time while a document is in the custody of a custodian under this section, a judge may, on an *ex parte* application of a person claiming a solicitor-client privilege

under this section, authorize that person to examine the document or make a copy of it in the presence of the custodian or the judge, but any such authorization shall contain provisions to ensure that the document is repackaged and that the package is resealed without alteration or damage.

Hearing in private

(10) An application under paragraph (3)(c) shall be heard in private.

Exception

(11) This section does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act* or under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

R.S., 1985, c. 27 (1st Supp.), s. 71; 2000, c. 17, s. 89; 2001, c. 41, s. 80.

Seizure of things not specified

489 (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Seizure without warrant

(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

R.S., 1985, c. C-46, s. 489; R.S., 1985, c. 27 (1st Supp.), s. 72, c. 42 (4th Supp.), s. 3; 1993, c. 40, s. 16; 1997, c. 18, s. 48.

Restitution of thing or report

489.1 (1) Subject to this or any other Act of Parliament, if a peace officer has seized anything under a warrant issued under this Act, under [section 487.11](#) or [489](#), or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as is practicable,

(a) return the thing seized, on being issued a receipt for it, to the person lawfully entitled to its possession and report to a justice having jurisdiction in respect of the matter and, in the case of a warrant, jurisdiction in the province in which the warrant was issued, if the peace officer is satisfied that

(i) there is no dispute as to who is lawfully entitled to possession of the thing seized, and

(ii) the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or

(b) bring the thing seized before a justice referred to in paragraph (a), or report to the justice that the thing has been seized and is being detained, to be dealt with in accordance with [subsection 490\(1\)](#), if the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii).

Person other than peace officer

(2) Subject to this or any other Act of Parliament, if a person other than a peace officer has seized anything under a warrant issued under this Act, under [section 487.11](#) or [489](#), or otherwise in the execution of duties under this or any other Act of Parliament, that person shall, as soon as is practicable and so that the thing seized may be dealt with in accordance with [subsection 490\(1\)](#),

(a) bring the thing before a justice having jurisdiction in respect of the matter and, in the case of a warrant, jurisdiction in the province in which the warrant was issued; or

(b) report to the justice referred to in paragraph (a) that the thing has been seized and is being detained.

Form

(3) A report to a justice under this section shall be in Form 5.2, varied to suit the case.

R.S., 1985, c. 27 (1st Supp.), s. 72; 1993, c. 40, s. 17; 1997, c. 18, s. 49; [2022, c. 17, s. 26](#).

Detention of things seized

490 (1) Subject to this or any other Act of Parliament, where, pursuant to [paragraph 489.1\(1\)\(b\)](#) or [subsection 489.1\(2\)](#), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,

(a) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or

(b) where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.

Further detention

(2) Nothing shall be detained under the authority of paragraph (1)(b) for a period of more than three months after the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless

(a) a justice, on the making of a summary application to him after three clear days notice thereof to the person from whom the thing detained was seized, is satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted and the justice so orders; or

(b) proceedings are instituted in which the thing detained may be required.

Idem

(3) More than one order for further detention may be made under paragraph (2)(a) but the cumulative period of detention shall not exceed one year from the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#), on the making of a summary application to him after three clear days notice thereof to the person from whom the thing detained was seized, is satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period and subject to such other conditions as the judge considers just, and the judge so orders; or

(b) proceedings are instituted in which the thing detained may be required.

Detention without application where consent

(3.1) A thing may be detained under paragraph (1)(b) for any period, whether or not an application for an order under subsection (2) or (3) is made, if the lawful owner or person who is lawfully entitled to possession of the thing seized consents in writing to its detention for that period.

When accused ordered to stand trial

(4) When an accused has been ordered to stand trial, the justice shall forward anything detained pursuant to subsections (1) to (3) to the clerk of the court to which the accused has been ordered to stand trial to be detained by the clerk of the court and disposed of as the court directs.

Where continued detention no longer required

(5) Where at any time before the expiration of the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor, or the peace officer or other person having custody of the thing seized, determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), the prosecutor, peace officer or other person shall apply to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#), where a judge ordered its detention under subsection (3), or

(b) a justice, in any other case,

who shall, after affording the person from whom the thing was seized or the person who claims to be the lawful owner thereof or person entitled to its possession, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, make an order in respect of the property under subsection (9).

Idem

(6) Where the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required, the prosecutor, peace officer or other person shall apply to a judge or justice referred to in paragraph (5)(a) or (b) in the circumstances set out in that paragraph, for an order in respect of the property under subsection (9) or (9.1).

Application for order of return

(7) A person from whom anything has been seized may, after the expiration of the periods of detention provided for or ordered under subsections (1) to (3) and on three clear days notice to the Attorney General, apply summarily to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#), where a judge ordered the detention of the thing seized under subsection (3), or

(b) a justice, in any other case,

for an order under paragraph (9)(c) that the thing seized be returned to the applicant.

Exception

(8) A judge of a superior court of criminal jurisdiction or a judge as defined in [section 552](#), where a judge ordered the detention of the thing seized under subsection (3), or a justice, in any other case, may allow an application to be made under subsection (7) prior to the expiration of the periods referred to therein where he is satisfied that hardship will result unless the application is so allowed.

Disposal of things seized

(9) Subject to this or any other Act of Parliament, if

(a) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or

(b) a justice, in any other case,

is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall

(c) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person, or

(d) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession,

and may, if possession of it by the person from whom it was seized is unlawful, or if it was seized when it was not in the possession of any person, and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

Exception

(9.1) Notwithstanding subsection (9), a judge or justice referred to in paragraph (9)(a) or (b) may, if the periods of detention provided for or ordered under subsections (1) to (3) in respect of a thing seized have expired but proceedings have not been instituted in which the thing may be required, order that the thing continue to be detained for such period as the judge or justice considers necessary if the judge or justice is satisfied

(a) that the continued detention of the thing might reasonably be required for a purpose mentioned in subsection (1) or (4); and

(b) that it is in the interests of justice to do so.

Application by lawful owner

(10) Subject to this or any other Act of Parliament, a person, other than a person who may make an application under subsection (7), who claims to be the lawful owner or person lawfully entitled to possession of anything seized and brought before or reported to a justice under [section 489.1](#) may, at any time, on three clear days notice to the Attorney General and the person from whom the thing was seized, apply summarily to

(a) a judge referred to in subsection (7), where a judge ordered the detention of the thing seized under subsection (3), or

(b) a justice, in any other case,

for an order that the thing detained be returned to the applicant.

Order

(11) Subject to this or any other Act of Parliament, on an application under subsection (10), where a judge or justice is satisfied that

(a) the applicant is the lawful owner or lawfully entitled to possession of the thing seized, and

(b) the periods of detention provided for or ordered under subsections (1) to (3) in respect of the thing seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4),

the judge or justice shall order that

(c) the thing seized be returned to the applicant, or

(d) except as otherwise provided by law, where, pursuant to subsection (9), the thing seized was forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant, the applicant be paid the proceeds of sale or the value of the thing seized.

Detention pending appeal, etc.

(12) Notwithstanding anything in this section, nothing shall be returned, forfeited or disposed of under this section pending any application made, or appeal taken, thereunder in respect of the thing or proceeding in which the right of seizure thereof is questioned or within thirty days after an order in respect of the thing is made under this section.

Copies of documents returned

(13) The Attorney General, the prosecutor or the peace officer or other person having custody of a document seized may, before bringing it before a justice or complying with an order that the document be returned, forfeited or otherwise dealt with under subsection (1), (9) or (11), make or cause to be made, and may retain, a copy of the document.

Probative force

(14) Every copy made under subsection (13) that is certified as a true copy by the Attorney General, the person who made the copy or the person in whose presence the copy was made is admissible in evidence and, in the absence of evidence to the contrary, has the same probative force as the original document would have if it had been proved in the ordinary way.

Access to anything seized

(15) Where anything is detained pursuant to subsections (1) to (3.1), a judge of a superior court of criminal jurisdiction, a judge as defined in [section 552](#) or a provincial court judge may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the

person by or on whose behalf the application is made be permitted to examine anything so detained.

Conditions

(16) An order that is made under subsection (15) shall be made on such terms as appear to the judge to be necessary or desirable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

Appeal

(17) A person who feels aggrieved by an order made under subsection (8), (9), (9.1) or (11) may appeal from the order

(a) to the court of appeal as defined in [section 673](#) if the order was made by a judge of a superior court of criminal jurisdiction, in which case [sections 678 to 689](#) apply with any modifications that the circumstances require; or

(b) to the appeal court as defined in [section 812](#) in any other case, in which case [sections 813 to 828](#) apply with any modifications that the circumstances require.

Waiver of notice

(18) Any person to whom three days notice must be given under paragraph (2)(a) or (3) (a) or subsection (7), (10) or (15) may agree that the application for which the notice is given be made before the expiration of the three days.

R.S., 1985, c. C-46, s. 490; R.S., 1985, c. 27 (1st Supp.), s. 73; 1994, c. 44, s. 38; 1997, c. 18, s. 50; [2008, c. 18, s. 14](#); [2017, c. 7, s. 63\(F\)](#).

Perishable things

490.01 Where any thing seized pursuant to this Act is perishable or likely to depreciate rapidly, the person who seized the thing or any other person having custody of the thing

(a) may return it to its lawful owner or the person who is lawfully entitled to possession of it; or

(b) where, on *ex parte* application to a justice, the justice so authorizes, may

(i) dispose of it and give the proceeds of disposition to the lawful owner of the thing seized, if the lawful owner was not a party to an offence in relation to the thing or, if the identity of that lawful owner cannot be reasonably ascertained, the proceeds of disposition are forfeited to Her Majesty, or

(ii) destroy it.

1997, c. 18, s. 51; 1999, c. 5, s. 17.

Sex Offender Information

Interpretation

Definitions

490.011 (1) The following definitions apply in this section and in [sections 490.012 to 490.07](#).

crime of a sexual nature means a crime referred to in [subsection 3\(2\)](#) of the [Sex Offender Information Registration Act](#). (*crimes de nature sexuelle*)

database has the same meaning as in [subsection 3\(1\)](#) of the [Sex Offender Information Registration Act](#). (*banque de données*)

designated offence means a primary offence or a secondary offence. (*infraction désignée*)

Ontario Act means [Christopher's Law \(Sex Offender Registry\), 2000](#), S.O. 2000, c. 1. (*loi ontarienne*)

pardon means a conditional pardon granted under Her Majesty's royal prerogative of mercy or under [section 748](#) that has not been revoked. (*pardon*)

primary offence means

(a) an offence under any of the following provisions:

- (i) [subsection 7\(4.1\)](#) (offence in relation to sexual offences against children),
- (ii) [section 151](#) (sexual interference),
- (iii) [section 152](#) (invitation to sexual touching),
- (iv) [section 153](#) (sexual exploitation),
- (v) [section 153.1](#) (sexual exploitation of person with disability),
- (vi) [section 155](#) (incest),
- (vii) [subsection 160\(1\)](#) (bestiality),
- (viii) [subsection 160\(2\)](#) (compelling the commission of bestiality),
- (ix) [subsection 160\(3\)](#) (bestiality in presence of or by a child),
- (x) [section 162.1](#) (publication, etc., of an intimate image without consent),
- (xi) [section 163.1](#) (child sexual abuse and exploitation material),
- (xii) [section 170](#) (parent or guardian procuring sexual activity),
- (xiii) [section 171.1](#) (making sexually explicit material available to child),
- (xiv) [section 172.1](#) (luring a child),
- (xv) [section 172.2](#) (agreement or arrangement — sexual offence against child),
- (xvi) [subsection 173\(2\)](#) (exposure),
- (xvii) [section 271](#) (sexual assault),

- (xviii) [section 272](#) (sexual assault with a weapon, threats to a third party or causing bodily harm),
- (xix) [section 273](#) (aggravated sexual assault),
- (xx) [subsection 273.3\(2\)](#) (removal of a child from Canada),
- (xxi) [section 279.011](#) (trafficking — person under 18 years),
- (xxii) [subsection 279.02\(2\)](#) (material benefit — trafficking of person under 18 years),
- (xxiii) [subsection 279.03\(2\)](#) (withholding or destroying documents — trafficking of person under 18 years),
- (xxiv) [subsection 286.1\(2\)](#) (obtaining sexual services for consideration from person under 18 years),
- (xxv) [subsection 286.2\(2\)](#) (material benefit from sexual services provided by person under 18 years), and
- (xxvi) [subsection 286.3\(2\)](#) (procuring — person under 18 years);

(b) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983:

- (i) [section 144](#) (rape),
- (ii) [section 145](#) (attempt to commit rape),
- (iii) [section 149](#) (indecent assault on female),
- (iv) [section 156](#) (indecent assault on male), and
- (v) subsection 246(1) (assault with intent) if the intent is to commit an offence referred to in any of subparagraphs (i) to (iv);

(c) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as enacted by [section 19](#) of *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, chapter 125 of the Statutes of Canada, 1980-81-82-83:

- (i) [section 246.1](#) (sexual assault),
- (ii) [section 246.2](#) (sexual assault with a weapon, threats to a third party or causing bodily harm), and
- (iii) [section 246.3](#) (aggravated sexual assault);

(d) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:

- (i) [subsection 146\(1\)](#) (sexual intercourse with a female under age of fourteen),

(ii) subsection 146(2) (sexual intercourse with a female between ages of fourteen and sixteen),

(iii) [section 153](#) (sexual intercourse with step-daughter),

(iv) section 157 (gross indecency),

(v) [section 166](#) (parent or guardian procuring defilement), and

(vi) [section 167](#) (householder permitting defilement);

(e) an offence under any of the following provisions of this Act, as they read from time to time before December 6, 2014 :

(i) paragraph 212(1)(i) (stupefying or overpowering for the purpose of sexual intercourse),

(ii) subsection 212(2) (living on the avails of prostitution of person under 18 years),

(iii) subsection 212(2.1) (aggravated offence in relation to living on the avails of prostitution of person under 18 years), and

(iv) subsection 212(4) (prostitution of person under 18 years); or

(f) an attempt or conspiracy to commit an offence referred to in any of paragraphs (a) to (e). (*infraction primaire*)

record suspension means a record suspension, as defined in [subsection 2\(1\)](#) of the *Criminal Records Act*, that has not been revoked or ceased to have effect. (*suspension du casier*)

registration centre has the same meaning as in subsection 3(1) of the *Sex Offender Information Registration Act*. (*bureau d'inscription*)

Review Board means the Review Board established or designated for a province under [subsection 672.38\(1\)](#). (*commission d'examen*)

secondary offence means

(a) an offence under any of the following provisions:

(i) [section 162](#) (voyeurism),

(ii) [subsection 173\(1\)](#) (indecent acts),

(iii) [section 177](#) (trespassing at night),

(iv) [section 231](#) (murder),

(v) [section 234](#) (manslaughter),

(vi) [paragraph 245\(1\)\(a\)](#) (administering noxious thing with intent to endanger life or cause bodily harm),

(vii) [paragraph 245\(1\)\(b\)](#) (administering noxious thing with intent to aggrieve or annoy),

- (viii) [section 246](#) (overcoming resistance to commission of offence),
- (ix) [section 264](#) (criminal harassment),
- (x) [section 279](#) (kidnapping),
- (xi) [section 279.01](#) (trafficking in persons),
- (xii) [subsection 279.02\(1\)](#) (material benefit — trafficking),
- (xiii) [subsection 279.03\(1\)](#) (withholding or destroying documents — trafficking),
- (xiv) [section 280](#) (abduction of a person under age of sixteen),
- (xv) [section 281](#) (abduction of a person under age of fourteen),
- (xvi) [subsection 286.1\(1\)](#) (obtaining sexual services for consideration),
- (xvii) [subsection 286.2\(1\)](#) (material benefit from sexual services),
- (xviii) [subsection 286.3\(1\)](#) (procuring),
- (xix) [section 346](#) (extortion),
- (xx) [paragraph 348\(1\)\(d\)](#) (breaking and entering a dwelling house with intent to commit an indictable offence),
- (xxi) [paragraph 348\(1\)\(d\)](#) (breaking and entering a dwelling house and committing an indictable offence),
- (xxii) [paragraph 348\(1\)\(e\)](#) (breaking and entering a place other than a dwelling house with intent to commit an indictable offence), and
- (xxiii) [paragraph 348\(1\)\(e\)](#) (breaking and entering a place other than a dwelling house and committing an indictable offence); or

(b) an attempt or conspiracy to commit an offence referred to in paragraph (a).
(*infraction secondaire*)

verdict of not criminally responsible on account of mental disorder means a verdict of not criminally responsible on account of mental disorder within the meaning of [subsection 672.1\(1\)](#) or a finding of not responsible on account of mental disorder within the meaning of [subsection 2\(1\)](#) of the [National Defence Act](#), as the case may be. (*verdict de non-responsabilité*)

Interpretation

(2) For the purpose of this section and [sections 490.012 to 490.032](#), a person who is convicted of, or found not criminally responsible on account of mental disorder for, a designated offence does not include a young person

(a) within the meaning of [subsection 2\(1\)](#) of the [Youth Criminal Justice Act](#) unless they are given an adult sentence within the meaning of that subsection for the offence; or

(b) within the meaning of [subsection 2\(1\)](#) of the [Young Offenders Act](#), chapter Y-1 of the Revised Statutes of Canada, 1985, unless they are convicted of the offence in

ordinary court within the meaning of that subsection.

2004, c. 10, s. 20; 2005, c. 43, s. 6; 2007, c. 5, s. 11; 2008, c. 6, s. 36; 2010, c. 3, s. 7, c. 17, s. 4; 2012, c. 1, ss. 31, 141; 2014, c. 25, s. 25; 2019, c. 17, s. 4; 2019, c. 25, s. 202; 2023, c. 28, s. 6; 2023, c. 28, s. 48.1; 2024, c. 23, s. 8.

Order to Comply with the *Sex Offender Information Registration Act*

Order

490.012 (1) Subject to subsection (5), when a court imposes a sentence on a person for a designated offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* if

- (a) the designated offence was prosecuted by indictment;
- (b) the sentence for the designated offence is a term of imprisonment of two years or more; and
- (c) the victim of the designated offence is under the age of 18 years.

Order — previous offence or obligation

(2) Subject to subsection (5), when a court imposes a sentence on a person for a designated offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* if the prosecutor establishes that, before or after the coming into force of paragraphs (a) and (b), the person

- (a) was previously convicted of a primary offence or previously convicted under [section 130](#) of the *National Defence Act* in respect of a primary offence; or
- (b) is or was, as a result of a conviction, subject to an order or obligation under this or another Act of Parliament to comply with the *Sex Offender Information Registration Act*.

Order — other circumstances

(3) Subject to subsection (5), when a court imposes a sentence on a person for a designated offence in circumstances in which neither subsection (1) nor (2) applies, or when the court renders a verdict of not criminally responsible on account of mental disorder for a designated offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* unless the court is satisfied the person has established that

- (a) there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under that Act; or
- (b) the impact of the order on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

(4) In determining whether to make an order under subsection (3) in respect of a person, the court shall consider

- (a)** the nature and seriousness of the designated offence;
- (b)** the victim's age and other personal characteristics;
- (c)** the nature and circumstances of the relationship between the person and the victim;
- (d)** the personal characteristics and circumstances of the person;
- (e)** the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f)** the opinions of experts who have examined the person; and
- (g)** any other factors that the court considers relevant.

Limitation — secondary offences

(5) A court shall make an order under any of subsections (1) to (3) in respect of a secondary offence only if the prosecutor applies for the order and establishes beyond a reasonable doubt that the person committed the secondary offence with the intent to commit a primary offence.

2004, c. 10, s. 20; 2007, c. 5, s. 13; 2010, c. 17, s. 5; 2014, c. 25, s. 26; 2019, c. 25, s. 203; 2023, c. 28, s. 7.

Date order begins

490.013 (1) An order made under [section 490.012](#) begins on the day on which it is made.

Duration of order — [s. 490.012\(1\)](#) or [\(3\)](#)

(2) An order made under [subsection 490.012\(1\)](#) or [\(3\)](#)

- (a)** subject to subsections (3) and (5), ends 10 years after it was made if the offence in connection with which it was made was prosecuted summarily or if the maximum term of imprisonment for the offence is two or five years;
- (b)** subject to subsections (3) and (5), ends 20 years after it was made if the maximum term of imprisonment for the offence is 10 or 14 years; and
- (c)** applies for life if the maximum term of imprisonment for the offence is life.

(2.1) ~~[Repealed, 2023, c. 28, s. 8]~~

Duration of order — offences in same proceeding

(3) An order made under [subsection 490.012\(1\)](#) or [\(3\)](#) applies for life if

(a) in the same proceeding, the person has been convicted of, or a verdict of not criminally responsible on account of mental disorder is rendered for, two or more designated offences in connection with which an order under any of [subsections 490.012\(1\) to \(3\)](#) may be made; and

(b) the court is satisfied that those offences demonstrate, or form part of, a pattern of behaviour showing that the person presents an increased risk of reoffending by committing a crime of a sexual nature.

If court not satisfied

(4) If paragraph (3)(a) applies in the circumstances but the court is not satisfied as set out in paragraph (3)(b), the duration of the order is determined by applying paragraphs (2)(a) to (c) to the designated offence with the longest maximum term of imprisonment.

Duration of order — other order or obligation

(5) An order made under [subsection 490.012\(1\)](#) or (3) applies for life if the person

(a) was previously convicted of, or previously received a verdict of not criminally responsible on account of mental disorder for, a primary offence or an offence under [section 130](#) of the *National Defence Act* in respect of a primary offence; or

(b) is, or was at any time, the subject of an order or obligation under this or another Act of Parliament to comply with the *Sex Offender Information Registration Act*.

Duration of order — [s. 490.012\(2\)](#)

(6) An order made under [subsection 490.012\(2\)](#) applies for life.

[2004, c. 10, s. 20; 2007, c. 5, s. 14; 2010, c. 17, s. 6; 2014, c. 25, s. 27; 2023, c. 28, s. 8.](#)

Reasons

490.0131 The court shall

(a) state the designated offence, and the term of imprisonment imposed for it, that form the basis of an order made under [subsection 490.012\(1\)](#); and

(b) give reasons for a decision under [subsection 490.012\(3\)](#) or [paragraph 490.013\(3\)](#) (b).

[2023, c. 28, s. 9.](#)

Failure to make order

490.0132 If the court does not consider the matter under any of [subsections 490.012\(1\) to \(3\)](#) at the time the sentence is imposed, or a verdict of not criminally responsible on account of mental disorder is rendered, for a primary offence, the court

(a) shall, within 90 days after the day on which it imposes the sentence or renders the verdict, set a date for a hearing to do so;

(b) retains jurisdiction over the matter;

(c) may require the person to appear at the hearing by videoconference, as long as the person is given the opportunity to communicate privately with counsel if they are represented by counsel; and

(d) may issue a summons in Form 6.3 to compel the attendance of the person at the hearing.

2023, c. 28, s. 9.

Appeal

490.014 The prosecutor, or a person who is subject to an order made under [section 490.012](#), may appeal from a decision of the court under section 490.012 or [490.013](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may

(a) dismiss the appeal; or

(b) allow the appeal and order a new hearing, quash or amend the order or make an order that may be made under [section 490.012](#).

2004, c. 10, s. 20; 2010, c. 17, s. 7; 2023, c. 28, s. 9.

Application for termination order

490.015 (1) A person who is subject to an order may apply for a termination order

(a) if five years have elapsed since the order was made, in the case of an order referred to in [paragraph 490.013\(2\)\(a\)](#);

(b) if 10 years have elapsed since the order was made, in the case of an order referred to in [paragraph 490.013\(2\)\(b\)](#); or

(c) if 20 years have elapsed since the order was made, in the case of an order referred to in [paragraph 490.013\(2\)\(c\)](#) or in any of [subsections 490.013\(3\)](#), [\(5\)](#) or [\(6\)](#).

Multiple orders

(2) A person who is subject to more than one order made under [section 490.012](#) of this Act, or under that section and [section 227.01](#) of the *National Defence Act*, may apply for a termination order if 20 years have elapsed since the most recent order was made.

Pardon, record suspension or absolute discharge

(3) Despite subsections (1) and (2), a person may apply for a termination order once they receive a pardon, once a record suspension is ordered or once they are absolutely discharged under [paragraph 672.54\(a\)](#).

Scope of application

(4) The application shall be in relation to every order that is in effect. If a person is subject to an obligation under [section 490.019](#) or [490.02901](#), under [section 227.06](#) of the *National Defence Act* or under [section 36.1](#) of the *International Transfer of Offenders Act*, the application shall also be in relation to that obligation.

Re-application

(5) A person whose application is refused may re-apply if five years have elapsed since they made the previous application. They may also re-apply once they receive a pardon or once a record suspension is ordered. However, they may not re-apply under this subsection if an order is made with respect to them under [section 490.012](#) of this Act or [section 227.01](#) of the *National Defence Act* after the previous application was made.

Jurisdiction

(6) The application shall be made to

- (a)** a superior court of criminal jurisdiction if
 - (i)** one or more of the orders to which it relates were made by such a court under [section 490.012](#), or
 - (ii)** one or more of the orders to which it relates were made under [section 227.01](#) of the *National Defence Act* and the Chief Military Judge does not have jurisdiction to receive the application under subsection 227.03(6) of that Act; or
- (b)** a court of criminal jurisdiction, in any other case in which the application relates to one or more orders made under [section 490.012](#).

[2004, c. 10, s. 20](#); [2007, c. 5, s. 15](#); [2010, c. 17, s. 8](#); [2012, c. 1, s. 142](#); [2023, c. 28, s. 10](#).

Termination order

490.016 (1) The court shall make a termination order if it is satisfied that the person has established that

- (a)** there would be no connection between continuing an order or obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*; or
- (b)** the impact on the person of continuing an order or obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

(1.1) In determining whether to make the termination order, the court shall consider

- (a)** the nature and seriousness of the offence that is the basis of an order or obligation;
- (b)** the victim's age and other personal characteristics;
- (c)** the nature and circumstances of the relationship between the person and the victim;
- (d)** the personal characteristics and circumstances of the person;

- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f) the opinions of experts who have examined the person; and
- (g) any other factors that the court considers relevant.

Reasons for decision

- (2) The court shall give reasons for its decision.

Requirements relating to notice

- (3) If the court makes a termination order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, to be notified of the decision.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 16](#); [2010, c. 17, s. 9](#); [2023, c. 28, s. 11](#).

Appeal

490.017 (1) The prosecutor or the person who applied for a termination order may appeal from a decision made under [subsection 490.016\(1\)](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may dismiss the appeal, or allow it and order a new hearing, quash the termination order or make an order that may be made under that subsection.

Requirements relating to notice

- (2) If the appeal court makes an order that may be made under [subsection 490.016\(1\)](#), it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 17](#); [2010, c. 17, s. 10](#).

Requirements relating to notice

490.018 (1) When a court or appeal court makes an order under [section 490.012](#), it shall cause

- (a) the order to be read by or to the person who is subject to it;
- (b) a copy of the order to be given to that person;
- (c) that person to be informed of sections 4 to 7.1 of the *Sex Offender Information Registration Act*, [sections 490.031](#) and [490.0311](#) of this Act and [section 119.1](#) of the *National Defence Act*; and
- (d) a copy of the order to be sent to
 - (i) the Review Board that is responsible for making a disposition with respect to that person, if applicable,

(ii) the person in charge of the place in which that person is to serve the custodial portion of a sentence or is to be detained in custody as part of a disposition under Part XX.1, if applicable,

(iii) the police service whose member charged that person with the offence in connection with which the order is made, and

(iv) the Commissioner of the Royal Canadian Mounted Police and, if there is a provincial police service that is responsible for the registration of information under the *Sex Offender Information Registration Act* in the province in which the court makes the order, the head of that police service.

Endorsement

(2) After paragraphs (1)(a) to (c) have been complied with, the person who is subject to the order shall endorse the order.

Notice on disposition by Review Board

(3) A Review Board shall cause a copy of the order to be given to the person who is subject to it when it directs

(a) under [paragraph 672.54\(a\)](#), that the person be discharged absolutely; or

(b) under [paragraph 672.54\(b\)](#), that the person be discharged subject to conditions, unless the conditions restrict the person's liberty in a manner and to an extent that prevent them from complying with sections 4, 4.1, 4.3 and 6 of the *Sex Offender Information Registration Act*.

Notice before release

(4) The person in charge of the place in which the person is serving the custodial portion of a sentence, or is detained in custody, before their release or discharge shall give the person a copy of the order not earlier than 10 days before their release or discharge.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 18](#); [2010, c. 17, s. 11](#); [2023, c. 28, s. 12](#).

Notice and Obligation to Comply with the *Sex Offender Information Registration Act* — Convictions Before December 15, 2004

Obligation to comply

490.019 A person who is served with a notice in Form 53 shall comply with the *Sex Offender Information Registration Act* for the applicable period specified in [section 490.022](#) unless a court makes an exemption order under [subsection 490.023\(2\)](#).

[2004, c. 10, s. 20](#).

Persons who may be served

490.02 (1) The Attorney General of a province or minister of justice of a territory may serve a person with a notice only if the person was convicted of, or found not criminally responsible on account of mental disorder for, an offence referred to in paragraph (a), (c), (c.1), (d) or (e) of the definition **designated offence** in [subsection 490.011\(1\)](#) and

(a) on the day on which the *Sex Offender Information Registration Act* comes into force, they are subject to a sentence for, or have not received an absolute discharge under Part XX.1 from, the offence; or

(b) in any other case,

(i) their name appears in connection with the offence, immediately before the *Sex Offender Information Registration Act* comes into force, in the sex offender registry established under the Ontario Act, and

(ii) they either were a resident of Ontario at any time between April 23, 2001 and the day on which the *Sex Offender Information Registration Act* comes into force or committed the offence in Ontario.

Exception

(2) A notice shall not be served on a person

(a) if they have been finally acquitted of, or have received a free pardon granted under Her Majesty's royal prerogative of mercy or under [section 748](#) for, every offence in connection with which a notice may be served on them under [section 490.021](#) of this Act or [section 227.08](#) of the *National Defence Act*;

(b) if an application has been made for an order under [subsection 490.012\(3\)](#) of this Act or [subsection 227.01\(3\)](#) of the *National Defence Act* in relation to any offence in connection with which a notice may be served on them under [section 490.021](#) of this Act or [section 227.08](#) of the *National Defence Act*; or

(c) who is referred to in paragraph (1)(b) if they have provided proof of a pardon in accordance with subsection 9(1) of the Ontario Act.

References

(3) The reference in subsection (1) to the definition *designated offence* is a reference to that definition as it read from time to time before the day on which this subsection comes into force, and the reference in paragraph (2)(b) to [subsection 490.012\(3\)](#) is a reference to that provision as it read from time to time before that day.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 20](#); [2023, c. 28, s. 13](#).

Period for and method of service

490.021 (1) The notice shall be personally served within one year after the day on which the *Sex Offender Information Registration Act* comes into force.

Exception

(2) If a person referred to in [paragraph 490.02\(1\)\(a\)](#) is unlawfully at large or is in breach of any terms of their sentence or discharge, or of any conditions set under this Act or under Part III of the *National Defence Act*, that relate to residence, the notice may be served by registered mail at their last known address.

Exception

(3) If a person referred to in [paragraph 490.02\(1\)\(b\)](#) is not in compliance with [section 3](#) of the Ontario Act on the day on which the *Sex Offender Information Registration Act* comes into force, the notice may be served by registered mail at their last known address.

Exception

(4) If a person referred to in [paragraph 490.02\(1\)\(b\)](#) is in compliance with [section 3](#) and [subsection 7\(2\)](#) of the Ontario Act on the day on which the *Sex Offender Information Registration Act* comes into force but fails to comply with subsection 3(1) or 7(2) of the Ontario Act within one year after that day, the notice shall be served within one year after the day on which they failed to comply and may be served by registered mail at their last known address.

Proof of service

(5) An affidavit of the person who served the notice, sworn before a commissioner or other person authorized to take affidavits, is evidence of the service and the notice if it sets out that

- (a)** the person who served the notice has charge of the appropriate records and has knowledge of the facts in the particular case;
- (b)** the notice was personally served on, or mailed to, the person to whom it was directed on a named day; and
- (c)** the person who served the notice identifies a true copy of the notice as an exhibit attached to the affidavit.

Requirements relating to notice

(6) The person who served the notice shall, without delay, send a copy of the affidavit and the notice to the Attorney General of the province, or the minister of justice of the territory, in which the person was served.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 21](#).

Date obligation begins

490.022 (1) The obligation under [section 490.019](#) begins

- (a)** either one year after the day on which the person is served with the notice or when an exemption order is refused under [subsection 490.023\(2\)](#), whichever is later; or
- (b)** when an exemption order is quashed.

Date obligation ends

(2) The obligation ends on the earliest of

- (a) the day on which an exemption order is made on an appeal from a decision made under [subsection 490.023\(2\)](#),
- (b) the day on which the obligation of a person referred to in [paragraph 490.02\(1\)\(b\)](#) to comply with [section 3](#) of the Ontario Act ends under [paragraph 7\(1\)\(a\)](#) of that Act, or
- (c) the day on which a person referred to in [paragraph 490.02\(1\)\(b\)](#) provides satisfactory proof of a pardon or record suspension to a person who collects information, as defined in subsection 3(1) of the *Sex Offender Information Registration Act*, at a registration centre.

Duration of obligation

(3) If none of paragraphs (2)(a) to (c) applies earlier, the obligation

- (a) ends 10 years after the person was sentenced, or found not criminally responsible on account of mental disorder, for the offence listed in the notice if the offence was prosecuted summarily or if the maximum term of imprisonment for the offence is two or five years;
- (b) ends 20 years after the person was sentenced, or found not criminally responsible on account of mental disorder, for the offence listed in the notice if the maximum term of imprisonment for the offence is 10 or 14 years;
- (c) applies for life if the maximum term of imprisonment for the offence listed in the notice is life; or
- (d) applies for life if, at any time, the person was convicted of, or found not criminally responsible on account of mental disorder for, more than one offence that is referred to in paragraph (a), (c), (c.1), (d) or (e) of the definition **designated offence** in [subsection 490.011\(1\)](#) of this Act or in paragraph (a) or (c) of the definition **designated offence** in [section 227](#) of the *National Defence Act* and if more than one of those offences is listed in the notice.

Reference

(4) The reference in paragraph (3)(d) to the definition *designated offence* is to a reference to that definition as it read from time to time before the day on which this subsection comes into force.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 22](#); [2012, c. 1, s. 143](#); [2023, c. 28, s. 14](#).

Application for exemption order

490.023 (1) A person who is not subject to an order under [section 490.012](#) of this Act or [section 227.01](#) of the *National Defence Act* may apply for an order exempting them from the obligation within one year after they are served with a notice under [section 490.021](#) of this Act or [section 227.08](#) of the *National Defence Act*.

Jurisdiction

(1.1) The application shall be made to a court of criminal jurisdiction if

- (a)** it relates to an obligation under [section 490.019](#) of this Act; or
- (b)** it relates to an obligation under [section 227.06](#) of the *National Defence Act* and the Chief Military Judge does not have jurisdiction to receive the application under subsection 227.1(2) of that Act.

Exemption order

(2) The court shall make an exemption order if it is satisfied that the person has established that the impact of the obligation on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

Reasons for decision

(3) The court shall give reasons for its decision.

Removal of information from database

(4) If the court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information that relates to the person that was registered in the database on receipt of the copy of the notice.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 23](#); [2010, c. 17, s. 13](#).

Appeal

490.024 (1) The Attorney General or the person who applied for an exemption order may appeal from a decision of the court under [subsection 490.023\(2\)](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may dismiss the appeal, or allow it and order a new hearing, quash the exemption order or make an order that may be made under that subsection.

Removal of information from database

(2) If the appeal court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information that relates to the person that was registered in the database on receipt of the copy of the notice.

[2004, c. 10, s. 20](#); [2010, c. 17, s. 14](#).

Requirements relating to notice

490.025 If a court refuses to make an exemption order or an appeal court dismisses an appeal from such a decision or quashes an exemption order, it shall cause the

Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision and shall cause the person who applied for the order to be informed of sections 4 to 7.1 of the *Sex Offender Information Registration Act*, sections 490.031 and 490.0311 of this Act and section 119.1 of the *National Defence Act*.

2004, c. 10, s. 20; 2007, c. 5, s. 24; 2010, c. 17, s. 15.

Application for termination order

490.026 (1) A person who is subject to an obligation under section 490.019 may apply for a termination order unless they are also subject to an obligation under section 490.02901, under section 227.06 of the *National Defence Act* or under section 36.1 of the *International Transfer of Offenders Act* — or an order under section 490.012 or under section 227.01 of the *National Defence Act* — that began later.

Time for application

(2) A person may apply for a termination order if the following period has elapsed since they were sentenced, or found not criminally responsible on account of mental disorder, for the offence listed in the notice:

- (a)** five years if the offence was prosecuted summarily or if the maximum term of imprisonment for the offence is two or five years;
- (b)** 10 years if the maximum term of imprisonment for the offence is 10 or 14 years;
or
- (c)** 20 years if the maximum term of imprisonment for the offence is life.

More than one offence

(3) If more than one offence is listed in the notice, the person may apply for a termination order if 20 years have elapsed since they were sentenced, or found not criminally responsible on account of mental disorder, for the most recent offence.

Pardon, record suspension or absolute discharge

(4) Despite subsections (2) and (3), a person may apply for a termination order once they receive a pardon, once a record suspension is ordered or once they are absolutely discharged under paragraph 672.54(a).

Re-application

(5) A person whose application is refused may apply again if five years have elapsed since they made the previous application. They may also apply again once they receive a pardon or once a record suspension is ordered. However, they may not apply again if, after the previous application was made, they become subject to an obligation under section 490.02901, under section 227.06 of the *National Defence Act* or under section 36.1 of the *International Transfer of Offenders Act* or to an order under section 490.012 or under section 227.01 of the *National Defence Act*.

Jurisdiction

- (6)** The application shall be made to a court of criminal jurisdiction if
- (a)** it relates to an obligation under [section 490.019](#) of this Act; or
 - (b)** it relates to an obligation under [section 227.06](#) of the *National Defence Act* and the Chief Military Judge does not have jurisdiction to receive the application under subsection 227.12(6) of that Act.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 24](#); [2010, c. 17, s. 16](#); [2012, c. 1, s. 144](#); [2023, c. 28, s. 15](#).

Termination order

490.027 (1) The court shall make an order terminating the obligation if it is satisfied that the person has established that

- (a)** there would be no connection between continuing the obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*; or
- (b)** the impact on the person of continuing the obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

(1.1) In determining whether to make the termination order, the court shall consider

- (a)** the nature and seriousness of the offence that is the basis of the obligation;
- (b)** the victim's age and other personal characteristics;
- (c)** the nature and circumstances of the relationship between the person and the victim;
- (d)** the personal characteristics and circumstances of the person;
- (e)** the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f)** the opinions of experts who have examined the person; and
- (g)** any other factors that the court considers relevant.

Reasons for decision

(2) The court shall give reasons for its decision.

Requirements relating to notice

(3) If the court makes a termination order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of

justice of the territory, to be notified of the decision.

2004, c. 10, s. 20; 2007, c. 5, s. 25; 2010, c. 17, s. 17; 2023, c. 28, s. 16.

Deemed application

490.028 If a person is eligible to apply for both an exemption order under [section 490.023](#) and a termination order under [section 490.026](#) within one year after they are served with a notice under [section 490.021](#) of this Act or [section 227.08](#) of the *National Defence Act*, an application within that period for one order is deemed to be an application for both.

2004, c. 10, s. 20; 2007, c. 5, s. 26.

Appeal

490.029 (1) The Attorney General or the person who applied for a termination order may appeal from a decision of the court made under [subsection 490.027\(1\)](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may dismiss the appeal, or allow it and order a new hearing, quash the termination order or make an order that may be made under that subsection.

Requirements relating to notice

(2) If the appeal court makes an order that may be made under [subsection 490.027\(1\)](#), it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

2004, c. 10, s. 20; 2007, c. 5, s. 26; 2010, c. 17, s. 18.

Notice and Obligation to Comply with the *Sex Offender Information Registration Act* — Convictions Outside Canada

Obligation

490.02901 A person who is served with a notice in Form 54 shall comply with the *Sex Offender Information Registration Act* for the applicable period specified in [section 490.02904](#) unless a court makes an exemption order under [subsection 490.02905\(2\)](#).

2010, c. 17, s. 19.

Persons who may be served

490.02902 (1) The Attorney General of a province, or the minister of justice of a territory, may serve a person with a notice in Form 54 only if the person arrived in Canada on or after April 15, 2011 and they were convicted of or found not criminally responsible on account of mental disorder for an offence outside Canada — other than a *service offence* as defined in [subsection 2\(1\)](#) of the *National Defence Act* — that is, in the opinion of the Attorney General or minister of justice, equivalent to an offence referred to in paragraph (a) of the definition *primary offence* in [subsection 490.011\(1\)](#).

Exception

(2) The notice shall not be served on a person who has been acquitted of every offence in connection with which a notice may be served on them under [section 490.02903](#).

[2010, c. 17, s. 19; 2023, c. 28, s. 17.](#)

Period for and method of service

490.02903 (1) A notice in Form 54 shall be personally served.

Proof of service

(2) An affidavit of the person who served the notice, sworn before a commissioner or other person authorized to take affidavits, is evidence of the service and the notice if it sets out that

(a) the person who served the notice has charge of the appropriate records and has knowledge of the facts in the particular case;

(b) the notice was personally served on the person to whom it was directed on a named day; and

(c) the person who served the notice identifies a true copy of the notice as an exhibit attached to the affidavit.

Requirements relating to notice

(3) The person who served the notice shall, without delay, send a copy of the affidavit and the notice to the Attorney General of the province, or the minister of justice of the territory, in which the person was served.

[2010, c. 17, s. 19.](#)

When obligation begins

490.02904 (1) The obligation under [section 490.02901](#) begins on the day on which the person is served with the notice.

When obligation ends

(2) The obligation ends on the day on which an exemption order is made.

Duration of obligation

(3) If subsection (2) does not apply, the obligation

(a) ends 10 years after the person was sentenced or found not criminally responsible on account of mental disorder if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is two or five years;

(b) ends 20 years after the person was sentenced or found not criminally responsible on account of mental disorder if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is 10 or 14 years;

(c) applies for life if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is life; or

(d) applies for life if, on April 15, 2011 or before or after that day, the person was convicted of, or found not criminally responsible on account of mental disorder for, more than one offence outside Canada that is, in the opinion of the Attorney General of the province or minister of justice of the territory, equivalent to an offence referred to in paragraph (a) of the definition *primary offence* in [subsection 490.011\(1\)](#) and if more than one of those offences is listed in the notice.

[2010, c. 17, s. 19](#); [2014, c. 25, s. 28](#); [2023, c. 28, s. 18](#).

Application for exemption order

490.02905 (1) A person who is served with a notice in Form 54 under [section 490.02903](#) may apply to a court of criminal jurisdiction for an order exempting them from the obligation within one year after they are served.

Exemption order

(2) The court shall make an exemption order if it is satisfied that the person has established that

(a) they were not convicted of or found not criminally responsible on account of mental disorder for or were acquitted of the offence in question;

(b) the offence in question is not equivalent to an offence referred to in paragraph (a) of the definition *primary offence* in [subsection 490.011\(1\)](#);

(c) there is no connection between the obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*; or

(d) the impact of the obligation on the person, including on their privacy or liberty, is grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

(2.1) In determining whether to make an exemption order under paragraph (2)(c) or (d), the court shall consider

(a) the nature and seriousness of the offence that is the basis of the obligation;

(b) the victim's age and other personal characteristics;

(c) the nature and circumstances of the relationship between the person and the victim;

(d) the personal characteristics and circumstances of the person;

- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f) the opinions of experts who have examined the person; and
- (g) any other factors that the court considers relevant.

Order to correct

(2.2) If the court does not make an exemption order but is satisfied that the offence in question, though not equivalent to the offence referred to in the notice, is equivalent to another offence referred to in paragraph (a) of the definition *primary offence* in [subsection 490.011\(1\)](#), the court shall order that the notice be corrected.

Reasons for decision

(3) The court shall give reasons for its decision.

Removal of information from database

(4) If the court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information that relates to the person that was registered in the database on receipt of the copy of the notice.

Notification

(5) If the court makes an order referred to in subsection (2.2), it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

[2010, c. 17, s. 19](#); [2023, c. 28, s. 19](#).

Application for variation order

490.029051 (1) A person who is served with a notice in Form 54 under [section 490.02903](#) may, within one year after they are served, apply to a court of criminal jurisdiction for an order to vary the duration of the obligation if

- (a) the obligation applies for life under [paragraph 490.02904\(3\)\(d\)](#); and
- (b) none of the offences in question listed in the notice have an equivalent offence with a maximum term of imprisonment for life provided for in Canadian law.

Variation order

(2) The court shall make the variation order if it is satisfied that the person has established that the offences in question listed in the notice do not demonstrate, or do not form part of, a pattern of behaviour showing that the person presents an increased risk of reoffending by committing a crime of a sexual nature.

Variation of duration

(3) If the court makes a variation order, it shall set out the duration of the obligation in the order, which shall be determined by applying [paragraphs 490.02904\(3\)\(a\) and \(b\)](#) to the offence in question listed in the notice whose equivalent offence has the longest maximum term of imprisonment provided for in Canadian law.

Reasons for decision

(4) The court shall give reasons for its decision.

Notification

(5) The court shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of a variation order made under this section.

[2023, c. 28, s. 20.](#)

Appeal

490.02906 (1) The Attorney General or the person who applied for an exemption order or a variation order may appeal from a decision under [subsection 490.02905\(2\)](#) or [\(2.2\)](#) or 490.029051(2) or [\(3\)](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may

(a) dismiss the appeal; or

(b) allow the appeal and order a new hearing, quash or amend the exemption order or variation order or make an order that may be made, as the case may be, under [subsection 490.02905\(2\)](#) or [\(2.2\)](#) or 490.029051(2).

Removal of information from database

(2) If an appeal court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information that relates to the person that was registered in the database on receipt of the copy of the notice.

[2010, c. 17, s. 19; 2023, c. 28, s. 21.](#)

Requirements relating to notice

490.02907 (1) If an appeal court quashes an exemption order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision and shall cause the person who applied for the order to be informed of sections 4 to 7.1 of the *Sex Offender Information Registration Act*, [sections 490.031](#) and [490.0311](#) of this Act and [section 119.1](#) of the *National Defence Act*.

Notice — variation order

(2) If an appeal court quashes a variation order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

2010, c. 17, s. 19; 2023, c. 28, s. 22.

Application for termination order

490.02908 (1) A person who is subject to an obligation under [section 490.02901](#) may apply to a court of criminal jurisdiction for a termination order unless they are also subject to another obligation under that section — or to an obligation under [section 490.019](#), under [section 227.06](#) of the *National Defence Act* or under section 36.1 of the *International Transfer of Offenders Act* or an order under [section 490.012](#) or under [section 227.01](#) of the *National Defence Act* — that began later.

Time for application — one offence

(2) The person may apply for a termination order if the following period has elapsed since the sentence was imposed or the verdict of not criminally responsible on account of mental disorder was rendered:

- (a)** five years if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is two or five years;
- (b)** 10 years if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is 10 or 14 years; or
- (c)** 20 years if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is life.

Time for application — more than one offence

(3) If more than one offence is listed in the notice served under [section 490.02903](#), the person may apply for a termination order if 20 years have elapsed since the sentence was imposed, or the verdict of not criminally responsible on account of mental disorder was rendered, for the most recent offence.

Re-application

(4) A person whose application is refused may apply again if five years have elapsed since the application was made.

2010, c. 17, s. 19.

Termination order

490.02909 (1) The court shall make an order terminating the obligation if it is satisfied that the person has established that

(a) there would be no connection between continuing the obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*; or

(b) the impact on the person of continuing the obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

(1.1) In determining whether to make the termination order, the court shall consider

- (a) the nature and seriousness of the offence that is the basis of the obligation;
- (b) the victim's age and other personal characteristics;
- (c) the nature and circumstances of the relationship between the person and the victim;
- (d) the personal characteristics and circumstances of the person;
- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f) the opinions of experts who have examined the person; and
- (g) any other factors that the court considers relevant.

Reasons for decision

(2) The court shall give reasons for its decision.

Requirements relating to notice

(3) If the court makes a termination order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, to be notified of the decision.

2010, c. 17, s. 19; 2023, c. 28, s. 23.

Appeal

490.0291 (1) The Attorney General or the person who applied for a termination order may appeal from a decision under [subsection 490.02909\(1\)](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may dismiss the appeal, allow the appeal and order a new hearing, quash the termination order or make an order that may be made under that subsection.

Requirements relating to notice

(2) If the appeal court makes an order that may be made under [subsection 490.02909\(1\)](#), it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

[2010, c. 17, s. 19.](#)

Obligation to advise police service

490.02911 (1) A person who was convicted of or found not criminally responsible on account of mental disorder for an offence outside Canada shall, if the offence is equivalent to one referred to in paragraph (a) of the definition *primary offence* in [subsection 490.011\(1\)](#), advise a police service within seven days after the day on which they arrive in Canada of that fact and of

- (a)** their name, date of birth, gender, address and telephone number in Canada; and
- (b)** to the best of their knowledge,
 - (i)** the offence for which they were convicted or found not criminally responsible,
 - (ii)** the country — and, if applicable, the province, state, territory or municipality in that country — in which the offence was committed,
 - (iii)** the day on which the offence was committed,
 - (iv)** the day on which they were convicted of the offence or found not criminally responsible for it, and
 - (v)** if different from the day on which they were convicted of the offence, the day on which the sentence was imposed.

New obligation to advise

(1.1) The person is not required to advise the police service again under subsection (1) unless they are later convicted of or found not criminally responsible on account of mental disorder for another offence outside Canada referred to in that subsection.

Change in address

(2) The person shall, if they are in Canada, advise a police service of a change in address within seven days after the day on which the change is made.

Information to be provided to Attorney General

(3) The police service shall cause the Attorney General of the province, or the minister of justice of the territory, in which it is located to be provided with the information.

Obligation ends

(4) A person's obligation under subsection (2) ends when they are served under [section 490.02902](#) or, if it is earlier, one year after the day on which they advise the police service under subsection (1).

[2010, c. 17, s. 19; 2023, c. 28, s. 24.](#)

International Transfer of Offenders Act

Application for exemption order

490.029111 (1) A person who is subject to an obligation under section 36.1 of the *International Transfer of Offenders Act* may apply to a court of criminal jurisdiction for an order exempting them from the obligation within one year after the day of their transfer to Canada under that Act.

Exemption order

(2) The court shall make an exemption order if it is satisfied that the person has established that

(a) there is no connection between the obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*; or

(b) the impact of the obligation on the person, including on their privacy or liberty, is grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

(3) In determining whether to make an exemption order, the court shall consider

(a) the nature and seriousness of the offence that is the basis of the obligation;

(b) the victim's age and other personal characteristics;

(c) the nature and circumstances of the relationship between the person and the victim;

(d) the personal characteristics and circumstances of the person;

(e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;

(f) the opinions of experts who have examined the person; and

(g) any other factors that the court considers relevant.

Reasons for decision

(4) The court shall give reasons for its decision.

Removal of information from database

(5) If the court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information

that relates to the person that was registered in the database on receipt of a copy of the Form 1 referred to in subparagraph 8(4)(a)(ii) of the *International Transfer of Offenders Act*.

2023, c. 28, s. 25.

Application for variation order

490.029112 (1) A person who is subject to an obligation under section 36.1 of the *International Transfer of Offenders Act* may, within one year after the day of their transfer to Canada under that Act, apply to a court of criminal jurisdiction for an order to vary the duration of the obligation if

- (a) the obligation applies for life under subsection 36.2(3) of that Act; and
- (b) none of the offences in question listed in the Form 1 referred to in subparagraph 8(4)(a)(ii) of that Act have an equivalent criminal offence with a maximum term of imprisonment for life provided for in Canadian law.

Variation order

(2) The court shall make the variation order if it is satisfied that the person has established that the offences in question listed in that Form 1 do not demonstrate, or do not form part of, a pattern of behaviour showing that the person presents an increased risk of reoffending by committing a crime of a sexual nature.

Variation of duration

(3) If the court makes a variation order, it shall set out the duration of the obligation in the order, which shall be determined by applying paragraphs 36.2(2)(a) and (b) of the *International Transfer of Offenders Act* to the offence in question listed in that Form 1 whose equivalent criminal offence has the longest maximum term of imprisonment provided for in Canadian law.

Reasons for decision

(4) The court shall give reasons for its decision.

Notification

(5) The court shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of a variation order made under this section.

2023, c. 28, s. 25.

Appeal

490.029113 (1) The Attorney General or the person who applied for an exemption order or a variation order may appeal from a decision under subsection 490.029111(2) or 490.029112(2) or (3) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may

(a) dismiss the appeal; or

(b) allow the appeal and order a new hearing, quash or amend the exemption order or variation order or make an order that may be made, as the case may be, under subsection 490.029111(2) or section 490.029112.

Removal of information from database

(2) If an appeal court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information that relates to the person that was registered in the database on receipt of a copy of the Form 1 referred to in subparagraph 8(4)(a)(ii) of the *International Transfer of Offenders Act*.

2023, c. 28, s. 25.

Requirements relating to notice

490.029114 (1) If an appeal court quashes an exemption order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision and shall cause the person who applied for the order to be informed of sections 4 to 7.1 of the *Sex Offender Information Registration Act*, sections 490.031 and 490.0311 of this Act and section 119.1 of the *National Defence Act*.

Notice — variation order

(2) If an appeal court quashes a variation order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

2023, c. 28, s. 25.

Application for termination order

490.02912 (1) A person who is subject to an obligation under section 36.1 of the *International Transfer of Offenders Act* may apply to a court of criminal jurisdiction for a termination order unless they are also subject to an obligation under section 490.019 or 490.02901 or under section 227.06 of the *National Defence Act* — or to an order under section 490.012 or under section 227.01 of the *National Defence Act* — that began later.

Time for application — one offence

(2) The person may apply for a termination order if the following period has elapsed since the sentence was imposed or the verdict of not criminally responsible on account of mental disorder was rendered:

(a) five years if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is two or five years;

(b) 10 years if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is 10 or 14 years; or

(c) 20 years if the maximum term of imprisonment provided for in Canadian law for the equivalent offence is life.

More than one offence

(3) If more than one offence is listed in the copy of the Form 1 that was delivered under subparagraph 8(4)(a)(ii) of the *International Transfer of Offenders Act*, the person may apply for a termination order if 20 years have elapsed since the sentence was imposed, or the verdict of not criminally responsible on account of mental disorder was rendered, for the most recent offence.

Absolute discharge

(3.1) Despite subsections (2) and (3), a person may apply for a termination order once they are absolutely discharged under [paragraph 672.54\(a\)](#).

Re-application

(4) A person whose application is refused may apply again if five years have elapsed since the application was made.

[2010, c. 17, s. 19](#); [2023, c. 28, s. 26](#).

Termination order

490.02913 (1) The court shall make an order terminating the obligation if it is satisfied that the person has established that

(a) there would be no connection between continuing the obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*; or

(b) the impact of continuing the obligation on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

(1.1) In determining whether to make the termination order, the court shall consider

(a) the nature and seriousness of the offence that is the basis of the obligation;

(b) the victim's age and other personal characteristics;

(c) the nature and circumstances of the relationship between the person and the victim;

(d) the personal characteristics and circumstances of the person;

- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f) the opinions of experts who have examined the person; and
- (g) any other factors that the court considers relevant.

Reasons for decision

- (2) The court shall give reasons for its decision.

Requirements relating to notice

- (3) If the court makes a termination order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, to be notified of the decision.

[2010, c. 17, s. 19](#); [2023, c. 28, s. 27](#).

Appeal

490.02914 (1) The Attorney General or the person who applied for a termination order may appeal from a decision under [subsection 490.02913\(1\)](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may dismiss the appeal, allow the appeal and order a new hearing, quash the termination order or make an order that may be made under that subsection.

Requirements relating to notice

- (2) If the appeal court makes an order that may be made under [subsection 490.02913\(1\)](#), it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

[2010, c. 17, s. 19](#).

Notice before release

490.02915 (1) The person in charge of the place in which a person who is subject to an obligation under section 36.1 of the *International Transfer of Offenders Act* is serving the custodial portion of a sentence, or is detained in custody before their release or discharge, shall give the person a copy of the Form 1 referred to in [subsection 490.02912\(3\)](#) not earlier than 10 days before their release or discharge.

Notice on disposition by Review Board

- (2) A Review Board shall cause a copy of the Form 1 to be given to the person when it directs

- (a) under [paragraph 672.54\(a\)](#), that the person be discharged absolutely; or
- (b) under [paragraph 672.54\(b\)](#), that the person be discharged subject to conditions unless the conditions restrict the person's liberty in a manner and to an extent that

prevent them from complying with sections 4, 4.1, 4.3 and 6 of the *Sex Offender Information Registration Act*.

2010, c. 17, s. 19.

Disclosure of Information

Disclosure

490.03 (1) The [Commissioner of the Royal Canadian Mounted Police](#) or a person authorized by the Commissioner shall, on request, disclose information that is registered in the database or the fact that such information is registered in the database

(a) to the prosecutor if the disclosure is necessary for the purpose of a proceeding under [section 490.012](#); or

(b) to the Attorney General if the disclosure is necessary for the purpose of a proceeding under [section 490.016](#), [490.023](#), [490.027](#), [490.02905](#), [490.029051](#), [490.02909](#), [490.029111](#), [490.029112](#), [490.02913](#), [490.04](#) or [490.05](#) or for the purpose of an appeal from a decision made in any of those proceedings or in a proceeding under [section 490.012](#) or [490.013](#).

Disclosure in connection with proceedings

(2) The Commissioner or that person shall, on request, disclose to the prosecutor or Attorney General the information that is registered in the database relating to a person if the person discloses, in connection with a proceeding or appeal other than one referred to in subsection (1), the fact that information relating to them is registered in the database.

Disclosure in proceedings

(3) The prosecutor or the Attorney General may, if the information is relevant to the proceeding, appeal or any subsequent appeal, disclose it to the presiding court.

(4) [\[Repealed, 2007, c. 5, s. 27\]](#)

[2004, c. 10, s. 20](#); [2007, c. 5, s. 27](#); [2010, c. 17, s. 20](#); [2023, c. 28, s. 28](#).

Offences

Offence

490.031 (1) Every person who, without reasonable excuse, fails to comply with an order made under [section 490.012](#) or under [section 227.01](#) of the *National Defence Act* or with an obligation under [section 490.019](#) or [490.02901](#), under [section 227.06](#) of the *National Defence Act* or under section 36.1 of the *International Transfer of Offenders Act* is guilty of an offence and liable

(a) on conviction on indictment, to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years, or to both; or

(b) on summary conviction, to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

Reasonable excuse

(2) For greater certainty, a lawful command that prevents a person from complying with an order or obligation is a reasonable excuse if, at the time, the person is subject to the Code of Service Discipline within the meaning of [subsection 2\(1\)](#) of the *National Defence Act*.

Proof of certain facts by certificate

(3) In proceedings under subsection (1), a certificate of a person referred to in paragraph 16(2)(b) of the *Sex Offender Information Registration Act* stating that the sex offender failed to report under section 4, 4.1, 4.2 or 4.3 — or provide information under [section 5](#) or notify a person under subsection 6(1) or (1.01) — of that Act is evidence of the statements contained in it without proof of the signature or official character of the person appearing to have signed it.

Attendance and cross-examination

(4) The sex offender named in the certificate may, with the leave of the court, require the attendance of the person who signed it for the purpose of cross-examination.

Notice of intention to produce

(5) A certificate is not to be received in evidence unless, before the commencement of the trial, the party who intends to produce it gives the sex offender a copy of it and reasonable notice of their intention to produce it.

[2004, c. 10, s. 20](#); [2007, c. 5, s. 28](#); [2010, c. 17, s. 21](#); [2019, c. 25, s. 204](#); [2023, c. 28, s. 29](#).

Offence

490.0311 Every person who knowingly provides false or misleading information under subsection 5(1) or 6(1) or (1.01) of the *Sex Offender Information Registration Act* is guilty of an offence and liable

(a) on conviction on indictment, to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years, or to both; or

(b) on summary conviction, to a fine of not more than \$10,000 or to imprisonment for a term of not more than two years less a day, or to both.

[2007, c. 5, s. 29](#); [2010, c. 17, s. 22](#); [2019, c. 25, s. 205](#); [2023, c. 28, s. 30](#).

Offence

490.0312 Every person who, without reasonable excuse, fails to comply with an obligation under [subsection 490.02911\(1\)](#) or [\(2\)](#) is guilty of an offence punishable on summary conviction.

[2010, c. 17, s. 23](#).

Warrant

Warrant to arrest

490.03121 (1) If a justice is satisfied that there are reasonable grounds to believe that a person has contravened any of sections 4 to 5.1 of the *Sex Offender Information Registration Act*, the justice may issue a warrant in Form 6.4 authorizing a peace officer to arrest the person and, despite section 7.1 of that Act, bring them to any registration centre to remedy the contravention.

Conditions

(2) The warrant shall contain any conditions that the justice considers advisable to ensure that an arrest authorized by the warrant is reasonable in the circumstances.

Execution of warrant

(3) The warrant may be executed anywhere in Canada.

Warrant in force

(4) The warrant remains in force until it is executed, until a charge under [section 490.031](#) is laid in respect of the contravention or until the person has remedied the contravention.

No charge

(5) No charge shall be laid against the person in respect of any contravention of any of sections 4 to 5.1 of that Act that is remedied by the person after the warrant is issued.
[2023, c. 28, s. 31.](#)

Regulations

Regulations

490.032 The Governor in Council may make regulations

(a) requiring that additional information be contained in a notice under Form 53 or Form 54; and

(b) prescribing, for one or more provinces, the form and content of that information.

[2004, c. 10, s. 20; 2010, c. 17, s. 24.](#)

Additional Orders

Application for exemption order

490.04 (1) A person may apply to a court for an order exempting them from

(a) an order made under [section 490.012](#) on or after April 15, 2011 but before the day on which this paragraph comes into force; or

(b) an obligation under [section 490.02901](#), or under section 36.1 of the *International Transfer of Offenders Act*, that began before the day on which this paragraph comes into force.

Limitation — application

(2) A person is not permitted to apply under paragraph (1)(b) if, on or after the day on which this subsection comes into force, they have made an application for an exemption order under [section 490.02905](#) or 490.029111 in respect of the same obligation.

Jurisdiction

(3) The application shall be made to

- (a) a superior court of criminal jurisdiction, if the application is made under paragraph (1)(a) in respect of an order made by such a court; or
- (b) a court of criminal jurisdiction, in any other case.

Limitation — exemption order

(4) The court shall not make an exemption order in respect of an application made under paragraph (1)(a) if

- (a) the designated offence that is the basis of the order made under [section 490.012](#) was prosecuted by indictment, the sentence for that offence is a term of imprisonment of two years or more and the victim of that offence was under the age of 18 years; or
- (b) before or after the order under [section 490.012](#) was made, the person
 - (i) was convicted of a primary offence — or convicted of an offence under [section 130](#) of the *National Defence Act* in respect of a primary offence — that is not the offence on the basis of which the order was made, or
 - (ii) is or was, as a result of a conviction, subject to another order or obligation under this or another Act of Parliament to comply with the *Sex Offender Information Registration Act*.

Exemption order

(5) Subject to subsection (4), the court shall make an exemption order if it is satisfied that the person has established that, at the time the order was made or the obligation began,

- (a) there was no connection between the order or obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*; or
- (b) the impact of the order or the obligation on the person, including on their privacy or liberty, was grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

Factors

- (6)** In determining whether to make the exemption order, the court shall consider
- (a)** the nature and seriousness of the offence that is the basis of the order or obligation;
 - (b)** the victim's age and other personal characteristics;
 - (c)** the nature and circumstances of the relationship between the person and the victim;
 - (d)** the personal characteristics and circumstances of the person;
 - (e)** the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
 - (f)** the opinions of experts who have examined the person; and
 - (g)** any other factors that the court considers relevant.

Reasons for decision

- (7)** The court shall give reasons for its decision.

Removal of information from database

(8) If the court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information that relates to the person that was registered in the database on receipt of a copy of the order made under [section 490.012](#), the notice referred to in [section 490.02901](#) or the Form 1 referred to in subparagraph 8(4)(a)(ii) of the *International Transfer of Offenders Act*, as the case may be.

[2023, c. 28, s. 32.](#)

Application for variation order

490.05 (1) A person may apply to a court for an order to vary the duration of

- (a)** an order made under [section 490.012](#), if the order applies for life under subsection 490.013(2.1), as it read from time to time before the day on which this paragraph comes into force;
- (b)** an obligation under [section 490.019](#), if the obligation applies for life under [paragraph 490.022\(3\)\(d\)](#) and none of the offences listed in the notice in Form 53 served on the person in respect of the obligation have a maximum term of imprisonment for life;
- (c)** an obligation under [section 490.02901](#), if the obligation applies for life under [paragraph 490.02904\(3\)\(d\)](#), the obligation began before the day on which this paragraph comes into force and the condition set out in paragraph 490.029051(1)(b) is met; or

(d) an obligation under section 36.1 of the *International Transfer of Offenders Act*, if the obligation applies for life under subsection 36.2(3) of that Act, the obligation began before the day on which this paragraph comes into force and the condition set out in paragraph 490.029112(1)(b) is met.

Limitation

(2) A person is not permitted to apply under paragraph (1)(c) or (d) if they have made an application for a variation order under section 490.029051 or 490.029112 in respect of the same obligation.

Jurisdiction

(3) The application shall be made to

(a) a superior court of criminal jurisdiction, if the application is made under paragraph (1)(a) in respect of an order made by such a court; or

(b) a court of criminal jurisdiction, in any other case.

Variation order

(4) The court shall make the variation order if it is satisfied that the person has established that the offences that are the basis of the order or obligation do not demonstrate, or do not form part of, a pattern of behaviour showing that the person presents an increased risk of reoffending by committing a crime of a sexual nature.

Variation of duration

(5) If the court makes a variation order, it shall set out the duration of the order or obligation in the order, which shall be determined by applying

(a) [subsection 490.013\(2\)](#) to the offence in question with the longest maximum term of imprisonment, in the case of an order under [section 490.012](#);

(b) [paragraphs 490.022\(3\)\(a\) and \(b\)](#) to the offence in question with the longest maximum term of imprisonment, in the case of an obligation under [section 490.019](#);

(c) [paragraphs 490.02904\(3\)\(a\) and \(b\)](#) to the offence in question whose equivalent offence has the longest maximum term of imprisonment provided for in Canadian law, in the case of an obligation under [section 490.02901](#); and

(d) [paragraphs 36.2\(2\)\(a\) and \(b\)](#) of the *International Transfer of Offenders Act* to the offence in question whose equivalent criminal offence has the longest maximum term of imprisonment provided for in Canadian law, in the case of an obligation under section 36.1 of that Act.

Reasons for decision

(6) The court shall give reasons for its decision.

Notification

(7) The court shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of a variation order made under this section.

2023, c. 28, s. 32.

Appeal

490.06 (1) The Attorney General or the person who applied for an exemption order or a variation order may appeal from a decision under [subsection 490.04\(4\)](#) or [\(5\)](#) or [490.05\(4\)](#) or [\(5\)](#) on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may

(a) dismiss the appeal; or

(b) allow the appeal and order a new hearing, quash or amend the exemption order or variation order or make an order that may be made, as the case may be, under [subsection 490.04\(5\)](#) or [section 490.05](#).

Removal of information from database

(2) If an appeal court makes an exemption order, it shall also make an order requiring the Royal Canadian Mounted Police to permanently remove from the database all information that relates to the person that was registered in the database on receipt of a copy of the order made under [section 490.012](#), the notice referred to in [section 490.02901](#) or the Form 1 referred to in subparagraph 8(4)(a)(ii) of the *International Transfer of Offenders Act*, as the case may be.

2023, c. 28, s. 32.

Requirements relating to notice

490.07 (1) If an appeal court quashes an exemption order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision and shall cause the person who applied for the order to be informed of sections 4 to 7.1 of the *Sex Offender Information Registration Act*, [sections 490.031](#) and [490.0311](#) of this Act and [section 119.1](#) of the *National Defence Act*.

Notice — variation order

(2) If an appeal court quashes a variation order, it shall cause the Commissioner of the Royal Canadian Mounted Police and the Attorney General of the province, or the minister of justice of the territory, in which the application for the order was made to be notified of the decision.

2023, c. 28, s. 32.

Forfeiture of Offence-related Property

Order of forfeiture of property on conviction

490.1 (1) Subject to [sections 490.3 to 490.41](#), if a person is convicted, or discharged under [section 730](#), of an indictable offence under this Act or the [Corruption of Foreign Public Officials Act](#) and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall

(a) if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and

(b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.

(1.1) [\[Repealed, 2001, c. 41, s. 130\]](#)

Property related to other offences

(2) Subject to [sections 490.3 to 490.41](#), if the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) is related to the commission of the indictable offence under this Act or the [Corruption of Foreign Public Officials Act](#) of which a person is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.

Property outside Canada

(2.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Appeal

(3) A person who has been convicted of an indictable offence under this Act or the [Corruption of Foreign Public Officials Act](#), or the Attorney General, may appeal to the court of appeal from an order or a failure to make an order under subsection (1) as if the appeal were an appeal against the sentence imposed on the person in respect of the offence.

1997, c. 23, s. 15; [2001, c. 32, s. 30](#), c. 41, ss. 18, 130; [2007, c. 13, s. 8](#); [2017, c. 7, s. 64](#).

Application for *in rem* forfeiture

490.2 (1) If an information has been laid in respect of an indictable offence under this Act or the [Corruption of Foreign Public Officials Act](#), the Attorney General may make an application to a judge for an order of forfeiture under subsection (2).

Order of forfeiture of property

(2) Subject to [sections 490.3 to 490.41](#), the judge to whom an application is made under subsection (1) shall order that the property that is subject to the application be forfeited and disposed of in accordance with subsection (4) if the judge is satisfied

- (a)** beyond a reasonable doubt that the property is offence-related property;
- (b)** that proceedings in respect of an indictable offence under this Act or the [Corruption of Foreign Public Officials Act](#) in relation to the property were commenced; and
- (c)** that the accused charged with the offence has died or absconded.

Accused deemed absconded

(3) For the purpose of subsection (2), an accused is deemed to have absconded in connection with the indictable offence if

- (a)** an information has been laid alleging the commission of the offence by the accused,
- (b)** a warrant for the arrest of the accused has been issued in relation to that information, and
- (c)** reasonable attempts to arrest the accused under the warrant have been unsuccessful during a period of six months beginning on the day on which the warrant was issued,

and the accused is deemed to have so absconded on the last day of that six month period.

Who may dispose of forfeited property

(4) For the purpose of subsection (2), the judge shall

- (a)** if the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and
- (b)** in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.

Property outside Canada

(4.1) An order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Definition of *judge*

(5) In this section and [sections 490.5 and 490.8](#), ***judge*** means a judge as defined in [section 552](#) or a judge of a superior court of criminal jurisdiction.

1997, c. 23, s. 15; [2001, c. 32, s. 31](#); [2007, c. 13, s. 9](#); [2017, c. 7, s. 65](#).

Voidable transfers

490.3 A court may, before ordering that offence-related property be forfeited under [subsection 490.1\(1\)](#) or [490.2\(2\)](#), set aside any conveyance or transfer of the property that occurred after the seizure of the property, or the making of a restraint order in respect of the property, unless the conveyance or transfer was for valuable consideration to a person acting in good faith.

1997, c. 23, s. 15.

Notice

490.4 (1) Before making an order under [subsection 490.1\(1\)](#) or [490.2\(2\)](#) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to, and may hear, any person who, in the opinion of the court, appears to have a valid interest in the property.

Manner of giving notice

(2) A notice shall

(a) be given in the manner that the court directs or that may be specified in the rules of the court;

(b) specify the period that the court considers reasonable or that may be set out in the rules of the court during which a person may make an application to the court asserting their interest in the property; and

(c) set out the offence charged and a description of the property.

Order of restoration of property

(3) A court may order that all or part of the property that would otherwise be forfeited under [subsection 490.1\(1\)](#) or [490.2\(2\)](#) be returned to a person — other than a person who was charged with an indictable offence under this Act or the [Corruption of Foreign Public Officials Act](#) or a person who acquired title to or a right of possession of the property from such a person under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property — if the court is satisfied that the person is the lawful owner or is lawfully entitled to possession of all or part of that property, and that the person appears innocent of any complicity in, or collusion in relation to, the offence.

1997, c. 23, s. 15; [2001, c. 32, s. 32](#); [2007, c. 13, s. 10](#); [2017, c. 7, s. 66](#).

Notice

490.41 (1) If all or part of offence-related property that would otherwise be forfeited under [subsection 490.1\(1\)](#) or [490.2\(2\)](#) is a dwelling-house, before making an order of

forfeiture, a court shall require that notice in accordance with subsection (2) be given to, and may hear, any person who resides in the dwelling-house and is a member of the immediate family of the person charged with or convicted of the indictable offence under this Act or the [Corruption of Foreign Public Officials Act](#) in relation to which the property would be forfeited.

Manner of giving notice

(2) A notice shall

- (a)** be given in the manner that the court directs or that may be specified in the rules of the court;
- (b)** specify the period that the court considers reasonable or that may be set out in the rules of the court during which a member of the immediate family who resides in the dwelling-house may make themselves known to the court; and
- (c)** set out the offence charged and a description of the property.

Non-forfeiture of property

(3) Subject to an order made under [subsection 490.4\(3\)](#), if a court is satisfied that the impact of an order of forfeiture made under [subsection 490.1\(1\)](#) or [490.2\(2\)](#) would be disproportionate to the nature and gravity of the offence, the circumstances surrounding the commission of the offence and the criminal record, if any, of the person charged with or convicted of the offence, as the case may be, it may decide not to order the forfeiture of the property or part of the property and may revoke any restraint order made in respect of that property or part.

Factors in relation to dwelling-house

(4) Where all or part of the property that would otherwise be forfeited under [subsection 490.1\(1\)](#) or [490.2\(2\)](#) is a dwelling-house, when making a decision under subsection (3), the court shall also consider

- (a)** the impact of an order of forfeiture on any member of the immediate family of the person charged with or convicted of the offence, if the dwelling-house was the member's principal residence at the time the charge was laid and continues to be the member's principal residence; and
- (b)** whether the member referred to in paragraph (a) appears innocent of any complicity in the offence or of any collusion in relation to the offence.

[2001, c. 32, s. 33](#); [2007, c. 13, s. 11](#); [2017, c. 7, s. 67](#).

Application

490.5 (1) Where any offence-related property is forfeited to Her Majesty pursuant to an order made under [subsection 490.1\(1\)](#) or [490.2\(2\)](#), any person who claims an interest in the property, other than

- (a)** in the case of property forfeited pursuant to an order made under [subsection 490.1\(1\)](#), a person who was convicted of the indictable offence in relation to which the

property was forfeited,

(b) in the case of property forfeited pursuant to an order made under [subsection 490.2\(2\)](#), a person who was charged with the indictable offence in relation to which the property was forfeited, or

(c) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) or (b) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,

may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4).

Fixing day for hearing

(2) The judge to whom an application is made under subsection (1) shall fix a day not less than thirty days after the date of the filing of the application for the hearing of the application.

Notice

(3) An applicant shall serve a notice of the application made under subsection (1) and of the hearing of it on the Attorney General at least fifteen days before the day fixed for the hearing.

Order declaring interest not affected by forfeiture

(4) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant

(a) is not a person referred to in paragraph (1)(a), (b) or (c) and appears innocent of any complicity in any indictable offence that resulted in the forfeiture of the property or of any collusion in relation to such an offence, and

(b) exercised all reasonable care to be satisfied that the property was not likely to have been used in connection with the commission of an unlawful act by the person who was permitted by the applicant to obtain possession of the property or from whom the applicant obtained possession or, where the applicant is a mortgagee or lienholder, by the mortgagor or lien-giver,

the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and the extent or value of the interest.

Appeal from order made under subsection (4)

(5) An applicant or the Attorney General may appeal to the court of appeal from an order made under subsection (4), and the provisions of Part XXI with respect to procedure on appeals apply, with any modifications that the circumstances require, in respect of appeals under this subsection.

Return of property

(6) The Attorney General shall, on application made to the Attorney General by any person in respect of whom a judge has made an order under subsection (4), and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined, direct that

(a) the property, or the part of it to which the interest of the applicant relates, be returned to the applicant; or

(b) an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

1997, c. 23, s. 15; 2001, c. 32, s. 34.

Appeals from orders under [subsection 490.2\(2\)](#)

490.6 Any person who, in their opinion, is aggrieved by an order made under [subsection 490.2\(2\)](#) may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI, and that Part applies, with any modifications that the circumstances require, in respect of such an appeal.

1997, c. 23, s. 15.

Suspension of order pending appeal

490.7 Notwithstanding anything in this Act, the operation of an order made in respect of property under [subsection 490.1\(1\)](#), [490.2\(2\)](#) or [490.5\(4\)](#) is suspended pending

(a) any application made in respect of the property under any of those provisions or any other provision of this or any other Act of Parliament that provides for restoration or forfeiture of the property, or

(b) any appeal taken from an order of forfeiture or restoration in respect of the property,

and the property shall not be disposed of or otherwise dealt with until thirty days have expired after an order is made under any of those provisions.

1997, c. 23, s. 15.

Application for restraint order

490.8 (1) The Attorney General may make an application in accordance with this section for a restraint order under this section in respect of any offence-related property.

Procedure

(2) An application made under subsection (1) for a restraint order in respect of any offence-related property may be made *ex parte* and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters:

(a) the indictable offence to which the offence-related property relates;

- (b) the person who is believed to be in possession of the offence-related property;
and
- (c) a description of the offence-related property.

Restraint order

(3) Where an application for a restraint order is made to a judge under subsection (1), the judge may, if satisfied that there are reasonable grounds to believe that the property is offence-related property, make a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, the offence-related property specified in the order otherwise than in the manner that may be specified in the order.

Property outside Canada

(3.1) A restraint order may be issued under this section in respect of property situated outside Canada, with any modifications that the circumstances require.

Conditions

(4) A restraint order made by a judge under this section may be subject to any reasonable conditions that the judge thinks fit.

Order in writing

(5) A restraint order made under this section shall be made in writing.

Service of order

(6) A copy of a restraint order made under this section shall be served on the person to whom the order is addressed in any manner that the judge making the order directs or in accordance with the rules of the court.

Registration of order

(7) A copy of a restraint order made under this section shall be registered against any property in accordance with the laws of the province in which the property is situated.

Order continues in force

(8) A restraint order made under this section remains in effect until

- (a) an order is made under [subsection 490\(9\) or \(11\)](#), [490.4\(3\)](#) or [490.41\(3\)](#) in relation to the property; or
- (b) an order of forfeiture of the property is made under [section 490](#) or [subsection 490.1\(1\) or 490.2\(2\)](#).

Offence

(9) Any person on whom a restraint order made under this section is served in accordance with this section and who, while the order is in force, acts in contravention of or fails to comply with the order is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

1997, c. 23, s. 15; 2001, c. 32, s. 35; 2019, c. 25, s. 206.

Management order

490.81 (1) With respect to offence-related property other than a *controlled substance* within the meaning of the *Controlled Drugs and Substances Act* or *cannabis* as defined in subsection 2(1) of the *Cannabis Act*, on application of the Attorney General or of any other person with the written consent of the Attorney General, a judge or justice in the case of offence-related property seized under section 487, or a judge in the case of offence-related property restrained under section 490.8, may, if he or she is of the opinion that the circumstances so require,

(a) appoint a person to take control of and to manage or otherwise deal with all or part of the property in accordance with the directions of the judge or justice; and

(b) require any person having possession of that property to give possession of the property to the person appointed under paragraph (a).

Appointment of Minister of Public Works and Government Services

(2) When the Attorney General of Canada so requests, a judge or justice appointing a person under subsection (1) shall appoint the Minister of Public Works and Government Services.

Power to manage

(3) The power to manage or otherwise deal with property under subsection (1) includes

(a) the power to make an interlocutory sale of perishable or rapidly depreciating property;

(b) the power to destroy, in accordance with subsections (4) to (7), property that has little or no value; and

(c) the power to have property, other than real property or a conveyance, forfeited to Her Majesty in accordance with subsection (7.1).

Application for destruction order

(4) Before a person who is appointed to manage property destroys property that has little or no value, they shall apply to a court for a destruction order.

Notice

(5) Before making a destruction order, a court shall require notice in accordance with subsection (6) to be given to and may hear any person who, in the court's opinion, appears to have a valid interest in the property.

Manner of giving notice

(6) A notice shall

- (a)** be given in the manner that the court directs or that may be specified in the rules of the court; and
- (b)** specify the effective period of the notice that the court considers reasonable or that may be set out in the rules of the court.

Destruction order

(7) A court shall order that the property be destroyed if it is satisfied that the property has little or no financial or other value.

Forfeiture order

(7.1) On application by a person who is appointed to manage the property, a court shall order that the property, other than real property or a conveyance, be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the law if

- (a)** a notice is given or published in the manner that the court directs or that may be specified in the rules of the court;
- (b)** the notice specifies a period of 60 days during which a person may make an application to the court asserting their interest in the property; and
- (c)** during that period, no one makes such an application.

When management order ceases to have effect

(8) A management order ceases to have effect when the property that is the subject of the management order is returned in accordance with the law, destroyed or forfeited to Her Majesty.

For greater certainty

(8.1) For greater certainty, if property that is the subject of a management order is sold, the management order applies to the net proceeds of the sale.

Application to vary conditions

(9) The Attorney General may at any time apply to the judge or justice to cancel or vary any condition to which a management order is subject, but may not apply to vary an appointment made under subsection (2).

[2001, c. 32, s. 36](#); [2017, c. 7, s. 68](#); [2018, c. 16, s. 217](#).

Sections 489.1 and 490 applicable

490.9 (1) Subject to [sections 490.1 to 490.7](#), sections 489.1 and 490 apply, with any modifications that the circumstances require, to any offence-related property that is the subject of a restraint order made under [section 490.8](#).

Recognizance

(2) Where, pursuant to subsection (1), an order is made under [paragraph 490\(9\)\(c\)](#) for the return of any offence-related property that is the subject of a restraint order under [section 490.8](#), the judge or justice making the order may require the applicant for the order to enter into a recognizance before the judge or justice, with or without sureties, in any amount and with any conditions that the judge or justice directs and, where the judge or justice considers it appropriate, require the applicant to deposit with the judge or justice any sum of money or other valuable security that the judge or justice directs.

1997, c. 23, s. 15.

Forfeiture of weapons and ammunition

491 (1) Subject to subsection (2), where it is determined by a court that

(a) a weapon, an imitation firearm, a prohibited device, a firearm part, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence and that thing has been seized and detained, or

(b) that a person has committed an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, ammunition, prohibited ammunition or an explosive substance and any such thing has been seized and detained,

the thing so seized and detained is forfeited to Her Majesty and shall be disposed of as the Attorney General directs.

Return to lawful owner

(2) If the court by which a determination referred to in subsection (1) is made is satisfied that the lawful owner of any thing that is or may be forfeited to Her Majesty under subsection (1) was not a party to the offence and had no reasonable grounds to believe that the thing would or might be used in the commission of an offence, the court shall order that the thing be returned to that lawful owner, that the proceeds of any sale of the thing be paid to that lawful owner or, if the thing was destroyed, that an amount equal to the value of the thing be paid to the owner.

Application of proceeds

(3) Where any thing in respect of which this section applies is sold, the proceeds of the sale shall be paid to the Attorney General or, where an order is made under subsection (2), to the person who was, immediately prior to the sale, the lawful owner of the thing.

R.S., 1985, c. C-46, s. 491; 1991, c. 40, s. 30; 1995, c. 39, s. 152; [2023, c. 32, s. 13.1](#).

Order for restitution or forfeiture of property obtained by crime

491.1 (1) Where an accused or defendant is tried for an offence and the court determines that an offence has been committed, whether or not the accused has been convicted or discharged under [section 730](#) of the offence, and at the time of the trial any property obtained by the commission of the offence

(a) is before the court or has been detained so that it can be immediately dealt with, and

(b) will not be required as evidence in any other proceedings,

[section 490](#) does not apply in respect of the property and the court shall make an order under subsection (2) in respect of the property.

Idem

(2) In the circumstances referred to in subsection (1), the court shall order, in respect of any property,

(a) if the lawful owner or person lawfully entitled to possession of the property is known, that it be returned to that person; and

(b) if the lawful owner or person lawfully entitled to possession of the property is not known, that it be forfeited to Her Majesty, to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

When certain orders not to be made

(3) An order shall not be made under subsection (2)

(a) in the case of proceedings against a trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for an offence under [section 330](#), [331](#), [332](#) or [336](#); or

(b) in respect of

(i) property to which a person acting in good faith and without notice has acquired lawful title for valuable consideration,

(ii) a valuable security that has been paid or discharged in good faith by a person who was liable to pay or discharge it,

(iii) a negotiable instrument that has, in good faith, been taken or received by transfer or delivery for valuable consideration by a person who had no notice and no reasonable cause to suspect that an offence had been committed, or

(iv) property in respect of which there is a dispute as to ownership or right of possession by claimants other than the accused or defendant.

By whom order executed

(4) An order made under this section shall, on the direction of the court, be executed by the peace officers by whom the process of the court is ordinarily executed.

R.S., 1985, c. 27 (1st Supp.), s. 74, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 18; [2017, c. 7, s. 69\(F\)](#).

Photographic evidence

491.2 (1) Before any property that would otherwise be required to be produced for the purposes of a preliminary inquiry, trial or other proceeding in respect of an offence under [section 334](#), [344](#), [348](#), [354](#), [355.2](#), [355.4](#), [362](#) or [380](#) is returned or ordered to be

returned, forfeited or otherwise dealt with under [section 489.1](#) or [490](#) or is otherwise returned, a peace officer or any person under the direction of a peace officer may take and retain a photograph of the property.

Certified photograph admissible in evidence

(2) Every photograph of property taken under subsection (1), accompanied by a certificate of a person containing the statements referred to in subsection (3), shall be admissible in evidence and, in the absence of evidence to the contrary, shall have the same probative force as the property would have had if it had been proved in the ordinary way.

Statements made in certificate

(3) For the purposes of subsection (2), a certificate of a person stating that

- (a)** the person took the photograph under the authority of subsection (1),
- (b)** the person is a peace officer or took the photograph under the direction of a peace officer, and
- (c)** the photograph is a true photograph

shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the certificate without proof of the signature of the person appearing to have signed the certificate.

Secondary evidence of peace officer

(4) An affidavit or solemn declaration of a peace officer or other person stating that the person has seized property and detained it or caused it to be detained from the time that person took possession of the property until a photograph of the property was taken under subsection (1) and that the property was not altered in any manner before the photograph was taken shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the affidavit or solemn declaration without proof of the signature or official character of the person appearing to have signed the affidavit or solemn declaration.

Notice of intention to produce certified photograph

(5) Unless the court orders otherwise, no photograph, certificate, affidavit or solemn declaration shall be received in evidence at a trial or other proceeding pursuant to subsection (2), (3) or (4) unless the prosecutor has, before the trial or other proceeding, given to the accused a copy thereof and reasonable notice of intention to produce it in evidence.

Attendance for examination

(6) Notwithstanding subsection (3) or (4), the court may require the person who appears to have signed a certificate, an affidavit or a solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the

issue of proof of any of the facts contained in the certificate, affidavit or solemn declaration.

Production of property in court

(7) A court may order any property seized and returned pursuant to [section 489.1](#) or [490](#) to be produced in court or made available for examination by all parties to a proceeding at a reasonable time and place, notwithstanding that a photograph of the property has been received in evidence pursuant to subsection (2), where the court is satisfied that the interests of justice so require and that it is possible and practicable to do so in the circumstances.

Definition of *photograph*

(8) In this section, ***photograph*** includes a still photograph, a photographic film or plate, a microphotographic film, a photostatic negative, an X-ray film, a motion picture and a videotape.

R.S., 1985, c. 23 (4th Supp.), s. 2; 1992, c. 1, s. 58; [2010, c. 14, s. 10](#).

Seizure of explosives

492 (1) Every person who executes a warrant issued under [section 487](#) may seize any explosive substance that they suspect is intended to be used for an unlawful purpose, and shall, as soon as possible, remove to a place of safety anything that they seize under this section and detain it until they are ordered by a judge of a superior court to deliver it to some other person or an order is made under subsection (2).

Forfeiture

(2) Where an accused is convicted of an offence in respect of anything seized by virtue of subsection (1), it is forfeited and shall be dealt with as the court that makes the conviction may direct.

Application of proceeds

(3) Where anything to which this section applies is sold, the proceeds of the sale shall be paid to the Attorney General.

R.S., 1985, c. C-46, s. 492; R.S., 1985, c. 27 (1st Supp.), s. 70; [2022, c. 17, s. 27](#).

Warrant for tracking device — transactions and things

492.1 (1) A justice or judge who is satisfied by information on oath that there are reasonable grounds to suspect that an offence has been or will be committed under this or any other Act of Parliament and that tracking the location of one or more transactions or the location or movement of a thing, including a vehicle, will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain that tracking data by means of a tracking device.

Warrant for tracking device — individuals

(2) A justice or judge who is satisfied by information on oath that there are reasonable grounds to believe that an offence has been or will be committed under this or any other Act of Parliament and that tracking an individual's movement by identifying the location of a thing that is usually carried or worn by the individual will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain that tracking data by means of a tracking device.

Scope of warrant

(3) The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the tracking device, including covertly.

Conditions

(4) A warrant may contain any conditions that the justice or judge considers appropriate, including conditions to protect a person's interests.

Period of validity

(5) Subject to subsection (6), a warrant is valid for the period specified in it as long as that period ends no more than 60 days after the day on which the warrant is issued.

Period of validity — organized crime and terrorism offence

(6) A warrant is valid for the period specified in it as long as that period ends no more than one year after the day on which the warrant is issued, if the warrant relates to

- (a)** an offence under any of [sections 467.11 to 467.13](#);
- (b)** an offence committed for the benefit of, at the direction of, or in association with a criminal organization; or
- (c)** a terrorism offence.

Execution in Canada

(6.1) A warrant issued under this section may be executed at any place in Canada. Any public officer or peace officer who executes the warrant must have authority to act in that capacity in the place where the warrant is executed.

Removal after expiry of warrant

(7) On *ex parte* application supported by an affidavit, the justice or judge who issued a warrant or another justice or judge who has jurisdiction to issue such warrants may authorize the covert removal of the tracking device after the expiry of the warrant under any conditions that the justice or judge considers advisable in the public interest. The authorization is valid for the period specified in it as long as that period is not more than 90 days.

Definitions

(8) The following definitions apply in this section.

data means representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device. (*données*)

judge means a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec. (*jugé*)

public officer means a public officer who is appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament. (*fonctionnaire public*)

tracking data means data that relates to the location of a transaction, individual or thing. (*données de localisation*)

tracking device means a device, including a computer program within the meaning of [subsection 342.1\(2\)](#), that may be used to obtain or record tracking data or to transmit it by a means of telecommunication. (*dispositif de localisation*)

1993, c. 40, s. 18; 1999, c. 5, s. 18; [2014, c. 31, s. 23](#); [2019, c. 25, s. 207](#).

Warrant for transmission data recorder

492.2 (1) A justice or judge who is satisfied by information on oath that there are reasonable grounds to suspect that an offence has been or will be committed against this or any other Act of Parliament and that transmission data will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain the transmission data by means of a transmission data recorder.

Scope of warrant

(2) The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the transmission data recorder, including covertly.

Limitation

(3) No warrant shall be issued under this section for the purpose of obtaining tracking data.

Period of validity

(4) Subject to subsection (5), a warrant is valid for the period specified in it as long as that period ends no more than 60 days after the day on which the warrant is issued.

Period of validity — organized crime or terrorism offence

(5) The warrant is valid for the period specified in it as long as that period ends no more than one year after the day on which the warrant is issued, if the warrant relates to

(a) an offence under any of [sections 467.11 to 467.13](#);

(b) an offence committed for the benefit of, at the direction of, or in association with a criminal organization; or

(c) a terrorism offence.

Execution in Canada

(5.1) A warrant issued under subsection (1) may be executed at any place in Canada. Any public officer or peace officer who executes the warrant must have authority to act in that capacity in the place where the warrant is executed.

Definitions

(6) The following definitions apply in this section.

data means representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device. (*données*)

judge means a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec. (*juge*)

public officer means a public officer who is appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament. (*fonctionnaire public*)

transmission data means data that

(a) relates to the telecommunication functions of dialling, routing, addressing or signalling;

(b) is transmitted to identify, activate or configure a device, including a computer program as defined in [subsection 342.1\(2\)](#), in order to establish or maintain access to a telecommunication service for the purpose of enabling a communication, or is generated during the creation, transmission or reception of a communication and identifies or purports to identify the type, direction, date, time, duration, size, origin, destination or termination of the communication; and

(c) does not reveal the substance, meaning or purpose of the communication. (*données de transmission*)

transmission data recorder means a device, including a computer program within the meaning of [subsection 342.1\(2\)](#), that may be used to obtain or record transmission data or to transmit it by a means of telecommunication. (*enregistreur de données de transmission*)

1993, c. 40, s. 18; 1999, c. 5, s. 19; [2014, c. 31, s. 23](#); [2019, c. 25, s. 208](#).

PART XVI

Compelling Appearance of Accused Before a Justice and Interim Release

Interpretation

Definitions

493 In this Part,

accused includes

- (a) a person to whom a peace officer has issued an appearance notice under [section 497](#), and
- (b) a person arrested for a criminal offence; (*prévenu*)

appearance notice [Repealed, 2019, c. 25, s. 209]

judge means

- (a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the Province,
- (b) in the Province of Quebec, a judge of the superior court of criminal jurisdiction of the province or three judges of the Court of Quebec,
- (c) [Repealed, 1992, c. 51, s. 37]
- (d) in the Provinces of Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland and Labrador, a judge of the superior court of criminal jurisdiction of the Province,
- (e) in Yukon and the Northwest Territories, a judge of the Supreme Court, and
- (f) in Nunavut, a judge of the Nunavut Court of Justice; (*juge*)

officer in charge [Repealed, 2019, c. 25, s. 209]

promise to appear [Repealed, 2019, c. 25, s. 209]

recognizance [Repealed, 2019, c. 25, s. 209]

summons [Repealed, 2019, c. 25, s. 209]

undertaking [Repealed, 2019, c. 25, s. 209]

warrant, when used in relation to a warrant for the arrest of a person, means a warrant in Form 7 and, when used in relation to a warrant for the committal of a person, means a warrant in Form 8. (*mandat*)

Principle and Considerations

Principle of restraint

493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in [subsection 498\(1.1\)](#) or [515\(10\)](#), as the case may be.

[2019, c. 25, s. 210.](#)

Aboriginal accused or vulnerable populations

493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of

- (a) Aboriginal accused; and
- (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

[2019, c. 25, s. 210.](#)

Arrest without Warrant and Release from Custody

Arrest without warrant by any person

494 (1) Any one may arrest without warrant

- (a) a person whom he finds committing an indictable offence; or
- (b) a person who, on reasonable grounds, he believes
 - (i) has committed a criminal offence, and
 - (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

Arrest by owner, etc., of property

(2) The owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property and

- (a) they make the arrest at that time; or
- (b) they make the arrest within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.

Delivery to peace officer

(3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

For greater certainty

(4) For greater certainty, a person who is authorized to make an arrest under this section is a person who is authorized by law to do so for the purposes of [section 25](#).

R.S., 1985, c. C-46, s. 494; [2012, c. 9, s. 3](#).

Arrest without warrant by peace officer

495 (1) A peace officer may arrest without warrant

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

Limitation

(2) A peace officer shall not arrest a person without warrant for

- (a)** an indictable offence mentioned in [section 553](#),
- (b)** an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
- (c)** an offence punishable on summary conviction,

in any case where

- (d)** he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
 - (i)** establish the identity of the person,
 - (ii)** secure or preserve evidence of or relating to the offence, or
 - (iii)** prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

- (e)** he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

Consequences of arrest without warrant

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

- (a)** any proceedings under this or any other Act of Parliament; and
- (b)** any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

R.S., 1985, c. C-46, s. 495; R.S., 1985, c. 27 (1st Supp.), s. 75.

Arrest without warrant – application of [section 524](#)

495.1 Despite any other provision in this Act, if a peace officer has reasonable grounds to believe that an accused has contravened or is about to contravene a summons, appearance notice, undertaking or release order that was issued or given to the accused or entered into by the accused, or has committed an indictable offence while being subject to a summons, appearance notice, undertaking or release order, the peace officer may arrest the accused without a warrant for the purpose of taking them before a judge or justice to be dealt with under [section 524](#).

[2019, c. 25, s. 211](#).

Appearance notice for judicial referral hearing

496 If a peace officer has reasonable grounds to believe that a person has failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the peace officer may, without laying a charge, issue an appearance notice to the person to appear at a judicial referral hearing under [section 523.1](#).

R.S., 1985, c. C-46, s. 496; [2019, c. 25, s. 212](#).

Issue of appearance notice by peace officer

497 If, by virtue of [subsection 495\(2\)](#), a peace officer does not arrest a person, they may issue an appearance notice to the person if the offence is

- (a)** an indictable offence mentioned in [section 553](#);
- (b)** an offence for which the person may be prosecuted by indictment or for which they are punishable on summary conviction; or
- (c)** an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 497; 1999, c. 25, s. 3(Preamble); [2019, c. 25, s. 212](#).

Release from custody — arrest without warrant

498 (1) Subject to subsection (1.1), if a person has been arrested without warrant for an offence, other than one listed in [section 469](#), and has not been taken before a justice or released from custody under any other provision of this Part, a peace officer shall, as soon as practicable, release the person, if

- (a) the peace officer intends to compel the person's appearance by way of summons;
- (b) the peace officer issues an appearance notice to the person; or
- (c) the person gives an undertaking to the peace officer.

Person delivered or detained

(1.01) Subsection (1) also applies in respect of a person who has been arrested without warrant and delivered to a peace officer under [subsection 494\(3\)](#) or placed in the custody of a peace officer under [subsection 163.5\(3\)](#) of the *Customs Act* and who is detained in custody for an offence other than one listed in [section 469](#) and who has not been taken before a justice or released from custody under any other provision of this Part.

Exception

(1.1) The peace officer shall not release the person if the peace officer believes, on reasonable grounds,

(a) that it is necessary in the public interest that the person be detained in custody or that the matter of their release from custody be dealt with under another provision of this Part, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence,

(iii) prevent the continuation or repetition of the offence or the commission of another offence, or

(iv) ensure the safety and security of any victim of or witness to the offence; or

(b) that, if the person is released from custody, the person will fail to attend court in order to be dealt with according to law.

When subsections (1) and (1.01) do not apply

(2) Subsections (1) and (1.01) do not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in [subsection 503\(3\)](#).

Consequences of non-release

(3) A peace officer who has arrested a person without a warrant, or who has been given the custody of a person arrested without a warrant, for an offence described in subsection (1), and who does not release the person from custody as soon as practicable in the manner described in that subsection shall be deemed to be acting lawfully and in the execution of the officer's duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; or

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (1).

R.S., 1985, c. C-46, s. 498; R.S., 1985, c. 27 (1st Supp.), s. 186; 1997, c. 18, s. 52; 1998, c. 7, s. 2; 1999, c. 25, ss. 4, 30(Preamble); [2019, c. 25, s. 213](#).

Release from custody — arrest with warrant

499 If a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one listed in section 469 and the warrant has been endorsed by a justice under [subsection 507\(6\)](#), a peace officer may release the person, if

- (a) the peace officer issues an appearance notice to the person; or
- (b) the person gives an undertaking to the peace officer.

R.S., 1985, c. C-46, s. 499; R.S., 1985, c. 27 (1st Supp.), s. 186; 1994, c. 44, s. 40; 1997, c. 18, s. 53; 1999, c. 25, s. 5(Preamble); [2019, c. 25, s. 214](#).

Contents of appearance notice

500 (1) An appearance notice shall

- (a) set out the name, date of birth and contact information of the accused;
- (b) set out the substance of the offence that the accused is alleged to have committed;
- (c) require the accused to attend court at a time and place to be stated in the notice and to attend afterwards as required by the court; and
- (d) indicate if the accused is required to appear at a judicial referral hearing under [section 523.1](#) for a failure under [section 496](#).

Summary of consequences — failure to appear

(2) An appearance notice shall set out a summary of [subsections 145\(3\) and \(6\)](#), [section 512.2](#) and [subsection 524\(4\)](#) and the possible consequences of a failure to appear at a judicial referral hearing under [section 523.1](#).

Attendance for purposes of *Identification of Criminals Act*

(3) An appearance notice may require the accused to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act*, if the accused is alleged to have committed an offence referred to in [paragraph 2\(1\)\(c\)](#) of that Act.

Signature of accused

(4) An accused shall be requested to sign in duplicate their appearance notice and, whether or not they comply with that request, one of the duplicates shall be given to the accused. If the accused fails or refuses to sign, the lack of their signature does not invalidate the appearance notice.

R.S., 1985, c. C-46, s. 500; 1999, c. 5, s. 20, c. 25, s. 6(Preamble); [2019, c. 25, s. 215](#); [2022, c. 17, s. 28](#).

Contents of undertaking

501 (1) An undertaking under [paragraph 498\(1\)\(c\)](#), [499\(b\)](#) or [503\(1.1\)\(b\)](#) must set out

- (a) the name, date of birth and contact information of the accused;
- (b) the substance of the offence that the accused is alleged to have committed; and
- (c) a summary of [subsections 145\(4\) and \(6\)](#), [sections 512 and 512.2](#) and [subsection 524\(4\)](#).

Mandatory conditions

(2) The undertaking must contain a condition that the accused attend court at the time and place stated in the undertaking and to attend afterwards as required by the court.

Additional conditions

(3) The undertaking may contain one or more of the following conditions, if the condition is reasonable in the circumstances of the offence and necessary, to ensure the accused's attendance in court or the safety and security of any victim of or witness to the offence, or to prevent the continuation or repetition of the offence or the commission of another offence:

- (a) report at specified times to the peace officer or other specified person;
- (b) remain within a specified territorial jurisdiction;
- (c) notify the peace officer or other specified person of any change in their address, employment or occupation;
- (d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the undertaking, except in accordance with any specified conditions;
- (e) abstain from going to any specified place or entering any geographic area related to any person referred to in paragraph (d), except in accordance with any specified conditions;
- (f) deposit all their passports with the peace officer or other specified person;
- (g) reside at a specified address, be at that address at specified hours and present themselves at the entrance of that residence to a peace officer or other specified person, at the officer's or specified person's request during those hours;
- (h) abstain from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, and surrender those that are in their possession to the peace officer or other specified person and also any authorization, licence or registration certificate or other document enabling them to acquire or possess them;
- (i) promise to pay an amount specified in the undertaking, which shall not be more than \$500, if they fail to comply with any condition of the undertaking;
- (j) deposit, with the peace officer specified in the undertaking, money or other valuable security whose value does not exceed \$500 if, at the time of giving the undertaking, the accused is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place in which they are in custody; and

(k) comply with any other specified condition for ensuring the safety and security of any victim of or witness to the offence.

Attendance for purposes of *Identification of Criminals Act*

(4) The undertaking may require the accused to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act*, if the accused is alleged to have committed an offence referred to in paragraph 2(1)(c) of that Act.

Money or other valuable security to be deposited with justice

(5) If the accused has deposited an amount of money or other valuable security with a peace officer, the officer shall, without delay after the deposit, cause the money or valuable security to be delivered to a justice for deposit with the justice.

Signature of accused

(6) The accused shall be requested to sign in duplicate their undertaking and, whether or not they comply with that request, one of the duplicates shall be given to them. If they fail or refuse to sign, the lack of their signature does not invalidate the undertaking.

R.S., 1985, c. C-46, s. 501; R.S., 1985, c. 27 (1st Supp.), s. 76; 1992, c. 47, s. 69; 1994, c. 44, ss. 41, 94; 1996, c. 7, s. 38; 2008, c. 18, s. 15; 2019, c. 25, s. 215; 2022, c. 17, s. 29; 2023, c. 32, s. 13.2.

Variation of undertaking on consent

502 (1) The undertaking in respect of which an accused has been released under section 498, 499 or 503 may, with the written consent of the accused and the prosecutor, be varied and the undertaking so varied is deemed to be an undertaking given under section 498, 499 or 503, as the case may be.

Replacement by justice of undertaking with order

(2) The accused or the prosecutor may, in the absence of consent between them, apply to a justice for a release order under subsection 515(1) or (2) to replace an undertaking given by the accused under paragraph 498(1)(c), 499(b) or 503(1.1)(b) with the order. If the prosecutor applies for the order, the prosecutor must provide three days notice to the accused.

R.S., 1985, c. C-46, s. 502; 1992, c. 47, s. 70; 1996, c. 7, s. 38; 1997, c. 18, s. 54; 2019, c. 25, s. 215.

Appearance of Accused before Justice

Appearance of the accused

502.1 (1) Except as otherwise provided in this Part, an accused who is required to appear in a proceeding under this Part shall appear in person but may appear by audioconference or videoconference, if arrangements are made with the court in advance and those arrangements are satisfactory to the justice.

Witness in Canada

(2) Despite [section 714.1](#), a witness in Canada who is required to give evidence in a proceeding under this Part may do so by audioconference or videoconference, if it is satisfactory to the justice.

Witness outside Canada

(3) For greater certainty, [sections 714.2](#) to [714.8](#) apply when a witness outside Canada gives evidence in a proceeding under this Part.

Participants

(4) A *participant*, as defined in subsection 715.25(1), who is to participate in a proceeding under this Part shall participate in person but may participate by audioconference or videoconference, if it is satisfactory to the justice.

Justice

(5) The justice who is to preside at a proceeding under this Part shall preside in person but may preside by audioconference or videoconference, if the justice considers it necessary in the circumstances.

[2019, c. 25, s. 216](#); [2022, c. 17, s. 30\(E\)](#).

Taking before justice

503 (1) Subject to the other provisions of this section, a peace officer who arrests a person with or without warrant and who has not released the person under any other provision under this Part shall, in accordance with the following paragraphs, cause the person to be taken before a justice to be dealt with according to law:

- (a)** if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period; and
- (b)** if a justice is not available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice as soon as possible.

Re-evaluation of detention

(1.1) At any time before the expiry of the time referred to in paragraph (1)(a) or (b), a peace officer who is satisfied that the continued detention of the person in custody for an offence that is not listed in [section 469](#) is no longer necessary shall release the person, if

- (a)** the peace officer issues an appearance notice to the person; or
- (b)** the person gives an undertaking to the peace officer.

Person delivered or in custody

(2) Subsections (1) and (1.1) also apply to a peace officer to whom a person is delivered under [subsection 494\(3\)](#) or into whose custody a person is placed under [subsection](#)

163.5(3) of the [Customs Act](#), except that the 24-hour period referred to in paragraphs (1)(a) and (b) begins after the person is delivered to the officer.

(2.1) [Repealed, 2019, c. 25, s. 217]

(2.2) [Repealed, 2019, c. 25, s. 217]

(2.3) [Repealed, 2019, c. 25, s. 217]

Remand in custody for return to jurisdiction where offence alleged to have been committed

(3) Where a person has been arrested without warrant for an indictable offence alleged to have been committed in Canada outside the territorial division where the arrest took place, the person shall, within the time prescribed in paragraph (1)(a) or (b), be taken before a justice within whose jurisdiction the person was arrested unless, where the offence was alleged to have been committed within the province in which the person was arrested, the person was taken before a justice within whose jurisdiction the offence was alleged to have been committed, and the justice within whose jurisdiction the person was arrested

(a) if the justice is not satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, shall release that person; or

(b) if the justice is satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, may

(i) remand the person to the custody of a peace officer to await execution of a warrant for his or her arrest in accordance with [section 528](#), but if no warrant is so executed within a period of six days after the time he or she is remanded to such custody, the person in whose custody he or she then is shall release him or her, or

(ii) where the offence was alleged to have been committed within the province in which the person was arrested, order the person to be taken before a justice having jurisdiction with respect to the offence.

Interim release

(3.1) Notwithstanding paragraph (3)(b), a justice may, with the consent of the prosecutor, order that the person referred to in subsection (3), pending the execution of a warrant for the arrest of that person, be released

(a) without conditions; or

(b) on the terms of a release order containing any conditions referred to in [paragraphs 515\(2\)\(a\) to \(e\)](#) that the justice considers desirable and to which the prosecutor consents.

Release of person about to commit indictable offence

(4) A peace officer having the custody of a person who has been arrested without warrant as a person about to commit an indictable offence shall release that person as

soon as practicable after the officer is satisfied that the continued detention of that person is no longer necessary in order to prevent that person from committing an indictable offence.

Consequences of non-release

(5) Despite subsection (4), a peace officer having the custody of a person referred to in that subsection who does not release the person before the expiry of the time prescribed in paragraph (1)(a) or (b) for taking the person before the justice shall be deemed to be acting lawfully and in the execution of the peace officer's duty for the purposes of

- (a)** any proceedings under this or any other Act of Parliament; or
- (b)** any other proceedings, unless in those proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (4).

R.S., 1985, c. C-46, s. 503; R.S., 1985, c. 27 (1st Supp.), s. 77; 1994, c. 44, s. 42; 1997, c. 18, s. 55; 1998, c. 7, s. 3; 1999, c. 25, s. 7(Preamble); [2019, c. 25, s. 217](#).

Information, Summons and Warrant

In what cases justice may receive information

504 Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

- (i)** is or is believed to be, or
- (ii)** resides or is believed to reside,

within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

R.S., c. C-34, s. 455; R.S., c. 2(2nd Supp.), s. 5.

Time within which information to be laid in certain cases

505 If an appearance notice has been issued to an accused under [section 497](#), or if an accused has been released from custody under section 498 or 503, an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by them shall be laid before a

justice as soon as practicable after the issuance or release, and in any event before the time stated in the appearance notice or undertaking for their attendance in court.

R.S., 1985, c. C-46, s. 505; [2019, c. 25, s. 218](#).

Form

506 An information laid under [section 504](#) or [505](#) may be in Form 2.

R.S., c. 2(2nd Supp.), s. 5.

Justice to hear informant and witnesses — public prosecutions

507 (1) Subject to [subsection 523\(1.1\)](#), a justice who receives an information laid under [section 504](#) by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under [section 505](#), shall, except if an accused has already been arrested with or without a warrant,

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

Process compulsory

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

Procedure when witnesses attend

(3) A justice who hears the evidence of a witness pursuant to subsection (1) shall

(a) take the evidence on oath; and

(b) cause the evidence to be taken in accordance with [section 540](#) in so far as that section is capable of being applied.

Summons to be issued except in certain cases

(4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

No process in blank

(5) A justice shall not sign a summons or warrant in blank.

Endorsement of warrant by justice

(6) A justice who issues a warrant under this section or [section 508](#), [512](#), [512.1](#) or [512.2](#) may, unless the offence is one listed in [section 469](#), authorize the release of the accused under [section 499](#) by making an endorsement on the warrant in Form 29.

Undertaking or appearance notice deemed confirmed

(7) If, under subsection (6), a justice authorizes the release of an accused under [section 499](#), an appearance notice or undertaking referred to in that section shall be deemed, for the purposes of [subsection 145\(3\)](#) or [\(4\)](#), as the case may be, to have been confirmed by a justice under [section 508](#).

Issue of summons or warrant

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to compel the accused to attend at the new or continued or renewed trial or hearing.

R.S., 1985, c. C-46, s. 507; R.S., 1985, c. 27 (1st Supp.), s. 78; 1994, c. 44, s. 43; [2002, c. 13, s. 21](#); [2019, c. 25, s. 219](#).

Referral when private prosecution

507.1 (1) A justice who receives an information laid under [section 504](#), other than an information referred to in [subsection 507\(1\)](#), shall refer it to a provincial court judge or, in Quebec, a judge of the Court of Quebec, or to a designated justice, to consider whether to compel the appearance of the accused on the information.

Summons or warrant

(2) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.

Conditions for issuance

(3) The judge or designated justice may issue a summons or warrant only if he or she

(a) has heard and considered the allegations of the informant and the evidence of witnesses;

(b) is satisfied that the Attorney General has received a copy of the information;

(c) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and

(d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant

evidence at the hearing.

Appearance of Attorney General

(4) The Attorney General may appear at the hearing held under paragraph (3)(a) without being deemed to intervene in the proceeding.

Information deemed not to have been laid

(5) If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid.

Information deemed not to have been laid — proceedings commenced

(6) If proceedings are commenced under subsection (5) and a summons or warrant is not issued as a result of those proceedings, the information is deemed never to have been laid.

New evidence required for new hearing

(7) If a hearing in respect of an offence has been held under paragraph (3)(a) and the judge or designated justice has not issued a summons or a warrant, no other hearings may be held under that paragraph with respect to the offence or an included offence unless there is new evidence in support of the allegation in respect of which the hearing is sought to be held.

Subsections 507(2) to (8) to apply

(8) Subsections 507(2) to (8) apply to proceedings under this section.

Non-application — informations laid under sections 810 and 810.1

(9) Subsections (1) to (8) do not apply in respect of an information laid under section 810 or 810.1.

Definition of *designated justice*

(10) In this section, ***designated justice*** means a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter or, in Quebec, a justice designated by the chief judge of the Court of Quebec.

Meaning of *Attorney General*

(11) In this section, ***Attorney General*** includes the Attorney General of Canada and his or her lawful deputy in respect of proceedings that could have been commenced at the instance of the Government of Canada and conducted by or on behalf of that Government.

Justice to hear informant and witnesses

508 (1) A justice who receives an information laid before him under [section 505](#) shall

(a) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so;

(b) if the justice considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice or undertaking or to an included or other offence,

(i) confirm the appearance notice or undertaking and endorse the information accordingly, or

(ii) cancel the appearance notice or undertaking and issue, in accordance with [section 507](#), either a summons or a warrant for the arrest of the accused to compel the accused to attend before the justice or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance notice or undertaking has been cancelled; and

(c) if the justice considers that a case is not made out for the purposes of paragraph (b), cancel the appearance notice or undertaking and cause the accused to be immediately notified of the cancellation.

Procedure when witnesses attend

(2) A justice who hears the evidence of a witness pursuant to subsection (1) shall

(a) take the evidence on oath; and

(b) cause the evidence to be taken in accordance with [section 540](#) in so far as that section is capable of being applied.

R.S., 1985, c. C-46, s. 508; R.S., 1985, c. 27 (1st Supp.), s. 79; [2019, c. 25, s. 220](#).

Information laid otherwise than in person

508.1 (1) For the purposes of [sections 504](#) to [508](#), a peace officer may lay an information by any means of telecommunication that produces a writing.

Alternative to oath

(2) A peace officer who uses a means of telecommunication referred to in subsection (1) shall, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to the officer's knowledge and belief, and such a statement is deemed to be a statement made under oath.

1997, c. 18, s. 56.

Summons

509 (1) A summons issued under this Part shall

- (a) be directed to the accused;
- (b) set out briefly the offence in respect of which the accused is charged; and
- (c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law.

Service on individual

(2) A summons shall be served by a peace officer who shall deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it for him at his latest or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.

(3) [Repealed, 2008, c. 18, s. 17]

Summary of certain provisions

(4) The summons must set out a summary of [subsection 145\(3\)](#), [section 512.1](#) and [subsection 524\(4\)](#).

Attendance for purposes of *Identification of Criminals Act*

(5) A summons may require the accused to appear at a time and place stated in it for the purposes of the *Identification of Criminals Act*, if the accused is alleged to have committed an offence referred to in [paragraph 2\(1\)\(c\)](#) of that Act.

R.S., 1985, c. C-46, s. 509; R.S., 1985, c. 27 (1st Supp.), s. 80; 1992, c. 47, s. 71; 1996, c. 7, s. 38; [2008, c. 18, s. 17](#); [2019, c. 25, s. 221](#); [2022, c. 17, s. 31](#).

510 [Repealed, 2019, c. 25, s. 222]

Contents of warrant to arrest

511 (1) A warrant issued under this Part shall

- (a) name or describe the accused;
- (b) set out briefly the offence in respect of which the accused is charged; and
- (c) order that the accused be forthwith arrested and brought before the judge or justice who issued the warrant or before some other judge or justice having jurisdiction in the same territorial division, to be dealt with according to law.

No return day

(2) A warrant issued under this Part remains in force until it is executed and need not be made returnable at any particular time.

Discretion to postpone execution

(3) Notwithstanding paragraph (1)(c), a judge or justice who issues a warrant may specify in the warrant the period before which the warrant shall not be executed, to allow

the accused to appear voluntarily before a judge or justice having jurisdiction in the territorial division in which the warrant was issued.

Deemed execution of warrant

(4) Where the accused appears voluntarily for the offence in respect of which the accused is charged, the warrant is deemed to be executed.

R.S., 1985, c. C-46, s. 511; R.S., 1985, c. 27 (1st Supp.), s. 81; 1997, c. 18, s. 57.

Certain actions not to preclude issue of warrant

512 (1) A justice may, where the justice has reasonable and probable grounds to believe that it is necessary in the public interest to issue a summons or a warrant for the arrest of the accused, issue a summons or warrant, notwithstanding that

- (a)** an appearance notice or undertaking has been confirmed or cancelled under [subsection 508\(1\)](#);
- (b)** a summons has previously been issued under [subsection 507\(4\)](#); or
- (c)** the accused has been released without conditions or with the intention of compelling their appearance by way of summons.

Warrant in default of appearance

(2) Where

- (a)** service of a summons is proved and the accused fails to attend court in accordance with the summons,
- (b)** an appearance notice or undertaking has been confirmed under [subsection 508\(1\)](#) and the accused fails to attend court in accordance with it in order to be dealt with according to law, or
- (c)** it appears that a summons cannot be served because the accused is evading service,

a justice may issue a warrant for the arrest of the accused.

R.S., 1985, c. C-46, s. 512; R.S., 1985, c. 27 (1st Supp.), s. 82; 1997, c. 18, s. 58; [2019, c. 25, s. 223](#).

Arrest warrant — failure to appear under summons

512.1 If an accused who is required by a summons to appear at the time and place stated in it for the purposes of the [Identification of Criminals Act](#) does not appear at that time and place and, in the case of an offence designated as a contravention under the [Contraventions Act](#), the *Attorney General*, within the meaning of that Act, has not made an election under [section 50](#) of that Act, a justice may issue a warrant for the arrest of the accused for the offence with which the accused is charged.

[2019, c. 25, s. 224](#).

Arrest warrant — failure to appear under appearance notice or undertaking

512.2 If an accused who is required by an appearance notice or undertaking to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, if the appearance notice or undertaking has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which the accused is charged.

2019, c. 25, s. 224.

Warrant to appear under [section 524](#)

512.3 If a justice is satisfied that there are reasonable grounds to believe that an accused has contravened or is about to contravene any summons, appearance notice, undertaking or release order that was issued or given to the accused or entered into by the accused or has committed an indictable offence while being subject to any summons, appearance notice, undertaking or release order, the justice may issue a warrant for the purpose of taking them before a justice under [section 524](#).

2019, c. 25, s. 224.

Formalities of warrant

513 A warrant in accordance with this Part shall be directed to the peace officers within the territorial jurisdiction of the justice, judge or court by whom or by which it is issued.

R.S., c. 2(2nd Supp.), s. 5.

Execution of warrant

514 (1) A warrant in accordance with this Part may be executed by arresting the accused

(a) wherever he is found within the territorial jurisdiction of the justice, judge or court by whom or by which the warrant was issued; or

(b) wherever he is found in Canada, in the case of fresh pursuit.

By whom warrant may be executed

(2) A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer.

R.S., c. 2(2nd Supp.), s. 5.

Judicial Interim Release

Release order without conditions

515 (1) Subject to this section, when an accused who is charged with an offence other than an offence listed in [section 469](#) is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in

custody is justified or why an order under any other provision of this section should be made.

Release order with conditions

(2) If the justice does not make an order under subsection (1), the justice shall, unless the prosecutor shows cause why the detention of the accused is justified, make a release order that sets out the conditions directed by the justice under subsection (4) and, as the case may be,

- (a)** an indication that the release order does not include any financial obligations;
- (b)** the accused's promise to pay a specified amount if they fail to comply with a condition of the order;
- (c)** the obligation to have one or more sureties, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order;
- (d)** the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount if they fail to comply with a condition of the order; or
- (e)** if the accused is not ordinarily resident in the province in which they are in custody or does not ordinarily reside within 200 kilometres of the place in which they are in custody, the obligation to deposit money or other valuable security in a specified amount or value, with or without the accused's promise to pay a specified amount by the justice if they fail to comply with a condition of the order and with or without sureties.

Imposition of least onerous form of release

(2.01) The justice shall not make an order containing the conditions referred to in one of the paragraphs (2)(b) to (e) unless the prosecution shows cause why an order containing the conditions referred to in the preceding paragraphs for any less onerous form of release would be inadequate.

Promise to pay favoured over deposit

(2.02) The justice shall favour a promise to pay an amount over the deposit of an amount of money if the accused or the surety, if applicable, has reasonably recoverable assets.

Restraint in use of surety

(2.03) For greater certainty, before making an order requiring that the accused have a surety, the justice shall be satisfied that this requirement is the least onerous form of release possible for the accused in the circumstances.

Power of justice — sureties

(2.1) If, under subsection (2) or any other provision of this Act, a judge, justice or court makes a release order with a requirement for sureties, the judge, justice or court may

name particular persons as sureties.

Appearance of the accused

(2.2) If, by this Act, the appearance of an accused is required for the purposes of judicial interim release, the accused shall appear in person but the justice may allow the accused to appear by videoconference or, subject to subsection (2.3), by audioconference, if the technological means is satisfactory to the justice.

When consent required for audioconference

(2.3) If the accused cannot appear by closed-circuit television or videoconference and the evidence of a witness is to be taken at the appearance, the consent of the prosecutor and the accused is required for the appearance of the accused by audioconference.

Factors to consider

(3) In making an order under this section, the justice shall consider any relevant factors, including,

- (a)** whether the accused is charged with an offence in the commission of which violence was used, threatened or attempted against their intimate partner; or
- (b)** whether the accused has been previously convicted of a criminal offence, including any offence in the commission of which violence was used, threatened or attempted against any person.

Conditions authorized

(4) When making an order under subsection (2), the justice may direct the accused to comply with one or more of the following conditions specified in the order:

- (a)** report at specified times to a peace officer, or other person, designated in the order;
- (b)** remain within a specified territorial jurisdiction;
- (c)** notify a peace officer or other person designated in the order of any change in their address, employment or occupation;
- (d)** abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;
- (e)** abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;
- (f)** deposit all their passports as specified in the order;
- (g)** comply with any other specified condition that the justice considers necessary to ensure the safety and security of any victim of or witness to the offence; and

(h) comply with any other reasonable conditions specified in the order that the justice considers desirable.

Condition prohibiting possession of firearms, etc.

(4.1) When making an order under subsection (2), in the case of an accused who is charged with

- (a) an offence in the commission of which violence against a person was used, threatened or attempted,
- (a.1) a terrorism offence,
- (b) an offence under [section 264](#) (criminal harassment),
- (b.1) an offence under [section 423.1](#) (intimidation of a justice system participant),
- (b.11) an offence under [subsection 423.2\(1\)](#) (intimidation — health services),
- (b.2) an offence relating to the contravention of any of [sections 9 to 14](#) of the *Cannabis Act*,
- (c) an offence relating to the contravention of any of [sections 5 to 7](#) of the *Controlled Drugs and Substances Act*,
- (d) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, ammunition, prohibited ammunition or an explosive substance, or
- (e) an offence under [subsection 20\(1\)](#), [20.1\(1\)](#), [20.2\(1\)](#), [20.3\(1\)](#) or [20.4\(1\)](#) of the *Foreign Interference and Security of Information Act*, or an offence under [subsection 21\(1\)](#) or [22\(1\)](#) or [section 23](#) of that Act that is committed in relation to an offence under [subsection 20\(1\)](#), [20.1\(1\)](#), [20.2\(1\)](#), [20.3\(1\)](#) or [20.4\(1\)](#) of that Act,

the justice shall add to the order a condition prohibiting the accused from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, firearm part, ammunition, prohibited ammunition or explosive substance, or all those things, until the accused is dealt with according to law unless the justice considers that such a condition is not required in the interests of the safety of the accused or the safety and security of a victim of the offence or of any other person.

Surrender, etc.

(4.11) Where the justice adds a condition described in subsection (4.1) to an order made under subsection (2), the justice shall specify in the order the manner and method by which

- (a) the things referred to in subsection (4.1) that are in the possession of the accused shall be surrendered, disposed of, detained, stored or dealt with; and
- (b) the authorizations, licences and registration certificates held by the person shall be surrendered.

Reasons

(4.12) Where the justice does not add a condition described in subsection (4.1) to an order made under subsection (2), the justice shall include in the record a statement of the reasons for not adding the condition.

Additional conditions

(4.2) Before making an order under subsection (2), in the case of an accused who is charged with an offence referred to in subsection (4.3), the justice shall consider whether it is desirable, in the interests of the safety and security of any person, particularly a victim of or witness to the offence or a justice system participant, to include as a condition of the order

(a) that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions that the justice considers necessary;

(a.1) that the accused abstain from going to any place or entering any geographic area specified in the order, except in accordance with any specified conditions that the justice considers necessary;

(a.2) that the accused wear an electronic monitoring device, if the Attorney General makes the request; or

(b) that the accused comply with any other condition specified in the order that the justice considers necessary to ensure the safety and security of those persons.

Offences

(4.3) The offences for the purposes of subsection (4.2) are

(a) a terrorism offence;

(b) an offence described in [section 264](#) or [423.1](#) or [subsection 423.2\(1\)](#);

(c) an offence in the commission of which violence against a person was used, threatened or attempted, including against the accused's intimate partner; and

(d) an offence under [subsection 20\(1\)](#), [20.1\(1\)](#), [20.2\(1\)](#), [20.3\(1\)](#) or [20.4\(1\)](#) of the *Foreign Interference and Security of Information Act*, or an offence under [subsection 21\(1\)](#) or [22\(1\)](#) or [section 23](#) of that Act that is committed in relation to an offence under subsection 20(1), 20.1(1), 20.2(1), 20.3(1) or 20.4(1) of that Act.

Detention in custody

(5) Where the prosecutor shows cause why the detention of the accused in custody is justified, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall include in the record a statement of his reasons for making the order.

Order of detention

(6) Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused's detention in custody is not justified, the justice shall order,

despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged

- (a)** with an indictable offence, other than an offence listed in [section 469](#),
 - (i)** that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,
 - (ii)** that is an offence under [section 467.11](#), [467.111](#), [467.12](#) or [467.13](#), or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,
 - (iii)** that is an offence under any of [sections 83.02 to 83.04](#) and [83.18 to 83.23](#) or otherwise is alleged to be a terrorism offence,
 - (iv)** that is an offence under [subsection 16\(1\)](#) or [\(2\)](#), [17\(1\)](#), [19\(1\)](#), [20\(1\)](#), [20.1\(1\)](#), [20.1\(1\)](#), [20.3\(1\)](#), [20.4\(1\)](#) or [22\(1\)](#) of the *Foreign Interference and Security of Information Act*,
 - (v)** that is an offence under [subsection 21\(1\)](#) or [section 23](#) of the *Foreign Interference and Security of Information Act* committed in relation to an offence referred to in subparagraph (iv),
 - (vi)** that is an offence under [section 95](#), [98](#), [98.1](#), [99](#), [100](#), [102](#) or [103](#),
 - (vii)** that is an offence under [section 244](#) or [244.2](#), or an offence under [section 239](#), [272](#) or [273](#), [subsection 279\(1\)](#) or [section 279.1](#), [344](#) or [346](#) that is alleged to have been committed with a firearm, or
 - (viii)** that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, a firearm part, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a *prohibition order* within the meaning of [subsection 84\(1\)](#);
- (b)** with an indictable offence, other than an offence listed in [section 469](#) and is not ordinarily resident in Canada,
 - (b.1)** with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted or discharged under [section 730](#) of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs;
 - (b.2)** with an offence in the commission of which violence was allegedly used, threatened or attempted against a person with the use of a weapon, and the accused has been previously convicted, within five years of the day on which they were charged for that offence, of another offence in the commission of which violence was also used, threatened or attempted against any person with the use of a weapon, if the maximum term of imprisonment for each of those offences is 10 years or more;

(c) with an offence under any of [subsections 145\(2\) to \(5\)](#) that is alleged to have been committed while they were at large after being released in respect of another offence under the provisions of this Part or section 679, 680 or 816; or

(d) with having committed an offence punishable by imprisonment for life under any of [sections 5 to 7](#) of the *Controlled Drugs and Substances Act* or the offence of conspiring to commit such an offence.

Reasons

(6.1) If the justice orders that an accused to whom subsection (6) applies be released, the justice shall include in the record a statement of the justice's reasons for making the order.

Release order

(7) If an accused to whom subsection (6) applies shows cause why their detention in custody is not justified, the justice shall make a release order under this section. If the accused was already at large on a release order, the new release order may include any additional conditions described in subsections (4) to (4.2) that the justice considers desirable.

(8) [Repealed, 2019, c. 25, s. 225]

Sufficiency of record

(9) For the purposes of subsections (5) and (6), it is sufficient if a record is made of the reasons in accordance with the provisions of Part XVIII relating to the taking of evidence at preliminary inquiries.

Written reasons

(9.1) Despite subsection (9), if the justice orders that the accused be detained in custody primarily because of a previous conviction of the accused, the justice shall state that reason, in writing, in the record.

Justification for detention in custody

(10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

- (i) the apparent strength of the prosecution's case,
- (ii) the gravity of the offence,
- (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
- (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Detention in custody for offence listed in [section 469](#)

(11) Where an accused who is charged with an offence mentioned in [section 469](#) is taken before a justice, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall issue a warrant in Form 8 for the committal of the accused.

Order re no communication

(12) A justice who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with such conditions specified in the order as the justice considers necessary.

Victim's and community's safety and security

(13) A justice who makes an order under this section shall include in the record of the proceedings a statement that the justice considered the safety and security of every victim of the offence and the safety and security of the community when making the order.

Aboriginal accused or vulnerable populations

(13.1) A justice who makes an order under this section shall include in the record of proceedings a statement that sets out both how they determined whether the accused is an accused referred to in [section 493.2](#) and their determination. If the justice determines that the accused is an accused referred to in [section 493.2](#), they shall also include a statement indicating how they considered their particular circumstances, as required under that section.

Copy to victim

(14) If an order is made under this section, the justice shall, on request by a victim of the offence, cause a copy of the order to be given to the victim.

Inquiry for copies

(14.1) Upon making an order under subsection (2), the justice must ask the prosecutor whether victims of the offence have been informed of their right to request a copy of the

order.

R.S., 1985, c. C-46, s. 515; R.S., 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44; 1995, c. 39, s. 153; 1996, c. 19, ss. 71, 93.3; 1997, c. 18, s. 59, c. 23, s. 16; 1999, c. 5, s. 21, c. 25, s. 8(Preamble); 2001, c. 32, s. 37, c. 41, ss. 19, 133; 2008, c. 6, s. 37; 2009, c. 22, s. 17, c. 29, s. 2; 2010, c. 20, s. 1; 2012, c. 1, s. 32; 2014, c. 17, s. 14; 2015, c. 13, s. 20; 2018, c. 16, s. 218; 2019, c. 25, s. 225; 2021, c. 27, s. 4; 2022, c. 17, s. 32(E); 2023, c. 7, s. 1; 2023, c. 30, s. 1; 2023, c. 32, s. 13.3; 2024, c. 16, s. 71; 2024, c. 16, s. 72(E); 2024, c. 16, s. 73(F); 2024, c. 22, s. 1.

Attendance — *Identification of Criminals Act*

515.01 When a release order is made under [section 515](#), the judge or justice may also make an order, in Form 11.1, requiring the accused to appear at the time and place stated in it for the purposes of the *Identification of Criminals Act* if the accused is charged with an offence referred to in [paragraph 2\(1\)\(c\)](#) of that Act.

[2022, c. 17, s. 33.](#)

Declaration of surety

515.1 (1) Before a judge, justice or court names a particular person as a surety, the person shall provide the judge, justice or court with a signed declaration under oath, solemn declaration or solemn affirmation in Form 12 that sets out

- (a) their name, date of birth and contact information;
- (b) information demonstrating that they are suitable to act as a surety for the accused, including financial information;
- (c) their relationship to the accused;
- (d) the name and date of birth of any other accused for whom they act as a surety;
- (e) their acknowledgment of the charge, and of any other outstanding charges against the accused and the contents of the accused's criminal record, if any;
- (f) their acknowledgment of the amount that they are willing to promise to pay or deposit to the court and that may be forfeited if the accused fails to comply with any condition of the release order;
- (g) their acknowledgment that they understand the role and responsibilities of a surety and that they assume these voluntarily; and
- (h) a description of the contents of their criminal record and any outstanding charges against them, if any.

Exception

(2) Despite subsection (1), a judge, justice or court may name a person as a surety without a declaration if

- (a) the prosecutor consents to it; or
- (b) the judge, justice or court is satisfied that
 - (i) the person cannot reasonably provide a declaration in the circumstances,

(ii) the judge, justice or court has received sufficient information of the kind that would be set out in a declaration to evaluate whether the person is suitable to act as a surety for the accused, and

(iii) the person has acknowledged that they have received sufficient information with respect to the matters referred to in paragraphs (1)(e) to (g) to accept the role and responsibilities of a surety.

Means of telecommunication

(3) A person may provide the judge, justice or court with the declaration referred to in subsection (1) by a means of telecommunication that produces a writing.

1997, c. 18, s. 60; 2019, c. 25, s. 226.

Remand in custody

516 (1) A justice may, before or at any time during the course of any proceedings under [section 515](#), on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused.

Detention pending bail hearing

(2) A justice who remands an accused to custody under subsection (1) or [subsection 515\(11\)](#) may order that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any conditions specified in the order that the justice considers necessary.

Duration of order

(3) An order made under subsection (2) remains in force,

(a) until it is varied or revoked;

(b) until an order in respect of the accused is made under [section 515](#);

(c) until the accused is acquitted of the offence, if applicable; or

(d) until the time the accused is sentenced, if applicable.

R.S., 1985, c. C-46, s. 516; 1999, c. 5, s. 22, c. 25, s. 31(Preamble); 2019, c. 25, s. 227.

Order directing matters not to be published for specified period

517 (1) If the prosecutor or the accused intends to show cause under [section 515](#), he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as

(a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or

(b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

Failure to comply

(2) Every person who fails, without lawful excuse, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.

(3) [Repealed, 2005, c. 32, s. 17]

R.S., 1985, c. C-46, s. 517; R.S., 1985, c. 27 (1st Supp.), s. 101(E); 2005, c. 32, s. 17; 2018, c. 29, s. 62.

Inquiries to be made by justice and evidence

518 (1) In any proceedings under [section 515](#),

(a) the justice may, subject to paragraph (b), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;

(b) the accused shall not be examined by the justice or any other person except counsel for the accused respecting the offence with which the accused is charged, and no inquiry shall be made of the accused respecting that offence by way of cross-examination unless the accused has testified respecting the offence;

(c) the prosecutor may, in addition to any other relevant evidence, lead evidence

(i) to prove that the accused has previously been convicted of a criminal offence,

(ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence,

(iii) to prove that the accused has previously committed an offence under [section 145](#), or

(iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;

(d) the justice may take into consideration any relevant matters agreed on by the prosecutor and the accused or his counsel;

(d.1) the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI, in writing, orally or in the form of a recording and, for the purposes of this section, [subsection 189\(5\)](#) does not apply to that evidence;

(d.2) the justice shall take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence; and

(e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

Release pending sentence

(2) Where, before or at any time during the course of any proceedings under [section 515](#), the accused pleads guilty and that plea is accepted, the justice may make any order provided for in this Part for the release of the accused until the accused is sentenced.

R.S., 1985, c. C-46, s. 518; R.S., 1985, c. 27 (1st Supp.), ss. 84, 185(F); 1994, c. 44, s. 45; 1999, c. 25, s. 9(Preamble).

Release of accused

519 (1) If a justice makes a release order under [section 515](#),

(a) if the accused thereupon complies with the order, the justice shall direct that the accused be released

(i) forthwith, if the accused is not required to be detained in custody in respect of any other matter, or

(ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter;

(b) if the accused does not thereupon comply with the order, the justice who made the order or another justice having jurisdiction shall issue a warrant for the committal of the accused and may endorse thereon an authorization to the person having the custody of the accused to release the accused when the accused complies with the order

(i) forthwith after the compliance, if the accused is not required to be detained in custody in respect of any other matter, or

(ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter

and if the justice so endorses the warrant, he shall attach to it a copy of the order; and

(c) any condition in the order that an accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with any specified conditions, is effective from the moment it is made, whether or not the accused has been released from custody.

Discharge from custody

(2) Where the accused complies with an order referred to in paragraph (1)(b) and is not required to be detained in custody in respect of any other matter, the justice who made the order or another justice having jurisdiction shall, unless the accused has been or will be released pursuant to an authorization referred to in that paragraph, issue an order for discharge in Form 39.

Warrant for committal

(3) Where the justice makes an order under [subsection 515\(5\)](#) or [\(6\)](#) for the detention of the accused, he shall issue a warrant for the committal of the accused.

R.S., 1985, c. C-46, s. 519; R.S., 1985, c. 27 (1st Supp.), s. 85; [2019, c. 25, s. 228](#).

Variation of release order with consent

519.1 A release order under which an accused has been released under [section 515](#) may be varied with the written consent of the accused, prosecutor and any sureties. The order so varied is considered to be a release order under section 515.

[2019, c. 25, s. 229.](#)

Review of order

520 (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under [subsection 515\(2\), \(5\), \(6\), \(7\), or \(12\)](#) or makes or vacates any order under [paragraph 523\(2\)\(b\)](#), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Notice to prosecutor

(2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.

Accused to be present

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

Adjournment of proceedings

(4) A judge may, before or at any time during the hearing of an application under this section, on application by the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

Failure of accused to attend

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

Execution

(6) A warrant issued under subsection (5) may be executed anywhere in Canada.

Evidence and powers of judge on review

(7) On the hearing of an application under this section, the judge may consider

- (a)** the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
- (b)** the exhibits, if any, filed in the proceedings before the justice, and

(c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

(d) dismiss the application, or

(e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in [section 515](#) that he considers is warranted.

Limitation of further applications

(8) Where an application under this section or [section 521](#) has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

Application of [sections 517, 518 and 519](#)

(9) The provisions of [sections 517, 518 and 519](#) apply with such modifications as the circumstances require in respect of an application under this section.

R.S., 1985, c. C-46, s. 520; R.S., 1985, c. 27 (1st Supp.), s. 86; 1994, c. 44, s. 46; 1999, c. 3, s. 31; [2019, c. 25, s. 230](#).

Review of order

521 (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under [subsection 515\(1\), \(2\), \(7\) or \(12\)](#) or makes or vacates any order under [paragraph 523\(2\)\(b\)](#), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order.

Notice to accused

(2) An application under this section shall not be heard by a judge unless the prosecutor has given to the accused at least two clear days notice in writing of the application.

Accused to be present

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

Adjournment of proceedings

(4) A judge may, before or at any time during the hearing of an application under this section, on application of the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

Failure of accused to attend

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

Warrant for detention

(6) Where, pursuant to paragraph (8)(e), the judge makes an order that the accused be detained in custody until he is dealt with according to law, he shall, if the accused is not in custody, issue a warrant for the committal of the accused.

Execution

(7) A warrant issued under subsection (5) or (6) may be executed anywhere in Canada.

Evidence and powers of judge on review

(8) On the hearing of an application under this section, the judge may consider

(a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,

(b) the exhibits, if any, filed in the proceedings before the justice, and

(c) such additional evidence or exhibits as may be tendered by the prosecutor or the accused,

and shall either

(d) dismiss the application, or

(e) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in [section 515](#) that he considers to be warranted.

Limitation of further applications

(9) Where an application under this section or [section 520](#) has been heard, a further or other application under this section or section 520 shall not be made with respect to the same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

Application of [sections 517](#), [518](#) and [519](#)

(10) The provisions of [sections 517](#), [518](#) and [519](#) apply with such modifications as the circumstances require in respect of an application under this section.

R.S., 1985, c. C-46, s. 521; R.S., 1985, c. 27 (1st Supp.), s. 87; 1994, c. 44, s. 47; 1999, c. 3, s. 32; [2019, c. 25, s. 231](#).

Interim release by judge only

522 (1) Where an accused is charged with an offence listed in [section 469](#), no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal

jurisdiction for the province in which the accused is so charged, may release the accused before or after the accused has been ordered to stand trial.

Idem

(2) Where an accused is charged with an offence listed in [section 469](#), a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of [subsection 515\(10\)](#).

Order re no communication

(2.1) A judge referred to in subsection (2) who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order except in accordance with such conditions specified in the order as the judge considers necessary.

Release of accused

(3) If the judge does not order that the accused be detained in custody under subsection (2), the judge may make a release order referred to in [section 515](#).

Order not reviewable except under [section 680](#)

(4) An order made under this section is not subject to review, except as provided in [section 680](#).

Application of [sections 517, 518 and 519](#)

(5) The provisions of [sections 517, 518](#) except subsection (2) thereof, and 519 apply with such modifications as the circumstances require in respect of an application for an order under subsection (2).

Other offences

(6) Where an accused is charged with an offence mentioned in [section 469](#) and with any other offence, a judge acting under this section may apply the provisions of this Part respecting judicial interim release to that other offence.

R.S., 1985, c. C-46, s. 522; R.S., 1985, c. 27 (1st Supp.), s. 88; 1991, c. 40, s. 32; 1994, c. 44, s. 48; 1999, c. 25, s. 10(Preamble); [2019, c. 25, s. 232](#).

Period for which appearance notice, etc., continues in force

523 (1) If an accused, in respect of an offence with which they are charged, has not been taken into custody or has been released from custody under any provision of this Part, the appearance notice, summons, undertaking or release order issued to, given or entered into by the accused continues in force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that

was received after the appearance notice, summons, undertaking or release order was issued, given or entered into,

(a) where the accused was released from custody pursuant to an order of a judge made under [subsection 522\(3\)](#), until his trial is completed; or

(b) in any other case,

(i) until his trial is completed, and

(ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of [section 673](#) is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

When new information is received

(1.1) If an accused is charged with an offence and a new information, charging the same offence or an included offence, is received while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, [section 507](#) or [508](#), as the case may be, does not apply in respect of the new information and the order for detention, release order, appearance notice, summons or undertaking applies in respect of the new information.

When direct indictment preferred

(1.2) If an accused is charged with an offence, and an indictment is preferred under [section 577](#) charging the same offence or an included offence while the accused is subject to an order for detention, release order, appearance notice, summons or undertaking, the order for detention, release order, appearance notice, summons or undertaking applies in respect of the indictment.

Order vacating previous order for release or detention

(2) Despite subsections (1) to (1.2),

(a) the court, judge or justice before which or whom an accused is being tried, at any time,

(b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in [section 469](#), or

(c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time

(i) where the accused is charged with an offence other than an offence listed in [section 469](#), the justice by whom an order was made under this Part or any other justice,

(ii) where the accused is charged with an offence listed in [section 469](#), a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or

(iii) the court, judge or justice before which or whom an accused is to be tried, may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

Provisions applicable to proceedings under subsection (2)

(3) The provisions of [sections 517, 518 and 519](#) apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2), except that [subsection 518\(2\)](#) does not apply in respect of an accused who is charged with an offence listed in [section 469](#).

R.S., 1985, c. C-46, s. 523; R.S., 1985, c. 27 (1st Supp.), s. 89; [2011, c. 16, s. 2](#); [2019, c. 25, s. 233](#).

Proceedings Respecting Failure to Comply with Release Conditions

Judicial referral hearing

523.1 (1) When an accused appears before a justice in any of the circumstances described in subsection (2), the justice shall

- (a) if the accused was released from custody under an order made under [subsection 522\(3\)](#) by a judge of the superior court of criminal jurisdiction of any province, order that the accused appear before a judge of that court so that the judge may hear the matter; or
- (b) in any other case, hear the matter.

Circumstances

(2) The circumstances referred to in subsection (1) are the following:

- (a) an appearance notice has been issued to the accused for failing to comply with a summons, appearance notice, undertaking or release order or to attend court as required and the prosecutor seeks a decision under this section; or
- (b) a charge has been laid against the accused for the contravention referred to in paragraph (a) and the prosecutor seeks a decision under this section.

Powers — Judge or Justice

(3) If the judge or justice who hears the matter is satisfied that the accused failed to comply with a summons, appearance notice, undertaking or release order or to attend court as required and that the failure did not cause a victim physical or emotional harm, property damage or economic loss, the judge or justice shall review any conditions of release that have been imposed on the accused and may, as the case may be,

- (a) take no action;

(b) cancel any other summons, appearance notice, undertaking or release order in respect of the accused and, as the case may be,

(i) make a release order under [section 515](#), or

(ii) if the prosecutor shows cause why the detention of the accused in custody is justified under [subsection 515\(10\)](#), make an order that the accused be detained in custody until the accused is dealt with according to law and if so detained, the judge or justice shall include in the record a statement of the judge's or justice's reasons for making the order; or

(c) remand the accused to custody for the purposes of the [Identification of Criminals Act](#).

Dismissal of charge

(4) If a charge has been laid against the accused for the failure referred to in paragraph (2)(a) and the judge or justice, as the case may be, makes a decision under subsection (3), the judge or justice shall also dismiss that charge.

No information or indictment

(5) If the judge or justice makes a decision under subsection (3), no information may be laid nor indictment be preferred against the accused for the failure referred to in paragraph (2)(a).

[2019, c. 25, s. 234.](#)

Hearing

524 (1) When an accused is taken before a justice in any of the circumstances described in subsection (2), the justice shall

(a) if the accused was released from custody under an order made under [subsection 522\(3\)](#) by a judge of the superior court of criminal jurisdiction of any province, order that the accused be taken before a judge of that court so that the judge may hear the matter; or

(b) in any other case, hear the matter.

Circumstances

(2) The circumstances referred to in subsection (1) are the following:

(a) the accused has been arrested for the contravention of or having been about to contravene, a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section; or

(b) the accused has been arrested for having committed an indictable offence while being subject to a summons, appearance notice, undertaking or release order and the prosecutor seeks to have it cancelled under this section.

Cancellation

(3) The judge or justice who hears the matter shall cancel a summons, appearance notice, undertaking or release order in respect of the accused if the judge or justice finds that

(a) the accused has contravened or had been about to contravene the summons, appearance notice, undertaking or release order; or

(b) there are reasonable grounds to believe that the accused has committed an indictable offence while being subject to the summons, appearance notice, undertaking or release order.

Detention

(4) If the judge or justice cancels the summons, appearance notice, undertaking or release order, the judge or justice shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why their detention in custody is not justified under [subsection 515\(10\)](#).

Release order

(5) If the judge or justice does not order that the accused be detained in custody under subsection (4), the judge or justice shall make a release order referred to in [section 515](#).

Reasons

(6) If the judge or justice makes a release order under subsection (5), the judge or justice shall include in the record a statement of the reasons for making the order, and [subsection 515\(9\)](#) applies with any modifications that the circumstances require.

Release

(7) If the judge or justice does not cancel the summons, appearance notice, undertaking or release order under subsection (3), the judge or justice shall order that the accused be released from custody.

Provisions applicable to proceedings under this section

(8) The provisions of [sections 516 to 519](#) apply with any modifications that the circumstances require in respect of any proceedings under this section, except that [subsection 518\(2\)](#) does not apply in respect of an accused who is charged with an offence mentioned in [section 469](#).

Review — order by judge

(9) An order made under subsection (4) or (5) respecting an accused referred to in paragraph (1)(a) is not subject to review except as provided in [section 680](#).

Review — order of justice

(10) An order made under subsection (4) or (5) respecting an accused other than the accused referred to in paragraph (1)(a), is subject to review under [sections 520 and 521](#)

as if the order were made under [section 515](#).

R.S., 1985, c. C-46, s. 524; 1999, c. 3, s. 33; [2019, c. 25, s. 234](#).

Review of Detention where Trial Delayed

Time for application to judge

525 (1) The person having the custody of an accused — who has been charged with an offence other than an offence listed in [section 469](#), who is being detained in custody pending their trial for that offence and who is not required to be detained in custody in respect of any other matter — shall apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody, if the trial has not commenced within 90 days from

- (a) the day on which the accused was taken before a justice under [section 503](#); or
- (b) in the case where an order that the accused be detained in custody has been made under [section 521](#), [paragraph 523.1\(3\)\(b\)\(ii\)](#) or [section 524](#), or a decision has been made with respect to a review under [section 520](#), the later of the day on which the accused was taken into custody under that order and the day of the decision.

The person shall make the application immediately after the expiry of those 90 days.

Waiver of right to hearing

(1.1) However, the person having the custody of the accused is not required to make the application if the accused has waived in writing their right to a hearing and the judge has received the waiver before the expiry of the 90-day period referred to in subsection (1).

Notice of hearing

(2) On receiving an application under subsection (1), the judge shall

- (a) fix a date for the hearing described in subsection (1) to be held in the jurisdiction
 - (i) where the accused is in custody, or
 - (ii) where the trial is to take place; and
- (b) direct that notice of the hearing be given to such persons, including the prosecutor and the accused, and in such manner as the judge may specify.

Cancellation of hearing

(3) The judge may cancel the hearing if the judge receives the accused's waiver before the hearing.

Consideration of proceeding's progression

(4) On the hearing described in subsection (1), the judge shall consider whether the prosecutor or the accused has been responsible for any delay and, if the judge is

concerned that the proceedings are progressing slowly and that an unreasonable delay may result, the judge may

- (a) give directions for expediting the proceedings; or
- (b) require a further hearing under this section within 90 days or any other period that the judge considers appropriate in the circumstances.

Release order

(5) If, following the hearing, the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of [subsection 515\(10\)](#), the judge shall make a release order referred to in [section 515](#).

Provisions applicable to proceedings

(6) [Sections 495.1](#), [512.3](#), [517](#) to [519](#) and [524](#) apply, with any modifications that the circumstances require, in respect of any proceedings under this section.

Definition of *judge* in the Province of Quebec

(7) In this section, *judge*, in the Province of Quebec,

(a) in the case where the order that the accused be detained in custody has been made by a judge of the superior court of criminal jurisdiction of the Province of Quebec, has the same meaning as in paragraph (b) of the definition *judge* in [section 493](#); and

(b) in any other case, means a judge of the superior court of criminal jurisdiction of the province, a judge of the Court of Quebec or three judges of the Court of Quebec.

(8) [Repealed, 2019, c. 25, s. 235]

(9) [Repealed, 2019, c. 25, s. 235]

R.S., 1985, c. C-46, s. 525; R.S., 1985, c. 27 (1st Supp.), s. 90; 1994, c. 44, s. 49; 1997, c. 18, s. 61; [2019, c. 25, s. 235](#).

Directions for expediting proceedings

526 Subject to [subsection 525\(4\)](#), a court, judge or justice before which or whom an accused appears under this Part may give directions for expediting any proceedings in respect of the accused.

R.S., 1985, c. C-46, s. 526; R.S., 1985, c. 27 (1st Supp.), s. 91; [2019, c. 25, s. 236](#).

Procedure to Procure Attendance of a Prisoner

Procuring attendance

527 (1) A judge of a superior court of criminal jurisdiction may order in writing that a person who is confined in a prison be brought before the court, judge, justice or provincial court judge before whom the prisoner is required to attend, from day to day as may be necessary, if

(a) the applicant for the order sets out the facts of the case in an affidavit and produces the warrant, if any; and

(b) the judge is satisfied that the ends of justice require that an order be made.

Provincial court judge's order

(2) A provincial court judge has the same powers for the purposes of subsection (1) or (7) as a judge has under that subsection where the person whose attendance is required is within the province in which the provincial court judge has jurisdiction.

Conveyance of prisoner

(3) An order that is made under subsection (1) or (2) shall be addressed to the person who has custody of the prisoner, and on receipt thereof that person shall

(a) deliver the prisoner to any person who is named in the order to receive him; or

(b) bring the prisoner before the court, judge, justice or provincial court judge, as the case may be, on payment of his reasonable charges in respect thereof.

Detention of prisoner required as witness

(4) Where a prisoner is required as a witness, the judge or provincial court judge shall direct, in the order, the manner in which the prisoner shall be kept in custody and returned to the prison from which he is brought.

Detention in other cases

(5) Where the appearance of a prisoner is required for the purposes of paragraph (1)(a) or (b), the judge or provincial court judge shall give appropriate directions in the order with respect to the manner in which the prisoner is

(a) to be kept in custody, if he is ordered to stand trial; or

(b) to be returned, if he is discharged on a preliminary inquiry or if he is acquitted of the charge against him.

Application of sections respecting sentence

(6) [Sections 718.3](#) and [743.1](#) apply where a prisoner to whom this section applies is convicted and sentenced to imprisonment by the court, judge, justice or provincial court judge.

Transfer of prisoner

(7) On application by the prosecutor, a judge of a superior court of criminal jurisdiction may, if a prisoner or a person in the custody of a peace officer consents in writing, order the transfer of the prisoner or other person to the custody of a peace officer named in the order for a period specified in the order, where the judge is satisfied that the transfer is required for the purpose of assisting a peace officer acting in the execution of his or her duties.